

# A Womb of One's Own: Supporting International Surrogacy Regulation with a Historical Wet Nursing Perspective

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## Abstract

*Surrogacy is a growing area of assisted reproductive technology that is used transnationally. Opinions on the practice vary widely, influencing legislation around the world. Some areas ban the practice altogether, while other areas have little regulation at all. International rights to health, including autonomy and reproductive rights, are evoked throughout the surrogacy process. Surrogacy, like wet nursing, involves women using reproductive abilities to support other families in exchange for compensation. This Comment supports regulation on surrogacy that does not ban the practice, arguing instead that international rights support the continued use of surrogacy, and that wet nursing supports the idea that surrogates should be compensated for their work.*

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\* I would like to thank the staff of the *Chicago Journal of International Law* for their suggestions and support and Professor Emily Buss for her insightful feedback.

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## I. INTRODUCTION

Surrogacy frequently appears in popular media. From political debates on the status of embryos in U.S.<sup>1</sup> to celebrities announcing the birth of their child via surrogate,<sup>2</sup> it seems there is no escaping the process. The international surrogacy market is valued at \$14 billion.<sup>3</sup> In the U.S. alone, gestational carriers make up around five percent of all embryo transfer cycles.<sup>4</sup> Gestational surrogacy is a modern development of childbearing, allowing for people with uteruses to carry fetuses that are not biologically related to them.<sup>5</sup> This process is highly contentious, involving moral concerns<sup>6</sup> and issues about the legal parenthood of the child.<sup>7</sup> This process should be regulated as it is a relatively new practice in an intimate area.

Surrogacy is an emotional process, involving hopeful parents and another human's body.<sup>8</sup> International surrogacy involves intended parents (IPs) who are from a different country than the surrogate. Sometimes the IPs never meet the surrogate at all.<sup>9</sup> A power imbalance arises when IPs are more affluent than the surrogate, leading to concerns of exploitation.<sup>10</sup>

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<sup>1</sup> See David Dodge, *The Surrogacy Industry Braces for a Post-Roe World*, N.Y. TIMES (Aug. 23, 2022), <https://perma.cc/8WGL-89NJ>.

<sup>2</sup> See Kase Wickman, *Olivia Munn and John Mulaney Welcome a Baby Girl Méi June Mulaney, Via Surrogate*, VANITY FAIR (Sept. 23, 2024), <https://perma.cc/9RK6-42J6>; see also Luchina Fisher, *Kim Kardashian West Explains Why She Chose a Surrogate for Her Third Child*, ABC NEWS (Mar. 13, 2018), <https://perma.cc/R3FW-KJL3>; Megha Mohan, *The Joy and Trauma of Carrying a Celebrity's Baby*, BBC NEWS (Jan. 28, 2023), <https://perma.cc/7778-BS8Q>.

<sup>3</sup> Carolyn Barber, *The Business of Renting Wombs is Thriving—and Surrogates Don't Always Understand the Risks*, FORBES (Nov. 17, 2022), <https://perma.cc/MAF9-K956>.

<sup>4</sup> National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, *2020 National ART Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 21, 2023), <https://perma.cc/E62X-SHX6>.

<sup>5</sup> Nayana Hitesh Patel et al., *Insight into Different Aspects of Surrogacy Practices*, 11 J. HUM. REPROD. SCI. 212, 212–13 (2018).

<sup>6</sup> See Kwame Anthony Appiah, *Is it OK to Hire a Surrogate to Bear Twins?*, N.Y. TIMES MAG. (Oct. 28, 2023), <https://perma.cc/EWJ5-XVD3>.

<sup>7</sup> See Kate Wells, *As Michigan Legalizes Surrogacy, Here's How Families Found Ways Around the Ban*, NPR (Apr. 1, 2024), <https://perma.cc/3A42-B28N> (describing stories of IPs having to gain custody of their biological children born through surrogacy).

<sup>8</sup> A surrogate does not need to identify as a woman, but for simplicity's sake in this Comment, surrogates will be referred to with female pronouns. Surrogacy refers to the process of carrying a pregnancy to term with the intention of not being the legal parent of the child.

<sup>9</sup> See Sheela Saravanan, *An Ethnomethodological Approach to Examine Exploitation in the Context of Capacity, Trust and Experience of Commercial Surrogacy in India*, PHIL. ETHICS AND HUMANITIES IN MED. 9 (2013).

<sup>10</sup> In addition to exploitation, human rights violations affiliated with surrogacy have been recorded, including children born stateless and IPs abandoning the child with the surrogate. See Baby Manji Yamada vs Union of India & Anr, AIR 2009 SC 84 (2008) (India) (A child born by surrogate in

Surrogacy laws vary around the world, with many countries banning the practice completely and only a minority allowing for commercial practice.<sup>11</sup> Where laws exist on surrogacy, many are insufficient for ensuring the protection of surrogates, as this process requires balancing a woman's right to contract and exercise control over her own body with concerns of coercion and human trafficking.

Banning surrogacy will not make it disappear. International regulation is needed as more people are turning to surrogacy,<sup>12</sup> and some are even entering active war zones to begin the process.<sup>13</sup> This Comment will evaluate papers on surrogates and wet nurses to better understand surrogacy before ultimately proposing a framework that preserves the surrogate's dignity. Wet nursing, a historical form of employment for women, will provide a perspective that supports the regulation of surrogacy. International health law provides a base for surrogacy regulation, as this Comment will demonstrate.

Section II of this Comment will provide a background on surrogacy, and Section III lays out the process's legal standing in several countries, including the U.S., Ukraine, and India. These countries were selected due to their array of regulatory approaches, enabling comparison. Section IV will then provide a timeline of wet nursing around the world to build an understanding of the practice. Section V will compare the similarities and differences of wet nursing and surrogacy practices, finding an overlap in the employment of women's bodies for reproductive purposes. Section VI, then, will propose a framework to regulate international surrogacy through an international right to health. Section VII will address shortcomings to this approach, and Section VIII will conclude the Comment.

## II. SURROGACY

### A. History of Surrogacy

Surrogacy, as understood today, is a relatively new process made possible by modern assistive reproductive technologies (ART). There are multiple forms of

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India to Japanese parents and denied citizenship by both countries); *see also* Hannah Beech, *They Were Surrogates. Now They Must Raise the Children*, N.Y. TIMES (Nov. 26, 2022), <https://perma.cc/8Z2U-CV6V>.

<sup>11</sup> *See generally* Adrian Ellenbogen et al., *Surrogacy – a Worldwide Demand. Implementation and Ethical Considerations*, 2 GYNECOLOGICAL AND REPROD. ENDOCRINOLOGY & METABOLISM, 66 (2021).

<sup>12</sup> *See* National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, *ART and Gestational Carriers*, CDC (Aug. 5, 2016) <https://perma.cc/T4A8-UEJE> (demonstrating an increase in the number of gestational carriers in the U.S.).

<sup>13</sup> Lorenzo Tondo & Artem Mazhulin, *'The bombs won't stop us': Business Brisk at Ukraine's Surrogacy Clinics*, THE GUARDIAN (July 26, 2023), <https://perma.cc/G777-ARSL>.

surrogacy distinguished by the genetic material used and whether the surrogate is paid for her services.

Gestational surrogacy is entirely dependent on modern technology. In this process, an embryo with no genetic connection to the surrogate is placed into the surrogate's uterus.<sup>14</sup> The embryo may consist entirely of genetic materials from the IPs, or it may be created from an egg donation, sperm donation, or both. Traditional surrogacy, where the genetic material from the surrogate is used, persists, but because it has generated special legal difficulties, gestational surrogacy is more accepted and common. Therefore, gestational surrogacy will be the focus of the regulations proposed in this Comment.<sup>15</sup>

Surrogacy also varies by whether the surrogates are paid for their services. Commercial surrogacy occurs when the surrogate is compensated for her services beyond the costs of the procedure. Commercial surrogacy is uncommon compared to altruistic surrogacy, where the surrogate volunteers her services.<sup>16</sup> Even during altruistic surrogacy though, IPs are generally still expected to pay for surrogacy-related expenses, including medical visits, travel to appointments, and the surrogate's loss of income.<sup>17</sup>

## B. Common Provisions in Surrogate Agreements

Surrogacy agreements outline the terms of the surrogacy process and expectations between all parties involved. The number of parties involved in the creation of the agreement is commonly regulated—some countries restrict attorney and surrogacy agency involvement—and the agreements are not always enforceable.<sup>18</sup> A typical surrogacy agreement covers decisions beginning from pre-

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<sup>14</sup> Patel et al., *supra* note 5, at 212.

