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Mothering for Money: Regulating Commercial Intimacy, Surrogacy, Adoption,

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Mothering for Money: Regulating Commercial Intimacy

PAMELA LAUFER-UKELES*

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INTRODUCTION

Surrogate motherhood has now been practiced in the United States and internationally for over thirty years.¹ Thousands of children have been born of surrogate mothers worldwide and only a minute percentage wind up in litigation or result in serious disputes.² The process of surrogate motherhood provides many

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1. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 851 (2000). “The earliest reported contemporary surrogate mother case is generally agreed to have been in 1980.” R.J. Edelmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 125 (2004). Of course, there are a number of Biblical instances of surrogacy as well; although, those instances are closer to surrogate wives than surrogate motherhood. See Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL’Y 91, 120 (2002).

2. See Natalie Gamble & Louisa Ghevaert, *Surrogacy, Parenthood and Disputes: Are There Any Lessons To Be Learned?*, BIONEWS (Feb. 14, 2011), http://www.bionews.org.uk/page_89334.asp; Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women*

infertile couples with genetically related children; it is a service that is highly valued and in demand.³ Surrogacy also allows homosexual couples to have genetically related children and can assist a single man to start a genetic family. As one scholar has noted, a once-maligned process is now largely accepted across the political and feminist spectrum.⁴

Still, the arguments for and against commercial surrogacy have created a whirlwind of agitation. Advocates intuitively embrace the practical solutions surrogacy provides for couples and individuals who seek to procreate but are inhibited by infertility or limitations of nature in the context of homosexual couples.⁵ Empirical studies of commercial surrogacy have largely concluded that surrogates and commissioning couples are satisfied and enriched by the process.⁶ In addition, the narratives of success and fulfillment that abound in the media and even in academic literature are powerful testimonies in favor of surrogacy. When the end is relieving suffering and fulfilling longing for family and children, utilitarian practical justifications weigh strongly in favor of surrogacy when participants are able and willing.⁷ Principled theoretical justifications are also offered to support advocates' positions: advocates support the autonomy and power it provides to commissioning and intended parents as well as to surrogates who choose to engage in these arrangements for compensation.⁸ Advocates view the

or a Commodification of Women's Bodies and Children?, 12 WIS. WOMEN'S L.J. 113, 130 (1997) ("The cases illustrated thus far demonstrate that conflicts over custody of a child born through surrogacy have been minimal."); Karen Synesiou, *Surrogacy: Myths and Realities*, MOTHERINGIN THEMIDDLE.COM (Nov. 22, 2010), <http://www.motheringinthemiddle.com/?tag=karen-synesiou>. *But see, e.g.*, S.N. v. M.B., 188 Ohio App. 3d 324, 333, 2010-Ohio-2479, 935 N.E.2d 463, 470 (10th Dist.) (holding that Ohio's Parentage Act applies to any parentage determination, including surrogacy cases), *cause dismissed*, 126 Ohio St. 3d 1525, 2010-Ohio-3583, 931 N.E.2d 126.

3. In this Article, I consider commercial surrogacy. Altruistic unpaid surrogacy is also practiced but it is not the subject of this Article. Some countries, such as Canada and the United Kingdom, prohibit commercial surrogacy but allow unpaid surrogacy. *See* Surrogacy Arrangements Act, 1985, c. 49, § 1A (U.K.), *inserted by* Human Fertilisation and Embryology Act, 1990, c. 37, § 36(1) (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.).

4. *See, e.g.*, Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 137-44 (2009).

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 infra* Part I.A.

7. *See, e.g.*, Emily Gelmann, "I'm Just the Oven, It's Totally Their Bun": *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159 (2011) (couching the need to legalize surrogacy in the context of helping to fulfill couples procreative desires); Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391 (2012).

8. *See, e.g.*, Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists, in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167 (Larry Gostin ed., 1990); JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 130-32 (1994); CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY *passim* (1989) (arguing that permitting surrogacy supports women's autonomy over their bodies); John

rejection of surrogacy as reactive and anti-technological because it denies important practical benefits to people searching to fulfill procreative desires.⁹

In the opposing camp, many have reacted with hostility and outrage to a contractual arrangement that commercializes women's gestational services.¹⁰ Such deontological arguments point to theoretical and conceptual concerns despite practical benefits. Anti-surrogacy advocacy by feminists, social conservatives, and others has led to the banning of the practice in a number of states in the United States and countries worldwide.¹¹ Such opposition is sometimes coupled with opposition to other fertility treatments such as egg and sperm donation and in vitro fertilization more generally, but it is also often targeted specifically at surrogate motherhood as an outlier among other fertility treatments.¹² Arguments against

Lawrence Hill, *What Does it Mean to be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 383 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309. There are also claims that U.S. citizens have a procreative right to use surrogacy. See, e.g., John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, in SURROGATE MOTHERHOOD, *supra*, at 24, 25–27. But, the constitutional right to privacy in coital reproduction does not likely extend to surrogacy. See Garrison, *supra* note 1, at 857; Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood*, 26 VT. L. REV. 407, 413–14 (2002).

9. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Gelmann, *supra* note 7, at 161 (citing Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 286 (2009) (describing the failure to provide regulation to permit surrogacy as a problem of legal conservatism: the "[l]aws have not kept pace with advancing growth in reproductive technologies."); London, *supra* note 7, at 393 ("This discussion is intended to invite a broader dialogue within feminist jurisprudence and the legal community and to advance the notion that the law should facilitate, rather than inhibit, procreative advancements.") (citing Shultz, *supra* note 8, at 303 ("By embracing the emerging opportunities provided by advancing technology, the law would enhance individual freedom, fulfillment and responsibility.")).

10. See MARTHA FIELD, SURROGATE MOTHERHOOD (1988); CHRISTINE OVERALL, HUMAN REPRODUCTION: PRINCIPLES, PRACTICES, POLICIES (1993); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM (1993); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17 (1991) (raising racial concerns connected with the use of surrogacy and advocating alternately for a ban on surrogate contracts or refusal to enforce surrogate contracts); Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 333–34 (1998); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987); Scott, *supra* note 4, at 130–37 (recounting feminists and social conservatives' objections to surrogate motherhood around the time of *In re Baby M*).

11. Australia, China, the Czech Republic, Denmark, France, Germany, Italy, Mexico, Spain, Switzerland, Taiwan, Turkey, and some U.S. states ban surrogacy altogether; Brazil, Israel, and the U.K. use tight restrictions to regulate surrogacy. See, e.g., Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CANADIAN J. FAM. L. 13, 32–36 (2010); Laufer-Ukeles, *supra* note 1, at 98–104; Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 972 (2010).

12. See *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 13 (Pa. Ct. Com. Pl. 2004) ("Those states that make surrogacy (e.g., paid surrogacy or baby selling) expressly illegal are Delaware, Iowa,

surrogate motherhood characterize the practice as child-selling, improperly commodifying human life,¹³ exploitative,¹⁴ patriarchal, and unable to be validly contracted for under doctrines of consent.¹⁵ Others are against technology that expands and complicates natural families.¹⁶ Mostly, the opposition is not focused on the actual practice of surrogacy or the individual surrogates and intended couples involved but on the overall process as being contestable on conceptual grounds.

Thus, in an often-asymmetric manner, deontological theoretical concerns go head-to-head with practical utilitarian benefits in a manner that creates dissociation and tension. No matter how prescient and compelling the ethical concerns brought forward by critics, advocates focused on the relief to suffering that surrogacy provides are unlikely to be swayed and vice versa. How do we reconcile these strongly contrasting positions? Is there any way to incorporate both sides of the debate into a coherent singular vision? Can one take seriously normative concerns while recognizing practical benefits? While there is no one-size-fits-all solution to the surrogacy dilemma, this Article attempts to create a framework in which both utilitarian and deontological principles are relevant.

What makes surrogate motherhood so difficult to navigate is that it is a transaction in commercial intimacy, and it is hard to take account of commerciality and intimacy simultaneously.¹⁷ Many commercial transactions in intimacy are banned or highly regulated.¹⁸ In surrogacy, a service is provided for money involving a biological, physical, and emotional relationship that develops between the surrogate and fetus as well as with the intended parents.¹⁹ Surrogacy involves procreation of a child and rights to motherhood, not normally commercial subjects.²⁰ Empirical studies support accounts of surrogacy as an intimate relationship in which attachments and emotional relationships are formed, if not

Michigan, New Mexico, New York, Oregon, Utah, Washington D.C. and Wisconsin. Surrogacy is exempt from criminal baby selling statutes in Iowa, Alabama and Washington. Those states that ban surrogacy contracts are Arizona, Connecticut, Indiana, Louisiana, New Jersey, North Dakota and Tennessee.”)

13. See, e.g., *In re Baby M*, 537 A.2d 1227, 1241, 1244–45 (N.J. 1988); Jennifer Damelio & Kelly Sorensen, *Enhancing Autonomy in Paid Surrogacy*, 22 *BIOETHICS* 269, 270 (2008); Radin, *supra* note 10, at 1930–36.

14. See, e.g., Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood: An Ethical Analysis*, in *SURROGATE MOTHERHOOD*, *supra* note 8, at 136, 141–42; CHRISTINE OVERALL, *ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS* 118, 124–26 (1987); Janice G. Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, *HASTINGS CTR. REP.*, Nov.–Dec. 1990, at 7, 11.

15. See, e.g., Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 *GEO. L.J.* 1811, 1816–1820 (1988).

16. See, e.g., PHYLLIS CHESLER, *SACRED BOND: THE LEGACY OF BABY M* 34 (1988).

17. By “commercial intimacy,” I refer to monetary payment for intimate services, comparable to payments for sex, body parts, and children. See *infra* Part I.B.

18. See *infra* note 118 and accompanying text. The sale of organs is banned and prostitution is usually illegal, as is baby-selling. See also *infra* note 70 and accompanying text. See *infra* notes 114–23 and accompanying text for a discussion of transactions in intimacy and when such transactions are most problematic.

19. See *infra* Part I.B.1.

20. See *infra* Part I.B.2.

with the fetus directly than with the commissioning parents.²¹ As an empirical and emotional reality, surrogates are vulnerable to the contractual control and relational desires of the more protected and powerful commissioning parents.²² The relational, intimate aspects of surrogacy are real and can cause real harms to surrogates and society more broadly.²³ The intimacy involved should not be ignored for the sake of fulfilling anyone's procreative desires. Yet, money is also integral; without it the transaction would not occur. Money provides appropriate and valuable compensation for the difficult work of surrogates. And the benefits of surrogacy are real and compelling, as described above.²⁴

The straightforward way to approach such a transaction is either to focus on the intimacy involved in the transaction—motherhood, relationships, children, and the potential for exploitation—or to focus on the benefits of the commerciality for commissioning parents as well as surrogates. Depending on which perspective is more intuitive or serves one's purposes will determine whether surrogacy is something shunned or embraced. If the focus is on motherhood and the transfer of children, opposition is intuitive. If the focus is on the way in which commerciality can solve problems of fertility and empower women, support is likely. In this Article, I argue that a myopic focus on either the concerns of intimacy or on the benefits of commerciality is problematic. Rather, the appropriate way to consider surrogacy is to recognize both its commercial benefits and intimate concerns *not* as a compromise position, but as a prescriptive, normative framework for regulation.

In particular, in the context of the transaction in commercial intimacy I explore, I focus on the vulnerability of the surrogate and take seriously her right to human dignity in the context of allowing the commercial transaction in surrogacy. The surrogate woman, her body, and the relationships she forms with the fetus she gestates and the commissioning couple who invites her into the most intimate parts of their lives must be imbued with human dignity, understanding, and ethical significance. Regulation must work to prevent the surrogate and the relationships she forms as means to an end—the baby. Yet, the surrogacy process need not by its essence subvert the humanity of its participants. Moreover, regulation should respect the commercial nature of the transaction that provides a necessary (if not primary) incentive for creating the commercial surrogate relationships and empowers surrogate workers.²⁵ It is my contention that regulation that appropriately reflects the intimate and commercial aspects of the relationship can protect the intimacy and promote the benefits of the commercial process while empowering and protecting the surrogate worker. I argue that in transactions of commercial intimacy such as surrogate motherhood, regulation should be formulated that respects the benefits of the commercial transaction while taking seriously the relational intimacy and potential exploitation involved in surrogate motherhood.

21. *See infra* Part I.A.

22. *See infra* Part I.B.5.

23. *See infra* Part I.B.5.

24. *See supra* notes 1–3 and accompanying text.

25. *See infra* notes 111–12 and accompanying text for a discussion of incentives propelling surrogates to engage in commercial transactions.

This Article will proceed in three Parts. In the first Part, I provide a framework for exploring the appropriate legal and ethical response to surrogate motherhood. To do so, I first examine empirical sociological and anthropological studies that demonstrate the complex intimate and commercial nature of these transactions. Such studies put into stark contrast the benefits provided and satisfaction enabled by surrogacy, the vulnerabilities and expectations of surrogates, and, practically, the ways such surrogates can best be protected. I then rely on theories of mixed commodification and relational autonomy to create a legal and ethical framework for contemplating, and guidelines for assessing, how best to contend with surrogacy. I describe the theory of mixed commodification and how it can be used to recognize both the nonmonetizable, emotional aspects of surrogacy as well as the more practical and beneficial financial arrangement that is undergone. I consider how intimacy coexists with commercialization within surrogate motherhood, and I will advocate for a regulatory framework that accounts for both the financial, contractual aspects of the arrangements and the personal, intimate relationships. Thus, I not only view mixed commodification as a descriptive reality but as a normative imperative for reflecting the reality, concerns, and benefits of surrogate contracts. I will also consider the theoretical approach of relational autonomy, which marks autonomy as potentially compromised in any situation—autonomy is not a yes or no condition. While surrogacy raises concerns about exploitation and diminished autonomy, there is no imperative to prohibit surrogacy on that basis. Rather, a regulatory approach should be used to optimize autonomy by recognizing circumstances, conditions, and surrounding relationships.

In the second Part, under the framework of this nuanced approach, I provide justification for a regulated system for domestic, state-based surrogate motherhood agreements. In particular, I argue that regulation that recognizes the kin-like emotional attachments that are built between surrogates and intentional parents by providing the possibility of postbirth contact between surrogates and the babies they gestate can validate and protect surrogate's work. Moreover, regulation that promotes autonomy through counseling, psychological evaluations, and a clear provision of information can promote autonomous decision making. On the whole, I believe in formulating regulation that allows surrogacy to continue to be practiced but in a manner that appropriately reflects the commercial and intimate nature of the transaction. And, the legal recognition of such intimacy corresponds with the general movement in family law towards recognizing intimate care relationships that do not necessarily correlate with traditional formal relationships.

In the third Part, I tackle the thorny problem of international surrogacy. Domestic surrogacy is of limited relevance, particularly if it is restricted through regulation; the new frontier in surrogacy is the hiring of foreign surrogates, and the question of how to consider and address such arrangements is pressing. Indeed, under precisely the same framework and based on the same normative concerns and empirical data, international surrogacy arrangements are cause for greater concern.²⁶ As I will demonstrate, the manner in which domestic regulations can

26. I use the term “international surrogacy” to denote the use of foreign surrogates that live in a different country than the commissioning couple or intended parents. Others also use the term “transnational surrogacy.” See, e.g., Jennifer S. Hendricks, *Not of Woman Born*:

recognize and organize the intimate and commercial aspects of surrogacy cannot be applied effectively in the international arena. In the context of international surrogacy, the concerns regarding commodification and exploitation are most pronounced and the empirical data most undermines the advisability of the process. Most pressing, the support and regulatory framework I argue are necessary to protect intimate relationships in domestic surrogacy are not practical or relevant in international surrogacy. And, conditions that raise concerns about how intimate work can exploit surrogate mothers are much more pronounced for foreign surrogates. Thus, I argue that while recognizing the concerns of intimacy and the benefits of commerciality can be formed into a normative framework for domestic surrogacy, such a system cannot be readily translated overseas.

Given the more problematic nature of international surrogacy as I describe it, the question that follows is what can be done in response. I propose that states providing a regulatory regime for domestic surrogacy should also consider effects of regulations on international surrogacy. Ruling out the possibility of criminalizing or denying citizenship to children of international surrogacy, I suggest that countries of commissioning couples attempt to disincentivize the use of international arrangements. I outline possible administrative procedures and foreign policy initiatives that could be put into place to encourage interested commissioning couples to use domestic surrogates in lieu of foreign surrogates.

In sum, this Article makes three contributions to the existing literature on surrogacy. First, I propose a mixed commodification and relational autonomy conceptual framework for regulating commercial surrogacy as the most appropriate reflection of the nature of the transaction. Under this framework, I argue that commercial surrogacy should be allowed to flourish as long as the intimacy involved is also recognized by taking relationships among the surrogate, fetus, and commissioning couple seriously and optimizing autonomy from a contextual perspective. Second, I propose regulatory provisions that recognize the concerns of intimacy as well as benefits of commerciality. Third, by examining the conditions of international surrogacy, I argue that this framework for recognizing intimacy is not transferable to surrogate relationships with foreign surrogates. A foreign surrogate is not just a surrogate living in a different locale; it is an entirely more commercial, less intimate, and more problematic method of baby making.

I. FRAMEWORK FOR CONSIDERING THE COMPLEX NATURE OF SURROGATE MOTHERHOOD

To shed light on what can and should be done to balance the benefits and drawbacks of surrogacy, I will first describe the complex nature of surrogate motherhood arrangements as outlined and analyzed in empirical, anthropological, and sociological studies that capture the intimate relational and commercial aspects of the engagement. I will then lean on notions of mixed commodification and relational autonomy in order to provide a legal and ethical framework for considering surrogacy. No single noncomplex principle such as autonomy,

A Scientific Fantasy, 62 CASE W. RES. L. REV. 399, 438 (2011); Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369 (2012).

exploitation, patriarchy, or procreative freedom can resolve these disputes. Rather, nuanced perspectives should take into account the complex nature of the transaction. I will develop these complex perspectives in this Part and then, in Parts II and III, I will apply the frameworks developed in the context of domestic and international surrogacy to suggest appropriate legal action.

A. Describing the Complex Surrogate Transaction: Results of Empirical, Sociological, and Anthropological Studies

Empirical studies, which have sought to track the realities, concerns, and overall experiences of surrogate mothers and intended parents, have coalesced around a number of basic and important findings. Such findings should inform the way we think about surrogate motherhood. While empirical studies have not been as numerous as one might have predicted given the onslaught of controversy and discussion surrounding surrogacy,²⁷ a reasonable stockpile of empirical data has been compiled since 1983 when surrogacy emerged as a fertility option.²⁸ What is striking about these empirical findings is their consistency.²⁹

One particularly salient finding is that the vast majority of surrogate mothers do not attest to bonding with the babies they gestate to the extent that many predicted and was evident in the case of Baby M.³⁰ While most surrogates assert that parting with the baby is a difficult separation, it does not appear to be as traumatic as expected.³¹ Indeed, given the thousands of surrogacy contracts that are entered into each year, “the lack of litigation is remarkable.”³² When asked, surrogate mothers do not generally indicate that the babies belong to them; rather, they feel they are providing a meaningful and valuable service for the intended parents.³³ While this appears to be true for both gestational and traditional surrogates,³⁴ it seems

27. See Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 22–24 (2005) (reporting twenty-seven empirical studies from January 1983–December 2003).

28. See *infra* Part I.A.

29. See, e.g., Ciccarelli & Beckman, *supra* note 27, at 29. Of course, there are always outliers that may not fit into the overall finding that I outline in this section. But my generalizations in this section are based on the findings of the studies that I cite in this Article.

