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ORIGINAL ARTICLE

Labour is labour: what surrogates can learn from the Sex Work Is Work movement

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Abstract

Though it is widely accepted that United Kingdom (UK) surrogacy laws are in need of reform, *how* they should be reformed remains a matter of considerable disagreement. This article explores a new regulatory suggestion: labour law. Building on the extensive sociological and anthropological literature that has conceptualized contract pregnancy as a form of work, it considers whether and how this might translate into a new regulatory framework, drawing on the Sex Work Is Work movement for inspiration. Though recognizing that this would require substantial changes to some of the present features of UK surrogacy law, it shows that there may be significant potential in this pre-existing set of protections, improving the position of surrogates without dramatically changing the culture of the practice.

1 | INTRODUCTION

Surrogacy is a process whereby a biological female agrees to carry a child for another person or couple, with the intention of relinquishing responsibility to them after birth. Though they are highly contested and entirely prohibited in most European Union (EU) member states, the United Kingdom (UK) has allowed (though not enforced) these arrangements on an altruistic-only basis since 1985.[1] Yet though on the face of it this may appear comparatively progressive, a growing number of voices are calling for reform of these now dated surrogacy laws, which are widely

[1] Surrogacy Arrangements Act 1985.

considered unfit for purpose.[2] A joint Law Commissions project considering potential reforms is already underway.[3]

Compared to many other areas of law reform, perhaps one of the most striking features of this project is the extent of its engagement with literature from other disciplines. Yet despite the extensive writings produced by non-legal scholars conceptualizing surrogacy as a form of work – including, but not limited to, sociologists, anthropologists, and gender study specialists – the idea that these arrangements might be regulated through labour law has not been given much attention. The goal of this article is to begin to bridge this interdisciplinary gap, using the Sex Work Is Work movement as inspiration for how this academic conversation might transmute into a novel regulatory model.

It is important to clarify at the outset of this article that its goal is descriptive-analytical, not normative. As is discussed further below, this approach demands recognition of a commercial market in surrogacy – a highly contested proposition. Though the article does question some assumptions about what introducing a commercial model would mean for domestic surrogacy, it recognizes that regulators may ultimately deem such a model inappropriate. The same is also true of making these arrangements (at least partially) enforceable. Primarily for these reasons, it is not argued that a labour law model necessarily *should* be adopted to manage this industry. Given the ongoing discussion as to how to approach surrogacy reform, however, as well as changing attitudes towards the practice, it is suggested that there is merit in at least considering whether this model *could* work. At the very least, it offers a new regulatory possibility to those exploring reform if they were to be open to adopting a commercial model, as well as closing the gap in the socio-legal literature.

2 | RECOGNIZING REPRODUCTIVE LABOUR AS WORK

Though the benefits of regulating surrogacy through labour law may remain under-theorized, the idea that contract pregnancy should be conceptualized as work is far from new. On the contrary, exploring the non-legal literature illustrates the extent to which there is a disconnect between how this industry has been discussed in other fields and the non-consideration of surrogacy by labour lawyers.

In a capitalist market, *productive labour* refers to that which results in goods or services that have monetary value, for which producers receive a wage. By contrast, *reproductive labour* refers to the tasks that are undertaken in the private or domestic sphere, such as cooking, cleaning, and childrearing. Though labour law understands 'work' to mean the former, the idea that the latter should also be recognized as such is one of longstanding feminist pedigree. Federici and James, for instance, established the International Wages for Housework Campaign in 1972.[4] The literature produced by this movement emphasized that the spheres of work and family are not distinct but rather a continuum.[5] Whether cooking and cleaning or conceiving and gestating, reproductive labour can be just as physically and emotionally demanding as many forms of 'traditional'

[2] K. Horsey and S. Sheldon, 'Still Hazy after All These Years: The Law Regulating Surrogacy' (2012) 20 *Medical Law Rev.* 67; A. Alghrani and D. Griffiths, *The Regulation of Surrogacy in the United Kingdom: The Case for Reform* (2017).

[3] Law Commission, 'Surrogacy' *Law Commission*, at <https://www.lawcom.gov.uk/project/surrogacy/>.

[4] S. Federici, *Wages against Housework* (1975).

[5] K. Weeks, 'Down with Love: Feminist Critique and the New Ideologies of Work' (2017) 45 *Women's Studies Q.* 37, at 39.

employment, if not more so. Domestic work is not easy or idyllic, and should not be romanticized as such.

The economic arguments in favour of this have also been explored, notably by Waring, author of the 1988 book *If Women Counted*.[6] She demonstrated that without reproductive labour, productivity would not be possible. The capitalist system is dependent on reproduction to ensure the generational replacement of workers, further sustaining the argument that this too is work that merits recognition. Drawing on these ideas, most recently Lewis has described surrogacy specifically as 'womb work'.[7]

In addition to such theoretical contributions, there are also a small but growing number of sociologists and anthropologists who have adopted this lens through which to conceptualize commercial surrogacy in their ethnographic research. Rudrappa, for instance, has mapped the conversion of gestation into wage labour, and how labour markets shape reproductive decision making.[8] Pande has framed surrogacy as a form of embodied, gendered, and stigmatized labour with the potential to provide these women with agency, and has advocated for visibilizing this work on the continuum of reproductive labour.[9] In the United States (US) context, Jacobson has further analysed both how surrogacy can be framed as work and stakeholder attitudes towards this.[10]

This literature challenges the idea that commercial surrogacy is easy money – again emphasizing that gestational labour is in fact work. Jacobson, for instance, has noted how physically challenging surrogacy can be.[11] Particularly when in vitro fertilization (IVF) is used, the physical toll on surrogates can be significant, involving hormonal regulation, supplemental injections, and steroids. The potential side effects of these treatments vary from fatigue to stomach upsets,[12] and IVF inevitably involves regular trips to medical practitioners. Even when a surrogate's own egg is used – thus avoiding the same level of medicalization – there are nonetheless challenges in juggling lifestyle, obligations, and natural physical consequences such as weight gain. This all comes before the birth, which is known as 'labour' for a reason.

Another particularly fertile subject of academic discussion has been the *emotional labour* that surrogates must undertake to successfully complete these arrangements. As well as maintaining the relationship with the intended parents, they must also manage their feelings towards the child to ensure that they can relinquish responsibility at the end. Various strategies have been recorded in this regard. Teman has noted, for instance, the way in which surrogates draw on the use of medical technology to compartmentalize their womb, refusing to see the 'artificial' as part of themselves.[13] They also often reflect on the differences between their surrogate pregnancies as compared with when they were pregnant with their own children: reduced weight gain, for instance, or lack of morning sickness.[14] Pande has found similar cases of emotional labour in

[6] M. Waring, *If Women Counted: A New Feminist Economics* (1988).

[7] S. Lewis, *Full Surrogacy Now: Feminism against Family* (2019).

[8] S. Rudrappa, *Discounted Life: The Price of Global Surrogacy in India* (2015).

[9] A. Pande, *Wombs in Labor: Transnational Commercial Surrogacy in India* (2014).

[10] H. Jacobson, *Labor of Love: Gestational Surrogacy and the Work of Making Babies* (2016).

[11] Id., ch. 3.

[12] American Surrogacy, 'List of Medications Involved in Surrogacy' *American Surrogacy*, at <https://surrogate.com/surrogates/pregnancy-and-health/list-of-medications-involved-in-surrogacy/>.

[13] E. Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (2010) 40.

[14] Id., p. 42.

India.[15] Whatever the reason that surrogates have engaged in this process, they require mental resilience to follow it through unscathed, let alone with any sort of satisfaction from the process. This demands active mental engagement, again making it unsurprising that this process has so often been discussed through the frame of work.

Evidently, then, the idea that surrogacy could be considered a form of labour is not new outside the field of law. The groundwork has been convincingly laid by academics to show both that reproductive labour generally, and surrogacy specifically, can be legitimately considered a form of work. What is traded in commercial surrogacy is not an end product, or even a body part, as in transactions for gametes, blood, or organs; rather, it is labour power, a commodity that is often offered in exchange for a wage. The question, however, is whether this might inspire a new taxonomical approach to regulation.

