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## BUILDING QUEER FAMILIES AND THE ETHICS OF GESTATIONAL SURROGACY

*Kimberly Mutcherson* \*

### INTRODUCTION

Throughout American history, government has used the law to deny some citizens the right to create or sustain families with children to show contempt for those citizens. As LGBT people fought for dignity, equality, and justice from Stonewall to the present, one of the greatest success stories of that fight is the change in how the law defines and protects families. Into the 1990s, people in same-sex relationships had cause to fear that their sexual orientation could be used to deprive them of custody of their children. Now, many states, through statute or case law, routinely recognize two parents of the same sex for a child, and some explicitly forbid discrimination on the basis of sexual orientation in adoption. Still, others are slowly taking steps to level the assisted reproduction playing field for same-sex couples through their laws and policies.

This Essay focuses on a particular aspect of the world of family building for LGBT people, which is the use of gestational surrogacy to create families with children. Within the LGBT community, gay men are the most frequent users of this practice because they must find a woman willing to gestate a child if the fathers desire genetic connection. The ethical concerns about hiring a gestational surrogate increase when the arrangement involves cross-border reproductive travel, sometimes pejoratively referred to as “reproductive tourism,” in which commissioning or intended parents<sup>1</sup> from a developed nation hire a surrogate from a developing nation to gestate a child.

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1. This Essay will use the terms “commissioning” and “intended parents” interchangeably to refer to the parties who initiate a surrogacy arrangement with the goal of becoming legal parents to any child or children produced from that arrangement.

The claim in this Essay is not that surrogacy is unethical per se or that gay men should not be able to, or should not choose to, avail themselves of the benefits of surrogacy to bring children into a family if they can afford to do so. Stories of surrogacy arrangements gone wrong are relatively few and far between, and hundreds of happy families and happy surrogates exist in the world. But, even when they go as planned, arrangements involving commercial trade in reproductive capacity are rife with ethical and legal quagmires, including the ever-present potential for exploitation of the women<sup>2</sup> who labor as gestational surrogates. This Essay ponders what responsibility intended parents should have when they opt to participate in this business knowing that gestational surrogates take on significant risk, physical and otherwise, to fulfill their part of a surrogacy contract, even when the contract terms are not in their favor. As people who contract for these unique services, intended parents have an ethical obligation to consider the conditions under which surrogates labor and, to the extent that they have any power to do so, attempt to eliminate or ameliorate exploitation.

Given the increasing role that single gay men and same-sex male couples play in this market, it is worth considering how people who are frequently accessing this market because of their own struggles to be treated with equality and dignity can avoid being responsible for treating another group—women in developing nations—with less dignity than they deserve. This is especially so to the extent that access to gestational surrogacy gets framed as a civil rights issue for gay men without a concomitant focus on how practices within the industry do not well serve the women who are an indispensable part of it. Though there is no adequate system in place for intended parents to do in-depth research on the practices of any given agency, this Essay argues that those who benefit from this industry have an ethical obligation to avoid bad actors if and when possible. This may require making inquiries into the ethical practices of an agency and choosing one that at least purports to treat its reproductive laborers with dignity and fairness. Certainly, where an agency is known to be a bad actor, or a country is known to have abhorrent practices, intended parents should not engage

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2. Though some transgender men and nonbinary people can become pregnant, the practice of hiring surrogates focuses on hiring cisgender women. For that reason, this Essay consistently uses the term “women” to refer to people who carry pregnancies in exchange for money.

with those agencies or countries. However, where information is unavailable, intended parents may wish to reassess their willingness to spend money in an industry that does not always share their commitments to human rights and justice.

## I. QUEER FAMILIES AND THE LIBERATION OF LGBT PEOPLE

In the 1995 Virginia Supreme Court case *Bottoms v. Bottoms*, Sharon Bottoms, a woman who was in a sexual relationship with another woman, fought her mother, Kay Bottoms, for custody of Sharon's young son, Tyler.<sup>3</sup> According to the record in the custody hearing, Sharon Bottoms led a chaotic life. She dropped out of school at eighteen, married a long-term boyfriend, and separated from him after eight months.<sup>4</sup> That marriage resulted in the birth of Tyler.<sup>5</sup> She had a variety of temporary living situations, and Tyler spent a significant amount of time living with his grandmother—Sharon's mother, Kay.<sup>6</sup> When Sharon confronted Kay about Kay's live-in boyfriend, who Sharon alleged had sexually assaulted her as a child, Kay decided that it was time to contact a lawyer and seek custody of Tyler.<sup>7</sup> It is not coincidental that Kay made this decision after Sharon began a "lesbian relationship" with April Wade and the mother and daughter became estranged.<sup>8</sup> Kay then went to court to gain custody of Tyler based in part on her disapproval of the sexual relationship between Sharon and April, which made Sharon a criminal under Virginia's sodomy law.<sup>9</sup>

In a case that ultimately went to the Supreme Court of Virginia, Sharon Bottoms lost custody of her son to her mother.<sup>10</sup> The court offered a number of reasons for upholding the trial court's finding that the presumption in favor of parents in custody proceedings was outweighed, in this case, by Sharon's unfitness.<sup>11</sup> In addition

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3. *Bottoms v. Bottoms*, 457 S.E.2d 102, 103–05 (Va. 1995); Brief of Appellant at 1, *Bottoms*, 457 S.E.2d 102 (No. 941166).

4. *Bottoms*, 457 S.E.2d at 105.

5. *Id.*

6. *Id.*

7. *Bottoms v. Bottoms*, 444 S.E.2d 276, 278–79 (Va. Ct. App. 1994).

8. *Bottoms*, 457 S.E.2d at 105–06.

9. *Id.* at 106, 108.

10. *Id.* at 108–09.

11. *Id.* at 107–08.

to what the court described as her lack of stability, her chronic unemployment, her neglect of Tyler, and her temper, the court upheld the grant of custody to Kay based in part on “the mother’s relationship with [another woman], and the environment in which the child would be raised if custody [was] awarded the mother.”<sup>12</sup> The court had previously determined that “living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationships with its ‘peers and with the community at large.’”<sup>13</sup>

In the years since the *Bottoms* decision, LGBT people and their allies have shattered many, though not all, barriers to their right to make families with children, and have found courts to be less hostile to those families than in the past. As chronicled by Professor Carlos Ball, the fight for parental rights for LGBT people has “fundamentally changed how American law defines and regulates parenthood.”<sup>14</sup> That the quest for LGBT rights has had this broader impact on the rights of parents and the definition of parenthood is a significant victory, but victories often bring unexpected complications.

