



## FAIR TRADE INTERNATIONAL SURROGACY

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### Keywords

*bioethics,*  
*developing world bioethics,*  
*surrogacy,*  
*international,*  
*fair trade*

### ABSTRACT

*Since the development of assisted reproductive technologies, infertile individuals have crossed borders to obtain treatments unavailable or unaffordable in their own country. Recent media coverage has focused on the outsourcing of surrogacy to developing countries, where the cost for surrogacy is significantly less than the equivalent cost in a more developed country. This paper discusses the ethical arguments against international surrogacy. The major opposition viewpoints can be broadly divided into arguments about welfare, commodification and exploitation.*

*It is argued that the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation. However, the possibility of exploitation is a weak argument for prohibition, as employment alternatives for potential surrogate mothers may be more exploitative or more harmful than surrogacy. It is concluded that international surrogacy must be regulated, and the proposed regulatory mechanism is termed Fair Trade Surrogacy. The guidelines of Fair Trade Surrogacy focus on minimizing potential harms to all parties and ensuring fair compensation for surrogate mothers.*

### INTRODUCTION

Recent media coverage has focused on developing markets in infertility treatments, specifically, the outsourcing of surrogacy to India.<sup>1</sup> Surrogacy is an arrangement in which a woman becomes pregnant and gives

birth to a child for someone else, usually an infertile couple. The woman may be compensated for her time, and the payment to women in India – quoted between US\$4,000 and US\$10,000 – is substantially less than the equivalent costs in the United States.

An article in *Marie Claire* highlighted the major ethical debates about international surrogacy:

The system certainly lends itself to the criticism that foreign women unwilling or unable to pay high Western fees happily exploit poor women at a 10th of the price it would cost back home. The system also avoids the legal red tape and ill-defined surrogacy laws women face in the U.S. . . . Or is it a mutually beneficial relationship?<sup>2</sup>

<sup>1</sup> A. Gentleman. 2008. India Nurtures Business of Surrogate Motherhood. *The New York Times*. 10 March. Available at: <http://query.nytimes.com/gst/fullpage.html?res=9B05EED91138F933A25750C0A96E9C8B63> [Accessed 9 Nov 2008]; A. Haworth. 2007. Surrogate Mothers: Wombs for Rent. *Marie Claire* 1 August. Available at: <http://www.marieclaire.com/world/articles/surrogate-mothers-india> [Accessed 9 Nov 2008]; A. Chopra. 2006. Childless Couples Look to India for Surrogate Mothers. *Christian Science Monitor*. 3 April. Available at: <http://www.csmonitor.com/2006/0403/p01s04-wosc.html> [Accessed 9 Nov 2008]; J. Warner. 2008. Outsourced Wombs. *The New York Times* 3 January. Available at: <http://warner.blogs.nytimes.com/2008/01/03/outsourced-wombs/> [Accessed 9 Nov 2008].

<sup>2</sup> Haworth, *op. cit.* note 1.

The major arguments against surrogacy can be broadly categorized into the welfare argument, the commodification argument, and the exploitation argument. The globalization of reproductive technologies introduces new dynamics into the existing ethical debate. Limited access to healthcare resources in developing countries raises new questions about the welfare of participating surrogate mothers. Income disparities between prospective parents and surrogate mothers are raised as an issue in domestic surrogacy, and the breadth of global inequalities amplifies these disparities in international surrogacy heightening fears of exploitation. The lack of uniformity of international law creates additional difficulties unique to international surrogacy.

I will argue that the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation. International surrogacy is ethical provided it is practiced following the principles of Fair Trade. Fair Trade addresses the injustices of traditional trade where benefits are unequally shared. Irrespective of whether surrogate mothers in developing countries benefit from surrogacy arrangements, they may still be exploited if they are unfairly compensated. My proposal for Fair Trade surrogacy is designed to ensure the benefits of surrogacy transactions are justly shared between the participating parties.

Before discussing the ethics of international surrogacy, a clarification of terms is required.