3 | FINDING PRECEDENT: THE SEX WORK IS WORK MOVEMENT

When asking this question, one parallel immediately springs to mind. The core premise of the Sex Work Is Work movement is similarly that the provision of sexual services is a form of work.[16] Employment law is therefore explored as a means of mitigating risks, including financial exploitation, physical harm, and exclusion from social security.[17] Strippers in the UK, for instance, have begun to unionize, bringing legal challenges to secure the rights that they were previously denied.[18] In doing so, they seek the rights that would be afforded to any other worker, including the right to a fair wage and health and safety protections. Rather than preventing exploitation through prohibition, this approach seeks to empower these women, thereby improving the conditions to which they are subject.

Given the idea that surrogacy might be considered a form of work, the arguments of the Sex Work Is Work movement are striking. Yet though it is admittedly not unusual to find literature that refers to both surrogacy and sex work,[19] this is rarely in the context of regulatory discussions or with reference to the Sex Work Is Work movement. As a result, these regulatory parallels have been overlooked; this is the gap that this article seeks to close. To jump from 'surrogacy has been examined as a form of work' to 'surrogacy could be regulated through labour law', however, is to overlook three significant preliminary issues: the need for a commercial market, the importance of enforceability, and the prospective employment status of surrogates. These must each be explored in turn, therefore, before we can ask what the regulatory merits of this model might be.

4 | INTRODUCING A COMMERCIAL MARKET TO UK SURROGACY

As noted above, the very idea of a labour law model presupposes the existence of a market. With the sale of sex between two consenting adults (as well as other forms of sex work) legal in the UK,

[15] Pande, op. cit., n. 9, pp. 157–158.

[16] E. Van der Meulen, 'When Sex Is Work: Organizing for Labour Rights and Protections' (2012) 69 *Labour/Le Travail* 147.

[17] G. Gall, *Sex Worker Unionization* (2016).

[18] J. Hall, 'Sex Work Is Officially Work – and Its Laborers Are Officially Unionizing' *Vice*, 17 April 2019, at <https://www.vice.com/en/article/ywygzv/sex-worker-union-rights-movement-uk>.

[19] A. van Niekerk and L. van Zyl, 'The Ethics of Surrogacy: Women's Reproductive Labour' (1995) 21 *J. of Medical Ethics* 345, at 345; T. Patrone, 'Is Paid Surrogacy a Form of Reproductive Prostitution? A Kantian Perspective' (2018) 27 *Cambridge Q. of Healthcare Ethics* 109; K. Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* (2013).

this precondition has not posed major problems for the Sex Work Is Work movement. Similarly, all of the ethnographic work that has explored surrogacy through the lens of work has done so in jurisdictions that (at least at the time of the studies) had adopted a marketized model of surrogacy. This is not, however, presently true of the UK – the first and perhaps most obvious hurdle to a labour law approach to these arrangements. Unless regulators prove willing to accept a surrogacy market, this approach would necessarily fail.

At present, the UK allows surrogacy on an altruistic basis, where gestational carriers are entitled to reasonable expenses only.[20] Deciding whether to continue with this non-marketized approach is, according to the Law Commissions consultation paper, the 'central issue' of any possible reform.[21] There can be no doubt that the present model continues to attract support. The All-Party Parliamentary Group on Surrogacy, for instance, has already concluded that it should be maintained.[22] It has been argued that to commodify gestational labour is to violate what Zelizer has described as the 'hostile worlds' theory – the perception that market values should not interact with that which is intimate and sacred[23] – by (among other things) corrupting the shared value of human life,[24] reducing women to 'baby factories',[25] and contravening the international prohibition on the sale of children.[26] With this in mind, resistance to a commercial approach would seem inevitable.

Yet, equally, the altruistic-only model is far from uncontested – perhaps now more so than ever. With the issue attracting the attention of scholars from across a wide range of disciplines, perhaps the greatest challenge for regulators is that for every article advocating in its favour, there is another criticizing it. Often influenced by the social reproduction theory already referenced, myriad scholars have questioned this exceptionalization of gestational labour,[27] pointing out the gender inequality in expectations of altruism.[28]

Similar disagreement is visible in the discussions on how to manage the more practical concerns raised by the prospect of a commercialized surrogacy industry. A further fear is that only the desperate would undertake contract pregnancy for money – desperate, and therefore more vulnerable to the imposition of unfavourable terms or conditions.[29] Perhaps most obviously, this can be criticized as unduly paternalistic. Particularly in the West, there is no evidence that surrogates are destitute, and they frequently offer compelling alternative motivations for engaging in

[20] Human Fertilisation and Embryology Act 2008, s. 54(8).

[21] Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law – A Joint Consultation Paper* (2019) 336, at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/Surrogacy-consultation-paper.pdf>.

[22] All-Party Parliamentary Group on Surrogacy, *Report on Understandings of the Law and Practice of Surrogacy* (2020) 5, at <https://www.andrewpercy.org/storage/app/media/appgs/Surrogacy%20APPG%204.pdf>.

[23] V. Zelizer, *The Purchase of Intimacy* (2005).

[24] M. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012).

[25] E. Anderson, 'Is Women's Labour a Commodity?' (1992) 19 *Philosophy and Public Affairs* 71.

[26] J. Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63 *International & Comparative Law Q*. 317.

[27] B. Parry, 'Surrogate Labour: Exceptional for Whom?' (2018) 47 *Economy and Society* 214.

[28] R. Almeling, 'Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation' (2009) 72 *Law and Contemporary Problems* 37.

[29] A. Allen, 'Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human' (2018) 41 *Harvard J. of Law and Public Policy* 753, at 784.

this process.[30] Even beyond this empirical reality, however, the assumption that it is therefore necessarily less exploitative not to pay them at all is questionable – as is the assumption that altruism does not carry with it risks and problems of its own.[31] There are thus a growing number of academics – including, but not limited to, those writing in the UK – who suggest that the best means of addressing the risks involved in surrogacy may be proper regulation, not restriction through either prohibition or an altruistic-only model.[32]

The concern that this approach would violate the universal prohibition on baby selling also no longer seems self-evident. Alongside these academic conversations, another notable development was the recent conclusion of the UN Special Rapporteur on the Sale and Sexual Exploitation of Children that commercial surrogacy is not necessarily a violation of international law.[33] Whereas the Hague Adoption Convention prohibits payments in the context of transnational adoption arrangements[34] – a policy to which the UK also adheres for its domestic arrangements – the Special Rapporteur recognized that though there are parallels between the core principles and human rights at stake in adoption and surrogacy, how they are to be protected may differ. This lends some credence to the suggestion that with sensitive management, states such as the UK could introduce a commercial model of surrogacy not only lawfully, but also without causing unjustifiable inconsistency with their unpaid adoption regime.

The 'dramatic' changes in how both surrogacy and family formation in the UK are viewed over the last two decades were discussed in the most recent Supreme Court exploration of surrogacy and public policy,[35] where a claim in tort for the cost of funding a commercial surrogacy arrangement in California was allowed. Admittedly, academics have cautioned against reading too deeply into this case.[36] With a 3:2 split on whether these damages could be recovered even for an arrangement elsewhere, the judgment did not mark a universal endorsement of commercial surrogacy, much less an indication of how any prospective domestic reform might look. On the contrary, perhaps the most striking reasons against commercializing surrogacy given in the recent reform projects have been a product of the cultural norms of surrogacy as it operates in this jurisdiction specifically. A commercialized, industry-based approach to the practice is presumed to be incompatible with the 'surrogacy through friendship'[37] approach that currently prevails, and that most stakeholders wish to maintain.

Yet without trying to diminish the importance of taking these concerns into account, the Law Commissions themselves have already recognized the problems with the labels 'altruistic' and

[30] O. van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21 *J. of Reproductive and Infant Psychology* 145.

[31] M. Trebilcock and R. Keshvani, 'The Role of Private Ordering in Family Law: A Law and Economics Perspective' (1991) 41 *University of Toronto Law J*. 533, at 582.

[32] S. Rudrappa, 'The Impossibility of Gendered Justice through Surrogacy Bans' (2021) 69 *Current Sociology* 286; C. Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' 24 *Medical Law Rev*. 59.