In this case, the complication of the much-welcomed expansion of access to parenthood for LGBT people is that the growth of the fertility industry, coupled with the liberalization of rules about who can and/or should become a parent, means that more LGBT people are accessing assisted reproductive technology (“ART”) to create pregnancies and add children to their families. While this is a boon for these individual families and perhaps for the larger

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12. *Id.* at 105, 108.

13. *Id.* at 108 (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)). Contrast this holding with the United States Supreme Court’s holding in *Palmore v. Sidoti*, a case in which a white mother lost custody of her child when she began a live-in relationship with a black man. Rejecting the legal salience of the lower court’s concern that the child would suffer social stigma because of her mother’s relationship, the Court wrote:

Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. “Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.”

466 U.S. 429, 433 (1984) (citing *Palmer v. Thompson*, 403 U.S. 217, 260–61 (1971) (White, J., dissenting)).

14. CARLOS A. BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 4 (2012).

LGBT community, it implicates queer families<sup>15</sup> in an industry riddled with both the risk of, and reality of, exploitation of and harm to women.<sup>16</sup> In particular, as discussed in the next section, the use of gestational surrogacy by gay men or men in same-sex relationships—especially when those men live in developed nations and purchase gestational services from women living in developing nations—warrants a critique of what communities of marginalized people owe to each other as they seek their own liberation.

#### A. *The Mechanics of Cross-Border Reproductive Travel for Surrogacy*

Surrogacy is an arrangement by which a woman contracts or otherwise agrees with a single person or couple to carry a child to term with whom she intends to have no legal parental relationship. In its earliest incarnations, surrogacy required sex between the surrogate and the man who intended to father the child, but the arrival of artificial insemination (“AI”) in the mid-twentieth century<sup>17</sup> meant that a woman working as a surrogate could become pregnant by having the intended father’s sperm transferred into her body, generally with the assistance of a physician.<sup>18</sup> An arrangement in which the surrogate becomes pregnant via AI and, therefore, carries a child to whom she is genetically linked, is frequently referred to as a traditional surrogacy arrangement.<sup>19</sup> The availability of in vitro fertilization (“IVF”) allows a surrogate to

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15. This Essay uses the term “queer” to reflect the political nature of LGBT families, even when those families do not call or consider themselves to be queer. The occasion of Stonewall Fiftieth provided an opportunity for activists and academics to reflect on the mainstreaming of queer politics, such that a movement centered on radical liberation has, arguably, left behind its radical potential in favor of seeking the trappings of heteronormativity, whiteness, and capitalism. See, e.g., Katherine Franke, *What Happened to the Radical Spirit of the Stonewall Rebels?*, NATION (June 30, 2019), <https://www.thenation.com/article/stonewall-radical-protest-domestication/> [https://perma.cc/LLU5-W52K]; Darnell L. Moore, *The Gentrification of Queerness*, NATION (June 25, 2019), <https://www.thenation.com/article/stonewall-christopher-street-gentrification/> [https://perma.cc/C3CZ-P6DE]; Keeanga-Yamahtta Taylor, *Gay Pride Doesn't Mean Gay Liberation*, NATION (June 29, 2019), <https://www.thenation.com/article/lgbtq-liberation-nigel-shelby-stonewall/> [https://perma.cc/Q6R2-ZW6L].

16. Francine Coeytaux et al., *Assisted Reproduction and Choice in the Biotech Age: Recommendations for a Way Forward*, 83 CONTRACEPTION 1–4 (2011).

17. KARA W. SWANSON, BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA (2014).

18. *Id.*

19. *Traditional Surrogacy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

have a gestational, but not genetic, tie to a child as it involves fertilization outside of the womb of an egg that can come from a woman who is not the gestational surrogate.<sup>20</sup> A surrogacy of this kind is known as gestational surrogacy, and it allows for the surrogate to gestate a child without having a genetic tie to that child. Though traditional surrogacy is often a cheaper option for intended parents, many of them eschew this option for a range of reasons, including a desire to have a child who is genetically tied to both intended parents (for an opposite sex couple), or a desire on the part of the surrogate and/or intended parents to make the surrogacy arrangement less fraught by eliminating the genetic link between the gestational surrogate and child.

Surrogacy has opened up a world of possibilities for people who need or want third-party assistance to create or carry a pregnancy and bring a child in to their family. Agencies in the United States and abroad happily take money from intended parents to facilitate a relationship with a surrogate who will gestate a child in accordance with a contract signed by the parties. Increasingly, these agencies cater to gay male couples who are a valuable source of clients. A Google search reveals numerous websites and agencies eager to assist gay men in their surrogacy journey. The website *GayswithKids.com* includes helpful articles such as *5 Questions Gay Men Should Ask Themselves Before Starting Surrogacy* and *Gay Dads Ask: Can We Make Surrogacy Cheaper?*<sup>21</sup> *ConceptualOptions.com* has a separate page on its website devoted to LGBT intended parents, where they assure would-be parents who are gay men that even though “[s]urrogacy for gay men can seem especially complicated as a woman’s body is required . . . there is no shortage of women who want to carry a child for male couples.”<sup>22</sup> IVFCon-

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20. *In Vitro Fertilization (IVF)*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> [<https://perma.cc/T269-VSLR>].

21. Yanir Dekel, *Gay Dads Ask: Can We Make Surrogacy Cheaper?*, GAYS WITH KIDS (May 1, 2019), <https://www.gayswithkids.com/gay-men-ask-these-questions-before-surrogacy-2594009108.html> [<https://perma.cc/7DH4-EWJS>]; Kristin Marsoli, *5 Questions Gay Men Should Ask Themselves Before Starting Surrogacy*, GAYS WITH KIDS (Aug. 16, 2018), <https://www.gayswithkids.com/can-we-make-surrogacy-cheaper-2635661023.html> [<https://perma.cc/TP54-4YDD>]. While looks can be deceiving, almost all of the gay dads featured on this website’s landing page are white.

