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## **Alienation, Commodification, and Commercialization: A Feminist Critique of Commercial Surrogacy Agreements Through the Lens of Labor Exploitation and U.S. Organ Donation Law**

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Alienation, Commodification, and  
Commercialization:  
A Feminist Critique of Commercial Surrogacy  
Agreements Through the Lens of Labor  
Exploitation and U.S. Organ Donation Law

Isa Elfers\*

ABSTRACT

In the United States, organ sale and other forms of paid organ donation agreements are legally prohibited on the grounds that they pose the potential to exploit indigent people for the use of their bodies by the wealthy. However, commercial surrogacy agreements, in which a woman is paid to undergo pregnancy on behalf of another person, form the basis of a booming industry in the United States and abroad. This note posits that commercial surrogacy agreements introduce the same potential for exploitation of the poor as paid organ donation agreements, and that that potential is compounded by specific exploitation of surrogates' reproductive labor along the lines of race, class, gender, and nationality. Therefore, this note argues that surrogacy agreements should be regulated under the same terms as organ donation and should become a purely altruistic form of legal agreement, rather than a salable service or good.

**Keywords:** alienation, commodification, commercialization, commercial surrogacy, labor exploitation, organ donation

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## I. INTRODUCTION

Imagine that you are a young woman<sup>1</sup> in the United States living below the poverty line. You may be working multiple jobs. You may have children, and you may be raising them alone. You're barely scraping by, and if you see the chance to make extra cash, you jump on it, because you need it to survive.

Despite all of this, you are relatively healthy. Your reproductive system is in good shape. Again, you may already have children, or you would be able to if you wished to. An opportunity falls into your lap: in exchange for nine months of pregnancy and the resulting child, with all the accompanying dangers to health and life involved, you earn approximately \$50,000—on the higher end of surrogacy payments—with the potential for bonuses based on multiple births, birth via Cesarean section, and other such “extra” components.<sup>2</sup> Do you take it?

The practice of organ donation in the United States is governed by the guiding principle of gift law. 42 U.S.C. § 274e(a) explicitly prohibits the exchange of “valuable consideration” for the acquisition, receipt, or other transfer of human organs.<sup>3</sup> “Valuable consideration” is defined in § 274e(c)(2) as any monetary incentive other than “reasonable payments” going toward medical costs associated with the donation.<sup>4</sup> The foundation of this law is the moral principle that permitting total alienability of body parts in exchange for financial incentive is exploitative, and would result in a society in which the human body is “easily quantified in dollars and cents; [its] worth would be the market price of the organ[s].”<sup>5</sup> In her article *Personalizing Personalty: Toward a Property Right in Human Bodies*, Michelle Bourianoff Bray argues that “recognizing body parts as fully alienable property would encourage the perception of body parts as interchangeable commodities.”<sup>6</sup> In other words, organs are not considered salable goods in the United States because permission of such sale would not only create the potential for financial coercion of the poor into dispensing of their organs for the use of others, but would additionally lead

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1. There are significant populations of people who can become pregnant but who do not identify as women. Because this note focuses specifically on misogyny and the commercial surrogacy trade, and because surrogate mothers typically do identify as women, this note refers to “women” throughout.

2. *Surrogate Mother Compensation: How Much Do Surrogates Get Paid in California?*, WEST COAST SURROGACY, <https://www.westcoastsurrogacy.com/become-a-surrogate-mother/surrogate-mother-compensation> (last visited Apr. 4, 2022).

3. 42 U.S.C. § 274e(a).

4. *Id.* § 274e(c)(2).

5. Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 243 (1990) (discussing the moral principle of gift law).

6. *Id.* at 241.

to a widespread devaluation of the human body to its potential financial value.<sup>7</sup>

Yet the practice of commercial surrogacy, involving the nine-month lease of an organ to an outside purchaser at great risk to its “owner,” is not regulated under similar principles in the majority of U.S. states, and no federal regulations exist concerning commercial surrogacy at all.<sup>8</sup> Rather, states determine their own laws regarding the legality of commercial surrogacy, and therefore commercial surrogacy agreements form the basis of an entire industry through which thousands of fetuses are carried each year.<sup>9</sup> (While rough estimates exist of how many embryos are implanted into the uteruses of “gestational carriers” each year, information on how many women act as surrogate mothers annually in the United States does not appear to be collected.)<sup>10</sup> This note will argue that the lease of organs, as with the uterus during surrogate pregnancy, should be barred by the same logic that bans the outright sale of organs.

Part I of this note explains in greater detail the basic principles and controlling laws surrounding organ donation in the United States. It additionally examines state laws both for and against commercial surrogacy agreements, and the ways in which these laws differ depending on whether the surrogate mother is genetically related to the resulting child. Part II compares permanent organ donation with temporary organ leasing, as in surrogate pregnancy, and analyzes the similar possibilities for exploitation of indigent people in both. Part III analyzes the ways in which the commercialization of surrogacy is rooted in the commodification and alienation of women’s bodies and labor, as well as the ways in which this commodification disproportionately impacts women who are marginalized on the bases of race, class, and nationality. Finally, Part IV addresses counterarguments in favor of commercial surrogacy rooted in feminist and pro-LGBT beliefs.

## II. LEGAL FRAMEWORKS OF SURROGACY AND PRINCIPLES OF ORGAN DONATION LAW

Organ donation in the United States is a state-regulated area of law, falling at the intersection of states’ reserved powers over matters of public health, matters of contracts and gifting, and, in the case of decedent donors,

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7. See S. REP. NO. 98-382, at 16–17 (1984).

8. *U.S. Surrogacy Map: Surrogacy Laws by State*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Apr. 4, 2022).

9. Christina Caron, *Surrogacy Is Complicated. Just Ask New York.*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/parenting/pregnancy/surrogacy-laws-new-york.html> (last visited Apr. 4, 2022).

10. *Id.*

matters of estate.<sup>11</sup> The primary governing law concerning organ donation in the U.S. is the Uniform Anatomical Gift Act (UAGA), approved by Congress in 1968 and subsequently adopted by all fifty states and the District of Columbia.<sup>12</sup> “The UAGA establishe[d] gift law as the central legal principle in the United States opt-in system of organ donation.”<sup>13</sup> This meant that organs would be transferred from donor to donee without contractual consideration or payment for the transaction, and the only payment involved went to professionals involved with the actual procedure of donation and transplant.<sup>14</sup> This legal framework remains the cornerstone of organ donation law today.

In 1983, a doctor from the state of Virginia, H. Barry Jacobs, formed the organization International Kidney Exchange, with the purpose of purchasing donated kidneys from indigent donors, some of whom came from developing nations, to sell to patients in need of kidney transplants.<sup>15</sup> Under the organization’s arrangement, the price of a human kidney would amount to an upper ceiling of \$10,000, plus a commission fee to Dr. Jacobs ranging from \$2,000 to \$5,000.<sup>16</sup> The organization sparked massive legal and medical backlash, with then-president of the National Kidney Foundation, Dr. David A. Ogden, stating, “[i]t is immoral and unethical . . . to place a living person at risk of surgical complication and even death for a cash payment to that person.”<sup>17</sup> The controversy stemming from this incident resulted in the passage of the National Organ Transplant Act of 1984 (NOTA), which both established measures for increasing organ donation rates in the United States and made the sale and purchase of organs for use in transplantation illegal.<sup>18</sup> The UAGA was revised in 2006 to reflect the NOTA’s prohibition of organ purchase or sale and similarly apply it to decedent donors.<sup>19</sup>

Surrogacy is a similarly state-regulated subject, but it is not governed by applicable federally recommended laws in the way that the UAGA governs organ donation. Therefore, laws concerning surrogacy and the

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11. Alexandra K. Glazier, *Organ Donation and the Principles of Gift Law*, 13 CLINICAL J. OF THE AM. SOC’Y OF NEPHROLOGY 1283, 1283 (2018).

12. *Id.*; *Spotlight ULC—Real World Impact of Our Acts*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/aboutulc/spotlightulc> (last visited Apr. 4, 2022).

13. Glazier, *supra* note 11.

14. *Id.*

15. Walter Sullivan, *Buying of Kidneys of Poor Attacked*, N.Y. TIMES (Sept. 24, 1983), <https://www.nytimes.com/1983/09/24/us/buying-of-kidneys-of-poor-attacked.html> (last visited Apr. 4, 2022).

16. Gwen Mayes, *Buying and Selling Organs for Transplantation in the United States*, MEDSCAPE (2003), <https://www.medscape.org/viewarticle/465200> (last visited Apr. 4, 2022).

17. Sullivan, *supra* note 15.

18. 42 U.S.C. §§ 273–274.

19. REVISED UNIFORM ANATOMICAL GIFT ACT § 16 (2006) (UNIF. LAW COMM’N, amended 2009).



and where courts will issue parentage orders featuring the intended parents, but where commercial surrogacy contracts are “void and unenforceable by statute.”<sup>24</sup>

Finally, the most restrictive “red light” states are states that prohibit commercial surrogacy contracts, do not issue birth certificates naming both intended parents (i.e. without the name of the surrogate mother), or both.<sup>25</sup> Only three states, Louisiana, Michigan, and Nebraska, fall into the “red light” category.<sup>26</sup> Only Louisiana makes the practice of commercial surrogacy agreements a criminal offense, punishable by a fine of up to fifty thousand dollars or imprisonment for up to ten years.<sup>27</sup>

One major distinction in types of surrogacies, beyond commercial and altruistic surrogacy agreements, is whether the surrogacy is traditional or gestational. A gestational surrogate is a surrogate mother who does not share genetic material with the child she is creating; that is, the implanted embryo consists of a sperm and an egg belonging to the intended parents or from sperm/egg donors other than the surrogate mother.<sup>28</sup> In a gestational surrogacy arrangement, the resulting child will likely share genetic material with at least one intended parent, but may be unrelated to all three parties.<sup>29</sup> In a traditional surrogacy arrangement, however, the surrogate mother uses her own eggs, and is typically impregnated with the sperm of the intended father.<sup>30</sup> In these arrangements, the surrogate mother therefore shares a biological link to the child she carries.<sup>31</sup> These distinct types of surrogacy carry with them distinct legalities that vary from state to state. Many states that permit gestational surrogacy do not allow traditional surrogacy or may allow payment for and enforcement of gestational surrogacy contracts but not traditional contracts.<sup>32</sup>

The legal issues surrounding traditional surrogacy, specifically, were most famously analyzed in *Matter of Baby M*, the first American court case to review the legality of paid surrogacy.<sup>33</sup> In *Matter of Baby M*, the Supreme

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Apr. 4, 2022); *Gestational Surrogacy in Wyoming*, CREATIVE FAM. CONNECTIONS (2020), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/wyoming/> (last visited Apr. 4, 2022).

