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## **I. Poultry Production in the United States**

### **Melissa Jones**

The United States is the world's largest producer of poultry meat and its second largest exporter of poultry meat. "Poultry" refers to domesticated fowl raised for meat and eggs, and includes chickens, turkeys, ducks, geese, emus, ostriches, and game birds. For the purposes of this investigation, "poultry" will be limited to mean only broiler chickens, which are chickens under 13 weeks old that are processed for their meat. Poultry production in the United States totals over 43 billion pounds annually, and over 80% of that total comes from broiler chickens. Broiler production also accounts for the majority of the total farm value of U.S. poultry production, which exceeds \$20 billion annually.<sup>1</sup> Essentially, this is an enormous industry that affects millions of people, both within the United States and around the world.

In the early 20<sup>th</sup> century, most poultry meat in the United States came from small slaughter plants and was used locally. The primary public health concern at that time was controlling the spread of animal diseases, which relied almost exclusively on visual inspection.<sup>2</sup> Today, poultry is slaughtered and processed in sophisticated, high-volume plants, and is often shipped great distances to meet consumers. Due to advancements in animal production, populations of broiler chickens have become more homogenous, and animal diseases are much

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<sup>1</sup> USDA ECONOMIC RESEARCH SERVICE. "Poultry & Eggs: Background." Last updated May 28, 2012. <http://www.ers.usda.gov/topics/animal-products/poultry-eggs/background.aspx#.UqG3oJH9csJ>

<sup>2</sup> NATIONAL CHICKEN COUNCIL. "U.S. Chicken Industry History." Last updated 2012. <http://www.nationalchickencouncil.org/about-the-industry/history/>

less of an issue. Now the primary concern has shifted to unseen hazards such as microbiological and chemical contamination. Increased understanding of pathogens has also led to a greater emphasis on safe handling and cooking procedures on the part of the consumer.

As the poultry industry changes, new measures must be taken to ensure that the health and safety of the public are being protected. This investigation seeks to determine the extent to which the poultry industry should utilize governmental regulations to best achieve this goal.

## **II. Foodborne Illnesses**

Foodborne pathogens account for an estimated 48 million illnesses and up to 3,000 deaths in the United States every year.<sup>3</sup> Foodborne illness is arguably the most significant public health concern for the poultry industry. It affects an alarming number of people and costs the American public enormous sums of money, both directly through medical expenses and indirectly through taxpayer dollars. In a 2000 estimate by the USDA's Economic Research Service, total estimated foodborne illness costs in the United States amounted to \$6.9 billion per year.<sup>4</sup> In 2012, a new study was published that set estimates of foodborne illness costs from the 14 major pathogens in the United States at a whopping \$14.1 billion per year.<sup>5</sup>

Bacteria themselves are a natural part of the environment and are present in all raw meat products, but some types of bacteria, called pathogens, can cause foodborne illnesses when they enter the food supply. Symptoms of "food poisoning" as it is commonly called may occur within minutes to weeks of ingesting the contaminated food product. These symptoms often include

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<sup>3</sup> USDA Food Safety and Inspection Service. "Foodborne Illness: What Consumers Need to Know." Updated May 2011.

<sup>4</sup> Sandra Hoffmann and Tobenna D. Anekwe, "Making Sense of Recent Cost-of-Foodborne-Illness Estimates," *USDA Economic Research Service*. September 2013.

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

nausea, vomiting, diarrhea, or fever, and can often be mistaken with other illnesses such as the flu.<sup>6</sup> Because onset is often delayed, and the symptoms are so similar to those of other illnesses, many foodborne illnesses often go unreported.

Everyone is at risk for contracting a foodborne illness, but some people are more susceptible than others. Those at greater risk include infants, young children, pregnant women and their unborn babies, the elderly, and those with weakened immune systems, such as people with HIV/AIDS, cancer, diabetes, kidney disease, or transplant patients.<sup>7</sup> Luckily, most instances of foodborne illness can be prevented through measures such as proper processing, handling and cooking at high temperatures, which renders products safe for consumption. But even safely and properly cooked foods can become cross-contaminated if they come into contact with pathogens from raw meat.

Foodborne illnesses are *especially* prevalent in the poultry industry for one primary reason: chickens are much smaller than other types of livestock, such as cows or hogs. This means that the edible parts of a chicken are in much closer proximity to its intestines, where pathogenic bacteria are stored. During processing, the edible meat parts may come into contact with the fecal matter inside the intestines, which results in bacterial contamination of the meat. Therefore, poultry is much more susceptible to bacterial contamination than other types of meat.<sup>8</sup>

There are 31 pathogens that have been found to cause foodborne illnesses, and several are commonly associated with poultry. These pathogens include *Salmonella*, *Staphylococcus aureus*,

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<sup>6</sup> USDA Food Safety and Inspection Service. “Foodborne Illness: What Consumers Need to Know.” Updated May 2011.

<sup>7</sup> USDA Food Safety and Inspection Service. “Foodborne Illness: What Consumers Need to Know.” Updated May 2011.

<sup>8</sup> Greene, Jeanna. Interview by Melissa Jones via telephone. November 24, 2013.



*Campylobacter jejuni*, *Listeria monocytogenes*, and *Escherichia coli* (*E.coli*).<sup>9</sup> If a consumer ingests food that has been contaminated with these pathogenic bacteria, he or she may become ill. The two types of bacteria that have caused the most widespread and dangerous effects of foodborne illness within the poultry industry are *Salmonella* and *Campylobacter jejuni*.<sup>10</sup>

### *Salmonella and Campylobacter*

*Salmonella* bacteria are the most frequently reported cause of foodborne illness, not only within the poultry sector but also across the entire food industry in the United States. 42,000 cases of salmonellosis (foodborne illness caused by salmonella) are reported to the Center for Disease Control every year.<sup>11</sup> But many milder cases go undiagnosed or unreported, so the actual number may be up to 30 times greater than reported. Estimates from the Center for Disease Control cite numbers as high as 1.4 million people afflicted with salmonellosis every year. There are over 2,300 strains of *Salmonella*, and approximately 2,000 of them can cause human disease.<sup>12</sup> Symptoms of salmonellosis can be very serious. In fact, the Center for Disease Control estimates that 400 people actually die from acute salmonellosis every year.<sup>13</sup>

*Campylobacter* bacteria are the second most frequently reported cause of foodborne illness in the United States.<sup>14</sup> However, unlike *Salmonella*, reported cases of *Campylobacter* are

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<sup>9</sup> FOOD SAFETY AND INSPECTION SERVICE OF THE US DEPARTMENT OF AGRICULTURE. "Chicken from Farm to Table: Foodborne Organisms Associated with Chicken." Last modified August 5, 2013.

<http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/poultry-preparation/chicken-from-farm-to-table/>.

<sup>10</sup> USDA Food Safety and Inspection Service. "Foodborne Illness: What Consumers Need to Know." Updated May 2011.

<sup>11</sup> CENTER FOR DISEASE CONTROL AND PREVENTION. "What is Salmonellosis?" Updated April 5, 2012.

<http://www.cdc.gov/salmonella/general/>

<sup>12</sup> Id.

<sup>13</sup> CENTER FOR DISEASE CONTROL AND PREVENTION. "What is Salmonellosis?" Updated April 5, 2012.

<http://www.cdc.gov/salmonella/general/>

<sup>14</sup> CENTER FOR DISEASE CONTROL AND PREVENTION. "Campylobacter General Information." Updated April 18,

usually isolated and more sporadic, rather than being a part of a major outbreak. About 14 cases are diagnosed each year per 100,000 persons in the population; however, many more cases go undiagnosed and unreported. It is estimated that over 1.3 million people are affected by campylobacteriosis ever year.<sup>15</sup> Campylobacteriosis can also be fatal, and causes an estimated 124 deaths each year.<sup>16</sup> *Campylobacter* bacteria themselves are very fragile, especially compared to *Salmonella*; but this bacterium is potent. Fewer than 500 of the tiny bacteria, enough to fit inside one drop of raw chicken juice, are enough to make a person sick.<sup>17</sup> The bacteria are also widespread. In a 2011 study, *Campylobacter* was found on 47% (almost *half*) of raw chicken samples bought in grocery stores.<sup>18</sup>

Because the dangers and costs associated with foodborne pathogens are so significant, it is imperative that the American poultry industry do everything it can to reduce them in order to protect public health. This involves maintaining high standards for safety within the industry and implementing systems to help prevent outbreaks of foodborne pathogens before they begin.

### III. Current Poultry Regulation

Poultry regulation in the United States is facilitated not just through one central power, but through a variety of interconnected channels including national legislation, state legislation, and self-regulation by the poultry companies themselves. Each component plays an important

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2013. <http://www.cdc.gov/nczved/divisions/dfbmd/diseases/campylobacter/>

<sup>15</sup> Id.

<sup>16</sup> USDA Food Safety and Inspection Service. “*Campylobacter* Questions and Answers.” Revised August 2011.

<sup>17</sup> CENTER FOR DISEASE CONTROL AND PREVENTION. “Campylobacter General Information.” Updated April 18, 2013. <http://www.cdc.gov/nczved/divisions/dfbmd/diseases/campylobacter/>

<sup>18</sup> Id.

role in ensuring that the chicken products we buy from the grocery store are of good, safe, reliable quality.