22. *Same-Sex Gay Marriage and LGBT Surrogacy*, CONCEPTUAL OPTIONS, [https://www.conceptualoptions.com/same-sex-surrogacy/?gclid=CjwKCAjw3c\\_tBRA4EiwAICs8CgHrq74InWkAZzB8YdL4NHoBPAPpL8sPugHLQ4JHwtrwbflBXIRDThoCqYYQAvD\\_BwE](https://www.conceptualoptions.com/same-sex-surrogacy/?gclid=CjwKCAjw3c_tBRA4EiwAICs8CgHrq74InWkAZzB8YdL4NHoBPAPpL8sPugHLQ4JHwtrwbflBXIRDThoCqYYQAvD_BwE) [<https://perma.cc/S2SB-3WKQJ>].

ceptions.com has a page devoted to “Gay Surrogacy,” which includes warnings about the risks of entering into a surrogacy arrangement in a developing nation, where there may be no laws governing surrogacy.<sup>23</sup> They also warn against “back channel” surrogacy arrangements, in which the surrogate and commissioning father represent themselves as a couple, sometimes to avoid bans against gay men accessing surrogacy services in a particular country.<sup>24</sup> IVF Conceptions offers surrogacy arrangements in Laos, Georgia, Mexico, Kenya, Colombia, Ukraine, and more.<sup>25</sup> Circle Surrogacy was founded by gay men and caters to the LGBT community with three levels of surrogacy packages starting at \$108,000, plus IVF costs for the essential package, and a VIP Program for “intended parents who are looking for the luxury of a customizable experience and additional support,” for which the website does not include prices.<sup>26</sup>

That companies advertise to and customize programs for LGBT, mostly gay, couples and singles speaks to the rise of an interest in parenting, especially genetic/biological parenting, among gay men,<sup>27</sup> and the perception that this is a profitable community to court. This Essay assumes that making parenthood accessible to people for whom its pursuit used to be and, in some cases still is, filled with legal pitfalls is, overall, a positive change in the lives of LGBT people and is one of the great successes of the LGBT rights movement. That said, no matter the relationship status or sexual orientation of the participants, any arrangement that involves the exchange of money for gestational services has deep potential for difficult, if not disastrous, outcomes. To better understand these risks, the next sections describe the global market in gestational services to lay the groundwork for the discussion of why queer families bolstering this market is problematic.

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23. *Gay Surrogacy*, IVF CONCEPTIONS, <https://ivfconceptions.com/gay-lgbt-surrogacy> [<https://perma.cc/F6E2-63C3>].

24. *Id.*

25. *Id.*

26. *Circle Surrogacy & VIP Programs for Parents*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/parents/how-it-works/programs-costs/surrogacy-vip-program> [<https://perma.cc/VR9B-KA9T>].

27. See, e.g., Stephanie A. Grover et al., *Assisted Reproduction in a Cohort of Same-Sex Male Couples and Single Men*, 27 REPROD. BIOMEDICINE ONLINE 217, 220–21 (2013).



### B. *Economic Inequality*

As is true of much of the market in assisted reproduction, a commercial surrogacy arrangement is an expensive and time-consuming endeavor that is out of reach for anyone who lacks the financial wherewithal to participate in the market. Consequently, given the global reality of income inequality, those who purchase surrogacy services are typically substantially wealthier than the women who offer their services. In the paradigmatic case, a commissioning couple, often opposite sex, married, white, and upper-class, works with an agency that hires and vets surrogates or with an attorney with expertise in surrogacy arrangements. Insurance will not cover the fees paid to the agency or attorney, nor the fee paid to the surrogate. The agency/broker attempts to match the commissioning couple or individual with a gestational surrogate who meets their criteria, which often focuses on the surrogate's physical health, a proven ability to carry a healthy child to term, and, to the extent that this can be gauged, a psychological profile commensurate with a person who will not renege on the promise to surrender the child to the intended parents after birth.

The costs of surrogacy for the people commissioning the arrangement vary greatly depending upon where the surrogacy is being arranged and where the gestation and birth will take place. In the United States, commissioning couples pay significant fees to agencies and lawyers. One agency, West Coast Surrogacy, enumerates its prices as follows:

- \* Base pay for an experienced surrogate: \$60,000 plus expenses and allowances, or \$50,000 plus expenses and allowances for a first-time surrogate;
- \* Fees for multiples: \$5000 for twins and \$10,000 for triplets
- \* C-section fee: \$3000
- \* Unique circumstances, such as an ectopic pregnancy, pregnancy termination, prenatal testing: Up to \$10,000
- \* Psychological screening for all parties: \$1000
- \* Drafting contract: \$2000–\$2750
- \* Review of contract for surrogate: \$1000
- \* Establishing parentage: \$4000–\$7000
- \* Trust account management: \$1000–\$1500
- \* Psychological support for surrogate: \$2500

\* Insurance verification for surrogate if she has a surrogacy friendly insurance policy: \$200–\$350

\* Insurance for surrogate (if necessary): \$25,000.<sup>28</sup>

Numerous other potential costs not included above include travel and hotel costs for the surrogate, or lost wages for the surrogate if the pregnancy interferes with her ability to work.<sup>29</sup> The commissioning parent or parents may also need to cover healthcare costs out of pocket for a surrogate who does not have her own insurance or who has an insurance policy that excludes coverage for surrogate pregnancies.<sup>30</sup> All totaled, West Coast Surrogacy estimates that a gestational surrogacy can cost up to \$130,000.<sup>31</sup> The Sensible Surrogacy Guide puts the cost of a United States-based surrogacy at \$95,000–\$150,000, as compared to \$50,000–\$80,000 in other countries.<sup>32</sup> Even an arrangement brokered for half that cost would place surrogacy out of the range of economic possibility for most American families. In the developing world, by contrast, surrogacy arrangements can be made for a fraction of the cost as discussed below.<sup>33</sup>

As described above, in the United States, the base pay for a gestational surrogate can range from a low of \$25,000<sup>34</sup> to a high of over \$60,000 with the highest fee going to women who are in demand, for instance, a woman who is an experienced surrogate and is willing to carry multiples.<sup>35</sup> A woman in India, a once bustling market for reproductive travel, or in other burgeoning markets in developing nations might receive a maximum fee closer to \$5000–\$7000 for her work, which could be the equivalent of ten years of

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28. *West Coast Surrogacy Costs and Fees*, W. COAST SURROGACY, <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> [https://perma.cc/Y4NY-D2RU].

29. *Id.*

30. *Surrogacy Insurance Myths*, NEW LIFE AGENCY, [http://www.newlifeagency.com/surrogate\\_maternity/surrogate\\_advocacy.cfm](http://www.newlifeagency.com/surrogate_maternity/surrogate_advocacy.cfm) [https://perma.cc/4YX4-T4LT].

31. *West Coast Surrogacy Costs and Fees*, *supra* note 28.

32. *The Surrogacy Cost Guide*, SENSIBLE SURROGACY GUIDE, <https://www.sensible-surrogacy.com/surrogacy-costs/> [https://perma.cc/M4SQ-EBE5].

33. Kimberly Mutcherson, *Reproductive Rights Without Resources or Recourse*, HASTINGS CTR. REP., Nov.–Dec. 2017, at S12.

34. *How Much Do Surrogate Mothers Get Paid*, SURROGATE.COM, <https://surrogate.com/surrogates/becoming-a-surrogate/being-compensated-as-a-surrogate/> [https://perma.cc/LW52-525S].

35. Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE (July 29, 2007), <https://www.marieclaire.com/politics/news/a638/surrogate-mothers-india/> [https://perma.cc/B2J6-FFAV].

salary for women living in rural areas in India.<sup>36</sup> Tragically, the fee might also be much less than \$5000 in actuality even if the woman is promised more in her initial agreement.<sup>37</sup> The drastic price gap reflects the differential value placed on the labor being performed or service being provided in each location despite the fact that the labor/service is identical across borders. Similarly, the fee reflects that levels of economic precarity, unsurprisingly, impact the price point that is sufficient to draw women into the market. Particularly given that women are frequently expected to have already given birth at least once before becoming a surrogate, a woman who has financial responsibility for children may find that this responsibility plays an outsized role in both her willingness to be a surrogate and the price sufficient to bring her into the market. Where the alternatives to surrogacy are few, dangerous, distasteful, or all of the above, the pull of a surrogacy fee that is a fraction of what women earn in the United States can be enormously and unfairly enticing.<sup>38</sup>

### C. *Contractual Inequality*

The labor provided by a woman who works as a surrogate is deeply intertwined with her physical self and has implications for her physical and psychological well-being and the psychological well-being of the intended parent(s). Inevitably, the contracts drafted and signed pursuant to these arrangements include provisions that are incredibly personal, invasive, intimate, and, in some cases, legally unenforceable. Agencies and brokers seek surrogates who have already given birth to at least one child before becoming a surrogate so that the woman is emotionally prepared for the experience of carrying a pregnancy to term and giving birth. Assuming that a woman who has not given birth to a child is incapable of or unlikely to keep a promise to part with a child to whom she gives

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36. AMRITA PANDE, *WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA* (2014); Haworth, *supra* note 35.

37. Haworth, *supra* note 35.

38. In his work on ethics and markets for items previously thought to be outside of the world of goods for sale, Michael Sandel speaks to the risks of coercion, mainly the concern that “injustice . . . can arise when people buy and sell things under conditions of severe inequality or dire economic necessity. According to this objection, market exchanges are not necessarily as voluntary as market enthusiasts suggest.” Michael J. Sandel, *Lecture at the Tanner Lectures on Human Values: What Money Can't Buy: The Moral Limits of Markets* 94 (May 11 & 12, 1998), [https://tannerlectures.utah.edu/\\_documents/a-to-z/s/sandel00.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf) [<https://perma.cc/K467-RM9G>].

birth perhaps assumes far too little about what women are physically and emotionally capable of handling. Just as important, previously giving birth to a child offers no guarantee that a gestational surrogate will not bond with a child she is carrying pursuant to a surrogacy agreement and seek to keep that child. Thus, women are asked to contract in a situation of potentially life changing uncertainty.

Once the agency or individual makes a match between a gestational surrogate and intended parents, the surrogate and the commissioning parents sign a contract to codify the relationship between the parties before, during, and after the pregnancy. Contracts can include terms that seek to control the surrogate's behavior during pregnancy, for instance, requiring that she follow all dictates from her obstetrician and that she avoid sexual intercourse while attempting to become pregnant lest she end up accidentally pregnant by her husband or romantic partner during the time period that she is meant to become pregnant with the child of the commissioning parents. The surrogate might agree to forego drinking alcohol for the duration of the pregnancy and to subject herself and the fetus she carries to prenatal testing to diagnose any fetal anomaly. She might further agree to terminate the pregnancy at the request of the commissioning parents where such an anomaly is found. Or if she becomes pregnant with multiples and the intended parents want fewer children, the contract may require that she submit to a selective reduction, a procedure that terminates some fetuses, while allowing others to continue to gestate.<sup>39</sup> Post-birth, surrogate mothers might contract to provide breastmilk for a baby for a period of time.<sup>40</sup>

When India was a huge market for cross-border reproductive travel, women working for surrogacy agencies sometimes left their families for the period of their pregnancies in order to live in homes set up by agencies specifically to house such women, to monitor their pregnancies, and to reassure intended parents that their future children were being well cared for in the womb. Some have

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39. See, e.g., Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 *CARDOZO J.L. & GENDER* 391, 391 (2012) (describing a case where intended parents backed out of a contract when the surrogate refused to selectively reduce a twin pregnancy to a singleton).

40. See Melanie Thernstrom, *Meet the Twiblings*, *N.Y. TIMES* (Dec. 29, 2010), <https://www.nytimes.com/2011/01/02/magazine/02babymaking-t.html> [<https://perma.cc/5PES-2QUW>].

described these homes for surrogates as modern breeding brothels. Thus, the women gave up some of their freedom in order to gestate a child for someone else. By contrast, in the United States, women typically remain in their own homes with their own families and live relatively unencumbered throughout their pregnancies.

Not all contract terms are enforceable in court if a surrogacy agreement fails. For instance, in the United States, no court would force a woman to undergo an abortion or selective reduction simply because she agreed to an abortion provision in a surrogacy contract.<sup>41</sup> And, of course, in states where surrogacy contracts are void as against public policy, the entirety of a contract will be unenforceable.<sup>42</sup> In these cases of unenforceability, contracts seem to play the role of setting expectations and codifying understandings rather than acting as a tool for creating legally binding obligations and laying out remedies in the case of a contract breach. Where a contract is unenforceable in its entirety, in the United States or elsewhere, a surrogate faced with an intended parent or parents who walk away from their responsibility in a surrogacy arrangement may be wholly without remedy.

For their part, the commissioning parents agree to pay various sums of money to the surrogate—often on a specific schedule, with final payment taking place after the child is born or even after court proceedings ensure that the intended/commissioning parents are the legal parents of the children born in this way. In some cases, the contract will include language laying out the relationship between the intended parents, the surrogate, and the ensuing child. Perhaps the contract, like some open-adoption arrangements, will require intended parents to share photographs of the future child or offer information about the child's welfare to the gestational carrier. In other cases, the language might specifically forbid the surrogate from attempting to maintain any future relationship with the child or children to whom she will give birth. When a surrogacy arrangement is happening a continent away from where the intended parents live, any agreement for post-birth contact seems specious at best.

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41. The crux of abortion jurisprudence since the *Roe v. Wade* decision in 1973 is that, at least until the point of viability, the ultimate decision whether to carry a pregnancy to term lies with the person who is pregnant, even though states can seek to influence her decision. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

42. *See, e.g.*, MICH. COMP. LAWS § 722.855.