[33] UN Special Rapporteur on the Sale and Sexual Exploitation of Children, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material* (2018) para. 72, at <https://undocs.org/en/A/HRC/37/60>.

[34] Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 29 May 1993, art. 4(c)(3), at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>.

[35] *Whittington Hospital NHS Trust* v. *XX* [2020] UKSC 14, para. 29, para. 48.

[36] K. Horsey and A. Powell, 'A Step Too Far? *Whittington Hospital NHS Trust* v. *XX* [2020] UKSC 14' (2021) 29 *Medical Law Rev*. 172.

[37] This is the motto of SurrogacyUK: <https://surrogacyuk.org/>.

'commercial' surrogacy.[38] The reality is that these are not mutually exclusive. The level of sacrifice involved in any surrogacy arrangement makes it difficult to sustain the argument that gestational labourers are motivated purely by money, and not equally by compassion or altruistic desire to help another family. By extension, it has been shown that even when a surrogacy arrangement is commercialized, close and long-lasting friendships still arise. Surrogates who are considered friends or even 'one of the family' emerge in ethnographies from states such as California[39] and Israel,[40] both of which allow profit. This strongly suggests that it is not whether money features in the surrogacy relationship that defines it or determines whether the parties develop a close bond; rather, as Zelizer has explained, people often 'create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties by means of everyday practices … [and] constantly negotiating the exact content of important social ties'.[41] It is the intentions and desires of the parties that determine the nature and extent of their relationship, not whether money is exchanged.

It is true that on the face of it, the label of 'employment' is uniquely charged. As well as the exchange of money, the dynamic of 'boss' and 'subordinate' introduces a new level of complexity – an apparently hierarchical structure that would seem to further preclude intimate interpersonal relationships. Yet just as commercial relationships cannot be essentialized, it is similarly critical not to overlook the heterogeneity of the contemporary workplace. The assumption that 'employment' denotes an arm's-length arrangement ignores the enormous variation in working environments. Corporations cannot be compared to family businesses, or home helpers to office employees. What defines these relationships is not employment status or income; rather, they are human, highly personal contracts, moulded by the parties themselves depending on both the context in which they operate and their personal preferences. This strongly suggests that just as commercialism is not necessarily incompatible with the desires of UK stakeholders, neither is understanding these arrangements as work. There are compelling legal, ethical, and moral grounds for regulators to at least remain open to a market-driven model if it could provide a compelling regulatory framework.

5 | ENFORCEABILITY

For this model to be successful, however, commercial surrogacy contracts would not only have to be accepted but also become enforceable. Much like marketization, this has been a key issue for law reformers – and, again, something that they are reluctant to change.[42] Two strands of potential concern can be identified here: protecting the child and protecting the surrogate. To respond appropriately to these, it is first necessary to clarify both the scope of this proposal and what it would mean.

The issue that consistently dominates discussion of enforceability is what should happen when the child is born – and specifically whether the surrogate should be obliged to relinquish the infant even if they change their mind. This is visible even in the Law Commissions consultation paper.

[38] Law Commission and Scottish Law Commission, op. cit., n. 21, para. 2.12.

[39] Jacobson, op. cit., n. 10, p. 145.

[40] Teman, op. cit., n. 13, p. 21.

[41] Zelizer, op. cit., n. 23, p. 32.

[42] Law Commission and Scottish Law Commission, op. cit., n. 21, pp. 220–222.

Here, the concern is largely that enforceability would mean that who bears legal responsibility for a child would become a matter of private ordering, outside the purview of the state.[43] This raises obvious questions regarding how the best interests of the child are to be guaranteed and is thus a major public policy concern with making these arrangements enforceable.

This is a different question, however, from whether the adult parties to the contracts should be able to rely on these arrangements over the course of the pregnancy. At this point, the concern is how best to protect the interests of the adults involved, ensuring that neither party feels that they have been taken advantage of. Though little discussed in the Law Commissions consultation paper, at present it appears to be assumed that surrogates are protected by the fact that these arrangements are not enforceable, and as a result they are free to refuse the requests of their intended parents without fear of repercussion. Yet that this is in fact the best approach is open to contestation.[44] It is well known that fear of legal consequences is not the only reason that a surrogate may have for saying no to any requests made of them; for instance, if they are working with family members, pressure may be emotional rather than practical. Unenforceability also means that they have little recourse to protection if their intended parents fail to deliver on *their* promises – a fact that could, for instance, leave the surrogate significantly out of pocket. Whether it might in fact be preferable to have concrete rights to fall back on is therefore again a further question for those exploring reform, and one that needs to be considered independently of the family law issues.

Bearing in mind this distinction, the suggestion here is that labour law could be adopted without undermining the Law Commissions' conclusions on the public policy of enforceability. The parties should be able to enforce lawful terms as they relate to the working relationship between them, recognizing that these legal responsibilities terminate at the moment of birth, at which point the gestational labour is complete. Separating this relationship out from the status of the parties in relation to the child would ensure their protection, but also leave the latter within the jurisdiction of family law. It would then be a matter of state sovereignty how they choose to manage the transfer of parentage.[45]

There are already signs of this thinking in the Law Commissions project, where it is recognized that partial enforceability may be necessary regarding the financial dimensions of these arrangements.[46] The labour law model is simply an extended form of this partial enforceability, allowing the needs of all parties to be balanced. This potential hurdle to a labour law approach, therefore, should not be overstated.

6 | THE EMPLOYMENT STATUS OF SURROGATES

The final difficulty with translating the idea that surrogacy is work into a regulatory framework is that labour rights do not attach to anything that can be conceptualized as work. This much is apparent from the above discussion of productive versus reproductive labour. Yet though the existence of a private contractual arrangement between two parties has the potential to differentiate

[43] Id., para. 9.126.

[44] Trebilcock and Keshvani, op. cit., n. 31.

[45] Partial enforceability is adopted in Russia. Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements* (2012) para. 27, at <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>.

[46] Law Commission and Scottish Law Commission, op. cit., n. 21, pp. 366–367.

surrogacy from 'conventional' pregnancy, even this is insufficient. To be able to adopt the labour law framework proposed below, what has to be shown is that the contractual relationship is of a nature that merits protection according to the internal logic of this area of law.

Notably, even among those who have considered surrogacy through the lens of work, there appears to be resignation to the fact that this atypical endeavour would fall outside its scope.[47] Recent decades have seen significant flexibilization and decentralization for workers, leading to an immense diversity in working styles.[48] This has rendered them more vulnerable, as labour law – originally constructed around the largely homogeneous, Fordist understanding of the workplace – has struggled to keep up. As it continues to grapple with its parameters, concern about how the discipline would react to gestational labour is unsurprising. Indeed, many sex workers have had to accept that though they might be able to use the discipline for inspiration, differences between themselves and traditional workers preclude formal inclusion.[49] The following analysis, however, suggests that though the atypicality of surrogacy may prevent access to the full gamut of employment law protections, the nature of the relationship is such that surrogates should not fall outside those parameters altogether. As such, there is merit in exploring further what such protections might have to offer.

There are two possible means by which a surrogate might qualify for labour protections under UK law. The first of these, which also offers the most rights, is by showing that they are an 'employee'. It is this status, which qualifies an individual for all employment protections, that those in atypical forms of work – including sex workers[50] – have found most difficult to prove.

In the Employment Rights Act (ERA) 1996, Section 230(1) defines an employee as someone who works under a contract of employment. Explained in Section 230(2) as 'a contract of service or apprenticeship', this is something that has largely been left to the courts to delineate and define. While decisions on how to do so have varied over the years, the test now 'most frequently adopted'[51] is that laid out by McKenna J in *Ready Mixed Concrete*.[52] According to this, a contract of service exists if

> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
> (iii) The other provisions of the contract are consistent with its being a contract of service.

[47] M. Sarkar, 'When Maternity Is Paid Work: Commercial Gestational Surrogacy at the Turn of the Twenty First Century' in *Women's ILO: Transnational Networks, Global Labour Standards, and Gender Equity, 1919 to Present*, eds E. Borus et al. (2018) 340; M. Cooper and C. Waldby, *Clinical Labor: Tissue Donors and Research Subjects in the Global Bioeconomy* (2014).

