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THAILAND'S BAN ON COMMERCIAL SURROGACY: WHY THAILAND SHOULD REGULATE, NOT ATTEMPT TO ERADICATE

INTRODUCTION

In August 2014, same-sex couple Steve and James were overjoyed to take their newborn son Rhyley home to Australia.¹ However, the family was unsure they would be able to leave Thailand that day.² Although legal at the time the parents commissioned the surrogacy, a preliminary law banned commercial surrogacy in Thailand, preventing the couple from leaving the airport until they obtained a court order allowing them to exit the country through proper immigration channels.³ Unfortunately, this was the case for many other couples that are the biological parents of a child born through a Thai-surrogate mother.⁴

Over the next few months, hundreds of couples just like Steve and James would be left in legal limbo.⁵ Some would be stuck in Thai hotels with newborns, away from both their families and jobs, with rapidly depleting resources, unable to leave pending a court order.⁶ Some hopeful parents would anxiously await from their home countries, wondering if they would ever be able to meet the baby they had commissioned long before the preliminary ban.⁷

Thailand has long been an attractive destination for reproductive tourism.⁸ Reproductive tourism, like other forms of

1. Lindsay Murdoch, *Thailand Surrogacy: Australian Couple Caught in Crackdown Break Their Silence*, SYDNEY MORNING HERALD (Aug. 19, 2014), <http://www.smh.com.au/world/thailand-surrogacy-australian-couple-caught-in-crackdown-break-their-silence-20140819-105p6g.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Hilary Whiteman, *Anxious Parents Fear for Babies as Thai Military Mightens Surrogacy Laws*, CNN (Aug. 19, 2014), <http://www.cnn.com/2014/08/19/world/asia/thailand-surrogacy-laws-change/>.

6. Murdoch, *supra* note 1.

7. Whiteman, *supra* note 5.

8. Thomas Fuller, *Thailand's Business in Paid Surrogates May Be Foundering in a Moral Quagmire*, N.Y. TIMES (Aug. 26, 2014),

medical tourism,⁹ occurs when people travel nationally or internationally to obtain medical services that are unavailable, unaffordable, or otherwise undesirable at home.¹⁰ International surrogacy¹¹ has become quite common for a multitude of reasons. For example, the cost of having a baby through a Thai surrogate is significantly less than in many other countries such as the United States, which attracts couples from around the globe.¹²

http://www.nytimes.com/2014/08/27/world/asia/in-thailands-surrogacy-industry-profit-and-a-moral-quagmire.html?_r=0.

9. Travel does not necessarily need to be across international borders to qualify as medical tourism, but can be within one's own country or even state, as long as the person is traveling from their home area to receive medical services elsewhere. April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 259 (2014). Medical tourism has steadily increased throughout the past century, with a growing number of western citizens traveling to less-developed countries to receive treatment. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1471 (2010).

10. Cohen, *supra* note 9. Another reason for the growth of medical tourism is the increased availability of information from afar through globalization and technology. Bruce Patsner, *Medical Tourism: A Serious Business Undergoing Serious Change*, U. HOUS. L. CTR. (Jan. 14, 2008), [https://www.law.uh.edu/healthlaw/perspectives/2008/\(BP\)%20med%20tourism.pdf](https://www.law.uh.edu/healthlaw/perspectives/2008/(BP)%20med%20tourism.pdf). The internet often plays a large role in attracting international customers. For example India, similarly to Thailand, was a popular destination for reproductive tourism before its own ban. Many Indian fertility clinics and surrogacy agencies "created websites that [were] designed to function as marketing tools for medical tourism, to attract patients from around the world to India and more importantly, to the clinic." Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 30 (2009).

11. International surrogacy, a form of reproductive tourism, "refers to the hiring of a surrogate that resides in a country that is different from the commissioning parents." Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1265 (2013).

12. Specifically, "[t]he cost of a baby by surrogate in Thailand is less than \$50,000, compared to about \$150,000 in the U.S." *Thailand's Parliament Approves Bill Banning Commercial Surrogacy*, GUARDIAN (Nov. 28, 2014), <http://www.theguardian.com/world/2014/nov/28/thailand-parliament-bill-ban-commercial-surrogacy-baby-gammy>; Jocelyn Gecker, *A Guide to Thailand's Surrogacy Scandals and Laws*, NORTHWEST ASIAN WKLY (Sept. 13, 2014), <http://www.nwasianweekly.com/2014/09/guide-thailands-surrogacy-scandals-laws/>.

Until recently, Thailand did not specifically ban commercial surrogacy by law.¹³ Though doctors were under certain restrictions regarding their ability to perform surrogacy procedures for compensation, these limitations were rarely enforced, and no regulations were placed on either surrogacy agencies or surrogate mothers.¹⁴ As a result, gestational surrogacy has become a lucrative, yet largely unregulated business in Thailand.¹⁵ However, given recent scandals that have brought Thailand's commercial surrogacy industry into the spotlight, Thailand's military government has sought reform.¹⁶

Three scandals in particular served as catalysts for reform efforts. First, in July 2014, an Australian couple was accused of abandoning a baby boy with Down's syndrome, leaving him with the Thai surrogate mother and returning home with his healthy twin sister.¹⁷ Subsequent investigation uncovered that the twins' father was a convicted pedophile.¹⁸ Second, Thai police investigated a twenty-four-year-old Japanese man who had commissioned sixteen babies through various Thai surrogates.¹⁹ Third, another Australian man has been charged with sexually abusing two daughters he fathered through Thai surrogacy.²⁰ Unfortunately, these are only a few examples of the larger group of incidents arising out of Thai commercial surrogacy.²¹

Thailand's military government²² has taken these situations as a call for action to address the current state of the country's

13. Gecker, *supra* note 12.

14. *Id.*

15. Trisha A. Wolf, Comment, *Why Japan Should Legalize Surrogacy*, 23 PAC. RIM L. & POL'Y J. 461, 485–86 (2014).

16. Amy Sawitta Lefevre, *Australia Seeks Thai Help for Aussie Couples, Surrogate Babies*, REUTERS (Aug. 29, 2014), <http://www.reuters.com/article/2014/08/29/us-thailand-australia-surrogacy-idUSKBN0GT0J520140829?feedType=RSS&feedName=worldNews&rpc=69>.

17. Whiteman, *supra* note 5.

18. *Id.*

19. Gecker, *supra* note 12.

20. *Id.*

21. Abby Phillip, *A Shocking Scandal Led Thailand to Ban Surrogacy for Hire*, WASH. POST (Feb. 20, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/20/a-shocking-scandal-led-thailand-to-ban-commercial-surrogacy-for-hire/>.

22. Thailand's military took power in a May 2014 coup, following widespread unrest and corruption with the former democratically elected government. As a result, "[t]he military says it has taken control of the government

reproductive laws.²³ In August 2014, the government published "Protection for Children Born Through Assisted Reproductive Technologies B.E." (the "Draft Law"), a law banning commercial surrogacy that would be "enforced when it is overdue 180 days since published on government gazette."²⁴ The Draft Law made commercial surrogacy a criminal offense in Thailand.²⁵ In November 2014, Thai parliament gave the Draft Law initial approval after its first reading in Parliament.²⁶ Next, in February 2015, the National Legislative Assembly of Thailand officially enacted the "Protection for Children Born Through Assisted Reproductive Technologies Act" (the "ART Act").²⁷ The ART Act, which is substantially the same as the Draft Law in terms of content, went into effect on July 30, 2015, prohibiting commercial surrogacy from serving foreign clients, and only allowing Thai heterosexual couples to make use of surrogacy arrangements.²⁸ Immediate consequences of the crackdown included couples being stopped at the airport if they were suspected of attempting to bring home a child born through a Thai

and suspended the constitution in order to restore order and enact political reforms." An interim administration has been appointed to oversee government reform. *Why is Thailand Under Military Rule?*, BBC NEWS ASIA (May 22, 2014), <http://www.bbc.com/news/world-asia-25149484>.

23. Gecker, *supra* note 12.

24. Memorandum of Principles and Reasons Compound with Protection of Children Born from Assisted Reproductive Technologies Act B.E., Subject No. 167/2553 (Thai.), *translation at Chaninat & Leeds Co., Thailand Draft Surrogacy Law*, THAI. L.F. (Aug. 19, 2014) [hereinafter *Thailand Draft Surrogacy Law*], <http://www.thailawforum.com/thailand-draft-surrogacy-law/>.

25. Gecker, *supra* note 12.

26. AFP, *Thai Parliament Votes to Ban Commercial Surrogacy Following Baby Gammy Outcry*, TELEGRAPH (Nov. 28, 2014), <http://www.telegraph.co.uk/news/worldnews/asia/thailand/11260210/Thai-parliament-votes-to-ban-commercial-surrogacy-following-baby-Gammy-outcry.html>.

27. Sayuri Umeda, *Thailand: New Surrogacy Law*, L. LIBR. CONGRESS (Apr. 6, 2015), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404368_text; Protection for Children Born Through Assisted Reproductive Technologies Act (Feb. 19, 2015), http://www.senate.go.th/bill/bk_data/73-3.pdf (original Thai text).

28. Penny Yi Wang, *Thailand's Bans Commercial Surrogacy for Foreigners, Singles*, AP: THE BIG STORY (Aug. 7, 2015), <http://bigstory.ap.org/article/9cbc8ccd150a45d9ac41cf8a1fc60336/thailand-bans-commercial-surrogacy-foreign-parents>. This Note uses "the ban" to refer to the ART Act's prohibition against foreign couples using Thai commercial surrogacy services.

surrogate mother, and not being permitted to exit the country until they obtained a family court order.²⁹ This new requirement entails a process³⁰ that can take many months to satisfy and has kept hundreds of couples in Thailand, unable to take their newborn babies home, putting both financial strain on the families and fear for the future.³¹ These uncertainties and challenges, however, are only the initial problems surrounding the complete ban of commercial surrogacy as set forth in the ART Act. A major future concern with far-reaching consequences is that rather than eliminating commercial surrogacy in Thailand, the new ban will drive the industry underground, which will produce a host of issues in and of itself.³²

This Note argues that Thailand's introduction of the ban on commercial surrogacy, while attempting to protect involved parties, will drive commercial surrogacy operations underground, which will result in the further marginalization of Thai surrogates, commercialization of children, and continuation of placing commissioning parents in limbo, absent strong protective measures. However, such a ban fails to take into account the demonstrated demand for a surrogacy market as well as benefits for all involved parties. Rather than outright banning commercial surrogacy, Thailand's military government should use Israel's current regulations³³ and the American Bar Association Model Act Governing Assisted Reproductive Technology

29. Lefevre, *supra* note 16.

30. As a result of the ART Act, "Thai authorities have declared that foreign biological parents must obtain a court order before being able to depart through immigration channels, a process fraught with difficulty that is expected to take months." Murdoch, *supra* note 1. If Bangkok airport immigration officials suspect a child is born through surrogacy in Thailand, the parents are "required to provide the child's birth certificate, copy of the [surrogate] mother's identification card, copy of the intended parent's passports and the surrogacy contract." Lindsay Murdoch & Larissa Nicholson, *Two Australian Couples with Surrogate Babies Stopped at Bangkok Airport as New Laws Revealed*, SYDNEY MORNING HERALD (Aug. 15, 2014), <http://www.smh.com.au/national/two-australian-couples-with-surrogate-babies-stopped-at-bangkok-airport-as-new-laws-revealed-20140814-103yr1.html>.