The Food and Drug Administration of the United States (FDA) is responsible for overseeing all food safety in the United States except for meat, poultry, and eggs, which are regulated by the United States Department of Agriculture (USDA.) Within the USDA, an agency called the Food Safety and Inspection Service (FSIS) is responsible for ensuring the safety and wholesomeness of meat, poultry, and processed egg products, and verifying that they are labeled properly. According to the USDA, the poultry industry is accountable for producing safe food, and the government is responsible for conducting carcass by carcass inspection, setting appropriate food safety standards, verifying through inspection that those standards are met, and maintaining a strong enforcement program to deal with plants that do not meet regulatory standards.<sup>19</sup>

Under the Wholesome Poultry Products Act of 1968, all poultry products found in retail stores in the United States are either inspected by the USDA or by state systems that have standards equivalent to those of the federal government.<sup>20</sup> Following slaughter, each carcass and its internal organs are visually inspected for signs of disease or fecal contamination by “one or more” FSIS inspectors.

### **Poultry Products Inspection Act (PPIA)**

The Poultry Products Inspection Act (PPIA) was passed by Congress in 1957 to give the FSIS authority and responsibility to inspect and regulate poultry production in the United

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<sup>19</sup> *Slaughter Inspection 101*, Food Safety and Inspection Service of the US Department of Agriculture, <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/slaughter-inspection-101/slaughter-inspection-101> (last modified Aug. 9 2013).

<sup>20</sup> Poultry Products Inspection Act (1957) § 451, 454(a).

States.<sup>21</sup> This act contains regulation on inspection, sanitation, and labeling, among other aspects of poultry production. Under the PPIA, all raw poultry sold in interstate and foreign commerce (including imported products) must be inspected by the FSIS. The agency monitors poultry products after they leave the federally inspected plants, as well as all state inspection programs, which inspect poultry products sold only within the state in which they were produced.<sup>22</sup> The purpose of the PPIA is to prevent adulterated or misbranded poultry from being sold as food in the United States, and to ensure that poultry is slaughtered and processed under sanitary conditions.

### **HACCP: Hazard Analysis & Critical Control Points**

In 1997, the National Advisory Committee on Microbiological Criteria for Foods (NACMCF) adopted the HACCP (Hazard Analysis & Critical Control Points) Principles and Application Guidelines to mandate measures to target and reduce the presence of pathogenic organisms in meat and poultry products. These measures include scientific testing by FSIS inspectors to ensure that pathogen reduction performance standards are being met, microbial testing to verify process control for fecal contamination, written sanitation standard operating procedures, and mandatory creation of a HACCP system in all meat and poultry plants. The implementation of these procedures helps ensure the safety of the meat, poultry, and egg supply in the United States.

According to the NACMCF, “HACCP is a management system in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards. This

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<sup>21</sup> Poultry Products Inspection Act, 21 U.S.C. § 454(a) (1957).

<sup>22</sup> Poultry Products Inspection Act, 21 U.S.C. § 454 (1957).

includes raw material production, procurement and handling, manufacturing, distribution, and consumption of the finished product.”<sup>23</sup>

The HACCP system applies to all poultry processing establishments operating within the United States as well as to those that import to the United States. Under this system, one or more FSIS online inspector (stationed on the actual slaughter and processing line) must inspect every carcass with its viscera (internal organs) at a fixed point along the slaughter and evisceration line immediately following the separation of the viscera from the interior of the carcass. The online inspectors examine the carcass for visual defects, and direct employees of the establishment to take corrective measures if the bird needs to be trimmed or reprocessed. Online inspectors also identify and condemn carcasses with septicemic and toxemic animal diseases, which cannot be corrected through trimming or reprocessing. Establishment personnel then dispose of the condemned carcass under FSIS supervision. Every establishment must also reassess the adequacy of its HACCP plan at least once annually to make sure it is functioning as effectively as possible.<sup>24</sup>

## **IV. A Changing Industry**

In 2011, President Barack Obama signed into effect through the FDA an act entitled the “Food Safety Modernization Act,” which has been touted as the most sweeping reform of food safety laws in American in over 70 years.<sup>25</sup> The purpose of this act was to ensure that the U.S.

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<sup>23</sup> NATIONAL ADVISORY COMMITTEE ON MICROBIOLOGICAL CRITERIA FOR FOODS. “HACCP Principles & Application Guidelines.” August 14, 1997.  
<http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006801.htm>

<sup>24</sup> Id.

food supply is safe by shifting the focus of federal regulation from *responding* to contamination to *preventing* it from happening in the first place. However, because the FDA created this act, it does not apply to the meat, egg, or poultry industries. In order to fully protect public health and guarantee the safest animal byproducts possible, it is imperative that the USDA also conducts a similar shift in focus for the meat, poultry, and egg industries away from *responding* to contamination to actually *preventing* it instead.

### **Modernization of Poultry Slaughter Inspection (Proposed Rule)**

In January of 2012, the Food Safety and Inspection Service of the USDA proposed a piece of legislation called “Modernization of Poultry Slaughter Inspection.” This proposed rule is a result of President Obama’s January 2011 Executive Order on Improving Regulation and Regulatory Review, which asked agencies to review existing regulations that might be outdated or ineffective, and modify or streamline them accordingly. During its investigation, the FSIS found some areas of poultry regulation that it believed could be improved by modification, and this “proposed rule” was the result. The ultimate goals of these proposed changes are: to improve food safety and the effectiveness of poultry slaughter inspection systems, to remove unnecessary regulatory obstacles to innovation, to make better use of the agency’s resources, and to save tax payers \$80 million through elimination of over 800 inspector positions.<sup>26</sup>

The new proposed inspection system would replace existing systems, and would require establishments to choose whether to operate under this new system or stick with the old systems.

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<sup>25</sup> *Food Safety Legislation Key Facts*, U.S. FOOD AND DRUG ADMINISTRATION <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm237934.htm> (Last modified March 18, 2013).

<sup>26</sup> Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012).

It also includes some changes that would apply to the entire industry, regardless of the inspection system each company chooses to use. Some key elements of this proposal include:

- ❖ Requiring company personnel to conduct initial sorting activities before FSIS conducts inspection.
- ❖ Reducing the number of FSIS inspectors from “one or more” to only one online inspector at the end of each line, and one offline inspector conducting microbial testing.
- ❖ Permitting faster line speeds than currently allowed (up to 175 birds/minute versus 145, the current limit.)
- ❖ Removing existing Finished Product Standards and replacing them with a requirement that participating establishments maintain records to document that their products meet the regulatory definition of “ready-to-cook poultry.”<sup>27</sup>

According to the FSIS, the current inspection protocol was established long ago when visual inspection was the primary means of identifying potentially contaminated birds, which is why the online inspectors are so heavily involved with preliminary sorting of healthy carcasses from visibly contaminated carcasses under the current system.<sup>28</sup> But as technology has developed, the industry gained access to much more advanced scientific methods for identifying pathogens in poultry, including a quick test for *Salmonella* that can be conducted in the establishment’s own labs in a matter of minutes.<sup>29</sup> So by requiring company personnel to complete the initial sorting tasks before the birds reach the inspector, the new system will greatly reduce the number of potentially contaminated carcasses the FSIS inspector has to weed out. According to the USDA, this reallocation of resources will save the inspectors time and energy, and greatly increase the efficiency of the entire process.<sup>30</sup> More importantly, this change will allow FSIS inspectors to focus more heavily on scientific microbial inspection. The FSIS believes that “reallocating inspection resources currently dedicated to online inspection under the

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<sup>27</sup> Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4408 (proposed Jan. 27, 2012).

<sup>28</sup> Id. at p. 4413 (II)(a).

<sup>29</sup> Telephone Interview with Jeanna Grenne (Nov. 24, 2013).

<sup>30</sup> Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. at 4448 (29)(e).

existing inspection systems to offline, food safety related inspection activities, such as increased HACCP verification, sanitation SOP verification, pathogen sampling, and Food Safety Assessments, could potentially reduce pathogen levels,” which is the main goal of any inspection procedure.<sup>31</sup> If these claims are true, this new proposed inspection system could significantly help the American poultry industry shift its focus away from responding to contamination to actually preventing it.

### **HACCP Inspection Models Project (HIMP) and HIMP Report**

To test the effects of these proposed changes, the Food Safety and Inspection Service of the USDA implemented a pilot program called “HACCP Inspection Models Project,” or “HIMP” in 1998. Twenty young chicken slaughter establishments were chosen to test out the new system, and the results were compared with 64 non-HIMP establishments comparable to the test factories in terms of production volume, line speed, and geographical distribution.<sup>32</sup> The test establishments implemented all the changes proposed in the Modernization of Poultry Slaughter Inspection proposed rule, and the results were presented in the “HIMP Report,” published by the Food Safety and Inspection Services agency.

According to the HIMP Report, far fewer contaminated birds in HIMP establishments ever made it to the FSIS inspector at the end of the processing line, because the company’s employees had already taken care of most of the preliminary sorting duties.<sup>33</sup> The HIMP report claims that HIMP establishments had about half the rate of visible fecal material contamination

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<sup>31</sup> Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. at 4410-4411.

<sup>32</sup> United States Department of Agriculture Food Safety and Inspection Service. “Evaluation of HACCP Inspection Models Project (HIMP).” Pgs. 11-12, Section 2.3: “Selection of Non-HIMP Comparison Establishments.” August 2011.

<sup>33</sup> Id at page 15, Section 3.2: “Verification by Offline Inspectors of the Establishment Executing its HIMP Process Control Plan under which Establishment Employees Sort Acceptable and Unacceptable Carcasses and Parts.”



as non-HIMP establishments.<sup>34</sup> This is important, because fecal contamination of poultry is the primary cause of foodborne illnesses such as *Salmonella* and *Campylobacter*. In fact, *Salmonella* positive rates in HIMP establishments were only about 80% as high as those of non-HIMP establishments, as reported by the FSIS.<sup>35</sup> Furthermore, increasing line speed was not seen to have a statistically significant impact on rates of *Salmonella* contamination.<sup>36</sup> The findings presented in this report support the notion that inspectors in HIMP establishments were able to inspect the carcasses properly, and were better able to identify contaminated or “adulterated” carcasses than those in non-HIMP establishments.