24. *Id.*

25. *Id.*

26. *Id.*

27. LA. REV. STAT. ANN. § 14:286 (2016).

28. *Traditional vs. Gestational Surrogacy - What's Best for My Family?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> (last visited Apr. 4, 2022).

29. *See id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *See Matter of Baby M*, 109 N.J. 396, 410 (1988) (“In this matter the Court is asked to determine the validity of a contract that purports to provide a new way of bringing children into a family.”); Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY MAG. (Mar. 2007),

Court of New Jersey found that a traditional surrogacy contract was unenforceable for public policy reasons including, but not limited to, the equality of the rights of natural parents over their child, with the court emphasizing that “the father’s right no greater than the mother’s.”<sup>34</sup> The court stated that “[t]he whole purpose and effect of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother.”<sup>35</sup> While the biological mother was not granted custody of Baby M due to the court’s belief that it would not be in the child’s best interest, she retained broad visitation rights and remained Baby M’s legal mother until the child arranged to be legally adopted by her intended parents at age eighteen.<sup>36</sup> The biological relation of the surrogate mother to the child was a crucial factor in determining the legality of the arrangement and the result of the case.<sup>37</sup> Even though the New Jersey Gestational Carrier Agreement Act otherwise renders New Jersey a “green light” state for gestational commercial surrogacy agreements, the precedent established in *Matter of Baby M* means that payment for traditional surrogacy is still illegal in New Jersey today.<sup>38</sup>

*Matter of Baby M* also laid public policy groundwork for other criticism of commercial surrogacy agreements.<sup>39</sup> As organ donation laws reacted to exploitation of the poor for their organs earlier in the decade,<sup>40</sup> *Matter of Baby M* saw dispute between a high-school dropout surrogate mother, whose “net assets were probably negative,” and a wealthy intended-parent couple composed of a medical doctor mother and a biochemist father, who could afford to pay \$10,000 to the surrogate mother, roughly \$24,000 in contemporary dollars.<sup>41</sup> The court stated:

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<https://web.archive.org/web/20070526004403/http://www.njmonthly.com/issues/2007/03-Mar/babym.htm> (last visited Apr. 4, 2022) (“The landmark case made society grapple with the consequences of surrogacy. The state Supreme Court set precedent in ruling that a fit mother cannot be forced to give away her baby.”).

34. *Matter of Baby M*, 109 N.J. at 435.

35. *Id.* at 436.

36. Weiss, *supra* note 33.

37. See *Matter of Baby M*, 109 N.J. at 435–36, 437.

38. *Gestational Surrogacy in New Jersey*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-jersey/> (last visited Apr. 4, 2022).

39. See generally Weiss, *supra* note 33 (“Twenty years ago, the question asked in the media, in law schools, and around family dinner tables was how far science should be allowed to go to help people have children. Should the Sterns—a biochemist and a pediatrician—be allowed to leverage their relative affluence to have Mary Beth Whitehead, a high school dropout married to a sanitation worker, become pregnant and give away a baby that is genetically half hers? Should we turn away if the surrogate changes her mind? If we do, what types of transactions could we condone?”).

40. See Mayes, *supra* note 16. See also Sullivan, *supra* note 15.

41. *Matter of Baby M*, 109 N.J. at 439–40. See *\$10,000 in 1988 is Worth \$23,982.76 Today*, CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1988?amount=10000> (last visited Apr. 4, 2022) (calculation of inflation conversion).

it is clear to us that it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent . . . Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.<sup>42</sup>

The court additionally found that “[t]here are, in a civilized society, some things that money cannot buy,” referring to the birth of the child conceived through paid surrogacy agreements, and beyond that referred to the potential for degradation of women stemming from commercial surrogacy.<sup>43</sup>

Most “green light” states that do not explicitly prohibit traditional surrogacy permit it by virtue of the fact that no statutes actually allow or disallow it.<sup>44</sup> One notable jurisdiction that stands in stark contrast to New Jersey is the District of Columbia, which expressly permits traditional surrogacy under D.C. Law 21-0255, the Collaborative Reproduction Amendment Act of 2016.<sup>45</sup> The law explicitly states:

In the case of a child born by a traditional surrogate, an intended parent or parents shall be the parent or parents of the child and have all rights under District law, regardless of whether the intended parent or parents has a genetic relationship to the child . . . A traditional surrogate and the traditional surrogate’s spouse or domestic partner, if any, shall not be the parent or parents of the child, and shall not have any rights, powers, privileges, immunities, duties, or obligations with respect to the child.<sup>46</sup>

Even at this degree of permissiveness with regard to traditional surrogacy, the District of Columbia still requires a waiting period of at least forty-eight hours following the birth of the child before issuing a parentage order naming the intended parents as the legal parents, giving the traditional surrogate mother time to change her mind about relinquishing the child.<sup>47</sup> It is generally recognized that the surrogate (genetic) mother in a traditional surrogacy arrangement holds greater rights over the resulting child than an

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42. *Id.* at 440.

43. *Id.* at 440–42.

44. See e.g., *Gestational Surrogacy in New Mexico*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/new-mexico/> (last visited Apr. 4, 2022); *Gestational Surrogacy in South Dakota*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/south-dakota/> (last visited Apr. 4, 2022).

45. *Gestational Surrogacy in the District of Columbia*, CREATIVE FAM. CONNECTIONS (2020), <https://www.creativefamilyconnections.com/us-surrogacy-law-map/dc/> (last visited Apr. 4, 2022). See D.C. CODE ANN. §§ 16-403, -404 (West 2017).

46. D.C. CODE ANN. § 16-407(b)(1)–(3) (West 2017).

47. *Id.* § 16-408(e)(2).

unrelated surrogate mother in a gestational surrogacy agreement.<sup>48</sup> It is also generally acknowledged that, as occurred in *Baby M*, the traditional surrogate mother may be more likely to change her mind about a surrogacy agreement when the resulting child is biologically hers, and may not truly know how she will feel about relinquishing that child prior to the child's actual birth, particularly if it is her first time giving birth or her first time engaging in a surrogacy agreement.<sup>49</sup>

### III. COMMERCIAL SURROGACY AS ORGAN LEASING

In examining concerns related to commercial surrogacy that mirror concerns of organ sale and other forms of paid organ donation, we return to the quote from Dr. Ogden regarding the International Kidney Exchange's practice of offering cash payment for kidney donation. Dr. Ogden stated, "[i]t is immoral and unethical to place a living person at risk of surgical complication and even death for a cash payment to that person."<sup>50</sup> Congress agreed with Dr. Ogden's sentiment, and subsequently the NOTA put an end to paid organ donation for this reason.<sup>51</sup> Paid organ donation entailed financially coercing indigent donors into undergoing life-threatening procedures in exchange for money, and Congress, along with the legal and medical professions at large, found this impermissibly unethical.<sup>52</sup>

Donors are still permitted to donate organs altruistically, with no payment other than compensation for medical treatment, lost wages, and similar costs of participating in the donation procedure.<sup>53</sup> Introducing a financial incentive for donation, however, opened up the consensual gift of a life-saving organ to the potential for any number of financially coercive arrangements into which many would-be donors may not have otherwise entered.<sup>54</sup> Yet commercial surrogacy agreements continue under the same

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48. Compare *Matter of Baby M*, 109 N.J. at 396 (upholding parental rights of traditional surrogate mother), with *Johnson v. Calvert*, 851 P.2d 776 (1993) (denying parental rights to gestational surrogate mother).

49. See *Matter of Baby M*, 109 N.J. at 414–15 (“Mrs. Whitehead realized, almost from the moment of birth, that she could not part with this child . . . She apparently broke into tears and indicated that she did not know if she could give up the child. She talked about how the baby looked like her other daughter and made it clear that she was experiencing great difficulty with the decision.” The dispute in *Matter of Baby M* was catalyzed by the later kidnapping of Baby M by Mary Beth Whitehead, the traditional surrogate mother, three days after her birth, after Whitehead “became deeply disturbed, disconsolate, stricken with unbearable sadness” and “had to have her child.”).

50. Sullivan, *supra* note 15.

51. *Id.*

52. See Mayes, *supra* note 16, at 2; S. REP. 98-382, at 16–17 (1984).

53. 42 U.S.C. § 274e(c)(2).

54. Of interest to some readers may be the moral question of plasma donation, the most common form of legal paid bodily donation (blood donation may legally be financially compensated, but such compensation is uncommon). Elizabeth Preston, *Why You Get Paid to Donate Plasma But Not Blood*, STAT (Jan. 22, 2016), <https://www.statnews.com/2016/01/22/paid-plasma-not-blood/> (last visited Apr. 4, 2022).

circumstances, despite arguably presenting a higher risk of harm to the donor than other organ donation procedures. Surrogate pregnancy not only often involves invasive and difficult surgery to complete, but also carries with it a unique set of risks beyond those traditionally assumed by the “standard” organ donor.

First, as a condition of their contract, commercial surrogates are commonly required to deliver the child they carry via Cesarean section (C-section), whether medically necessary or not. Requiring a C-section helps “to ease scheduling and maximize birth numbers at the clinic or to accommodate intended parents who wish to attend the birth of their child.”<sup>55</sup> C-sections are major, extremely invasive procedures, involving opening of the lower abdomen and temporary displacement of the abdominal muscles in order to remove the child from the uterus.<sup>56</sup> A French study on the subject conducted in the late 1990s found that, compared to vaginal births, women who deliver via C-section are over three times more likely to die in childbirth, primarily due to complications from anesthesia, infections, and blood clots.<sup>57</sup> Women who deliver via C-section are also at increased risk of blood loss and pain or infection at the incision site, and the potential exists for injury to the bowel or bladder during the surgery.<sup>58</sup> Already, we see the trade Dr. Ogden decried with regard to paid organ donation—the expectation that for a certain sum of money, a woman should be willing to undergo a massive surgical procedure at great risk of complications and potential loss of life. The risk of surgical complications from C-sections are particularly compounded for surrogate mothers, who often return home from childbirth to small towns and rural communities, where access to quality postpartum obstetrical care may be limited or nonexistent.<sup>59</sup> This means that indigent surrogate mothers in particular are

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While in-depth discussion of this topic is beyond the scope of this note, see Julia Press & Robin Lindsay, *Business is Booming for the \$24 Million Plasma Industry—But It May Be Putting Vulnerable Donors at Risk*, BUS. INSIDER (Mar. 11, 2011), <https://www.businessinsider.com/plasma-donating-industry-vulnerable-health-2021-3> (last visited Apr. 4, 2022), for discussion of the unknown potential for long-term health consequences stemming from frequent plasma donation and the financial need that drives many plasma donors to donate.