- Prospective parents: the individuals who seek a surrogate mother in order to have a child
- Surrogate mother: a woman who carries a child for someone else, usually an infertile couple
- Gestational surrogacy: the embryo is conceived through in vitro fertilization (IVF), typically using the egg and sperm from the prospective parents, though donor egg (from a woman other than the surrogate) and/or donor sperm may also be used. This arrangement has also been called 'full surrogacy'.
- Traditional surrogacy: the surrogate mother's egg is used and she typically conceives through artificial insemination. This arrangement has also been called 'partial surrogacy' or 'genetic surrogacy'.
- Non-commercial surrogacy: no payment is provided to the surrogate mother although the prospective parents may provide reimbursement for medical care; this arrangement typically occurs between family members or friends.
- Commercial surrogacy: a fee is paid to the surrogate mother who carries the pregnancy; this arrangement most commonly occurs between individuals previously unknown to each other.

- International surrogacy: commercial, gestational surrogacy which occurs across country borders, typically with prospective parents from wealthier countries and surrogate mothers from poorer countries

## THE WELFARE ARGUMENT

The possibility of harm to the surrogate mother or child is employed as an argument against permitting surrogacy. The potential of physical harm to the surrogate mother is real and minimizing this risk is a goal of my Fair Trade proposal. But the argument against surrogacy on the basis of some harm compared to no harm is an inequitable comparison. Rather, we must evaluate the workplace risks these women currently face. As stated by Laura Purdy: 'Poor women now face substantial risks in the workplace. Even a superficial survey of the hazards in occupations available to poor women would give pause to those who would prohibit surrogacy on grounds of risk'.<sup>3</sup> The risks of work are even greater for women in developing countries. In India, the rate of occupational accidents is nearly three times as high the rates of accidents in established market economies.<sup>4</sup>

If possible psychological harm is a reason to prohibit international surrogacy, the supposed harms would need to be greater than the harms of available alternatives (i.e. harms from either greater poverty or from the other ways of earning money). Psychological harm following surrogacy is the expected condition, but the foundation of this expected harm is based on the false premise that all pregnant women bond with their fetuses. As Debra Satz observes, '. . . not all women "bond" with their fetuses. Some women abort them.'<sup>5</sup> It would be more accurate to say that there is a risk of psychological harm to the surrogate mothers; the assumption of automatic harm as the default position is false.<sup>6</sup> The incidence of psychological harm among gestational surrogate mothers in developing countries has not yet been researched, but in a study of surrogate mothers in the United Kingdom, none of the surrogate mothers experienced any doubts or difficulties

<sup>3</sup> L.M. Purdy. Surrogate Motherhood: Exploitation or Empowerment? *Bioethics* 1989; 3: 18–34: 32.

<sup>4</sup> P. Hamalainen, J. Takala, & K.L. Saarela. Global Estimates of Occupational Accidents. *Saf Sci* 2006; 44: 137–156.

<sup>5</sup> D. Satz. Markets in Women's Reproductive Labor. *Philos Public Aff* 1992; 21: 107–131: 117.

<sup>6</sup> C. Strong. 1997. *Ethics in Reproductive and Perinatal Medicine: A New Framework*. New Haven, CT: Yale University Press: 103–110.

while handing over the baby, and the surrogacy experience was overwhelmingly positive for all women involved.<sup>7</sup>

The objection to surrogacy based on potential harms to the child is, to my knowledge, purely theoretical at this time. I have been unable to find any evidence that the children born through surrogacy suffer physical or psychological harms related to the experience. Jonathan Glover wryly notes: 'If the child's feelings are a reason against surrogacy, the baby has to have, by the time of birth, highly specific feelings towards the particular woman who bears him. The evidence for this can charitably be described as light.'<sup>8</sup>

Finally, in our commitment to do no harm, we may disregard the welfare of the prospective parents. Involuntary infertility is a known harm, whether it is psychologically or sociologically constructed.<sup>9</sup> The principled welfare objection to international surrogacy should acknowledge the conflict between nonmaleficence and beneficence. Some might suggest that the risk of harm to surrogate mothers is so great that the welfare of the prospective parents does not merit consideration. However, studies from surrogacy arrangements in the United Kingdom undermine such concerns about welfare; surrogacy is usually a positive experience for both the prospective parents and surrogate mothers.<sup>10</sup> A welfare-derived argument against international surrogacy is incomplete if it fails to consider the potential benefit to prospective parents, as international surrogacy may be the only way some families suffering from involuntary infertility would be able to have a child.