30. In the case of *In re Baby M*, the traditional surrogate mother did not want to give the child to the intended parents. *In re Baby M*, 537 A.2d 1227, 1235–40 (N.J. 1988). See Olga B.A. van den Akker, *Psychological Trait and State Characteristics, Social Support and Attitudes to the Surrogate Pregnancy and Baby*, 22 HUM. REP. 2287, 2293–94 (2007); Eric Blyth, “I Wanted To Be Interesting. I Wanted To Be Able to Say ‘I’ve Done Something Interesting with My Life’”: Interviews with Surrogate Mothers in Britain, 12 J. REPROD. & INFANT PSYCHOL. 189, 195–96 (1994); Susan Fischer & Irene Gillman, *Surrogate Motherhood: Attachment, Attitudes and Social Support*, PSYCHIATRY, Feb. 1991, at 13, 16.

31. See, e.g., J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 357 (2011).

32. *Id.* at 356 (citation omitted).

33. See Edelmann, *supra* note 1, at 130; Fischer & Gillman, *supra* note 30, at 17; see also KRISTY STEVENS & EMMA DALLY, *SURROGATE MOTHER: ONE WOMAN’S STORY* (1985).

34. Traditional surrogates are both genetic and gestational mothers of the fetus;

especially true for gestational surrogates who do not have a genetic connection to the fetus.³⁵ Gestational surrogates report to heavily emphasize genetics and consider the baby in the womb to be someone else's based on genetic affiliation.³⁶ Whether or not one believes that genetic affiliation between intended parents and the baby does or should make a significant difference in the permissibility of surrogacy or in identifying legal motherhood, studies suggest that the lack of genetic affiliation matters to gestational surrogates (but apparently not to traditional surrogates)³⁷ and facilitates the process for them.³⁸

Instead of the close bond that researchers expected surrogates to develop with the baby, the predicted emotional connection seems to be forming between the surrogate mother and the commissioning couple.³⁹ As pregnancy lasts nine months and prenatal care can be intensive and involved, it is the long-term engagement between surrogate and intended parents that studies indicate create emotional bonds reflecting the very intimate nature of the agreement.⁴⁰ Surrogates and intended parents tend to experience the pregnancy and labor together and become emotionally and intimately involved in each other's daily lives and relationships.⁴¹ It has been described by researchers as more than just a "commonplace friendship"

gestational surrogates do not have a genetic connection to the fetus. See *infra* Part II.B.1 discussing the relevance of gestational surrogacy.

35. See Olga van den Akker, *Genetic and Gestational Surrogate Mothers' Experience of Surrogacy*, 21 J. REPROD. & INFANT PSYCHOL. 145, 147 (2003) [hereinafter van den Akker, *Experience of Surrogacy*] (reporting that some traditional surrogates reported some problems relinquishing the child but most did not, and none of the gestational surrogates did).

36. See, e.g., ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* 31–68 (2010) (describing in great detail her in depth interviews with more than twenty-six gestational surrogates and over forty-three intended families over a period of eight years); Hal B. Levine, *Gestational Surrogacy: Nature and Culture in Kinship*, ETHNOLOGY, Summer 2003, at 173, 175.

37. See, e.g., Olga B. A. van den Akker, *A Longitudinal Pre-Pregnancy to Post-Delivery Comparison of Genetic and Gestational Surrogate and Intended Mothers: Confidence and Genealogy*, 26 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 277, 281 (2005) [hereinafter van den Akker, *Longitudinal Comparison*]; van den Akker, *Experience of Surrogacy*, *supra* note 35, at 151 (demonstrating how a majority of gestational surrogates but not genetic surrogates believe in the importance of a genetic link).

38. See *supra* note 37; see also van den Akker, *Longitudinal Comparison*, *supra* note 37, at 282 (reporting that gestational surrogates relied on lack of genetic affiliation to facilitate process).

39. See, e.g., TEMAN, *supra* note 36, at 142–47, 205–29; Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57, 58, 64–67 (2002) (describing his thesis of maternal-fetal detachment during commercial surrogacy and noting the strong relationships developed with infertile couples using the concept of "deflection"); Melinda M. Hohman & Christina B. Hagan, *Satisfaction with Surrogate Mothering: A Relational Model*, 4 J. HUM. BEHAV. SOC. ENV'T 61, 67–69, 81–82 (2001); Helena Ragoné, *Chasing the Blood Tie: Surrogate Mothers, Adoptive Mothers and Fathers*, 23 AM. ETHNOLOGIST 352, 359–62 (1996).

40. See TEMAN, *supra* note 36, at 142–47, 205–29; Baslington, *supra* note 39, at 66–67; Hohman & Hagan, *supra* note 39, at 67–69, 81–82; Ragoné, *supra* note 39, at 359–62.

41. See TEMAN, *supra* note 36, at 142–47, 205–29; Baslington, *supra* note 39, at 66; Hohman & Hagan, *supra* note 39, at 67–69, 81–82; Ragoné, *supra* note 39, at 359–62.

but rather a relationship deeply intertwined with the welfare of the child and based on the intimacy of the pregnancy.⁴² In fact, many studies show that it is the relationship between intended mother and surrogate that is the strongest—it is compared to a joint mothering experience.⁴³ Indeed, in an extreme circumstance a surrogate expressed becoming so attached to the intended parents that they refused payment for a second surrogacy arrangement.⁴⁴ Moreover, many describe postbirth relationships that continue between the adults, which involve but are not necessarily focused on the baby.⁴⁵ Indeed, it is this bond between the surrogate and the intended parents that appears difficult to erase after the birth of the baby and that may cause emotional heartache as well as logistical and legal complications.⁴⁶

Surrogates attest that the relationship with intended parents is an important aspect of the surrogacy arrangements.⁴⁷ When relationships are good, many surrogates express a high level of contentment with the process post birth.⁴⁸ They are most satisfied with the process when they develop a connection with intended parents whom they feel appreciate their important contribution in helping them to create a family.⁴⁹ The more such feelings are returned, and the better the relations between surrogate and intended parents, the better the surrogate tends to feel about her experience and the lower the level of distress or exploitations she reports. Empirical studies demonstrate that when surrogates feel that the intended parents are distant and that the level of relationship did not meet their expectations the surrogates are likely to express dissatisfaction with the process.⁵⁰ In fact, disappointed expectations about relationships correlate closely with surrogates' dissatisfaction with the surrogacy process.⁵¹

The nature of this relationship with the intended parents that is experienced and expected by many surrogates is complex and potentially long lasting. In the short term, many surrogates contend that it is important to see the child born of the

42. Edelmann, *supra* note 1, at 129 (citing Blyth, *supra* note 30).

43. *See, e.g.*, TEMAN, *supra* note 36, at 110–79; Hohman & Hagan, *supra* note 39, at 67–69; Ragoné, *supra* note 39, at 359–62.

44. *See* TEMAN, *supra* note 36, at 209 (describing the case of a surrogate who refused payment for second surrogacy to express her love for the couple).

45. *See id.* at 221–25 (focus of relationship is with intended mother); Baslington, *supra* note 39, at 66 (focus of relationship is with the couple); Edelmann, *supra* note 1, at 129; Hohman & Hagan, *supra* note 39, at 69–70.

46. *See* TEMAN, *supra* note 36, at 221–29; Hohman & Hagan, *supra* note 39, at 67–69; Ciccarelli & Beckman, *supra* note 27, at 31–32.

47. *See, e.g.*, TEMAN, *supra* note 36, at 110–34; Hohman & Hagan, *supra* note 39, at 67–69.

48. TEMAN, *supra* note 36, at 215–25; Baslington, *supra* note 39, at 65–67; Ciccarelli & Beckman, *supra* note 27, at 32 (“[I]t is the quality of the relationship with the couple that largely determines the surrogate mother’s satisfaction with her experience.”); DiFonzo & Stern, *supra* note 31, at 358–59; Hohman & Hagan, *supra* note 39, at 67–69.

49. Baslington, *supra* note 39, at 66; Hohman & Hagan, *supra* note 39, at 67–69.

50. *See, e.g.*, TEMAN, *supra* note 36, at 205–21; Hohman & Hagan, *supra* note 39, at 67–69.

51. *See, e.g.*, TEMAN, *supra* note 36, at 205–21; Hohman & Hagan, *supra* note 39, at 67–69.

agreement and to be acknowledged by the new family during and after the birth.⁵² But, overall, surrogates' expectations appear to be that the relationship will last well past the birth, perhaps in perpetuity. Indeed, according to relevant studies, it is important to surrogates that these relationships that form during the pregnancy do not terminate suddenly and drastically when the child is born and transferred to the intended parents.⁵³ Surprisingly, satisfaction with the process can be negatively influenced even if the relationship was good during the pregnancy but then tapers off after the birth.⁵⁴ Most surrogate mothers, and especially the ones who are particularly satisfied with the process, report continued relationships and contact with the commissioning couple for years after the birth.⁵⁵ Thus, it is not only the relationship that is important to surrogates during the time of the agreement, but it is important for them to feel an emotional connection well past that timeframe. The surrogate wants to feel that the relationship that developed during the pregnancy with the intended couple is real and meaningful and that it will last—that it was not just a time-limited contract exchanging payment for services, but that a real emotional bond developed that went beyond an exchange of money for a pregnancy.

Many surrogates express that they want to feel appreciated and thanked for their investment in time and effort beyond receiving payment.⁵⁶ While they work for money, many surrogates express altruistic motives as well, and no amount of money could fully compensate women for the level of commitment they must make.⁵⁷ In describing their work, surrogate narratives use concepts of “gift-giving” and “mission” to accentuate the more altruistic side of their endeavors and to deemphasize the commercial contractual nature of their work.⁵⁸ Evidence suggests that surrogates want to be acknowledged for the altruistic aspects of their actions as well as paid for the commercial aspects.

In sum, studies indicate that surrogates go through an intense emotional and physical process for the intended parents and want their work to be acknowledged and valued. Moreover, relationships that develop during the course of the forty-week pregnancy with commissioning couples matter to surrogates; surrogates want the relationships to have meaning. If surrogates do not feel appreciated and connected to the intended parents beyond the birth, they often feel used and

52. TEMAN, *supra* note 36, at 205–21.

53. *Id.*

54. *See, e.g.*, TEMAN, *supra* note 36, at 225–29; Ciccarelli & Beckman, *supra* note 27, at 32.

55. Only a limited number of studies have tracked surrogate relationships with intended parents for years after the birth, but some are available and all attest to the continued relationships that usually develop and the satisfaction this bring surrogates. *See* TEMAN, *supra* note 36, at 205–33; Ciccarelli & Beckman, *supra* note 27, at 32.

56. *See* LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 136 (2007); TEMAN, *supra* note 36, at 205–35.

57. *See infra* notes 111–12 and accompanying text.

58. Amrita Pande, *Transnational Commercial Surrogacy in India: Gifts for Global Sisters?*, 23 REPROD. BIOMEDICINE ONLINE 618, 619 (2011); *see* TEMAN, *supra* note 36, at 205–33, *passim*.

discarded.⁵⁹ This attests to the ways that surrogacy transcends a mere job for hire. Surrogates work for money, but many surrogates attest that the investment they make in carrying the fetus is extremely physically and emotionally involved and that they want the nature of this relationship appreciated and recognized. These empirical studies are important for the picture of surrogacy they paint, which is quite different from the concerns about exploitation and trauma than many predicted. In particular, they demonstrate that there are indeed emotional bonds formed during surrogacy that transcend the contractual agreement and that these emotional bonds are between adults rather than with the fetus the surrogate carries and the baby she births.

Another important empirical finding is that, generally, surrogate mothers, when working for commissioning couples domestically within the United States, Europe, and Israel, are not members of an underclass faced with poverty particularly susceptible to exploitation but rather are generally working-class women.⁶⁰ In the United States and Europe, they are also usually Caucasian, Christian, and in their late twenties and early thirties.⁶¹ They usually have high school and not infrequently some college education.⁶² While surrogates are generally in a lower economic class than intended parents, they are not usually in desperate positions.⁶³ It is possible that poor, more vulnerable women are screened out by surrogacy agencies and commissioning couples,⁶⁴ but the availability of educated, financially stable women for surrogacy is instructive. Studies also demonstrate that surrogates often have multiple children themselves and use the money to supplement family

59. See TEMAN, *supra* note 36, at 205–33; DiFonzo & Stern, *supra* note 31, at 357–58; Baslington, *supra* note 39, at 66–67.

60. TEMAN, *supra* note 36, at 23–24; Ciccarelli & Beckman, *supra* note 27, at 29–31; DiFonzo & Stern, *supra* note 31, at 357–58.

61. See, e.g., HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 54 (1994) (“The quantifiable data collected from [twenty-eight] formal surrogate interviews reveal that surrogates are predominantly white, working class, of Protestant or Catholic background; approximately 30 percent are full-time homemakers, married, with an average of three children, high school graduates, with an average age of twenty-seven years.”); Isadore Schmukler & Betsy P. Aigen, *The Terror of Surrogate Motherhood: Fantasies, Realities, and Viable Legislation*, in GENDER IN TRANSITION: A NEW FRONTIER 235, 244 (Joan Offerman-Zuckerberg ed., 1989) (age); Baslington, *supra* note 39, at 61 (age); Hohman & Hagan, *supra* note 39, at 66 (age, race, and religion); Ciccarelli & Beckman, *supra* note 27, at 31 (describing surrogates as “in their twenties or thirties, White, Christian, married and have children of their own.”); Hohman & Hagan, *supra* note 39, at 63; Christine Hagan Kleinpeter & Melinda M. Hohman, *Surrogate Motherhood: Personality Traits and Satisfaction with Service Providers*, 87 PSYCHOL. REP. 957, 958–59, 962–63 (2000) (age, race, and religion); van den Akker, *Experience of Surrogacy*, *supra* note 35, at 148 (age); van den Akker, *Longitudinal Comparison*, *supra* note 37, at 279 (age).

62. E.g., RAGONÉ, *supra* note 61, at 54–55; Hohman & Hagan, *supra* note 39, at 63, 66; van den Akker, *Experience of Surrogacy*, *supra* note 35, at 148; van den Akker, *Longitudinal Comparison*, *supra* note 37, at 278–79.

63. See, e.g., DiFonzo & Stern, *supra* note 31, at 357 (“Research shows that although surrogates are not poor, they are usually of lower income and are less educated than the intended parents that employ them.”).

64. See, e.g., Ciccarelli & Beckman, *supra* note 27, at 31.

income while staying home to raise children or working part-time.⁶⁵ In particular, military wives, who move too much to hold down steady jobs but have good health benefits, use the opportunity to surrogate in order to double their household income while raising small children.⁶⁶

Thus, feminist predictions that gestational surrogacy would lead to a situation in which poor, uneducated women would be used and controlled in an undignified manner have not materialized.⁶⁷ This is true at least in domestic surrogacy arrangements in the United States, Europe, and Israel, locales in which these studies have been conducted.⁶⁸ This is an important finding for determining the level of exploitation and autonomy that may be involved. Contrary to many predictions, there are educated women who do have other choices for earning money and supporting themselves and their families who seem to prefer surrogacy to other job choices and even enjoy the process. Indeed, the author has met a physician who served as a surrogate to a younger, less educated woman to whom she was not related. While such instances are relatively rare, the fact that they occur is informative.

B. Mixed Commodification: Mothering for Money

The way to make sense of the tension between ethical concerns regarding protecting vulnerability and the satisfaction expressed for the practical benefits of commercial surrogacy is by exploring and recognizing the complex nature of the controversial transaction, which is also a relationship. Commercial surrogacy is both deeply intimate and a market transaction. This deep intimacy emanates from the nature of pregnancy, its duration, and its biological impact on the baby and the gestating woman.⁶⁹ Yet, money is an essential part of the transaction, providing due compensation for extremely hard work, relieving suffering for infertile couples, and, for the most part, engendering satisfied partnerships between commissioning couples and surrogate mothers. In this Part, I will first broadly outline the physical and emotional intimacy of surrogacy reflected in the empirical studies described above and the potential harms such intimacy creates when part of a market transaction. The commercial aspects of paid surrogacy are clear as are benefits to the intended parents and the monetary benefits to the surrogate. But, the intimate aspects and the harms of commodification of such intimacy should be clarified. Then, I will describe the theoretical perspective of mixed commodification that best reflects and explains the complexity of surrogate motherhood. I will then move

65. DiFonzo & Stern, *supra* note 31, at 357–58.

66. *See id.* at 358.

67. *See, e.g.,* ROTHMAN, *supra* note 10, at 237; OVERALL, *supra* note 14, at 124–26.

68. *See supra* Part I.A.

69. *See* ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 64 (1976) (observing that in women's experience, the fetus challenges the inside-outside dualism in western philosophy by being at once introduced from without and nascent from within, so that "[t]he child that I carry for nine months can be defined *neither* as me or as not-me" (emphasis in original)); Theresa Glennon, *Regulation of Reproductive Decision-Making*, in *REGULATING AUTONOMY: SEX, REPRODUCTION AND FAMILY* 149, 154 (Shelley Day Sclater et al. eds., 2009).

from theory to practice, arguing for the need to regulate commercial surrogacy due to the intimacy involved while recognizing the simultaneous need to allow surrogacy to exist in the market to provide valuable services to commissioning couples and valid labor choices for surrogates. Finally, I will consider some criticisms of mixed commodification and its application to the legal context and discuss why such criticisms do not undermine the propriety of regulating commercial intimacy.

1. Physical and Emotional Intimacy of Surrogacy

An ongoing concern with surrogacy is the problem of commercializing the intimate process of gestation. Such intimacy coupled with the invaluable benefit it provides to commissioning couples is what I posit fosters the struggle around legalizing commercial surrogacy. Commercializing pregnancy in surrogate motherhood creates a transaction in intimacy for physical, biological, and emotional processes. This intimacy is clarified and expanded upon in the empirical studies outlined above. While the purchase of intimacy does occur in other contexts, it is usually regulated, is often banned, and is always fraught with concerns.⁷⁰

The nature of the intimacy in surrogate motherhood can be described on a number of interlocking levels. First, surrogate agreements involve a long-lasting and intense involvement in the bodily integrity of the surrogate. Surrogate contracts assert control over the lives of surrogates while they gestate; their body is literally being used for someone else's purposes in a constant and inseparable manner. There is no going home at the end of the day; there are no breaks and one cannot really quit or get a new job without complete upheaval and the suffering involved in undergoing an abortion.⁷¹ Once a pregnancy is initiated, surrogates are literally trapped, physically, into their agreements and into their entangled relationship with intentional parents.⁷² Moreover, commissioning parents are interested in and can even assert control over the daily actions of the surrogate.⁷³ Surrogacy contracts may prevent surrogates from international travel or participation in high impact

70. See *infra* Part I.B.2 for a general discussion of the concerns raised by commercializing intimacy. See also Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493–96 (2005).

71. See, e.g., Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 647, 657 (2010) (“Provisions such as the specifics of the IVF treatment, prenatal care, and whether the intended parents can attend medical appointments are incorporated into the contract to reinforce that, while the surrogate may be the one carrying the child, it is not her pregnancy. From the parties’ perspectives, the pregnancy belongs to the intended parents and the surrogate is hired to provide a valuable service.” (footnotes omitted)).

72. *Id.* at 657 n.42 (“Many surrogacy contracts incorporate provisions related to abortion and fetal reduction. The surrogate has a constitutional right to have an abortion; however, in many instances the parties to a surrogacy contract may insert a provision into the contract requiring that the surrogate waive her right to an abortion or stating that an abortion must be performed in certain circumstances.”).