31. Murdoch, *supra* note 1.

32. Lefevre, *supra* note 16.

33. *Israel—Regulation of Surrogacy Birth: Ethical Considerations*, BIOETHICS LEGISLATION IN SELECTED COUNTRIES, LL File No. 2012-008118, at 36 (Glob. Legal Res. Ctr., Oct. 2012) [hereinafter *Israeli Regulation of Surrogacy Birth*], https://www.loc.gov/law/help/bioethics_2012-008118FINAL.pdf.

(the "ABA Model Act")³⁴ as models to regulate commercial surrogacy in a manner that affords protections to all parties, but is not so stringent as to drive commercial surrogacy practices underground.

Part I of this Note will provide background on Thailand's history of reproductive tourism and examine the current state of its legal framework concerning commercial surrogacy. Part II will discuss scandals arising out of international surrogacy arrangements in Thailand, which have brought Thai surrogacy laws and the need for regulation to the forefront of international attention. Part III will explore the detrimental effects a complete ban on commercial surrogacy will have on Thai surrogate mothers, children born through surrogacy, and the commissioning parents of a surrogacy agreement. Part IV will propose that Thailand look to Israeli surrogacy laws and the ABA's Model Act as models in order to establish regulations for commercial surrogacy, instead of banning it altogether. This Note will conclude with the suggestion that in striking a balance between stringent regulations and relative ease of compliance, the proposed surrogacy laws will afford protection to all parties involved.

I. SURROGACY IN THAILAND

In recent years, reproductive tourism has been a booming industry in Thailand for a variety of reasons. Against a backdrop of minimal and rarely enforced regulations, commercial gestational surrogacy has proliferated for a number of years. Thai laws concerning commercial surrogacy, however, began to evolve, and restrictions tightened once issues arising from the industry made their way to the forefront of the international stage.

This Part will first discuss the history of reproductive tourism in Thailand and will outline reasons for its recent proliferation. Second, it will address the evolution of Thailand's legal framework for surrogacy, noting the former lack of regulation, and highlight some of the scandals serving as a call to action for Thai legislators.

34. MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (AM. BAR ASS'N 2008) [hereinafter MODEL ART ACT].

A. Reproductive Tourism in Thailand

Prior to the ART Act's passage in 2015, Thailand was a leading destination for reproductive tourism.³⁵ In Thailand, "[o]fficials estimate that there are several hundred surrogate births" each year.³⁶ For at least ten years, couples paid Thai women to carry a genetically unrelated child to term in exchange for a fee, a practice known as commercial gestational surrogacy.³⁷ Gestational surrogacy³⁸ is when a nongenetically related surrogate mother carries a child conceived from either both commissioning parent's³⁹ gametes,⁴⁰ or from one parent's gamete and the accompanying donor gamete.⁴¹ Often, these couples or commissioning parents traveled internationally to obtain this particular reproductive service.⁴² There are many motivations for reproductive tourism, both economic and non-economic.⁴³ Couples may travel abroad in search of gestational surrogates due to unavailability, illegality, cost, long waiting lists, and other hurdles present in their home countries.⁴⁴ Depending on the couple's country of origin, reproductive tourism

35. Fuller, *supra* note 8.

36. *Id.*

37. *Id.*

38. This Note will focus largely on gestational surrogacy, as opposed to traditional surrogacy, which "results in a surrogate's genetic child following her artificial insemination with the intended father's sperm." Margaret Ryznar, *International Commercial Surrogacy and its Parties*, 43 J. MARSHALL L. REV. 1009, 1010 (2010).

39. Commissioning parents are "those who initiate the surrogacy and are the intended parents." *Id.* at 1023.

40. A gamete, for purposes of discussing human gestational surrogacy, is "human sperm or ova." S. 388, 2011 Legis., 234th Sess. (N.Y. 2011).

41. Ruby L. Lee, *Note: New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 276 (2009).

42. Cherry, *supra* note 9, at 260.

43. *Id.*

44. *Id.* For many lesbian, gay, bisexual, and transgender couples that are unwilling to adopt, reproductive tourism is the only viable alternative if their home country prohibits surrogacy arrangements, or if it is too expensive. For male couples, the use of a surrogate may be the only viable alternative to adoption or childlessness, "and the only alternative for such female couples, should the women be unable or unwilling to carry the child to term." Robert Zimmer, Jr., *The Surrogacy Minefield: Legal Challenges and Opportunities for Prospective LGBT Parents and Their Attorneys*, 35 WHITTIER L. REV. 311, 312 (2014).

can significantly cut down costs, making “ART⁴⁵ use financially accessible to some who could not afford it at home.”⁴⁶ Additionally, some countries may not possess the necessary materials or technology to provide an ideal surrogacy arrangement.⁴⁷ No matter the motivation, “reproductive tourism has become a normal and accepted part of our global culture.”⁴⁸

One of the main incentives in choosing Thailand as a destination for commercial gestational surrogacy was economic.⁴⁹ Because of the relatively low costs, Thailand was “a go-to destination for couples from Australia, Hong-Kong, and Taiwan, and a low-cost alternative to the United States.”⁵⁰ Reports show that the cost of a commercial surrogacy in Thailand is about \$42,000 USD.⁵¹ In comparison, commercial surrogacy arrangements in

45. “ART” is an acronym for “Assisted Reproductive Technology.” Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277 (2009).

46. *Id.* at 299.

47. Cherry, *supra* note 9, at 261. Developing nations, in particular those in Africa and Latin America, have some of the highest infertility rates in the world, though “accurate figures are difficult to obtain.” *WHO Report on Medical, Ethical and Social Aspects of Assisted Reproduction Current Practices and Controversies in Assisted Reproduction* (Effy Vayena, Patrick J. Rowe & P. David Griffin eds., 2001), <http://apps.who.int/iris/bitstream/10665/42576/1/9241590300.pdf>. It is in those developing nations, however, where the availability of ART is extremely limited, and “the cost is even more prohibitive.” *Id.* This is largely because such low-resource nations encounter such widespread health and social concerns that infertility is not “a social priority.” *Id.*

48. Cherry, *supra* note 9, at 263.

49. Gecker, *supra* note 12.

50. *Id.* Couples in the United States who travel abroad in search of a surrogate “may indeed end up paying only half as much as what they would pay in the United States, or even less.” Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1167 (2014). Thailand’s economy was devastated as a result of the Asian financial crisis in the late 1990s. The value of the Thai *baht* dropped significantly, and private hospitals started expanding their international customer bases. Leigh Turner, *First World Health Care at Third World Prices: Globalization, Bioethics and Medical Tourism*, 2 BIOSOCIETIES 303, 312–13 (2007). Following this financial devastation, “[l]ow prices for sexual reassignment surgery, cosmetic surgery and other medical procedures transformed Thailand into a major destination for inexpensive international health travel.” *Id.*

51. *Australian Couple Leaves Thailand with Child Born to Surrogate Mother*, GUARDIAN (Aug. 16, 2014), <http://www.theguardian.com/world/2014/aug/17/australian-couple-allowed-leave-thailand-child-born-surrogate-mother>.

the United States may cost couples around \$150,000 USD, more than triple the price in Thailand.⁵² Viewed in economic terms, it is clear why an American couple would prefer the less costly pursuit of a Thai surrogate mother.

During the ten years preceding the ART Act, the main reason commercial surrogacy proliferated among women within Thailand was also economic.⁵³ Financial incentive was a major motivation for Thai women when deciding to become surrogate mothers.⁵⁴ Thai officials report that surrogate mothers were paid between \$10,000 USD⁵⁵ and \$15,000 USD for a successful pregnancy, increasing for twins.⁵⁶ Additionally, women often received around \$450 USD in monthly allowance, and free lodging in Bangkok, where many surrogates resided under the supervision of a fertility clinic throughout the term of their pregnancies.⁵⁷

A second incentive foreigners may have had in choosing Thai surrogates, rather than using surrogates in their home countries or going elsewhere, was the degree of control exercised over the surrogate mothers during the term of the pregnancy. The majority of paid Thai surrogates either chose or were instructed to live in Bangkok for the duration of their pregnancies, where they were directly supervised by surrogacy clinics

52. Gecker, *supra* note 12.

53. Fuller, *supra* note 8.

54. *Id.*

55. United States dollar equivalent to what Thai surrogate mothers get paid in Thailand's currency, the Thai baht. *Thai Currency*, STATRAVEL, <http://www.statravel.com.au/thai-currency.htm>.

56. Fuller, *supra* note 8; *Australian Couple Leaves Thailand with Child Born to Surrogate Mother*, *supra* note 51.

57. A 2014 case study of Pak Ok, a remote rural village in Thailand, highlights the financial incentive to become a surrogate, as it chronicles the spread of commercial gestational surrogacy's popularity throughout Thailand. Fuller, *supra* note 8. According to the study, one surrogate mother's purchase of a new car and conspicuous home renovations sparked interest in the community. *Id.* Neighbors became both jealous and excited of the surrogate mother's newly acquired wealth. *Id.* The farming communities around Pak Ok quickly became a "lucrative cottage industry," with at least twenty-four women out of a population of thirteen thousand people becoming paid surrogates. *Id.* In a poor village, with little opportunity to make money aside from farming, it is clear that Pak Ok residents understand the attraction of becoming paid surrogates. A fifty-year-old shopkeeper even reflected, "[i]f I weren't this old, maybe I would have done it myself." *Id.*

and provided medical services throughout their pregnancies.⁵⁸ This supervision and control helped assuage any concerns a foreign couple might have had regarding the quality of care its unborn child was receiving, which may have contributed to the health of the child.

Finally, foreign couples looked to Thailand as an ideal destination for reproductive tourism because of its lack of any law specifically banning same-sex couples from obtaining a child through commercial surrogacy.⁵⁹ India, much like Thailand, was a premiere destination for commercial surrogacy arrangements and other types of medical tourism.⁶⁰ However, recent Indian legislation banning same-sex couples from commissioning Indian surrogate mothers will make it difficult, if not impossible, for many same-sex couples to continue using Indian surrogates.⁶¹ Additionally, recent statehood issues⁶² for children born through surrogacy have deterred couples who might have formerly sought out Indian surrogacy arrangements.⁶³ With even more stringent regulations limiting “those that can apply for medical surrogacy visas to heterosexual cou-

58. *Id.*

59. Gecker, *supra* note 12; Zimmer, Jr., *supra* note 44.

60. Wolf, *supra* note 15, at 478.

61. *Id.* at 462.

62. One example of a statehood issue surrounding an international surrogacy arrangement is the Baby Manji Case. Baby Manji's parents divorced before she was born, and while her Japanese commissioning father intended to raise her, the commissioning mother no longer wished to. *Id.* at 473–75. Since a donated egg was used, and the Indian surrogate mother had already renounced her parental rights to Manji by contract, no woman was left with parental rights to Manji. *Id.* When her father attempted to bring her back to Japan, the Japanese embassy refused to issue a passport and said they would use the birth mother's nationality to determine the nationality of the child. *Id.* However, under Indian laws, Manji was ineligible for Indian citizenship. *Id.* It ultimately took three months for Manji to receive a Japanese visa, and though India subsequently offered her a certificate of identity, there is no evidence that she has since received the Japanese citizenship she was promised. *Id.* Statelessness does not only lead to a child's inability to travel internationally—“[a]s long as she was without a nationality, Manji's basic human rights remained at risk of violation.” Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 *CARDZO J. INT'L & COMP. L.* 545, 558–559 (2013).