## THE COMMODIFICATION ARGUMENT

Another objection to international surrogacy is the commodification argument. The economic definition of commodification is the process of moving something into the market, making it a fungible object, that is, a commodity available for sale and purchase.<sup>11</sup> The commodification

objection is that international surrogacy commodifies reproduction, children and/or women, and unlike the international trade in coffee, human life has infinite value and should not be traded in the marketplace. If international surrogacy does indeed commodify reproduction, children and women, why is this wrong?<sup>12</sup>

It does not seem to me that international surrogacy commodifies reproduction to any greater extent than egg donation, in vitro fertilization or other assisted reproductive technologies. Indeed, the introduction of any new reproductive technology generally elicits condemnation founded on commodification. For example, Leon Kass argued that IVF was unethical in part because the process turns procreation into manufacturing.<sup>13</sup> The moral wrong of manufactured procreation is rooted in a religious or metaphysical view of how reproduction should occur. This argument is problematic because it is based on the naturalistic fallacy, that is to say, assisted reproductive technologies are immoral because they are not natural. Moreover, even if one believes the commodification of reproduction may have immoral elements, these harms should be judged against the possible benefits of the technology. In fact, after the birth of the first 'test tube' baby, Kass changed his stance based on the joy the birth of a child conferred to infertile couples.<sup>14</sup> Possible harms from the commodification of reproduction must be balanced against the known good that results.

The argument has been made that surrogacy commodifies children, making them products or pets.<sup>15</sup> If children are commodified, there is a limit to their commodification that is unaffected by the mechanisms of their conception, gestation and birth. The children would be treated as a commodity insofar as payment was made, but the responsibilities of prospective parents to their child would be the same as the responsibility of any parent to their child.<sup>16</sup> I agree with Margaret Radin when she says: 'We can both know the price of something and know that it is

<sup>7</sup> V. Jadva, et al. Surrogacy: the Experiences of Surrogate Mothers. *Hum Reprod* 2003; 18: 2196–2204.

<sup>8</sup> J. Glover. 1989. *Fertility and the Family: Glover Report on Reproductive Technologies to the European Commission*. London, UK: Fourth Estate: 75.

<sup>9</sup> I.G. Leon. Adoption Losses: Naturally Occurring or Socially Constructed? *Child Dev* 2002; 73: 652–663.

<sup>10</sup> Jadva, *op. cit.* note 7; F. MacCallum, et al. Surrogacy: the Experience of Commissioning Couples. *Human Reprod* 2003; 18: 1334–1342.

<sup>11</sup> A. Borgmann. 2006. *Real American Ethics: Taking Responsibility for our Country*. Chicago, IL: University of Chicago Press: 61.

<sup>12</sup> Carson Strong, among others, argues that surrogacy contracts may be constructed to prevent claims of commodification. 'If payment is not contingent on a live birth, then it is difficult to maintain that pregnancy is baby selling.' Strong, *op. cit.* note 6, p. 108.

<sup>13</sup> L.R. Kass Making Babies – the New Biology and the 'Old' Morality. *Public Interest* 1972; 26: 18–56.

<sup>14</sup> L.R. Kass. 'Making Babies' Revisited. *Public Interest* 1979; 54: 32–60.

<sup>15</sup> G.J. Annas. Death without Dignity for Commercial Surrogacy: The Case of Baby M. *Hastings Cent Rep* 1988; 18: 21–24.

<sup>16</sup> A similar argument is made by: H. McLachlan & J.K. Swales. Babies, Child Bearers and Commodification: Anderson, Brazier et al., and the Political Economy of Commercial Surrogate Motherhood. *Health Care Anal* 2000; 8: 1–18.

priceless.<sup>17</sup> International surrogacy may commodify children, but the children born through international surrogacy will still be priceless.

The final commodification objection – that surrogacy commodifies the surrogate mothers – has garnered the most attention and debate.<sup>18</sup> This argument is derived from Kant's categorical imperative, 'Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.'<sup>19</sup> By making women's labour a commodity, a woman becomes a 'reproductive conduit'<sup>20</sup> or 'human incubator'<sup>21</sup> and is therefore dehumanized, and not treated as an end in and of herself. To counter this argument, consider a hypothetical situation where surrogacy is employed in the treatment of premature infants.