Surrogacy practiced in relatively resource-rich settings tends to involve women who have some measure of power in their relationships with commissioning parents. This is not to say that these women never find themselves in conflict with intended parents, but they at least have access to a court system in which they may seek to have their interests vindicated.<sup>43</sup> For women in developing nations, the opportunities to enforce contracts is much less present: the women may not have the resources to hire legal help; the commissioning parents may live hundreds of miles away and be inaccessible; and the laws of the country may be hostile to surrogacy and unavailable to a woman seeking to enforce a contract. In these cases, a woman may have no remedy when a surrogacy arrangement falls apart. Not only might she be left without the money she was meant to earn, she may also be forced to live with physical or emotional consequences of the surrogacy, or in the extreme case, might even be left with a child to raise who was meant to be raised by others.<sup>44</sup>

Surrogacy contracts involve agreements about an experience that is not typically subject to commercial terms. There are people—professional athletes for instance—who sign contracts that involve the use of their bodies in very specific ways but playing a sport for entertainment and gestating a new human being are acts with very different societal significance. Consequently, surrogacy contracts must be subject to a higher level of scrutiny.

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43. See, e.g., *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

44. Abandonment of a child with Down syndrome seemed to be what happened in 2013 when a Thai gestational surrogate gave birth to twins, Gammy and Pipah, for an Australian couple. The couple somehow ended up back in Australia after the birth with Pipah, a neurotypical child, while Gammy, the twin with Down syndrome, remained in Thailand to be raised by the surrogate mother with whom he had no genetic connection. There were competing stories about how the twins came to be separated, but an Australian family court judge eventually ruled that the child had not been abandoned by the commissioning parents and that Gammy would stay in Thailand and Pipah would stay in Australia. *Australian Couple “Did Not Reject Down’s Baby” Gammy*, BBC NEWS (Apr. 14, 2016), <https://www.bbc.com/news/world-australia-36012320> [https://perma.cc/FG38-7W8E].

## II. REPRODUCTIVE HIERARCHIES, ACCESS TO SURROGACY, AND CROSS-BORDER REPRODUCTIVE TRAVEL

Though it is part of a global market, gestational surrogacy is not accessible to all who want it. As mentioned earlier, price is a barrier for many people. For other medically<sup>45</sup> or socially infertile people,<sup>46</sup> engaging a gestational carrier is impossible in their own countries because they are priced out or are legally forbidden from accessing surrogacy services. Some countries restrict or forbid payment for surrogacy, but allow arrangements where a surrogate is paid no fee, though she can be reimbursed for her expenses (e.g., the cost of maternity clothes).<sup>47</sup> Even among those countries where surrogacy, commercial or otherwise, is not banned outright, there are often significant limitations on who can access the service. Some countries prevent single people, regardless of sexual orientation, from commissioning a surrogate, or they require that those commissioning a surrogate use only their own gametes, not donated or purchased gametes. For those who are pushed from their home countries, reproductive travel is an option.

People who travel for surrogacy services include opposite-sex or same-sex couples seeking cheaper surrogacy services or attempting to avoid bans in their home countries. Some of those couples will come to the United States, where laws on surrogacy vary. Others will travel to developing nations, which creates a wealth of concerns.

Cross-border reproductive travel in this context refers to individuals/couples from the developed world traveling to developing

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45. Clinical or medical infertility refers to the inability for a person to get pregnant or sustain a pregnancy after one year of unprotected intercourse or six months if the woman seeking pregnancy is over the age of thirty-five. INFERTILITY: DEFINITIONS AND TERMINOLOGY, WORLD HEALTH ORG., <https://www.who.int/reproductivehealth/topics/infertility/definitions/en/> [https://perma.cc/WWN9-LNFZ].

46. Social infertility is the term often given to same-sex couples in which the partners may not meet a medical definition of infertility, but they nevertheless require third-party assistance to create and/or gestate a pregnancy. See Anna Louie Sussman, *The Case for Redefining Infertility*, NEW YORKER (June 18, 2019), <https://www.newyorker.com/culture/annals-of-inquiry/the-case-for-social-infertility> [https://perma.cc/RH83-MLLA].

47. Countries including the United Kingdom, Australia, and India follow this model. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and Is It Legal?*, BBC NEWS (Aug. 6, 2014), <https://www.bbc.com/news/world-28679020> [https://perma.cc/5TB4-KKJ6]; Sharmila Rudrappa, *India Outlawed Commercial Surrogacy—Clinics Are Finding Loopholes*, CONVERSATION (Oct. 23, 2017, 12:20 EDT), <https://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784> [https://perma.cc/Y8NH-J2C8].

or otherwise economically struggling countries to hire gestational surrogates at cut-rate prices. Before closing its borders to foreigners, many such travelers favored India because of its significant population of English speakers, access to high-quality healthcare, and friendly regulatory scheme, which consisted of little to no regulation of what became a booming business in international surrogacy. As India, Thailand, and Nepal became less accessible after closing their borders to gay couples and then to all foreigners,<sup>48</sup> other markets remained or became available in places like Mexico,<sup>49</sup> Guatemala, Ukraine, Russia, and Georgia.<sup>50</sup> In other words, any part of the world where there are women with available uteruses sufficiently willing or desperate to bargain their reproductive capacity in exchange for money is fertile ground for a business of gestating babies.

#### A. *Surrogacy as Exploitative Reproductive Labor*

The thriving commercial market for surrogacy in a world with porous borders raises significant concern for those who support women. The ethical and practical concerns about surrogacy range from (1) the financial disparity between the intended parents and the gestational surrogate, which creates a lopsided power dynamic; (2) the lack of procedural protections for the gestational surrogate depending upon where the surrogacy is taking place; (3) the taint of baby-selling in violation of the law; and (4) the enticement of the relatively significant payment for surrogacy that far outstrips what many women can earn in other professions in nine months. There has been some positive movement in how the law and society view surrogacy since the fiasco of the *Baby M.* case in the 1980s, but the practice remains one of the most banned forms of assisted reproduction on a global scale. In part, this is due to the difficulty

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48. Rudrappa, *supra* note 47; see also Sarah Elizabeth Richards, *Locked Out of Asia, Americans Are Turning to Eastern Europe To Hire Surrogates*, HUFFPOST (July 25, 2017), [https://www.huffpost.com/entry/surrogacy-ukraine-russia-georgia-czech-republic\\_n\\_595fa776e4b02e9bdb0c2b47](https://www.huffpost.com/entry/surrogacy-ukraine-russia-georgia-czech-republic_n_595fa776e4b02e9bdb0c2b47) [https://perma.cc/38FY-CR7E].

49. Victoria Burnett, *As Mexican State Limits Surrogacy, Global System Is Further Strained*, N.Y. TIMES (Mar. 23, 2017), (<https://www.nytimes.com/2017/03/23/world/america/as/as-mexican-state-limits-surrogacy-global-system-is-further-strained.html?auth=login-google>) [https://perma.cc/EA4C-RA64].

50. See Richards, *supra* note 48; Karen Smith Rotabi & Nicole Faten Brumfield, *The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns*, 27 J. WOMEN & SOC. WORK 129, 134–35 (2012).



of regulating a market of this kind and the inherent risks of exploitation in reproductive labor.