Because online inspectors at the HIMP establishments were given less visual inspection sorting duties, more effort was directed to the offline microbial scientific testing, which according to leading industry expert Dr. Jeanna Wilson, professor of Poultry Science at the University of Georgia, is the best way to prevent foodborne illnesses and protect public health.<sup>37</sup> FSIS inspectors at HIMP establishments were able to perform an average of 14,135 offline verification inspections in a year, as compared to the average 8,724 offline inspections at non-HIMP establishments included in the study.<sup>38</sup> This increased level of inspection insures that HIMP establishments continuously satisfy food safety performance standards and HACCP regulations, thereby creating a safer final product for consumers. So according to the HIMP Report, the proposed rule does seem to accomplish its goals of improving food safety and effectiveness of poultry slaughter inspection systems, removing unnecessary regulatory obstacles to innovation, saving money, and making better use of the agency’s resources.

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<sup>34</sup> Id at page 21, Section 3.3.3: “Fecal Contamination.”

<sup>35</sup> United States Department of Agriculture Food Safety and Inspection Service. “Evaluation of HACCP Inspection Models Project (HIMP).” Pg. 26, Table 3-12: “Salmonella Percent Positive Rates for HIMP and Non-HIMP Broiler Establishments.” August 2011.

<sup>36</sup> Id. At page 36, Section 5.0: “Conclusions.”

<sup>37</sup> Greene, Jeanna. Interview by Melissa Jones via telephone. November 24, 2013.

<sup>38</sup> Id at page 19, Section 3.3.1: “Offline Inspection Procedures Performed.”

## Responses to HIMP Report

The U.S. Governmental Accountability Office (GAO) responded quite critically to the HIMP Report, recognizing several strengths but also pointing out several crucial design and methodology weaknesses that compromised the overall validity and reliability of the program's results. First, the report used only two 2-year periods of experimental data rather than the entire duration of the pilot project of more than 10 years. Next, the 5 turkey plants included in the pilot study were not reported on at all, due to the small sample size. Yet despite this fact, the USDA claimed that its proposed rule was based on experience with both young chicken *and* young turkey plants. This misrepresentation of data has kept stakeholders from gaining complete and accurate information to make fully informed comments on the proposed rule.<sup>39</sup>

The GAO also identified strengths and weaknesses of the HIMP pilot program based on the views cited most frequently by 11 key stakeholder groups involved representing industry, labor, consumer advocacy, and animal welfare. The strengths identified were an increase in flexibility and responsibility for plants to ensure food safety and quality, a greater emphasis on food safety activities performed by FSIS inspectors, potential job creation, and increased production.<sup>40</sup> The weaknesses identified by the GAO included a lack of standardization among plant employee training, concern that faster line speeds might pose a risk to worker safety, and decreased ability for workers to spot contaminated carcasses at high speeds. GAO also referenced potential conflicts of interest for plant employees sorting the carcasses, decreased ability to monitor plant compliance against the zero-tolerance policy for fecal contamination,

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<sup>39</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE. "Food Safety: More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections." August 2013. Report No. GAO-13-775. <http://www.gao.gov/assets/660/657144.pdf>.

<sup>40</sup> Id at page 18.

insufficient data to support claims of lower contamination rates in the pilot program, and increased costs to the poultry industry.<sup>41</sup>

The GAO made recommendations to the Secretary of Agriculture that the FSIS should do two things to improve the validity of its study. First, it should disclose to the public *all* information used to create the regulations stipulated in the Modernization of Poultry Slaughter Inspection proposed rule. Second, the FSIS should collect and analyze all information necessary to properly evaluate its other pilot programs while they are still in effect.<sup>42</sup>

Another notable opponent of the proposed rule has been Food & Water Watch, a public interest organization that works to ensure that the food, water, and fish consumed by the American people are safe, accessible, and sustainably produced. This group expressed concerns similar to those outlined in the GAO investigation. It suggested that excessive line speeds promoted by these changes combined with lack of training could contribute to high amounts of error in the inspection process.<sup>43</sup> Next, it expressed concern that the decrease in inspection would be remedied by an increase in the use of chemicals, which is stipulated as a proposed change in the Modernization of Poultry Slaughter Inspection proposed rule. Third, the group pointed out that the proposed rule does not require company employees to receive any training or prove proficiency in performing duties that are normally performed by trained government inspectors. Food & Water Watch also asserted that privatization of the inspection industry could create misaligned incentives for workers, who might want to protect public health but also want to keep

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<sup>41</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE. "Food Safety: More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections." August 2013. GAO-13-775. Pages 19-22. <http://www.gao.gov/assets/660/657144.pdf>.

<sup>42</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE. "Food Safety: More Disclosure and Data Needed to Clarify Impact of Changes to Poultry and Hog Inspections." August 2013. GAO-13-775. Pg. 28. <http://www.gao.gov/assets/660/657144.pdf>.

<sup>43</sup> Press Release: "Privatized Meat Inspection Experiment Jeopardizes Food Safety." *Food and Water Watch*. March 7<sup>th</sup>, 2012. <http://www.foodandwaterwatch.org/pressreleases/privatized-meat-inspection-experiment-jeopardizes-food-safety/>

their jobs. Finally, the group suggested that the increased speeds might have adverse effects on worker safety. Ultimately, Food & Water Watch believed the proposed changes were more about cutting costs than modernizing the industry and protecting public health.<sup>44</sup>

### Counterarguments In Favor of HIMP

The USDA accepted public comments and questions about the proposed rule, and then responded to stated questions and concerns in a Federal Register notice. It responded to concerns over the reduction in online inspectors by asserting that since fewer potentially contaminated birds would ever reach the FSIS inspectors, fewer inspectors would be needed. It also reinforced the agency's ability to take regulatory action against establishments that did not prove their methods were effective in reducing pathogens. This regulatory power includes the ability for the FSIS online inspector to stop the entire processing line if necessary to prevent contaminated carcasses from entering the chiller.<sup>45</sup> In response to the lack of a mandate for the frequency of testing, the FSIS explained that an adequate amount of testing would vary from factory to factory based on the company's production volume, source of their flocks, slaughter and dressing processes, and consistency of their scientific microbial testing over time. When asked about the standards to which facilities would be held, the FSIS explained that it has a "zero-tolerance policy" for fecal contamination, because if any contamination is found, it would indicate that the methods being used to prevent foodborne illnesses at that factory are not sufficient.<sup>46</sup> In response to worker safety concerns, FSIS asserted that it was conducting a full investigation into worker

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<sup>44</sup> Wenonah Hauter. "Mr. Almanza: You Missed Some Key Facts," *The Huffington Post Blog*, April 17, 2012, [http://www.huffingtonpost.com/wenonah-hauter/chicken-inspection-policy-critique\\_b\\_1431619.html](http://www.huffingtonpost.com/wenonah-hauter/chicken-inspection-policy-critique_b_1431619.html).

<sup>45</sup> Federal Register Volume 77, No. 81. "Modernization of Poultry Slaughter Inspection: Summary of Issues Raised and FSIS Response." 9 CFR Parts 381 and 500. Docket No. FSIS-2011-0012. April 26, 2012.

<sup>46</sup> Federal Register Volume 77, No. 81. "Modernization of Poultry Slaughter Inspection: Summary of Issues Raised and FSIS Response." 9 CFR Parts 381 and 500. Docket No. FSIS-2011-0012. April 26, 2012.

safety implications, and would ensure that the process was safe for workers before implementing the program across the entire poultry industry.<sup>47</sup>

Some industry experts argue that company employees might actually be *more* effective at sorting potentially healthy carcasses from contaminated/diseased carcasses than FSIS employees.<sup>48</sup> FSIS inspectors are trained by the Department of Agriculture, but their affiliation with the company in which they are working is neutral. Because the success of a poultry manufacturer depends so heavily on the safety of the products it produces, *Salmonella* outbreaks linked back to a specific manufacturer can spell disaster for the company's reputation and financial success. Therefore, company employees have direct motivation to ensure the safety and wholesomeness of the products they inspect, in order to protect the best interests of their employer. Neutral government-appointed inspectors might not have this same direct motivation. Furthermore, shifting the initial visual inspection duties to these company employees would create opportunities for FSIS inspectors to be trained in depth on scientific microbial testing procedures. When combined, this reallocation of inspection resources could help to ensure that each party involved is knowledgeable, highly trained, and intrinsically motivated to perform its specific task as effectively as possible, thus increasing the effectiveness of the entire inspection process.

The overarching conflict of this proposed rule boils down to whether tightly controlled governmental regulation or highly supervised self-regulation in the poultry industry would be more effective at reducing instances of foodborne illness and protecting public health.

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<sup>47</sup> Id.

<sup>48</sup> Greene, Jeanna. Interview by Melissa Jones via telephone. November 24, 2013.

## **V. Analysis and Conclusions**

With an industry as far-reaching, powerful, and potentially dangerous as the American poultry industry, it is crucial that there are systems in place to ensure that poultry establishments are producing safe products and to hold them accountable for their actions. What is less clear, however, is the extent to which those regulations should be mandated by federal and state governments or be developed by the companies themselves. In the past century, the U.S. poultry industry has become increasingly more regulated by the federal government, which aligns with the trends of poultry industries in other developed countries. However, there continue to be outbreaks of foodborne illness in the United States, and with the emergence of antibiotic resistant strains of these bacteria, the situation becomes even more dangerous. That is why it is crucial, now more than ever, that the USDA finds a way to best maximize safe practices within the industry, safeguard against outbreaks, and protect public health.