<sup>15</sup> Erika L. Fuchs & Abbey B. Berenson, *Outcomes for Gestational Carriers Versus Traditional Surrogates in the United States*, 27 J. WOMENS HEALTH 640, 641, 644–45 (2018) (Finding a significant gap between gestational and traditional surrogate participants and offering explanations for the difference); *What is Traditional Surrogacy?*, AMERICAN SURROGACY, <https://perma.cc/TCG6-ALYG> (last accessed Jan. 6, 2025) (stating that traditional surrogacy is rare and that most surrogacy professionals do not practice it); *About Surrogacy: Traditional vs Gestational Surrogacy—What's Best for My Family?*, SURROGATE.COM, <https://perma.cc/N3YL-JQP9> (last accessed Apr. 16, 2025).

<sup>16</sup> See Fuchs & Berenson, *supra* note 15, at 640. One reason for this is that some people believe that commercial surrogacy amounts to the practice of selling babies. See Maud de Boer-Buquicchio (Special Rapporteur on the sale and sexual exploitation of children), *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material*, U.N. Doc. A/HRC/37/60 (Jan. 15, 2018).

<sup>17</sup> *What is Altruistic Surrogacy*, AM. SURROGACY, <https://perma.cc/A9CW-UE5J> (last accessed Nov. 15, 2024).

<sup>18</sup> See, e.g., Surrogacy Arrangements Acts 1985, cl. 49, § 1 (UK).

pregnancy through post-birth.<sup>19</sup> Items in the agreements range from the handling of insurance and medical expenses to decisions on the surrogate's behavior, including diet, exercise, and travel.<sup>20</sup> Importantly, agreements outline the IPs' intent to assume parental rights over the child.<sup>21</sup> A clause on the termination or selective reduction of pregnancy is encouraged to be made in these agreements.<sup>22</sup> This clause provides terms for when a surrogate shall terminate a pregnancy, often arising from medical complications for the embryo or surrogate.<sup>23</sup> The number of multiple pregnancies is rising due to ART, and selective reduction is used to achieve the highest chance of a healthy delivery and baby.<sup>24</sup> Reducing the fetal number can have life-saving benefits for the other fetuses and the surrogate.<sup>25</sup> However, this would amount to an elective abortion, a controversial topic with varying opinions across the political spectrum. Surrogates and IPs must be very clear on expectations should the need to reduce the number of embryos arise, as different parties can have opposite beliefs on abortions. This clause, especially, requires informed consent.<sup>26</sup> The surrogate must know beforehand what the decision would be and must agree to it, as it is her body that ultimately carries the fetus.

### III. LAWS ON SURROGACY

Surrogacy laws vary on the ability to contract, the involvement of third parties like surrogacy agencies, and payments to surrogates. Surrogacy is outright

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<sup>19</sup> Stephanie M. Brinkley, *What is Included in a Surrogacy Agreement?*, BRINKLEY LAW FIRM (Oct. 16, 2023), <https://perma.cc/ME2V-2FZR>; see also Saravanan, *supra* note 9, at 8–9 (describing different post-birth expectations of surrogates in India, including feeding plans for the infant, requiring the surrogate to continue providing breastmilk for the child).

<sup>20</sup> See generally Brinkley, *supra* note 19.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See R.C. Wimalasundera, *Selective Reduction and Termination of Multiple Pregnancies*, 15 SEMINARS IN FETAL & NEONATAL MED. 327, 327–28 (2012); see also Sreya Sam et al., *Trends of Selective Fetal Reduction and Selective Termination in Multiple Pregnancy, in England and Wales: a Cross-Sectional Study*, 29 REPROD. SCI. 1020 (2022).

<sup>25</sup> Wimalasundera, *supra* note 24, at 334.

<sup>26</sup> The IPs may be more concerned with the well-being of the fetus than of the surrogate, leaving the surrogate to advocate for herself and her own health in decisions regarding termination. Discussing a path in case of termination ensures the surrogate understands the risks. See Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. INT'L L. 1, 36–38 (2018).

banned in France<sup>27</sup> and Italy.<sup>28</sup> Other countries ban only commercial surrogacy and do not enforce any form of surrogacy agreements.<sup>29</sup> A glimpse of regulation variations is seen in case studies on the U.S., Ukraine, and India, each being able to contribute to an international framework.

#### A. United States—Patchwork Regulation

The U.S. has no federal law on surrogacy, leaving regulation to the states. This has created a patchwork system. The lack of consistency across jurisdictions can make it difficult for couples and surrogates to confidently navigate the system. Surrogacy in the U.S. is also very expensive, with some estimates of up to \$200,000.<sup>30</sup>

*In re Baby M* marked the first surrogacy agreement to come before any U.S. court. In this 1988 New Jersey case, the IPs and surrogate had a contract in which the surrogate would provide her own egg, carry the child for the IPs, and terminate her parental rights after birth.<sup>31</sup> The court ultimately rejected the contract, finding the surrogate to have parental rights in addition to the biological father, but was open to altruistic surrogacy and legislation.<sup>32</sup> Since this case, statutes in the U.S. concerning surrogacy have been enacted in most states.<sup>33</sup>

The Uniform Parentage Act (2017) (UPA)<sup>34</sup> sets out a uniform legal framework for surrogacy in states. The UPA requires surrogates and IPs to be at least twenty-one years old, undergo physical and mental evaluations, and have legal representation.<sup>35</sup> Additionally, surrogates must have previously birthed at

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<sup>27</sup> Banned in 1994 by the Bioethics Law. *See* Loi 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal [Law 94-654 of July 29, 1994 on the Donation and Use of Elements and Products of the Human Body, Medically Assisted Procreation, and Prenatal Diagnosis] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France].

<sup>28</sup> Italy takes it a step further, banning couples in Italy from going abroad to seek surrogacy. *See Emma Bubola, Italy Criminalizes Surrogacy From Abroad, a Blow to Gay and Infertile Couples*, N.Y. TIMES (Oct. 16, 2024), <https://perma.cc/TZ2K-VJRB>.

<sup>29</sup> *See, e.g.*, Surrogacy Arrangements Act 1985, cl. 49, § 1A (U.K.) (stating that no surrogacy arrangement is enforceable).

<sup>30</sup> Nafesah Allen, *How Much Does a Surrogate Cost*, INVESTOPEDIA (Apr. 8, 2024), <https://perma.cc/44JW-823W>.

<sup>31</sup> *Matter of Baby M*, 109 N.J. 396, 412 (N.J. 1988).

<sup>32</sup> *Id.* at 411, 468–69. In its opinion, the court found “payment of money to a ‘surrogate’ mother illegal, perhaps criminal, and potentially degrading to women.” *Id.* at 411.

<sup>33</sup> *See infra* note 41.

<sup>34</sup> U.P.A. § 802 (NAT. CONF. OF COMM’R ON UNIF. STATE L. 2017).

<sup>35</sup> *Id.*

least one child.<sup>36</sup> For surrogacy agreements to be enforceable, they can only provide compensation for “reasonable expenses,”<sup>37</sup> including that the IPs must pay for legal representation.<sup>38</sup> The surrogate reserves the right to make all health decisions regarding her pregnancy, including termination.<sup>39</sup> An agreement can be terminated at any time before the embryo transfer, releasing parties from the agreement but still requiring IPs to cover expenses.<sup>40</sup> Most states have not adopted the surrogacy section of the UPA; only Utah and Texas have adopted the previous 2002 version of the surrogacy section.<sup>41</sup> California and New York are examples of states with their own legislation on gestational surrogacy.<sup>42</sup>

### 1. California

In 1993, the California Supreme Court ruled that surrogacy agreements are enforceable.<sup>43</sup> Twenty years later, gestational surrogacy was codified under the California Family Code. The statute includes requirements for the contents of a surrogacy agreement in order for it to be enforceable.<sup>44</sup> At the very least, the agreement must contain the persons whose gametes were used, and if part or all of the gametes were donated, then this must be specified, who the IPs are, and how the IPs will cover medical expenses for the surrogate and child.<sup>45</sup> Surrogates are eligible for compensation,<sup>46</sup> though it must be held in escrow or a trust

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<sup>36</sup> *Id.* § 802(a)(2).

<sup>37</sup> *Id.* §§ 804(b), 812(a).

<sup>38</sup> *Id.* § 803

<sup>39</sup> *Id.* § 804(a)(7)–(8).

<sup>40</sup> U.P.A., *supra* note 34, § 804(b)(2).