55. *Surrogates*, SURROGACY360 (2019), <https://surrogacy360.org/relationship/surrogates/> (last visited Apr. 4, 2022).

56. Cari Nierenberg & Sarah Wild, *Vaginal Birth vs. C-Section: Pros & Cons*, LIVE SCIENCE, <https://www.livescience.com/45681-vaginal-birth-vs-c-section.html> (last visited Apr. 4, 2022).

57. Catherine Deneux-Tharaux et al., *Postpartum Maternal Mortality and Cesarean Delivery*, 108 OBSTETRICS AND GYNECOLOGY 541, 545–46 (2006).

58. Nierenberg, *supra* note 56.

59. *Surrogates*, *supra* note 55. See Leslie Morgan Steiner, *Who Becomes a Surrogate?*, ATLANTIC (Nov. 25, 2013), <https://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/> (last visited Apr. 4, 2022) (discussing demographic factors of surrogate mothers, including higher likelihood to live in rural areas, tendency toward lower income; and overrepresentation of military wives, whose access to postpartum care may be of inconsistent and/or poor quality due to frequent relocation).

subject not only to a heightened risk of more severe post-surgical complications, but also to heightened risk during any subsequent vaginal births, should they someday want to have their own children following participation in a surrogacy agreement.<sup>60</sup>

Aside from Ogden's concern about surgical complications specifically, pregnancy on its own is an extraordinarily taxing and dangerous condition for the human body to endure. Pregnancy introduces the potential for a host of health complications, including high blood pressure, gestational diabetes, and preeclampsia, which can be fatal if not properly treated.<sup>61</sup> Even the healthiest pregnancies carry an innate risk of loss of life of the mother, especially in the United States, which, in 2018, had the worst maternal mortality rate of any industrialized country in the world, at 17.4 maternal deaths per 100,000 pregnancies.<sup>62</sup> Therefore, merely by becoming pregnant, regardless of the need for surgical intervention, the commercial surrogate is already putting her life at risk in exchange for the monetary payout of the surrogacy contract.

These pregnancy risks increase dramatically when carrying twins. The risk of maternal mortality in particular is roughly 2.5 times higher on average in twin pregnancies than in singleton pregnancies.<sup>63</sup> Triplet pregnancies are even more dangerous; a 1985-1999 study conducted at a research hospital in Sudan found that from a roughly doubled maternal mortality rate in twin pregnancies of 35.8 maternal deaths per 100,000 pregnancies, rates jumped in triplet pregnancies to 99 per 100,000.<sup>64</sup> This increased risk is relevant to surrogate mothers because many commercial surrogates are expected to undergo multiple embryo transfers to increase the chance of pregnancy or attempt to guarantee the birth of multiple children to the intended parents.<sup>65</sup> The likelihood that a surrogate mother

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60. *Id.* Quantitative statistics regarding perinatal and postpartum health consequences for surrogates are difficult to track, and studies that focus specifically on the potential for poor health outcomes in rural areas are almost nonexistent. *See generally* Viveca Söderström-Anttila et al., *Surrogacy: Outcomes for Surrogate Mothers, Children, and the Resulting Families—A Systematic Review*, 22 HUMAN REPROD. UPDATE 260, 263, 265 (2016) (reviewing several studies from different Western countries regarding obstetric complications experienced by surrogate mothers and rates at which they occur).

61. Jacquelyn Cafasso, *Complications During Pregnancy and Delivery*, HEALTHLINE (May 25, 2016), <https://www.healthline.com/health/pregnancy/delivery-complications> (last visited Apr. 4, 2022).

62. Eugene Declercq & Laurie Zephyrin, *Maternal Mortality in the United States: A Primer*, COMMONWEALTH FUND (Dec. 16, 2020), <https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer> (last visited Apr. 4, 2022).

63. Danielly S. Santana et al., *Perinatal Outcomes in Twin Pregnancies Complicated by Maternal Morbidity: Evidence from the WHO Multicountry Survey on Maternal and Newborn Health*, 18 BMC PREGNANCY AND CHILDBIRTH 2, 2 (2018).

64. Saad E. Dafallah & Eisa M. Yousif, *A Comparative Study of Twin and Triplet Pregnancy*, 25 SAUDI MED. J. 502, 505 (2004).

65. *Surrogates*, *supra* note 55.

will experience pregnancy complications or risk to her life is even greater under these common conditions.

A final issue faced specifically by surrogate mothers compared to other types of organ donors is the dramatic risk of postpartum psychiatric illnesses such as depression or psychosis, which pose additional danger not only to the health, well-being, and livelihood of the mother, but to her life. Suicide is one of the leading causes of death for perinatal and postpartum mothers, with one Canadian study finding that, over the course of a fifteen-year research period, one in every nineteen maternal deaths occurring in the year after birth was caused by suicide.<sup>66</sup> Highest rates of postpartum suicide occurred among women in rural and remote regions, as well as among women without access to mental health care.<sup>67</sup> Many surrogate mothers come from such circumstances: rural or disadvantaged regions where available healthcare resources may be few and far between.<sup>68</sup> And while certainly not every surrogate mother experiences postpartum depression—it impacts about 10-20% of mothers overall—and those who do often suffer deep traumatic effects.<sup>69</sup>

For example, the surrogate mother in *Matter of Baby M*, Mary Beth Whitehead, was so deeply troubled by postpartum depression that she kidnapped the child she delivered and kept her in her home for a period of four months, until Baby M was seized by police and returned to her intended parents.<sup>70</sup> Other stories abound of surrogate mothers struggling dramatically with postpartum depression, suicidal ideation, and career and family fallout as a result of declining mental health. Famously, America's first legal surrogate mother, known pseudonymously as Elizabeth Kane, published a memoir, *Birth Mother*, describing the events of the year she acted as a surrogate, the year's "dark residue," and her subsequent mental health decline: "depression, suicidal despair, her family in shambles."<sup>71</sup> Postpartum depression and psychosis are unique to surrogate pregnancy

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66. Sophie Grigoriadis et al., *Perinatal Suicide in Ontario, Canada: A 15-Year Population-Based Study*, 189 CAN. MED. ASS'N J. E1085, E1087 (2017).

67. *Id.* at E1085, E1088.

68. See Steiner, *supra* note 59; Kate Bauer, *America's Overlooked Surrogate Mothers*, RICHMOND J.L. & TECH. BLOG (Jan. 24, 2018), <https://jolt.richmond.edu/2018/01/24/americas-overlooked-surrogate-mothers/> (last visited Apr. 4, 2022); Kamalpathi Rao H., *Surrogacy On the Rise in Tribal Areas*, DECCAN CHRON. (Apr. 7, 2016), <https://www.deccanchronicle.com/lifestyle/health-and-wellbeing/070416/surrogacy-on-the-rise-in-tribal-areas.html> (last visited Apr. 4, 2022) (discussing commercial surrogacy in India prior to the 2018 ban).

69. Jenna Carberg, *Postpartum Depression Statistics*, POSTPARTUM DEPRESSION (June 3, 2021), <https://www.postpartumdepression.org/resources/statistics/> (last visited Apr. 4, 2022).

70. *Matter of Baby M*, 109 N.J. 396, 414–16 (1988).

71. Lynn Smith, *She Never Thought She Would Want to Keep It*, L.A. TIMES (June 12, 1988), <https://www.latimes.com/archives/la-xpm-1988-06-12-bk-7162-story.html> (last visited Apr. 4, 2022) (reviewing ELIZABETH KANE, *BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER* (1988)).

over other forms of organ donation, and are a significant risk assumed by the mother when she undergoes a surrogacy agreement.

Considering the magnitude of these risks, we must question whether commercial surrogacy agreements are ethical, even when other forms of commercial organ donation and selling are not. The ethical argument that it is immoral to expect people in need to undergo dramatic surgical procedures in exchange for cash sparked the creation of the NOTA.<sup>72</sup> Can we truly claim that surrogacy is so different from other forms of organ donation such that these ethical considerations are not applicable? Commercial surrogacy, plain and simple, is the use of an organ, at great personal risk to the organ's living owner. It stretches credibility to claim that this use is entirely different from paid organ donation because the organ is not literally transplanted into the body of another when such use still carries all the accompanying risks and dangers of living organ donation and more to the donor.

#### IV. COMMERCIALIZATION AS A RESULT OF COMMODIFICATION

##### A. ALIENATION OF REPRODUCTIVE LABOR AS ALIENATION FROM SELFHOOD

This note discusses the similarities between surrogacy agreements and organ sale arrangements, wherein a person is compensated financially for the use of a part of their body. Indeed, surrogacy agreements are generally written so that the surrogate mother's role is that of a service provider, or a bodily "environment" in which the intended parents' child grows.<sup>73</sup> However, such rhetoric around surrogacy proliferates under the belief that pregnancy is a task solely of the womb, which has nothing to do with the selfhood or labor of the woman to whom the womb belongs. In her article "*Surrogate Mothering*" and *Women's Freedom*, Mary Lyndon Shanley writes:

Women's accounts of pregnancy point out the complexity of women's childbearing experiences and the ways in which a woman's self, not simply her womb, may be involved in reproductive labor . . . [I]n our culture "pregnancy does not belong to the woman herself. It either is a state of the developing foetus

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72. See Sullivan, *supra* note 15; S. REP. 98-382, at 16-17 (1984).