In 1985, Gena Corea imagined the present moment of a world of commercialized surrogacy and envisioned the path to which that present moment would lead us. She wrote of the institutionalization of “breeding service in surrogate motherhood companies” and the creation of a class of “professional breeders.”<sup>51</sup> She knew that “Third World women” would act as surrogates for less money than their developed world counterparts and that the rise of IVF would allow these women to gestate babies for “wealthier Westerners.”<sup>52</sup> She referred to surrogates as “reproductive prostitute[s]” and referenced Andrea Dworkin’s stark image of a “reproductive brothel,”<sup>53</sup> made possible in a world of IVF that allowed women to “sell reproductive capacities the same way old-time prostitutes sold sexual ones. While sexual prostitutes sell vagina, rectum and mouth, reproductive prostitutes would sell other body parts: wombs, ovaries, eggs.”<sup>54</sup>

The world that Corea imagined in the 1980s has not quite come to pass in totality, but the concept of women in developing nations gestating children for wealthier citizens of developed nations, sometimes in spaces that could certainly be termed reproductive brothels, is disturbing. Our ability to make the conditions in which women provide reproductive labor fair and equitable instead of exploitative and abusive requires diligence and a commitment to preventing commercialization from inexorably leading to dehumanization. There are many players who can impact how the commercial surrogacy industry organizes itself, and intended parents are an important part of the landscape of those who can make inroads in how the industry operates.

### III. ETHICAL NONCOITAL PROCREATION AND BODIES ACROSS BORDERS

The United States Constitution protects a fundamental, but limited, right to procreate.<sup>55</sup> The world of ethics also sees procreation

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51. GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 274 (1985).

52. *Id.* at 274–75.

53. *Id.* at 275.

54. *Id.*

55. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

as an experience of value, but not without limits. The choice to procreate has moral implications for anyone who opts to do so, whether they do so through coital reproduction or noncoital reproduction.<sup>56</sup> In previous work, this Author has argued that people who procreate noncoitally should not bear a heavier burden of regulation than those who procreate coitally.<sup>57</sup> This Author takes largely the same position in the world of ethics. What makes this stance difficult is that the ability of and opportunity for the law to assert control over procreative choices is much more expansive in the context of noncoital reproduction. It is difficult to control whether two people have sex and create a pregnancy. It is far easier to, for instance, shape insurance mandates so as to make it more difficult for a same-sex couple to access insurance to make a child using assisted reproduction. The feasibility of exercising control over noncoital reproduction creates negative incentives to judge or intervene in these choices in ways that would not or should not be utilized for people who procreate coitally. It should not be the case that people who procreate through third-party reproduction bear more stringent ethical or legal obligations than people who procreate coitally, but perhaps there are obligations that are attendant to being a consumer, especially a consumer of bodily goods, that warrant legal and ethical concern and analysis. And those who rent wombs as part of the fertility industry are very much consumers in a unique and sometimes troubling market.

For instance, imagine a same-sex, American, male couple living in New York seeking a gestational surrogate in Ukraine to cut overall costs. Imagine also that this couple found out before signing any contracts that the Ukrainian agency with which they planned to work was the subject of a series of investigations for mistreatment of the women it hired as gestational surrogates. The mistreatment included women who did not get paid or got paid much less than they contracted for, women who experienced post-pregnancy complications and were given no access to medical care after delivery, and women left to care for babies born with significant birth anomalies when the intended parents balked at taking those children home. The stories the couple reads make clear that this agency does not treat its surrogates well. Armed with that

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56. See Sarah Hannan, *Introduction to PERMISSIBLE PROGENY?: THE MORALITY OF PROCREATION AND PARENTING* 1, 1 (Sarah Hannan et al. eds., 2015).

57. Kimberly M. Mutcherson, *Procreative Pluralism*, 30 *BERKELEY J. GENDER L. & JUST.* 22, 22 (2015).

knowledge, the intended parents should seek an alternative broker or accept that they are knowingly engaging in a transaction in which they are supporting the exploitation of and harm to women.

Undoubtedly, some, if not most, of the people who arrange for surrogacies at home or abroad crave information about the business practices of the agencies and brokers with whom they work because not exploiting the surrogate is a value in keeping with their desire for a baby. But the more detached the relationship, geographically and otherwise, between the surrogate and the people who hire her, the more difficult it can be to engage in the practice of surrogacy in an ethically sound manner. In those cases, the danger of women who labor as gestational surrogates not being treated with the respect and dignity that they deserve gets heightened. Such was potentially the case in Nepal in 2015.

In May 2015, Nepal experienced a devastating earthquake that left hundreds dead and hundreds more scrambling for basic aid like food and shelter. At the time of the earthquake, several gay male couples were awaiting the birth of their children to Indian surrogates who had been relocated to Nepal. In 2012, when India closed its doors to foreigners and same-sex couples seeking to hire gestational surrogates, agents and brokers in India began flying gestational surrogates to Nepal to give birth in order to circumvent India's ban. One of those couples was Tal and Amir, from Israel, who chronicled their surrogacy journey on an episode of the National Public Radio show *Radiolab*.<sup>58</sup>

Israel does not ban surrogacy. In fact, for the right people, the government covers the costs of surrogacy arrangements. As a same-sex couple, however, Tal and Amir were forbidden from legally marrying in Israel and were not allowed to take advantage of the availability of surrogacy.<sup>59</sup> Instead, they had to find another place in the world where two men could pursue a surrogacy arrangement and that country was Nepal, via India. Though Amir

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58. *Birthstory*, RADIOLAB (June 7, 2018), <https://www.wnycstudios.org/podcasts/radiolab/articles/birthstory2018> [<https://perma.cc/VSM4-4T5N>].