<sup>41</sup> U.P.A. art. 8 cmt. at 72. Thirty-one states have statutory provisions on surrogacy. *See Regulation Details in the US by State*, NATIONAL CENTER FOR LESBIAN RIGHTS, <https://perma.cc/485P-769J> (last accessed Jan. 9, 2025). Washington State adopted the UPA in its entirety, so the state has statutory provisions for both gestational and traditional surrogacy. WASH. REV. CODE ANN. §§ 26.26A.755, 26.26A.760 (West). In contrast, Indiana, and Nebraska have statutes declaring surrogacy contracts unenforceable. IND. CODE ANN. § 31-20-1-1 (West); NEB. REV. STAT. ANN. § 25-21200(1). Michigan had a criminal ban on surrogacy until 2024, when new legislation was introduced in the state legislation. *See* Wells, *supra* note 7.

<sup>42</sup> CAL. FAM. CODE § 7960 (West); 750 ILL. COMP. STAT. ANN. 47/1; N.Y. FAM. CT. ACT § 581-401(c) (McKinney).

<sup>43</sup> *Johnson v. Calvert*, 5 Cal. 4th 84, 101 (Cal. 1993) (affirming the judgment of the Court of Appeals). This case involved a gestational surrogate agreement. The Supreme Court of California ultimately ruled that the surrogate had no parental rights to the child.

<sup>44</sup> CAL. FAM. CODE §§ 7962(a), 7962(f) (West).

<sup>45</sup> *Id.* § 7962(a) (West).

<sup>46</sup> *Id.* § 7960 (West).



maintained by an attorney.<sup>47</sup> The statute does not dictate a minimum or maximum payment.

## 2. New York

New York demonstrates the fluidity of surrogacy law in the U.S. In 2021, the Child-Parent Security Act expressly opened the doors to commercialized gestational surrogacy.<sup>48</sup> The law outlines the requirements for a surrogacy agreement and clarifies outcomes for specific scenarios, such as if the IPs get divorced.<sup>49</sup> The agreement must allow for the surrogate to make all health decisions regarding herself and the pregnancy and may not limit the right of the surrogate to terminate or continue the pregnancy.<sup>50</sup>

The Act requires payments to be held in escrow, and the agreement must be explicit on how the IPs will pay for medical expenses.<sup>51</sup> New York has similar requirements for the surrogate as the UPA.<sup>52</sup> The surrogate must be represented by an attorney, though this attorney can be paid for by the IPs.<sup>53</sup> IPs must pay for health and life insurance policies for the surrogate through the duration of the pregnancy and an additional twelve months following the delivery.<sup>54</sup> The Act prohibits international surrogacy, requiring at least one intended parent to be an American citizen or a lawful permanent resident and to have been residing in New York for at least six months.<sup>55</sup>

Compensation can encompass medical risks, inconvenience, and responsibilities undertaken by the surrogate.<sup>56</sup> Separate legislation in New York governs surrogacy programs and facilitators, enabling the New York Department of Health and Department of Financial Services to regulate and ensure that informed consent is administered.<sup>57</sup>

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<sup>47</sup> *Id.* § 7961(a) (West).

<sup>48</sup> N.Y. FAM. CT. ACT § 581-401(b)–(c) (McKinney) (“A surrogacy agreement may provide for payment of compensation under part 5 of this article.”).

<sup>49</sup> *Id.* § 581-404.

<sup>50</sup> *Id.* § 581-402(h)(1)(v)–(vii).

<sup>51</sup> N.Y. GEN. BUS. LAW § 1403 (McKinney).

<sup>52</sup> N.Y. FAM. CT. ACT § 581-402(a). Similar to the UPA, New York requires the surrogate to be twenty-one years old and undergo medical examination.

<sup>53</sup> *Id.* § 581-402(a)(6).

<sup>54</sup> *Id.* § 581-402(a)(7)–(8).

<sup>55</sup> *Id.* § 581-402(b).

<sup>56</sup> *Id.* § 581-502. Compensation must be reasonable and can be negotiated in good faith. *Id.* § 581-502(b). The legislation does not indicate what reasonable compensation would entail beyond the listed reasons in § 581-502(a).

<sup>57</sup> N.Y. GEN. BUS. LAW § 1404.

The patchwork of laws on surrogacy in the U.S. demonstrates the collective action problem of larger surrogacy regulation: states and countries are unwilling to accept a universal regulation on surrogacy. This patchwork makes it difficult to regulate consistency across borders, creating uncertainty.<sup>58</sup>

## B. Ukraine—Minimal Regulation

Ukraine is a popular choice for international IPs using surrogacy because of lower costs and the country's relaxed laws on legal parenthood.<sup>59</sup> This combination allows for IPs' names to immediately be on the child's birth certificate.<sup>60</sup> The surrogacy industry in Ukraine has persisted despite ongoing conflict with Russia.<sup>61</sup> However, the status of surrogacy is unclear due to minimal legislation on the process, and existing legislation is silent on key areas.

In Ukraine, notarized, written informed consent of the surrogate and IPs is required.<sup>62</sup> Order of the Ministry of Health of Ukraine No. 787 requires that IPs have medical reasons for using surrogacy, that the surrogate be over eighteen years old, and that the surrogate already has at least one healthy genetic child.<sup>63</sup> Order No. 787 also requires the IPs to be married, thereby excluding single parents and same-sex couples.<sup>64</sup>

<sup>58</sup> See Victoria R. Guzman, Comment, *A Comparison of Surrogacy Laws of the U.S. to other countries: should there be a uniform federal law permitting commercial surrogacy?*, 38. Hous. J. INT'L L. 619, 643–44 (2016).

<sup>59</sup> Sam G. Everingham & Andrea Whittaker, *Trends in Engagement in Surrogacy by Nationality 2018–2020: A Survey of Surrogacy Agencies*, 8(1) GLOBAL REPRODUCTIVE HEALTH 1, 5 (2022) (explaining that Ukraine is a popular choice for IPs as it allows them to be placed on the birth certificate automatically).

<sup>60</sup> Family Code of Ukraine, art. 123(2) (*Vidomosti Verkhovnoi Rady Ukrainy*, 2006, No. 18) <https://perma.cc/5MFJ-LWHF>; Oleg M. Reznik & Yuliia M. Yakushchenko, *Legal Considerations Surrounding Surrogacy in Ukraine*, 73 WIADOMOŚCI LEKARSKIE 1048, 1050–51 (2021). The IPs are the legal parent regardless of if the child is made up of both of their genetics or uses a donor egg. Family Code of Ukraine, art. 123(2). Furthermore, the surrogate is prohibited from contesting parental affiliation. *Id.* art. 139(2).

<sup>61</sup> S. Marinelli et al., *The Armed Conflict in Ukraine and the Risks of Inter-country Surrogacy: The Unsolved Dilemma*, 26 EUROPEAN REV. FOR MED. AND PHARMACOLOGICAL SCIS. 5646, 5647 (2022); see also Maria Varenikova & Andrew E. Kramer, *How Ukraine's Surrogate Mothers Have Survived the War*, N. Y. TIMES (Oct. 16, 2022), <https://perma.cc/6RVL-DAKZ>; Stephanie Hegarty & Eleanor Layhe, *Ukraine: Impossible Choices for Surrogate Mothers and Parents*, BBC NEWS (Mar. 21, 2022), <https://perma.cc/5PPS-VUUE>; Sophie Cameron, *Ukraine Conflict Highlights Legal Issues Surrounding International Commercial Surrogacy*, INT'L BAR ASS'N (July 29, 2022), <https://perma.cc/F5Y6-QMJW>.

<sup>62</sup> *Ukrainian Surrogacy Laws*, UKR. FAM. LAW, <https://perma.cc/KZ8T-YCGD>; Reznik & Yakushchenko, *supra* note 60, at 1050.

<sup>63</sup> Reznik & Yakushchenko, *supra* note 60, at 1049.

<sup>64</sup> ORDER OF THE MINISTRY OF HEALTHCARE OF UKRAINE NO 787 'ON APPROVAL OF THE PROCEDURE FOR THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGIES IN UKRAINE OF 9 SEPTEMBER 2013 (Ukr.), <https://perma.cc/2TJD-UC4R> (Last accessed Jan. 8, 2024), translation by

Surrogacy regulation in Ukraine is silent in many areas. Legislation does not define surrogate mother nor surrogacy agreement.<sup>65</sup> A surrogacy contract is not required by law.<sup>66</sup> The law does not address situations where the intended mother contributes no genetic material and does not carry the child.<sup>67</sup> Finally, legislation on surrogacy in Ukraine is contradictory. For example, the statute that expressly allows access to ART for all people regardless of marital status limits surrogacy to married couples only.<sup>68</sup> The minimal legislation and silence on key areas make it difficult for regulators to monitor the surrogacy process and ensure surrogate mothers are respected.