73. See e.g., Kristian Foden-Vencil, *An Explicit Contract Makes Surrogacy Viable for An Oregon Woman*, NPR (July 9, 2015), [https://media.npr.org/documents/2015/july/Surrogacy\\_contract\\_sample\\_070215.pdf](https://media.npr.org/documents/2015/july/Surrogacy_contract_sample_070215.pdf) (last visited Apr. 4, 2022) (providing a sample contract which makes many provisions for health tests, obstetrical care, and behavioral requirements to which the surrogate mother must submit, but no significant mention of the labor involved in carrying a child or children to term).

[sic], for which the woman is a container; or it is an objective, observable process coming under scientific scrutiny; or it becomes objectified by the woman herself, as a 'condition' in which she must 'take care of herself.'"<sup>74</sup>

This is a crucial distinction between surrogate pregnancy and other forms of organ donation. While the living donation of a kidney or a part of one's liver involves preliminary treatment and a one-time surgery on the part of the donor, pregnancy requires nine months of active work on the part of the surrogate mother, doing the taxing reproductive labor of growing a child. In her essay, *Pregnant Embodiment: Subjectivity and Alienation*, Iris Marion Young refers to the pregnant woman's experience of herself during pregnancy as "a source and participant in a creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she *is* this process, this change."<sup>75</sup> The commodification of women's reproductive labor erases this experience and the work behind it; pregnancy becomes a service or purchasable good, separate from the woman engaged in the labor of growing another human being inside her own body.

Most forms of labor under capitalism are alienable under market conditions. General wage labor certainly involves alienating parts of oneself in order to earn money; one's free time, one's interest, one's skill, and one's labor output, to name only a few aspects, are put into the hands of one's employer in exchange for money. Some forms of wage labor require greater involvement of one's sense of self and therefore greater degrees of self-alienation than others; for example, jobs that break one's body down dramatically over time, or jobs which "warp the spirit" through requirement of unethical behavior in order to remain employed.<sup>76</sup> But reproductive labor specifically involves an incredibly high degree of self-alienation, differentiating it both from other forms of labor and from other forms of organ donation.

In her book *The Sexual Contract*, Carole Pateman argues that the basic principles of surrogacy agreements erase "any intrinsic relation between the female owner, her body and reproductive capacities."<sup>77</sup> The surrogate mother's "emotional, physical, and sexual experiences," and her "understanding of [herself] as [a] woman," are alienated from her when her pregnancy is reduced to the mere provision of a salable service,

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74. Mary Lyndon Shanley, "Surrogate Mothering" and *Women's Freedom: A Critique of Contracts for Human Reproduction*, 18(3) SIGNS 618, 626 (1993) (quoting IRIS MARION YOUNG, *Pregnant Embodiment: Subjectivity and Alienation*, in 'THROWING LIKE A GIRL' AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 160 (1990)).

75. IRIS MARION YOUNG, *Pregnant Embodiment: Subjectivity and Alienation*, in 'THROWING LIKE A GIRL' AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 167 (1990).

76. Shanley, *supra* note 74, at 627.

77. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 216 (1988).

indistinguishable from any other paid job.<sup>78</sup> Other forms of organ donation are seen as market inalienable because their potential to alienate oneself from one's body is too great for them to be ethically purchasable. Yet surrogate pregnancy entails not only much more intense labor than other forms of organ donation, but also much more profound self-alienation—including erasure of deep emotions, bonds, and self-perceptions—is still considered a commodity that is morally acceptable to pay for.

At the first press conference of the National Coalition Against Surrogacy in 1987, speaker Gena Corea asked, “As a society, do we want to industrialize reproduction? Is absolutely everything grist for the capitalist mill? Are there any limits to what can be bought and sold?”<sup>79</sup> Corea argued that the permissibility of commercial surrogacy, which she described as creating an underclass of women exploited for their reproductive labor, would both unethically alienate women from such reproduction and severely damage the self-regard of young girls.<sup>80</sup> In her article *Personalizing Personalty: Toward a Property Right in Human Bodies*, Bray argues that “[p]eople selling body parts not only would lose a part of themselves, but might begin to view themselves solely as a means to someone else's physical cure, instead of as an end in themselves.”<sup>81</sup> The perception Bray describes has the potential, as Corea suggests, to extend to women and girls as a class through the permissibility of commercial surrogacy—boiling women's reproductive capacity down to a salable aid to others, rather than an invaluable portion of a woman's self that she could choose to use or not use as she saw fit, without the potential to be financially coerced into alienating it from herself out of need.

#### B. DOMESTIC EXPLOITATION OF BLACK WOMEN THROUGH ALIENATION OF REPRODUCTIVE LABOR

Alienation of reproductive labor stands to potentially harm the self-regard and self-perception of any woman who enters into a paid surrogacy agreement. However, women of color, particularly Black women, are in a unique position to be additionally harmed by this alienation, both as a result of the racism they already endure and the racism they stand to face while working as surrogates for white parents.

Khiara M. Bridges wrote about the potential for the deterioration of Black women's self-regard as a result of reproductive exploitation in her student law review note, *On the Commodification of the Black Female*

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78. Shanley, *supra* note 74, at 627.

79. Gena Corea, *Surrogate Mothers*, C-SPAN (Aug. 31, 1987), <https://www.c-span.org/video/?57586-1/surrogate-mothers> (last visited Apr. 4, 2022).

80. *Id.* It should be noted that Corea's exact terminology in this quote referenced “a class of breeder women,” phrasing which the author finds offensive and ultimately disagrees with. While the author obviously sexual and reproductive exploitation indefensible, no level of exploitation could reduce women to the animal class of breeding stock.

81. Bray, *supra* note 5, at 243.

*Body: The Critical Implications of the Alienability of Fetal Tissue.* Bridges argues that “the Black woman exists in a unique space within the social consciousness that makes her more prone to victimization by a market,” in body parts, and that “the sale of the body has the potential to exploit the Black woman and further damage her self-regard.”<sup>82</sup> She posits that Black women are uniquely vulnerable to the kind of deep self-alienation caused by reproductive exploitation not only because of their higher likelihood of poverty, but because of the historical and ongoing devaluation of the Black woman in the American consciousness:

[T]he Black woman, historically and currently, has been conceptualized as outside the realm of worth: She is a ‘mammy,’ a ‘Jezebel,’ a ‘Sapphire.’ But she is never a *woman* meriting society’s respect for her bodily integrity. Within this societal framework, the Black woman’s subjugation by a market in fetal tissue would be understood as normal, necessary, or nonexistent.<sup>83</sup>

Bridges goes on to address the crucial racial dynamic of the practice of women of color birthing white babies, which is extremely common in the contemporary surrogacy industry.<sup>84</sup> Intended parents in commercial surrogacy contracts are overwhelmingly middle-class white couples; therefore, traditional surrogates, who are the biological mothers of the children they bear, are more likely to be white.<sup>85</sup> As discussed in Part I, traditional surrogates are the women most likely to retain forms of parental rights over their children and be allowed to change their minds about surrogacy agreements. The bonds with the children they bear are more likely to be met with respect, or at least sympathy, in a courtroom. Gestational surrogates, however, may be women of any race, as the children they carry are biologically unrelated to them. Gestational surrogates in commercial agreements are therefore more likely than traditional surrogates to be women of color.<sup>86</sup> Bridges points to the very different decisions in *Matter of Baby M*, which centered on the maternal rights of white traditional surrogate Whitehead, and *Johnson v. Calvert*, in which the California Supreme Court enforced a gestational surrogacy contract

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82. Khiara M. Bridges, Note, *On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue*, 102 COLUM. L. REV. 123, 124–25 (2002).

83. *Id.* at 136–37.

84. Quantitative statistics on virtually any aspect of surrogacy beyond the number of children born via surrogate each year are ill-kept and difficult to source reliably. However, see generally Laura Harrison, *BROWN BODIES, WHITE BABIES: THE POLITICS OF CROSS-RACIAL SURROGACY* (2016), which thoroughly explores the practice of cross-racial surrogacy and discusses the frequency with which women of color act as gestational surrogates for white women, and vice versa the infrequency with which white women act as gestational surrogates for women of color.

85. Bridges, *supra* note 82, at 148.

86. *Id.*

denying legal parental rights to the Black surrogate mother, Anna Johnson, of a mixed-race white and southeast Asian child.<sup>87</sup>

Like Whitehead, Johnson felt that she had bonded with the child during her pregnancy and indicated that she would refuse to give him over to his intended parents.<sup>88</sup> Anita L. Allen writes in her article *The Black Surrogate Mother* that “[t]he race issue, Anna Johnson’s race . . . made [trial court] Judge Parslow’s ultimate decision predictable . . . I suspect that few regard Black women as the appropriate legal mothers of children who are not at least part Black.”<sup>89</sup> Indeed, Judge Parslow went so far as to intimate that Johnson’s statements regarding the level of maternal bonding she felt to the unborn child were insincere, and that her actions in attempting to withhold him from his intended parents and her subsequent lawsuit against them were acts of deliberate, dishonest opportunism.<sup>90</sup> The disparate standards established by these cases based on the surrogate mother’s genetic relation to the child necessarily also creates disparate racial standards for surrogate mothers. A Black surrogate mother is not only more likely than a white one to be denied legal parentage of the child she bears, but additionally more likely to have her motives for wishing to keep the child called into question.<sup>91</sup> “As an ironic consequence,” Allen concludes in her article, “Black gestators could be the safest surrogate mothers for white women who want white children.”<sup>92</sup>

Another issue concerning the exploitation of women of color as gestational surrogates to white parents is the level of control intended parents may exercise over the behavior of a gestational surrogate during pregnancy, as opposed to that of a traditional surrogate. In her article *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, Nicole Miller Healy argues that because a gestational surrogate is not genetically related to the child she carries, her race is generally of little import to intended parents.<sup>93</sup> However, her willingness to comply with behavioral demands set by the intended parents, such as cessation of smoking, engagement in certain forms of exercise, or even refusal of pain medication during birth, may be a key factor.<sup>94</sup> Healy writes that if “willingness to conform her behavior during pregnancy” is what intended parents look for in a gestational surrogate, “a woman of any race or class who is financially desperate may be particularly compliant.”<sup>95</sup> Because of

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87. *Id.* (citing *Johnson v. Calvert*, 851 P.2d 776 (1993)).

88. Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 21 (1991).

89. *Id.* at 23.

90. *Id.* at 26.

91. Bridges, *supra* note 82, at 148–49.

92. Allen, *supra* note 88, at 31.

93. Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN’S L.J. 89, 103 (1991).