### **Implications of Governmental Regulation**

According to the PPIA, “unwholesome, adulterated, or misbranded poultry products” hurt customers, hurt the poultry producers and processors, destroy confidence in markets for properly regulated poultry products, and are injurious to the public welfare.<sup>49</sup> Government regulation seeks to prevent and combat these negative side effects, and to preserve not only the poultry industry itself, but also public health. Standardizing legal determinants for factory procedures, permissible contamination percentages, and inspection criteria make it easy for the government to monitor companies and hold them accountable when they do not meet standards. One place that more governmental regulation could be very beneficial in the poultry industry is protecting animal rights and animal welfare. Chickens are not included under the Humane Methods of

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<sup>49</sup> Poultry Products Inspection Act (1957) § 451.

Slaughter Act because they are not considered to be “livestock.”<sup>50</sup> This is one opportunity where governmental regulation could have a beneficial impact on the entire poultry industry in the United States. Governmental regulation also protects the poultry industry against companies who are inclined to put their own profits ahead of the welfare of their customers. It creates a level of trust for consumers, and can be applied, monitored, and enforced at the industry-wide level.

But governmental regulation in the poultry industry also presents some drawbacks. Unnecessary regulation can slow down the process of poultry production and make it less efficient. It can discourage innovation and keep companies from discovering methods that could work even better for them and produce safer products. Using one set criteria for all poultry establishments can also be problematic, because plants of different size, geographical location, and ownership all operate differently, and have different optimal conditions of operation. Furthermore, implementing regulation on aspects such as frequency of inspection can potentially limit the efforts of a company to ensure the safety of its product, asking it to simply fill a quota rather than to continually seek operational improvements.

### Implications of Self-Regulation

One benefit of self-regulation is that it would allow establishments more flexibility to find the most effective ways to ensure food safety and quality. Success in the poultry industry depends almost entirely on producing a safe product.<sup>51</sup> As illustrated by the fallouts of various *Salmonella* outbreaks, producing an unsafe product for consumers can spell disaster for poultry companies. Another thing to keep in mind is that these companies have intrinsic motivation to produce a healthy product, because they and their families consume these products as well. The

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<sup>50</sup> 48 U.S.C. “Humane Methods of Livestock Slaughter.” § 1901, Sec. 904 (1) (1958).

<sup>51</sup> Greene, Jeanna. Interview by Melissa Jones via telephone. November 24, 2013.

USDA understands that while profit and efficiency are probably the biggest motivators for these poultry companies, they cannot have either without producing a safe, high quality product for their customers. Furthermore, the shift in emphasis from visual inspection to scientific testing that these proposed changes in regulation would allow is probably the most important and beneficial potential result of deregulation in the poultry industry. However, the FSIS would need to thoroughly monitor the safety programs of these establishments and verify that they are producing positive results in order for these changes to be effective.

There are also a lot of risks and drawbacks that could accompany the adoption of the Modernization of Poultry Slaughter Inspection proposed rule. The first is the lack of necessity for pre-approval of HACCP plans before implementation. It is true that there is currently no pre-approval required for HACCP plans, but if the proposed changes are enacted, these HACCP plans will essentially be the primary regulations on the poultry industry. Without pre-approval, it will be hard to know if their plans are sufficient to protect public health until they are put into action. Additionally, since no specific training is required for workers, there is no way to guarantee that the company-appointed inspectors will be highly trained and knowledgeable about their tasks. It will also be more difficult to enforce regulations that companies created for themselves, and there is always the potential that a company might become lazy and put profits ahead of public health. There would need to be a substantial increase in the amount of government monitoring of company procedures and testing results to ensure that poultry establishments are doing what they need to be doing.

## **Conclusions and Recommendations**

Neither complete governmental regulation nor complete self-regulation seems to be ideal for the poultry industry, but there may be a balance in between the two extremes that would be a



significant improvement over the current system. Given the fact that the success of poultry companies is directly tied to the safety of their products, a shift to a more self-regulated approach might actually be beneficial for this industry. Allowing the companies to establish their own best practices for slaughter and inspection could promote innovation and allow the industry to discover new ways to reduce *Salmonella* and *Campylobacter* in their products. However, close governmental monitoring to ensure that companies are sticking to their HACCP plans and achieving results would be absolutely crucial to ensuring the success of this system.

There are several components of the Modernization of Poultry Slaughter Inspection proposed rule that seem more problematic than beneficial, such as the lack of standardization in training methods, lack of required maximum thresholds for *Salmonella* and *Campylobacter* contamination levels, and the increased line speeds with regards to worker safety concerns. The benefits of restructuring the inspection process need to be balanced by building in safety precautions against the potential consequences of deregulation. Building in legal protections for workers could guard against unsafe inspection behavior due to conflicts of interests with employers. Exploring alternatives for reducing the spread of pathogens in chickens before slaughter could also effectively reduce numbers of foodborne illnesses, and increasing requirements for scientific testing could lead to innovation and increased public safety. Finally, a renewed emphasis on public education about the importance of safe food handling procedures is absolutely critical, regardless of regulatory structure. There are many possible ways to create a safer poultry industry for consumers, and increased governmental regulation is only one of those possible solutions.

Unfortunately, it is unlikely that the poultry industry will ever be able to fully rid itself of foodborne illness-causing pathogens, because they are a part of nature. If we are ever able to rid

the industry of the 2 biggest strains of *Salmonella*, it is almost certain that another strain would rise to take their place. The best thing the American poultry industry can do is to reduce contamination wherever possible throughout the entire process from farm to table. Focusing on prevention and scientific testing can help ensure that the chicken on the shelf is as safe as possible, and educating the public about safe handling and cooking techniques can help prevent any remaining bacteria from making people sick. It will take a combination of governmental regulation and close monitoring, conscientious self-regulation on the part of the poultry companies, and public education efforts to achieve a significant reduction in the amount of foodborne illnesses in America, and to ultimately improve public health.

## Are You My Mother? Gestational surrogacy and the determination of legal maternity

Mark Weingarten

In 1985, obstetrician Dr. Wulf Utian and his colleagues reported the first known example of a live birth following *in vitro* fertilization and the subsequent implantation of an embryo into an unrelated surrogate third party.<sup>52</sup> In contrast to traditional surrogacy, in which the woman who donates the ovum also bears the fetus, gestational surrogacy differs in that one woman (usually the intended parent) donates the ovum while another gestates it. Surrogates are usually sought when a couple is able to produce viable gametes, but the woman is unable to bear a child. Potential reasons for this inability include a history of spontaneous abortions, congenital absence of the womb, surgical removal of the womb,<sup>53</sup> or the presence of a thin uterine wall that could rupture during the gestational period as a result of the strains placed on it by the fetus.<sup>54</sup> In those instances when a couple decides to forgo natural gestation in favor of gestational surrogacy, their gametes are fertilized *in vitro*. Subsequently, the pre-embryo is implanted into the uterus of a woman who, until this point, has had no direct biological connection to the offspring. This “gestational surrogate” maintains the fetus until birth, at which time its “intended parents” assume parenthood.<sup>55, 56</sup>

The successful delivery of a child by a gestational surrogate prompted a maelstrom of considerations which question the legality of such a procedure. Many of these considerations

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<sup>52</sup> W.H. Utian, et al., *Successful Pregnancy After In Vitro Fertilization and Embryo Transfer From an Infertile Woman to a Surrogate*, NEW ENGLAND JOURNAL OF MEDICINE, 313:21, 1351-2 (1985).

<sup>53</sup> Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, THEORETICAL MEDICINE AND BIOETHICS, 21: 154 (2000).

<sup>54</sup> ROBERT M. VEATCH, AMY M. HADDAD, AND DAN C. ENGLISH, CASE STUDIES IN BIOMEDICAL ETHICS 216, Oxford UP, (2010).

<sup>55</sup> *Id.* at 155.

<sup>56</sup> Todd Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, ANNALS OF HEALTH LAW, Volume 5: 194 (1996).

revolve around the rights of the surrogate, and whether her involvement is ethical. In order to address some of these questions, it is critical to first establish the definition of legal maternity. In this case, maternity could either be granted to the ovum donor, or to the surrogate. Ascertaining legal maternity would advance resolutions regarding which party should receive custody in a contested surrogacy arrangement, which party is financially responsible for the child, and whether gestational surrogates can receive payment for their services.

Following nearly thirty years of debate, both state and federal law remain divided on the definition of legal maternity and proper treatment of surrogates.<sup>57</sup> Regulation of surrogacy has largely been left to individual states. It is interesting to note that some states may not even consider maternal identity as a necessary factor in allocating custody for a child. This mentality is reflected in the case of *Guardianship of Phillip Becker*, a non-surrogacy custody dispute in which a couple who visited and cared for an institutionalized minor with down-syndrome were awarded custody and the ability to make medical decisions for the child that overturned the decision of the biological parents. The Court recognized that the non-biological parents had become the “psychological parents” of the child, and thus could assume the parental role, in spite of biological parental objections.<sup>58</sup> While this case is distinct from surrogacy in multiple ways, it is important in that it determines parenthood by the “best interests of the child.”

This idea is also partially reflected in the United States Supreme Court decision in *Lehr v. Robinson*. In this case, the majority of the Court concluded that if a parent:

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<sup>57</sup> Michael J. Broyde, *The Establishment of Maternity & Paternity in Jewish and American Law*, NATIONAL JEWISH LAW REVIEW. III: 117-158 (1988).