63. Wolf, *supra* note 15, at 486. A stateless person is one who is “not considered as a national by any State under the operation of its law.” Convention Relating to the Status of Stateless Persons art. 1, Sept. 28, 1954, 360 U.N.T.S. 117.

ples who have been married for at least two years, potential same-sex customers were pushed out of India and towards a Thai market devoid of similar regulations.⁶⁴ According to global commercial surrogacy studies, “the most popular destinations are jurisdictions with few or no applicable regulations.”⁶⁵ Given the financial benefits, assurance of control of surrogate mothers, and lack of barriers to same-sex couples not available in former leading surrogacy countries, Thailand was the prime destination for reproductive tourism.⁶⁶

B. The Evolution of Commercial Surrogacy Laws in Thailand

Before the ART Act, Thailand only had a few Medical Council regulations addressing the use of surrogacy services.⁶⁷ Even with these regulations in place, the lack of government oversight combined with a high demand for commercial surrogacy services ensured that these regulations were rarely enforced.⁶⁸ However, in 2014, numerous controversies stemming from failed surrogacy arrangements, abuse of surrogacy services, and questionable surrogate parents highlighted the need for some sort of regulation.⁶⁹ As a reaction to these problems, the Thai government sought reform first through the Draft Law, and ultimately through the ART Act, which completely bans surrogacy for commercial purposes.⁷⁰

1. Lack of Regulation Prior to the Ban

Until 2015, Thailand did not specifically ban the actual practice of commercial surrogacy.⁷¹ Regulation of the commercial surrogacy industry merely included measures aimed toward Thai doctors, not the parties to surrogacy arrangements, and even those measures were routinely overlooked. For example, the Medical Council of Thailand prohibited doctors from per-

64. Wolf, *supra* note 15, at 479, 486.

65. Cherry, *supra* note 9 at 263.

66. *Id.*

67. *Surrogacy in Thailand: Laws and Regulations*, THAI. ATT'Y BLOG (Sept. 3, 2014), <http://www.thailand-lawyer.com/thailand-attorney/surrogacy-in-thailand-laws-and-regulations/>.

68. Gecker, *supra* note 12.

69. Whiteman, *supra* note 5.

70. *Id.*; Yi Wang, *supra* note 28.

71. Gecker, *supra* note 12.

forming surrogacy services for compensation,⁷² and a 1997 Medical Council regulation on surrogacy required doctors to obtain licenses⁷³ to perform any surrogacy services.⁷⁴ Additionally, a 2002 supplement to these laws established that doctors may only assist in surrogacy services if the mother is a blood relative of one of the commissioning parents and is not receiving payment for carrying the child.⁷⁵ Medical clinics were also under certain obligations regarding surrogacy procedures.⁷⁶ Penalties for violating these laws, however, have “rarely been enforced.”⁷⁷

Prior to the ART Act banning commercial surrogacy, there were no regulations directly targeted at surrogate mothers.⁷⁸ Under Thai law, a mother is “the person who gives birth.”⁷⁹ This means that in order “for the biological parents to gain custody,” the birth mother, or surrogate mother, had to first renounce her parental rights to the child.⁸⁰ However, this possible legal obstruction was often avoided, merely because there was no government authority overseeing or regulating these practices.⁸¹ In essence, surrogacy agencies were allowed to operate, and surrogate mothers were able to form agreements with commissioning parents without the law intervening. Only doctors were limited in scope.⁸² Though the Draft Law was first introduced in 2004, before the ART Act took effect, it was never implemented and had not made its way to the forefront until scandals arose.⁸³ The lack of enforcement regarding existing physician-targeted laws, combined with the lack of governance

72. *Id.*

73. The regulation obligates doctors to obtain a surrogacy license from the Royal Thai College of Obstetricians and Gynecologists. *Surrogacy in Thailand: Laws and Regulations*, *supra* note 67.

74. *Id.*

75. *Id.*

76. *Id.*

77. Penalties for violating these laws include, but are not limited to, doctors losing their medical licenses, being fined, or being imprisoned for up to one month. *Id.* Additionally, surrogacy agencies may also accrue fines. *Id.*; Gecker, *supra* note 12.

78. Gecker, *supra* note 12.

79. Fuller, *supra* note 8.

80. *Id.*

81. *Id.*

82. Gecker, *supra* note 12.

83. *Surrogacy in Thailand: Laws and Regulations*, *supra* note 67.

over surrogacy agencies and mothers, rendered Thailand a unique zone of reproductive lawlessness, leading to widespread unregulated commercial surrogacy arrangements.⁸⁴

2. A Call to Action

In July 2014, the state of Thailand's commercial surrogacy regulation was brought to the forefront of international news with the controversy over baby Gammy.⁸⁵ Thai news media reported that a Western Australian couple paid a young Thai woman to carry twins.⁸⁶ The couple returned home, however, with only the healthy twin girl, Pipah, leaving Gammy, the twin brother with Down's syndrome, in Thailand with the surrogate mother.⁸⁷ This story resulted in public outcry and accusations that the couple abandoned their son, although they deny any such allegations.⁸⁸

According to the commissioning father, David Farnell, he and his wife Wendy found out late into the pregnancy that Gammy would be born with Down's syndrome.⁸⁹ The couple admitted to asking the Bangkok surrogacy agency they had used to give them their money back.⁹⁰ Though David Farnell admitted that

84. Part of a surrogacy arrangement, of course, involves the commissioning parents taking their newborn child home. While the Thailand Civil and Commercial Code addresses parentage issues regarding adoption, abandonment, legitimacy, divorce, a parent's death, and more, it fails to address surrogacy, let alone commercial gestational surrogacy in the international context. *The Thailand Civil and Commercial Code*, SAMUI FOR SALE, <http://www.samuiforsale.com/law-texts/thailand-civil-code-part-1.html> (last visited Jan. 24, 2015).

85. Whiteman, *supra* note 5.

86. Commercial surrogacy is banned in Australia. There are laws against both advertising for surrogates and compensated surrogacy. Melissa Davey, *Commercial Overseas Surrogacy More Dangerous, Australian Study Finds*, *GUARDIAN* (Aug. 28, 2014), <http://www.theguardian.com/lifeandstyle/2014/aug/28/commercial-overseas-surrogacy-more-dangerous-australian-study-finds>; Fuller, *supra* note 8.

87. Lefevre, *supra* note 16.

88. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *BBC NEWS ASIA* (Aug. 7, 2014), <http://www.bbc.com/news/world-asia-28686114>; Gecker, *supra* note 12.

89. Amanda Meade, *Gammy: Australian Parents Wanted a Refund and Would Have Aborted Him*, *GUARDIAN* (Aug. 10, 2014), <http://www.theguardian.com/world/2014/aug/10/baby-gammy-parents-interview-aborted-downs-syndrome-australia>.

90. *Id.*

they likely would have terminated the embryo had it been safe at that stage of the pregnancy, he denied purposely leaving the baby behind with Pattaramon Chanbua, the Thai surrogate mother.⁹¹ Chanbua had a conflicting story⁹² and claimed “they deliberately left Gammy behind, but took his healthy twin sister.”⁹³

Though public outrage originally accompanied this story, after further investigation, a new source for alarm arose.⁹⁴ Australian court records revealed that David Farnell was “convicted and imprisoned for twenty-two counts of child sexual abuse in the 1990s,” triggering concern for his parental fitness and baby Pipah’s safety.⁹⁵ Meanwhile, Chanbua has been raising baby Gammy at her home in Thailand, stating that “she kept the baby because she feared he would end up in a state institution.”⁹⁶ Despite the Farnells’ statements that they miss “their

91. *Id.* In the couple’s first media interview since the incident made international headlines, David Farnell stated “we wanted to bring him with us . . . but the surrogate mother wanted to take our girl and we were getting scared that we were going to lose her. We had to try and get out as fast as we could.” *Id.*

92. *Id.*

93. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *supra* note 88. In earlier media reports, Chanbua recounted that the couple ignored Gammy when they came to the hospital and “were happy for her to keep him.” Meade, *supra* note 89. Further, Chanbua claims that the couple even asked her to have an abortion four months into the pregnancy, which she refused to do since it is against both her Buddhist beliefs, as well as the law in Thailand. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *supra* note 88.

94. Fuller, *supra* note 8.

95. *Id.* Farnell had faced pedophilia charges involving the sexual assault of several young girls in the 1980s and 1990s for which he served a jail sentence. *Australian Couple Leaves Thailand with Child Born to Surrogate Mother*, *supra* note 51. Though the couples’ adult son told local media that Farnell was a “good father who had changed,” the Western Australia Child Protection Minister contacted the couple to address concerns arising out of the situation. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *supra* note 88.

96. Gecker, *supra* note 12. This scandal not only sparked national outcry but also pleas for help for the surrogate, who already had two children of her own with her husband and does not have adequate resources to pay for Gammy’s various medical needs. Fuller, *supra* note 8; Sarah Michael, *Exclusive: Selfies with Gammy, Working at a Noodle Shop with her Grandmother and Scouting for Good Looking Surrogate Mothers: Inside the Life of the Birth Mum of the Down Syndrome Baby Abandoned by his Australian Parents*, MAIL ONLINE (Aug. 7, 2014), <http://www.dailymail.co.uk/news/article->

little boy,” they admittedly have made no effort to contact Chanbua, inquire about Gammy’s health, or reach out to the Australian embassy for help in taking Gammy home.⁹⁷

The baby Gammy case was only the first in a string of scandals arising out of the Thai crackdown on surrogacy practices.⁹⁸ Shortly after, Thai police received a tip concerning a twenty-four-year-old Japanese man, Mistutoki Shigeta.⁹⁹ Following the tip, Thai authorities found “six boys and three girls, all aged two or younger, in a condominium in Bangkok.”¹⁰⁰ Several nannies and a pregnant woman were also present.¹⁰¹ Many of the children were born only months or weeks apart.¹⁰² Upon further investigation, authorities discovered that Shigeta had “fathered at least sixteen babies” through eleven Thai surrogates.¹⁰³

Subsequently, Shigeta was investigated for conducting a baby-trafficking operation following police confirmation that he took a baby with a Thai passport to Cambodia three separate

2718974/Inside-life-Gammys-birth-mother-surrogacy-row.html. Despite the challenges Chanbua is likely to face in raising Gammy, including the possibility of Gammy gaining Australian citizenship or the Farnells’ attempting to win custody of the child, she is determined to raise the child as her own. Brendan Foster & Alexandra Topping, *Baby Gammy May be Given Australian Citizenship, Government Suggests*, *GUARDIAN* (Aug. 4, 2014), <http://www.theguardian.com/world/2014/aug/04/baby-gammy-australian-citizenship-government-suggests>.

97. Meade, *supra* note 89. This incident has subjected Thailand’s surrogacy industry to internal, as well as international, scrutiny. The Medical Council of Thailand has set up a specialized committee for the baby Gammy case and plans to investigate two doctors believed to be involved in the twins’ birth. Murdoch & Nicholson, *supra* note 30.

98. Gecker, *supra* note 12.

99. *Id.*

100. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *supra* note 88.