### C. India—Shifting Regulation

Guidance on gestational surrogacy in India was first proposed in 2002, but no further steps were taken until 2005, when the Ministry of Health and Family Welfare promulgated regulations for ART and accredited facilities.<sup>69</sup> The ART Regulation Bill was meant to legalize surrogacy but was in draft form beginning in 2010, illustrating the challenge India faced in formulating regulation that was clear and nondiscriminatory.<sup>70</sup> The Bill remained in draft form through 2015, allowing surrogacy to go unregulated.<sup>71</sup>

The absence of statutory regulations made India a popular choice for international surrogates.<sup>72</sup> Surrogates had little control over the process, having no power over decisions relating to the gestational process or birth.<sup>73</sup> Furthermore, agencies were arranging surrogate contracts without providing a copy of the signed agreement to the surrogates, making it difficult for surrogates to know their rights and obligations.<sup>74</sup> This restricted the surrogates' ability to provide informed

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Feskov Human Reproduction Group at <https://perma.cc/9FQQ-6EUW>; see also Reznik & Yakushchenko, *supra* note 60, at 1050.

<sup>65</sup> Reznik & Yakushchenko, *supra* note 60, at 1050.

<sup>66</sup> *Id.*

<sup>67</sup> Family Code of Ukraine, art. 123 (*Vidomosti Verkhovnoi Rady Ukrainy*, 2006, No. 18) <https://perma.cc/5MFJ-LWHF>.

<sup>68</sup> Reznik & Yakushchenko, *supra* note 60, at 1050 (citing to Rule 123 of the Family Code of Ukraine).

<sup>69</sup> Pritha Sen, *Surrogacy Laws in India Through the Years*, 2 INDIAN J. OF INTEGRATED RSCH. IN LAW 420, 429, 427 (2021).

<sup>70</sup> Saravanan, *supra* note 9, at 2.

<sup>71</sup> Jasdeep Kaur, *Assisted Reproductive Technology (Regulation) Bill, 2010: An Analysis of the Surrogacy Provisions*, 5 RGNUL LAW REVIEW 1, 1–4 (2015).

<sup>72</sup> Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 ASIAN BIOETHICS REVIEW 5, 6 (2022).

<sup>73</sup> Saravanan, *supra* note 9, at 6.

<sup>74</sup> *Id.*

consent.<sup>75</sup> Some surrogates were required to leave their families and live in surrogate houses where they would stay for the duration of the pregnancy.<sup>76</sup> This living situation allowed for constant monitoring of the surrogates, restricting the surrogates' movement.<sup>77</sup>

Reports of exploitation led India to regulate surrogacy,<sup>78</sup> ultimately resulting in a ban on international surrogacy in 2016.<sup>79</sup> The Surrogacy (Regulation) Act of 2021 banned commercial surrogacy<sup>80</sup> and required surrogacy clinics to register with the government.<sup>81</sup> To become a surrogate, the Act requires women to be between twenty-five to thirty-five years old, married, and have at least one biological child of her own.<sup>82</sup> She must also provide written informed consent.<sup>83</sup> IPs must have a medical record necessitating gestational surrogacy.<sup>84</sup> The surrogate cannot be forced to undergo an abortion except in some conditions,<sup>85</sup> and the IPs cannot abandon the child for any reason.<sup>86</sup> The Act also created the National Assisted Reproductive Technology and Surrogacy Board, a multidisciplinary board that enforces the Act.<sup>87</sup> Violation of the Act by engaging in commercial surrogacy is punishable by up to five years imprisonment and five lakh rupees for the first offence, both of which can double for subsequent

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<sup>75</sup> UNIVERSITY OF CHICAGO LAW SCHOOL - GLOBAL HUMAN RIGHTS CLINIC, HUMAN RIGHTS IMPLICATIONS OF GLOBAL SURROGACY, GLOBAL HUMAN RIGHTS CLINIC 21 (2019) [hereinafter Global Human Rights Clinic].

<sup>76</sup> Lucy Wallis, *Living Inside the House of Surrogates*, BBC NEWS (Oct. 1, 2013), <https://perma.cc/3CFU-LJME>. Surrogates would often have to stay at the houses after birth to provide breastmilk to the children. Saravanan, *supra* note 9, at 4, 7.

<sup>77</sup> Saravanan, *supra* note 9, at 8–9.

<sup>78</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, Executive Summary. The lack of law prior to 2016 results in many irregularities in practice and lead to the 2008 case Baby Manji Yamada vs Union of India & Anr, AIR 2009 SC 84 (2008) (India). In this case, a child born by surrogacy was left stateless for months until a visa on humanitarian grounds was issued.

<sup>79</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 14.

<sup>80</sup> Surrogacy (Regulation) Act, 2021, cl. 7, § 38 (India).

<sup>81</sup> *Id.* cl. 2. The Assisted Reproductive Technology (Regulation) Act of 2021 furthered clarified the role of surrogacy agencies and the process for registering. *See generally* Assisted Reproductive Technology (regulation) Act, 2021, cl. 3–4 (India).

<sup>82</sup> Surrogacy (Regulation) Act, 2021, cl. 3, § 4(iii)(b) (India).

<sup>83</sup> *Id.* cl. 3, § 6. For there to be informed consent, the surrogate must have been informed on all known side effects of the procedures, sign written consent to undergo the procedures in a language the surrogate understands and can withdraw her consent before implantation of the embryo. *Id.*

<sup>84</sup> *Id.* cl. 3, § 4(ii)(a).

<sup>85</sup> *Id.* cl. 3, § 10

<sup>86</sup> *Id.* cl. 3, § 7.

<sup>87</sup> *Id.* cl. 5, § 17(2).

offences.<sup>88</sup> Only married, heterosexual couples can use surrogacy.<sup>89</sup> India's swing in surrogacy regulations reflects an ability to respond to exploitation concerns.

#### D. Summary of Case Studies

The preceding case studies demonstrate the varied approaches to surrogacy regulation around the world. India and New York have enacted legislation that prevents international surrogacy.<sup>90</sup> The regulatory board of India checks for fairness in surrogacy agreements, reflecting a solution to exploitation.<sup>91</sup> The ability to compensate surrogates in California allows for recognition of the work surrogates are completing.<sup>92</sup> Enforceability of agreements varies by country, making it difficult to be certain that every party's rights are being respected.<sup>93</sup> Furthermore, the ability to access surrogacy in some places turns on medical necessity or citizenship, while others have no such restrictions. Many of these laws were enacted in response to human rights violations, but they do not work together to create a uniform system, enabling vulnerable surrogates to fall through the cracks.<sup>94</sup> This can be addressed through an analysis of wet nursing and international law.

### IV. WET NURSING

*"If we have to have a stranger for a nurse, let us begin by choosing her well."*<sup>95</sup>

So Rousseau begins his discussion on wet nursing in *Emile*, underscoring the notion that while maternal nursing is best, when not available, a wet nurse must meet specific requirements in health, diet, and character to best care for the child.<sup>96</sup> Wet nursing is the practice of supplying one person's breastmilk to a child that is

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<sup>88</sup> Surrogacy (Regulation) Act, *supra* note 82, cl. 7, § 40.

<sup>89</sup> Soumya Kashyap & Priyanka Tripathi, *The Surrogacy (Regulation) Act, 2021: A Critique*, 15 ASIAN BIOETHICS REV. 5, 9–11 (2022).

<sup>90</sup> Surrogacy (Regulation) Act, *supra* note 82, cl. 3, § 4(ii)(a); N.Y. FAM. CT. ACT § 581-402(b).

<sup>91</sup> Surrogacy (Regulation) Act, *supra* note 82, cl. 5.

<sup>92</sup> Cal. Fam. Code § 7960.

<sup>93</sup> Compare 750 Ill. Comp. Stat. Ann. 47/50(b), 47/30(b) with Surrogacy Arrangement Acts 1985, cl. 49, § 1 (U.K.).

<sup>94</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 2. The ban on international surrogacy in some places, pushes parents to seek a surrogate elsewhere. This may lead IPs to surrogates in areas with very little regulation and protection of surrogates, creating concern of exploitation of the surrogate.

<sup>95</sup> JEAN-JACQUES ROUSSEAU, EMILE: OR ON EDUCATION 56 (Allan Bloom trans., Basic Books 1979) (1792).