94. *Id.*

95. *Id.*

high rates of poverty among women of color, Healy writes that there is a high likelihood that they constitute “the most desperate” potential surrogate mothers.<sup>96</sup> Therefore, for the same reasons women of color are more likely to be the subjects of financially exploitative gestational surrogacy agreements, they are more likely to be subject to high-control behavioral requirements from intended parents during pregnancy.<sup>97</sup>

In a society built on anti-Black racism, the vulnerability of Black women in particular to exploitation of this type has troubling implications. Many legal articles have raised the long history in the United States of Black women’s use, whether through enslavement or employment, as wet nurses, governesses, and other such labor roles of motherhood and child-rearing, to white women and their children. In her article *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, April L. Cherry writes:

Although Black women could never be righteous mothers to their own children, they could be used to mother others, as long as those mothering relationships were constrained or supervised by Whites. Under this conception of Black womanhood, Black women could be called on to care for the children of “real” women as servants, wet nurses, and the like . . . [T]his phenomenon created the “second part of the stereotype of black women as mothers . . . as servants caring for (white) children” under the strict moral supervision of White women.<sup>98</sup>

As one Black wet nurse described her work to the New York newspaper *The Independent* in 1912:

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96. *Id.* See also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 276–77 (1997) (discussing the ways in which economic pressures on poor Black women force them into demeaning, high-labor occupations in which white women would not consent to work).

97. See Teresa Donaldson, *Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behavior During Pregnancy*, 23 WM. & MARY J. WOMEN & L. 367, 386–87 (2017). While Donaldson here puts forth an argument that diametrically opposes that espoused in this note, she touches on the issue of what types of behavioral requirements intended parents may put forth when contracting with surrogate mothers (i.e., vegetarian intended parents requiring that a surrogate mother abstain from eating meat). The question of whether these contractual measures are constitutional is one that has not been fully addressed, and one that is beyond the scope of this note. However, Donaldson includes example statutory language from Illinois’ Gestational Surrogate Act, which presumes commercial surrogacy agreements to be enforceable “even though” they may include clauses requiring the surrogate mother’s abstention from “any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child.” *Id.* (citing 750 ILL. COMP. STAT. 47/15 (2004)).

98. April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 110 (2001) (quoting Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 153, 171 (Joyce Trebilcot ed., 1983)).

I not only have to nurse a little white child . . . I wash and dress the baby two or three times each day; I give it its meals, mainly from a bottle; I have to put it to bed each night; and, in addition, I have to get up and attend to its every call between midnight and morning . . . I see my own children only when they happen to see me out on the streets when I am with the children . . . You might as well say that I'm on duty all the time—from sunrise to sunrise, every day in the week.<sup>99</sup>

This troubled history further problematizes the practice of Black women performing reproductive labor in the service of white intended parents. Indeed, in the lower court's decision in *Johnson*, Judge Parslow explicitly referred to the relationship between Johnson and the white child she carried as a foster care or “wet-nursing” relationship.<sup>100</sup> This rhetoric places Johnson as far away from the child she carried as a hired employee. The Black woman is erased from the picture; her role in literally carrying the child of a white (or white and non-Black, as in *Johnson*) couple is rendered invisible in the same way other forms of child-rearing labor performed by Black women on behalf of white mothers have been erased throughout history.

### C. TRANSNATIONAL SURROGACY AND REPRODUCTIVE EXPLOITATION OF WOMEN ABROAD

Commercial surrogacy, by its nature, creates distance between the surrogate mother and the child she carries. However, the most distant variety of surrogacy agreement is transnational surrogacy—effectively the outsourcing of reproductive labor to a country in which it is more affordable. Transnational surrogacy occurs in many countries, but this section will focus primarily on the experiences of surrogate mothers in India, as the practices of the surrogacy industry in India are well-documented and have been written about at length by Indian feminists and legal scholars.

India banned commercial surrogacy in 2018 due to concerns about the exploitation of poor Indian women by intended parents from wealthier countries.<sup>101</sup> Prior to 2018, India was considered the top destination in the world for transnational surrogacy agreements, with approximately 12,000 babies born through transnational surrogacy each year.<sup>102</sup> Under the

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99. *More Slavery at the South: By a Negro Nurse*, INDEPENDENT 196–97, (Jan. 25, 1912) [available at: <https://docsouth.unc.edu/fpn/negnurse/negnurse.html> (last visited Apr. 4, 2022)].

100. Allen, *supra* note 88, at 24 (citing Reporter's Transcript, *Johnson v. Calvert*, No. X633190 consolidated with A.D. 57638) (Cal. Sup. Ct. Oct. 22, 1990)).

101. Jagadish Rao Padubidri & JSRG Saran, *New Laws Ban Commercial Surrogacy in India*, 88 MEDICO-L. J. 148, 149 (2020).

102. Virginie Rozée et al., *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, 20 BMC WOMEN'S HEALTH 234, 234 (2020).

country's new law, surrogacy can only be performed "by a close Indian relative of a married Indian couple, without any financial compensation."<sup>103</sup> Thailand, Cambodia, and Nepal are all also former popular transnational surrogacy destinations that have banned transnational surrogacy in the wake of specific scandals or ongoing exploitation concerns.<sup>104</sup> Countries in which commercial transnational surrogacy is popular, or on the rise, in the wake of these major legal bans include Greece, Russia, Ukraine, Nigeria, Georgia, and Kenya.<sup>105</sup>

The practice of commercial surrogacy in India pre-2018 was an ill-regulated, highly stigmatized form of work for poor and marginalized women. In her article *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, Amrita Pande describes the practice as a "systemic and near-total domination of surrogates' lives," a manipulative and predatory means commonly used to bring desperate women into the industry.<sup>106</sup> Pande interviewed forty-two surrogates in the state of Gujarat from 2006 to 2008.<sup>107</sup> Of those women, thirty-four reported income below or around the poverty line—roughly eighty-one percent of the women surveyed.<sup>108</sup> For most of the participating women, the money earned from a single commercial surrogacy agreement—roughly \$3,000—was "equivalent to four or five years of family income."<sup>109</sup> Sixty-four percent of participating women were surrogates for international and "non-resident Indian" couples located outside of India.<sup>110</sup> Meanwhile, transnational surrogacy clients recouped "substantial cost savings" from hiring surrogates in India rather than in other countries.<sup>111</sup> Pande reports in another article, "*At Least I Am Not Sleeping with Anyone*": *Resisting the Stigma of Commercial Surrogacy in India*, based on the same studies, that surrogacy agreements that would range in price from \$30,000 to \$70,000 in Canada or the United States could be completed for under \$20,000 total in Gujarat.<sup>112</sup>

Most commercial surrogates were recruited through word of mouth, reflecting the intense stigma and secretive nature of the practice.<sup>113</sup> This

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103. *Id.*

104. *Surrogacy in Other Countries*, GROWING FAMILIES (2020), <https://www.growingfamilies.org/surrogacy-in-other-countries/> (last visited Apr. 4, 2022).

105. *See Surrogacy Guide/Countries Allowing Surrogacy*, GROWING FAMILIES (2020), <https://www.growingfamilies.org/surrogacy-by-country/> (last visited Apr. 4, 2022).

106. Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. WOMEN CULTURE & SOC'Y 969, 970–71 (2010).

107. *Id.* at 974.

108. *Id.*

109. Amrita Pande, "*At Least I Am Not Sleeping with Anyone*": *Resisting the Stigma of Commercial Surrogacy in India*, 36 FEMINIST STUDIES 292, 297 (2010).

110. *See Pande, supra* note 106, at 974–75.

111. Pande, *supra* note 109, at 295.

112. *Id.*

113. Pande, *supra* note 106, at 975.

recruitment could include high-pressure tactics designed to target women who were financially desperate, coming from people who knew the women well and lived alongside them in their villages. Pande reports that:

Recruitment tactics often tapped into women's anxiety about being bad mothers—mothers who were unable to provide for their children or, especially, mothers who could not get their daughters married on time . . . Regina is a forty-two-year-old surrogate and one of the oldest at the clinic. She has a teenage daughter with severe mental challenges, and her story exemplifies how fear of being a bad mother affects the decision to become a surrogate: “I came to the clinic when my daughter was ill. The nurse is from my village, and she has seen the state of my daughter. She knows I am old, but she told me if I want to be a surrogate, she would try to get me in. I was not agreeing in the beginning; I was too scared. But she said, ‘How else will you get that mad daughter of yours married?’”<sup>114</sup>

Other Indian surrogate mothers reported being convinced into surrogacy through lines of reasoning that emphasized the alienability of their wombs from their bodies. One woman interviewed by Kalindi Vora for her article *Potential, Risk, and Return in Transnational Indian Gestational Surrogacy* shared that she became involved in the surrogacy industry on the recommendation of a friend, who told her that her womb “is like an extra room in a house that I don't need and [that] can be rented out.”<sup>115</sup> This rhetoric was reiterated by the co-director of the clinic Vora studied, which taught would-be surrogates that the use of their womb in a surrogate context was equivalent to “letting someone else's child stay in your house for nine months.”<sup>116</sup> Vora states:

The narrative produced in the clinic positions the surrogate as someone who lacks a genetic relationship to the fetus and therefore is providing a service to the commissioning parents as the owner of a uterus that is a machine to be let out and whose production is to be professionally managed through hostelry, medical surveillance, and coaching her to be the right kind of subject.<sup>117</sup>

Both of these reports circle back to concerns raised in subsections A and B of this section: alienation of the surrogate mother from her body and exercise of high-control behavioral requirements over poor women of color, specifically, by intended parents, who are typically wealthy and

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114. *Id.* at 975–76.

115. Kalindi Vora, *Potential, Risk, and Return in Transnational Indian Gestational Surrogacy*, 54 *CURRENT ANTHROPOLOGY* (Supplement 7) S97, S100 (2013).