73. *Id.* at 672; Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 413 (2012).

sports or cigarette smoking, or they may require certain actions and encumber surrogates' freedom generally.⁷⁴

Second, from a biological perspective, the physical interconnectedness between the fetus and the gestational mother has been well documented, and her actions do have effects on the fetus.⁷⁵ The fetus and surrogate mother share bodily functions, physical space, and molecular biology.⁷⁶ Thus, it is unlikely that intended parents can be expected to leave a gestational mother to act in any manner she chooses. More fundamentally, the act of gestation is decidedly different from incubation from a scientific perspective. Gestation involves a real biological interdependency over the course of forty weeks that affects both the fetus and the surrogate and that should not be ignored.⁷⁷ The surrogate is affected on a constant basis by the fetus growing inside her and vice versa.

Finally, as described in empirical studies described above, this physical involvement and interrelatedness is coupled with long-lasting emotional connections, if not with the fetus, then with the intended parents.⁷⁸ Such emotional connectedness and the humanity involved in these commercial transactions can create high-level disputes and suffering. Surrogate mothers have reported feeling devastated when their involvement in the process is minimized.⁷⁹ Gestating a fetus may not lead to motherhood,⁸⁰ but it is also not like building a cabinet. Commercializing the singular, long-term nature of the gestational process is complex. When human life is changing hands, the nature of these transactions should be considered to ensure that the interests of the children and the parties involved are being protected.

74. See, e.g., Kimberly R. Willoughby & Alisa A. Campbell, *Having My Baby: Surrogacy in Colorado*, 31 COLO. LAW. 103, 105–06 (2002) (itemizing the kind of restrictions found in surrogacy contracts).

75. See *supra* note 69 and accompanying text; see also *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967) (discussing effects of rubella on fetus); Cori S. Anapolen, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 Va. J. Soc. Pol'y & L. 744 (2005); Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 Hastings L.J. 505 (1992).

76. See, e.g., Robert Martone, *Scientists Discover Children's Cells Living in Mothers' Brains*, SCI. AM. (Dec. 4, 2012), <http://www.scientificamerican.com/article.cfm?id=scientists-discover-childrens-cells-living-in-mothers-brain>; Nancy Shute, *Beyond Birth: A Child's Cells May Help or Harm the Mother Long After Delivery*, SCI. AM. (Apr. 30, 2010), <http://www.scientificamerican.com/article.cfm?id=fetal-cells-microchimerism> (describing a process of cellular exchange between gestating mother and fetus known as microchimerism); see also Catherine Arcabascio, *Chimeras: Double the DNA—Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 439 (2007) (citing J. Lee Nelson, *Microchimerism: Incidental Byproduct of Pregnancy or Active Participant in Human Health?*, 8 TRENDS IN MOLECULAR MED. 109, 109 (2002)).

77. See *supra* notes 73–76 and accompanying text.

78. See *supra* Part I.A.

79. *Id.*

80. For a discussion of legal parenthood, see *infra* Part II.A.2.

2. Harms of Commodification

Due to the intimacy involved in surrogacy described in detail above, a major critique of commercializing surrogacy is that such a market inappropriately commodifies the human body as a form of baby selling or as a form of selling gestational services.⁸¹ As one scholar puts it, by commercializing the womb, “[w]e potentially do harm to ourselves and to human flourishing if we treat something integral to ourselves as a commodity, that is, as separate and fungible.”⁸² It is argued that commodification of services or things that are self-defining (i.e., integral to the self) should not be put on the market because doing so harms participants specifically and society broadly.⁸³ These harms include both consequentialist and intrinsic concerns regarding the effects of exchanges of body parts for money.⁸⁴ Consequentialist harms refer to specific empirical effects of commodification on the value of persons in society and the way persons relate to one another; the intrinsic arguments concern the problematic nature of the sale itself.⁸⁵

It is argued that there is a cost to society in allowing the sale of humans, bodily organs, and capacities because we see ourselves as more than mere commodities. Allowing ourselves and our body parts to be traded for money forces us to perceive ourselves in terms of our own monetary worth. Surrogates thus might view themselves and their bodies merely in terms of their saleable worth and not for their essential value as part of humanity. Women might then be bought and sold based on their worth in surrogacy. Thus, commercializing intimacy is critiqued as problematic because selling intimacy compromises the personal and emotional nature of that intimacy and treats female body parts not as an end in themselves but as a means to an end.

In addition, it is argued that the intimate nature of the surrogacy relationship warrants consideration to protect vulnerable parties from the emotional harm that such intimate contracts can cause.⁸⁶ As one scholar noted, “[t]he commissioning couple does not just enter into a contract with the surrogate: they embark on a relationship with her.”⁸⁷ Human emotions, pain and suffering as well as joy, often

81. For a discussion of these alternate ways of viewing the commodification inherent to surrogacy, see Laufer-Ukeles, *supra* note 8, at 414–20.

82. Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 222 (2009); see Radin, *supra* note 10, at 1930–36.

83. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 137–38 (1996).

84. See Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in THE TANNER LECTURES ON HUMAN VALUES 87, 94–95 (Grethe B. Peterson ed., 2000); Suter, *supra* note 82, at 234–35; Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 693 (2003).

85. See Sandel, *supra* note 84, at 94–95; Suter, *supra* note 82, at 234–35; Note, *supra* note 84, at 693.

86. See Jennifer A. Parks, *Care Ethics and the Global Practice of Commercial Surrogacy*, 24 BIOETHICS 333, 335 (2010).

87. *Id.* at 338 (emphasis omitted).

revolve around commercial surrogate transactions and can be devastating to participants whose expectations are not met.⁸⁸

These harms are amorphous and at times overstated, particularly as compared to the real financial and procreative benefits involved in commercializing surrogacy. However, they are still relevant and intuitive given both are real anathema toward selling humans—children, organs and fetuses included—as well as selling love and sex and the real effects the sale of human goods can have on the participants. Such vulnerabilities and potential harms are reflected in the empirical studies discussed above as well as more abstract harms to humanity. Most pointedly, it is the emotional and physical vulnerability of the surrogate mother whose humanity cries for protection from harm and exploitation and in protection of her human dignity.

3. The Mixed Commodification Analysis

If one takes the commodification concerns as described above seriously, the only way to make sense of surrogacy as a financial transaction is to recognize the complex nature of the transaction that includes both the benefits of commercialization to the surrogates and the intended parents and the intimacy involved. “Incomplete commodification” was originally coined by Margaret Radin to acknowledge that some commodities are monetized, but not entirely.⁸⁹ Margaret Radin asks, can we both know the price of something and simultaneously know that it is priceless?⁹⁰ While Radin recommends incomplete commodification by regulating some markets without banning them, such as prostitution,⁹¹ she does so in the context of struggling with incomplete commodification in order to preserve the non-commercial nature of some transactions.⁹² For instance, Radin is willing to accept incomplete commodification in the context of prostitution in order to pragmatically deal with the reality that a market for prostitution will continue to exist despite bans in a manner that hurts sex workers. However, she fears the commodification of such intimacy and wants to inhibit commercialization of surrogacy in order to avoid the “domino effect.”⁹³

Joan Williams and Viviana Zelizer have taken the possibility of incomplete commodification and spun it in a more positive light through which they describe many transactions that involve both money and intimacy. They have argued for a “differentiated ties” view of the commodification of intimacy,⁹⁴ or, in its most recent application by Zelizer, a “connected lives” theory of commodification.⁹⁵

88. *Id.* at 335 (“[H]uman beings are not best understood as individual rights bearers or property owners, but as vulnerable beings-in-relationship who rely on one another for care, concern, nurture, and identity.”).

89. *See* RADIN, *supra* note 83, at 102.

90. *Id.*

91. *See* Radin, *supra* note 10, at 1932–34.

92. *See* RADIN, *supra* note 83, at 134–39.

93. *See* Radin, *supra* note 10, at 1933–34.

94. *See* Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION* 362, 369 (Martha M. Ertman & Joan C. Williams eds., 2005).

95. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005).

Williams and Zelizer argue that many transactions contain both elements of commercialization and non-monetizable intimacy, care or emotional connection.⁹⁶ In other words, one could accept money for actions that are at least partially motivated by a sense of social connectedness or altruism and perform the job in a caring, selfless manner.⁹⁷ This perspective seeks to recognize both the market and caring/selfless aspects of certain endeavors, refusing to see them as mutually exclusive: “Instead of living in segregated spheres, people participate in dense networks of social relations that intertwine the intimate and economic dimensions of life.”⁹⁸

In her recent book *The Purchase of Intimacy*, Viviana Zelizer describes in great detail the concept of mixed commodification, which she terms “connected lives,” and its wide-ranging applications.⁹⁹ She explains that conceptual approaches towards commodification have taken two diametrically opposed directions: (1) “hostile worlds” and (2) “nothing-but.”¹⁰⁰ In “hostile worlds” approaches, that which is intimate, private, emotional, and built on love and care should not be commoditized or in any way allowed into the market.¹⁰¹ As Margaret Radin explains, commodification of children, people, body parts, sex, etc., cheapens the nature of these beings and attributes, devalues humanity, and thus has serious negative effects on the individuals involved and on society at large.¹⁰² Those with a hostile worlds approach to intimacy argue for a complete disaggregation of intimate attributes and the market keeping each in its own separate sphere.¹⁰³ There is opposition to not only surrogate motherhood, but to intimate, personal human entities such as children, sex, organs, sperm, eggs, votes, motherly caregiving, and wifely housekeeping services.

In the diametrically opposed “nothing-but” approach, scholars argue that the market should be open to just about everything, including children and sex.¹⁰⁴ They argue that the market is its own best regulator and that keeping intimate objects out of the market is not realistic or wise. Rather, the market can attribute appropriate values to all commodities and market forces will ensure that they are best distributed. As Zelizer explains, “[F]or economic reductionists caring, friendship, sexuality, and parent-child relations become special cases of advantage-seeking individual choice under conditions of constraint—in short, of economic

96. Williams & Zelizer, *supra* note 94, at 369.

97. See Nancy Folbre & Julie A. Nelson, *For Love or Money—Or Both?*, 14 J. ECON. PERSP. 123, 132 (2000) (“One could, of course, let self-interest overtake altruistic concerns and do the work in a cold-hearted way, but this not implied a priori. One could, in fact, be exceptionally nonmaterialistic and generous.”).

98. See Williams & Zelizer, *supra* note 94, at 366.

99. ZELIZER, *supra* note 95, at 32.

100. *Id.* at 28–32.

101. *Id.* at 22.

102. Radin, *supra* note 10, at 1915–17.

103. Maxine Eichner, *The Family and the Market—Redux*, 13 THEORETICAL INQUIRIES L. 97, 99–102 (2012) (citing MICHAEL WALZER, SPHERES OF JUSTICE (1983)).

104. See generally Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009); Landes & Posner, *supra* note 9, at 344.

rationality.”¹⁰⁵ Others, Zelizer argues, believe that everything can be reduced to cultural beliefs or political or exploitative bases.¹⁰⁶

According to Zelizer, “People . . . blend intimacy and economic activity [and] actively engage[] in constructing and negotiating ‘Connected Lives.’”¹⁰⁷ “[P]eople create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties by means of everyday practices, sustaining those ties through joint activities (including economic activities), but constantly negotiating the exact content of important social ties.”¹⁰⁸ Even in the most intimate of relationships—between persons in the same household or between paramours, there are both economic and intimate aspects to the interactions.¹⁰⁹ In other words, we are connected to people in many ways, many of which include some level of economic connection and intimate, personal connections: plural meanings are a constant reality.¹¹⁰

Indeed, the commercialization of women’s gestational capacity is, descriptively, a paradigmatic example of the “connected lives” approach developed by Zelizer. First, surrogates describe elements of both monetary and altruistic motivation for

105. ZELIZER, *supra* note 95, at 29.

106. *Id.*

107. *Id.* at 22.

108. *Id.* at 32.

109. *Id.* at 33.

110. A number of other scholars have made these claims about surrogacy and other commodities in the legal context. In a previous article, I have used Zelizer’s theory to argue that it is problematic to exclude all paid caregivers, especially foster parents, from the possibility of receiving *de facto* parental status based on the issuing of payment itself. See Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 55–59 (2009). Such a hostile worlds approach fails to acknowledge the important role finances play in raising all children and discriminates against the poor and racial minorities who are in more need of state funding in order to provide necessary care and live-in nannies who create deep emotional ties with children as a way to earn a living. Martha Ertman has argued for a more realistic mixed commodification perspective on parenthood markets. While not going so far as to argue for full commodification like Posner, she does argue for a regulated market in paying for sperm, acknowledging that money does not necessarily corrupt parent-like relationships and allows for financial contracts between spouses regarding childcare responsibilities. Martha M. Ertman, *What’s Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 55–59 (2003). Naomi Cahn has argued that household work needs to be compensated and that such compensation will not corrupt the spousal relationship. Naomi R. Cahn, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER, RACE & JUST. 1 (2001). Similarly, Katherine Silbaugh argues for limited commodification of women’s household labor to combat the problem of the “cashless woman,” explaining that it is the sales of children and sex that are objectionable, not women’s receipt of money for caretaking work. Katherine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J. L. & FEMINISM 81, 104–07 (1997); see also Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 71–73 (2002). While conceding that regulation keeping these goods and services from being freely marketable remains relevant, Williams and Zelizer argue that banning all payment to impute value to such services is neither practical nor desirable. Williams & Zelizer, *supra* note 94, at 366–69.

engaging in agreements.¹¹¹ Indeed, most list altruism as the primary motivation for becoming a surrogate mother, although there is no doubt that commercial surrogates view their acts as work as well and appreciate and expect the compensation.¹¹² Second, commercializing gestation involves selling bodily functions in an ongoing manner that can be potentially exploitative and devalue the non-commercialization of human life. This is because of the intimate nature of gestation described above, which leads to intimate relationships and attachments.¹¹³ Third, surrogacy involves the transferring of a human child from one woman's womb to a couple's arms. The fetus's needs must be looked after during the pregnancy and the children's needs and interests must be attended to after the birth.

Mixed commodification allows us to accept that there are multiple identifiable purposes for our actions. Thus, altruistic motives do not cancel or encroach on monetary fiscal motives. Moreover, the nature of an act can be both deeply personal and saleable, and thus the relationship between the surrogate and the commissioning couple can be recognized without negating the commercial nature of the transaction.

4. From a Descriptive to a Prescriptive Mixed Commodification Analysis of Surrogacy

Zelizer's project regarding the nature of intimate relations and intimacy's interaction with the market is largely descriptive.¹¹⁴ In her book, by reviewing a

111. Ciccarrelli & Beckman, *supra* note 27, at 29–31 (citing, among others, Hilary Hanafin, *The Surrogate Mother: An Exploratory Study*, in 45 DISSERTATION ABSTRACTS INTERNATIONAL 3335–36-B (1985)); van den Akker, *Experience of Surrogacy*, *supra* note 35, at 150–51.

112. Baslington, *supra* note 39, at 58, 62–63, 67; Ciccarrelli & Beckman, *supra* note 27, at 30 (citing Joan Einwohner, *Who Becomes a Surrogate: Personality Characteristics*, in GENDER IN TRANSITION: A NEW FRONTIER 123, 123–32 (Joan Offerman-Zuckerberg ed., 1989)) (“40% of women state the fee was their main, although not their only, motivator.”); Edelmann, *supra* note 1, at 128.

113. See *supra* Part I.B.1.

114. Zelizer herself, although attesting to making a descriptive argument, pushes this boundary as well. ZELIZER, *supra* note 95, at 297. She concedes, for instance, that the otherwise flawed hostile worlds/nothing-but analyses of the relationship between the market and intimacy, “zones of intimacy operate according to different rules from other sorts of organizations.” *Id.* at 291. While not going so far as to say that such alternate rules are appropriate, it can be inferred. In fact, later she explains that the insistence on “perpetuating the myth of inescapable divisions and battles between the worlds of sentiment and rationality, of market and domesticity, hostile worlds arguments divert us from real solutions.” *Id.* at 297. She urges scholars to take up her perspective on interconnected lives in order to “get the interaction of intimacy and economic activity right.” *Id.* at 298. Zelizer points to some examples of injustices that the failure to recognize mixed commodification or connected lives thinking perpetuates: (1) failure to compensate women for household work; (2) low pay for caregivers; (3) discrimination against mothers on welfare; and (4) prohibitions on child labor that can harm households. *Id.* at 298. These harms result from closing off markets in the intimate sphere entirely. However, she asserts the challenge is to refrain from attempts to separate intimacy from economy entirely or to blend them entirely,

considerable number of legal cases, Zelizer demonstrates how both intimacy and economics are a factor in many interactions. More specifically, she demonstrates how the hostile worlds and nothing-but perspectives often expressed in judicial opinions miss the complex reality of what transpires between persons. Her basic proposition is that, descriptively, “in all social settings, intimate and impersonal alike, social ties and economic transactions mingle, as human beings perform relational work by matching their personal ties and economic activity.”¹¹⁵ Her claim is that intimate relations cannot be separated entirely from the market, but they cannot be mixed or confused with pure market transactions either—intimate relations often have elements of both and thus can be partly marketable and partly unmarketable.

In this Article, I push Zelizer’s descriptive theory firmly into the realm of the prescriptive. Not only do certain transactions contain elements of both intimacy and economics, some transactions *should* be regulated to take into account the intimacy and personal nature of relations as well as the economic elements involved. As the commercial nature will be governed by the market, regulation should be enacted to reflect the intimacy. This is not only to deal with pragmatic realities as described by Radin,¹¹⁶ but because that is the normatively best way to deal with sales of intimate objects. Markets in intimacy will continue to flow and develop, and such sales can be extremely beneficial to participants and to society as a whole and thus should not be prohibited. This is the case with surrogacy. But, when significant amounts of intimacy are involved, these markets should be regulated and such regulation can be justified to recognize the plural nature of such markets.¹¹⁷

5. Towards a Regulatory Framework for Commercial Surrogacy

The first question that follows is: what is sufficient intimacy to necessitate regulation? Many broad categories of transactions involve some degree of intimacy, such as any sale of labor services or the sale of property. Labor and property laws do regulate such intimacy to some degree. But such categories entail less intimacy than surrogate motherhood because they are more separable from the self. I would argue that there are at least three broad categories of intimate transactions that are so intimate as to require regulation specifically aimed at protecting and recognizing their intimacy: the sale of body parts, the sale of bodily functions, and the sale of love—all of which are significantly tied up with the self.¹¹⁸ Ultimately, commodification is a matter of degree and not bright line

but rather to “create fair mixtures. We should stop agonizing over whether or not money corrupts, but instead analyze what combinations of economic activity and intimate relations produce happier, more just, and more productive lives.” *Id.* Although admitting that money can corrupt, and must be restrained, she urges that we must accept mingling and then determine how to resolve mingling in the most productive and appropriate manner. *Id.* at 298–99.

115. *Id.* at 288.

116. *See supra* notes 89–93 and accompanying text.

117. *See, e.g.,* Hasday, *supra* note 70, at 494–99 (describing the appropriateness of regulation to differentiate intimate markets from other markets).