<sup>96</sup> *Id.* 56–58.

not their own.<sup>97</sup> The practice of wet nursing has ancient roots and was common across the eighteenth to early twentieth centuries.<sup>98</sup> The form of wet nursing has evolved over time due to different factors, including social attitudes and pressures, as well as adaptations in technology.<sup>99</sup>

## A. History of Wet Nursing

Wet nursing was practiced worldwide, though it has faded in and out of fashion throughout history.<sup>100</sup> In ancient Egypt, Rome, and Greece, wet nurses were used by royalty and the wealthy, and nurses were afforded high status.<sup>101</sup> In imperial China and Europe in the Middle Ages, wet nurses were either slaves or former slaves employed by wealthy and noble families.<sup>102</sup> Wet nurses were frequently used among the upper-class in eighteenth century as mothers chose not to nurse their children due to cultural and social beliefs.<sup>103</sup> In 1780, an estimated 21,000 infants were born in Paris and only 700 of these infants were nursed by their mothers.<sup>104</sup> By the nineteenth century, rhetoric shifted against wet nursing, describing mothers who could breastfeed but instead hired a wet nurse as selfish.<sup>105</sup> This influenced regulation and marked a decline in wet nursing.<sup>106</sup>

Wet nurses often took the position for economic reasons.<sup>107</sup> Nurses could be employed by private residences or by foundling hospitals. Frequently, this would entail abandoning their own children at the hospitals, as many employers would require the wet nurse to not be feeding any other child.<sup>108</sup> These hospitals

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<sup>97</sup> Some differentiate wet nursing between breastfeeding and expressed milk feeding, but for ease this Comment will use the term wet nursing to refer to all practices of feeding an infant with human milk not produced by its biological mother or legal parent.

<sup>98</sup> See Kelly L. Baumgartel et al., *From Royal Wet Nurses to Facebook: The Evolution of Breastmilk Sharing*, 24 BREASTFEEDING REV. 25, 26–27 (2016).

<sup>99</sup> JANET GOLDEN, A SOCIAL HISTORY OF WET NURSING IN AMERICA 156 (1996).

<sup>100</sup> Baumgartel et al., *supra* note 98, at 25–30.

<sup>101</sup> *Id.* at 27.

<sup>102</sup> *Id.*; see also Jen-Der Lee, *Wet Nurses in Early Imperial China*, 2 NAN NÜ 1, 10 (2000).

<sup>103</sup> GOLDEN, *supra* note 99, at 194. Wet nurses were similarly hired by Chinese aristocrats because their social status allowed them to rather than out of necessity. See Lee, *supra* note 102, at 7.

<sup>104</sup> T.G.H. Drake, *Infant welfare Laws in France*, 7 ANNALS OF MED. HIST. 49, 51 (1935).

<sup>105</sup> Baumgartel et al., *supra* note 98, at 28. This moral contempt against mothers who hired wet nurses was strongly seen in France.

<sup>106</sup> Janet Golden, *From Wet Nurse Directory to Milk Bank: The Delivery of Human Milk in Boston, 1909–1927*, 62 BULLETIN OF THE HIST. OF MED. 589, 589 (1988).

<sup>107</sup> Baumgartel et al., *supra* note 98, at 29 (noting that many wet nurses were unwed mothers and dependent on the income of nursing).

<sup>108</sup> GOLDEN, "Victims of distressing circumstances": *The Wet Nurse Labor Force and the Offspring of Wet Nurses, 1860–1910*, in A SOCIAL HISTORY OF WET NURSING IN AMERICA, 97 (1996). Colonial writings from

had very high mortality rates.<sup>109</sup> Believing that it was wet nursing causing the deaths, and that the use of wet nurses was the fault of upper-class women turning away from breastfeeding, philosophers and doctors in France viewed wet nursing as a moral failure.<sup>110</sup> Many people publicly turned away from the practice, while some continued to hire wet nurses privately.<sup>111</sup>

Despite the social vulnerability of some wet nurses, they were frequently paid better wages than other forms of work available to women.<sup>112</sup> Many wet nurses received both lodging and food under the belief that the wet nurses' milk could cause child illnesses. For this reason, wet nurses were heavily monitored in their diet, exercise, and sexual activity.<sup>113</sup> Due to the high pay, people became concerned that wet nurses, particularly ones that already had children, had poor moral character.<sup>114</sup> Where wet nurses were not compensated fairly, they organized to demand better conditions.<sup>115</sup> Wet nursing declined as other employment opportunities grew and more viable options for feeding infants were developed.<sup>116</sup> Thus, when wet nurses were employed, it was out of desperation, as breastmilk was prioritized for the sickest of infants.<sup>117</sup> This allowed the wet nurse to make more demands, giving her a large amount of power to seek the treatment and payment she wanted in return for her services.<sup>118</sup>

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India illustrate these wet nurses as callous mothers, willing to leave their own child to die in order to take a salary feeding a different child. See Indrani Sen, *Colonial domesticities, Contentious Interactions: Ayahs, Wet-Nurses and Memsahibs in Colonial India*, 16 INDIAN J. OF GENDER STUD. 299, 320 (2009).

<sup>109</sup> Drake, *supra* note 104, at 65.

<sup>110</sup> Baumgartel et al., *supra* note 98, at 29.

<sup>111</sup> Jill Lepore, *Baby Food*, THE NEW YORKER (Jan. 11, 2009), <https://perma.cc/QG2W-5ECS>; Baumgartel et al., *supra* note 98, at 28–29.

<sup>112</sup> GOLDEN, *supra* note 99, at 140–41.

<sup>113</sup> See Baumgartel et al., *supra* note 98, at 27 (discussing the “ideal wet nurse” across time and that it was believed that children took on the traits and dispositions of their wet nurses, thus creating a need to have constant monitoring of the wet nurse, including having her in the home); Lee, *supra* note 102, at 37; Sen, *supra* note 108, at 320.

<sup>114</sup> Sen, *supra* note 108, at 319 (finding that white colonial families in India viewed the native wet nurses as greedy, exploiting the families for high salaries; the families often felt this way because they had no option but to hire the wet nurse or else the baby would starve); see also GOLDEN, *supra* note 99, at 154.

<sup>115</sup> See Dana Frank, *No Money, No Milk*, HAMMER & HOPE (2024), <https://perma.cc/Y95B-HAGY>.

<sup>116</sup> Katharina Rowold, *Other Mother's Milk: From Human Wet Nursing to Human Milk Banking in England, 1900–1950*, 16 CULTURAL AND SOC. HIST. 603, 605 (2019).

<sup>117</sup> Golden, *supra* note 106, at 596.

<sup>118</sup> *Id.*; see also GOLDEN, *supra* note 99, at 139.

## B. Legal Standing and Regulation of Wet Nursing

Wet nursing practices around the world were impacted and complicated by religion.<sup>119</sup> In Islam, breastmilk is a form of kinship, meaning that wet nursing evokes laws on marriage and restricts whom children that have been nursed can marry.<sup>120</sup> Due to the belief that traits can be passed down through breastmilk, Christians did not hire Jewish or Muslim women as wet nurses.<sup>121</sup> Similarly, Jewish families were supposed to only hire Jewish wet nurses, though difficulty in finding enough Jewish wet nurses meant that many Christian women were hired instead.<sup>122</sup> While religion complicated the hiring of wet nurses, it did not eliminate the practice.<sup>123</sup>

The eighteenth century brought about an infant welfare movement in France, where regulations on wet nursing became more rigorous.<sup>124</sup> In 1705, law forbade wet nurses from being lodged in Paris outside of the *Bureau du Recommandaresses* (“the Bureau”), and failure to follow this procedure resulted in a fine.<sup>125</sup> Wet nurses were required to register with the Bureau,<sup>126</sup> and the Bureau managed all of the logistics, connecting families with wet nurses and handling payment.<sup>127</sup> Restrictions were set on eligibility to be a wet nurse.<sup>128</sup> People could be imprisoned for failure to pay the wet nursing fees.<sup>129</sup> In June of 1793, the

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<sup>119</sup> Salasiah Hanin Hamjah et al., *A Quantitative Study on Muslim Milk Mother’s Understanding of the Islamic Concept of Wet Nursing*, 17 PLOS ONE 1, 2–4 (2022) (studying the confusion women faced regarding whether wet nursing was allowed by their religion or not); see generally Dilek Konukbay et al., *Determining Knowledge and Opinions of Neonatal Intensive Care Unit Nurses on Wet-Nursing and Human Milk Banks: A Cross-Sectional Study in Türkiye*, 39 J. OF HUM. LACTATION 636 (2023).

<sup>120</sup> C.A.R. Norysyamlina et al., *A Cross-Sectional Study on the Practice of Wet nursing Among Muslim Mothers*, 21 BMC PREGNANCY AND CHILDBIRTH 1, 2 (2021).