59. The fight to expand Israel's laws to give access to surrogacy services to gay men continues. In 2018, the government proposed expanding the law to allow single women, in addition to opposite-sex couples, to avail themselves of surrogacy services in Israel, but the ban on single men, including gay men, would remain in place. Dan Avery, *Gay Dads in Israel Asked by Government Agent, Who Is the Mother?*, NBC NEWS (Nov. 18, 2019), <https://www.nbcnews.com/feature/nbc-out/gay-dads-israel-asked-government-agent-who-mother-n1084006> [<https://perma.cc/BGM5-J73Y>].

was enthusiastic about pursuing a surrogacy arrangement in India/Nepal, Tal was more hesitant to engage in a process that he found morally troubling. Specifically, he expressed concern about the morality of “us[ing] [a] woman to give me a present like that, and I know she will never see this baby anymore.”<sup>60</sup> To ease Tal’s moral concerns, the couple agreed to use a company called Lotus, through which they would pay the gestational surrogate a fee of \$12,000. In that situation, Tal thought, “Maybe this was kind of comfort. They can get the money and can change their lives. They can buy a house, send her children to school to learn in the University. When I thought it would be life-changer, and not exploiting to her, so I agreed.”<sup>61</sup>

Once they agreed to move forward, the men decided to hire two surrogates so that they each could attempt to have a genetically related child.<sup>62</sup> They purchased eggs from Ukrainian women,<sup>63</sup> used their own sperm to fertilize those eggs, and had the resulting embryos transferred to the wombs of two Indian gestational surrogates, both of whom became pregnant, one with twins—babies that the women would eventually give birth to in Nepal to avoid India’s ban on foreigners and gay men.<sup>64</sup> When the babies were born, just a few weeks apart, Tal and Amir went to Nepal and set up residence for a time to complete the required paper work and bond with their new children.<sup>65</sup> It was during this time that the earthquake happened.<sup>66</sup>

Post-earthquake, amid the humanitarian crisis that ensued, Tal, Amir, and several other couples with a total of twenty-four children, found themselves at the Israeli embassy where they were cared for until the Israeli government sent planes to pick up the new fathers and their babies, all of whom had hired Indian surrogates who gave birth in Nepal.<sup>67</sup> Tal and Amir worried about the fate of their gestational surrogates, but the agency assured them

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60. *Birthstory*, *supra* note 58.

61. *Id.*

62. *Id.*

63. *Id.* Purchasing eggs from women in eastern Europe is not an uncommon practice for people who want to purchase eggs from women who are categorized as white, at a cheaper cost than in their home countries or because of other legal barriers, such as bans on anonymity for gamete providers. *See id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

that the two women had returned home to India before the earthquake struck.<sup>68</sup> Later, however, due to an encounter with a gestational surrogate from another agency who indicated that she was paid only \$3000 for her work, Tal and Amir attempted to confirm that the payment they thought they were making to the surrogates ended up in their hands.<sup>69</sup> To their dismay, it ultimately became clear that there was no guarantee that their surrogates received anywhere near the promised \$12,000 and may even have reaped only \$1000 after middle-men took their own cut.<sup>70</sup>

There are multiple troubling issues with this arrangement and its outcome. First is the fact that the Israeli government arranged transportation for the babies born of the surrogates in Nepal, but not the surrogates themselves. It is possible that none of the Indian surrogates would have wanted to leave Nepal in order to seek refuge in Israel post-earthquake, or that they, in fact, were already back home in India when the earthquake happened. And, of course, even if they were still in Nepal, perhaps all they would have wanted was immediate return to their homes. However, there is no indication that the Israeli government made any attempt to ensure the safety of the women who labored to bring new Israeli citizens into being. Consequently, one is left thinking that the men and agencies who employed these women, with malice or not, treated the gestational surrogates as vessels that could be discarded having served their purpose.

Second, Tal recognized and lamented the power dynamic and potential exploitation in the arrangement that he and his partner made in order to have the genetically related children that they desired. He sought to assuage that concern through the selection of an agency that purported to at least pay well, so that the women who did the labor required to bring their babies into the world would be able to change their own lives, and the lives of their children, with the money they earned. In the end, Tal was left to live with the reality that these women may have done this reproductive labor for a mere fraction of what they were promised, thus negating Tal and Amir's attempt to do right in circumstances where it was very easy to do wrong.

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68. *Id.*

69. *Id.*

70. *Id.*

Third, the nature of this arrangement shows how power is relative. On one hand, Israel marginalized Tal and Amir by refusing to recognize that their relationship was worthy of a state sanctioned marriage or that they deserved to be able to pursue bringing children into their family with the same tools made available to opposite sex couples. And, even when they left home to pursue surrogacy, the two men faced discrimination abroad because of their sexual orientation. There is no doubt that their road to parenthood was less smooth because they are gay, and that discrimination is a powerful marker of the ongoing need to champion LGBT rights on a global scale.

But Tal and Amir were also powerful as compared to the women they hired to be their surrogates, women who were basically behind a veil because their agency acted as the go-between between the couple and the gestational surrogates. Tal and Amir had the money, sophistication, and support they needed to circumvent rules created to make it harder for them to become parents. Money allowed them to circumvent discrimination. For the women who worked as their surrogates, money was an enticement, in exchange for which they subjected themselves to the risks that are always attendant to pregnancy, left their homes to give birth in another country, and placed trust in an agency that may not have had their best interests at heart. While it is fair to say that both sides of this transaction were living within constraints, Tal and Amir had a better foundation of resources from which to free themselves from those constraints.

No matter where a woman acts as a surrogate, the risk of exploitation in a bodily exchange of this type is ever-present, and especially so in settings where the power differential between a gestational surrogate and intended parents is high. It is fair to argue that denying women in developing nations access to work as gestational surrogates—a form of labor that can be significantly remunerative—unjustly denies those women agency and autonomy. Simultaneously, one can condemn the ways in which certain women suffer at the hands of the fertility industry. The choices that women in developing nations make about working as surrogates are made within enormous constraints formed by the reality of their sometimes quite difficult lives. When other parties benefit from this labor, they are ethically obligated, even if not legally so, to flex whatever power they have for the benefit of the party that may be less able to make demands.

There is enormous structural inequality in the fertility industry between buyers and sellers. Global ART markets allow men like Tal and Amir to use their economic privilege to contract for the children that they want. But they do so at grave risk of supporting systems of enormous injustice. As one group of gay and lesbian people opposed to gestational surrogacy explains,

[O]ur community is leading the way now in normalising, sanitising, and destigmatising this practice. Those who are proposing that surrogacy should be legalised, using the arguments of “gay rights” and equality, are subverting the core aims of the gay liberation movement, which is about dignity and respect for all, and not the abuse of other people’s rights.<sup>71</sup>

Many would argue that half a century post-Stonewall, the gay liberation movement has morphed into a movement for acceptance into the mainstream. As such, rather than seeking to dismantle systems of oppression, some gay people seek only to climb to a higher level on the pyramid. And that climb is much easier for those who are white, male, and economically privileged in a world in which all of those characteristics are frequently accorded unearned value. In the realm of reproduction, this value is reflected in the international surrogacy industry that not only welcomes gay men, but actively courts them into a business that thrives on the bodies of women with few choices. This begs the question whether liberation can be justified if one must trample potential allies to get there?