[48] U. Beck, *The Brave New World of Work* (2000); B. Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in *The Idea of Labour Law*, eds G. Davidov and B. Langille (2011) 30; B. Kubicek and C. Korunka (eds), *Job Demands in a Changing World of Work* (2017).

[49] Gall, op. cit., n. 17.

[50] *Stringfellow Restaurants Ltd* v. *Quashie* [2012] EWCA Civ 1735.

[51] Id., para. 7.

[52] *Ready Mixed Concrete (South East Limited)* v. *Minister of Pensions and National Insurance* [1968] 1 QB 497, at 515.

Though it is easy to see how this definition would apply to those in traditional forms of work, the flexibility – or precarity – of atypical working arrangements have often proved incompatible with this.

On the one hand, the unusual characteristics of surrogacy put gestational labourers in a better position than many others who have sought to prove their employment status. For instance, the concept of 'mutuality of obligation' has often proved challenging for those in temporary or insecure working arrangements. A common indicator of employment, this requires that both parties not only provide work and skill, but also be under a continuing obligation to both offer and accept work.[53] This is undoubtedly true of surrogacy. Indeed, if any contract could satisfy the mutuality of obligations test, it would be this. Once the surrogate is pregnant, neither party can refuse to continue to perform their contractual obligations without consequence, indicative of a provision of work and skill that is compatible with the status of employment.

With this would likely also come other factors that are consistent with surrogacy arrangements being a contract of service. Though commercial surrogacy may not presently be permissible in the UK, it is now widely acknowledged that if it were to be introduced, best practice would be to ensure payments were made on a pro rata basis.[54] This would guarantee that surrogates would be remunerated for their labour even in the case of miscarriage or stillbirth, challenging the claim that this industry amounts to a form of baby selling. Regular payment from the intended parents, however, is also consistent with these arrangements being a contract of service – something that, again, many atypical workers would struggle to show.

What would be likely to prove problematic, however, would be the idea that the surrogate must be subject to the control of their intended parents. Though *Ready Mixed Concrete* may have moved away from the idea that this is the sole test of employment,[55] as a definitional element in its own right it undoubtedly continues to hold considerable weight. Yet though there are jurisdictions in the world where surrogates have been subject to a high level of control, obliged to live in surrogacy 'dorms' with their every move managed,[56] this is certainly not the case for surrogates in the UK. Throughout the pregnancy, they retain a largely unfettered freedom to go about their life as they wish. More significantly, even behaviour as it pertains to the pregnancy does not seem to be strictly dictated. Though little research has been done into the exact content of these arrangements, that one of the arguments against introducing commercial surrogacy is fear of an US-style approach – with restrictions on activities including travel and sex – indicates that intended parents are currently discouraged from imposing too heavily on the autonomy of their surrogate.[57] Furthermore, it suggests that there is little desire to move towards a more controlling model. While it will be shown that labour law does not have to mean total loss of autonomy or inevitable adversarialism, continued commitment to a team-based model would undoubtedly create challenges because a surrogate would need to be subject to the control necessary to establish themselves as an 'employee'.

Yet contrary to the perceptions of other authors,[58] this does not necessarily mean that a labour law approach could not still be effective for gestational labourers. The very fact that surrogacy is a

[53] *Cornwall County Council* v. *Prater* [2006] EWCA Civ 102.

[54] UN Special Rapporteur on the Sale and Sexual Exploitation of Children, op. cit., n. 33.

[55] *Yewens* v. *Noakes* (1880) 6 QBD 530.

[56] Pande, op. cit., n. 9.

[57] SurrogacyUK, 'Why Shouldn't We Pay UK Surrogates?' *SurrogacyUK*, 29 January 2020, at <https://surrogacyuk.org/2020/01/29/why-shouldnt-we-pay-uk-surrogates/>.

[58] Sarkar, op. cit., n. 47; Cooper and Waldby, op. cit., n. 47.

team-based endeavour shows that their autonomy over the process is not absolute. Though they may not be subject to total control, they are not free to proceed with the pregnancy as if it were their own. They have to respect and respond to the fact that it has been initiated by another, who will have more than likely come into it with their own idea of how it should proceed. While those who are entirely independent contractors have the autonomy necessary to ensure that their own best interests are upheld, this is not guaranteed when 'encompassed within the business of others',[59] where the likelihood of interference means that there are obvious risks of blurred boundaries, loss of privacy, and exploitation, among other things.

UK labour law has long been alive to the potential problems of this hybrid situation, adopting the intermediate category of 'worker' (as opposed to 'employee') to offer those in this position a more limited range of employment rights. This has proved critical for atypical workers, and, it is suggested, would be far more likely to be accessible to surrogates if an employment law model of regulation is ultimately adopted.

According to Section 230(3) of the ERA, a worker is anyone who performs work under either

> a. a contract of employment, or
> b. any other contract … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

It is Subsection (b) that makes this concept more expansive than employment, and that is thus the focus here. Again, this is a definition that has largely been developed through case law, and there is similarly no 'single key' that elucidates whether an individual would qualify.[60] Nonetheless, the first question would clearly be whether surrogates are under an obligation to perform this work 'personally'. To answer this question, courts have commonly used the right to substitution as proxy: could the purported worker send someone else in his or her place?[61] Clearly, this is physically impossible for surrogates; pregnancy is not a transferrable act. Significantly, however, even if this were not the case, it seems unlikely that the intended parents would be open to substitution. Even beyond the necessary general screening, intended parents invest considerable time and energy into choosing the surrogate who is right for them. Letters, phone calls, and face-to-face meetings (when possible) help to promote trust before the process is taken further; great lengths are gone to in order to ensure that the values of each party are compatible.[62] Entering a surrogacy arrangement means accepting that this is an obligation to perform personally.

This then leads to the second question: can it be established that the intended parents are neither customers nor clients? Factors such as the level of integration[63] and mutuality of obligations[64] already discussed would be relevant here. A third critical dimension, however, is the economic risk assumed by the prospective parents.[65] For instance, there is no guarantee that IVF will be

[59] *Pimlico Plumbers Ltd* v. *Smith* [2017] EWCA Civ 51, CA, para. 9.

[60] *Hospital Medical Group Ltd* v. *Westwood* [2012] EWCA Civ 1005, [2013] ICR 415, para. 20.

[61] *Pimlico Plumbers Ltd*, op. cit., n. 59, para. 21, citing *Express & Echo Publications Ltd* v. *Tanton* [1999] ICR 693.

[62] Brilliant Beginnings, 'My Surrogacy Journey: An Intended Parent's Story' *Brilliant Beginnings*, at <https://www.brilliantbeginnings.co.uk/my-surrogacy-journey-an-intended-parents-story/>.

[63] *Cotswold Developments Construction Ltd* v. *Williams* [2006] IRLR 181, para. 53.

[64] *Windle* v. *Secretary of State for Justice* [2016] ICR 721, para. 23.

[65] *Pimlico Plumbers Ltd*, op. cit., n. 59, para. 46.

successful first time, or indeed at all, with the financial burden of this falling entirely on them. It is they who pay not only for each fresh round of treatment but also, under a commercial model, their surrogate's salary. They also shoulder financial responsibility for any other expenses incurred during the pregnancy – another important indicator that they are neither customers nor clients.

Ultimately, the context-specific question of employment status is not one that can be conclusively resolved ex ante. There are also other factors that have been important in headline worker status cases – for instance, penalties for non-compliance or a requirement of 'brand' conformity[66] – that clearly do not apply here. It is important to recognize, however, that subordination has been expressly rejected as an independent test for worker status.[67] On the contrary, it has been acknowledged that workers may in fact have a high level of autonomy in the provision of their skills, but if their integration into the enterprise of another is so significant as to render them vulnerable, they can still benefit from the protections of worker status.[68] This is essentially the argument put forward here. In this form of highly intimate and embodied labour, it is inevitable that a surrogate has a relatively high level of control over their actions, and by extension how they execute these contracts. Nonetheless, it is the symbiotic relationship between that labour and the welfare of the intended parents' unborn child – and the inevitable emotional and financial investments that come with this – that means that this labour is not undertaken at the arm's-length distance that would ordinarily be expected in a fully autonomous contract of services. Surrogates enter a contractual relationship with someone who has a vested interest in almost their every move, with extremely high exit costs. It is on the basis of this interdependence, and the risks that come with it, that the status of worker appears most compelling.