101. *Id.*

102. Fuller, *supra* note 8.

103. Gecker, *supra* note 12. When questioned about his motives for wanting so many children, Shigeta, a businessman rumored to be the son of a Japanese billionaire, deferred to his lawyer, who stated that Shigeta just “wanted a big family.” Peter Alford, *Surrogacy Scandal Spurs Thai Probe into Baby Trafficking*, *AUSTL.* (Aug. 11, 2014), <http://www.theaustralian.com.au/news/world/surrogacy-scandal-spurs-thai-probe-into-baby-trafficking/story-e6frg6so-1227019715555?sv=94a484081685ee850a8ff0f85f06a272>; Whiteman, *supra* note 5.

times in 2014.¹⁰⁴ One baby is also known to have “passed through India, where a Japanese passport was swapped for the Thai document.”¹⁰⁵ This incident will likely have widespread effects on other surrogacy arrangements, as “[a]ll IVF Centre, the most popular surrogacy clinic for Australians . . . ha[ve] been forced to close after being linked to [this] ‘baby factory’ case.”¹⁰⁶

The third case involves an Australian man charged with “sexually abusing twin girls he fathered several years ago with a Thai surrogate.”¹⁰⁷ The unidentified Australian man paid a Thai surrogate 170,000 Thai baht for her services, which included using her own eggs to conceive the twins, possibly because the man’s wife was no longer fertile.¹⁰⁸ According to the Thai surrogate, the couple was just married and desperate to have a child, but the twins’ well-being took a turn for the worse upon their return to Australia.¹⁰⁹ When the father lost his job, his temper became violent and his marriage broke down, and the children began experiencing night tremors and frequent bed-wetting.¹¹⁰ The man was eventually charged with sexually abusing the twin girls, and a subsequent raid on his home further revealed alleged possession of child pornography materials, leading to additional charges.¹¹¹ These three scandals may only be the beginning of a look into the “dark side”¹¹² of commercial surrogacy operations in Thailand, as the Thai military council “has ordered raids on a number of clinics suspected of carrying out surrogacy procedures illegally.”¹¹³

104. Alford, *supra* note 103.

105. *Id.* Following this bizarre discovery, authorities have continued to investigate the man’s background and have performed DNA tests. *Thai Surrogate Baby Gammy: Australian Parents Contacted*, *supra* note 88.

106. Murdoch & Nicholson, *supra* note 30.

107. Gecker, *supra* note 12.

108. Samantha Hawley, *Australian Charged with Sexually Abusing Twins He Fathered with Thai surrogate*, ABC NEWS (Sept. 1, 2014), <http://www.abc.net.au/news/2014-09-01/australian-who-fathered-surrogate-twins-facing-abuse-charges/5710796>.

109. *Id.*

110. *Id.*

111. *Id.*

112. Alford, *supra* note 103.

113. Lefevre, *supra* note 16.

3. Reactive Legislation: An Attempt to Eradicate Commercial Surrogacy

Following these incidents and resulting public outrage, Thailand's military government sought reform, primarily through the Draft Law banning commercial surrogacy in Thailand.¹¹⁴ Though often referred to as a "crackdown" measure in response to the above-mentioned scandals, the Draft Law has actually existed since 2004.¹¹⁵ The Draft Law was created to prevent abuses of commercial surrogacy and alternative reproductive technology, but due to the pressing importance of preventing surrogacy abuse in Thailand, "the Thai government and professional associations have renewed efforts to make the Thai draft surrogacy law official."¹¹⁶ The resulting laws, contained in the ART Act, were formally endorsed by the Thai King on July 30, 2015.¹¹⁷

While the Draft Law addressed many issues relating to the protection of children and the use of assisted reproductive technology, Chapter Three specifically targeted surrogacy.¹¹⁸ In a blanket provision, Section 23 completely prohibited "surrogacy for commercial purposes."¹¹⁹ Section 25, within the surrogacy chapter, prohibited any person from acting as a paid middleman or broker who manages or promotes surrogacy.¹²⁰ Section 26 prohibited the circulation of information about women who wanted to be surrogate mothers, as well as women who wanted to find surrogates, whether it was for commercial or other purposes.¹²¹

These laws, now memorialized in the ART Act, make commercial surrogacy a criminal offense.¹²² Offenders of the ban on commercial surrogacy can be imprisoned for up to ten years, fined up to 200,000 baht, or both.¹²³ Any person who violates Section 25 or 26, which would include agencies, advertisers, or

114. Gecker, *supra* note 12.

115. Murdoch, *supra* note 1; *Surrogacy in Thailand: Laws and Regulations*, *supra* note 67.

116. *Surrogacy in Thailand: Laws and Regulations*, *supra* note 67.

117. Whiteman, *supra* note 5; Yi Wang, *supra* note 28.

118. *Thailand Draft Surrogacy Law*, *supra* note 24.

119. *Id.*

120. *Id.*

121. *Id.*

122. Whiteman, *supra* note 5; Yi Wang, *supra* note 28.

123. *Thailand Draft Surrogacy Law*, *supra* note 24.

recruiters of surrogate mothers, can be sentenced to up to five years in prison and fined up to 100,000 baht.¹²⁴

The ART Act¹²⁵ took effect on July 30, 2015.¹²⁶ The law “prohibits commercial surrogacy serving foreign clients,” and excludes same-sex couples as well, since only married couples can use surrogates and “same-sex marriage is not recognized” in Thailand.¹²⁷ To qualify for a surrogacy arrangement, both the husband and wife must be Thai, or “if only one applicant is Thai, the couple must have been married for at least three years.”¹²⁸ The ART Act expressly forbids any individual involved from profiting from the arrangement, and the surrogate mother must be a “blood relative of either of the applicants” and have had a pregnancy prior to the surrogacy.¹²⁹ As outlined in the Draft Law, the provisions of the ART Act completely ban surrogacy for commercial purposes, and offenders can be imprisoned for up to ten years, fined up to 200,000 baht, or both.¹³⁰ Those acting as agents of commercial surrogacy “by requesting or accepting money, property, or other benefits in return for managing or giving advice about surrogacy” can face “imprisonment for up to five years and/or a fine of up to 100,000 baht.”¹³¹

II. DETRIMENTAL EFFECTS OF A COMPLETE BAN ON COMMERCIAL SURROGACY

The ART Act’s blanket prohibition on commercial surrogacy arrangements will force the industry out of the public eye, harming all parties involved. In an unregulated underground surrogacy industry, surrogate mothers will face overwhelming exploitation. Commissioned children will experience, at a minimum, confusion about their origin as well as legal battles over citizenship rights, and at worst, life-threatening health risks. Commissioning parents will face uncertainty, emotional trauma, and financial risk.

124. *Id.*

125. Umeda, *supra* note 27.

126. Yi Wang, *supra* note 28.

127. *Id.*

128. Umeda, *supra* note 27.

129. *Id.*

130. *Id.*

131. *Id.*

This Part will first discuss how a ban on commercial surrogacy will serve to push the entire industry underground where it cannot be regulated. Second, it will analyze how the lack of regulation will negatively impact surrogate mothers, leading to both physical and psychological damage, financial exploitation, and marginalization due to a lack of autonomy. Third, this Part will explore the health risks, statehood issues, and psychological harm associated with being a child commissioned by surrogacy in an industry lacking safeguards. Finally, it will identify problems unique to commissioning parents, such as the emotional uncertainty and financial risk associated with taking a gamble on surrogacy arrangements that are unregulated.

A. A Complete Ban Will Drive the Commercial Surrogacy Industry Underground

Commercial surrogacy, while desirable to many couples and profitable for many Thai surrogate mothers, also comes with a host of issues that negatively affect all parties involved.¹³² The Thai government's response to these issues, in combination with the recent scandals, was to promulgate the ART Act, in essence completely banning and criminalizing commercial surrogacy arrangements.¹³³

It is important to analyze just how effective the ART Act will be in solving issues surrounding international commercial surrogacy. “[M]aking commercial surrogacy illegal could push the industry underground” rather than eliminating it.¹³⁴ The Thai newspaper that originally published the baby Gammy story predicted that “[p]eople will carry it out illegally and out of sight — and may resort to human trafficking or kidnapping to get children out of the country.”¹³⁵ Further, illegality may not even substantially deter prospective parents.¹³⁶ A study commissioned by Surrogacy Australia¹³⁷ and published in the *Medical Journal of Australia* found that “only nine per cent of re-

132. See generally Fuller, *supra* note 8.

133. Gecker, *supra* note 12; *Thailand Draft Surrogacy Law*, *supra* note 24.

134. Lefevre, *supra* note 16.

135. Fuller, *supra* note 8.

136. Murdoch & Nicholson, *supra* note 30.

137. Surrogacy Australia is a non-profit organization that supports Australians who are currently parents through a surrogacy arrangement or plan to become parents through surrogacy. SURROGACY AUSTL., <http://www.surrogacyaustralia.org/> (last visited Mar. 27, 2016).

spondents to an online survey would rule out paying a woman living overseas to have their baby if it was illegal.”¹³⁸ Scholars state “with a great deal of certainty, we can speculate that criminalization merely drives the practice underground.”¹³⁹

If the commercial surrogacy industry is pushed underground and out of law enforcement’s sight, it will remain a “largely unregulated” industry.¹⁴⁰ Consequently, parties to surrogacy arrangements will be subject not only to problems stemming from an unregulated industry that existed prior to the ART Act, but also new issues arising out of the law.¹⁴¹ There are three main parties “involved in international commercial surrogacies: the surrogates, the commissioning parents, and the resulting children.”¹⁴² It is important to note the different issues each party may encounter when involved in a covert industry with no meaningful regulation.

B. The Ban’s Effect on Surrogate Mothers

The party often at the heart of moral, philosophical, and legal debate surrounding international commercial surrogacy is the surrogate mother herself.¹⁴³ Notwithstanding the Thai ban on surrogacy, Thai surrogates and other similarly situated surrogates around the world already face a host of difficulties.¹⁴⁴ There are varying opinions as to what the most ethical response to these problems would be, as well as the “appropriate

138. Murdoch & Nicholson, *supra* note 30.

139. Cherry, *supra* note 9, at 288.

140. Gecker, *supra* note 12.

141. This is precisely what has occurred in India. India, much like Thailand, was a go-to destination for commercial surrogacy until the government restricted such arrangements to infertile Indian married couples. Kanishka Singh, *Ban drives surrogacy-for-foreigners underground*, SUNDAY GUARDIAN LIVE (Jan. 2, 2016), <http://www.sundayguardianlive.com/investigation/2446-ban-drives-surrogacy-foreigners-underground>. As a result, India is facing harm that makes clear that while “[t]he intention . . . of the government might be noble, . . . it is not without consequence.” *Id.* The demand for international commercial surrogacy is increasing, and clinics are charging premium fees while paying surrogates a fraction of the promised amount. *Id.* Shipra Jain, a social activist in Delhi, stated that “there are thousands of underground clinics operating in Delhi” and that “[t]his is worse than allowing commercial surrogacy. It has started turning into a cartel now.” *Id.*

142. Ryznar, *supra* note 38, at 1022.

143. *Id.* at 1028.