The majority of infants in a Neonatal Intensive Care Unit (NICU) are treated for pathology related to their prematurity, and supportive care is provided to allow further physiological development. For example, the respiratory system is underdeveloped in preterm infants preventing effective oxygenation of blood, a task completed by the placenta in utero. Suppose the technology exists whereby we can transfer a preterm infant into another woman's uterus for the purpose of completing gestation, and this new technology is only employed for 'pre-viable' infants, which is currently approximately 23 weeks or less gestation. The role of the surrogate mother in this hypothetical is identical to her role in gestational surrogacy. Regardless of whether an embryo or a 22-week-old foetus is transferred to the surrogate mother's uterus, a child will not exist without a surrogate womb.

I believe surrogacy would be permitted if foetal transfer technology were available. The evident benefits of foetal transfer would outweigh the supposed harms of commodification, and surrogate mothers would be regarded as healthcare workers or temporary guardians not dehumanized incubators. The benefits of surrogacy and the harms of its prohibition are less apparent in surrogacy as currently practiced, but there is no morally

relevant difference between embryo and foetal transfer surrogacy. In either case, the commodification of women is limited, and there is nothing inherent to the practice that would violate Kant's categorical imperative.

## THE EXPLOITATION ARGUMENT

To this point, I have rejected arguments against international surrogacy based on welfare and commodification. The final objection I will consider is the argument that international surrogacy should not be permitted because surrogate mothers are exploited. Exploitation is usually considered with regards to commercial surrogacy, and the potential exploitation of poor women by wealthier couples.<sup>22</sup> When commercial surrogacy occurs across borders, the possible exploitation is magnified by the enormous wealth disparities between poor and rich countries.

Before evaluating the argument that exploitation is wrong because surrogate mothers are exploited, the concept of exploitation must be defined. In his book *Exploitation*, Alan Wertheimer distinguishes between harmful exploitation and mutually advantageous exploitation.<sup>23</sup> In the case of harmful exploitation, 'the intended parents gain from the transaction while the surrogate is encouraged "to make a grave self-sacrifice to the broker's and adoptive couple's advantage".'<sup>24</sup> As defined by Wertheimer, harmful exploitation would include the arguments about welfare and commodification, which I have chosen to address separately. Therefore, I will limit my consideration of harmful exploitation to the case where someone is exploited when they are induced to behave in a manner contrary to how they want to act.<sup>25</sup>

The second type of exploitation characterized by Wertheimer is mutually advantageous exploitation where 'both the intended parents and the surrogate gain from the transaction but the distribution of those gains is unfair to the surrogate, say, because, "the interests of

<sup>17</sup> M.J. Radin. 1989. Justice and the Market Domain. In *Markets and Justice*. J.W. Chapman & J.R. Pennock, eds. New York, NY: New York University Press: 175.

<sup>18</sup> Some pivotal articles within the debate include: E.S. Anderson. Is Women's Labor a Commodity? *Philos Public Aff* 1990; 19: 71–92; Satz. *op. cit.* note 4; A. van Niekerk & L. van Zyl. The Ethics of Surrogacy: Women's Reproductive Labour. *J Med Ethics* 1995; 21: 345–349; McLachlan & Swales, *op. cit.* note 16.

<sup>19</sup> I. Kant. 1998. *Groundwork of the Metaphysics of Morals*. Translated and edited by M. Gregor. Cambridge, UK: Cambridge University Press: xxii.

<sup>20</sup> J.G. Raymond. Reproductive Gifts and Gift Giving: The Altruistic Woman. *Hastings Cent Rep* 1990; 20: 7–11: 11.

<sup>21</sup> van Niekerk & van Zyl, *op. cit.* note 18, p. 347.

<sup>22</sup> M. Warnock. 1985. *A Question of Life: the Warnock Report on Human Fertilisation and Embryology*. Oxford, UK: Blackwell; R. Ber. Ethical Issues in Gestational Surrogacy. *Theor Med Bioeth* 2000; 21: 153–169; S. Wilkinson. The Exploitation Argument against Commercial Surrogacy. *Bioethics* 2003; 17: 169–187; A. Wertheimer. Two Questions about Surrogacy and Exploitation. *Philos Public Aff* 1992; 21: 71–92. Exploitation has also been considered in the context of non-commercial surrogacy in Raymond, *op. cit.* note 20.