This still, however, leaves one final issue to be discussed. Subsection (b) of Section 230(3) of the ERA states that to be classified as a worker, someone must perform 'services for another party to the contract'. As the very essence of surrogacy is that the gestational labour is undertaken on behalf of another, this analysis has proceeded on the basis that the intended parents would assume the position of the employer, defined by Section 230(4) of the ERA as the 'person by whom the employee or worker is (or, where the employment has ceased, was) employed'. Though it is unusual to find natural rather than legal persons in this position, other forms of reproductive labour – for instance, childcare and domestic work – illustrate that this is not a barrier to assuming this role per se.

What may prove problematic, however, is that the phrasing of Section 230(3)(b) defines a 'worker' in the context of a bilateral contractual relationship. What is the effect when this is not the case? Agencies frequently facilitate surrogacy arrangements, organizing matches and ensuring that the process runs smoothly. Previous employment status cases have shown, however, that this can be problematic for the discipline. When employer responsibilities are shared among multiple parties, it can be difficult to determine who is in fact responsible under Section 230(4) and therefore obliged to uphold these employment protections. For many agency and gig economy workers, this has created cracks in labour law protection. Nonetheless, the suggestion here is that surrogates would be unlikely to fall through these.

There are two main risks in this regard. The first would be a scenario in which there is no contract between the surrogate and the intended parents. This has been a common problem for traditional agency workers seeking to prove their employment status, where contracts have been

[66] Id., para. 48.

[67] *Clyde & Co LLP* v. *Bates van Winkelhof* [2014] UKSC 32, para. 39.

[68] *Percy* v. *Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] para. 146.

found between the agency and the worker and between the agency and the end user, but not between the worker and the end user.[69] This would separate the contractual nexus from the person for whom the work is being performed, pushing surrogates outside of the definition of workers under Section 230(3)(b). The reluctance of the court to imply contracts between the worker and the end user to facilitate employment claims would thus cause problems.[70] There is no reason, however, why it should get to this point. Express arrangements between surrogates and intended parents are the norm even now, despite not being enforceable.[71] This certainly would not change under a different regulatory model. As such, courts would not be left in the position that they either imply a contract or leave the purported worker without protection.

The second risk arises where the express contracts do not reflect the reality of the situation that a worker is seeking to challenge.[72] In the case of surrogacy, this could be either (1) if a surrogate wanted to bring a claim against the agency with whom they may not have a contractual nexus for the purposes of Section 230(3)(b), or (2) if the intended parents were to argue in light of a claim against them that they are not the employer under Section 230(4) because the express arrangement between them and the surrogate is a sham.

As is implicit in the above analysis, however, neither of these situations is likely. The principal issue on both counts is relative degree of control.[73] In the UK, however, surrogacy agencies have a genuinely facilitative function, meaning that their degree of control is limited compared to that of the intended parents. For example, there were five factors of particular significance in the recent *Uber BV* case that led to the conclusion that drivers were under contract as workers for Uber.[74] None of these would also apply to surrogacy agencies. Even under a commercial model, they would be unlikely to set a surrogate's wages; as is discussed further below, these are negotiated between surrogates and intended parents. They do not dictate contractual terms, nor restrict the ability of a surrogate to say no to intended parents. Limitations on the surrogate's behaviour are not decided by agencies, and indeed they actively encourage a relationship with the 'end user'. While these may not be the only possible factors to consider, this does illustrate that agencies genuinely act as a conduit for the relationship between the intended parents and the surrogate. Not only does this make it difficult to imagine a surrogate bringing a claim against their agency, it also suggests that there is little basis to think that an agency would interrupt the understanding of a surrogate's worker status put forward here. The criteria of Section 230(3)(b) would be satisfied between the surrogate and their intended parents.

7 | WHAT MIGHT LABOUR LAW HAVE TO OFFER?

Having recognized and responded to the preliminary challenges with the proposal of labour law as a potential regulatory paradigm for surrogacy, the question now becomes what the framework might have to offer. How could worker status help to manage this acutely sensitive industry?

[69] *Brook Street Bureau (UK) Ltd* v. *Dacas* [2004] EWCA Civ 217.

[70] *James* v. *London Borough of Greenwich* [2008] EWCA Civ 35 CA.

[71] Department of Health & Social Care, 'The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales' *Gov.uk*, 23 July 2021, at <https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales>.

[72] *Autoclenz Ltd* v. *Belcher* [2011] UKSC 41.

[73] *Uber BV* v. *Aslam* [2021] UKSC 5, para. 92.

[74] Id., para. 93.

7.1 | A minimum wage

Ensuring a fair wage is important for work of any nature. In situations where remuneration is taboo or even illegal, however, the financial risks and challenges are dramatically heightened. The desire to protect themselves against skimming and extortion, for instance, is one reason why sex workers have sought integration into the employment law framework. While the financial challenges with surrogacy are undoubtedly different in nature, there is nonetheless still reason to think that a labour law model might be of practical use.

It has already been noted that the question of whether surrogates ought to be paid at all is one that has caused challenges for and disagreements between regulators. The same is also true, however, of surrogates themselves. Some feel very strongly that they do not want to be paid – for instance, because they are motivated solely by a desire to help their intended parents, or because they are concerned that by accepting a 'salary' they may jeopardize the state benefits to which they are otherwise entitled.[75] This is not, however, 'the full range of UK surrogacy experience'.[76] Other major surrogacy stakeholders within the UK take the position that surrogates ought to have the option to be compensated for their time and effort if they so wish, recognizing the demands of surrogacy discussed above.[77] Ultimately, informed financial decisions about benefits and tax can also only be taken if surrogates have a clear understanding of the payments to which they are entitled and how this income is to be characterized – something that is certainly not the case at present.

If regulators prove willing to accept the introduction of a commercialized form of surrogacy to the UK, therefore, the first thing that labour law has to offer is a means of striking this balance. It is well known that people regularly undertake what would otherwise be paid employment for free or on an expenses-only basis, with volunteer agreements used to ensure that both parties fully appreciate what it is that they are signing up to. Even in traditional industries, these often touch on similar issues, including precise details of the role and what is expected, whether the volunteer is protected under any insurance policies, and expenses.[78] Though such agreements are not enforceable and thus would not offer surrogates access to the same substantive labour law protections as are described below, it is important to recognize that a labour law approach would not take away their ability to offer their services unpaid.

What this model would do, however, is open the option of payment to those who do want it – as well as offer a clear stance on how to approach this. A significant challenge with commercial surrogacy is determining how much surrogates ought to receive.[79] Admittedly, labour law would not offer an automatic solution to the difficulties of placing a financial value on the invaluable contributions of surrogates. The wages of traditional workers do not necessarily meaningfully reflect the value of their contributions. Labour law would, however, set a baseline hourly rate for which the state deems individuals can work without being considered financially exploited. The minimum wage, calculated centrally and provided as a statutory entitlement, would at least guarantee surrogates the same rights as traditional workers.

[75] SurrogacyUK, op. cit., n. 57.

[76] Brilliant Beginnings, 'All Party Parliamentary Group Confirms Surrogacy Law Needs Reform, Again' *Brilliant Beginnings*, at <https://www.brilliantbeginnings.co.uk/appg-confirms-surrogacy-law-reform-needed/>.

[77] Id.

[78] *Gov.uk*, 'Volunteer Opportunities, Rights and Expenses' *Gov.uk*, at <https://www.gov.uk/volunteering/volunteers-rights>.

[79] Law Commission and Scottish Law Commission, op. cit., n. 21, pp. 339–340.

As well as offering insight into how much surrogates should be paid, other reproductive labourers have also recently been the subject of guidance on what exactly qualifies as working time and thus needs to be paid for. A clearer understanding of surrogates' working time may help to reduce the number of hours for which intended parents are obliged to pay them under a labour law model, thereby assuaging another concern with commercial surrogacy – namely, that it would price many people out of parenthood.