144. *Id.*

legal response: regulation or prohibition.”¹⁴⁵ Given the complex nature of the surrogate mother’s situation, there is no clear solution, but looking to the circumstances that create issues for surrogate mothers helps analyze the effectiveness, or ineffectiveness, of the new Thai legislation.¹⁴⁶

1. Physical and Psychological Harm

One threat that every surrogate mother faces is the risk to her medical and psychological well-being.¹⁴⁷ There are “health risks and dangers inherent to every pregnancy,” and commercial surrogacy is no different.¹⁴⁸ In fact, surrogate mothers may stand an even higher risk of enduring negative physical effects, as multiple embryos are often transferred to the surrogate mother,¹⁴⁹ leading to “high levels of multiple pregnancies and premature births.”¹⁵⁰ Implanting a large number of embryos into the surrogate mother, a practice sometimes used “to ensure the likelihood of a pregnancy[,] [is] detrimental to the health of the pregnant woman and to the health of the children that result from a multiple pregnancy.”¹⁵¹ Additionally, repeat surrogates are at heightened risk for negative medical effects

145. Cherry, *supra* note 9, at 259.

146. *Id.*

147. Ryznar, *supra* note 38, at 1029–30.

148. *Id.* at 1029.

149. See Davey, *supra* note 86. The physical process of gestational surrogacy begins when “an egg is removed from the intended mother or an anonymous donor and fertilized with the sperm of the intended father or anonymous donor. The fertilized egg, or embryo, is then transferred to a surrogate who carries the baby to term.” *Overview of the Surrogacy Process*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process>.

150. Davey, *supra* note 86.

151. Cherry, *supra* note 9, at 284. For example,

[s]ome experts estimate that maternal morbidity is seven times greater in multiple pregnancies than in singleton deliveries and that perinatal mortality rates are four times higher for twins and six times higher for triplets and higher-order births. Multiple pregnancies are also likely to be premature, thus increasing the chance of problems associated with low birth weight.

Low birth weight can lead to serious health issues not only when the infant is born, but throughout his or her life. Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1644 (2008).

due to the health consequences that come with recurring pregnancies.¹⁵²

Similarly, traditional pregnancies often produce psychological consequences. For example, “postpartum depression¹⁵³ [sic] effects ten to twenty percent of women giving birth.”¹⁵⁴ The risks women typically encounter during and after pregnancy can be exacerbated by issues deriving specifically from the surrogacy arrangement. After carrying a fetus for nine months, “relinquishing a child upon birth may be difficult.”¹⁵⁵ Thai women often enter into surrogacy arrangements due to economic incentive and may not anticipate psychological difficulties that come with giving up a child.¹⁵⁶

Additionally, surrogates who choose to or are instructed to live away from home during their pregnancy, such as Thai women who live in group homes in Bangkok, or Indian women who live in dormitory-style homes in hospitals, may be cut off from their families during that time.¹⁵⁷ While most surrogacy clinics welcome visits from the surrogates' family members, the families usually cannot afford to, which “can increase the isolation that surrogates already feel.”¹⁵⁸ Another potential psychological consequence unique to the surrogacy arrangement is the surrogate's loss of control, both with having a say in decisions concerning her physical body as well as the ability to make decisions with her own best interest in mind.¹⁵⁹ Surrogates may often feel that they have very little control over the trajectory of their pregnancies, and consequently, their own health, since involved doctors often make medical decisions “in the best interest of the pregnancy, not the surrogate.”¹⁶⁰

152. Ryznar, *supra* note 38, at 1029–30.

153. The Mayo Clinic defines postpartum depression as a “more severe, long-lasting form of depression” than “postpartum baby blues,” which often includes “mood swings, crying spells, anxiety, and difficulty sleeping” after a woman gives birth. *Postpartum Depression*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/postpartum-depression/basics/definition/con-20029130> (last visited Apr. 4, 2016).

154. Ryznar, *supra* note 38, at 1030.

155. *Id.*

156. Fuller, *supra* note 8; Ryznar, *supra* note 38, at 1030.

157. Fuller, *supra* note 8; Wolf, *supra* note 15, at 484.

158. Wolf, *supra* note 15, at 484.

159. *Id.*

160. *Id.* For example, in 2013, a surrogate mother died on the operating table due to gestational diabetes and hypo tendency. Roshni Nair, *Everything*

These medical and psychological risks are problematic for surrogates in an unregulated surrogacy industry and will only worsen with a ban on commercial surrogacy.¹⁶¹ Despite the ART Act, problems caused by lack of regulation will remain, since an underground surrogacy industry would also be unregulated.¹⁶² Additionally, new problems will arise.¹⁶³ An underground industry will make it harder for “patients to access quality physicians and medical care.”¹⁶⁴ Furthermore, there will be immediate problems for surrogates who were already pregnant when the Draft Law and ART Act were publicized.¹⁶⁵ Following the introduction of the Draft Law, some private hospitals caring for Thai surrogates reportedly moved the pregnant women to lower-cost government hospitals for fear of legal consequences.¹⁶⁶ Pregnant surrogates might also stop attending regular medical checkups, go into hiding, or even seek abortion in fear of running afoul of the law. These medical consequences will not just affect the surrogate mother, but will have a direct effect on the commissioning parents, as well as the resulting child.¹⁶⁷

2. Unequal Bargaining Power and Financial Exploitation

Another problem surrogates face when participating in commercial surrogacy arrangements is the unequal bargaining power between themselves and the commissioning parents.¹⁶⁸ This is especially true when there are no laws regulating agreements between the intended parents and the surrogate,

You Wanted to Know about Multimillion Dollar Surrogacy Business, DNA INDIA (Aug. 2014), <http://www.dnaindia.com/lifestyle/report-everything-you-wanted-to-know-about-multimillion-dollar-surrogacy-business-2014959>. Apparently “the symptoms were obvious during pregnancy, but nothing was done.” *Id.* Some surrogates may continue a pregnancy even in the face of significant personal health problems, as many agencies refuse to abort a fetus “unless there is a valid medical reason to do so,” with medical reasons referring to the health of the fetus, not the surrogate. *Id.*

161. Lefevre, *supra* note 16.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Australian Couple Leaves Thailand with Child Born to Surrogate Mother*, *supra* note 51.

166. *Id.*

167. Whiteman, *supra* note 5.

168. Wolf, *supra* note 15, at 483.

as there is nothing binding to protect the surrogate's rights, except perhaps a private contract.¹⁶⁹ Due to lack of adequate legal counsel, contracts that are often not in the surrogate's native language, and lack of monetary resources, surrogates "are more susceptible to manipulation and accepting a contract that is unfair to them."¹⁷⁰ Without regulations, there is no assurance of a fair contract stipulating a formal payment structure, and therefore nothing to ensure surrogates actually get the money they are owed.¹⁷¹ If surrogates were "not in a position of power" prior to the ART Act, once the entire industry operates out of sight, there is no saying what inequality in bargaining power surrogates may encounter.¹⁷²

Thai surrogates are most often involved in surrogacy arrangements due to economic concerns.¹⁷³ For example, "[m]ost become surrogates to pay for their education, to pay off debts, or to support their families."¹⁷⁴ Some women may also feel pressured into becoming surrogates by their family or husbands who recognize the relatively large payout to be had.¹⁷⁵ Though some Thai women believe that "[t]here's nothing wrong with surrogacy," as it helps other women and provides a valuable source of income to willing surrogate mothers, the lack of meaningful choice surrounding their decisions to

169. *Id.*

170. *Id.* Some countries have made prebirth surrogacy contracts unenforceable as a matter of law on the premise that a mother cannot be sure she is willing to give up a baby she has carried until after it is born. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 *ILSA J. INT'L & COMP L.* 369, 373–74 (2012). These laws stem from the concern

that the surrogate will experience a change of heart and be unable to extricate herself from the contract. Whereas a birth mother in a traditional adoption situation may wait until the birth or after the birth to figure out how she feels about giving up the child, in a contract adoption or surrogacy situation, the birth or gestational mother does not have that luxury.

Molly Walker, *Precommitment in Free-market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 *J. LEGIS.* 329, 334 (2005).

171. Wolf, *supra* note 15, at 482.

172. *Id.* at 487.

173. Fuller, *supra* note 8.

174. Wolf, *supra* note 15, at 487.

175. Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 *U. PA. J. INT'L L.* 1429, 1445 (2009).

become surrogates raises concerns about the surrogates' autonomy.¹⁷⁶ Scholars argue that "surrogacy takes advantage of the women's severe economic vulnerability."¹⁷⁷ Since surrogacy is one of the few ways these women can obtain basic goods, the fact that a woman has chosen surrogacy over unemployment does not mean that she has made the choice freely.¹⁷⁸

Though commercial surrogacy arrangements may reflect women's lack of free choice and autonomy,¹⁷⁹ prohibiting its practice does nothing to ameliorate the problem.¹⁸⁰ Rather, it further limits poor women's options for obtaining wealth.¹⁸¹ Although surrogacy is far from an ideal means of income, "[c]an we tell the women whose options are to crush glass or gestate someone else's fetus that she must crush glass in order to feed her family?"¹⁸² Though women are effectively compelled by poverty to participate in commercial surrogacy, taking away that option by prohibiting it will unfortunately not improve these women's lack of autonomy.¹⁸³

3. Lack of Autonomy and Marginalization of Surrogate Mothers

Finally, a woman's option to use her body to make money raises issues of commodification and loss of personhood, which act to marginalize commercial surrogates.¹⁸⁴ Despite the surro-

176. Fuller, *supra* note 8; Cherry, *supra* note 9, at 277.

177. Cherry, *supra* note 9, at 269.

178. *Id.* at 276.

179. It is not clear that commercial surrogacy arrangements actually negatively compromise a surrogate mother's autonomy. While some have moral objections to commercial surrogacy as "baby-selling," if the payment is for the surrogate's services of bearing the child and not the baby itself, it should be no more problematic than payment for egg and sperm donations. Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2283 (2012). Put simply, "[a] fee alone does not cause a surrogate additional hardship, nor does it negate her free will; otherwise, any high-paying job would be exploitative." *Id.*

180. Cherry, *supra* note 9, at 286.

181. *Id.*

182. *Id.* In other words, "while women driven by economic necessity to sell eggs might not have made such a choice if everything else were equal, they might well prefer selling eggs over taking a job that pays poorly and offers few rewards." Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 240 (2009).

183. *Id.*

184. *Id.* at 280. There is substantial debate surrounding the moral implications of women serving as gestational surrogates. Some "[e]thical scholars

gate's central importance to the commercial surrogacy arrangement and the risks she often takes on in such a role, she is often seen as fungible, merely a "womb for rent."¹⁸⁵ Unfortunately, surrogate mothers may be "treated as a means of production," viewed merely as a vehicle for others' reproductive purposes.¹⁸⁶

This commodification of a woman's childbearing ability diminishes her dignity, as "every human being must be considered as being without a price and unable to be commercialized."¹⁸⁷ Further, "commodification works to diminish the personhood to those who are the owners of those commodities."¹⁸⁸ While prohibition may help prevent this commodification and loss of personhood, it would do so while harming women in other ways.¹⁸⁹ It is important to address "the subordination that made the exchange seem desirable" in the first place.¹⁹⁰ Banning commercial surrogacy will deny freedom of choice to women who were already oppressed.¹⁹¹

International commercial surrogacy prompts concerns for the surrogate mother's health, her lack of bargaining power and autonomy, and the exploitation, commodification, and marginalization that occur when "lack of opportunity drives the surrogate's decision."¹⁹² A Thai ban on commercial surrogacy does not ameliorate any of these problems, and in some situations exacerbates them.

argue that the use of a woman's uterus for profit is inconsistent with human dignity." Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 153 (1997).