116. *Id.*

117. *Id.* at S101.

white. Indeed, Pande posits in *Manufacturing a Perfect Mother-Worker* that the Indian transnational surrogate pre-2018 exemplified “the perfect surrogate” to the wealthy first-world couple: “cheap, docile, selfless, and nurturing,” and made that way through a lengthy disciplinary process conducted by clinics to create “a subject similar to a trained factory worker . . . who is simultaneously a virtuous mother.”<sup>118</sup> In her article *Transnational Surrogacy and Objectification of Gestational Mothers*, Sheela Saravanan argues that these circumstances were deliberately engineered by clinics, which selected surrogate mothers in part based on their perceived “submissiveness to the demands of medical practitioners and intended parents.”<sup>119</sup> She states:

Aggressive or assertive women are rejected [by surrogacy clinics] on medical pretexts. After they enter into an agreement, many of these women are expected to stay in surrogate homes away from their own children and have very little say in any of the decisions, including those pertaining to their own bodies. The monetary fee they receive is considered adequate compensation for all these factors.<sup>120</sup>

As Saravanan describes, transnational surrogates are commonly subject to demands that surpass those inflicted on surrogate mothers in the United States.<sup>121</sup> In India, the operation of “surrogate hostels” was a commonplace practice to which would-be surrogate mothers were expected to capitulate.<sup>122</sup> Saravanan reports that in Anand, the same city in which Pande’s studies were conducted, one clinic made it mandatory for surrogates in its employ to live in surrogate homes away from their families for almost an entire year, “including the period of embryo transfer, pregnancy, and post-natal care.”<sup>123</sup> She describes these surrogate homes as overcrowded, dirty residences in which surrogate mothers were subject to a number of intense rules concerning what they were allowed to do, who they were allowed to see, and so on:

One mother could not visit home even when a close relative had passed away . . . [C]hildren were allowed to visit their mothers only on Sundays; however, they cannot sit on her bed and can see their mother only from a distance. They are told that their mother is sick and if they go near her, they could get infected . . . [W]omen in surrogate homes were hardly seen walking around; they were

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118. Pande, *supra* note 106, at 976.

119. Sheela Saravanan, *Transnational Surrogacy and Objectification of Gestational Mothers*, 45 *ECON. & POL. WKLY.* 26, 26 (Apr. 17, 2010).

120. *Id.*

121. *Id.* at 27.

122. *Id.*

123. *Id.*

typically always lying on the bed. The cesarean rate is very high . . . Surrogate homes are also overcrowded resulting in water and hygiene inadequacies. Most mothers in the early stages suffer from vomiting and bleeding thus causing serious hygiene problems without adequate water in the surrogate homes. The surrogate home above the Akanksha clinic [in Anand] had used syringes thrown near the windowpanes and spit stains.<sup>124</sup>

Pande describes a similar surrogate residence in Anand as “[a] long room . . . lined with nine iron cots with barely enough space to walk between,” with a surrogate occupying each cot.<sup>125</sup> Her analysis in *Manufacturing a Perfect Mother-Worker* applies the Foucauldian concept of enclosure to the surrogacy hostel, stating that the dormitory environment of surrogate housing served to provide clinic operators and medical providers with the ability to observe and control all aspects of surrogates’ lives for the duration of their residence there.<sup>126</sup> In housing within the clinic itself, Pande states that women “have nothing to do the whole day except pace back and forth on the same floor (they are not allowed to climb the stairs and have to wait for the nurses to operate the elevator) . . . and wait for the next injection.”<sup>127</sup> They were kept on strict diets meant to promote healthy pregnancy and adhered to schedules based on when meals were served and when doctors made rounds.<sup>128</sup> Leaving the hostel was treated as an incentive with which to reward labor performance; so long as the mother was sufficiently obedient and the fetus looked healthy, a surrogate might be permitted to go home to visit family for a day or two.<sup>129</sup> Surrogates living in hostels farther from the clinic had more freedoms and amenities, but even leisure activities were designed to promote better reproductive labor in future surrogacy agreements—for example, English lessons, so surrogates could speak to international clients, and computer classes to facilitate communication with the same.<sup>130</sup> In both residences, surrogate mothers were surveilled and controlled in order to produce both the most favorable outcome of the pregnancy and the most desirable possible reproductive laborer.<sup>131</sup>

The practice of commercial transnational surrogacy in India relied on conceptions of women in developing nations as commodities purchasable by customers in the industrialized world. This dynamic is reflected in many

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124. *Id.* at 27–28.

125. Pande, *supra* note 109, at 292.

126. Pande, *supra* note 106, at 981–82.

127. *Id.* at 981.

128. *Id.* at 982.

129. *Id.*

130. *Id.* at 983.

131. *Id.* at 984.

parts of American life, and life in the Western world as a whole. Arlie Hochschild writes in her article, *Childbirth at the Global Crossroads*:

Person to person, family to family, the First World is linked to the Third World through the food we eat, the clothes we wear, and the care we receive. That Filipina nanny who cares for an American child leaves her own children in the care of her mother and another nanny. In turn, that nanny leaves her younger children in the care of an eldest daughter. First World genetic parents pay a Third World woman to carry their embryo . . . The worlds of rich and poor are invisibly bound through chains of care.<sup>132</sup>

This commodification is reflected in the criteria frequently sought by intended parents in Indian gestational surrogates, delineated in spite of the fact that gestational surrogates were biologically unrelated to the children they carried. Surrogates were frequently selected based on traits such as “religion, caste, skin color, and attractiveness.”<sup>133</sup> An article from the Indian magazine *Outlook* stated that “[f]air skin, [l]ighter hair, [b]lue/green or light eyes, and [h]igh I.Q. levels” specifically were in high demand among intended parents utilizing the services of surrogacy clinics.<sup>134</sup> Another source, the Indian “citizen journalism” website *Merinews*, stated that “childless couples are also interested in [Northern Indian] women . . . because ‘they are healthy and whitish in color. Foreign couples are eager to have a white child.’”<sup>135</sup> One clinician in Anand admitted that “[a] fair-skinned, educated middle-class Brahman [woman belonging to the highest caste of Hindu society] who speaks English will fetch that much more” financially from a commercial surrogacy agreement than a woman with darker skin, less education, or lower caste status.<sup>136</sup>

It is worth underscoring that a gestational surrogate is not genetically related to the child she carries, and her race and appearance have no bearing on what the child will look like. In her article *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, Alison Bailey

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132. Arlie Hochschild, *Childbirth at the Global Crossroads*, AM. PROSPECT: IDEAS, POL. & POWER (Sept. 19, 2009), <https://prospect.org/features/childbirth-global-crossroads/> (last visited Apr. 4, 2022).

133. Alison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26 HYPATIA J. FEMINIST PHIL. 715, 720 (2011).

134. *Id.* (quoting Comments and Suggestions on the Assisted Reproductive Technology (Regulation) Bill and Rules (draft), to the Ministry of Health and Family Welfare and ICMR, Sama (Dec. 4, 2008)).

135. Bailey, *supra* note 133 (quoting Sujit Roy, *Surrogate Motherhood: Should it Be Allowed?*, MERINEWS 6 (June 30, 2008), <https://web.archive.org/web/20100107050532/http://merinews.com/article/surrogate-motherhood-should-it-be-allowed/136765.shtml> (last visited Apr. 4, 2022)).

136. Bailey, *supra* note 133. (quoting Sarmishta Subramanian, *Wombs for Rent*, MACLEAN'S 9 (July 2, 2007), <https://archive.macleans.ca/article/2007/7/2/wombs-for-rent> (last visited Apr. 4, 2022)).

draws the same conclusion about Indian gestational surrogacy that Cherry and Allen came to in their work on Black gestational surrogacy in the United States, referenced in subsection B of this Part:<sup>137</sup>

[W]orries about skin color are most likely code for deeper worries about the surrogate's moral character. It appears that the racial markers that have historically marked light-skinned women as good *mothers* and dark-skinned women [as] bad mothers have been extended to mark "good" and "bad" *wombs*.<sup>138</sup>

The commodification of female reproductive labor, then, encourages intended parents in industrialized countries to view surrogate mothers abroad as a grab-bag of physical characteristics to be chosen from; within that context, racist ideas of who is a "good mother" are reinforced in reference to women who are not related to the children they carry. The stereotype of Indian women as docile, motherly, and submissive is reinforced by the transnational surrogacy industry, as are racial denotations of light-skinned women as virtuous mothers and dark-skinned women as unfit parents.

Finally, the selection of a specific surrogate mother abroad came with the added benefit introduced at the beginning of this subsection—the physical distance inherent to the arrangement. Not only could a wealthy Western couple hire a gestational carrier to match their racial, educational, and religious preferences, but they could hire a woman specifically because she was an ocean away and might lack the resources to connect with them in the future.<sup>139</sup> With that, it would be easier for the Western couple to wash one's hands from a gestational carrier who is more compliant, less expensive, and harder to reach in the future than a gestational surrogate in the United States.

While the practice of transnational surrogacy in India has come to an end, transnational surrogacy in nations that still allow it perpetuates the same commodification. In Ukraine, for example, surrogacy is legal on a federal level and effectively unregulated, with demand for transnational surrogates surging following the banning of commercial surrogacy in India, Thailand, and Nepal.<sup>140</sup> Ukraine is now estimated to represent over a

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137. Compare Bailey, *supra* note 133 at 715, with Allen, *supra* note 88, and Cherry, *supra* note 98.

138. Bailey, *supra* note 133.

139. See Vora, *supra* note 115, at S102.

140. Madeline Roache, *Ukraine's 'Baby Factories': The Human Cost of Surrogacy*, AL JAZEERA (Sept. 13, 2018), <https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy> (last visited Apr. 4, 2022); Milana Nikolova, *Commercial Surrogacy Presents a Moral Dilemma for Ukraine*, EMERGING EUR.: NEWS & ANALYSIS (June 23, 2021), <https://emerging-europe.com/news/commercial-surrogacy-presents-a-moral-dilemma-for-ukraines-baby-factories/> (last visited Apr. 4, 2022).

quarter of the global surrogacy market.<sup>141</sup> One gestational surrogate, Alina, stated that she and other surrogates “were treated like cattle and mocked by doctors” during her employment as a surrogate for BioTexCom, Ukraine’s largest surrogacy agency, and placed in small housing arrangements that lacked hot water and forced women to share beds.<sup>142</sup> BioTexCom’s owner, Albert Tochilovsky, states that surrogacy is a “highly paid job” for “women from small villages without husbands, [otherwise] exploited for 2,000 hryvnia [roughly \$68 USD] a month,” depicting the dire financial straits that push many Ukrainian surrogates toward the industry.<sup>143</sup> Ukrainian women are commonly preferred as surrogates and egg donors in today’s market because they are overwhelmingly white, reaffirming the commonly-held prejudicial ideas of which kinds of women are fit for motherhood that Bailey noted in her article.<sup>144</sup> In the vacuum left by the Indian commercial surrogacy industry, Ukraine is poised to step in, with many of the same issues that led to India’s ban of the practice.