118. *See* Michele Goodwin, *Relational Markets in Intimate Goods*, 44 *TULSA L. REV.* 803, 805 (2009) (“The dual statuses of intimacy are employed here—both as a metaphor for

rules.¹¹⁹ For instance, I would argue that surrogacy is more intimate than egg and sperm sales because of the longer bodily and emotional commitment that gestation entails and thus more in need of regulation. Others may disagree depending on the importance placed on genetics. I am arguing for a pragmatic, context-specific approach that takes intimacy seriously, particularly when the intimacy is so prevalent that it overwhelms the transaction. But, what distinguishes my perspective from an anti-commodification perspective is that I believe that within these categories of intimacy a market can flourish in an ethical and legal manner. Moreover, my argument is not grudging, accepting commodification because I believe it is not preventable;¹²⁰ rather, I believe that a regulated market that recognizes the commercial and intimate aspects of surrogacy transactions is befitting and appropriate at least in a domestic market.¹²¹

Regulation is the appropriate response to recognition of plural meanings as it provides an intermediate position between a ban and full marketization and differentiates intimate markets recognizing the complex nature of such transactions.¹²² Still, a regulatory response to recognizing the relevance of mixed commodification is not obvious, although first raised by Radin in her discussion of incomplete commodification.¹²³ In the context of surrogacy, Radin nonetheless opted for a ban on commercializing gestation.¹²⁴ Ertman, although recognizing the relevance of mixed commodification in intimate markets, uses it to justify the mostly free market in donor sperm.¹²⁵ Both of these positions miss the mark. The reason to turn mixed commodification from a descriptive tool to a normative framework creating the need for regulation is that it better allows for the benefits of surrogacy, while eliminating or minimizing the potential harms.

Regulation can be carefully drafted to contend with the high levels of intimacy involved, as well as the positive benefits marketization provides. On the one hand this approach recognizes that there is a cost to full commodification that could harm participants and undermine our notions of the sanctity of personhood more generally. On the other hand, there is no reason to lose the benefits of markets in intimate relationships and in bodily functions because intimacies are frequently exchanged for money. Rather, the markets should be harnessed to reap the benefits while taking care not to harm the participants and society more broadly.

relationships and affinity linkages . . . and also as the term relates to the exclusively yours: biological goods, such as kidneys, ova, sperm, and babies.”). I add to intimate relationships and body parts described as “intimate” by Goodwin the leasing (selling) of bodily functions such as gestation.

119. See Laufer-Ukeles, *supra* note 8, at 422.

120. See, e.g., Suter, *supra* note 82, at 220–21, 232 (describing how she “give[s] in” to a baby market despite deep concerns and idealized notions that would favor prohibition of baby markets).

121. See *infra* Part II.

122. See Hasday, *supra* note 70, at 528 (“A child is not a commodity and should not be subject to the same rules of economic exchange applied to commodities.”); see also Viviana A. Zelizer, *From Baby Farms to Baby M*, SOCIETY, Mar./Apr. 1988, at 28 (suggesting that proper regulation could make surrogacy a completely acceptable transaction but not specifying what kind of regulation or oversight would be necessary).

123. See *supra* notes 89–93 and accompanying text.

124. See *supra* notes 91–93 and accompanying text.

125. See Ertman, *supra* note 110, at 28–35.

The question that follows will be discussed at length below: What kind of regulation, specifically, may be appropriate in the context of surrogate motherhood? Recognizing the regulation may be appropriate only begins the conversation. Inappropriate regulation, in fact can do more harm than good to markets in intimacy.¹²⁶ Effective regulation of intimate transactions would recognize and protect the intimacy, avoiding to the extent possible the harm it can cause to vulnerable parties as well as the damage it can cause to self-perception and the non-monetary aspects of personhood generally. Yet, it would also allow the market to flourish in a fair and reasonably stable manner. Regulators should acknowledge empirically the emotional connections surrogates form with intended parents, and potentially the fetus as well.¹²⁷ Regulation should also acknowledge the significant benefits surrogacy has reaped for infertile couples, the general satisfaction attested to by all parties and the lack of litigation resulting from the vast majority of agreements.

6. Responding to Criticism of Mixed Commodification

A number of scholars have argued that mixed commodification as a framework for exploring intimate transactions is particularly problematic, perhaps more so than full commodification or complete noncommodification. Some legal scholars criticize mixed commodification approaches because regulation of intimate markets asymmetrically impacts women as most of the taboo trades—surrogacy, prostitution, and egg sales—involve women’s labor.¹²⁸ This argument is of course true of complete anti-commodification arguments as well, and even more so because such approaches would entirely ban intimate trade. It is not particularly surprising that trades involving intimacy and human body parts often, but not always, involve women’s work.¹²⁹ Women have traditionally been pegged with much of the caregiving and domestic work that involves intimacy.¹³⁰ The

126. See, e.g., Hasday, *supra* note 70, at 522 (discussing distributive costs of limiting financial compensation for intimate exchanges).

127. See *infra* Parts I.A & I.B.1.

128. See, e.g., Kimberly D. Krawiec, *A Woman’s Worth*, 88 N.C. L. REV. 1739, 1741–42 (2010) (while admitting that commodification arguments also apply to gender neutral sales of organ and to male sperm, she nonetheless argues that the bulk of anti-commodification arguments are directed at woman’s labor).

129. For instance, the sale of organs. See, e.g., David E. Chapman, Comment, *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 405 (1983) (“[S]ociety should not view the sale of human organs any differently than the sale of other necessary commodities such as food, shelter, and medication.”); Shelby E. Robinson, Comment, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1050 (1999) (arguing that America’s deficit of transplantable human organs can be solved through commodification).

130. 29 U.S.C.A. § 2601(a)(5) (West 2009) (“[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women.”); see Mary Anne Case, *Pets or Meat*, 80 CHL-KENT L. REV. 1129 (2005). See generally Radin, *supra* note 10 (discussing the interplay between market-inalienability and prostitution, baby-selling, and surrogate motherhood, all of which involve the intimate use of women’s bodies).

disproportionate effect on women also rests on the biological reality that only women can gestate babies or produce eggs.¹³¹ Increasing gender equality has involved men in such domestic jobs as well. Such jobs can be regulated while still providing sufficient compensation that values intimacy. Regulation should work to protect vulnerability and value intimacy and not work distributive injustice on workers involved.¹³²

More interesting are arguments that mixed commodification is particularly problematic for allowing the mixing of money and intimacy in transactions and that, as a result, it would be preferable to allow *either* complete commodification or complete noncommodification.¹³³ For instance, Mary Anne Case argues that allowing intimacy in commercialization may hurt the employee in the context of domestic help.¹³⁴ She explains that calling domestic help part of the family does not come from an egalitarian perspective but one of hierarchy and that pure commercial relationships are perhaps more appropriate.¹³⁵ Similarly, being part of the family can harm one's ability to earn the highest wages possible and undermine one's readiness to make demands in one's own economic self-interest.¹³⁶

But, as Case soon thereafter admits, domestic help also seek and benefit from this intimacy and thus it does not appear that she is arguing that mixing is avoidable.¹³⁷ Later, she posits that many employers seem to prefer a more business-like relationship with employees, even when employees prefer intimacy, but she also admits that employers purchase love for their children when they hire caregivers.¹³⁸ The intimate worker—whether domestic laborer or surrogate mother—is the more vulnerable party and tends to have less in terms of power and material resources.¹³⁹ Thus, if such a worker prefers a more commercial, less intimate relationship, that should be her choice and will be relevant in the regulatory framework I propose below as well.¹⁴⁰ But it is problematic for employers to ignore the sensitivity of the relationship involved and the frequently desired recognition of intimacy voiced by the intimate worker.¹⁴¹

As Case describes it, intimate labor is complicated. Intimacy and commercialization create a cloudy, complex dynamic. Ultimately, her description is of a mixed, complex system of commodification in domestic labor and the harms

131. Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 *LAW & INEQUALITY* 277, 305–07 (2009).

132. See Hasday, *supra* note 70, at 517–22.

133. See Case, *supra* note 130, at 1131 (“Whereas Radin focused on the hope and promise of incomplete commodification, I in this essay shall concentrate on its risks, on the double bind incomplete commodification itself can pose.”).

134. Case, *supra* note 130, at 1132–35.

135. *Id.* at 1137–43.

136. *Id.*; see also Pande, *supra* note 11, at 986–88 (describing how surrogates use intimacy to explain why they do not demand more fees).

137. Case, *supra* note 130, at 1139–40.

138. *Id.* at 1136.

139. See Parks, *supra* note 86, at 338–39.

140. See *infra* notes 186–87 and accompanying text.

141. See Parks, *supra* note 86, at 339.

that could result from such intimacy to the parties, especially to the employees.¹⁴² Thus her arguments buttress the appropriateness of regulation to contend with such vulnerabilities. While intimacy can make the intimate worker vulnerable, recognition of this intimacy does not create the vulnerability; it only attempts to protect the vulnerable party.

Kimberly Krawiec criticizes mixed commodification approaches because taboo markets are then “tolerated, but not embraced, and this uneasy accommodation directly impacts commercial providers of sex, oocytes, and surrogacy.”¹⁴³ The focus of her criticism is on what she perceives as mixed commodification’s insistence that women who engage in surrogacy or oocyte sales do so for altruistic reasons and not for profit.¹⁴⁴ But the mixed commodification argument that Zelizer puts forth is more complex than this portrayal—it is not altruism or profit, it is both and both should be recognized.

The profit motive should be recognized as permissible by allowing profitable payment and the altruistic, intimate element recognized through regulations that protect the parties and provide rights and status to the intimate worker.¹⁴⁵ Regulations created to recognize mixed commodification should not prevent women from profiting from their work. Such regulations can give women more rights; the ability to rescind agreements and the right to receive counseling. While exploitation arguments may weigh in favor of limits on payments in some contexts,¹⁴⁶ the idea of mixed commodification should be to allow the commercial trade, but to put forward regulations that recognize intimacy through giving rights and status to the subject of the sale of intimate goods. Indeed, arguments that mixed commodification only increases exploitation and stigma are misguided. Regulations should increase the status of such workers by giving them recognition and rights beyond contractual terms.

C. Relational Autonomy: Maximizing without Ensuring Autonomy

Another commonly voiced concern about surrogate motherhood is that it exploits poor women who do not have other means of earning money. Commentators previously predicted that these contracts would employ poor women as an underclass for the privileged.¹⁴⁷ Concerns are also expressed that brokers take advantage of surrogates and make too much money from the use of the surrogate’s body.¹⁴⁸ Images of *Brave New World*¹⁴⁹ scenarios in which the rich hire the poor to

142. See Case, *supra* note 130, at 1132–37.

143. Krawiec, *supra* note 128, at 1743.

144. *Id.* at 1757.

145. Krawiec’s article focuses on egg donors. In general, I am more concerned with the intimacy involved in surrogacy than for egg donors as surrogates have an ongoing relationship with the fetus and commissioning family in a way that egg donors do not. In fact, although the process is less pleasurable and more intrusive, egg donors are more like sperm donors than surrogates. Thus, less regulation, if any, would be needed to protect egg donors.

146. See *infra* Part II.B.5.

147. See *supra* notes 14, 60 and accompanying text.

148. See, e.g., Anne Donchin, *Reproductive Tourism and the Quest for Global Gender*

incubate their children with much sacrifice and little profit abound in reaction to surrogacy.¹⁵⁰ Empirical research does not bear out this fear in the studies of domestic surrogacy in the United States, Europe, and Israel.¹⁵¹ In international surrogacy, however, the fears are more substantiated.¹⁵²

Still, a decision to become a commercial surrogate, undergoing pregnancy and labor for money on behalf of another family, is difficult.¹⁵³ As described above, surrogacy involves the choice to lend one's body for a considerable duration for the purposes of another family and to undergo numerous medical procedures and labor for financial remuneration. One's body, time, and freedom are purchased in an extricable manner. Contracts often restrict women's actions, as does the nature of pregnancy itself.¹⁵⁴ And, those who broker and organize a surrogate's services do usually still have an advantage over her in terms of resources and information, which makes the surrogate more vulnerable.¹⁵⁵ There may be many social and financial pressures affecting such a decision. Being a surrogate is such a unique experience that even if a woman has been pregnant before, perhaps she can never be fully aware of the nature of the contract to which she is agreeing.¹⁵⁶

Generally, however, we should be skeptical of exploitation arguments that too narrowly focus on women as victims. Many contracts take advantage of the

Justice, 24 *BIOETHICS* 323, 328 (2010).

149. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

150. *See, e.g.*, RAYMOND, *supra* note 10, at 143–44 (1993); John Lawrence Hill, *Exploitation*, 79 *CORNELL L. REV.* 631, 691 (1994) (citing to a study that approximately forty percent of all surrogate applicants were unemployed or received financial assistance); Radin, *supra* note 10, at 1916–17; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51, 66 n.81 (1997) (citing GENA COREA, *THE MOTHER MACHINE* 276 (1985) (describing a reproductive brothel)); Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 *WHITTIER J. CHILD & FAM. ADVOC.* 529, 544 (2007) (arguing that the most frequent argument against surrogacy is that it could exploit poor women who enter into surrogacy agreements purely out of economic necessity). *Contra* Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 *VA. L. REV.* 2343, 2349–50 (1995); Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 *HARV. J.L. & GENDER* 67, 78 (2007) (“[S]urrogacy may produce at least the appearance of some social leveling: the surrogate’s fertility makes up for ‘perceived, if unacknowledged, economic differences’ between the surrogate and the commissioning couple.”).

151. *See supra* notes 60–63 and accompanying text.

152. *See infra* Part III.A.3.

153. *See also supra* Part I.B.1 for a description of the emotional and physical nature of surrogacy.

154. *See supra* notes 70–74 and accompanying text.

155. *See* Damelio & Sorensen, *supra* note 13, at 269.

156. *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988) (“Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby’s birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.”); *see Model Human Reproductive Technologies and Surrogacy Act*, 72 *IOWA L. REV.* 943, 981–85 (1987); Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 *TENN. L. REV.* 135, 143 (1992).

emotional, physical, and pecuniary needs of people willing to do unseemly or dangerous things for money. That wealthier people would not agree to be janitors, stuntmen, or butchers or that healthy people would not agree to undergo experimental therapies does not make agreeing to do such jobs or treatments exploitative. On the other hand, some choices are paternalistically limited. Willing participants cannot agree to work for less than minimum wage or engage in activities that are deemed too dangerous. Selling ones gestational services seems to be somewhere in between—more personal, involved, and implicating of bodily integrity than housekeeping, but not as potentially harmful as agreeing to undergo unproven drug therapies for high levels of compensation. Gestation is a condition, not an irreplaceable body part. And, with modern medicine, gestation is no more dangerous than many other activities that are legal. Still, it is a commitment of a bodily function, long-term and involved, that does not mirror typical jobs.¹⁵⁷ Thus, there is room to be concerned about the autonomy of the surrogate without paternalistically denying her right to engage in their services altogether.¹⁵⁸

Yet, it is too simplistic a question to ask whether such choices are autonomous or exploitative. Autonomy is not an all-or-nothing proposition; there are degrees of autonomy.¹⁵⁹ Autonomy is a worthy goal for all members of society, surrogates included, and having the choice to surrogate is part of that goal.¹⁶⁰ But not all choices that are individually made are truly informed and free.¹⁶¹ Choices are not always made individually in accordance with a liberal model of individual rights; they are influenced by context and societal and familial pressures.¹⁶² These issues should be taken into account. And, as discussed above, there are a number of factors pointing towards the potential vulnerability and exploitation of a surrogate.¹⁶³

“Relational Autonomy” provides an alternative understanding of autonomy that acknowledges the many social and contextual constraints and pressures that may be placed on choices while simultaneously recognizing that there is value in self-determination.¹⁶⁴ It provides a complex account of autonomy that considers gray

157. It is worth noting that while I frame issues regarding decisional autonomy as concerns regarding exploitation, others have framed such concerns as part of commodification concerns. I think separating commodification concerns that involve the subject of the transaction from autonomy concerns involving the freedom and knowledge of the person making the decision is logical and helpful. Admittedly, the nature of the transaction may escalate exploitation concerns, but this does not mean that the two types of concerns cannot be considered separately.

158. See, e.g., Damelio & Sorensen, *supra* note 13, at 275 (“[T]he surrogate is vulnerable in important ways, but autonomy prevents a ban, and even positively supports the enhanced choice that surrogacy contracts make possible.”).

159. See *id.* at 270–71.

160. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 8–9 (1989) (“[F]eminists are centrally concerned with freeing women to shape our own lives, to define who we (each) are, rather than accepting the definition given to us by others (men and male-dominated society, in particular).”).

161. See Damelio & Sorensen, *supra* note 13, at 275.

162. See Nedelsky, *supra* note 160, at 8–10.

163. See *infra* Parts 1.B.1&2.

164. See, e.g., GRACE CLEMENT, CARE, AUTONOMY, AND JUSTICE: FEMINISM AND THE

areas between full individualistic autonomy and complete coercion. Under the normative framework of relational autonomy, relationships with doctors, family, friends, community, and society at large are deemed necessary to support autonomous choices.¹⁶⁵ Relational autonomy takes into account the circumstances and conditions under which decisions are made and tries to foster autonomy. “Relational selves are inherently social beings that are significantly shaped and modified within a web of interconnected (and sometimes conflicting) relationships.”¹⁶⁶

The goal of relational autonomy is to maximize and foster autonomy—not to ensure it. Under this theory, conditions should be put in place to optimize noncoercive and deliberate decision making. Because surrogacy is a process that deeply implicates personhood, bodily integrity, potential emotional and physical trauma, as well as societal constraints and familial pressures, the law should ensure that women who choose to be surrogates are in optimal situations to make such choices. The need for regulation is not to deny women their choices or to give them complete freedom but to ensure optimal conditions for autonomous decision making. Thus, regulations should seek to ensure that women are free from familial pressure, not in economic distress and as informed as possible about the process.

II. REGULATING DOMESTIC SURROGACY

Due to the potential harms of commodification and exploitation arising from the intimacy of surrogacy as discussed above, I have pointed to the need for regulation of surrogacy despite the benefits of commercial surrogacy to commissioning couples and surrogates and the lack of conflict that usually ensues from such agreements. Commercial surrogacy involves both a financial exchange as well as an intimate relationship. The potential harms that can result from the vulnerabilities and emotional aspects of these relationships should be recognized. Such regulation should protect the intimacy from full marketization, fostering a system of surrogacy that is both commercial and intimate. Regulations should also acknowledge that the sale of gestational services is an involved and long-term intimate commitment and ensure that autonomy is supported to the fullest extent possible.

In considering proper regulation of surrogacy, I will first consider regulation of domestic arrangements of surrogacy and, second, the regulation of international surrogacy, in which a couple from one country employ the services of a foreign

ETHIC OF CARE 21–22 (1996); Susan Sherwin, *A Relational Approach to Autonomy in Health Care*, in *THE POLITICS OF WOMEN’S HEALTH: EXPLORING AGENCY AND AUTONOMY* 19, 26–28 (Susan Sherwin ed., 1998); Glennon, *supra* note 69, at 151–52; Nedelsky, *supra* note 160, at 14.

165. See CLEMENT, *supra* note 164, at 42–44; Glennon, *supra* note 69, at 151–52; Nedelsky, *supra* note 160, at 12 (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy.”); Carl E. Schneider, *After Autonomy*, 41 *WAKE FOREST L. REV.* 411, 413 (2006) (“The second criticism contends that the autonomy principle, while estimable and essential, promotes deleterious attitudes, perhaps principally by underwriting a corrosive individualism that alienates people from their family, friends, and physicians.”).

166. Sherwin, *supra* note 164, at 35; see CLEMENT, *supra* note 164, at 22.

surrogate. While international surrogacy warrants its own in-depth examination,¹⁶⁷ I want to comment on domestic and international surrogacy in tandem to demonstrate that while domestic surrogacy arrangements can be channeled in a manner that recognizes the intimate and commercial aspects involved, under the same framework, international surrogacy is much more problematic. In short, it is hard to imagine that the intimacy in international surrogacy can be properly valued as it has been developed on a model that intends to minimize the personal nature of surrogacy. Moreover, the distance involved creates detachment and disenfranchisement.