185. *Id.* at 271; Ryznar, *supra* note 38, at 1028.

186. Cherry, *supra* note 9, at 271. However, liberal feminist scholars have expressed that when "choice, autonomy, and informed consent" are made the central focus of reproductive arrangements, surrogacy arrangements become unproblematic and may even help ameliorate much of the marginalization nontraditional families face through increased reproductive options. Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 309 (2005).

187. Cherry, *supra* note 9, at 279.

188. *Id.* at 280.

189. *Id.* at 286.

190. *Id.*

191. *Id.*

192. Ryznar, *supra* note 38, at 1031.

C. The Ban's Effect on Children Commissioned by Commercial Surrogacy

Another party directly affected by surrogacy laws is the commissioned child.¹⁹³ Commercial surrogacy arrangements, especially unregulated ones, raise both health issues and problems concerning statehood and commodification, which can affect children from the moment they are born, and throughout their lives.¹⁹⁴ Possible physical health consequences associated with being born by a surrogate include potential negative results of artificial reproductive techniques such as increased risk for multiple pregnancies and cerebral palsy, as well as higher rates of birth defects.¹⁹⁵ In addition, studies have shown that “suspected developmental delay increased four-fold in children born after in vitro fertilization.”¹⁹⁶ While these results are inherent risks surrounding surrogacy in general, health risks increase significantly absent proper medical care in an underground surrogacy industry if, for example, reputable hospitals refuse to administer medical care in surrogacy cases.¹⁹⁷

Commissioned children may experience psychological consequences resulting from the surrogacy arrangement as well, such as confusion about identity and the circumstances of their birth, feelings of loss, and infant separation issues.¹⁹⁸ However, “such issues unavoidably arise in the adoption context” as well, and are not unique to surrogacy arrangements.¹⁹⁹

A major problem that is unique to children commissioned through surrogacy, and exacerbated by a lack of regulation, is statehood issues and legal status of the child.²⁰⁰ Like in Thai-

193. *Id.* at 1032.

194. *Id.* at 1032–33.

195. *Id.* at 1034.

196. *Id.*

197. Fuller, *supra* note 8.

198. Ryznar, *supra* note 38, at 1034.

199. *Id.*

200. Wolf, *supra* note 15, at 462. Some states respond to instances of illegal surrogacy arrangements by denying citizenship to children born through surrogacy in another country. While well-intentioned, “[t]he response does not appear to be well geared to discouraging international surrogacy, nor does it entail any mechanism by which a nation might express more than a mere symbolic concern for the welfare of children and surrogate mothers.” Richard Storrow, “*The Phantom Children of the Republic*”: *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 561, 602 (2012).

land, "Japanese law mandates that the woman who gives birth to a child is his/her legal mother."²⁰¹ Laws like these give children born to foreign surrogates uncertain legal status.²⁰² For example, in addition to the baby Manji case,²⁰³ Japanese television personality Aki Mukai was compelled to adopt her biological twin sons born through a surrogacy arrangement.²⁰⁴ The Supreme Court of Japan ordered that the surrogate be listed as the mother on the birth certificate, despite Mukai being the biological mother.²⁰⁵ After a four-year legal battle, Mukai eventually adopted the twins.²⁰⁶

Custody battles resulting from a break in the commissioning family, such as divorce, further highlight the need for legal clarity on the enforcement of surrogacy contracts.²⁰⁷ Relatedly, it is important to minimize the movement of children between homes, as well as stressful circumstances resulting from families' inability to return home.²⁰⁸ Lack of certainty and arrangements left in limbo have left commissioning parents distressed, running out of money, and living in Thai hotel rooms.²⁰⁹ As one same-sex couple observed, "[t]he babies are getting upset, they are crying constantly," as this is hardly an appropriate environment in which to raise a newborn child.²¹⁰

Finally, with commercial surrogacy comes the risk that commissioned children, much like their surrogate mothers, will become "mere commodities in the market, with their interests neglected."²¹¹ Unless commercial surrogacy is regulated, with specific laws targeted at protecting children, there is nothing in an underground surrogacy business that will protect this especially vulnerable party.²¹²

201. Wolf, *supra* note 15, at 476; Fuller, *supra* note 8.

202. Wolf, *supra* note 15, at 462.

203. *Id.* at 473.

204. *Id.* at 461–62.

205. *Id.*

206. *Id.*

207. Ryznar, *supra* note 38, at 1033.

208. *Id.*; Murdoch, *supra* note 1.

209. Murdoch, *supra* note 1.

210. *Id.*

211. Ryznar, *supra* note 38, at 1035.

212. *Id.* at 1034.

D. The Ban's Effect on Commissioning Parents

The last major party implicated in changing surrogacy laws is the commissioning parents.²¹³ Commissioning parents who had arrangements with surrogates who were pregnant at the time the Draft Law and Art Act were introduced, faced uncertainty and fear that they would not receive their commissioned child, or be able to take the child home.²¹⁴ Many Australians who had commissioned pregnancies underway at the time of the Draft Law's introduction were unable to contact their surrogates "because of raids on clinics, including All IVF, the most popular clinic for Australians, which ha[d] been forced to close."²¹⁵ Exacerbated by the lack of contact with their surrogates, couples worried that that ban would motivate a surrogate to end the surrogacy through abortion, especially if she feared criminal liability.²¹⁶

Beyond worrying about whether they would receive their child in the first place, upon introduction of the ban, commissioning parents faced a myriad of uncertainty about when and how they would return home with their children.²¹⁷ The Australian government called for transitional arrangements so that concerned Australians would not be unduly affected by the

213. *Id.* at 1023.

214. Murdoch, *supra* note 1.

215. *Id.*

216. Gecker, *supra* note 12. Same-sex couple Bud Lake from New Jersey and Manuel Santos from Valencia entered into a surrogacy arrangement with a Thai woman in March 2014, before the new surrogacy laws were enacted. Lindsay Murdoch, *Gay Couple and Thai Surrogate Mother in Custody Tug-of-War*, SYDNEY MORNING HERALD (Aug. 16, 2015), <http://www.smh.com.au/world/gay-couple-and-thai-surrogate-mother-in-custody-tugofwar-20150816-gj00ru.html>. The couple was not anticipating any issues—"[t]here was no problem during the pregnancy and the surrogate signed a consent form that allowed Mr. Lake to take the baby from a hospital in Bangkok and to put his name on her birth certificate." *Id.* However, the surrogate failed to appear at "a subsequent meeting at the US embassy to sign papers that would have allowed the couple to take the baby through Thai immigration." *Id.* She feared criminal liability, since the couple was same-sex and the new laws specifically deny same-sex couples the right to participate in Thai surrogacy arrangements. *Id.* As a result, six-month old baby Carmen's future is uncertain as she and her fathers remain in Bangkok with their jobs in danger, and family divided on the issue. *Id.*

217. Murdoch, *supra* note 1.

new laws.²¹⁸ The Thai government announced that those with preexisting arrangements at the time of the introduction of the Draft Law would not be penalized, but that there would be a new process to exit the country.²¹⁹

Even before the ART Act, when specific surrogacy laws were not enforced, parents were left struggling to overcome the statehood and parentage issues their commissioned children encountered due to the necessity of the surrogate's renunciation of parental rights.²²⁰ Prior to the ban, the process for commissioning parents to gain parental rights over their children took about four months, and since the commissioning parents had to "take physical custody of the child during that time," it was necessary for them to "spend a large amount of time" and resources in Thailand.²²¹ After the Draft Law's introduction, couples with pregnant surrogates were expected to seek a Family Court ruling before taking their newborns out of the country—a process that could take six months.²²² While this regulation provided some clarity for commissioning parents, it is an increase in time that they must remain in Thailand with their newborns, often in conditions that are not ideal.²²³

Remaining in Thailand while seeking permission from Thai family court to return home with their children puts significant stress on couples with newborns. In addition to money and time couples have already expended commissioning the surro-

218. Murdoch & Nicholson, *supra* note 30. A spokesman for Australia's Department of Foreign Affairs stated, "while regulation of surrogacy in Thailand is a matter for Thailand, we continue to encourage Thai authorities to adopt appropriate transitional arrangements for any new measures they may introduce, so concerned Australians are not unduly affected." *Id.*

219. Whiteman, *supra* note 5.

220. Wolf, *supra* note 15, at 486. One such instance occurred in January 2014, when "sixty-five babies born to Israeli couples who had entered into surrogacy arrangements in Thailand were stuck in Thailand because the Israeli government considered the babies to be Thai citizens and surrogates to have full parental rights." *Id.* Subsequently, Israel announced that they would no longer permit couples to enter into surrogacy arrangements in Thailand. *Id.* at 486–87.

221. *Id.* at 487.

222. Whiteman, *supra* note 5.

223. *Id.* Sam Everingham, founder of Surrogacy Australia, said "the confirmation that a court order will be required will at least provide 'some clarity' for parents deeply distressed by the crackdown and who were previously uncertain they would be allowed to take their babies home." Murdoch & Nicholson, *supra* note 30.

gacy and traveling, “[t]he extra costs and delays are an unexpected blow.”²²⁴ Many couples, including an estimated two hundred Australian couples alone, endured an agonizing wait as they were left in limbo and having issues with their babies because they were so distressed.²²⁵ For example, same-sex couple Steve and James²²⁶ were forced to take out additional loans while waiting, and reported that many of the other Australian couples were “in dire financial strife.”²²⁷ Some parents even faced losing their jobs unless they returned to work soon.²²⁸

A complete ban on commercial surrogacy in Thailand will create further issues for commissioning parents. Absent regulated surrogacy arrangements and fertility clinics, strained communication between commissioning parents and surrogate mothers will lead to uncertainty about the status of the unborn child similar to that which surrounded the introduction of the preliminary ban. Further, an underground commercial surrogacy industry will create more statehood and parentage issues for babies born through surrogacy, complicating the commissioning parents’ ability to take their newborn children home.²²⁹

In addition to regulating commercial surrogacy in order to avoid these negative consequences, there are positive attributes to maintaining the legality of commercial surrogacy ar-

224. Whiteman, *supra* note 5.

225. Murdoch, *supra* note 1.

226. *Id.*

227. *Id.*

228. Steve reported, “Their credit cards are maxed out. They have refinanced their homes. They have taken out personal loans.” *Id.*

229. Erica Davis, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT’L L. 120, 133–34 (2012). These further complications will arise because “[w]hen surrogacy is performed on the black market, the parties have no legal recourse in the event of disputes. In these situations, illegal surrogacy thus poses risks not only for the intended couple and the surrogate, but also for the children born through surrogacy.” *Id.* Argentina first sought to legalize commercial surrogacy in 2013, recognizing that even if legalization was not ideal, regulation was preferable when it would occur out of sight anyway. Marisa Herrera, who helped reform Argentina’s civil code, stated, “[i]t is frequently used a lot abroad, and we cannot ignore it. It is better to have a law to regulate and control it, protecting the child above all, but also the surrogate mother and the intended parents who want to have their biological child this way.” Marcela Valente, *Argentina to Legalise Surrogate Motherhood*, INTER PRESS SERV. NEWS AGENCY (Mar. 8, 2013), <http://www.ipsnews.net/2013/03/argentina-to-legalise-surrogate-motherhood>.

rangements. Not only does it provide a valuable source of income to Thai women who may be subject to worse fates without the option of becoming a surrogate,²³⁰ but it provides same-sex, infertile, and other couples the ability to have a family that they likely would otherwise be denied.²³¹

III. EXEMPLARY APPROACHES TO COMMERCIAL SURROGACY

In creating regulatory laws and procedures, the Thai government should look to both Israel's regulatory approach to commercial surrogacy²³² and the ABA Model Act,²³³ and adapt relevant portions and considerations as they apply to Thailand's unique, demonstrated needs. This Part will explore both the Israeli approach and the ABA Model Act's provisions.