<sup>58</sup> ROBERT M. VEATCH, AMY M. HADDAD, AND DAN C. ENGLISH, CASE STUDIES IN BIOMEDICAL ETHICS 405-407, Oxford UP, (2010).

Grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.<sup>59</sup>

In that case, the father had abandoned his child at her birth and had not supported her financially. The Supreme Court ruled that the state was not required to inform him of adoption proceedings.<sup>60</sup> However, the Court's logic in *Lehr* may be problematic if extended to judicial ability to decide parental identity in cases where both parties desire the child, such as in surrogacy disputes. Indicating that parental obligations are not completely based on biological factors mitigates the absolute responsibility of biological parents toward the children that they create. In addition, such reasoning may enable a court to temper any contracts or efforts on behalf of both surrogates and ovum donors with its own evaluation of the child's best interests. This idea, as applied to surrogacy, was rejected in state district courts in both *McDonald v. McDonald* and in *Johnson v. Calvert* as it raised "the specter of government interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."<sup>61</sup>

Other legal options for determining maternity focus on the intent of the parties as indicated in the surrogacy agreement.<sup>62</sup> However, this idea was rejected in *Belsito v. Clark* on the basis that it allows one to "surrender. . . parental rights by agreement," and that it permits the

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<sup>59</sup> *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

<sup>60</sup> Marina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, CARDOZO LAW REVIEW. 17, 521 (1995-1996).

<sup>61</sup> *Johnson v. Calvert*, 851 P. 2d n.10, 776, 782 (Cal.1993).

<sup>62</sup> *McDonald v. McDonald*, 608 N.Y.S. 2d 477 (1936).

“circumvention of established adoption.”<sup>63</sup> The Court in *Belsito* also established the genetic donor of the ovum as the legal mother, highlighting the significance of genetic contribution in establishing maternity.<sup>64</sup> In that case however, the Court failed to address the role of gestation in determining motherhood.<sup>65</sup> Perhaps this was because in *Belsito*, the surrogate mother never sought to be named as the parent or to be granted custody.<sup>66</sup> Therefore, although the Court in *Belsito* took steps to define the limits of surrogacy contracts, it did not issue a clear directive for defining maternity in cases of gestational surrogacy.

While few arguments are posed to counterbalance the ovum donor’s biological link to the child, studies should be undertaken to investigate whether the gestational surrogate contributes significantly to the fetus’s physiological and genetic makeup. If the surrogate’s genetic material is found to catalyze extensive epigenetic changes in the fetus, this may impact the future definition of maternity. Perhaps the gestational surrogate should then be deemed more worthy of maternal status than the ovum donor because she has a genetic and gestational role in the creation of the fetus. The ovum donor’s case is solely predicated on the donation of her egg and the surrogacy agreement in which the surrogate consents to the transference of custody and maternal rights of the future child to the ovum donor. However, as illustrated by *Belsito*, such a transaction cannot effect a transfer of maternal identity, and thus is irrelevant to its definition. This leaves the ovum donor with the sole claim of genetic contribution to the child. This claim would be countered by a genetic connection of the surrogate. The surrogate’s claim to maternity is also bolstered by the Uniform Parentage Act of 1987 which states that “the parent and child

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<sup>63</sup> *Belsito v. Clark*, 644 N.E. 2d, Ohio ct. C.P.P. Div., 765 (1994).

<sup>64</sup> Marina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, CARDOZO LAW REVIEW., 517 (1995-1996).

<sup>65</sup> *Id.*

<sup>66</sup> *Belsito v. Clark*, 644 N.E. 2d, Ohio ct. C.P.P. Div., 767 (1994).

relationship between a child and...the natural mother may be established by proof of her having given birth to the child."<sup>67,68</sup> Regardless, even with such biological evidence, one could question creating an equivalency based on the surrogate's genetic contribution when such a contribution is still relatively miniscule when compared to that of the ovum donor.

It is essential to resolve whether legal maternity should be granted to the ovum donor or to the gestational surrogate in order to elucidate the protocol for the formulation of ethical surrogacy agreements. If the gestational surrogate is granted maternity, her relinquishment of custody should not be distinguished from the termination of custodial rights in adoptions. Therefore, a state that prohibits payment for a transfer of custody rights in adoptions should also prohibit payment in surrogacy agreements. Nevertheless it is possible to argue that the determinative facts of the typical gestational surrogacy case, which deal with a married couple seeking the services of a gestational surrogate, are distinguishable from a case of adoption. This is due to the fact that in the traditional case of gestational surrogacy, the ovum donor seeks joint custody with the undisputed legal father. This distinction led the Court in *Surrogate Parenting Associates, Inc. v. Kentucky*<sup>69</sup> to allow payment for gestational surrogates. A New York court expressed concurrence with this decision in *The Matter of the Adoption of Baby Girl L.J.*<sup>70</sup>

Articulating maternal identity would also provide clear direction for action in cases of a contested surrogacy contract, where both the ovum donor and gestational surrogate desire the child, or in those where neither desires the child. If the surrogate mother is the legal mother, she should not be compelled to honor the surrogacy contract. Therefore, if she were to renege and

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<sup>67</sup> Uniform Parentage Act § 3, 9B U.L.A. § 295, 297-298 (1987).

<sup>68</sup> Marina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, CARDOZO LAW REVIEW., 524 (1995-1996).

<sup>69</sup> *Surrogate Parenting Associates, Inc. v. Kentucky*, 704 S.W.2d 209 (Ky. 1986).

<sup>70</sup> 132 Misc. 2d 972, 505 N.Y.S.2d 813, Sur. Ct. (1986).

assert maternal rights to the child, she should be granted custody. However, the fact that the biological father is married to the ovum donor would likely create a variety of complications, including those with regards to allocation of child support and visitation rights.

The issue of maternal identity also arises with the question of whether surrogates can be prohibited from consuming alcohol or drugs throughout their pregnancy even if the law forbids remuneration for surrogacy. If the surrogate is not the parent, it could be argued that she must abide by the terms of the contract that she signed. This would make her analogous to an unpaid employee and should perhaps, borrowing a Talmudic legal concept, limit her responsibilities to damages that arose from direct negligence.<sup>71</sup> If the law allows surrogate remuneration, which is a more logical conclusion if we assume that the surrogate is not the legal mother, then perhaps the surrogate could be required to abide by stricter regulations. However, as noted above, if the surrogate mother is deemed the legal mother, then the stipulations of the contract would likely be negated, or transformed to those of standard adoption procedures to take effect following birth. As such, legal restrictions which do not apply to all pregnant women should also not apply to the surrogate.

Another ethical question that plagues every surrogacy agreement is whether the surrogate's decision to accept such an agreement was made with true consent or whether it violates her autonomy. It could be argued that only women who have given birth, and are familiar with the physiological and emotional stress as well as pain that such a process entails, should be allowed to serve as surrogates.<sup>72</sup> However, while this proposal simplifies matters, it

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<sup>71</sup> See Babylonian Talmud. *Tractate Bava Metzi'a*, 93a, and *Tractate Shevuos*, 49a.

<sup>72</sup> Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, THEORETICAL MEDICINE AND BIOETHICS, 21: 165 (2000).



does not completely resolve them. The complications of pregnancy and deliveries vary and often lack consistency. Multiple natural deliveries may be followed by a requisite caesarian section.

This author proposes that if ovum donors are recognized as the legal parents, they should pay for the surrogate's insurance to cover the duration of the pregnancy and any subsequent complications that may arise from it even after an extended period of time. In the event of death from birth complications, arrangements must also be made to remunerate and to support the surrogate's family. This remuneration should exist regardless of whether payment is permitted for the surrogate arrangement. Moreover, the insurance policy selected should either be that of the surrogate or of the ovum donors. The selection between the two policies should depend upon which policy is more inclusive. Thus, the donors will provide the surrogate with the care that they would have provided for themselves, or that the surrogate would have been willing to provide for herself should she have decided to become pregnant on her own. However, if the surrogate is granted maternity and reneges on the agreement to transfer parental rights to the ovum donor, it is logical to argue that the surrogate voids rights to such benefits, and even should be required to reimburse the ovum donor for previous medical care and any related payments.

In her article, "Ethical Issues in Gestational Surrogacy," Rosalie Ber argues that these aforementioned measures to protect surrogates are not sufficient. She asserts that "gestational surrogacy is a form of prostitution and slavery, exploitation of the poor and needy by those who are better off."<sup>73</sup> This idea is reflected by many.<sup>74,75</sup> However, the California Supreme Court has ruled:

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<sup>73</sup> *Id.* at 153.

<sup>74</sup> C. Shalev, *Halacha and Patriarchal Motherhood – an Anatomy of the New Israeli Surrogacy Law*, ISRAEL LAW REVIEW., 32:1, 51-50 (1998).

[There is] No proof that surrogacy contracts exploit poor women to a greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or other undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it.<sup>76</sup>

Furthermore, studies report a lack of anxiety and depression in surrogate mothers after giving birth and relinquishing the child.<sup>77</sup> Despite these findings, measures must be taken to assure the preservation of gestational surrogates' dignity. Such measures should include the surrogates' right to withdraw from the surrogacy agreement in order to procure rights to the unborn child, their ability to receive proper medical treatment, and the restriction of gestational surrogacy to situations where it is the only means for the couple to have a genetically related child.<sup>78</sup> Moreover, tests must be conducted on the embryo prior to implantation to confirm that it is not carrying any diseases that could be transmitted to the gestational surrogate.<sup>79</sup>

The morality of gestational surrogacy remains an extremely controversial topic. The ethical and moral quandaries that result from such a procedure are partially predicated upon the legal identity of the mother. If maternity is ceded to the gestational surrogate, any gestational surrogacy contract could be comparable to a case of an adoption. In these circumstances, surrogates should not be viewed as an external element of medical care. Acceptance of surrogate maternity would also necessitate that a higher standard of legal protection and parental rights be

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<sup>75</sup> Moshe Tendler, *Medical Ethics: A Compendium of Jewish Moral, Ethical and Religious Principles in Medical Practice*, NEW YORK FEDERATION ON JEWISH PHILANTHROPIES, 5<sup>TH</sup> ED., ADDENDUM 1981 (1975).