One need not wholly condemn the practice of surrogacy in order to raise serious questions about how surrogacy is practiced in the real world. Asking intended parents to act responsibly in their quest for children is akin to efforts to dissuade consumers from purchasing products made by child laborers or created under conditions of gross abuse. It is not the case that we are all as conscientious as perhaps we should be about our consumer choices, but baby markets, given what is at stake, demand great vigilance from those who participate. ART can create access and equality to the formation of families with children for people who have traditionally been marginalized in the world of family, and that is a good thing. This Essay does not stand for the proposition that gay men

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71. Julie Bindel & Gary Powell, *Gay Rights and Surrogacy Wrongs: Say “No” to Wombs-for-Rent*, #STOPSURROGACYNOW, <https://www.stopsurrogacynow.com/gay-rights-and-surrogacy-wrongs-say-no-to-wombs-for-rent> [<https://perma.cc/S7Y4-JAZS>].

who seek to hire gestational surrogates are morally bankrupt for that desire. But as Laura Mamo eloquently explains:

When considering the queering of reproduction today, while there is much to celebrate as users on the margins join the center, there is also much from which to raise concern: participation in normativity includes participation in the global trafficking in human sperm, eggs, and wombs. Who will provide the eggs and the wombs necessary to enable these family forms? From what towns, communities, and countries will the bio-materials be drawn? From whose gendered, raced, and classed bodies will they be drawn? Will these services follow capitalism from the west to the rest to secure the bodies and labor necessary to fulfill our American Dreams? How can we be accountable to these collaborative reproducers? In all, questions of how reproductive technologies should be developed, used, and by whom include questions of LGBT actors and queer reproductive practices. As calls for further regulation sound, where are queer practices, queer bodies in these debates?<sup>72</sup>

Some of the questions Mamo poses can be answered with relative ease. The global fertility market has already shown its eagerness to exploit global income inequality. The bodies that sell in these markets are often brown, female, and poor. They come from developing countries and can be used in a capitalist market that pays them pennies on the dollar compared to their counterparts in the United States. The harder question is the accountability of those who access these markets in ways that potentially dismantle some forms of oppression while benefitting from others. In the context of this Essay, accountability starts with accepting that the good outcomes that gestational surrogacy across borders provides do not outweigh the potential wrongs that it makes possible. Buyers like Tal and Amir might find their attempt to do the right thing thwarted by the realities of a foreign market, the inner workings of which are largely opaque,<sup>73</sup> which then may require them to consider whether their desire to build a family with children can ethically be satisfied when they are building that family on the weight of another person's suffering.

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72. Laura Mamo, *Queering the Fertility Clinic*, 34 J. MED. HUMAN. 227, 234–35 (2013).

73. Surrogacy 360 explains that “because international commercial surrogacy is largely unregulated, intended parents are . . . potentially at risk of unwittingly entering into surrogacy arrangements that directly contradict their values and interests and violate the health and human rights of surrogates, egg providers, and children.” *Intended Parents*, SURROGACY360, <https://surrogacy360.org/relationship/intended-parents> [https://perma.cc/A9A8-DCCH].



In an ideal world, an international licensing and rating system would exist to allow intended parents to make decisions about which agency to use based on factors beyond price, location, and community reputation. In addition to typical factors, intended parents could see whether the agency engages in fair labor practices—how does it recruit women, and from where? What are these women paid, and when do they get paid? How are the women treated before, during, and after pregnancy? Have there been complaints against the agency and, if so, what was the nature of those complaints, and were they founded? Just as we have systems in place to allow people to choose food based on the ethical practices of the supplier (cage-free eggs come to mind), we could imagine a system that creates this kind of transparency for those seeking surrogacy services in the developing world. Without it, intended parents must rely on rumor, word of mouth, conjecture, and the claims of intermediaries who have strong incentives to deceive.

Given the concern that people who procreate noncoitally should not be subjected to layers of ethical or legal standards that vary greatly from those of people who procreate coitally, this Author wants to make clear that the responsibility this Author is opting to lay at the feet of those who procreate noncoitally via a commercial surrogacy arrangement is quite limited. This Author is especially conscious of the fact that within the world of assisted reproduction, there are hierarchies of users and opposite sex married couples still tend to sit at the top of the hierarchy of those who reproduce noncoitally. Consequently, creating barriers on top of barriers is especially worrisome. However, at bare minimum, all people should attempt to avoid engaging in the international gestational surrogacy market in a way that exploits those who are sellers in the market. In order to be able to do this, the greater responsibility does and should lay at the feet of the agencies and brokers to create and implement fair practices and be transparent about those practices.

Creating a system of licensing and inspection would not be easy, and this Author does not purport in this Essay to have a road map for creating this system. My role here is simply to assert that part of what it means to ethically engage in a market of this kind is to take minimal steps to avoid exploitation and that a system of licensure and ratings is one way to allow people to take that step. But, in the absence of such a system, people who participate in global surrogacy markets, especially people who themselves have

benefitted from the solidarity of other marginalized communities in a quest for fairness and equality, should be wary of availing themselves of the benefits of a system that thrives in imbalance. For some people, this might mean foregoing or delaying having a child, which is a significant sacrifice, but one worth considering in order to be on the right side of the fertility business ethics divide.

### CONCLUSION

It is difficult and perhaps impossible to come to a resolution on the most just way for law and society to contend with the business of creating babies through gestational surrogacy. We can respect the ways in which women choose to use their bodies for economic gain, while recognizing that all such choices are made within webs of constraint. One way to shape the world in a way that allows for, and perhaps even encourages, intended parents to make conscientious choices about hiring a surrogate is certainly through a system that makes it more difficult for brokers to hide the unethical parts of their businesses. Doing so would have the consequence of encouraging better behavior, though it is also likely to drive up prices and make it more difficult for some people to join the market, but that is the right outcome if it makes the market more just for the women who labor in it.

IVF, the sale of gametes, and the ability to gestate children to whom they have no genetic connection means that some number of women, especially those in the developing world, are subject to exploitation in their quest to find work that allows them to feed, clothe, and otherwise care for themselves and their families. One potentially impactful way that intended parents can play a role in making the world of commercial surrogacy less problematic is by making demands of the brokers and agencies that hire surrogates. Ultimately, a system of licensing and reporting would best serve the goal of empowering intended parents to work only with agencies that respect their reproductive workers. But without that system in place, intended parents can and should ask the right questions, do their own research, and attempt to assess the labor practices of agencies with whom they partner.

As the world becomes a place where more women have increased access to tools of economic empowerment, being a gestational surrogate may cease to be an option that many women will find tantalizing. In the meantime, though, it behooves those who

have power within this particular system, even if their power is limited in other arenas because of homophobia and discrimination, to wield it in ways that accrue to the benefit of more vulnerable parties. To paraphrase Audre Lorde, queer people are not free if other marginalized people continue to be bound in shackles. Our ability to claim liberation demands that we do not do so by benefiting from and building our own happiness from the pain of others.