When making this determination, the first task would be to establish how surrogates' work should be classified, as this impacts what they are paid for.[80] Based on the payment structure of these arrangements, the suggestion here is that gestational labour would be a form of time work. As already noted, there are significant legal and policy problems with paying surrogates only at the end of the process, or only on the delivery of a healthy baby. Recognizing this makes it unlikely to be considered piece work. However, neither is it so predictable as to be salaried work. The pro rata approach means that if a surrogate miscarried, they would only be paid for labour that they had actually performed – yet there is no way of predicting this in advance. This uncertainty means that the total number of basic hours would not be calculable from their contract. This would not, however, make it necessary to use guesswork to determine the number of hours for which they were to be paid. Unlike unmeasured work, the key factor is the duration of the contract, not the hours worked over its course. It would therefore be precisely determinable, but on a rolling basis – akin to time work.

However, this conclusion then leads to the task of determining the time for which a surrogate would be paid. Isolated hours worked during the conception, such as medical trips, would likely be easy to quantify. More challenging, however, is the pregnancy: would the minimum wage apply 24/7 throughout? To answer this, it is necessary to consider Section 32 of the Working Time Regulations 2015. This states that

> 1. Time work includes hours when a worker is available, and required to be available, at or near a place of work for the purposes of working unless the worker is at home.
> 2. In paragraph (1), hours when a worker is 'available' only includes hours when the worker is awake for the purposes of working …

There are two ways in which this provision could potentially implicate surrogacy. The first is the clear home exemption: that workers merely 'available' to work from home are not entitled to pay. The reality, however, is that though surrogates may spend considerable time at home, this is because they have no fixed workplace and can work elsewhere. Section 32 thus would not apply. They are not merely 'available' for work when at home; they are actively working. Certainly, this time must still be paid for.

The second, however, would be if surrogates were classified as 'sleep-in' workers, thus not entitled to pay for time spent asleep unless actively awakened for the purposes of working. This issue was recently considered by the Supreme Court.[81] Though it recognized that sleep can in some instances be considered work, it was held that 'where the principal purpose and object of the arrangement is that the worker will sleep at or near the place of work', with responding to any

[80] The National Minimum Wage Regulations 2015, Part 5, chs 3–5, at <https://www.legislation.gov.uk/ukdsi/2015/9780111127964>.

[81] *Royal Mencap Society* v. *Tomlinson-Blake* [2021] UKSC 8.

disturbances merely 'subsidiary to that purpose or objective', there is no minimum wage entitlement unless the individual is awake for the purposes of working.[82]

On the one hand, it might be said that surrogates are always working; gestation does not stop as they sleep. If this is the case, it is difficult to say that sleep is their principal purpose. Yet when considering this argument, the focus of the literature that understands surrogacy as work should not be forgotten. It deliberately moves away from the notion that pregnancy is a passive process, emphasizing the physical difficulties of the undertaking and the emotional strength that it requires. Adopting this line of thought, however, as this article does, makes it difficult to then argue that surrogates are working when they are asleep and removed from these pressures; rather, it seems that the principal purpose of this time is to rest, suggesting that they may indeed be classified as sleep-in workers in relation to their overnight obligations, as were the carers in the Supreme Court. Lady Arden was clear that working from home would not change this finding.[83] This analysis suggests that, unless they are interrupted and have to deal with problems or emergencies – or, indeed, go into labour – it is unlikely that surrogates would be entitled to pay while asleep. Therefore, the cost of commercial surrogacy may not be as high as initially anticipated, balancing the interests of both parties.

Admittedly, the possibility of using the minimum wage to calculate what a surrogate should be entitled to has already been considered by the Law Commissions, who considered it conceptually problematic to 'calculate the value of labour that is uniquely performed by women'.[84] Nonetheless, they notably propose using the minimum wage to calculate a fixed fee for surrogates. Under a labour law model, however, this is not how the minimum wage would be conceived. It would instead offer a floor below which intended parents could not drop, not a ceiling. Unlike setting a fixed rate, therefore, surrogates would still be free to bargain for more per hour if they so wished, reducing the concern that this would mandate only the minimum wage for gestational labour, and retaining the benefits discussed.

7.2 | Health and safety provisions

As discussed above, surrogacy is undoubtedly physically and emotionally demanding. It is not something to be undertaken lightly; women may have to be put on bed rest, and there is always the risk that they will lose their uterus or even die. Though pregnancy is clearly unpredictable, surrogates need to be secure in the knowledge that, as far as possible, they will not come to harm.

Occupational health and safety has been a lens through which the needs of sex workers have been considered for some time now.[85] From pole-dancing injuries to sexually transmitted infections, they use this legislation to legitimize calls for not only ex ante protection such as condoms, but also ex post compensation for workplace accidents, just as any other worker would receive. The same conceptualization, it is suggested, might also be extended to surrogates.

Principally governed by the Health and Safety at Work etc Act 1974, employers in the UK have a responsibility to assess and manage the risk to which they subject their employees, as well as

[82] Id., para. 57.

[83] Id.

[84] Law Commission and Scottish Law Commission, op. cit., n. 21, para. 14.69.

[85] P. Alexander, 'Sex Work and Health: A Question of Safety in the Workplace' (1998) 53 *J. of the American Medical Women's Association* 77.

to consult where appropriate. The importance of such a maximal transparency approach in surrogacy cannot be underestimated. Though many of the physical risks involved are unpredictable and incurred without blame, this would at least guarantee that surrogates would enter the process fully informed and with the right to refuse to undergo dangerous procedures.[86]

Moreover, despite the embodied and unpredictable nature of this work, labour law would assist with managing those risks that are controllable. It would remind intended parents when making potentially risky decisions, such as how many embryos to implant, that they have a legal responsibility towards the surrogate to factor the latter's health into the decision-making process. Given the emotional labour involved in these arrangements, their obligations may also stretch to providing mental health support for their surrogate – something that is currently only offered by some surrogacy agencies in the UK. Again, therefore, labour law has the potential to guarantee critical baseline rights to protect surrogates against some of the most major concerns that the industry faces and to concretize the mutuality that is currently only a matter of best practice. The significance of this cannot be underestimated.

7.3 | Privacy protection

There is also a close relationship between health and safety protections for surrogates and a further potential benefit of a labour law model: privacy protection. In many ways, surrogacy would be one of the freest forms of employment conceivable. Surrogates are not bound to a workplace and have flexibility in their time management. Indeed, in jurisdictions that do allow commercial surrogacy, it has presented an almost unparalleled opportunity for many women who otherwise struggle to find a work/life balance.[87]

Similar narratives have also emerged from sex workers in the UK.[88] Despite these freedoms, however, their experience also shows that reproductive labourers are particularly vulnerable to other forms of intrusion when compared to those in 'conventional' jobs. When marketizing something so ostensibly personal and intimate, it can be challenging for surrogates to delineate boundaries and make clear what they are comfortable with. While many surrogacy arrangements are undoubtedly completed without either the surrogate or the intended parents being left unhappy with the behaviour of the other, perhaps one of the greatest concerns with surrogacy is how to ensure that the intended parents do not interfere too drastically with the surrogate's privacy.[89] This can be a cause or a consequence of a breakdown in trust, and can manifest in different ways, including, but not limited to, overbearing supervision during the pregnancy and failing to afford sufficient respect for the surrogate's bodily autonomy (such as when making medical decisions).

It is important to recognize that though employment contracts may be subject to protections that ordinary arrangements are not, they are still negotiated around the fundamental principle of freedom of contract. Offering surrogates a concrete right to privacy would not, therefore, deprive

[86] Not all surrogates feel that this has been the case previously. See for example Marie Anne, 'Messing with My Body, Messing with My Mind' in *Broken Bonds: Surrogate Mothers Speak Out*, eds J. Lahl et al. (2019) 101.

[87] This is true, for instance, for army wives. See B. Kessler, 'Recruiting Wombs: Surrogates as the New Security Moms' (2009) 37 *Women's Studies Q*. 167.

[88] English Collective of Prostitutes, *What's a Nice Girl like You Doing in a Job like This? A Comparison between Sex Work and Other Jobs Commonly Done by Women* (2019) 6, at <https://prostitutescollective.net/wp-content/uploads/2019/10/Nice-Girl-report.pdf>.