<sup>76</sup> *Johnson v. Calvert*, 851 P. 2d n.10, 776, 782 (Cal.1993).

<sup>77</sup> Peter Brinsden, *Gestational Surrogacy*, HUMAN REPRODUCTION UPDATE, 9:5, 487 (2003).

<sup>78</sup> Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, THEORETICAL MEDICINE AND BIOETHICS, 21: 166 (2000).

<sup>79</sup> Peter Brinsden, *Gestational Surrogacy*, HUMAN REPRODUCTION UPDATE, 9:5, 486 (2003).

granted to the gestational surrogate. Furthermore, surrogate maternity questions whether the surrogate could receive payment for participation in such an endeavor, which could be seen as selling one's child.<sup>80</sup> Nevertheless, even if one argues that the gestational surrogate is not legally the mother of the child she bears, ethical considerations mandate that proper insurance be provided, that the measures taken to maintain the surrogate's health parallel or exceed those that the biological mother would exercise, and that the surrogate be granted full protection and consideration under the law.

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<sup>80</sup> Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, THEORETICAL MEDICINE AND BIOETHICS, 21: 162 (2000).

# **The Persistence of Rape Culture in India**

**Kelly Sackley**

Of the over 600 charges of rape filed in Delhi in 2012, only one case resulted in a successful conviction by the Indian judicial system that year: the Nirbhaya case.<sup>81</sup> In late December 2012, a female paramedical student and her male friend boarded what seemed like a city bus after a day of classes. However, the ‘bus’ quickly proved to be a ruse. Shortly after boarding, a group of males began viciously assaulting the two students, eventually throwing the bloodied male out of the door of the moving bus. Focus then licentiously shifted to the female victim. For one hour, the bus from hell traversed the crowded streets of Delhi while the young men mercilessly gang-raped and beat the young woman before ejecting her damaged body from the vehicle. Five days later, the paramedical student, nicknamed Nirbhaya by the public, meaning ‘fearless one,’ died of intestinal damage and multi-organ failure in a local hospital.<sup>82</sup>

Shocked by this sadistic act, international outrage sparked a slew of protests regarding India’s trouble protecting its female population from sexual violence. Men and women alike picketed the parliament and left flowers at the hospital commemorating Nirbhaya.<sup>83</sup> For the first time in years, the women’s movement gained momentum, and the government responded to the public outcry for action with actual action—the Prime Minister fast-tracked the case, whose investigators soon managed to catch and convict each of the perpetrators.<sup>84</sup> Justice prevailed. Over the next few months, the Indian government further demonstrated its dedication to turning a corner in the battle against sexual violence by increasing the age of consent to 18, making

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<sup>81</sup> Sonia Faleiro, *The Unspeakable Truth About Rape in India*, N.Y. TIMES (Jan. 1, 2013), <http://www.nytimes.com/2013/01/02/opinion/the-unspeakable-truth-about-rape-in-india.html>.

<sup>82</sup> Ruchira Gupta, *Victims Blamed in India's Rape Culture*, CNN. N.p., 28 Aug. 2013, (3 Dec. 2013), <http://www.cnn.com/2013/08/27/opinion/gupta-india-rape-culture/>.

<sup>83</sup> Id.

<sup>84</sup> Sonia Faleiro, *The Unspeakable Truth About Rape in India*, N.Y. TIMES (Jan. 1, 2013), <http://www.nytimes.com/2013/01/02/opinion/the-unspeakable-truth-about-rape-in-india.html>.

voyeurism a criminal act, and clearing the Criminal Law (Amendment) Bill by March 21, 2013.<sup>85</sup> Hopeful Indian women, tired of the looming fear of sexual assault, imagined significant changes in society lying over the horizon thanks to the considerable lawmaking initiated by the case of Nirbhaya. But will the situation of women in India actually improve in the immediate future?

History indicates that it will not. The massive public indignation catalyzed by the brutal case of Nirbhaya is not as unique or potentially impactful as it might seem. In the 1970s, a similar case with a similar government reaction also occurred.<sup>86</sup> Mathura, a young unmarried woman, eloped with her lover, Ashok, to begin a new life together. Reported as kidnapped by her brother, Mathura and company were soon located and transported to the local police station for questioning. After settling the dispute, the on-call police officer requested that Mathura stay for further inquiries while her family returned home. At the mercy of the policeman, Mathura endured violent rape until her suspicious family came back to find her traumatized, injured body<sup>87</sup>. Consistent with the case of Nirbhaya, Mathura's plight incited a wave of anger that quickly overtook the country and spread around the world, especially when the judicial system acquitted her policeman-rapist due to debate over Mathura's non-consent.<sup>88</sup> The resulting fury receded when Parliament quickly introduced the Criminal Law (Amendment) Act of 1983, which established laws against custodial rape, and an amendment to the Indian Evidence Act of 1872 as flimsy proof of the government's effort to eradicate violence against women.<sup>89</sup>

Although the government instituted theoretical protection with additions to the Constitution, concrete protection of women remained worryingly obsolete. Freshly written laws

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<sup>85</sup> Id.

<sup>86</sup> Dipa Dube, *Rape Laws in India*, LEXISNEXIS BUTTERWORTHS INDIA, 2008 xxvii.

<sup>87</sup> JOSEPH SUAD, VOL. 2: FAMILY, LAW AND POLITICS 702-704 (Brill Academic Publishers) (2005).

<sup>88</sup> Dipa Dube, *Rape Laws in India*, LEXISNEXIS BUTTERWORTHS INDIA, 2008 xxvii at 69-97.

<sup>89</sup> Id.

and amendments failed to translate into the Indian reality. Between 1971 and 2005, reported cases of rape continued to increase exponentially, rising from 2487 complaints filed to a staggering 18,359.<sup>90</sup> Therefore, despite perceived attempts to improve, the government of India has failed in the past and continues to fail when it comes to keeping the female population safe from sexually based crime.<sup>91</sup> Why is preventing and punishing rape so difficult in Indian society? According to research, the perpetuated lack of protection and justice for women faced with sexual violence in India remains unchanged, even by articles of law, because of the underlying patriarchal culture, corruption of the legal system, and the declining emphasis on morality in Indian society.

If one were to imagine Indian society simply by reading the edicts outlined in the Indian Constitution, women would seem to occupy a slightly elevated position. Illustrating a push for gender parity, the preamble proposes, “the equality of status and equal opportunity” to all citizens.<sup>92</sup> A variety of special provisions also indicate a dedication to the advancement and safety of women, such as the reservation of a seat section for females on buses. However, the Constitution portrays a different India than does the harsh light of reality. In truth, these constitutional guarantees of gender equality remain unfulfilled.<sup>93</sup>

Despite efforts to move toward gender equality within the Constitution, the fact is that largely patriarchal beliefs have been the underpinning of Indian culture since the beginning. Due to resultantly traditional misogyny, the woman’s position in Indian society lies at the feet of men regardless of government intervention, which enables the act of rape through psychological

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<sup>90</sup> Id.

<sup>91</sup> Amritpal Kaur Bhati & Mahabir Singh Bhati, *Women Empowerment vs Anti-Rape Bill*, 3 GOLDEN RESEARCH THOUGHTS 2013, at 1-2.

<sup>92</sup> Ashish Shrivastava & N.S. Upadhyaya, *Sexual Harassment and Rape Laws in India - Analytical Study*, 3 INDIAN STREAMS RESEARCH JOURNAL 6, at 1.

<sup>93</sup> Id. at 5.

conditioning. Beginning at birth, many females receive a harsh education regarding inferiority to males. Passivity and subservience are hammered into the personalities of women as values most essential to happiness in an arranged marriage. The ideals of patriarchal society influence the male gender as well. While patriarchal rules reduce the power of women to almost nothing, the power of males increases substantially in all realms of life—relationships, business, politics, etc.<sup>94</sup> The corroboration of overwhelming chauvinism encourages men to believe in their own superiority, and by the time of adulthood, this belief is ingrained in their patterns of thought. Perceived superiority causes women to be objectified to the level of property or simple sex objects, and the accompanying encouragement of masculinity and aggression with women makes some men view the act of rape as less of a crime and more of a birthright (Saxepa 1995).

In addition to brewing a culture of condoned rape, the pillars of patriarchal society maximize the traumatic effects of rape on young Indian women, rendering justice nearly impossible to obtain. During childhood a woman's master is her father, but entering womanhood, a new master must be found: a husband. Without a husband, women in India rarely prosper due to limited opportunities. Coalescing with the idea of passivity of ideal Indian females, the most valuable attributes in a potential wife, according to tradition, are chastity and honor.<sup>95</sup> As a result of the strong bond between chastity, honor, and marriage, the act of rape devastates the life of a woman in India far more than imaginable. According to Indian perception, rape is the ultimate defilement of not only the female body, but also the soul.<sup>96</sup> Thus, honor and chastity are blackened—the woman is often considered unfit for marriage. Virtually her only path shatters into near impossibility, leaving her unable to move forward from trauma. Conditioned to believe

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<sup>94</sup> Sonia Faleiro, *The Unspeakable Truth About Rape in India*, N.Y. TIMES (Jan. 1, 2013), <http://www.nytimes.com/2013/01/02/opinion/the-unspeakable-truth-about-rape-in-india.html>.

