

***Are You My Mother?* Surrogacy and Love of Neighbor**

Gestational surrogacy, a contractual arrangement between commissioning parents and the woman who carries the baby in pregnancy and gives birth to the baby, is a growing practice. What's a Christian lawyer to think of this? Is surrogacy proper to the nature of human beings, who are embodied beings made in the image of God? What view of contracting and the human person does it presuppose? Is it conducive to human flourishing and love of neighbor?

I. Gestational Surrogacy 101

- How surrogacy works
Commissioning parents contract with a woman who, implanted with their genetic embryo by in vitro fertilization (IVF), carries the baby in pregnancy and gives birth to the baby.
- The market
 - 2022 valuation: \$14 billion
 - 2032 estimate: \$129 billion
 - Cost to commissioning parents
 - *cf.* Pay of surrogate women
- The people
 - Infertility and heartbreak
 - Longing for children
 - Are the kids alright?

II. Two Paradigms: Autonomy and Dualism

- **Autonomy**
 - Autonomy as the regnant view in contract law
If contract law used to be oriented toward virtue, now it's all about autonomy—parties' freedom of contract.
 - vs. Natural law and virtue
Law, including contract law, historically throughout Western legal thought was concerned with, and was oriented toward, virtue, *e.g.*, commutative justice and promise-keeping.

- Freedom vs. licentiousness
Freedom is now commonly understood as the unshackling of limits, being free from restraints. But traditionally, freedom has to do with one's free assent in choosing the good.

- **Dualism**

- Applying body–self dualism to the human person, Robert P. George explains that it is a form of Gnosticism in which

the material or bodily is inferior—if not a prison to escape, certainly a mere instrument to be manipulated to serve the goals of the “person,” understood as the spirit or mind or psyche. The self is a spiritual or mental substance; the body, its merely material vehicle. You and I, as persons, are identified entirely with the spirit or mind or psyche, and not at all (or in only the most highly attenuated sense) with the body that we occupy (or are somehow “associated with”) and use.

Gnostic Liberalism, FIRST THINGS (Dec. 2016), <https://www.firstthings.com/article/2016/12/gnostic-liberalism>; see also PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS (2008).

- vs. Aristotelian-Thomistic hylomorphism
We humans are embodied beings: *We are* our bodies, not minds or souls who happen to have bodies. This is the understanding of the human person as one of a substantial unity of mind and body. The body is an essential and intrinsic aspect of personal identity, rather than a mere extrinsic appendage of the self.
- Begotten? Or made?

Our offspring are human beings, who share with us one common human nature, one common human experience and one common human destiny But that which we make is unlike ourselves In that it has a human maker, it has come to existence as a human project, its being at the disposal of mankind. It is not fit to take its place alongside mankind in fellowship To speak of ‘begetting’ is to speak of . . . the possibility that one may form another being who will share one’s own nature, and with whom one will enjoy a fellowship based on radical equality.

OLIVER O’DONOVAN, BEGOTTEN OR MADE?: HUMAN PROCREATION AND MEDICAL TECHNIQUE 1–2 (1984).

- The surrogate mother
 - The technological culture and “the tyranny of the possible”
If we *can* do it, then we *should* do it?
 - The embodiment of pregnancy
While the baby is his own being, he grows inside the womb of the birth mother. There is a shared life between the two, and a resulting bond from it. The embodiment of shared life matters, and it testifies to the biological parentage of the birth mother.
 - Opposition to surrogacy and strange bedfellows
What is it that the Catholic Church, many feminists, wealthy progressive European nations, and poor conservative Asian countries have in common?

- The child
 - Donor conception and the surrogacy industry
IVF and “donor” eggs and sperm—as well as their differing price tags, *e.g.*, the eggs of an Ivy League-educated donor command more money in the market (so-called “Ivy eggs”)
 - “For whatever may be said about gametes, children are not property to be conveyed. The notion that one might undertake to become the parent of a child in order to alienate one’s parental relation to another, implicitly converts the child from a person to a commodity.”
O’DONOVAN, *supra*, at 37.
 - Commodification and eugenics
If children are already manufactured anyway, why not manufacture them with desirable characteristics and specifications? Why not produce children who are *more*, not less, perfect?
 - Shared life of pregnancy, labor, and birth with mother
If the baby is imprinted on the birth mother through the shared life of pregnancy, labor, and birth, so is the birth mother imprinted on the baby. The child’s navel is an ever-present reminder to him that he owes his life to his birth mother, by design unknown to him and cut off from him.
 - A ghost in a machine? Or is the body the person?
Meat suits? Or does the body *reveal* the person?
 - Identity, genesis, and well-being
In surrogacy, the earliest and most powerful bonds formed between a child and his birth mother are, *by design*, severed, disregarded, and rendered irrelevant.

- Just like adoption?
Between the child and the parents, whom does adoption serve? Whom does *surrogacy* serve?
- A right to have children?
If having children is a right, then children are *owed* to us, and we are entitled to them. But is there a different paradigm for thinking about children?

III. Whither Surrogacy?

- Two newest trends
 - Social surrogacy
Hiring a surrogate when a woman simply does not desire to go through pregnancy, labor, and birth—although able to
 - “Whole body gestational” surrogacy
Using a woman who is in a persistent vegetative state or is brain dead as a surrogate to gestate babies for commissioning parents
- Whither *should* we go?
 - Natural law and virtue ethics in jurisprudence
 - Hylomorphism
 - Children as gifts
“Lo, children are a heritage of the Lord and the fruit of the womb is His reward.”
Psalm 127:3.