In this Part, I outline some regulatory steps that can be taken to recognize the intimacy of surrogacy while fostering a well-functioning system of domestic commercial surrogacy. These proposals are not meant to be exhaustive or, except for the first provision, required. The first provision for post-birth contact between surrogates and baby at the surrogate's election within an overall best interests framework is the most central and necessary provision. It is also the most unique. Essentially, it is this provision that best reflects the complex nature of surrogacy as a transaction that is still an intimate relationship. Only by undergirding the commercial transaction with a potentially legally enforceable relationship, and thereby recognizing the intimate contribution the surrogate provides, does the mixed nature of the transaction take shape. The other provisions I suggest are in use in many states that regulate surrogacy; they can also be used to recognize intimacy and account for the benefits of commerciality. But, under the conceptual framework of mixed commodification and relational autonomy, prescriptive regulatory measures are a matter of degree and good regulation can of course take multiple forms.

A. Post-Birth Contact Between Surrogates and Baby

The primary regulatory response that I introduce to reflect the mixed commodification and relational autonomy perspectives on commercial surrogacy is to provide surrogates with a legally enforceable opportunity for post-birth contact with the baby that they gestated. Although such an election would have to be within the context of an overall best interests analysis and may not provide for extensive or long-lasting visitation, it would give surrogates legally recognizable status as more than just a contract worker. Such a provision recognizes the intimate relationship the surrogate has with the baby and gives credence to the relationships that surrogates tend to build with commissioning families during the surrogate process. Moreover, such post-birth contact dignifies the surrogate and her body, treating her as more than a means to an end and contends with the surrogate's potential vulnerabilities and the power imbalances that most surrogate arrangements entail.

In this Part, I describe the regulatory framework for the post-birth contact that I propose. I then discuss the issue of the legal definition of parenthood which is

167. See generally Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009 (2010) (describing in depth the nature and effects of international surrogacy).

directly implicated by this discussion. In giving post-birth contact with the baby to surrogates within the context of supporting a regulated system of commercial surrogacy, the primary legal parents of the baby are assumed to be the commissioning couple, but parental rights are disaggregated and deconstructed in a manner that rejects the exclusive binary rights of traditional parenthood and embraces a more kin-like, extended, and functional familial structure.¹⁶⁸ Thereby, the model of surrogate motherhood I introduce parallels the movement in family law toward recognition of functional parenthood, the benefits of open adoption and more extended, flexible notions of parenthood, custody, and visitation.

1. The Regulatory Framework

In adoption law, a birth mother has a right to rescind an agreement for adoption after the baby is born.¹⁶⁹ This right to rescind gives a mother a right to decide about her baby's fate once a child is born and reflects both the desire to ensure informed consent and concerns about commodification and baby selling.¹⁷⁰ In adoption law the intimacy of motherhood is clear and intuitively respected.

This right to rescind does not apply in the context of surrogate motherhood, and surrogacy is not regulated in the same manner as adoption.¹⁷¹ Based on differing definitions of motherhood, the intimacy recognized in surrogacy regulation is comparatively less. The distinction is justified due to the lack of genetic affiliation between surrogate mother and baby in gestational surrogacy and, in traditional surrogacy, due to the difference in intent and, potentially, the genetic relationship with the intended father.¹⁷² In surrogacy, the baby was created because of the surrogate contract whereas in adoption, the baby was created regardless of the contract. Still, there could be a commissioned adoption in which the child is conceived and born because of the intent to adopt. Under such conditions there

168. See, e.g., Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 20–21 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314–32 (2007); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85 (2004); Laura T. Kessler, *Community Parenting*, 24 WASH. U. L.J. & POL'Y 47, 74 (2007); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 428–35 (2013); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 394–95 (2008).

169. See, e.g., ARIZ. REV. STAT. ANN. § 8-107(B) (1989) (West) (consent valid only seventy-two hours after birth); *In re Timothy W.*, 223 Cal. App. 3d 437, 445 (Cal. Ct. App. 1990) (holding that when a birth mother has formally refused to give her consent, the court shall order the adoptive parents to relinquish the child); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 443 (1996).

170. See, e.g., Cathy J. Jones, *Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379, 383 n.14–15 (1990).

171. See, e.g., Kerian, *supra* note 2, at 118–20, 124–26, 138.

172. See *infra* Part II.B.1 (describing in depth the distinctions between traditional and gestational surrogacy).

would be a right to rescind despite the intent that the adoptive parents raise the child. While gestational surrogacy is different in that there is no genetic tie between the gestational mother and the baby, gestation is an important potential indicatory of motherhood (as it is for egg donation) and consists of a long-term physical attachment with a fetus. Thus, it should be relevant in defining legal motherhood.¹⁷³ While the surrogate's gestation on behalf of a commissioning couple may not create full parental rights to exclusively parent a child,¹⁷⁴ or a right to rescind comparable to adoption, it does create an intimate relationship. In sum, while there may be somewhat less intimacy involved in surrogacy than in adoption, there is still a high degree of intimate contact between surrogate, fetus, and commissioning couple that should not be ignored.

In recognition of the unavoidable intimacy in surrogacy, when surrogates do have trouble detaching from a baby, their needs should be taken into account.¹⁷⁵ Surrogates are potentially vulnerable to control exerted over their bodies in surrogate contracts and empirically appear to be the parties that seek recognition and continued contact and relationships with commissioning couples and thus are vulnerable to the extent commissioning couples do not want such relationships.¹⁷⁶ Empirical studies suggest that emotional attachments and the desire for ongoing relationships exist for surrogates due to attachments to the intended family, not just the child that was gestated.¹⁷⁷ Surrogates, in general, are most satisfied with the surrogacy process when such relationships continue and their work is appreciated on a human level as well as through financial compensation.¹⁷⁸ This research demonstrates that many surrogates crave this relationship with intended parents because of the familial emotional connections they develop during pregnancy.¹⁷⁹ The legal system should recognize this reality and meet them in the middle with legal standing that recognizes their connection to the embryo they carry and to the commissioning intended parents with whom they have worked in intimate partnership. Although the empirical research focuses on the connection between the surrogate and the intended parents, it would be admittedly awkward to force a relationship between adults and it is still appropriate that the post-birth contact surround the baby as the baby is the source of the relationship around which the emotional connections were built. Surrogates have created connections with the family and post-birth contact should continue with the family with a focus on the baby she birthed.

In sum, surrogates are not incubators that can be discarded after labor. Surrogacy should be regulated to promote a process that is satisfactory to all parties, without the surrogate being perceived as a temporary mechanism of aid that can be readily discarded once the baby is born. Acknowledging intimacy under the

173. See *supra* Part I.B.1; see also sources cited *infra* note 194.

174. As discussed below, I feel that no definitive test can definitively determine exclusive parenthood in all situations and before the child is born. See *infra* Part II.A.2.

175. See Parks, *supra* note 86, at 335–39.

176. See *supra* Part I.A.

177. See *supra* Part I.A.

178. See *supra* Part I.A.

179. See *supra* Part I.A.

mixed commodification framework means supporting and recognizing the value of these relationships.¹⁸⁰

In addition, practically, as intended parents are reliant on a woman to gestate their child, and the woman is subject to the intended parents needs and demands, and because a child is born and separated from the laboring mother, warm, emotional, kin-like relations are important. Indeed, to the extent that all parties agree that a smooth surrogacy process is best, and dissatisfaction and litigation should be avoided, the need for good relationships is central as it is the breakdown of these relationships that appears to result in conflict.¹⁸¹

Thus, in the rare circumstances in which a surrogate demands ongoing contact with the baby without coming to a mutual agreement with the intended parents in the form of ongoing relations, an arrangement of infrequent but potentially ongoing visitation that allows the surrogate mother to disconnect from the fetus more slowly may be appropriate. Or, if the family can work out a more open relationship, multiple parental-child relationships may be securely and safely established to the benefit of all involved.¹⁸² While some would object that this violates the exclusivity and privacy of parenthood, where procreating and raising children involves third parties, such exclusivity may not be appropriate.¹⁸³ With a baby born of artificial means in which numerous persons contributed to creating that baby, gestation, as well as genetics and intent, may give someone status to seek custody and other parental rights.¹⁸⁴ But, circumstances should be taken into account because conflict between parental figures is not good for a child. Thus, shared parenting can only work for parents who want or can accept this kind of arrangement. In the rare but possible circumstance of conflict, courts would have to work with the surrogate to create an arrangement that would allow her some continuing contact with the baby and allow detachment over time.¹⁸⁵ Such legal status can be accomplished through legal precedent or set forth more clearly through regulation that provides for the possibility of ongoing, infrequent visitation by a surrogate who requests such rights.

The implications of this potential for legal status may be to discourage surrogacy.¹⁸⁶ However, this is unlikely to have a large effect because it will only come into play in a very small percentage of cases. In most cases, such ongoing contact is fostered regardless of legal obligations.¹⁸⁷ And, the possibility of such status being imposed legally will likely further encourage such ongoing relationships. Bargaining in the shadow of the law, intended parents will be

180. *See, e.g.*, Parks, *supra* note 86, at 335 (discussing how under an ethic of care, intimate relationships should be valued and recognized).

181. *See supra* Part I.A.

182. *See supra* Part I.A.

183. *See* sources cited *supra* note 8.

184. *See supra* Part II.A.1.

185. Even though studies suggest that surrogates' attachment is with the commissioning couple, it is centered around the child such that visitation with that child is likely the appropriate response. *See supra* Part I.A.

186. *See* Parks, *supra* note 86, at 339.

187. *See supra* Part I.A.

encouraged to permit infrequent visits and foster ongoing warm relations.¹⁸⁸ Moreover, it will encourage gestational surrogacy because women indicate less attachment to embryos that do not also carry their genes. It will encourage trusted friends or family members to act as surrogates as they may be less likely to cause problems. Most importantly, it will encourage warm, kin-like relations between intended parents and surrogate mothers even after the birth because such ongoing relations are the best way to avoid conflict and promote satisfaction.¹⁸⁹

Regulation that encourages such relationships best reflects the complicated nature of surrogacy, which is not fully commodifiable. Such regulation is a way of reinforcing a sociological reality and hopefully a mechanism for correcting misunderstandings and encouraging protection of vulnerable surrogates by building relationships. Of course, if a surrogate is not interested in continued contact, her ability to gain such status would be irrelevant and it should certainly not be forced upon her if it is unwanted. The goal is to regulate the practice of surrogacy to make it more relational and responsive to the human relationships that are actually created.¹⁹⁰

Such a relationship-focused regime may seem forced and artificial if legalized and not engaged in voluntarily, but it is not unique. Such practice conforms with the movement towards open adoption, multiple parentage, de facto parental status, and grandparent visitation rights.¹⁹¹ More conceptually, the goal is to make legal relationships more reflective of actual relationships and to give more status to those vulnerable parties who have traditionally been excluded from legal status despite actual investment in children.¹⁹² This movement is not only aimed at providing for the best interests of children, but also for the sake of vulnerable, intimate workers such as caregivers and surrogate mothers.¹⁹³ The overall vision is for a more kinship-based method of caring for children that recognizes the variety of intimacy involved in the process. Recognition of intimacy in this manner is new but not unprecedented in the literature.¹⁹⁴

2. The Puzzle of Defining Parenthood

Creating this framework for surrogate motherhood involvement in raising a child implicates the captivating question of legally defining parenthood. Although I engaged in concerted analysis of this question in my earlier thinking about surrogacy,¹⁹⁵ I no longer find it to be the seminal question in considering surrogate motherhood. That is because there can be no fully satisfactory answer as to who is

188. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954–57 (1979) (discussing how the law affects separation agreement negotiations at divorce).

189. See *supra* Part I.A.

190. See Parks, *supra* note 86, at 334–35.

191. See sources cited *supra* note 168.

192. See, e.g., Murray, *supra* note 168, at 394–95.

193. See, e.g., Laufer-Ukeles, *supra* note 110, at 51.

194. See sources cited *supra* notes 111 & 168.

195. See Laufer-Ukeles, *supra* note 1; Laufer-Ukeles, *supra* note 8.

the exclusive legal mother in surrogate motherhood or even egg donation—the genetic mother, the intended mother, or the gestational mother.¹⁹⁶

Both gestation and genetics are important legal indicators of motherhood and attempts to choose one over the other are fraught with circular arguments, stereotypes, and paternalism. Looking solely to genetics to determine motherhood, as the Ohio Court of Common Pleas did in *Belsito v. Clark*,¹⁹⁷ faces two compelling problems. First, if in gestational surrogate motherhood genetics determines parenthood, then women who receive egg donations should not legally be considered mothers of the children they birth. In order to differentiate surrogacy from egg donations, courts must rely on intent, which I consider below. Second, choosing genetics over gestation as the marker of parenthood ignores a uniquely feminine aspect of parenting—gestation.¹⁹⁸ Essentially, as fatherhood is defined by genetic affiliation, a focus on genetics assumes that motherhood originates from genetics as well, despite the more complex manner in which a mother-child relationship is formed. Ignoring gestation, a forty week continuous process of physical nurturing and complex interdependence,¹⁹⁹ fails to recognize an involved

196. A large number of articles have considered this dilemma, advocating one definition over another. See FIELD, *supra* note 10 (arguing for a best interest test with a presumption of maternal custody in traditional surrogacy); SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? (1994) (arguing that the woman who gives birth to the child should be considered the legal mother of the child); ROTHMAN, *supra* note 10 (arguing that the essential maternal tie is based on carrying the child in pregnancy); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 673 (1993) (discussing the development of this dilemma based on the breakdown of natural parenthood); Hill, *supra* note 8, at 419 (concluding that contractual intent provides a rule of certainty in favor of the “prime movers” of the child’s conception); Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, 21 HASTINGS CENTER REP. 5 (1991) (considering the various methods, including genetics, to determine the real mother); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (arguing for a free market in babies and reproductive services); Schultz, *supra* note 8 (reasoning that contract principles further the gender neutral goals of intention and choice in reproductive decisions); Suzanne F. Seavello, *Are You My Mother? A Judge’s Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN’S L.J. 211 (1992) (arguing for a genetics based determination).

197. 644 N.E. 2d 760 (Ohio Ct. Com. Pl. 1994).

198. See *Soos v. Superior Court*, 897 P.2d 1356, 1358–59 (Ariz. Ct. App. 1994) (holding that viewing gestation as opposed to genetics as the indicator of parenthood is not a violation of equal protection due to the differences between sexes in procreation); Laufer-Ukeles, *supra* note 8. See generally FIELD, *supra* note 10, at 123–25 (discussing differences between gestation and AID, and the legal and practical differences between mothers and fathers “at the moment when a child is born”); ROTHMAN, *supra* note 10 (arguing that care alone and not seed should determine parenthood).

199. See ROTHMAN, *supra* note 10, at 35–36 (describing maternal rights based on gestation as a uniquely nurturing social and physical relationship); ROBIN WEST, CARING FOR JUSTICE 35, 39–50, 81–89 (1997); see also *In re Union Pac. R.R. Emp’t Practices Litig.*, 378 F. Supp. 2d 1139, 1147–48 (D. Neb. 2005); Nancy S. Erickson, *The Feminist Dilemma Over Unwed Parents’ Custody Rights: The Mother’s Rights Must Take Priority*, 2 LAW & INEQ. 447, 461–62 (1984) (basing the rights of the birth mother on the fact that she is not only the primary caretaking parent but also the only caretaking parent at that point). For scientific

and biologically significant process that is uniquely feminine. This focus on gestation is not as some critiques have argued because of a belief that women “should” gestate their children,²⁰⁰ but rather recognition of the unique and valuable contribution of gestation when it is provided.²⁰¹

Moreover, attempts to point to intent as creating a legally identifiable motherhood relationship at the time of birth cannot legitimately be distinguished from simply enforcing contractual agreements. And, enforcing contractual agreements regarding motherhood seems to belie notions that such relationships should not be bought or sold in the marketplace.²⁰² For instance, in the seminal case of *Johnson v. Calvert*, the court determines motherhood as a matter of nature based on intent and not as a matter of contract.²⁰³ The court decides that in the context of gestational surrogacy where genetics and gestation, the two traditional natural indicators of natural motherhood, conflict intent determines natural motherhood.²⁰⁴

studies demonstrating this bond, see John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392, 392 (1983); John H. Kennell & Marshall H. Klaus, *Mother-Infant Bonding: Weighing the Evidence*, 4 DEVELOPMENTAL REV. 275, 281 (1984); Maureen A. Knippen, *Microchimerism: Sharing Genes in Illness and in Health*, ISRN NURSING, 2011, available at <http://www.isrn.com/journals/nursing/2011/893819/>; see also FIELD, *supra* note 10, at 48, 123–25; Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 44–48 (2004).

200. See, e.g., Noa Ben-Asher, *The Curing Law: The Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1914 (2009).

201. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 275–76 (2006); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 430–31, 474–78 (2007); Laufer-Ukeles, *supra* note 8, at 445.

202. For a discussion of what is wrong with babyselling, see RADIN, *supra* note 83, at 137–38 (“If we permit babies to be sold, we commodify not only the mother’s (and father’s) baby-making capacities—which might be analogous to commodifying sexuality—but also the baby herself. . . . Commodifying babies leads us to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and this might well create in those people a commodified self-conception.”); Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling?*, 26 PAC. L.J. 135, 144–45 (1995) (address given at the McGeorge School of Law on March 4, 1994); MARGARET JANE RADIN, REINTERPRETING PROPERTY 136–39 (1993). For a discussion of why intent cannot be a basis for determining “natural” motherhood, see *In re Baby M*, 537 A.2d 1227, 1240–50 (N.J. 1988) (discussing how intentional arguments that enforce contracts align with baby-selling); *Belsito*, 644 N.E.2d at 765 (rejecting intent-based argument on grounds that it enforces contracts for the sale of children); Jeffrey M. Place, Recent Development, *Gestational Surrogacy and the Meaning of “Mother”*: *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993), 17 HARV. J.L. & PUB. POL’Y 907, 913–14 (1994).

203. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), *cert. denied*, 114 S. Ct. 206 (1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 288–91 (Cal. Ct. App. 1998) (declaring that when a child is conceived by implanting anonymously donated sperm and egg, the intended mother as expressed in the surrogacy contract—not the surrogate or the unknown egg donor—is the lawful mother).

204. *Johnson*, 851 P.2d at 782 (“We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child

The court could have said that the contract determined motherhood but declines to do so; contractual motherhood would conflict with the court use of the concept of “natural.”²⁰⁵ Instead the court creates a category of natural motherhood based on intent as derived from the contract.²⁰⁶ But, there is no real logical distinction between determining motherhood based on preconception intent and determining motherhood based on a contract prepared to detail and certify such intent. The discomfort expressed for contracting for parenthood in adoption and surrogacy cannot be hidden by the language of intent. Arguably, regulations intended to prevent adoption from undermining prohibitions against baby-selling are relevant whenever there is a contract for parenting rights and status, including surrogacy. While an adoptive baby would have been born regardless of the legal transfer of the baby and a baby born of surrogacy is conceived due to the contract, a baby conceived through sexual relations for the purpose of adoption would still be subject to adoption regulations.