[89] SurrogacyUK, op. cit., n. 57.

the parties of the ability to approach this undertaking together and to make mutual decisions depending on their shared desires and personal boundaries. So long as both parties are in agreement, the right to privacy can be lawfully derogated, giving surrogates and intended parents flexibility in what they can agree to.

The difference between labour law and both informal arrangements and absolute freedom of contract, however, is that the former recognizes that workers need boundaries. Surrogates should feel that they have the right to say no if unreasonable demands are being made of them and if the team-based approach is in fact becoming disproportionately intrusive.[90] In the context of labour law, much of the right to respect for privacy in the UK is grounded in Article 8 of the European Convention on Human Rights.[91] It is now established that domestic courts have an obligation to ensure that this right is respected in the workplace.[92] As such, though employers may have a natural interest in what their workers are doing and how, their ability to act on this is limited. Though this protection may be weighty, however, it is also flexible and context dependent. When determining the sphere of privacy, a human rights model of protection inevitably demands exploration of whether the steps put in place were necessary and proportionate. Rather than inevitably pitting surrogates and their intended parents against each other, therefore, it must be hoped that that this model would encourage dialogue between the parties about what contested measures are trying to achieve and whether there are alternative means of reaching the same goal. If sensitively managed, this may avoid irreparably damaging the relationship.

Moreover, it may well be possible to find precedent despite this seemingly unique context. Particularly in jurisdictions where more research has been done into the lived experience of surrogates, it is well documented that loss of trust can lead intended parents to make specific unreasonable demands. Common examples include excessive contact,[93] surveillance,[94] and randomized drug testing.[95] Though the first may be better dealt with through the health and safety provisions already discussed (or even anti-harassment law depending on the nature of the situation), what is notable is that all of these are already topics of either discussion or precedent in labour law, where the goal is always to balance the needs of both parties.[96] Just as sex workers have found labour law to be a well of potential pre-existing solutions, therefore, so too may surrogates.

It is true that these parallels do not exist on all privacy matters with which surrogates are likely to be concerned. Another fear regarding allowing these contracts, and particularly making them enforceable, is that a surrogate may be stripped of their right to choose. This could manifest in one of two ways: being denied the right to unilaterally decide to abort, or being forced to undergo an abortion against their wishes. To the extent that employment contracts permit some derogation of the right to privacy, there is thus obvious scope for concern.

[90] See Marie Anne, op. cit., n. 86.

[91] This is incorporated into domestic law through Article 8 of the Human Rights Act 1998.

[92] *Bărbulescu* v. *Romania* [2017] ECHR 742.

[93] Teman, op. cit., n. 13, pp. 97–98.

[94] H. L. Berk, 'Savvy Surrogates and Rock Star Parents: Compensation Provisions, Contracting Practices, and the Value of Womb Work' (2020) 45 *Law & Social Inquiry* 398.

[95] H. L. Berk, 'The Legalization of Emotion: Risk, Gender, and the Management of Feeling in Contracts for Surrogate Labor' (2013) PhD thesis, University of California, Berkeley, 2, at <https://digitalassets.lib.berkeley.edu/etd/ucb/text/Berk_berkeley_0028E_13203.pdf>.

[96] See for instance TUC, *Drug Testing in the Workplace* (2019), at <https://www.tuc.org.uk/resource/drug-testing-workplace>.

Though it is difficult to appeal to employment law precedent, it is nonetheless compelling to consider the remedies that labour law offers – and, in particular, its attitude towards specific performance. To try to prevent a surrogate from aborting, the intended parents would have to seek an injunction. Generally, however, courts are very reluctant to grant these when to do so is effectively to specifically enforce labour contracts.[97] Even outside of surrogacy, there is real concern that this would illegitimately blur the line between labour and forced servitude, as well as creating an unworkable environment. Given the obvious challenges of proceeding with a now unwanted pregnancy, it seems very unlikely that reproductive labourers would be deprived of the right to access abortion under this regulatory model.

Depending on the reason for unilaterally aborting, it is admittedly conceivable that the surrogate would be liable for damages. Unless there is threat to life, in which case the surrogate would have a right under health and safety law to remove themselves from the dangerous situation without consequence,[98] taking this step would likely open the possibility of a suit for breach of contract. Recognizing that decisions to unilaterally abort are rare, however, and in particular that surrogates are unlikely to do so without good reason, there are remedial possibilities that could be explored if these contracts were to be formally drafted and enforceable. The possibility of liquidated damages, for instance, has been proposed elsewhere.[99] This remedy is not novel to labour lawyers, and again might allow for a balance to be struck between the concerns of both parties. These possibilities cannot even be explored, however, without some consideration of what an enforceable contract regime might look like. There is considerable merit, therefore, in at least igniting this discussion.

This then leaves the question of whether a surrogate could be forced to abort against their wishes. Of course, the goal is to avoid disagreements on these issues. It is widely recognized that before entering a surrogacy contract, it is in the interests of both parties to have difficult conversations such as when they might want the surrogate to consider an abortion, thereby ensuring that both parties are on the same page. Though labour law would not guarantee that these conversations would happen, it is notable that workers are entitled to a written statement of terms[100] – a formalization that, it must be hoped, would encourage dialogue. This would also open a claim for breach of contract if the intended parents attempted to refuse payment when a surrogate had not promised that they would terminate. Even if this prophylactic approach fails, however, it is again highly unlikely that the intended parents would be able to obtain an equitable order for specific performance. As such, terms to this effect could not be enforced even under a purportedly enforceable regulatory model.

7.4 | Procedural protections

Thus far, the focus has been on some of the substantive protections from which surrogates might benefit if a labour law model of regulation were adopted. One of the most notable characteristics of labour law, however, is that it also offers workers a range of procedural rights. These allow workers to push for more than minimum protections and enable active participation in the workplace

[97] *Lumley* v. *Wagner* [1852] EWHC (Ch) J96.

[98] Employment Rights Act 1996, s. 44.

[99] D. Mazer, 'Born Breach: The Challenge of Remedies in Surrogacy Contracts' (2016) 28 *Yale J. of Law and Feminism* 211.

[100] Employment Rights Act 1996, s. 1.

through representation and participation. With this in mind, a critical goal of the Sex Work Is Work movement – which may similarly be of interest when considering surrogacy regulation – is unionization.[101]

On the one hand, this would not be a dramatic change. It is well documented that surrogates frequently form support groups, turning to others in the same position for advice and support.[102] This, in essence, is the heart of the union movement. Though unions are often perceived as entirely adversarial or disruptive in relation to employers, this understanding is overly simplistic. Unions perform a range of functions, many of which could be of benefit to both surrogates and intended parents.

As noted, the most effective means of ensuring that a surrogacy arrangement runs as smoothly as possible is to guarantee that both parties have realistic expectations of their rights and responsibilities throughout the process. Achieving this, however, can be challenging. Frequently, neither party has experience of the process or is fully aware of what to expect, much less able to understand the legal technicalities. To this extent, introducing labour law – and expecting both intended parents and surrogates to get to grips with another layer of complexity – might be thought problematic. Adopting a labour law understanding of these arrangements, however, would not only open the possibility of professional support, but also offer unions as a ready-made source of affordable knowledge. The importance of this guidance and support from a repeat actor at the contracting stage should not be underestimated. Similarly, in seeking to achieve a clearly understood and comprehensive agreement from the outset, the possibility of collective bargaining should not be ruled out. Sectoral-level collective bargaining has traditionally been an important mechanism by which otherwise disconnected groups or even whole industries can be guaranteed rights above those that have been legislated for.