A. *Israel's Approach to Commercial Surrogacy*

Israeli surrogacy law is both well organized and specifically tailored to the Israeli people, as it "incorporates a hybrid legal system which relies on both civil and religious law."²³⁴ This robust system is a fitting model for Thailand because it aims to protect against many issues that Thailand has already faced

230. In the long-term, monetary benefits to the surrogate may be fleeting, especially if the woman's situation necessitates spending the money right away rather than saving. However, it is nonetheless a monetary benefit that goes to directly to the surrogate, and other parties such as commissioning parents and surrogacy agencies still benefit in the long-term. Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate*, 48 VAND. J. TRANSNAT'L L. 1, 37–38 (2015).

231. Fuller, *supra* note 8; Cherry, *supra* note 9, at 286. Commercial surrogacy arrangements also often give the commissioning parents a less expensive option than those presented in their home countries, as well as the ability to avoid legal constraints. It provides surrogates with high income compared to the relatively limited opportunities often available. Some group surrogacy homes even provide surrogate mothers with education, and it is interesting to note that it is one of the few occupations in which women need not compete with men for jobs. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 439–40 (2012). Some say that through their ability to bear children and get paid for it, surrogates also experience an increased sense of self-worth and control while increasing respect for the childbearing process. Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 FORDHAM INT'L L.J. 665, 677 (2012).

232. *Israeli Regulation of Surrogacy Birth*, *supra* note 33, at 36.

233. MODEL ART ACT, *supra* note 34.

234. Lee, *supra* note 40, at 295, 296.

and would continue to grapple with given a complete ban, such as the exploitation of gestational surrogates and commissioning parents.²³⁵ A central feature of the Israeli regulation scheme is the “Approvals Committee,” which is in charge of judicial review and the approval of surrogacy contracts.”²³⁶ The Approvals Committee²³⁷ “reviews issues implicated in the surrogacy contract, including fairness to both parties.”²³⁸ It provides guidance in order to ensure that surrogacy contracts are fair, surrogates are not taken advantage of, and commissioning parents are not exploited.²³⁹ Unlike in India or the United States, in which the protection of the parties is left to the “voluntary self-regulation of the community,” Israeli surrogacy parties receive guidance from the Approvals Committee, which has proved successful since its implementation.²⁴⁰

One of the reasons Israel’s approach to surrogacy law has been so successful is that it is rooted in “cultural practice, religious tradition, and civic life, while respecting individual autonomy.”²⁴¹ The Jewish understanding of marriage includes the great importance of building a family, and the legalization of commercial surrogacy provides an avenue for Israelis to do so despite personal limitations such as infertility.²⁴² While this importance of family-building stems from the Jewish religion, it also comports with Israeli cultural views.²⁴³ Israel is considered a “pro-natalist society,” which means “its people are will-

235. *Id.* at 297.

236. Cara Luckey, *Is Regulation Necessary to Manage the Industry?*, 26 WIS. J.L. GENDER & SOC’Y 213, 228 (2011).

237. Lee, *supra* note 41, at 296. In 1992, Israel formed the Aloni Commission in order to assess complex issues arising out of advancements in reproductive technology. *Id.* In efforts to maintain a balance between competing state interests in regulating human reproduction and respect for personal autonomy and privacy of the individual, the Aloni Commission formed the “Approvals Committee.” *Id.* The implementation of Israeli surrogacy law rests primarily with the Approvals Committee, “which is responsible for judicial review and formal approval of surrogacy contracts, ensuring all parties’ interests are protected in a balanced way, and protecting the integrity of Israel’s public policy regarding commercial surrogacy.” *Id.*

238. *Id.* at 297.

239. *Id.* at 297–98.

240. *Id.*

241. *Id.* at 293.

242. *Id.* at 294.

243. *Id.*

ing to try any means to have children.”²⁴⁴ Because of the religious, cultural, and civic importance of having children, Israel realized a need for the legalization and regulation of commercial surrogacy starting in 1992.²⁴⁵

While having children is the much-desired end goal of commercial surrogacy arrangements, the Jewish tradition condones this practice under the condition that no one else is harmed in the process.²⁴⁶ To that end, Israel “has safeguards set up to prevent potential surrogate mothers from being exploited. These safeguards consist of physical and psychological suitability assessments and the requirement of informed and voluntary consent, among other requirements. This extensive scheme is sufficient to prevent the industry from being self-regulated by the community.”²⁴⁷ Given the characteristics of Israel’s approach, which incorporates the existing civic and religious culture of society, direct oversight through the Approvals Committee, and respect for individual autonomy, such a system is an ideal model to base Thai’s surrogacy laws on because it not only addresses the safety of all parties involved, but incorporates religious and societal considerations to ensure compliance.

B. The American Bar Association Model Act Governing Assisted Reproductive Technology

The American Bar Association adopted the ABA Model Act in 2008, though its formation and completion took twenty years.²⁴⁸ Though there has not been widespread legislative acceptance of the ABA Model Act, American states have the ability to adopt it in part or in whole. The purpose of the ABA Model Act is “to give assisted reproductive technology (ART) patients, participants, parents, providers, and the resulting children and their siblings clear legal rights, obligations, and protections.”²⁴⁹ It is composed of a set of laws and standards

244. *Id.*

245. *Id.* at 293.

246. *Id.* at 294.

247. *Id.* at 293.

248. Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA JOURNAL (Mar. 1, 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

249. MODEL ART ACT, *supra* note 34.

designed to provide a flexible framework by which issues such as parentage, informed consent, mental health consultation, privacy and insurance can be approached and resolved. The model act proposes two alternative ways of handling surrogacy arrangements: One would require a judge's pre-approval of any surrogacy agreement in which neither of the intended parents has a genetic link to the resulting child ("Alternative A"); the other, an administrative model, would require no judicial involvement as long as at least one of the intended parents has a genetic link to the resulting child and all of the parties submit to eligibility and procedural requirements—including a mental health evaluation, a legal consultation and health insurance coverage ("Alternative B").²⁵⁰

This flexible framework is an ideal model to serve as a starting point for Thai surrogacy law, as it provides a structure for regulation that previously did not exist, while still allowing Thailand to tailor its laws toward its own culture and values.

In both Alternative A and B, the ABA Model Act places substantial importance on informed consent, and that informed consent must be outlined in a document including plain language, party signatures, an agreement clarifying parental rights, time limits, and an ability to receive a copy of the record.²⁵¹ Among other requirements, the informed consent provisions must outline the parties' right to withdraw consent prior to embryo implantation, include a description of the risks, and detail any "policy of the provider regarding the number of embryos transferred."²⁵² The ABA Model Act also imposes a requirement that all participants in the surrogacy arrangement undergo a mental health consultation and are offered additional counseling.²⁵³ Finally, whether Alternative A or B is being pursued, embryo donors must be screened in "compliance with applicable state and federal law."²⁵⁴

Finally, the ABA Model Act specifically outlines who is entitled to enter into surrogacy arrangements. For example, under Alternative B of the Model Act, the intended parents have to contribute at least one gamete, have to have a medical need for

250. *Id.*

251. *Id.* art. 2, § 201–02 (discussing informed consent).

252. *Id.*

253. *Id.* art. 3, § 301–02.

254. *Id.* art. 5, § 503 (describing embryo transfer and disposition of embryos not transferred).

a gestational carrier arrangement as documented by a qualified physician, undergo mental health evaluations, and undergo some form of legal consultation with independent legal counsel before being eligible for a gestational surrogacy arrangement.²⁵⁵ There are restrictions regarding who may become a surrogate as well. Under Alternative B's eligibility requirements, a gestational carrier must complete both a medical evaluation and a mental health evaluation to be eligible to be a surrogate mother.²⁵⁶

IV. PROPOSED REGULATIONS FOR COMMERCIAL SURROGACY IN THAILAND

Rather than banning commercial surrogacy altogether and driving the practice underground, Thailand should implement laws and procedures regulating commercial surrogacy so that arrangements may proceed with protections in place for all parties. Since Thailand's commercial surrogacy industry has never had meaningful regulation, the key is to strike a balance between enough oversight to protect parties while maintaining a relative ease of compliance so that parties will retain autonomy and not feel compelled to circumvent existing laws. This Part will propose solutions for the regulation of commercial surrogacy in Thailand including a regulated private market, specific surrogacy legislation addressing the parties' rights, a supervisory entity for compliance and enforcement, and standards of review for approval.

A. A Regulated Private Market

One logical way to structure surrogacy regulations in Thailand is to continue the former practice of a somewhat private market for surrogacy arrangements, which is run through fertility clinics and surrogacy agencies, as seen in some states in the United States.²⁵⁷ Many surrogacy agencies already exist and have wide customer bases in Thailand, but have been forced to shut down as a result of the ART Act.²⁵⁸ This market,

255. *Id.* at Alternative B, § 702 (discussing criteria for eligibility).

256. *Id.*

257. *U.S. Surrogacy Law by State*, SURROGACY EXPERIENCE, <http://www.thesurrogacyexperience.com/surrogate-mothers/the-law/u-s-surrogacy-law-by-state/> (last visited Jan. 24, 2015).

258. Murdoch, *supra* note 1.

however, must be regulated through both laws, as seen in the United States,²⁵⁹ and some form of additional oversight, such as screening and approval processes similar to those in Israeli law and the ABA Model Act.²⁶⁰

B. Specific Surrogacy Legislation Addressing the Parties' Rights

Thailand is in need of basic laws to form a reference point for commercial surrogacy arrangements in order to provide certainty to both commissioning parents and surrogates, and to streamline the statehood and immigration process for commissioned children and their families. In addition to the existing chapters in the Thai Civil and Commercial Code, Thai parliament should amend the laws to include a separate chapter concerning surrogacy, as they do with adoption,²⁶¹ and account for surrogacy arrangements in other affected areas of the law, such as parentage and guardianship provisions.

In particular, Thai lawmakers must address parentage rights. They should reconsider whether the birth mother should automatically be considered the legal mother for purposes of gestational surrogacy arrangements, despite the child having no genetic relation to the surrogate, or whether the individual providing gametes or consenting to the assisted reproduction receives parental rights, as in the ABA Model Act.²⁶²

259. *U.S. Surrogacy Law by State*, *supra* note 259. In the United States, surrogacy law is governed primarily by state law and varies drastically from state to state. Some states are surrogacy-friendly, some outright ban surrogacy, some allow gestational surrogacy but not traditional surrogacy, and many have no laws concerning surrogacy at all. Legal issues turn on whether the court generally favors the practice. *Id.* Similar to international commercial surrogacy, within the United States, "some commercial surrogacy agencies use the Internet systematically to attract parents to their home state specifically to avoid states with unfavorable legislation." Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED. & ETHICS 300, 301 (2007).