Intentional arguments for parenthood are also undermined in contexts in which, despite agreements, biological donors or surrogate mothers function as parental figures. Courts then try to reinvent notions of intent to better reflect practical realities. For instance, in the case of *K.M. v. E.G.*, the egg donor, who was also the partner of the intended mother, agreed not to lay parental claims to the child in a clear and explicit agreement.²⁰⁷ Yet, she raised the child with the intended mother after the children were born.²⁰⁸ Courts in such circumstances legitimately do not want to deny the genetic mother her attachment to the child.²⁰⁹ Ultimately, when intentions break down or when practices do not track contractual intentions, we are still left with the biological indicators of genetics and gestation and such affinities persist. Although in *K.M.* the court attempts to differentiate between the contractual waiver of parental rights, which is invalidated, and intent to raise the children in a joint home, which is adopted as a crucial indicator of parenthood, this distinction is hard to decipher.²¹⁰ And, ultimately, it is the genetic relationship added to the joint parenthood that ensued that seems to persuade the court.²¹¹ Indeed, had *E.G.* waived parental rights and not raised the child with *K.M.*, it is highly doubtful she would have succeeded in her parental claim. Intent alone by contract is then rejected when other elements such as actual parenting and genetics are present. Surrogacy thus creates a puzzle without an easier answer. The bottom line is that intent, genetics, gestation, and functional care all matter in determining parental ties, and it is difficult and perhaps artificial to separate one out as the exclusive indicator of legal parenthood.

Yet, despite these complexities, ultimately the intended mother and intended father almost always raise the child as their own in accordance with a surrogacy or

relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”).

205. *Id.*

206. *Id.*

207. *K.M. v. E.G.*, 117 P.3d 673, 675–76 (Cal. 2005).

208. *Id.* at 677.

209. *See id.* at 679.

210. *Id.*

211. *See id.* at 679–82.

egg donor arrangement. Thus, in the vast majority of instances, the puzzle of defining parenthood remains a theoretical concern that need not be resolved. Regulatory frameworks can be enacted that circumvent such definitional complexities. In the end, however, unless harm to the child is found or exceptional circumstances exist, the intentional parents will undertake or, in extreme and rare cases, be awarded primary custody in the best interests of the child. The extent to which additional parental figures may be allowed to parent is a worthwhile and contested inquiry that is relevant in a variety of contexts,²¹² including surrogacy,²¹³ but need not prevent surrogacy from happening. Although the surrogate may not be awarded parental rights equivalent to those of a formal parent, allowing her some continued contact with the baby and commissioning couple may be beneficial and necessary to properly reflect the nature of the relationship.²¹⁴ As discussed above, promoting relational bonds between the surrogate, the commissioning couple, and the baby born of surrogacy can be a positive and necessary part of the surrogacy process.²¹⁵

B. Additional Regulatory Provisions Reflecting Mixed Commodification and Relational Autonomy

Having explored and described at length the primary regulatory provision of post-birth contact between surrogate and baby that I propose, I will now consider other provisions that can be used to reflect the mixed commodification and relational autonomy framework for considering surrogacy. Unlike the contact provision, these provisions are often already in use by states that regulate commercial surrogacy. They may be appropriate but are not all necessary or appropriate in any regulatory regime to foster human dignity or autonomy.

1. Gestational Surrogacy Only

Since the time of the often cited and discussed case of *In re Baby M*,²¹⁶ in which a child who was genetically related to the intended father and the surrogate mother was born of a surrogate motherhood agreement, the use of surrogate motherhood has evolved and now often is used to create children related to both the intended mother and father through genetic affiliation.²¹⁷ Alternately, surrogacy involves an

212. See, e.g., Appleton, *supra* note 168, at 20–21; Jacobs, *supra* note 168, at 314–32; Kavanagh, *supra* note 168, at 85–86; Kessler, *supra* note 168, at 74; Laufer-Ukeles & Blecher-Prigat, *supra* note 168, at 421–24; Murray, *supra* note 168, at 394.

213. See Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165 (1994) (arguing for multiple mothers from the perspective of a kinship relationship).

214. See *supra* notes 39–59 and accompanying text.

215. See *supra* notes 52–56 and accompanying text.

216. 537 A.2d. 1227 (N.J. 1988).

217. Although it is clear that most surrogacy agreements are gestational, it is hard to pinpoint exact percentages because there is no registration or accounting of the nature of such agreements. See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 132

egg donor other than the surrogate mother.²¹⁸ In fact, empirical research indicates that more than ninety-five percent of surrogates carry fetuses with genetic material that is not their own.²¹⁹ This process is known as gestational surrogate motherhood.²²⁰ Most often the egg of the intended mother and the sperm of the intended father are combined through the process of in vitro fertilization (“IVF”) and then implanted into the womb of the paid surrogate.²²¹ Gestational surrogacy, as opposed to traditional surrogacy using artificial insemination by donor (“AID”), entails a more invasive medical procedure for both the intended mother (or egg donor) and the surrogate.²²² The surrogate must have the embryo implanted in her uterus, which is a more invasive procedure than artificial insemination.²²³ When an intended mother is also the genetic mother, she undergoes a series of invasive procedures in a manner that is significantly different from her passive and biologically distant role in traditional surrogacy.²²⁴ The intended mother must go through hormone treatments, an invasive surgical procedure to extract the eggs, general anesthesia, and other medical processes similar to those experienced by a woman who undergoes IVF and plans to carry the fetus herself.²²⁵

Having the intended mother physically involved in the process creates a different kind of surrogacy procedure where concerns about patriarchy and baby-selling may be less compelling.²²⁶ The emotional and genetic connection and investment by the intended mother diminishes the sense that the process is one of baby-selling as opposed to reproductive aid. Even when the intended mother is not the egg donor—either when surrogacy is used by homosexual couples or when the

(2006); DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 80–82, 84 (2006); Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 524 (2011) (“[B]ecause the surrogacy realm is largely unregulated, it is often difficult to find accurate statistics regarding the use of gestational surrogacy arrangements.”).

218. See, e.g., Dara L. Hofman, “Mama’s Baby, Daddy’s Maybe:” *A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 451 (2009).

219. DiFonzo & Stern, *supra* note 31, at 355.

220. See *Johnson v. Calvert*, 851 P.2d 776, 789–90 (Cal. 1993) (Kennard, J., dissenting).

221. See Peter R. Brinsden, *Gestational Surrogacy*, 9 HUM. REPROD. UPDATE 483 (2003).

222. See MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, *SURROGACY IN AMERICA* 18 (2010) (“IVF is generally more invasive, and therefore more risky, than AI. IVF also carries a higher risk of multiple pregnancy, which is riskier than single pregnancy.”).

223. See *id.*

224. See *Resources: Gestational Surrogacy*, THE CENTER FOR REPRODUCTIVE HEALTH, http://www.reproductivehealthctr.com/treatments_for_women_surrogacy.htm (“The medical process requires that the genetic mother’s and the gestational carrier’s menstrual cycles be synchronized. The genetic mother undergoes ovarian superovulation and egg retrieval.”); Kerian, *supra* note 2, at 114.

225. See Hisano, *supra* note 217, at 527 (“[G]estational surrogacy uses the more complicated procedure known as in vitro fertilization. IVF refers to the process by which a doctor stimulates a woman’s ovaries, removes several eggs, and fertilizes the eggs outside her body. The fertilized egg is then implanted in the gestational surrogate’s uterus.”); Jami L. Zehr, Note, *Using Gestational Surrogacy and Pre-Implantation Genetic Diagnosis: Are Intended Parents Now Manufacturing the Idyllic Infant*, 20 LOY. CONSUMER L. REV. 294, 297 (2008).

226. See Scott, *supra* note 4, at 121.

intended mother cannot or chooses not to use her own eggs—empirical studies demonstrate that the added biological distance between the surrogate and the fetus assists the surrogate mother in separating herself from the fetus she is carrying.²²⁷ And, traditional surrogates demonstrate more cognitive dissonance regarding their beliefs about whose child they are carrying than gestational surrogates who use genetics to dissociate as much as possible from the child.²²⁸ This greater dissonance experienced by traditional surrogates should be avoided if possible because it can be an indicator of difficulty in separation.²²⁹ Surrogates tend to emphasize the genetic connection between the intended mother and the fetus, as well as their own lack of relatedness to the fetus. While disconnection between the surrogate and the fetus may seem artificial and problematic, demonstrating the sense in which the surrogate is selling her body, it also facilitates a process where the surrogate becomes less emotionally invested in the fetus and thus more able to dissociate from the child after birth.²³⁰

Therefore, a possibility for recognizing the intimate nature of surrogate motherhood is to allow only gestational surrogacy. However, preferring gestational surrogacy should not be based on essentializing the genetic link and thus permitting surrogacy only when the surrogate is not the genetic mother.²³¹ Rather, gestational surrogacy may be preferred because, empirically, when the surrogate is not also the genetic donor, surrogate mothers indicate that the lack of genetic affiliation helps them to distance themselves from the fetuses they carry.²³² Many surrogates seem to place great importance on genetics as a way to differentiate these pregnancies from their own. To the extent that this facilitates the surrogacy process for them, it should be acknowledged.

On the other hand, traditional surrogates do seem to place less weight on genetics than gestational surrogates.²³³ And, women who gestate fetuses created with egg donors are likely to minimize the importance of the genetic link. Attachment is a matter of degree. Too much should not be made of the difference between gestational and traditional surrogacy as traditional surrogates also attest to being able to detach from the babies by focusing on the importance of social parenthood. While studies indicate greater ease for gestational surrogates, this may not be enough to ban traditional surrogacy, perhaps only to prefer gestational surrogacy through guidelines or recommendations.²³⁴

227. See *supra* notes 33–38 and accompanying text; see also Edelman, *supra* note 1, at 129.

228. See van den Akker, *Longitudinal Comparison*, *supra* note 37, at 282.

229. *Id.* at 282–83.

230. See *supra* notes 33–38 and accompanying text.

231. For a discussion and description of formal and functional indicators of parenthood, see Laufer-Ukeles & Blecher-Prigat, *supra* note 168.

232. See *supra* notes 33–38 and accompanying text.

233. See *supra* note 37.

234. Indeed, only a few studies look to mark the differences between gestational and traditional surrogacy. See, e.g., van den Akker, *Longitudinal Comparison*, *supra* note 37, at 282 (indicating some greater difficulty experienced by traditional surrogates but not a substantial difference).

2. Psychological Evaluations

Psychological evaluations of surrogates and intended couples have been suggested by legal scholars and mandated by legislation in some, but not all jurisdictions where surrogacy is permitted.²³⁵ Regardless of regulations, such evaluations are a matter of common practice in the commercial surrogacy marketplace.²³⁶ In the context of such invasive, sensitive, and life-altering arrangements, such evaluations are useful to ensure the surrogate and the commissioning couple are psychologically fit to undergo such an arrangement. This is important not only for the adult parties but for the child born of the arrangement as well.²³⁷ Psychological evaluations can ensure that surrogates are fit to make such a decision and recognize the intimate, transformative, and personal nature of the surrogate relationship. While what it means to be psychologically fit for surrogacy is amorphous, presumably professionals should be able to provide some threshold screening. A surrogate, as well as a commissioning couple, should have reasonable expectations and rational beliefs and concerns. All parties should be stable and competent. Such evaluations can screen for exploitative arrangements in which informed and competent decision making is not present.

3. Counseling

Separate and apart from psychological fitness, commissioning couples and potential surrogates may be provided with counseling to ensure that they understand the complex nature of these arrangements, thereby promoting autonomy and avoiding exploitation. These counseling sessions would not be about fitness but about informing and counseling, separately, the commissioning couple and the surrogate about all the emotional and physical risks and benefits of the arrangement.²³⁸ Counseling sessions could be informative and discursive, assessing and addressing any and all concerns and providing as much information as

235. See, e.g., Andrews, *supra* note 150, at 2348; Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 498 (2011); Edelman, *supra* note 1, at 127 (describing the common practice of psychological evaluations); Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 206, 216–17 (2008) (suggesting legislation that mandates psychological consultations); Watson, *supra* note 150, at 530.

236. See Kindregan & Snyder, *supra* note 235, at 216–17.

237. But see I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 450–71 (2011) (contending that arguments justifying regulation of artificial reproductive technologies for the sake of future children are logically problematic).

238. See Ciccarelli & Beckman, *supra* note 27, at 34 (“Professional support and intervention, including therapy, before and during the surrogacy process may maximize satisfaction rates among surrogates.”); cf. Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women’s Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 616–17 (2011) (suggesting informational counseling sessions as opposed to psychological screenings in the context of reproductive choices).

needed.²³⁹ The surrogate could be provided information about the law of her jurisdiction and also be given information about other surrogates' experiences. The goal of such counseling would be to decrease the surrogate's vulnerability, to help her make an informed and deliberate choice.

Counseling sessions could be provided as a matter of course and be mandated by legislation. And, for the surrogate, the sessions could be paid for by the commissioning couple so as not to make this a hurdle she cannot meet as she is undoubtedly the party who is more financially in need.²⁴⁰ Counseling should identify familial, economic, and social pressures that may compromise autonomy. While counselors likely would not be in the business of disqualifying candidates who seem to be under what they consider too much pressure, they can help surrogates resolve their dilemmas and make recommendations to both surrogates and commissioning couples about the suitability of the arrangements. Many surrogacy agencies provide counseling for surrogates voluntarily.²⁴¹ Studies indicate varied levels of satisfaction with counseling, although many find it somewhat useful.²⁴²

4. Not First Pregnancy

Because pregnancy is a unique physiological state, and gestating a fetus and then relinquishing the baby once born is likely to be an emotionally trying experience, regulation can logically restrict surrogates to those who are not going through pregnancy for the first time. It is difficult to imagine that a woman who has never been pregnant can appreciate the nature of the agreement. Being able to appreciate the nature of what you are contracting for is a matter of degree as informed by relational autonomy, but certainly would seem to be enhanced by having directly relevant experience to inform the surrogate as to the nature of the agreement. Indeed, surrogacy agencies usually do use women who have had children before, and perhaps this custom is worthy of regulation.²⁴³

5. Limitations on Financial Compensation

Because the demand for surrogates is high and the supply relatively low, at least within developed countries like Canada, Israel, and some jurisdictions in the United States that allow surrogate motherhood, the compensation is increasing at a

239. In a related proposal, Damelio and Sorensen recommend short classes on contract pregnancy in order to ensure informed consent and enhance autonomy. *See* Damelio & Sorensen, *supra* note 13, at 269–70, 275–76 (describing such policies as “soft law” solutions).

240. *See id.* at 276–77.

241. *See* Ciccarelli & Beckman, *supra* note 27, at 34.

242. *Compare id.* (relating the results of Ciccarelli's 1997 study, which found that access to professional psychological support increased satisfaction among nearly all surrogate mothers studied), *with* van den Akker, *Experience of Surrogacy*, *supra* note 35, at 153 (reporting that the author's 2001 study revealed mixed results regarding the usefulness of counseling to surrogate mothers).

243. Ciccarelli & Beckman, *supra* note 27, at 34.

significant rate.²⁴⁴ And if one wants an arrangement done quickly and without too much hassle, brokers and lawyers charge even more.²⁴⁵

Limiting the price paid to surrogate mothers through regulation (perhaps at a rate that reflects the rising Consumer Price Index) can be justified for two reasons. First, capping the price reflects the desire to ensure that surrogacy is not fully marketized but rather appreciated for its dual function of creating intimate and monetary relationships. The surrogacy arrangement should not solely be made between those willing to pay the most with those willing to take the least, but in a brokered, rational, and regulated way that accounts for the personal intimate bodily functions that are involved. Payment should be tendered and profits and bargaining contemplated, but regulation should monitor the exchanges. Surrogacy also should not be prohibitively expensive in domestic markets because, as I will explain below, domestic surrogacy should be preferred as a matter of policy to international surrogacy.²⁴⁶ Second, a standard price should be fixed to avoid comparable and drastically high prices to induce surrogates to act irresponsibly because there is no other way for them to earn so much money. Surrogacy is an emotional and complex arrangement and should remain a rational option among others—not the only way for a woman to earn extravagant amounts of money quickly. Otherwise, people may engage in the process without preparation or proper consideration, and disasters could result.

While a limit on compensation may be advisable in order to prevent exploitation and full marketization, mixed commodification arguments should not be used to justify compensation limits that eliminate profits or support unpaid surrogacy only.²⁴⁷ The goal of mixed commodification is to recognize the market aspects *and* intimate aspects of the transaction. Too often barring or limiting payment is used to manage commodification concerns, but there are other more effective means of regulating the exchange of intimacy that can better support participants and ensure the appropriateness of the exchange as I have delineated in this Article.²⁴⁸ Thus, payment should be allowed, and the extent that the work is done for money should be appreciated in addition to the extent that intimacy and relationships are also involved in the transaction.

244. The average fee paid to a surrogate in the United States is about \$25,000, but overall costs are much greater, reaching about \$100,000 to \$120,000. *See, e.g.,* Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 44 (the typical fee paid to a surrogate is \$20,000 to \$25,000); Watson, *supra* note 150, at 531–32; Pande, *supra* note 58, at 620.

245. *See* Tamara Audi & Arlene Chang, *Assembling the Global Baby*, WALL ST. J., Dec. 11, 2010, at C1.

246. *See infra* Part III.B.

247. *See* RADIN, *supra* note 83, at 137–41 (arguing that due to the high level of intimacy involved in surrogacy and surrogate bodies and the extent that this can affect personhood, commercial surrogacy should be banned and even unpaid surrogacy).

248. *See, e.g.,* Hasday, *supra* note 70, at 528–29 (suggesting that although regulation is appropriate for intimate exchanges to limit commercialization, eliminating financial compensation too often results in distributive injustice and less “impoverishing” should be preferred).

In sum, regulatory provisions that recognize intimacy are varied. I have suggested a number of provisions that may foster good, commercial relationships. Most centrally, allowing a surrogate to maintain a relationship with the commissioning family through visitation is likely to empower the surrogate and therefore foster parity between the more vulnerable surrogate and the commissioning couple, and legally recognize the intimacy that already exists. Regulation that encourages gestational surrogacy over traditional surrogacy, either through mandatory counseling to that end, easing the process for gestational surrogacy, or even by permitting only gestational surrogacy, also recognizes the intimacy involved by acknowledging the way in which surrogates use the lack of genetic affiliation to help them detach from the child they gestate. Exploitation is avoided and autonomy promoted by appropriate psychological evaluations and informative counseling sessions as well as by requiring that surrogates have been pregnant before. Regulating the price paid to surrogates helps avoid exploitation and recognizes intimacy, but such regulations should not undermine a surrogate's ability to make money and to benefit from the process. On the whole, through some mix of these provisions and others that recognize the intimacy inherent to surrogacy and the potential for exploitation, good regulations can be promulgated that promote autonomy and intimate relationships in the context of domestic surrogacy.

III. REGULATING INTERNATIONAL SURROGACY

International commercial surrogacy is now a commonly used option and therefore domestic control over the process is waning. In this Article, the term "international surrogacy" refers to the hiring of a surrogate that resides in a country that is different from the commissioning parents. Whatever regulations or prohibitions are put in place on domestic surrogacy will have limited significance if surrogates can be readily hired abroad.²⁴⁹ Couples increasingly hire surrogates to carry babies on their behalf in India, Armenia, Panama, and Ukraine.²⁵⁰ The state of California with its relatively liberal surrogacy laws is also a destination for international surrogacy.²⁵¹ One of the most popular destinations for hiring

249. See Richard F. Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-Border Reproductive Travel*, 23 REPROD. BIOMEDICINE ONLINE 538 (2011); Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 298–99 (2005).