<sup>95</sup> B.C. PATHAK, RAPE: LAW AND FLAW (Allahabad: Gogia Law House 1988).

<sup>96</sup> *Id.* at 13

her only purpose lies in being a good wife, the victim may experience unrelenting humiliation in society, of herself and her family, by remaining unmarried.<sup>97</sup> Primitively, the victim in some cases is forced to marry her rapist, the source of her destruction, as the devil's alternative to continuing to financially burden her family.

Concatenated with the damages of patriarchal society, the failure of the legal system to enforce government laws against assault with convictions of accused rapists significantly contributes to the powerlessness of female victims in India. When neither society nor the law stands up for women, potential sex offenders take advantage of the probability of committing a heinous crime without punishment.<sup>98</sup> The main contributors in the Indian legal system to the disappointment of female victims are demonstrated bias, a corrupted police force, poor standards of medical examination, and contemptible treatment in court.

Within the legal system, two types of bias significantly skew law enforcement's treatment of sexual violence cases: pro-male bias and pro-rich bias. Both biases cause a visibly crooked understanding of fairness in administering the law, negatively affecting the treatment of distressed victims. Influenced by the previously discussed system of patriarchy, the legal system innately reflects a bias toward the male gender through both the language of the law and individual officers of the law.<sup>99</sup>

The established laws against rape clearly indicate a prejudiced author through their incomplete definition of assault and ambiguous rules on corroboration of non-consent. According to Section 375 of the Indian Penal Code, 1860, an offense becomes rape if it falls

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<sup>97</sup> Id. at 19-59.

<sup>98</sup> Dipa Dube, *Rape Laws in India*, LEXISNEXIS BUTTERWORTHS INDIA, 2008 xxvii at 141-150.

<sup>99</sup> Id.



under any of these six conditions:<sup>100</sup>

- 1) Against her will
- 2) Without her consent
- 3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt
- 4) With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married
- 5) With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent
- 6) With or without her consent when she is under 18 years of age

*Explanation:* Penetration is sufficient to constitute the sexual intercourse necessary for rape

*Exception:* Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape

These inadequate restrictions simply do not consider or cover by law the various types of rape and sexual assault, leaving many victims without even the opportunity for justice. Firstly, requiring penile penetration of the vagina to constitute rape clearly does not encompass all subsections of this horrific offense. Victims of rape by forced penetration of objects, forced penetration by other body parts, forced penetration anally, or forced penetration orally cannot

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<sup>100</sup> B.C. PATHAK, RAPE: LAW AND FLAW 19-59 (Allahabad: Gogia Law House 1988).

seek legal action because Indian law does not recognize the rape, and therefore victims generally suffer in silence.<sup>101</sup> Further highlighting the law's incompleteness, these victims are not always grown women; in cases of child rape, the uneducated limitations to the definition of rape truly provide a source of devastating injustice, as in many incidents, penile penetration does not occur. Male victims of rape are also conspicuously unrecognized by the Indian Penal Code. Secondly, Section 375 of the Indian Penal Code rejects the idea of marital rape with an amended exception, illustrating the male author's belief in ownership of women through marriage.<sup>102</sup> As a result of this exclusion, many women in sexually abusive relationships cannot pursue divorce on grounds of rape or justice according to the law.

In addition, the ambiguous rules establishing consent in Section 375 create a substantial difficulty in proving non-consent, especially to a patriarchal audience. In many incidents, if a woman does not have physical marks or injuries implying resistance, then the woman's testimony is not sufficient to prove her non-consent to the sexual act.<sup>103</sup> For example, in the case of Mathura, a lack of blood or seminal fluid in the vagina implied to the court a lack of struggle against her accused attacker, therefore the judge ruled that, "the farthest one can go into believing her and the corroborative circumstances, would be the conclusion that while at the Police Station, she had sexual intercourse."<sup>104</sup> Therefore due to its relative ease, the defense most frequently endeavors to cast doubt upon the non-consent of the female party in order to acquit the accused. Unfortunately, due to unclear specifications, many loopholes in rape laws of consent exist, and this endeavor often proves successful.

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<sup>101</sup> Ashish Shrivastava & N.S. Upadhyaya, *Sexual Harassment and Rape Laws in India - Analytical Study*, 3 INDIAN STREAMS RESEARCH JOURNAL 6, at 3-4.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> PARAS DIWAN & PEEYUSHI DIWAN, *LAW RELATING TO DOWRY, DOWRY DEATHS, BRIDE BURNING, RAPE, AND RELATED OFFENCES* (Universal Law Pub) (1997).

<sup>104</sup> *Id.* at 192-195.

Reflecting the influence of a patriarchal society, the individual pro-male bias of law enforcement officers, ranging from police officers to Supreme Court justices, invariably distorts legal fairness against the interests of female victims of rape. At the outset, the curious attitude of law enforcement toward women claiming sexual violence is, “tinged with doubt, disbelief, [and] suspicion.”<sup>105</sup> Somehow, in a society that rejects raped women as defective, many judges and various upholders of the law remain naive enough to believe that women will often falsely report rape due to animosity toward the accused or confused hysteria.<sup>106</sup> Bringing cases of rape to light risks destroying the victim’s plans for marriage, ostracizing her from society, and alienating her family—so why would she file charges unless they were painfully true?<sup>107</sup> This illogical suspicion of the court confirms their inherent bias against female accusations of sexual violence. Further showing the disadvantage of these victims, some court medical advisors even go so far as to express suspicion of the *possibility* of rape by stating that, “[they] don’t see how a woman can be penetrated if she does not cooperate... [one] just can’t thread a moving needle.”<sup>108</sup>

The pro-male bias of law enforcement officers also prompts the blaming of the victim in incidents of assault, which results in irrelevant character assassination and a painful insult to the victim’s trauma. Verifying the deep roots of misogyny, prominent members of Parliament have responded to reporters regarding rape cases with the statement, “men will be men [if tempted].”<sup>109</sup> The attitude that culpability lies with the female victim if she goads men to abandon humanity for lust reveals the patriarchal encouragement of an animalistic urge for sex in Indian males. In the case of *Raju v. State of Karnataka*, two men offered a lone woman safe

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<sup>105</sup> *Id.* at 191-217.

<sup>106</sup> B.C. PATHAK, *RAPE: LAW AND FLAW* 19-59 (Allahabad: Gogia Law House 1988).

<sup>107</sup> SHOBHA SAXENA, *CRIMES AGAINST WOMEN AND PROTECTIVE LAWS* (DEEP & DEEP PUBLICATIONS) (1995).

<sup>108</sup> B.C. PATHAK, *RAPE: LAW AND FLAW* 74-103 (Allahabad: Gogia Law House 1988).

<sup>109</sup> Sonia Faleiro, *The Unspeakable Truth About Rape in India*, N.Y. TIMES (Jan. 1, 2013), <http://www.nytimes.com/2013/01/02/opinion/the-unspeakable-truth-about-rape-in-india.html>.

escort to her home for a wedding. Stopping in Hasan for the night, the group rented a single room, where the woman was to take the cot while the men sleep on the floor. During the course of the night, the two men took turns raping the woman until a hotel attendant discovered the scene. Although convicted by the trial court to serve seven years rigorous imprisonment, the Supreme Court later reduced the sentence, blaming the woman by stating that, “the prosecutrix herself caused inducement to the accused who was a young man and only on such inducement and under grave provocation he had lost the mental frame and in a fit of passion which was very natural in that age committed the offence of rape.”<sup>110</sup> Therefore, the court defended rape while also assassinating her character by implying intentional seduction of both men. Although the Supreme Court established in *State of Maharashtra v. Madhukar N. Madhikar* that the character of the victim cannot have anything to do with ruling, lower courts continue to malign rape victims to create an illusion of fault and to intimidate the victim into dropping the suit. The aspect of character most analyzed is the chastity of the woman in question. The assessment in court often involves humiliating questions about sexual history, although the victim’s history has nothing to do with the accused’s offense.<sup>111</sup> Almost as emotionally painful as the rape itself, according to women who have undergone trial, character assassination by the defense leaves the victim full of even more shame than before the trial.<sup>112</sup>

A pro-rich bias also affects lawmakers in decisions of guilt, resulting in the elite in India being found innocent more often than not even when guilty. In the case of Nirbhaya, Ram Singh, the head of the pack of rapists from the upper castes, told the men as they cleaned the bus of

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<sup>110</sup> Dipa Dube, *Rape Laws in India*, LEXISNEXIS BUTTERWORTHS INDIA, (69-115) (2008).

<sup>111</sup> SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) 334, 360 (1995).

<sup>112</sup> PARAS DIWAN & PEEYUSHI DIWAN, LAW RELATING TO DOWRY, DOWRY DEATHS, BRIDE BURNING, RAPE, AND RELATED OFFENCES (Universal Law Pub) 191-217 (1997).

blood, “not to worry, nothing will happen.”<sup>113</sup> While on this occasion this assertion proved false, on many other occasions in the past Singh’s belief in the shielding force of money and power have proved to be true. In the case of *Madan Gopal v. Naval*, a doctor confirmed to have raped a number of his young female patients was acquitted by a trial court on the basis of his high position in society.<sup>114</sup> The proclivity of the law toward the rich and socially elite often acts as a hindrance to the conviction of accused rapists.