<sup>121</sup> Jose-Alberto Palma & Fermin Palma, *Maternal Breastfeeding or Wet Nursing? Religion, Persecution, and Ideology in the 17<sup>th</sup> Century*, 15 BREASTFEEDING MED. 756, 757 (2020).

<sup>122</sup> Ekaterina Oleshkevich, *Who Nursed the Jewish Babies? Wet-Nursing Among Jews in the Late Russian Empire*, 39 POLIN STUD. IN POLISH JEWRY 140, 149–50 (2024).

<sup>123</sup> Hamjah et al., *supra* note 119, at 2–4.

<sup>124</sup> Drake, *supra* note 104, at 49, 51. The Bureau was a government organization that regulated wet nurses. Organizations directing wet nursing employment in Paris existed as early as the twelfth century, providing food, housing, and employment opportunities for wet nurses. The Bureau was established to create a central place for organizing wet nurses.

<sup>125</sup> *Id.* at 51.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 54. Pay was also set by the Bureau and varied by if the wet nurse was able to live in her own home or had to live in the child’s home.

<sup>128</sup> *Id.* These restrictions required that wet nurses only have two nurslings and inform the parents if she becomes pregnant.

<sup>129</sup> Drake, *supra* note 104, at 54. This was overturned in 1792.



National Convention aimed to reduce the number of wet nurses by passing a law prohibiting national relief to families who chose to use wet nurses.<sup>130</sup>

Today, wet nursing persists in the form of donations and banks, such as the Human Milk Banking Association of North America.<sup>131</sup> The banks act as middlemen, accepting donations, checking breastmilk for quality, pasteurizing it, and then providing it to those in need.<sup>132</sup>

## V. RELATING THE TWO PRACTICES

Wet nursing is not dissimilar to surrogacy: the two are both services that can only be provided by female reproductive organs. Further, both practices concern vulnerable populations: children and indigent women. Moral, religious, and political grounds impacted wet nursing and continue to control surrogacy, allowing for the historical practice of wet nursing to shed some light onto the present-day practice of surrogacy.

Both services involve a third person stepping into a personal matter to fulfill a need that the parents cannot; in wet nursing this was providing breastmilk and in surrogacy it is reproduction. Furthermore, the person offering services is scrutinized for their health and ability to provide service.<sup>133</sup> This does not mean that surrogates have a total loss of autonomy over their body; the varying forms of wet nursing demonstrate that a woman can continue to make decisions over her body and control her life while providing this service, so long as regulations exist to ensure this right is safeguarded.<sup>134</sup>

The employment of wet nurses, despite social stigma, signifies that the regulation and legal use of surrogacy is not so farfetched. While the treatment of wet nurses in the past is not perfect, examples of financial coercion provide lessons for a path forward that protects surrogates.

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<sup>130</sup> *Id.* at 59–60; *see also* Lepore, *supra* note 111. This relief included state aid in the form of pensions for infants and payments to mothers.

<sup>131</sup> *About: Frequent Questions*, HUM. MILK BANKING ASS'N OF N. AM., <https://perma.cc/5TF3-5VAE> (last accessed Nov. 15, 2024).

<sup>132</sup> Baumgartel et al., *supra* note 98, at 32.

<sup>133</sup> Rowold, *supra* note 116, at 605–08.

<sup>134</sup> As wet nursing turned away from private employment and towards milk banks, women were able to have more control over their daily life as the physicians could not enforce rules set, with the threat of being fired for major transgressions guiding the wet nurses. GOLDEN, *Medical Oversight and Medical Dilemmas: The Physician and the Wet Nurse, 1870–1910*, in *A SOCIAL HISTORY OF WET NURSING IN AMERICA*, 150–52.

## VI. A FRAMEWORK FOR INTERNATIONAL SURROGACY LAW

Some scholars believe that the only way to prevent unethical international surrogacy practices is an international ban.<sup>135</sup> However, banning surrogacy could be considered a form of discrimination that violates human rights.<sup>136</sup> International rights to health and bodily autonomy rest in Article 12 of the Universal Declaration of Human Rights<sup>137</sup> and Article 10 of the Covenant on Economic, Social, and Cultural Rights, which state that: “The widest possible protection and assistance should be accorded to the family . . . particularly for its establishment.”<sup>138</sup> Human rights treaties have been interpreted to include a right to privacy and right to bodily autonomy, with an emphasis on informed consent and dignity.<sup>139</sup> An international right to health includes a right to control one’s body and reproductive freedom.<sup>140</sup> States have a duty to uphold these rights.<sup>141</sup> The decision to become a surrogate exists under the reproductive freedom and bodily autonomy rights granted by these international treaties. Becoming a surrogate concerns a choice over using one’s own body and the use of reproductive technologies. A ban on surrogacy restricts a woman’s right to choose what to do with her body and limits her reproductive freedom, infringing upon the right to health. This Comment argues that banning surrogacy does not properly reflect international rights and individual autonomy. Reflecting on the history of wet nursing provides a path forward to ethical contracts that allow for the commodification of the body if one so chooses.

A transnational approach should be taken for regulating surrogacy to best address its current problems. If surrogacy is approached only on a domestic level, the banning of the practice in one country only leads to an increase in the practice

<sup>135</sup> See generally Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 39 CUMB. L. R. 15, 81–85 (2008–09).

<sup>136</sup> Banning surrogacy restricts women of control over their body and decisions regarding their reproductive health, and controls access IPs have to family planning options. GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 21. This includes the International Covenant on Civil and Political Rights, which includes the protection of family rights, See generally G.A. Res. 2200A (XXI) A, International Covenant on Economic, Social and Cultural Rights at art. 10, (Dec. 16, 1966); Claudia Flores, *Accounting for the Selfish State: Human Rights, Reproductive Equality, and Global Regulation of Gestational Surrogacy*, 23 CHI. J. INT’L L. 391, 435–40 (2023).

<sup>137</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights at art. 12 (Dec. 10, 1948).

<sup>138</sup> G.A. Res. 2200A (XXI) A, International Covenant on Economic, Social and Cultural Rights at art. 10, ¶ 1, (Dec. 16, 1966).

<sup>139</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 15–16; G.A. Res. 217 (III) A., *supra* note 137, at art. 12.

<sup>140</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 at cl. 1 ¶¶ 8, 14 (Aug. 11, 2000) [hereinafter General Comment No. 14].

<sup>141</sup> See General Comment No. 14, *supra* note 140.

in places with less regulation.<sup>142</sup> These places may subject surrogates to conditions that are coercive, making it impossible for surrogates to provide informed consent. Underground surrogacy raises concerns of human trafficking, as the lack of regulation restricts any oversight that could safeguard human rights.<sup>143</sup> Further, IPs move across borders to seek surrogates, pushing surrogacy out of the domestic sphere.<sup>144</sup> States have a duty to uphold the right to health,<sup>145</sup> and with surrogacy this would require regulation that provides access, instead of a total ban. Transnational regulation would help build better monitoring systems.<sup>146</sup> Regulated commercial surrogacy should be enacted that enforces surrogacy agreements with safeguards for the surrogate to minimize the potential harms and threats of coercion. Pieces of regulation around the world, including from India, Ukraine, and the U.S., can be quilted together to make a comprehensive regulation that achieves these goals.<sup>147</sup> International bodies, such as the U.N. and Hague Conference on Private International Law, can drive this regulation.<sup>148</sup>

International regulation should recognize surrogacy contracts as enforceable as Ukraine and U.S. states already do. Enforceable contracts are needed to protect both IPs and surrogates. Without this protection, cases may arise where the surrogate determines she wants to keep the child, harming the IPs.<sup>149</sup> However, without a contract, if the IPs back out, the surrogate may be left with a baby she

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<sup>142</sup> For instance, when India banned surrogacy, it led to an increase in Thailand, Laos, Malaysia, and Cambodia. GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 14. Since India's ban, both Cambodia and Thailand have banned the practice. Sarah Haaij, *Cambodia Proves Fertile Ground for Foreign Surrogacy After Thailand Ban*, THE GUARDIAN (Aug. 19, 2016), <https://perma.cc/7CCU-4JN4>; Hannah Beech, *They Were Surrogates. Now They Must Raise the Children*, N. Y. TIMES (Nov. 26, 2022), <https://perma.cc/8Z2U-CV6V>.

<sup>143</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 18–19, *see also* Emma Lamberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. OF PUB. AND INT'L AFFS. (May 1, 2020), <https://perma.cc/B5GC-MBRS>.

<sup>144</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 63.