250. See Claire Bigg & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE/RADIO LIBERTY, June 4, 2011, available at http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html (discussing surrogacy in Ukraine); Uday Mahurkar, *Donating a Womb*, INDIA TODAY, Aug. 13, 2007, at 56, available at <http://indiatoday.intoday.in/story/Donating+a+womb/1/1174.html> (discussing surrogacy in India); *Surrogacy in Armenia*, SURROGACY CLINICS (Feb. 13, 2012), <http://www.surrogacyclinics.com/category/surrogacy-in-armenia/> (discussing surrogacy in Armenia); Leslie Minora, *Gaybies: Gay Couples in Florida Turn to Foreign Surrogacy*, NEW TIMES (Broward Palm Beach), Jan. 27, 2011, available at <http://www.browardpalmbeach.com/2011-01-27/news/gaybies-gay-couples-in-florida-turn-to-foreign-surrogacy/> (discussing surrogacy in Panama).

251. Pande, *supra* note 58, at 619.

surrogates is India, where surrogacy is permitted by law.²⁵² In India surrogate motherhood is legal, but unregulated and thus completely governed by the free market.²⁵³ Business in reproductive tourism is thriving in India, growing at some seven percent annually, and is approximated to be a \$500 million industry.²⁵⁴ There are an estimated 3000 surrogacy clinics in India.²⁵⁵ Current data indicates that approximately 2000 children are born to surrogates a year in India.²⁵⁶ Therefore, as India is one of the largest and most popular international markets for surrogates and the locale where most foreign studies have been conducted, I will focus on India. However, the discussion of the distinctions between domestic and international surrogacy apply to any surrogacy destination to the extent that such distinctions are reflected and are relevant.²⁵⁷

People use international surrogacy arrangements for at least three main reasons: (1) domestic surrogacy is prohibited by law, or it is uncertain that a domestic surrogacy contract can be enforced;²⁵⁸ (2) domestic surrogacy is more expensive than foreign surrogacy;²⁵⁹ and (3) commissioning couples prefer the restrictive and monitored nature of the surrogate process experienced by foreign surrogates.²⁶⁰

252. Richard F. Storrow, “*The Phantom Children of the Republic*”: *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 561, 597 n.264 (2012) (citing Nilanjana S. Roy, *Protecting the Rights of Surrogate Mothers in India*, N.Y. TIMES, Oct. 4, 2011, http://www.nytimes.com/2011/10/05/world/asia/05iht-letter05.html?_r=0 (finding that since commercial surrogacy was legalized in India in 2002, it has become key in the country’s booming medical tourism market)); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 22 (2008) (“Outside of the United States, India is quickly becoming the top destination spot for fertility tourists due to a number of interrelated factors creating a “perfect storm” for a booming commercial surrogacy market.”). There is no formal regulation of surrogacy contracts. There are, however, guidelines used by the clinics themselves, but they are not enforceable in courts. See LAW COMM’N OF INDIA, GOV’T OF INDIA, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY, REP. NO. 228, ¶¶ 1.14, 2.1–2, at 14, 16–17 (2009), <http://lawcommissionofindia.nic.in/reports/report228.pdf> [hereinafter LAW COMM’N REPORT].

253. See Pande, *supra* note 58, at 620; Ryznar, *supra* note 167, at 1018.

254. See Neeta Lal, *Pitfalls of Surrogacy in India Exposed*, ASIA TIMES, May 24, 2012, http://www.atimes.com/atimes/South_Asia/NE24Df02.html; Krawiec, *supra* note 104, 225; Pande, *supra* note 58, at 641; Ryznar, *supra* note 167, at 1016.

255. Shilpa Kannan, *Regulators Eye India’s Surrogacy Sector*, BBC NEWS, (Mar. 18, 2009, 22:33 GMT), <http://news.bbc.co.uk/2/hi/business/7935769.stm>.

256. Lal, *supra* note 254.

257. For instance, although the conditions of surrogacy and exploitation are less of a concern in the United States as compared with India, see *infra* notes 271–76, 287–304, and accompanying text, the problem of distance and detaching between the commissioning couple and the surrogate is an equal challenge when the surrogate resides in California and the commissioning couple comes from abroad. See *infra* notes 277–87 and accompanying text.

258. See Storrow, *supra* note 252, at 596 & nn. 254–59 (“[L]egal restrictions on assisted reproductive procedures or limitations on access to them by certain classes of individuals may trigger travel abroad for assisted reproductive services.”).

259. See Ryznar, *supra* note 167, at 1018–19 (“The typical surrogacy fee in India has

In this Part, I will demonstrate that under a framework of mixed commodification and relational autonomy, regulation that cannot promote a mutually beneficial and appropriate system of commercial surrogacy cannot be translated abroad to the commissioning of foreign surrogates. The cultural and geographical distance between intended parents and surrogates, as well as the intentional emphasis on commercialization in lieu of intimacy by those who structure international surrogacy, coupled with the greater potential for exploitation, make international surrogate transactions much more troubling than domestic surrogate relationships. First, I will describe international surrogacy, explaining how it is more problematic than domestic surrogacy, and then I will begin the conversation about what can be done to discourage foreign surrogacy in favor of domestic surrogacy.

A. Distinguishing Domestic and International Surrogacy

In this Section, I will describe how domestic and international surrogacy can be differentiated; they are not just different locales for surrogacy. Domestic, as opposed to foreign, surrogacy is a very different proposition. While my descriptions of the differences focus on India, in some ways they are relevant to any foreign surrogacy arrangements due to the increased distance, detachment, potential for exploitation, and commercialization that I describe.

1. Conditions of Surrogacy

Unlike in domestic surrogacy, international surrogates (and the fetus being gestated) are supervised by a foreign medical, legal, and cultural system, all of which may not compare to the domestic system and therefore may cause discomfort and dissociation. Medical care is not necessarily comparable to what is expected in the home country, which may cause complications for the surrogate and the fetus.²⁶¹ Women may be subjected to more medical risks in foreign jurisdictions that do not meet the same levels of medical care.²⁶²

Moreover, the medical system may be explicitly subject to pressure from the surrogacy system in ways not expected or accepted in the domestic jurisdiction of the commissioning couple.²⁶³ For instance, a number of ethical concerns were

been around \$25,000 to \$30,000, which is approximately a third of that in developed countries such as the United States.” (citing LAW COMM’N REPORT, *supra* note 252, at ¶ 1.7, at 11); Pande, *supra* note 58, at 620.

260. See Pande, *supra* note 58, at 620. Pande also cites the motivation of wanting to ease the lives of foreign surrogates who live in very dire circumstances. See *id.* at 623.

261. See Donchin, *supra* note 148, at 328 (among other differences, “[o]ften more embryos are transferred than the home country would permit, risking higher rates of multiple pregnancy which endanger both woman and fetus, requiring very costly prenatal and postnatal care . . .”).

262. See I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1381 (2012).

263. See, e.g., Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT’L L.J. 665, 676 (2012).

raised in a recent incident that resulted in the death of the surrogate.²⁶⁴ The surrogate, who was in her eighth month of pregnancy, was brought to the hospital in severe distress, and the fetus she was carrying was immediately removed. She was then treated for her own medical issues. Apparently, under the terms of most surrogacy contracts in India, the surrogate mother and her partner agree that if the childbearing woman is injured or diagnosed with a life-threatening disease during advanced pregnancy, she is to be “sustained with life support equipment to protect the fetus viability and insure a healthy birth on the genetic parents’ behalf.”²⁶⁵ In essence, the fetus’s health explicitly comes before the mother’s, although both are eventually cared for.²⁶⁶

In addition, as managed in India, surrogates often live in group homes during their pregnancy.²⁶⁷ Their daily activities, food intake, and prenatal medical treatment are highly monitored.²⁶⁸ Some clinics allow children to live with surrogates; others permit only limited visits with children and prohibit sexual intercourse with spouses.²⁶⁹ These highly restrictive conditions have been established to ensure fetal safety,²⁷⁰ but also to control the surrogates and ensure their docility and compliance with surrogate contracts.²⁷¹ While this does not raise medical concerns, it does raise ethical and legal concerns. The international surrogate loses more of her independent humanity than a domestic surrogate would and her entire life becomes focused on gestating the child for the commissioning couple. As a matter of degree, such control and dehumanization is more troubling from the perspective of commodification. It is not only her gestational services that are rented while she essentially goes on with her life for the duration of the pregnancy, but her entire body is rented out and housed at the cost of the commissioning couple.

Another defining characteristic of international surrogacy is the very high use of Cesarean sections (“C-sections”). Natural labor is not a part of the process as overseen by supervising doctors.²⁷² Rather, C-sections are performed as a matter of

264. See Lal, *supra* note 254.

265. *Id.*

266. *Id.*

267. See, e.g., Pande, *supra* note 11, at 981; Lee, *supra* note 9, at 280; Rina Chandran, *Poverty Makes Surrogates of Indian Women in Gujarat*, REUTERS, (Apr. 8, 2009, 12:47 PM), <http://www.reuters.com/article/2009/04/08/us-india-surrogate-idUSBOM1574520090408>.

268. See Ian Williams & Rory Kress, *A Baby Made in India: A Couple’s Dream Comes True*, NBCNEWS.COM (May 28, 2012, 8:13 AM), http://todayhealth.today.msnbc.msn.com/_news/2012/05/28/11883566-a-baby-made-in-india-a-couples-dream-comes-true?lite (surrogates in India live in a hostel so that doctors can monitor their health and nutrition); see also Pande, *supra* note 11, at 982.

269. See Alison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26 HYPATIA 715, 721 (2011).

270. See *id.*

271. See Pande, *supra* note 11, at 982.

272. See Scott Carney, *Cash on Delivery*, MOTHER JONES, Mar./Apr. 2010, at 68 (explaining that although C-sections are often considered riskier for the baby and dramatically increase the woman’s risk of death during childbirth, they are generally used for international surrogacy, perhaps because they are faster and less personal than vaginal deliveries). Carney’s article is available electronically under the alternative title *Inside*

course. This does not provide extra risk to the fetus and may indeed be preferred by commissioning parents. However, C-sections may be more risky for the surrogates and their nearly automatic use distinguishes the international system from the domestic system, where there is no evidence that C-Sections are regularly preferred.²⁷³ This factor again demonstrates the greater dehumanization and medicalization of an intimate relationship that occurs in international surrogacy.

In addition, there are other indicators of the greater threat of commodification that occurs in international surrogacy. Foreign surrogates are uniformly much poorer and live very different lives than commissioning couples, exacerbating the extent to which, “a rich woman pays a poorer one to carry her child.”²⁷⁴ Surrogates may be allowed to see the baby, but they are quickly separated from the baby and from the commissioning couple.²⁷⁵ This may seem useful to commissioning couples, as they do not need to deal with messy emotions and relationships. The greater medicalization and institutionalization of the process in international surrogacy reflects a much narrower development of relationships and human attachment than in domestic surrogacy.

On the whole, the conditions of surrogacy as described above are intentionally more commercialized and less intimate. Surrogates are largely dehumanized, highly controlled and monitored, and discouraged from having any intimate connections with the fetus or commissioning couple. Suppression of intimacy, however, does not make it disappear, as will be discussed further in the following Section.²⁷⁶

2. Detachment and Distance

As can be extracted from the conditions of international surrogacy described above, the process of international surrogacy contains considerably more detachment and distance between the surrogate and the commissioning couple than is experienced in domestic systems of surrogacy. The detachment and distance between the surrogate and the commissioning couple is more than just medical and experiential post-birth; culturally and socio-economically, the commissioning couple and the surrogate are strangers. Unlike in domestic surrogacy, relations between commissioning parents and surrogate mothers are distant due to geographic and cultural differences. Commissioning couples usually do not meet the surrogate until after the child is born, and are completely uninvolved in her medical care during pregnancy and with her recovery after the pregnancy.²⁷⁷ The relationship is completely contractualized, not personal and intimate as in the manner it develops in domestic surrogacy relationships. Commissioning couples may prefer the detachment; it may seem as less of a headache and also less

India's Rent-a-Womb Business, available at <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>.

273. *Id.*

274. SPAR, *supra* note 217, at 94.

275. See Pande, *supra* note 58, at 622; Pande, *supra* note 11, at 976 (“The surrogate is expected to be a disciplined contract worker who will give the baby away immediately after delivery without creating a fuss.”)

276. See *infra* notes 277–87 and accompanying text.

277. See Parks, *supra* note 86, at 333–34.

complicated.²⁷⁸ In fact, many individuals who use international surrogacy say that they prefer the more systematic, professional way that international surrogacy works, in which the messy personal involvement is largely avoided.²⁷⁹

The question is whether and how such detachment is problematic. This distance and detachment bend the mixed intimate and commercial nature of the relationship discussed above towards being more commercial. Avoiding human relationships thereby hides the intimacy involved in surrogacy, as the surrogate nurtures the fetus, but does not get to know the commissioning family. As discussed above, the intimacy involved in gestation fosters an emotional relationship with the commissioning couple when they come into contact with one another. Moreover, empirical studies demonstrate the surrogates benefit from the relationship with the intended parents and are more content with the experience the better relations are with the parents.²⁸⁰ International surrogacy essentially avoids this whole issue. Some might argue that this is the more appropriate way for the relationships to proceed.²⁸¹ But, such avoidance is problematic. Many surrogates are likely to suffer more from the process personally since surrogates attest to benefitting from the relationships in domestic settings. Intimacy as an expression of the intimate work the surrogate is performing is more constrained for a foreign surrogate.

Indeed, in a testimony to the need for intimacy, as well as the natural development of intimacy between surrogates and intended parents, interviews with surrogates in India demonstrate that foreign surrogates may crave that intimacy. Many foreign surrogates emphasize their global sisterly ties with commissioning couples, insisting that they will continue to stay in constant contact after the birth and even that the intended parents were likely to pay for the surrogate's children's educational expenses directly out of familial love.²⁸² In interviews, some surrogates contended that strict clinic guidelines insisting the baby be removed from the surrogate immediately would not be enforced by commissioning couples.²⁸³ Some of these surrogates went so far as pining for and imagining relationships with the couple hiring them.²⁸⁴ They form imagined bonds with intended mothers, referred to by some as "sisters" and predict a continued relationship with these women and the children that they gestate once the children are born.²⁸⁵ Even when these relationships cannot and do not exist, the need for these relationships is still personified. Although such relationships may exist, it is almost never really the case that they exist in the manner that the surrogates imagine them to be and continuing such relationships is logistically very difficult given the cost and legal

278. *See id.* at 334 (referring to the preference that commissioning parents may have for a surrogate who cannot bother them after the birth).

279. Rita Bakshi, *India – a Suitable Destination of International Intended Parents*, IVF SURROGACY INDIA (May 10, 2012), <http://ivfcentreindia.blogspot.com/2012/05/india-suitable-destination-of.html>.

280. *See supra* notes 47–51 and accompanying text.

281. *See Case, supra* note 130, at 1132–35.

282. *See Pande, supra* note 58, at 622.

283. *Id.* at 622.

284. Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, 36 FEMINIST STUD. 292, 306–07 (2010).

285. *Id.*; Pande, *supra* note 58, at 622.

restrictions of traveling. Moreover, even foreign surrogates describe their activities using concepts of “gifts,” if not to the intended couple, then for themselves due to the money they are receiving, and consider intended parents their “global sisters.” Like surrogates that live closer to the commissioning parents, foreign surrogates transfer the intimacy of gestation to their perception of the nature of the surrogate relationships.²⁸⁶ The intimacy is hidden and minimized in foreign surrogacy, but it is still experienced. Foreign surrogates do not want to see themselves as commodified, replaceable wombs, despite their treatment by the clinics.²⁸⁷

Gestation is intimate by its nature, and in order to avoid problematic levels of commodification of vulnerable parties, it is important that such intimacy be given an outlet alongside the contractual aspects of the agreement. The mixing of the intimate and commercial in international surrogacy may play out differently and the intimacy is more contained, but it exists regardless. The outlet for this intimacy should not be just in the imagined or experienced worlds of the surrogate, but recognized as a central part of the surrogacy relationship. International surrogacy transactions do not and cannot legally reflect the intimate and commercial complexity of surrogacy and therefore are more problematic. These transactions have developed as distant and commercial in a way that domestic systems do not. Surrogates cannot benefit with ongoing relationships with commissioning couples. The way in which these arrangements devalue personhood by treating women as incubators and not as ends in and of themselves is much more pronounced. This can have both personal and societal effects. Thus, both on a consequentialist empirical basis and an inherent deontological “commodification” basis, international surrogacy is both different and more problematic.

3. Exploitation

Just as there is a greater threat of harm from commodification, there is also a greater threat of exploitation and compromised autonomy of the surrogate. This is for two overlapping reasons. First, the fee paid for surrogacy in the international arena is quite high compared with other options afforded to women of the lower classes who engage in these contracts.²⁸⁸ Apart from other problematic ways of earning money, such as drugs or prostitution, there is no comparable way for uneducated women in India to earn such large fees.²⁸⁹ The lack of choice facing

286. See Pande, *supra* note 58, at 624.

287. See Pande, *supra* note 11, at 986.

288. See Carney, *supra* note 272 (“In exchange for the inconvenience and physical discomforts, [Indian surrogates] stand to receive a sum that’s quite substantial by their meager standards”); Smerdon, *supra* note 252, at 54 (citing *Outsourcing to Indian Surrogate Mothers* (CNN television broadcast Oct. 17, 2006), available at http://transcripts.cnn.com/TRANSCRIPTS/0610/17/i_ins.01.html (“[T]o the extent that people are looking to India because of the less expensive [surrogate] arrangement they can make, if you do the math, [Indian surrogates are] making ten times their husband’s [income], then that’s the equivalent of paying somebody [in the United States] probably \$150,000 to \$200,000 for being a gestational surrogate.”)).

289. Ryznar, *supra* note 167, at 1018 n.61 (citing Krawiec, *supra* note 104, at 225–26) (“Thirty-five percent of Indians live on less than one dollar per day, while a surrogate mother

women is due to the greater socioeconomic disparities between rich and poor, greater levels of poverty suffered, and diminished economic mobility.²⁹⁰ In this economic climate, these decisions seem much more coercive and pressured than in first world countries where women tend to have other choices to support themselves.²⁹¹ Studies of Indian surrogates, in contrast to the domestic studies described above,²⁹² demonstrate a very low level of education and economic earning power.²⁹³ For many, surrogacy is their last resort for feeding and educating existing children.²⁹⁴ The supply of surrogates is ample despite stigmatization of the enterprise in Indian culture.²⁹⁵ Foreign surrogates themselves attest to this economic compulsion caused by the poverty in which they live.²⁹⁶ Though they give their consent in the liberal meaning, there is no doubt that these choices are made under less than optimal conditions. In such contexts exploitation and compromised autonomy are much greater threats.

Second, the status of women in the countries in which international surrogacy is permitted is lower than in the countries of most commissioning couples.²⁹⁷ Men may bear undue influence over their wives and female family members, pressuring them to earn the money that surrogacy affords.²⁹⁸ The money earned is not regularly held in women's names due to patriarchal family structures.²⁹⁹ As

earns between six and ten thousand dollars"); *see also* Donchin, *supra* note 148, at 326 ("Poverty induces people to resort to work that separates them from their families or jeopardizes their health."); Pande, *supra* note 11, at 974 ("[M]oney earned through surrogacy [is] equivalent to almost five years of total family income . . .").

290. *See* Ryznar, *supra* note 167, at 1018; *see also* Brugger, *supra* note 263, at 670–71 & n.28 (citing Smerdon, *supra* note 252, at 54 ("Indian women may be pressured by their families, brokers, and personal circumstances to lend their bodies for cash.")); Donchin, *supra* note 148, at 325–26.