## V. COUNTERARGUMENTS

Despite concerns about exploitation, there are many proponents of commercial surrogacy who provide feminist and pro-LGBT rationale for their support of the practice. Neither school of thought sufficiently addresses the issue of commercial surrogacy on the basis of material axes of oppression, instead providing “feel-good,” allegedly empowerment-based reasons commercial surrogacy should be permitted. This Part will address both arguments and discuss why their analyses of the issue does not adequately address the commodification and exploitation inherent in the commercial surrogacy industry.

### A. “MY BODY, MY CHOICE” IN FINANCIALLY COERCIVE CIRCUMSTANCES

“My body, my choice” has become perhaps the definitive refrain of the feminist movement for bodily autonomy. The slogan applies near-universally, from abortion rights, to rights over reproductive healthcare (i.e., the right to a hysterectomy or tubal ligation without a sign-off from one’s husband), to the fight to end rape.<sup>145</sup> However, this note argues that “my

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141. Nikolova, *supra* note 140.

142. Roache, *supra* note 140.

143. Nikolova, *supra* note 140; For currency conversion, see *2000 UAH to USD—Convert Ukrainian Hryvni [sic] to US Dollars*, XE CURRENCY CONVERTER, <https://www.xe.com/currencyconverter/convert/?Amount=2000&From=UAH&To=USD> (last visited Apr. 4, 2022).

144. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, 416 (2012).

145. See Suzannah Weiss, *5 Things That Are #MyBodyMyChoice*, BUSTLE (Sept. 25, 2015), <https://www.bustle.com/articles/113094-5-things-that-are-mybodymychoice-because-respecting-them-is-essential-for-creating-a-culture-of-consent> (last visited Apr. 4,

body, my choice” should not apply to commercial surrogacy—a situation in which the “choice” in question is commonly one a woman is coerced into due to drastic financial need—in the same way that the slogan would not apply to the sale of an organ for profit.

In the case of commercial surrogacy, the rhetoric of “choice” reflects a broader trend in mainstream feminist thought toward “choice” as an inherently feminist concept—the idea that the availability of a decision to women is feminist simply because, whatever the decision may be, the woman has chosen to make it.<sup>146</sup> Natalie Fixmer-Oraiz argues in her article *Speaking of Solidarity: Transnational Surrogacy and the Rhetorics of Reproductive (In)Justice*, that “choice feminism collapses our capacity to both perceive and interrogate . . . ‘reproductive stratification,’ or ‘the power relations by which some categories of people are empowered to nurture and reproduce, while others are disempowered.’”<sup>147</sup> Fixmer-Oraiz writes:

In lieu of settling for (or, worse, uncritically celebrating) surrogacy as the best choice among a constrained few, rhetorical efforts that privilege an ethic of reproductive justice urge us to reveal commercial surrogacy’s exploits, to consider what it would take to transform current conditions (of global capital, labor, etc.) toward women’s health and dignity, and to begin building transnational alliances in order to reach those goals.<sup>148</sup>

In short, a financially coercive choice does not become a feminist opportunity for empowerment simply because it is a choice available to women. Suggesting otherwise ignores the many factors that open the targeted class of women to such financial coercion in the first place, including coercion by other women. It is not a feminist choice for a wealthy white woman in the industrialized world to hire a poor woman of color in her home country, or a poor woman living in a developing country, to perform reproductive labor on her behalf.

In her article, Fixmer-Oraiz describes the commonly touted concept of “global sisterhood” as a reason the commercial surrogacy industry is supposedly an empowering employment opportunity for women in the developing world.<sup>149</sup> International surrogacy agreements are often built on

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2022); Lily Patterson, *The Evolution of “My Body, My Choice,”* VOICES OF GEN-Z (July 27, 2020), <https://www.voicesofgenz.com/post-1/the-evolution-of-my-body-my-choice> (last visited Apr. 4, 2022).

146. See Natalie Fixmer-Oraiz, *Speaking of Solidarity: Transnational Surrogacy and the Rhetorics of Reproductive (In)Justice*, 34 FRONTIERS: J. WOMEN’S STUDIES 126, 148 (2013).

147. *Id.* at 148 (quoting Shellee Colen, ‘Like a Mother to Them’: *Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, in CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION 78, 97–98 (Faye D. Ginsburg & Rayna Rapp eds., 1995)).

148. Fixmer-Oraiz, *supra* note 146, at 149.

149. *Id.* at 135.

the idea of wealthy women in the industrialized world joining hands in friendship to financially support poor women in other countries, provided, of course, that those women endure nine months of backbreaking bodily labor and surrender the resulting child.<sup>150</sup> This concept has been discussed everywhere from Oprah to Marie Claire magazines, suggesting not only that the act of surrogacy is an act of inherent altruism, but that the act of seeking a poor woman in the developing world to “uplift” through commercial surrogacy is altruistic in nature.<sup>151</sup> In the context of transnational surrogacy, this pretext is not only insulting but takes on a disturbing colonialist tone, depicting the surrogate mother in the developing world as effectively completely helpless, devoid of agency, waiting for a wealthy Western woman to step in on her behalf and “save” her.<sup>152</sup>

Romantic dismissals of reproductive stratification and hierarchy enable westerners to envision commercial surrogacy as a form of philanthropy, a discourse eerily reminiscent of a kind of “western benevolence” critical to colonial projects. In an interview with CNN Adrienne Arieff [a mother of twins carried by a surrogate from Anand] explains: “If my money was going to benefit an Indian woman financially for a service she willingly provided, I preferred that it be a poor woman who really needed help because the money that a surrogate earns in India is, to be blunt, life-changing . . . I ended up feeling like her big sister. I wanted her to be comfortable, happy and safe. I just wanted to take care of her . . . Maybe that’s friendship but it felt like sisterhood.”<sup>153</sup>

Despite this rosy characterization of the surrogacy agreement she commissioned, Arieff acknowledges the business aspect of the transaction later in the same interview, albeit with some reluctance. She states:

The whole “womb for rent,” that’s where the medical contract and the business transaction side of things comes in . . . When I first met her, it felt like a business transaction. She needed some money for her family, it was the equivalent of 10 to 15 years of salary, and I had fertility challenges, so it was win-win, but initially it felt like

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150. *Id.*

151. *Id.* at 138–40, 145. See Lisa Ling, *Journey to Parenthood*, OPRAH.COM (Jan. 1, 2006), <https://www.oprah.com/world/wombs-for-rent> (last visited Apr. 4, 2022); Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE (July 28, 2007), <https://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/> (last visited Apr. 4, 2022) (both discussing the Akanksha clinic in Anand).

152. Fixmer-Oraiz, *supra* note 146, at 145.

153. *Id.* (quoting Emanuella Grinberg, *The Highs and Lows of Foreign Surrogacy*, CNN WIRE (Mar. 29, 2012), <https://www.cnn.com/2012/03/29/living/sacred-thread-foreign-surrogacy/index.html> (last visited Apr. 4, 2022)).

more business transaction. It's surrogacy, it's not ideal but we came up with a business agreement for both parties.<sup>154</sup>

This is the gist of the commercial surrogacy agreement; as good as it may feel to the intended parent to feel as though she is performing a feminist act through her "sisterhood" with a woman in the developing world, the relationship exists solely because the intended parent is in possession of an amount of money that is disposable to her and life-changing to the surrogate mother. Again, Arieff states that her payment to her gestational surrogate, Vaina, was equivalent to *ten to fifteen years'* worth of her typical salary.<sup>155</sup> With this kind of incentive on the table, who in Vaina's position is well-placed to refuse?

Indeed, though the financially coercive element of surrogacy applies across the board, specifically Indian surrogate mothers frequently referred to commercial surrogacy agreements in language that explicitly refutes the concept of choice: *majboori*, an Urdu word referring to necessity or compulsion.<sup>156</sup> One surrogate mother quoted in Pande's research, Salma, stated:

Who would choose to do this? I have had a lifetime worth of injections pumped into me. Some big ones in my hips hurt so much. In the beginning I had about twenty to twenty-five pills almost every day. I feel bloated all the time. But I know I have to do it for my children's future. This is not a choice; this is *majboori*. When we heard of surrogacy, we didn't have any clothes to wear after the rains—just one pair that used to get wet and our roof had fallen down. What were we to do?<sup>157</sup>

A woman facing this type of financial desperation, trying to feed a family and, in Salma's case, literally keep a roof over their heads, cannot be said to be "choosing" an exploitative line of work that pays significantly higher rates than any other job available to her, offering the equivalent of several years of her family's typical collective income at once. There is no choice in that situation. Salma herself asked, "If your family is starving what will you do with respect? Prestige won't fill an empty stomach."<sup>158</sup>

A surrogate mother in Ukraine, Maria, shared similar feelings about the "choice" to become a surrogate: Maria had originally planned to become

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154. Emanuella Grinberg, *The Highs and Lows of Foreign Surrogacy*, CNN WIRE (Mar. 29, 2012), <https://www.cnn.com/2012/03/29/living/sacred-thread-foreign-surrogacy/index.html> (last visited Apr. 4, 2022).

155. *Id.*

156. Pande, *supra* note 106, at 988.

157. Pande, *supra* note 109, at 301–02.

158. *Id.* at 302.

an egg donor, which would have paid roughly 700 euros (\$762 USD).<sup>159</sup> However, “15,000 euros in nine months,” or roughly \$17,000 USD, for participation in a commercial surrogacy agreement “was far more tempting.”<sup>160</sup> Maria needed the money, she stated reticently, to “solve a lot of private problems.”<sup>161</sup> Even in the absence of the deepest destitution, such as that experienced by Salma,<sup>162</sup> money seemed to remain at the core of Maria’s agreement to become a surrogate mother. At eight months pregnant with a surrogate child, she asserted that the physical exhaustion was not the worst part of the pregnancy; rather, that before bodily pain or fatigue, she was “tired morally.”<sup>163</sup> The feeling she took away from the arrangement was not pride or empowerment, but exhaustion.