<sup>145</sup> *See* General Comment No. 14, *supra* note 140.

<sup>146</sup> GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 64.

<sup>147</sup> A discussion on combining Ukrainian and Israeli laws regarding surrogacy is proposed by Guzman, *supra* note 58, at 651.

<sup>148</sup> Kirsty Horsey, *The Future of Surrogacy: A Review of Current Global Trends and National Landscapes*, 48 RBMO 1, 12 (2024); *see also*, Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. OF L. AND POL. 41, 42 (2016) (arguing that the Hague Convention on Protection of Children and Cooperation in Respect of Inter-County Adoption should be expanded to include surrogacy).

<sup>149</sup> *See* P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018) (demonstrating that even where contracts are enforceable, issues of this nature arise).

did not want to raise.<sup>150</sup> There would have to be boundaries to the contract, such as not allowing specific performance as a remedy, thereby not forcing a surrogate to become pregnant and have a child for the couple.<sup>151</sup>

Regulatory bodies on a domestic and international level should be built into the framework to ensure the autonomy of the surrogate and that informed consent is provided. This oversight body would be responsible for upholding regulations and preventing human rights violations.<sup>152</sup> India's committee is an example here, as the board is made up of a diverse group of experts and is intended to implement regulations and advise on policy.<sup>153</sup> Concerns of financial coercion are greatest where unequal bargaining exists.<sup>154</sup> By evaluating the agreement and listening to parties, the committee acts as a safeguard against coercion of the surrogate and checks that informed consent has been provided. Mandating that surrogates be informed in the contracting phase and onwards helps minimize the violations against surrogates.<sup>155</sup>

The wet nursing perspective supports an international regulatory scheme that works in conjunction with rights to health and the economic rights protected by international agreements.<sup>156</sup> Incorporating labor laws that include workers' rights could assist in the protection of surrogates.<sup>157</sup> France, which has a ban on surrogacy, did just that with wet nursing. The country set minimum payments and other workers' protections.<sup>158</sup> Treating surrogacy as employment and providing

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<sup>150</sup> Nicolas Perpitch, *Gammy Case: Commercial Surrogacy Should be Legalized, Lawyer Says*, ABC NEWS (Aug. 12, 2014), <https://perma.cc/LL99-68C3>; Elizabeth Cohen, *Girl in Famous Surrogacy Case Dies at Age 8*, CNN (Aug. 8, 2020), <https://perma.cc/NUL8-WA3P>.

<sup>151</sup> N.Y. FAM. CT. ACT § 581-409(c). Prior to implantation, parties should be free to walk away from the contract. N.Y. FAM. CT. ACT § 581-405.

<sup>152</sup> Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L. J. 2249, 2287–89 (2012).

<sup>153</sup> Surrogacy (Regulation) Act, 2021, cl. 5, § 17(2) (India). Israel has a similar board that reviews every surrogacy agreement. See Committee for Approval of the Embryo Carrying Agreement, *Surrogacy in Israel*, MINISTRY OF HEALTH (Oct. 13, 2024).

<sup>154</sup> Jaden Blazier & Rien Janssens, *Regulating the International Surrogacy Markets: The Ethics of Commercial Surrogacy in the Netherlands and India*, 23 MED., HEALTH CARE, AND PHIL., 621, 623 (2020).

<sup>155</sup> Saravanan, *supra* note 9, at 6.

<sup>156</sup> See generally, G.A. Res. 2200A (XXI) A, International Covenant on Economic, Social and Cultural Rights at art. 7, (Dec. 16, 1966) (requiring fair wages and safe working conditions with reasonable limitations on working hours).

<sup>157</sup> Smerdon, *supra* note 135, at 43–44.

<sup>158</sup> Drake, *supra* note 104, at 54.

workers' rights for surrogates in legislation may even make the process more favorable in the public's eyes.<sup>159</sup>

Opponents to commercial surrogacy ignore a benefit that wet nursing illustrates: the ability to provide the service offers women a lucrative employment that they can take pride in.<sup>160</sup> This empowerment may be considered lesser by those in the Western hemisphere, but where deep gender divides and restrictions on female employment persist, surrogacy offers an uplifting path.<sup>161</sup> A ban on this practice takes away this avenue and assumes that surrogates are incapable of informed consent and making decisions regarding their bodies.<sup>162</sup> This assumption infantilizes women and does not protect the surrogates' rights. Exploitation concerns can be ameliorated through informed consent as it requires respect for the patient's legal capacity and autonomy.<sup>163</sup> Informed consent bolsters the rights protected in international agreements, including rights to self-determination and respect for human dignity.<sup>164</sup>

Surrogacy is an arduous service, and people may feel a moral obligation to compensate surrogates due to this.<sup>165</sup> Surrogacy should be viewed as a service involving, with consent, the use of a human body, not "baby buying." The timing of compensation helps create this perspective shift: a payment that is not contingent on a live birth or the health of a child helps assert that it is the service and work of the surrogate being compensated, not the providing of a baby.<sup>166</sup>

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<sup>159</sup> Andrew Luttrell, *Can New Rules Shape Public Opinion?*, PSYCH. TODAY (Mar. 16, 2020) <https://perma.cc/AZQ4-ANH3> (summarizing studies around the world on public perception to policies after regulations have been enacted).

<sup>160</sup> Rowold, *supra* note 116, at 611.

<sup>161</sup> Patel, *supra* note 5, at 215.

<sup>162</sup> The feminist argument against surrogacy claims that there is no free choice by surrogates when being paid. This is discussed more in the following section. Other criticisms assume that surrogates are always low-income women being exploited, though this research is mix. Compare José Ángel Martínez-López & Pilar Munuera-Gómez, *Surrogacy in the United States: Analysis of Sociodemographic Profiles and Motivations of Surrogates*, 49 RBMO, at 2–3 (2024) with Saravanan, *supra* note 9, at 6.

<sup>163</sup> Human Rights Council, Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶¶ 10–14, U.N. Doc. A/64/272, (Aug. 10, 2009) [hereinafter Human Rights Council]. Informed consent is a "voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making." Human Rights Council, at 5, ¶ 9; see also Global Human Rights Clinic, *supra* note 75, at 21.

<sup>164</sup> Human Rights Council, *supra* note 163, at 6–7, ¶¶ 18–19, 23 (2009).

<sup>165</sup> Global Human Rights Clinic, *supra* note 75, at 64–66.

<sup>166</sup> Mortazavi, *supra* note 152, at 2284. One critic argues that the way contracts are structured amounts to baby-selling. See Emily Brooke McNally, *To Know and Be Known: Commercial Surrogacy and the Subordination of Children's Rights to the Desires of Adults*, at 48 (M.A. thesis, Indiana University) <https://perma.cc/SA28-333U>. However, this does not defeat the Comment's proposed framework, which aims to shift contracts away from this perspective and make clear that compensation is being provided for the surrogate's labor.

Regulation should be used to exercise control over surrogacy agencies. Agencies may be viewed as coercive middlemen, who ultimately are party to, or commit, human rights violations against surrogates.<sup>167</sup> However, agencies play an important role in connecting IPs and surrogates. For surrogacy agencies to be successful, there is a need for trust and accountability, especially in the case of IPs and surrogates who do not speak the same language. IPs depend on agencies for the guidelines and trust that agencies will pay the surrogate.<sup>168</sup> India's statute illustrates what this may look like. Here, the surrogacy agencies work on a voluntary basis and are not allowed to recruit or advertise their services.<sup>169</sup> This restriction ensures that people who engage in surrogacy are ones that have sought it out because they want to and were not enticed by false promises. Wet nursing in the early twentieth century of the U.S. further proves the need for an agency that functions as such—wet nurses were needed but were incredibly challenging to find until the Boston Wet Nursing Directory was established.<sup>170</sup> By creating the Directory, families in need were able to connect to women able to provide the service.<sup>171</sup>

Many regulations require IPs to have a medical need to use surrogacy.<sup>172</sup> This requirement is justified as protecting surrogates from exploitation by ensuring surrogacy is only being used as a final resort.<sup>173</sup> However, it violates an intended mother's right to reproductive freedom. Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women requires states to "eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."<sup>174</sup> Family planning is the "basic right to decide freely and responsibly the number and spacing of their children."<sup>175</sup> By

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<sup>167</sup> Saravanan, *supra* note 9, at 8–10 (discussing how payments must be through the clinic and that the clinics engaged in practices to recruit surrogates).

<sup>168</sup> *Id.* at 5.

<sup>169</sup> Surrogacy (Regulation) Act, *supra* note 82, cl. 7, 40. The U.K., where surrogacy is only altruistic, has similar regulations on agencies. Surrogacy Arrangements Acts 1985, cl.49, §§ 3–4 (U.K.).