<sup>23</sup> A. Wertheimer. 1996. *Exploitation*. Princeton, NJ: Princeton University Press: 96–122.

<sup>24</sup> *Ibid.*: 98.

<sup>25</sup> This is similar to Wertheimer's evaluation of whether 'surrogacy is injurious to the surrogate not because she is treated wrongly, but because she *participates* in something wrong.' *Ibid.*: 105.

wealthy contracting couples are better served than those of the surrogates".<sup>26</sup> Mutually advantageous exploitation can be resolved by adequate compensation, so that an alternate way to conceive of this kind of exploitation is that someone is exploited when they are given too little in return.

An example of harmful exploitation may be found in the following dialogue in Shakespeare's *Romeo and Juliet*:

Apothecary: My poverty, but not my will, consents.

Romeo: I pay thy poverty, but not thy will.<sup>27</sup>

The argument against international surrogacy is that prospective parents are paying a woman's poverty and not her will; no one would consent to participate in a surrogacy agreement without significant financial inducement. But how is payment for surrogacy different from financial inducement for other types of work? Our will might not consent to being a house cleaner, but our poverty might. Does it follow that offering payment for house cleaning is exploitative? To quote the judicial opinion in a commercial surrogacy case, there is no evidence that surrogacy will: 'exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.'<sup>28</sup>

But equating surrogacy with house cleaning is an oversimplification. Returning to *Romeo and Juliet*, the Apothecary's will does not consent because he is selling poison. Therefore, the Apothecary's moral objection to either the illegality or the purpose of the poison makes the transaction not only a purchase of the poison but also, in part, a purchase of the Apothecary's will or conscience. The key distinction is between payment for work you consider wrong, such as selling poison, and payment for work you consider undesirable, such as cleaning toilets.

Instead of distinguishing between immoral and undesirable employment, opponents to commercial surrogacy incorrectly focus on the financial incentive itself, and the difference 'between doing something out of love and doing it for money.'<sup>29</sup> The fundamental mistake being made is to assume that a person cannot rationally and autonomously weigh the overall value of the money against the disadvantages of being a surrogate mother. To quote David Bromham:

To induce anyone to undertake similar employment without reasonable payment would certainly, in other fields, be regarded as exploitative. With surrogates, the reverse seems true and the payment of a fee to a surrogate seems to be the major factor linking surrogacy with accusations of female exploitation.<sup>30</sup>

Arguments against commercial surrogacy predicated on harmful exploitation are not convincing. What remains valid is the objection that those in rich countries may not pay a fair price for the service. I do not endorse the neo-liberalist doctrine 'that market exchange is an ethic in itself, capable of acting as a guide for all human action.'<sup>31</sup> A surrogate mother may benefit from surrogacy and still be exploited if she is not fairly compensated. The remaining ethical challenge to international surrogacy lies in addressing this type of exploitation.

Suppose an incubator were designed to allow ectogenesis throughout a nine-month gestation. After obtaining an embryo through IVF, prospective parents contract with gestational service companies. These companies manage incubator facilities in the United States and India, and the gestational service industry is a profitable business.

In Situation A, the incubator's design requires full-time maintenance by a skilled, trained professional. In the United States, a trained professional is paid \$20,000 per trimester, while in India a trained professional is paid \$6,000 per trimester. In Situation B, the incubator requires full-time maintenance, but its simple design does not require a skilled worker. In the United States, the federal minimum wage requires workers to be paid \$10,000 per trimester. In India, there is no set minimum wage for the incubator maintenance industry,<sup>32</sup> and workers are paid \$300 per trimester. Are the workers in India exploited?

The incubator maintenance workers in India are paid less for the same work in either situation, but only the workers in Situation B are exploited. Situation A closely matches international outsourcing in the service industries, such as call centers. The nominal wages for workers at Indian call centers are lower than their counterparts in

<sup>26</sup> Ibid: 99.

<sup>27</sup> Shakespeare. *Romeo and Juliet*. Act V, Scene 1.