291. Donchin, *supra* note 148, at 326; Ryznar, *supra* note 167, at 1017; SPAR, *supra* note 217, at 87.

292. SPAR, *supra* note 217, at 82; Pande, *supra* note 284, at 297 (finding that surrogate education levels in India ranged from illiteracy to high school level, with the average being middle school level); Pande, *supra* note 11, at 974 (same).

293. Pande, *supra* note 11, at 974 (stating the median family income of forty-two surrogates she interviewed was \$60 per month; thirty-four of forty-two were below the official Indian poverty line).

294. *Id.* at 976.

295. Pande, *supra* note 284, at 293; Pande, *supra* note 11, at 975 ("The parallels between commercial surrogacy and sex work in the Indian public imagination make surrogacy a highly stigmatized labor option."); Lee, *supra* note 9, at 280.

296. *See* Pande, *supra* note 10, at 988.

297. *See generally* Smerdon, *supra* note 252, at 53 ("Though the underlying technologies are new, surrogacy perpetuates the legacy of reproductive oppression of poor Indian women.").

298. Ryznar, *supra* note 161, at 1029 (citing Sudha Ramachandran, *India's New Outsourcing Business-Wombs*, ASIA TIMES ONLINE (June 16, 2006), http://www.atimes.com/atimes/South_Asia/HF16Df03.html; Sreeraman, *India Urged to Regulate "Commercial Surrogacy"*, MEDINDIA (Dec. 12, 2009), <http://medindia.net/news/India-Urged-to-Regulate-Commercial-Surrogacy-62159-2.htm>); *see also* Pande, *supra* note 271, at 303 (discussing the way surrogates in India look at their actions as directed by the family, which is led by the husband).

299. Ryznar, *supra* note 167, at 1029.

women's autonomy in general is much more compromised in these geographies, one should be more wary of the freedom of contract attaching to women who engage in these surrogate arrangements.³⁰⁰ As the nature of selling gestation services is more complex than most other engagements, this compromised autonomy should be taken seriously in considering whether these arrangements can be freely and autonomously chosen.

4. Race

A racial or cultural hierarchy is also involved in international surrogate motherhood that appears not to be regularly present in domestic surrogacy.³⁰¹ Commissioning couples prefer genetic donors from similar racial and/or cultural backgrounds, while they are comfortable using surrogates of different races or cultures. While the United States is also a destination for gamete donations as well as hiring surrogates, the cheaper cost and availability of women in third-world countries is increasingly popular.³⁰² These women are wanted for their gestational abilities, not for their genetic contributions to procreation. In domestic surrogacy, surrogates tend to be of similar cultural and racial backgrounds to commissioning couples.³⁰³ International surrogates are usually different, darker, and less Western than their commissioning couples.³⁰⁴

This hierarchy of race among those commissioning surrogates, egg donors, and surrogates gestating children may be more troubling on commodification and exploitation grounds. Such arrangements may seem more like buying lower class women's services as opposed to sharing a relationship with women who provide intimate services for commissioning couples. Indeed, Lisa Ikemoto argues that the act of hiring foreign, racially different surrogates is an act of hierarchy and detachment: "What these stories express is the persistence of a form of racial distancing that may make hiring a woman to gestate, give birth to, and give up a child psychologically comfortable. It is a post-industrial form of master-servant privilege."³⁰⁵ Given the greater detachment and commercialization involved in international surrogacy discussed above, we should be wary of avoiding difficult emotional attachments in a potentially racial and hierarchical manner.

5. Concerns Regarding Nationality

Another difference between domestic and international surrogacy is that when a commissioning couple uses a foreign surrogate, the commissioning couple may experience significant hurdles in bringing the baby home and obtaining citizenship

300. See, e.g., Pande, *supra* note 284, at 303 (recounting interviews in which male family members describe making decisions for female surrogates).

301. See *infra* notes 302–05 and accompanying text (noting that surrogates are often of the same race as commissioning couples).

302. See, e.g., Ikemoto, *supra* note 131, at 285–87, 295.

303. *Id.* at 286.

304. See *id.* at 308.

305. *Id.*

for the child.³⁰⁶ Different countries have a variety of rules regarding who is the legal mother of a baby born through surrogacy.³⁰⁷ In fact, as I have argued above, defining parenthood in the context of surrogacy and other Artificial Reproductive Techniques (ART) is a complex and persistent dilemma with multiple answers and is difficult to resolve within a jurisdiction, not to mention across a myriad of jurisdictions worldwide. As citizenship or nationality is usually tied to parentage, if a foreign jurisdiction refuses to recognize the commissioning couple as parents, crises may ensue. For instance, in the English case of *X & Y*, the commissioning couple was not considered the legal parents under English law; rather, in accordance with British parentage statutes, the Ukrainian surrogate and her husband would have to be considered the legal parents.³⁰⁸ In Ukraine, the commissioning couple was considered to be the legal parents. Thus, it was not even feasible to adopt the child, and the commissioning couple was not able to remain in Ukraine. After a protracted legal struggle, the child was allowed to enter the United Kingdom on a special decision in the interests of the child, despite legal rules to facilitate his citizenship. Even if crises do not ensue, and ultimately the commissioning couple finds solutions, the extra bureaucratic struggle and costs do differentiate foreign from domestic arrangements.

Moreover, as the case above illustrates, if any dispute exists, the commissioning couple and the baby may become separated by geography and travel visas. If the commissioning couple separates and a custody battle ensues or they do not want the baby, if the baby has serious disabilities, or if other legal problems arise, the geographic distance between commissioning couple and child, as well as the problems of nationality, can cause litigation and suffering.³⁰⁹ Indeed, in at least one case, a child born to an Indian surrogate was left without parents or citizenship.³¹⁰ These complications can make an already complex situation into a labyrinth.

In sum, on account of these differences, international surrogate motherhood raises more concerns than domestic surrogacy. Simply put, the commercialization has run rampant in international surrogacy without much regard for the intimacy

306. See, e.g., Donchin, *supra* note 148, at 328.

307. See *infra* notes 308–10 and accompanying text; see also Donchin, *supra* note 148, at 328.

308. *X & Y (Foreign Surrogacy)*, [2008] EWHC (Fam) 3030, [5], [9]–[10] (Eng.) (holding that under both English and Ukrainian law, the children were made both parentless and stateless under the circumstances). However, the Court held that under the letter of the law in England, the Ukrainian surrogate and her husband were the legal parents. *Id.* at [5] (“It is clear (and accepted on all sides) that the effect of the provision is that in English law the Ukrainian woman (although biologically unrelated to the twins) is for all purposes the sole legal mother of these children. . . . It is common ground that the Ukrainian woman’s husband acquiesced to the surrogacy and, if subsection (2) applies to him, he is in English law the sole father (although again biologically unrelated) of these children.”)

309. See, e.g., KARI POINTS, THE KENAN INST. FOR ETHICS AT DUKE UNIV., COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI 5–7 (2009), available at <http://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Surrogacy.pdf> (discussing how the commissioning couple divorced and then the father became enmeshed in litigation in two legal systems in trying to transport the baby back to Japan, which bans surrogacy, from India); Parks, *supra* note 86, at 333–34.

310. Parks, *supra* note 86, at 333–34.

involved. Practically, foreign surrogates are detached and distant. Recognizing the intimacy along with the financial transaction is more difficult. The emotional, socioeconomic, and racial distance between commissioning couples and foreign surrogates is much more pronounced. Both in the context of commodification and exploitation, the problematic nature of international surrogacy makes its use morally charged and unpalatable, particularly in comparison with domestic surrogacy.

B. How Domestic Jurisdictions Should React to the More Problematic Nature of International Surrogacy

Given the more problematic nature of international surrogacy evident in these differences, the jurisdiction in which the intended parents reside and which will be the country of residence of the baby born of international surrogacy are left to contemplate how to respond. Ultimately, even appropriate regulation of domestic surrogacy will not prevent people from using foreign surrogates. Moreover, if domestic regulations are restrictive or supply does not meet demand, then domestic citizens will be further incentivized to look abroad when hiring a surrogate.³¹¹ While many have recommended international regulation of international surrogacy,³¹² and such regulation may indeed be appropriate, for various reasons it has not occurred and is unlikely to occur anytime in the near future.³¹³ Thus, it is left for the local jurisdiction of the intended parents to consider how to respond to international surrogacy if they want to disincentivize its use.³¹⁴

On the one hand, it is cumbersome to try to affect foreign surrogate arrangements. Moreover, since local jurisdictions do not have control over foreign residents, it can be argued that it is an inappropriate infraction on sovereignty, even if justifiable on ethical and regulatory grounds, to attempt to alter foreign citizens' behaviors.³¹⁵ For instance, even if a domestic jurisdiction disagrees with foreign

311. See Donchin, *supra* note 148, at 329.

312. See, e.g., Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1453–62 (2009).

313. See Brugger, *supra* note 263, at 681–87 (listing various reasons why international regulation is unlikely, including widely differing views on the advisability of surrogacy at all, the different areas of law such an agreement would impact, and conflicts with domestic legal regimes, as well as problems of noncompliance).

314. For an interesting account of how criminalization of regulation of medical tourism can be justified from a normative perspective, see Cohen, *supra* note 262, at 1384–85. Cohen emphasizes that as foreign surrogates are citizens of a foreign jurisdiction, the domestic state may not have an interest in regulating foreign surrogacy. In this Article, I assume that regulation can be justified by a state's interests in actions of the commissioning couple participating in foreign surrogacy. In addition, a child born of foreign surrogacy will be brought back to the domestic jurisdiction. Finally, a domestic system can have an interest in the commodification and exploitation of foreign citizens.

315. See David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT'L L. 953 (2010) (discussing infringement on sovereignty arguments against transnational laws); Emmanuelle Mazuyer, *Labor Regulation in the North American Free Trade Area: A Study on the North American Agreement on Labor Cooperation*, 22 COMP. LAB. L. & POL'Y J. 239, 258 (2001) (one country asserting its labor laws on other

labor practices, which its own citizens benefit from in the form of cheaper labor and products, states generally leave foreign countries to deal with protecting their own citizens.³¹⁶ One country may try to influence foreign governments to modify their labor practices through political means, but domestic jurisdictions generally will not pass regulations directed at the employers or prohibit trade in such products.³¹⁷

However, while foreign surrogacy progresses abroad, which is where the contract is signed and the surrogate lives, the jurisdiction of the commissioning couple does have some legal control over the process. Babies born of foreign surrogacy arrangements are born in the foreign country, and commissioning parents then seek travel documents to bring the baby back to the domestic jurisdiction.³¹⁸ Moreover, commissioning couples must seek a legal determination from their home countries that they are the legal parents of the baby.³¹⁹ In order for international surrogacy to work smoothly, domestic jurisdictions must at a minimum provide for these legalities.³²⁰ Thus, the jurisdiction of the commissioning couple can choose to criminalize the use of foreign surrogates for local citizens or to deny babies born of surrogacy citizenship, thereby making the process largely untenable for local citizens.

These options should be rejected. Criminalization or refusing citizenship is extremely punitive and affects the children as much as the parents.³²¹ Such prohibitions or criminalization can serve to stigmatize children and punish innocent children in a manner that fails to protect children's civil rights.³²² Moreover, assuming that foreign surrogacy continues despite these regulations, it is very problematic not to allow those children to be raised by their intended parents. Refusal to let the child into the country seems particularly harsh when they were created at the behest of local citizens. The burden on the foreign country also seems unfair to that jurisdiction and overly punitive to the baby who may be a genetic relation to the intended parents. While this can be said of international adoption as well, children who are orphaned in foreign countries are still citizens of that

countries can raise significant concerns about infringing the other state's sovereignty).

316. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 403–11 (2001); cf. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1531, 1578–80 (2002) (“Resistance to transnational legal authority, endemic to American law, has insulated labor law from the potential influence of international human rights or other labor rights such as those that have forced the reexamination of national labor laws in Europe and elsewhere.”). I am not judging whether one country should try to regulate a foreign jurisdiction's labor practices or whether international treaties should be enforced; I am only commenting on the customary practice of leaving each country to create its own system of labor laws.

317. See *infra* notes 312–14 and accompanying text. But see Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COL. HUM. RTS. L. REV. 1 (2011) (advocating transnational regulation to prevent child labor); Doorey, *supra* note 315.

318. See Storrow, *supra* note 252, at 597–598.

319. See Smerdon, *supra* note 252, at 73–81.

320. *Id.*

321. Storrow, *supra* note 252, at 608 (discussing harms to children from delegitimizing surrogacy).

322. See *id.*

country and clearly the responsibility of that country. Moreover, it is possible that not all foreign jurisdictions practice surrogacy in a manner that implicates problematic levels of commodification or exacerbates exploitation concerns. Thus, criminalization may not be appropriate.

There are other more intermediate options short of criminalization and prohibition that could be considered by jurisdictions trying to avoid their citizens' use of foreign surrogates, given the more problematic nature of international surrogacy. I explore a few possibilities, which are not intended to be exhaustive.

Given the more ethically and legally problematic nature of foreign surrogate motherhood as described above, local jurisdictions may attempt to find ways to encourage the use of domestic surrogacy short of outlawing foreign surrogacy. Domestic jurisdictions should take into account that domestic surrogacy is preferable on many accounts than foreign surrogacy. Therefore, domestic jurisdictions should work to ensure that the domestic system is accessible.³²³ In addition, instead of criminalizing foreign surrogacy or refusing to grant the baby born of foreign surrogacy citizenship in the local jurisdiction, domestic jurisdictions could fine commissioning families monetarily for using foreign surrogates that are not otherwise approved through the system of accreditation suggested below.³²⁴ This would have the likely effect of disincentivizing foreign surrogacy and equalizing the costs of domestic and foreign surrogacy depending on the amount of the fine imposed. Thus, commissioning couples would have less of an incentive to use foreign surrogates and would hopefully instead use a domestic surrogate under a framework that is less ethically and legally problematic.

Moreover, similar to the way the United States tries to influence foreign labor laws, there are "soft law" regulations that use carrot-and-stick policies in the context of trade with foreign governments to incentivize them to improve conditions in their own countries.³²⁵ While international surrogacy is unlikely to attract sufficient attention from the general public to influence overall trade policies with foreign countries, spreading influence in this context through trade agreements has been suggested.³²⁶

Comparable to the manner in which international adoption is regulated in the United States for those countries that are signatories to the Hague Convention,³²⁷ a certification system can be made for surrogacy agencies abroad as they are for international adoption agencies.³²⁸ When significant problems are found in foreign

323. Cf. Donchin, *supra* note 148, at 331 (suggesting but rejecting the possibility that domestic jurisdictions provide a more liberal system of gamete and surrogacy transactions in order to disincentivize people from using the more ethically problematic system of international surrogacy).

324. See *infra* notes 327–331 and accompanying text.

325. See Doorey, *supra* note 315, at 953; Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 253–54 (1988).

326. See Donchin, *supra* note 148, at 331.

327. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134. The Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000), codified at 42 U.S.C. §§ 14901–54 (2006), is the implementing legislation for the Convention.

328. See 42 U.S.C. § 14921(a)(1)–(2) (2006) ("Except as otherwise provided in this

country adoption, the United States has prevented international adoptions in those countries.³²⁹ In the context of international surrogacy as well, domestic jurisdictions can certify certain countries for surrogacy while disincentivizing international surrogacy from other countries.³³⁰ This would allow foreign jurisdictions to meet a domestic jurisdiction's determination of minimally acceptable protections and procedures in a manner comparable to international adoption.³³¹ It would incentivize foreign jurisdictions to meet those standards. This would allow domestic jurisdictions to certify foreign surrogacy destinations on a case-by-case basis depending on the protections in place in those countries.³³² Finally, if international law were to regulate surrogacy, a local jurisdiction could sign on to such a convention.³³³

In the end, it is important to recognize the differences between domestic and international surrogacy. Regulators of domestic surrogacy and foreign policy makers should deliberate on how to treat international surrogacy in light of the problematic conditions involved.

CONCLUSION

The benefits to surrogacy are real. History and empirical studies demonstrate the benefits, as do the thousands of personal success stories. Litigation is rare and general satisfaction is high among both commissioning parents and surrogates.

subchapter, no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person (1) is accredited or approved in accordance with this subchapter; or (2) is providing such services through or under the supervision and responsibility of an accredited agency or approved person.”); *see also* Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 85–91 (2010) (describing the accreditation process for intercountry adoption agencies and how accreditation helps to prevent abuses); *International Adoption Becoming Difficult Amid Treaties, Regulation* (PBS NewsHour television broadcast July 1, 2008), available at http://www.pbs.org/newshour/bb/social_issues/july-dec08/adoptionabroad_07-01.html (discussing stringent adoption regulations that have been implemented by international organizations and foreign countries).

329. *See* Estin, *supra* note 328, at 86–87 & nn.219–20 (citing Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, at 42; Elissa Gootman, *Investigation by I.N.S. Delays Obtaining Visas and Snarls Adoptions in Vietnam*, N.Y. TIMES, Jan. 29, 2002, at B5 (describing a couple's heartbreak and anger with their failed attempt to adopt a Vietnamese child); Seth Mydans, *U.S. Interrupts Cambodian Adoptions*, N.Y. TIMES, Nov. 5, 2001, at A7; Elizabeth Olson, *Families Adopting in Vietnam Say They Are Caught in Diplomatic Jam*, N.Y. TIMES, Feb. 11, 2008, at A14; *U.S. Embassy Report Faults Vietnam's Oversight of Adoptions*, N.Y. TIMES, Apr. 26, 2008, at A7).

330. *See, e.g.*, Donchin, *supra* note 148, at 330–31.

331. *See, e.g.*, Iris Leibowitz-Dori, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 353 (1997) (proposing that surrogacy be regulated similar to international adoption in which member countries have to follow certain guidelines before adoptions with the country are recognized).

332. *Cf.* I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1515–23 (2010) (arguing for a certification process with regards to medical tourism more generally).

333. *See supra* notes 329–30 and accompanying text.

Surrogacy should therefore not be prohibited or suppressed. But, the ongoing concerns about surrogacy are also real. Surrogates engage in a delicate bargain: selling their bodily capacities and gestating a baby on someone else's behalf. Their bodies are not entirely their own, and the relationships they develop with commissioning couples are significant. This intimate bargain creates real fears of potential exploitation and commodification of women's bodies. Surrogates are vulnerable to these bargains at the same time that they benefit from them.

The suggested regulations consider different protections for the surrogates, whom I identify as the vulnerable parties. We should care about the vulnerabilities of surrogates and their human dignity as well as the effects of commodification on society for ethical and practical reasons. A system of surrogacy that takes seriously real relationships will avoid conflict and treat people providing useful services appropriately and with dignity. While such protections can in theory be waived or go unenforced, the regulation will recognize not only the transaction but the relationships that develop, raising the status of the surrogates and their work. Such efforts to improve the status of surrogates and to better reflect the relationships involved in commercial intimacy are comparable to efforts to create a more kin-like legal framework for parenthood that better reflects the reality of the way children are both created and cared for.

Given the need to recognize the intimacy while reaping the benefits of commerciality in the prescriptive framework for regulating commercial intimacy I develop, the move from surrogates who are hired locally, or at least within the same country as the commissioning couple, to those living abroad is significant. Due to the distinct differences between domestic and international surrogacy, the balance that I argue can be achieved in domestic surrogacy between stimulating markets and recognizing intimacy cannot be obtained in international surrogacy. The intimacy is lost in the geographical and cultural distance. Thus, international surrogacy is not just another form of the same surrogate process; it is constitutively different and morally and practically more problematic. To the extent possible, it should be avoided, and governmental policy should reflect this hierarchy.