Admittedly, surrogacy contracts cannot be fully universalized due to the often highly personal and sensitive issues on which they touch. In California, however, where commercial surrogacy arrangements are popular, there are signs of some standardization emerging. This is said to be the case particularly with regards to additional compensation for events such as caesarean sections or the loss of a reproductive organ.[103] Though this is not presently the norm in the UK, it is a possibility that it may need to be considered as the financial dimensions of these arrangements are reformed and clarified. If so, it is vital that the interests and voices of both parties are taken into consideration, guaranteeing that the risks faced by surrogates, and the contributions that they make, are not underestimated. A sectoral approach would allow a clear arrangement to be agreed by repeat actors with the knowledge to do so, minimizing the risk of surrogates being harmed through their inexperience. Under this model, it is generally employers' organizations and trade unions – or alternatively some form of joint bargaining council – that are responsible for negotiating these arrangements. Such bodies do not currently exist, of course, but expert stakeholders in this industry would be an obvious place to start. The number of actors with decades of experience in UK surrogacy that have come forward to work with groups such as the Law Commissions illustrates that the engagement is possible; there is clear commitment to developing the law so as to guarantee both surrogates and intended parents the best possible conditions. While this would be a novel application of their knowledge, it would help to ensure their best interests – thus, again, the idea of a bargaining council is not as radical or unrealistic as it may first seem.

[101] M. Chateauvert, *Sex Workers Unite: A History of the Movement from Stonewall to SlutWalk* (2013).

[102] Growing Families, 'UK Support Organisations' *Growing Families*, at <https://www.growingfamilies.org/uk-support-organisations/>.

[103] Berk, op. cit., n. 94, p. 412.

Unions are not only relevant at the time that work contracts are arranged; rather, they may also provide a source of support throughout the contractual relationship. In many instances, this may simply be an extension of the information function already described. Importantly, however, they can also play a role if the relationship breaks down and disagreements arise. It is perhaps for this reason that unions get their reputation for being particularly adversarial. Nonetheless, the reality is that issues or disagreements are frequently dealt with through forms of alternative dispute resolution such as mediation, described by the Trades Union Congress as one of the most important tools available to trade union reps.[104] Litigation is not conducive to restoring the healthy and productive relationship needed if two parties are to continue working with each other. Though unions may recognize the importance of workers having an opportunity to express their grievances therefore, that is not to say that the overarching preference will not continue to be for working towards a mutually conceived solution – again building on years of experience in such disputes to support surrogates at what might otherwise be an isolating and confusing time.

Of course, if workers reach the stage where they feel that communication is fruitless or that their interests are being continually disregarded, the final procedural right from which they benefit is the right to strike: taking direct action to emphasize that they are not merely vessels, but rather have interests of their own which they have the power to make known. For some academics, this is the most important reason to embrace a labour model. Lewis, for instance, goes so far as to say that 'the immanent possibility of the gestational strike is probably, in the end, the most important reason for treating surrogacy as work'.[105] Yet though giving surrogates this scope to assert themselves may seem convincing in theory, the obvious question that it begs is how exactly they could do so in practice. Once the surrogate is pregnant, there is no way of reversibly withdrawing this labour – so can this dimension of labour law really be of use at all?

However, though strikes may ordinarily be associated with the image of a walk-out and an absolute refusal to continue working, this has never been the full picture of industrial action. Workers have always explored alternative means to have their voices heard, working to rule or go-slows being classic examples. In recent years, moreover, unions have become increasingly innovative in how they challenge working conditions. Though the prevalence of conventional strikes (particularly in the West) is often said to have declined over recent decades, scholars are increasingly considering whether they have simply changed form.[106] With this in mind, though a surrogate might not be able to go on full strike, that is not to say that they could not harness the same logic, withholding something valuable in order to strengthen their position. For instance, they could exclude the intended parents from the process by deliberately denying them any information, unless and until the parents show willingness to engage with the surrogate's concerns. Taking away the parents' access to information, and arguably more importantly their opportunity to vicariously experience the pregnancy, undeniably has the potential to be effective. It would also be perhaps the most plausible form of industrial action in that it would both avoid harming the child and be unlikely to put surrogates in breach of their contract despite being action short of a full strike, as it is generally assumed that these relationships would emerge organically rather than being established through a contract. While this would not necessarily exempt surrogates from

[104] TUC, *Mediation: A Guide for Trade Union Representatives* (2010), at <https://www.tuc.org.uk/publications/mediation-guide-trade-union-representatives>.

[105] Lewis, op. cit., n. 7, p. 86.

[106] L. Bordogna and G. Primo Cella, 'Decline or Transformation? Change in Industrial Conflict and Its Challenges' (2002) 8 *Transfer: European Rev. of Labour and Research* 585.

the technical balloting requirements that characterize the law on industrial action in the UK,[107] it does suggest that both conceptually and legally striking might be a meaningful course of action for a surrogate.

8 | THE WORKING TIME DIRECTIVE

There would undoubtedly be many other practical issues that would require ironing out. For instance, would sick leave accrue to be taken at the end? What would the tax law consequences be? However, though these issues would have to be resolved for this model to be effectively implemented, they do not constitute potential incompatibilities between labour law and surrogacy. What might appear to do so, however, is working time.[108] At present, the working week is capped at 48 hours,[109] and regular breaks are mandated.[110] This suggests a major challenge for the idea that contract pregnancy – a 24/7 process for (hopefully) nine months – might be regulated as a form of work.

There are two possible ways in which this apparently incompatibility could be managed. First, and perhaps most simplistically, workers can opt out of these protections.[111] So long as this was expressly stated in the contract, therefore, there is no reason why working time provisions should cause problems. The only potential exception to this might be the right of workers to revoke their waiver of working time protection. Though it is difficult to know how the courts would respond to a subsequent claim that a surrogate's rights have been violated given the inability of intended parents to give the surrogate the mandated time off, this could potentially cause the intended parents as employers to be fined.

However, a second possibility, which would avoid this, would be to establish a sectoral exemption. This is not something that has been necessary for sex workers, though it is notable how many other classes of reproductive labourers are covered by such exemptions. Both workers in domestic households[112] and family workers[113] are already expressly exempted under UK law. Though neither of these classifications would necessarily extend to surrogates, they do illustrate that there is scope for absolute exemptions to be introduced. There is also no reason why this would undermine the overall goals of labour law. If stripped back to their first principles, two primary functions of working time provisions can be identified: protecting work/life balance and providing the time away from work necessary to rest, thereby preventing accidents in the workplace.[114] Exempting surrogates from working time provisions should not jeopardize either of these objectives. Though gestational labour is constant, it is also frequently passive. It is entirely possible for a surrogate to go grocery shopping, for instance, or spend time with friends and family, while still working. Though demanding and intrusive, therefore, it is not clear that surrogacy can really be considered

[107] Trade Union and Labour Relations (Consolidation) Act 1992, Part V.

[108] Working Time Regulations 1998 (SI 1998/1833).

[109] Id., s. 4(1).

[110] Id., s. 12.

[111] Id., s. 5.

[112] Id., s. 19.

[113] Id., s. 20(b).

[114] Citrus HR, 'The Working Time Directive Explained' *Citrus HR*, 20 September 2019, at <https://citrushr.com/blog/day-to-day-hr/working-time-directive-explained/>.

a threat to work/life balance. The same is also true of the rest needed to ensure safe working. The flexibility of the role can easily accommodate gestational labourers taking the time that they need to rest and stay healthy even if excluded from express working time protections and provisions.

Particularly striking in this regard is the similarity of the reasoning applied by the Court of Justice of the European Union (CJEU) when considering how working time laws might apply to foster carers. In a preliminary ruling on this matter, the CJEU recognized not only that the nature of the work is such that it would not be compatible with working time provisions, but also highlighted that foster carers are free to move about rather than being bound to the workplace.[115] Though this means that they fall under the public services exception – something that could not be extended to surrogates due to the private nature of their transactions – it does illustrate that there is scope for flexibility where there are legitimate reasons for these violations. Working time is perhaps the most flexible area of labour law, and thus should not be seen as an insurmountable barrier to a labour law model for surrogacy.

9 | CONCLUSION

There are many difficult questions that any state proposing to regulate surrogacy would have to answer. It is important to recognize that labour law is not a panacea, capable of resolving all of these. The focus of this article, however, has been on how to manage the relationship between the surrogate and the intended parents. Following the lead of the Sex Work Is Work movement, it has suggested a labour law model. It has shown that this model would not only bridge the gap between the law and an important strand of feminist and sociological thinking on the matter, but also offer concrete protections for those involved in the industry. While there are potential hurdles, these are not insurmountable. Certainly, they should not preclude further consideration of this regulatory model.

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[115] Case C-147/17 *Sindicatul Familia Constanta and Others* v. *Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* [2018] ECLI EU C 2018 92.