<sup>28</sup> The Supreme Court of California. Anna Johnson, Plaintiff and Appellant v. Mark Calvert et al., Defendants and Respondents. No. S023721. 20 May 1993.

<sup>29</sup> Annas. *op. cit.* note 15, p. 23.

<sup>30</sup> D.R. Bromham. Surrogacy: Ethical, Legal, and Social Aspects. *J Assist Reprod Genet* 1995; 12: 509–516: 510.

<sup>31</sup> D. Harvey. 2005. *A Brief History of Neoliberalism*. Oxford, UK. Oxford University Press: 3.

<sup>32</sup> Minimum wages in India vary according to state and sector, and some industries do not adhere to a minimum wage, including the apparel and footwear industries. U.S. Department of State. 2008. *Country Reports on Human Rights Practices*. Washington, DC. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2007/100614.htm> [Accessed 9 Nov 2008].

the United States, but the real wage rates are equivalent.<sup>33</sup> In contrast, the workers in Situation B are underpaid. The transaction is mutually advantageous to both parties, but the unfair distribution of the transaction's benefits makes it exploitative towards the incubator workers.

The exploitation of Situation B is comparable to other forms of international trade. Is such mutually advantageous exploitation a reason to prohibit international surrogacy? I think the best approach to this dilemma is regulation, not prohibition. To quote Debora Spar:

Unless one posits, however, that the existence of global inequality renders all economic choices moot; and until there is any path by which these inequalities can feasibly be addressed, denying women this particular choice seems oddly counter-productive. It also does not square with the kind of logic applied to other areas of the global labour market . . . [where] concerns about global inequality lead toward international rules and regulations, *not* a total prohibition of the activity involved.<sup>34</sup>

International surrogacy, as currently practiced, is a *laissez-faire* system that both benefits and exploits surrogate mothers. The economic benefit to surrogate mothers is an argument against prohibition, while the economic exploitation of surrogate mothers is an argument against the status quo. The market of international surrogacy should be regulated.

## FAIR TRADE SURROGACY

The regulation of international surrogacy should be primarily concerned with limiting mutually advantageous exploitation. The solution can therefore borrow from the well-known and widely advocated Fair Trade practices. Fair Trade is concerned with justice through benefit sharing. By applying Fair Trade principles to international surrogacy, a regulatory framework can be developed to ensure the transaction is sufficiently beneficial to the surrogate mother.

The international coffee trade provides a useful example of the need for and the application of Fair Trade principles. The coffee trade was freed from price controls with the end of the International Coffee Agreement in

1989, and in the subsequent decade the value of the coffee market held by producer-country exports fell from one-third to less than ten percent. Transnational companies in wealthy countries dramatically increased their profits, while producers in poor countries were forced to sell coffee for less than the cost of production.<sup>35</sup>

Fair Trade practices were introduced to the coffee trade as a way to ensure everyone in the supply chain benefits. According to the Fair Trade Foundation website:

Fair Trade is about better prices, decent working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world. By requiring companies to pay sustainable prices (which must never fall lower than the market price), Fair Trade addresses the injustices of conventional trade, which traditionally discriminates against the poorest, weakest producers.<sup>36</sup>

Fair Trade has helped to improve the lives of disadvantaged farmers in developing countries, but it is not a panacea. Fair Trade certification is optional, and fairly traded coffee accounts for less than 1% of the market.<sup>37</sup> The remaining 99% of the coffee market is a *laissez-faire* system. In an example of mutually advantageous exploitation, large corporations maximize their profits by decreasing payments to growers. Similarly, international surrogacy is currently a *laissez-faire* or free trade system, and surrogacy arrangements are likely to benefit the healthcare providers, surrogacy agencies, and prospective parents at the expense of the surrogate mothers and their communities. This absence of regulation nearly ensures that a surrogate mother in a poor country has been underpaid and thus exploited by wealthier individuals. Fair Trade principles can provide a framework to ensure the ethical practice of surrogacy, and the Fair Trade practice of international surrogacy should be mandatory rather than optional.

Regulation of international surrogacy could occur through a variety of mechanisms. Ideally, a formal international agreement governing intercountry surrogacy could be developed and adopted by participating

<sup>33</sup> The nominal wage rate is the salary in equivalent dollars, while the real wage rate is the amount that the nominal wage rate can buy in terms of goods and services.