Acting as the first defense, police hold the power to initiate investigations into sexual violence; however, corruption throughout the police system leaves women vulnerable to injustice. Well-known issues of police acceptance of bribery, connivance with the guilty, and the police-politician alliance have become major causes of unpunished crimes against women.<sup>115</sup> Bribery by the richer party in a criminal case often accompanies suspicious tampering or disappearance of evidence overnight, resulting in the disposal of a rape case. Additionally, police have been known to attempt to convince victims of sexual assault to refrain from lodging formal complaints, and even to flat-out refuse to report a crime by filing a First Information Report form.<sup>116</sup> This police resistance sometimes persuades women to forget the offense, meaning that the rape or assault goes unreported and uninvestigated. Adding to proof of corruption, the police-politician alliance is rumored to have played a part in the instigation of religious pogroms in Gujarat in recent years, which involved the rape of many Muslim women.<sup>117</sup> Clearly, the reliability and honesty of the police is in question. Increasing corruption has even led some police to indulge in the criminal activity of sexual violence due to their near-impervious position

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<sup>113</sup> Ruchira Gupta, *Challenging India’s Rape Culture*, THE HINDU. N.P. (13 Jan. 2013).

<sup>114</sup> Dipa Dube, *Rape Laws in India*, LEXISNEXIS BUTTERWORTHS INDIA (69-115) (2008).

<sup>115</sup> SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) (358-359) (1995).

<sup>116</sup> *Id.* at 334, 342, 349.

<sup>117</sup> JOSEPH SUAD, VOL. 2: FAMILY, LAW AND POLITICS 702-704 (Brill Academic Publishers) (702-704) (2005).

as keepers of the law. In February 1988, a large group of police allegedly raped two sisters, but the indiscretion was ‘solved’ when a female Member of Parliament offered the sisters compensation for their silence.<sup>118</sup> As a result of the unreliability of the police force, victims of sexual violence sometimes cannot even get past square one in reporting the crime.

Poor medical examination also contributes to the perpetuated injustice for female victims of sexual violence. Oftentimes, the medical examination does not occur within 24 hours, missing the peak of evidence usability, so the police and victim lose potential corroboration.<sup>119</sup> Doctors enlisted to perform medical examinations can be under qualified, meaning that their skills of detection of rape are merely preliminary. In fact, many unknowledgeable physicians believe that use of the ‘Two Finger Test’ of virginity and virtue is the most effective for determining probability of rape.<sup>120</sup> This presumption is false; the Two Finger Test has been proven unreliable in cases of rape and unnecessarily scarring for victims of recent sexual assault.<sup>121</sup> As a result of the medical examiner’s incompetence, victims of sexual violence are at risk of losing the opportunity for deserved justice.

When enduring the trial phase of a case, the assaulted woman is often mistreated by the court system. Again responding to the instilled patriarchy of Indian society, many times judges seem to take the side of the accused male by engineering excuses for their actions against the victim. Additionally, judges frequently display suspicion when noting the victim’s failure to immediately report to the police after assault, treating the delay as a ploy to manufacture a

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<sup>118</sup>SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) (331-358) (1995).

<sup>119</sup> PARAS DIWAN & PEEYUSHI DIWAN, LAW RELATING TO DOWRY, DOWRY DEATHS, BRIDE BURNING, RAPE, AND RELATED OFFENCES (Universal Law Pub) (191-217) (1997).

<sup>120</sup> Id.

<sup>121</sup> Id.

stronger story against the accused rather than a panic-stricken moment of hesitation.<sup>122</sup> Victims of sexual violence are forced to defend their story of suffering in order to substantiate their claim for an unsympathetic judge. Furthermore, the interpretation of sexual violence laws by the lower courts is increasingly misinformed and riddled with victim-blaming because of the limp arm of federal law, enabling women to be wrongly accused of character fault by a rogue lower court.<sup>123</sup> Finally, one of the worst mistreatments of the legal system is the obscene length of a trial and its expensive cost, usually too exorbitant for the average citizens to maintain for long. All of these limitations to the trial phase of a case decrease the number of convictions by setting the odds against a female victim of sexual violence.

The seemingly degenerating emphasis on morality throughout Indian society also contributes to the increasing number of sexual assault cases and the lack of justice for victims.<sup>124</sup> Due to the developing norm of crime without punishment, citizens over time become more daring in their criminal endeavors, leading to a decreasing spiral of ethics. The problem of decreasing integrity in Indian culture and its accompanying impact on sexual violence is caused by a series of combined issues: urbanization, alcoholism, sexually conservative parenting, and the negative example of the elite.

The formerly stringent Indian values have been convoluted by urbanization due to the social pressures in association with it—the urges to gain money and power.<sup>125</sup> In response to the pressure to attain wealth for status, women are sent out to find jobs even though the streets of big cities like Delhi are known to be unsafe for females, as anonymity provided by the urban

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<sup>122</sup> SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) (323-331, 337, 360) (1995).

<sup>123</sup> *Id.* at 331-338.

<sup>124</sup> PARAS DIWAN & PEEYUSHI DIWAN, LAW RELATING TO DOWRY, DOWRY DEATHS, BRIDE BURNING, RAPE, AND RELATED OFFENCES (Universal Law Pub) (191-217) (1997).

<sup>125</sup> SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) (358-359) (1995).

environment encourages crimes of sexual violence.<sup>126</sup> Tied to the squalor of urbanization, alcoholism also contributes to the increase of sexual violence due to decreased inhibition and self-control. The combination of urbanization and alcoholism places women in dangerous positions.

As a result of sexually conservative parenting, children find corrupted explanations in internet porn, of which India watches more than almost any country in the world.<sup>127</sup> Purportedly knowing nothing about the natural act of sex from their parents, children's exposure to an abundance of porn impresses indelible ideas onto a completely blank slate. The porn embodies a sexual education; however, the rampant promotion of violence and gang rape unfortunately gives children the wrong ideas. Eventually, as a result of the inability of parents to openly discuss sex with their children, violence towards women and sex become too closely associated to conceivably separate.<sup>128</sup> The culture of rape continues into the next generation.

The most perpetuating motivation behind the decline of morality and increasing number of sexual assault in India is the negative influence of the nefarious elite class projected onto the minds of the lower classes in the media. Politicians and business leaders associate an overzealous masculinity with success and are overwhelmingly corrupt in their dealings with women, which results in the movement toward aggression with females. For example, Former Prime Minister P.V. Narsimha Rao wrote in his biography *The Insider* that Congressional leaders would buy hookers during Congress Working Committee Sessions.<sup>129</sup> Prominent business leaders are also often seen gallivanting with paid escorts or saving their law-breaking sons from the charges of rape. When the law allows the elite to wiggle out of the consequences of rape, it implies to

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<sup>126</sup> MIKE DAVIS, *PLANET OF SLUMS* 158-159 (Verso.) (2006).

<sup>127</sup> Ruchira Gupta, *Challenging India's Rape Culture*, THE HINDU. N.P. (13 Jan. 2013).

<sup>128</sup> Id.

<sup>129</sup> Id.



society that rape can be committed without paying the price. Additionally, the elite's treatment of women like disposable sex toys impresses the categorization of women as objects upon society, influencing poor treatment and disregard for the humanity of women.<sup>130</sup> Objectification of women is further encouraged by the increasingly sexualized Hindi film genre, sensationalizing the new trend of sexual violence, crime, and brutality.<sup>131</sup> The example of the prominent upper class highlights the connection between power and property embedded in society. While the members of Parliament and the wealthy businessmen own their escorts and demonstrate their power, they encourage citizens to find their own power through aggressive property ownership.<sup>132</sup> The downward spiral of morality in Indian society leads to some of the public understanding the elite's interaction with women as encouragement of the deduction that, because paying for female companionship is not feasible, the act of rape will give the same fleeting feeling of both power and property experienced by upper class males.

In conclusion, although the massive public outcry, bolstering of the women's movement, and perceived shift toward change by the Indian government after the Nirbhaya case seems like the promise of an improving future regarding violence against women in the world's largest democracy, the same ingredients comprised a similar situation nearly fifty years ago over the Mathura case, after which nothing changed. Simply stacking more rape laws on top of the old ones did not prevent the continually increasing rate of rape in India in the 1980s, and alone it will not prevent the rate of rape from increasing today. In today's reality, this outdated patriarchal society encourages the suppression of women more than ever, influencing both the frequency of sexual violence inflicted upon subservient females and the legal system that is entrusted with

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<sup>130</sup> Id.

<sup>131</sup> SHOBHA SAXENA, CRIMES AGAINST WOMEN AND PROTECTIVE LAWS (DEEP & DEEP PUBLICATIONS) (366-367) (1995).

<sup>132</sup> B.C. PATHAK, RAPE: LAW AND FLAW 19-59 (Allahabad: Gogia Law House 1988).

punishing such heinous acts. Due to the old infection of misogyny, courtrooms remain prejudiced against women, and police are increasingly taking criminal liberties with female charges.<sup>133</sup> Maximizing the problem, the crumbling legal system and devolving Indian emphasis on the importance of morality render some males unfeeling, committing sexual violence due to the knowledge that punishment is unlikely.

The problem of sexual violence against women in India has festered and grown long enough. It is time for the terror of Indian women to end. In order to effect material improvement in the lives of women, the fundamental backbone of Indian society must be broken and rearranged to enable support of both sexes equally. If women are going to receive appropriate treatment by Indian society, immense and perhaps painful changes are necessary. However, by rehabilitating society's view of women and rape, strengthening sexual violence laws to close currently gaping loopholes, and overhauling the leadership of the country with individuals sympathetic to the mistreatment of women, the vulnerable existence of Indian women can be uplifted to one of empowerment.

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<sup>133</sup> PARAS DIWAN & PEEYUSHI DIWAN, LAW RELATING TO DOWRY, DOWRY DEATHS, BRIDE BURNING, RAPE, AND RELATED OFFENCES (Universal Law Pub) (191-217) (1997).