<sup>170</sup> Golden, *supra* note 106, at 599.

<sup>171</sup> *Id.*

<sup>172</sup> ORDER OF THE MINISTRY OF HEALTHCARE OF UKRAINE NO 787 'ON APPROVAL OF THE PROCEDURE FOR THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGIES IN UKRAINE' OF 9 SEPTEMBER 2013 (Ukr.).

<sup>173</sup> Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?* 68 IND. L.J. 205, 225 (1992).

<sup>174</sup> G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 12 § 1 (Sept. 3, 1981).

<sup>175</sup> U.N. Department of Economic and Social Affairs, Population Division, World Family Planning 2022: Meeting the Changing Needs for Family Planning: Contraceptive Use by Age and Method, 1, U.N. Doc. DESA/POP/2022/TR/NO. 4 (2022).

controlling access intended mothers have to surrogacy, women are deprived of methods of ART that men are otherwise able to access. The wet nursing perspective further demonstrates that regulations should not have this requirement as wet nurses were used even when the biological mothers could breastfeed.<sup>176</sup> Surrogacy should follow suit, allowing for the service to be used without medical necessity. Regulations should have minimal restrictions on the right to access ART, including surrogacy, to be in line with international rights.

## VII. SHORTCOMINGS OF THIS FRAMEWORK

This proposed framework is only a partial piece of the regulation needed for international surrogacy. Only the surrogate and the surrogate's rights are explored here, ignoring the child and the citizenship and parental rights granted at birth. These pieces are not necessarily in competition with each other, because it is possible for a framework that supports surrogates' rights to collaborate with a framework that protects children, but the wet nursing perspective does not contribute to the latter framework.

There are a variety of different reasons people may oppose surrogacy, from religion to feminist arguments, and this framework does not completely address the opposition. Feminists claim their ethical concern with surrogacy is that potential surrogates have no free choice if they have financial needs and thus end up "lend[ing] their bodies for cash."<sup>177</sup> This issue is not clearly about surrogate autonomy and free choice, but rather a critique on allowing women to use their bodies for a service. This vilification of using the body is not unique to surrogacy; wet nurses were viewed as immoral for taking up the profession.<sup>178</sup> Legal scholars view proposals that only allow for altruistic surrogacy and require a medical necessity to use surrogacy as minimizing the harms the feminist argument raises.<sup>179</sup> However, these proposals limit the rights of the parties, and a ban on payments may drive the practice underground.<sup>180</sup> Therefore, the feminist critique does not defeat the argument for an international regulation that permits commercial surrogacy.

The international framework does not address religious beliefs. The wet nursing perspective is also inadequate in addressing religious opposition, as religious views towards wet nursing and surrogacy differ. Using religious beliefs

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<sup>176</sup> France appears to be the only state that took action against this practice. Lepore, *supra* note 111.

<sup>177</sup> Smerdon, *supra* note 135, at 54.

<sup>178</sup> GOLDEN, *supra* note 99, at 168–69.

<sup>179</sup> Lieber, *supra* note 173, at 224–26.

<sup>180</sup> *Id.* at 228.

to justify denying health access is not unique to surrogacy.<sup>181</sup> While international rights aim to overcome religious and conscientious objections to rights,<sup>182</sup> there is little power to make states take actions that support surrogacy.

Anti-surrogacy advocates frame surrogacy as a commercial contract that commodifies children.<sup>183</sup> Compensation for surrogacy is not the “cost for a child” but the cost of the service being provided. As wet nursing was compensation for the service provided to a child and family, commercial surrogacy is compensation for the service provided by a surrogate to create a family. Regulations within the proposed framework can also limit the framework of surrogacy being baby selling, such as restrictions on paying more for desirable traits, or preventing IPs from abandoning the child of surrogacy.<sup>184</sup>

Without an international framework, a collective action problem among countries may arise. Regulation enacted in one popular destination may create a race to the bottom. Asymmetrical regulation may push IPs and surrogates to unregulated jurisdictions, increasing the risk of exploitation. This Comment uses a historical perspective and international right to health standard to legitimize regulation. Without international collaboration and incentives to enact regulations, the framework is unlikely to be uniform around the world. This would be the work, again, of a realized international right to health, obligating countries to create and enforce surrogacy regulations.

A pro-altruistic framework is not contradicted by this framework. While many surrogates choose the work in order to make money, others are motivated by wanting to help IPs create a family or enjoying pregnancy.<sup>185</sup> The wet nursing perspective supports commercial surrogacy as wet nursing was an important form of employment for women. Some women opted to donate their milk as well,

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<sup>181</sup> See Marie Juul Peterson, *Freedom of Religion or Belief and Health*, DANISH INSTITUTE FOR HUMAN RIGHTS (2020), <https://perma.cc/2U3G-FXFH>. Minority groups experience restrictions to healthcare, including institutionalized discrimination and unequal care provided, that is sometimes justified by religious or cultural beliefs. For women specifically, practices of female genital mutilation are continued through cultural and religious justifications.

<sup>182</sup> See, e.g., Working Group on Discrimination Against Women and Girls, *Conscientious Objections to Abortion: Key Considerations*, U.N. Doc. A/HRC/WG.11/41/1 (2024), <https://perma.cc/3NBP-S5TU>.

<sup>183</sup> Chad De Guzman, *Pope Francis Calls Surrogate Motherhood ‘Deplorable,’ Calls for Global Ban*, TIME MAGAZINE (Jan. 9, 2024), <https://perma.cc/VVS5-G9H9>. This is in contrast to adoption, which is governed by international law that prohibits adoption payments. Hague Conference on Private International Law, *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, May 29, 1993.

<sup>184</sup> These restrictions already exist in India and the U.S. Surrogacy (Regulation) Act, *supra* note 82, cl. 3, § 7; N.Y. FAM. CT. ACT § 581-502(c)–(d) (McKinney).

<sup>185</sup> See also *Surrogate Mom Damages Heart After Four Babies*, ABC NEWS (Mar. 1, 2011), <https://perma.cc/5CCR-LCN5> (saying that she chose to be a surrogate for altruistic reasons in addition to the financial support).



refusing payment.<sup>186</sup> Wet nursing today is more often altruistic, or even mandated to be altruistic.<sup>187</sup> Thus, the argument that surrogacy should be a form of employment and commercialization of surrogacy be legal, does not solely stand on the same right to employment grounds as wet nursing once did. It is unlikely to be persuasive that surrogacy is needed as a form of employment—yet clearly it is a draw for women who are seeking the financial status it can provide them.<sup>188</sup> Taking this ability away then limits the number of employment opportunities for women, particularly for women in more rural areas with fewer options to provide for their families.<sup>189</sup> Thus, prohibiting the ability to profit from the service provided would still restrict a surrogate's ability to make decisions for herself. Further, just because some women are willing to become surrogates without pay, does not mean they should have to. Compensation is a way for the IPs to express gratitude and acknowledge the difficulty of the process. Regulation also ensures that these surrogates are receiving the compensation owed to them and brings them to the table to ensure their voices are heard.

## VIII. CONCLUSION

Surrogacy regulation varies widely, and the lack of consistency makes it difficult to navigate the system. This leads to concerns that IPs will seek underground, private, or unregulated paths to surrogacy. While some view surrogacy as exploitation and demand it to be banned everywhere, the practice of women contracting for reproductive services is rooted in history, as seen in wet nursing. Similar to surrogacy, the practice of wet nursing was impacted by advances in medical technology, faced opposition through religious and political thought, and experienced different controls across countries. What remained consistent in wet nursing was that the practice was seen as a legitimate form of employment, offering women opportunities to provide income to their families. Considering that wet nursing provided valuable employment opportunities to many women, it may be true that surrogacy provides the same for women around the world. Allowing for commercial surrogacy ensures compensation for surrogates' services and respects their dignity. Further, legitimizing surrogacy recognizes the right surrogates have over their bodies to make informed decisions. Shaping surrogacy regulation to reflect an employment opportunity, as wet nursing did, can help the law move forward in a way that respects women's autonomy and right to contract. This includes allowing for commercial surrogacy,

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<sup>186</sup> Golden, *supra* note 106, at 598.

<sup>187</sup> *About: Frequent Questions*, *supra* note 131.

<sup>188</sup> Saravanan, *supra* note 9, at 6.

<sup>189</sup> *Id.* at 5–6; GLOBAL HUMAN RIGHTS CLINIC, *supra* note 75, at 37–39.

regulating the process with independent bodies and clinics, and requiring informed consent.