<sup>34</sup> D. Spar. For Love and Money: the Political Economy of Commercial Surrogacy. *Rev Int Polit Econ* 1995; 12:287–309: 303–304.

<sup>35</sup> C. Gresser & S. Tickell. 2002. *Mugged: Poverty in Your Coffee Cup*. Boston, MA: Oxfam America. Available at: [http://www.oxfamamerica.org/newsandpublications/publications/research\\_reports/mugged](http://www.oxfamamerica.org/newsandpublications/publications/research_reports/mugged) [Accessed 9 Nov 2008].

<sup>36</sup> Fairtrade Foundation. 2008. *What is Fairtrade? FAQs about Fairtrade*. London, UK: Fairtrade Foundation. Available at: [http://www.fairtrade.org.uk/what\\_is\\_fairtrade/faqs.aspx](http://www.fairtrade.org.uk/what_is_fairtrade/faqs.aspx) [Accessed 9 Nov 2008].

<sup>37</sup> D. Jaffee. 2007. *Brewing Justice: Fair Trade, Sustainability, and Survival*. Berkeley, CA: University of California Press.

countries. This type of regulatory framework could model *The Hague Convention of Intercountry Adoption*, which governs adoptions between Hague Convention countries. Unfortunately, any international regulation of surrogacy would likely take years to develop and potentially decades to implement.<sup>38</sup>

A more immediate remedy is regulation through immigration law, again following the example of international adoption. To adopt a child from outside the United States, prospective parents must work with a nationally accredited adoption service provider.<sup>39</sup> Similarly, the brokers and agencies involved in international surrogacy could be accredited based on their compliance with Fair Trade surrogacy standards, and the list of approved surrogacy service providers could be publicized on the State Department website as it is for adoption service providers.

The unique features of international surrogacy makes immigration law a pragmatic solution to the dilemma of how to enforce Fair Trade standards. Unlike domestic surrogacy arrangements, children born to surrogate mothers in other countries must be granted a visa or passport in order to migrate from their birth country to their prospective parents' country. International surrogacy could be regulated through emigration, immigration or both.<sup>40</sup> This policy framework would allow developing countries to regulate surrogacy independent of developed countries and vice versa.

Having established a potential regulatory mechanism, I must now address how Fair Trade principles can inform the specific requirements of Fair Trade surrogacy. Of the

ten standards of Fair Trade published by the International Federation for Alternative Trade (IFAT), three standards are particularly relevant to Fair Trade surrogacy: payment of a fair price, working conditions, and transparency and accountability.<sup>41</sup>

The payment of a fair price is a primary concern in Fair Trade surrogacy. I have argued that mutually advantageous exploitation is the only valid ethical argument against international surrogacy, and therefore fair compensation must be a condition of Fair Trade surrogacy. IFAT describes a 'fair price in the regional or local context' as 'one that has been agreed through dialogue and participation. It covers not only the costs of production but enables production which is socially just and environmentally sound. It provides fair pay to the producers and takes into account the principles of equal pay for equal work by women and men.'

Setting an exact dollar amount for surrogacy is outside the scope of this paper, but the incubator maintenance worker hypothetical, previously presented, can provide a useful starting point for determining appropriate compensation. Nominal wages may be less to surrogate mothers in developing countries compared to their counterparts in developed countries, but the real wages should be equivalent, and the surrogate mother should be fairly compensated relative to the total amount paid by the prospective parents to the surrogacy agency or broker.

Additionally, surrogacy contracts would specify that payment is for the surrogate mother's time, risks and labour. Just as the hypothetical incubator maintenance workers were paid an hourly wage, surrogate mothers should be paid on a time-based system. Further, payment must be independent of pregnancy outcome (e.g. miscarriage, voluntary abortion, stillbirth or disabled child), as my arguments about commodification would fail if payment to the surrogate mother were contingent on the delivery of a healthy baby.