260. It is true that "the United States and Israel are widely regarded as possessing two of the most ART-friendly environments in the world." Ellen Waldman, *Cultural Priorities Revealed: The Development And Regulation Of Assisted Reproduction In The United States And Israel*, 16 HEALTH MATRIX 65, 68 (2006). While Thailand is not known to be as ART-friendly, especially given the recent ban, the fact that there is already a large industry for commercial surrogacy is reason to look to other systems with widespread demand for ART as an example.

261. *The Thailand Civil and Commercial Code*, *supra* note 84.

262. MODEL ART ACT, *supra* note 34, art. 6, §§603, 701.

Similarly to Alternative B of the ABA Model Act, Thai lawmakers should also decide who is entitled to enter into surrogacy arrangements,²⁶³ making it accessible to anyone, including same-sex couples and singles, limiting it to married couples or those unable to have their own children, or any other conditions or limitations that comport with Thai cultural, religious, and societal beliefs.²⁶⁴ By tailoring surrogacy laws to the Thai population's unique cultural practice, religious beliefs, and civic values, as does Israel,²⁶⁵ lawmakers will afford legitimacy to the law that will produce greater compliance than a blanket ban that fails to consider societal or individual needs.

In efforts to provide clarity on possible statehood issues for commissioned children of international surrogacy arrangements and to streamline the immigration process, Thai law should articulate proper procedures parties should follow in pursuing an international surrogacy arrangement. Given the historical popularity of international surrogacy arrangements using Thai surrogates, these laws would provide peace of mind to international commissioning parents, prevent backlog in Thai family court, and eliminate the distress-inducing limbo so many couples faced upon the promulgation of the Draft Law.²⁶⁶ There are many other surrogacy issues that Thai law should attempt to address, such as restrictions on how surrogates are recruited. However, the provisions mentioned would serve to assuage many of the major problems Thailand will continue to face under the ART Act.

C. A Supervisory Entity for Compliance and Enforcement

Given how rarely the Thai Medical Council's regulations for surrogacy and In Vitro Fertilization clinics were enforced prior to the ART Act,²⁶⁷ it is clear that in addition to having regulatory laws in place, Thailand needs a supervisory entity to ensure compliance and prevent abuses. A regulatory system close to Israel's Approvals Committee²⁶⁸ would be beneficial to Thailand, as evidenced by the demonstrated failure of a self-

263. MODEL ART ACT, *supra* note 34.

264. *Id.*

265. Lee, *supra* note 41, at 293.

266. Murdoch, *supra* note 1.

267. Gecker, *supra* note 12.

268. *Israeli Regulation of Surrogacy Birth*, *supra* note 33, at 37.

regulatory system to protect the parties to a surrogacy arrangement. In order to ensure fairness and compliance with the law, Thailand should both develop model forms for surrogacy arrangements, as the ABA Model Act strives to,²⁶⁹ and create an oversight body similar to the Approvals Committee that is responsible for ensuring that clinics comply with certain minimum standards.

In implementing an oversight body for surrogacy arrangements, Thailand should either expand the functionality of its existing Medical Council to include approval of all private commercial surrogacy arrangements, or create a separate governmental body to do so.²⁷⁰ The Medical Council should then adopt certain Israeli laws as well as ABA Model Act provisions to form minimum standards of review before approving or denying surrogacy contracts.

Specifically, Thailand should employ a robust informed consent requirement much like that of ABA Model Act Article 2.²⁷¹ As conditions of approval, Thailand should also adopt the Israeli law requiring “medical and psychological evaluation regarding the suitability of each one of the parties to engage in surrogacy,” professional consultations, and assurance that “the agreement does not pose a threat to the health of the surrogate mother or the expected child” as conditions of approval.²⁷² It would be difficult for Thailand to adopt the strict standards that Israel employs, since the costs of the screening process are covered by Israel’s public healthcare system,²⁷³ but it is feasible to mandate that surrogacy clinics at least follow minimum

269. MODEL ART ACT, *supra* note 34.

270. The Thai military government is unlikely to adopt these measures due to the costs and associated procedural considerations involved. However, enforcing a complete ban on commercial surrogacy is not without costs. The government must expend resources to investigate hospitals and fertility clinics, as well as provide law enforcement personnel to enforce the ban. Additionally, government resources would be spent on prosecuting violators of the law. Expansion of the Thai Medical Council’s responsibilities is likely a more cost-effective and less cumbersome avenue to regulate commercial surrogacy than creating a new government entity.

271. MODEL ART ACT, *supra* note 34, art. 2 (discussing informed consent).

272. *Israeli Regulation of Surrogacy Birth*, *supra* note 33, at 38.

273. Lee, *supra* note 41, at 297.

fairness requirements in addressing fundamental concerns inherent in any surrogacy agreement.²⁷⁴

D. Proposed Standards of Review for Approval of Surrogacy Agreements

Some proposed standards include screenings for both the surrogate and the commissioning parents as set forth in Israeli law²⁷⁵ and Section 702 of ABA Model Act Alternative B,²⁷⁶ approval of the contract in terms of fairness and the best interests of the resulting children as set forth in Section 703 of ABA Model Act Alternative B,²⁷⁷ and the supply of or at least information about how to access legal, social, and mental health services, as outlined in Israeli law²⁷⁸ and Article 3 of the ABA Model Act.²⁷⁹

First, a medical screening of the surrogate will ensure that she is safely able to withstand the physical demands of bearing a child. Second, similarly to Alternative B of the ABA Model Act, the surrogate should undergo a mental health evaluation to confirm that the unique emotional circumstances of carrying another person's child will not have a detrimental effect on her, and that she is of sound mind to make decisions throughout the pregnancy.²⁸⁰ Preferably, these evaluations should be done by a third-party unrelated to the surrogacy agency, to prevent economic interests from leading to surrogate approval. Third, though social workers may not be available to accompany the parties throughout the process as they are in Israel,²⁸¹ both surrogates and commissioning parents should be advised as to how to obtain such services if they so desire, as the provisions

274. Some of these fundamental concerns include unequal bargaining power among parties, what should happen if any party has a change of heart, and a course of action in a case of changed circumstances. *See generally* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014).

275. *Israeli Regulation of Surrogacy Birth*, *supra* note 33, at 38.

276. MODEL ART ACT, *supra* note 34, at Alternative B, § 702 (describing the criteria for eligibility).

277. *Id.* at Alternative B, § 703 (setting forth the requirements for a Gestational Agreement).

278. Lee, *supra* note 41, at 297.

279. MODEL ART ACT, *supra* note 34, art. 3 (discussing mental health consultation and additional counseling).

280. MODEL ART ACT, *supra* note 34, at Alternative B, § 702.

281. Lee, *supra* note 41, at 297.

of ABA Model Act Section 301 similarly provide.²⁸² These protections will prevent economically disadvantaged women from entering into surrogacy contracts despite a probability of harming their health.

The commissioning parents should also undergo a screening process in order to ensure their suitability as parents. There should be an application process with requirements that are similar to either Thailand's procedure for adoption,²⁸³ or in the case of commissioning parents abroad, their home country's adoption procedures. For example, though likely different than their own adoption procedures, the Thai government could allow an Australian couple to enter into a Thai surrogacy arrangement upon presentation of proof that the couple has undergone the required application procedure in their own country. This type of cooperation among countries was similarly requested by the Israeli Public Committee on Fertility.²⁸⁴

As part of the screening process, the surrogacy clinic should not proceed with embryo implantation until an unbiased parental fitness report is provided, whether from a Thai or foreign authority. Commissioning parents should also undergo a criminal background check, which is demonstrably critical following the Baby Gammy case and other scandals. These requirements will provide assurance that the commissioning parents are fit to raise children and are not commissioning children for illegal or harmful reasons.

Finally, the Thai Medical Council or alternative governmental body should review the contract between the parties. Though negotiation for compensation may be devolved to the parties, as seen in Israel, review of the contract for fairness will "make it difficult to financially exploit gestational surrogates."²⁸⁵ Allowing the parties to engage in negotiation affords individuals personal autonomy, yet with contract review there is still a backstop to ensure a minimal level of fairness. The

282. MODEL ART ACT, *supra* note 34, art. 3.

283. Thai adoption procedure requires that adoptive parents must be at least twenty-five-years old, that a married person who seeks to adopt must obtain his or her spouse's consent, among many other requirements. Additionally, the person able to give consent to the adoptive parents regarding whether the child may be adopted must do so. *The Thailand Civil and Commercial Code*, *supra* note 84, ch. IV.

284. *Israeli Regulation of Surrogacy Birth*, *supra* note 33, at 40.

285. Lee, *supra* note 41, at 297–98.

Medical Council should ensure that the parties have laid out guidelines for compensation, that parties have or are aware that they may consult a lawyer, and that there is voluntary and informed consent. Assuring informed consent includes confirming that each party understands the contract and has received a copy in a language that they understand. This contract approval will guard against much of the unequal bargaining power of Thai surrogates prior to regulation, as well as protect commissioning parents from vulnerability. In sum, these minimum laws and regulations will provide all parties with clarity and protection, while maintaining a workable avenue for international commercial surrogacy arrangements.

CONCLUSION

The potential for Thai surrogates to be exploited, international commissioning parents to become stuck in limbo, and for scandals involving Thai surrogacy to be uncovered demands a resolution that will not further deficiencies already present in Thai surrogacy arrangements. These circumstances illuminate the dark side of the Thai surrogacy industry, ushering in a "wombs for rent" view from the international community, and a call for change.²⁸⁶ Commercial surrogacy comes with a unique and lengthy set of ethical, medical, and legal concerns. The lack of meaningful regulation in Thailand has led to horrific outcomes, such as the abandonment of a disabled child, a possible child-trafficking operation, and the commissioning of a surrogate child by a convicted pedophile.²⁸⁷ Despite the growing need for change, careful evaluation is necessary before banning commercial surrogacy in Thailand altogether. With the clear demand for Thai surrogates, and risk that the ART Act will drive the surrogacy industry underground, the Thai government must reconsider its ban on all commercial surrogacy arrangements.

Despite the risks involved, commercial surrogacy offers Thai surrogates a valuable source of income while also providing couples with an affordable way to have genetically related children that they otherwise would not be able to have. However, neither a lack of regulation in Thailand nor a complete ban on commercial surrogacy strikes an adequate balance between the

286. Cherry, *supra* note 9, at 271.

287. Gecker, *supra* note 12.

reality of market demand and protections for the involved parties. Both the ABA Model Act and current Israeli surrogacy regulations provide workable models from which Thailand can solve commercial surrogacy problems through regulation, rather than eradication.

The ABA Model Act provides an example of law that the Thai Parliament can adopt and modify to fit its own unique cultural and societal needs. Laws governing parentage, immigration, and eligibility will streamline the surrogacy process, eliminating uncertainty and delays that harm both commissioning parents and their newborn children. The Israeli surrogacy system highlights ethical concerns inherent in surrogacy arrangements, and provides screening mechanisms to ensure oversight and protection that is not overly burdensome. Combined and adapted to fit Thailand's needs, these two precedents, rather than a complete ban, will better ensure the protection, autonomy, and satisfaction of every party involved in a commercial surrogacy arrangement.

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