The argument that a financially coerced form of labor cannot be said to be “chosen,” especially in a feminist sense, commonly results in the counterargument that if surrogacy is financially coerced, what about other forms of difficult or dirty labor offered to people living in poverty? Why is surrogacy significantly more objectionable than, say, working long hours at an Amazon warehouse in an area with few other jobs, or as an under-the-table cleaning woman making a low wage for lengthy, taxing chores? The answer must first begin with a concurrence: such forms of labor are exploitative, and in situations in which laborers have few or no other choices to earn an income, they are financially coercive. But to determine why surrogacy is a particularly egregious form of exploitation, we must return to the “body” in “my body, my choice.”

As this note discusses at length in Parts II and III, the difference between reproductive labor and other forms of wage labor is that reproductive labor renders body parts alienable from the self, a practice that is otherwise recognized in American law as objectionable through laws prohibiting paid organ donation or sale. Organ donation can be an altruistic choice, and many people who feel called to do so engage in the practice in a way that is personally fulfilling; the same applies to surrogacy. However, the sale or lease of one’s body parts is not a choice that occurs in a context outside of social inequality, in which one group of people become vendors of the body and another group of people become buyers. In her essay *It’s*

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159. Christopher Bobyn, *Inside Ukraine’s Surrogacy Industry Where Australians Are Travelling to Have a Family*, ABC NEWS (Dec. 14, 2018), <https://www.abc.net.au/news/2018-12-15/inside-ukraines-surrogacy-industry/10614172> (last visited Apr. 4, 2022). For currency conversion, see *700 EUR to USD—Convert Euros to Dollars*, XE CURRENCY CONVERTER, <https://www.xe.com/currencyconverter/convert/?Amount=700&From=EUR&To=USD> (last visited Apr. 4, 2022).

160. *Id.*

161. *Id.*

162. See Pande, *supra* note 109, at 301–02.

163. Bobyn, *supra* note 159.

*My Body and I'll Do What I Like With It: Bodies as Objects and Property*, Anne Phillips writes:

Willing choice is, admittedly, a capacious category, and since most of us need some incentive to work, even at tasks we find relatively attractive, it could be said that no-one willingly chooses anything. But that would take us to the limit of what we understand by choice, in ways that threaten to deprive the concept of most of its utility. It is not delusional to think that a division of labour [sic] can be made compatible with equality. What is delusional is thinking that specialising [sic] in organ vending could be made compatible in this way. Markets in human organs rely on a systemic inequality between recipients and vendors that has the effect of denying our moral equality. The fact that it is the body that is up for sale matters, not because our identities are intimately bound up with all the parts of our bodies, but because we all have bodies. If some of us nonetheless become positioned as sellers and others as buyers, the only conceivable explanation lies in our inequality.<sup>164</sup>

For these reasons, the feminist narrative of “choice” cannot be said to apply to commercial surrogacy agreements, any more than it could be said to apply to the sale of a kidney. It fundamentally alienates the body from the self, turning the embodied individual into a collection of parts which may be hired or sold to the highest bidder. Commercial surrogacy may put money into women’s hands, but it does not empower them; rather, it is a “choice” into which many women are coerced by desperate need for money. “My body, my choice” does not apply to a situation in which the “choice” is between leasing the use of one’s organs in exchange for money over poverty. The financially coercive element of commercial surrogacy renders it not a true choice at all.

#### B. ERASURE OF REPRODUCTIVE LABOR IN LGBT SURROGACY AGREEMENTS

In recent years, the “right” of access to the surrogacy industry has been framed as an issue of LGBT rights, specifically the realization of the right to “fertility equality,” or the right to have a family of one’s own regardless of sexual orientation, gender identity, or biological capacity to have children.<sup>165</sup> This concept is often thought of as the natural successor to the LGBT fight for equal rights to adoption, and gay parents are often split into

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164. Anne Phillips, *It's My Body and I'll Do What I Like With It: Bodies as Objects and Property*, 39 POL. THEORY 724, 739 (2011).

165. David Kaufman, *The Fight for Fertility Equality*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html> (last visited Apr. 4, 2022).

two camps: “adoption parents” and “surrogacy parents.”<sup>166</sup> The cause of LGBT family rights is deeply significant, and laws surrounding the topic are tremendously complicated, with the obvious desire from a policy standpoint to maximize rights and freedoms for LGBT people. However, a “right” to the organs and reproductive labor of other people cannot exist under any circumstances, even in the name of enabling LGBT couples to have children biologically related to them.

LGBT intended parents are commonly single gay men or gay male couples, who cannot conceive biological children without the assistance of a woman.<sup>167</sup> Lesbians may also utilize the labor of a surrogate in the event of infertility, but this is less typical; less expensive and exploitative procedures, such as sperm donation and intrauterine insemination, are more common.<sup>168</sup> Some gay men view the high price of reliance on commercial surrogacy as “a penalty for not being straight.”<sup>169</sup> As sympathetic as this point of view may be, gay male commercial surrogacy agreements create the same exploitative circumstances as commercial surrogacy agreements commissioned by straight couples. The fact that a couple cannot have children together, or that a single cisgender man cannot have children on his own, does not automatically entitle either to access to another person’s womb to change that circumstance.

For gay men, couples are often uniquely positioned to benefit from the services of an altruistic surrogate mother, for example a relative or friend. It is not uncommon within LGBT communities for lesbians and gay men to reciprocally assist one another with reproduction; a gay man might donate sperm to a lesbian couple, or a lesbian might agree to carry a child for a gay couple.<sup>170</sup> Again, it is not this altruistic, unpaid surrogacy to which this note, nor many feminists critical of surrogacy, object. In an open letter to then-governor of New York, Andrew Cuomo, Gloria Steinem writes,

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166. See John Culhane, *For Gay Parents, Deciding Between Adoption and Surrogacy Raises Tough Moral Questions*, SLATE: OUTWARD (Mar. 23, 2017), <https://slate.com/human-interest/2017/03/for-gay-parents-deciding-between-adoption-and-surrogacy-raises-tough-moral-questions.html> (last visited Apr. 4, 2022).

167. Kaufman, *supra* note 165.

168. *Id.*

169. *Id.*

170. This assertion is based largely on the author’s anecdotal knowledge and experience within LGBT communities, and personal connections to gay men and lesbians who have engaged in reproductive assistance for each other. See e.g., *Lesbian Surrogate will Lead South Carolina Equality*, PROUD PARENTING (June 30, 2010), <https://www.proudparenting.com/2010/06/lesbian-surrogate-will-lead-south-carolina-equality/> (last visited Apr. 4, 2022); *Lesbian Lawmaker Surrogate for Gay Male Couple*, S. FLA. GAY NEWS (Jan. 11, 2010), <https://southfloridagaynews.com/National/utah-lesbian-surrogate.html> <https://southfloridagaynews.com/National/utah-lesbian-surrogate.html> (last visited Apr. 4, 2022) (providing an example of reproductive assistance in which Rep. Christine Johnson, a lesbian, carried a baby for gay male friends in an altruistic surrogacy arrangement).

The danger here is not the use of altruistic surrogacy to create a loving family, which is legal in New York now, but the state legalizing the commercial and profit-driven reproductive surrogacy industry. As has been seen here and in other countries, this harms and endangers women in the process, especially those who feel that they have few or no economic alternatives.<sup>171</sup>

It is also not to be assumed that the LGBT community as a whole is in consensus regarding the legalization of commercial surrogacy as a pro-LGBT issue. On the floor of the New York State Assembly, Assemblywoman Deborah Glick, the first openly gay member of the New York Legislature, stated that she was “not certain, considering the money involved, that this is an issue for the broader LGBT community . . . It is pregnancy for a fee, and I find that commodification of women troubling.”<sup>172</sup> In the case of gay male couples specifically, commercial surrogacy connects “the purchasing power of men . . . to the bodies of women,”<sup>173</sup> introducing an additionally gendered component to the already exploitative nature of commercial surrogacy agreements. Some gay men additionally make this connection; John Culhane states in his article, *For Gay Parents, Deciding Between Adoption and Surrogacy Raises Tough Moral Questions*, that:

[w]hen it comes to the gestational surrogate, there’s the additional issue of contributing to an industry that commodifies the body in an obvious way. The ethical issues multiply when the surrogate is from a developing country, often India, where women are paid much less for their services.<sup>174</sup>

The issue of LGBT family rights is an important one. However, the sexual orientation of intended parents does not change the circumstance of commercial surrogacy, which is fundamentally based in bodily alienation and financial coercion. The “fiscal injustice” that some believe gay men specifically face in terms of reproductive technology does not grant access to the womb and reproductive labor of another person.<sup>175</sup> Put simply, *no one* should be able to pay a woman in dire straits for the use of her womb. The struggle for equal LGBT family rights, while deeply significant and compelling, does not carve out an exception to that rule, nor does it permit

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171. Gloria Steinem, *Gloria Steinem Calls Upon New York Gov. Andrew Cuomo to Not Legalize Commercial Surrogacy*, STOP SURROGACY NOW, <https://www.stopsurrogacynow.com/gloria-steinem-calls-upon-new-york-gov-cuomo-to-not-legalize-commercial-surrogacy/> (last visited Apr. 4, 2022).

172. Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html> (last visited Apr. 4, 2022).

173. Kaufman, *supra* note 165.

174. Culhane, *supra* note 166.

175. See Kaufman, *supra* note 165.

a “tradeoff” of one form of struggle for another in the form of LGBT oppression versus class struggle.

## VI. CONCLUSION

This note demonstrates the myriad issues of class, race, nationality, and gender implicated in the matter of commercial surrogacy. Surrogacy agreements in the United States should be controlled by the same legal principles that govern organ donation, which disallow payment to prevent exploitation of the poor for the benefit of the wealthy. Along with the risk of bodily alienation introduced by organ sale or leasing, surrogacy includes the risk of reproductive exploitation because of the nature of the service provided. It includes risks to the life and health of the surrogate that meet and exceed those which may occur in the process of organ donation. Poor women, especially Black women and other women of color, as well as women living in developing countries, are at particular risk of exploitation and alienation under current conditions of the commercial surrogacy industry, so many countries have justifiably banned the practice as a result. The United States should follow suit and permit surrogacy agreements only in altruistic circumstances, in which the surrogate mother can be said to give her full, voluntary consent, free of the financially coercive conditions of commercial surrogacy.

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