The second applicable Fair Trade standard is the requirement for a safe and healthy working environment. While I argued that the supposed harms of surrogacy were insufficient grounds for prohibition of the practice, the requirement for a safe and healthy work environment necessitates some constraints as to who may work as a surrogate mother. This is similar to occupational requirements in other fields, for example, the physical fitness prerequisites of fire fighters. The occupational qualifications for surrogate mothers should focus on minimizing potential physical and psychological harms (e.g. good

<sup>38</sup> This convention demonstrates both the promise and the difficulty of any international agreement. While it serves to increase transparency and protect children in international adoptions, the time from introduction to ratification by the United States took nearly 15 years and the adoptions between Hague and non-Hague are not prohibited. Hague Conference on Private International Law (HCCH). 1993. *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. The Hague, Netherlands: HCCH. Available at: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69) [Accessed 9 Nov 2008] and U.S. Department of State. 2008. *Hague Adoption Convention*. Washington, DC. Available at: [http://travel.state.gov/family/adoption/convention/convention\\_462.html](http://travel.state.gov/family/adoption/convention/convention_462.html) [Accessed 9 Nov 2008].

<sup>39</sup> U.S. Department of State. 2008. *Accredited, Temporarily Accredited, and Approved Hague Adoption Service Providers*. Washington, DC. Available at: [http://www.travel.state.gov/family/adoption/convention/convention\\_4169.html#](http://www.travel.state.gov/family/adoption/convention/convention_4169.html#) [Accessed 9 Nov 2008].

<sup>40</sup> The concept of regulation of emigration is also borrowed from intercountry adoption policy. For example, foreign prospective adoptive parents considering adoption of a child from India are required to use an adoption agency approved by the Central Adoption Resource Agency (CARA). Ministry of Law and Justice. 2006. *The Juvenile Justice (Care and Protection of Children) Amendment Act*. New Delhi, India. Available at: <http://www.adoptionindia.nic.in/carahome.html> [Accessed 9 Nov 2008].

<sup>41</sup> The International Federation for Alternative Trade (IFAT). 2008. *Ten Standards of Fair Trade*. Culemborg, the Netherlands: IFAT. Available at: [www.ifat.org/index.php?option=com\\_content&task=view&id=2&Itemid=14](http://www.ifat.org/index.php?option=com_content&task=view&id=2&Itemid=14) [Accessed 9 Nov 2008].

health, normal Body Mass Index (BMI), no history of high risk pregnancies, no history of mental illness or postpartum depression). The development of evidence-based occupational health guidelines for surrogate mothers should also be a component of Fair Trade surrogacy, given the current lack of research into the physical and psychological risks of surrogacy in developing countries.

The final Fair Trade standard meriting consideration is the requirement for transparency and accountability. Transparency of financial transactions between surrogacy brokers, prospective parents and surrogate mothers will aid in the development of a market wage and help limit mutually advantageous exploitation analogous to the underpaid incubator workers in the previously described thought experiment.

I have focused on the three Fair Trade standards most salient to the ethical debate about international surrogacy, but a comprehensive Fair Trade surrogacy policy would include the other standards such as capacity building, gender equity and addressing trade relations. These guidelines show how Fair Trade standards could be applied to the developing market of international surrogacy, and they can serve as the foundation for a more complete regulatory framework.

## CONCLUSIONS

The development of assisted reproductive technology has helped millions of previously infertile individuals to become parents. Surrogacy has existed since Biblical times, but with the development of in vitro fertilization the landscape has changed. Genetic maternity and

gestational maternity may be incongruous, and the intended social mother may not have a genetic or gestational relationship to her child. The ethical debate about surrogacy has usually focused on commercial versus non-commercial surrogacy. Recent media articles have focused on a new frontier in this debate – international surrogacy.

I have argued that the only valid objection is the likelihood of mutually advantageous exploitation whereby prospective parents or surrogacy brokers unfairly benefit from the surrogacy transaction at the expense of the surrogate mothers. International surrogacy cannot continue as currently practiced. The absence of regulations has created a market that is free but not fair, providing fertile ground for unjust and exploitative practices. International surrogacy should only be practiced under Fair Trade conditions. The unique nature of pregnancy favours a regulated market because the best interests of the child and prospective parents match the well-being of the surrogate mother during pregnancy. Fair Trade surrogacy would benefit all parties.

### Acknowledgments

The author would like to thank Tony Hope for his advice and assistance throughout the development of this paper, as well as Michael Parker and Rosamond Rhodes who provided helpful feedback on an early draft.

### Biography

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