SURROGACY AND LIMITATIONS TO FREEDOM OF CONTRACT: TOWARD BEING MORE FULLY HUMAN

ADELINE A. ALLEN*

Gestational surrogacy, a contractual arrangement between commissioning parents and the woman who carries the baby in pregnancy (the birth mother), is big business. Yet it remains unregulated in the United States at the federal level. Popular and academic discourse often view surrogacy arrangements through the lens of freedom of contract. This Article will show that surrogacy does not properly belong in the realm of freedom of contract, but rather in the *limitation* to freedom of contract. Human flourishing and the common good require both the affirmation and limitation of that freedom, given that parties to a contract are rational beings, but imperfectly so. Although it is a deep-seated human desire to have a genetic child, the absence of whom can be deeply disappointing and painful, surrogacy contracts inherently dehumanize the birth mother and child. After weighing the competing interests and costs in surrogacy, this Article concludes that surrogacy should be prohibited in the United States as against public policy that is oriented toward human flourishing, or toward being more fully human.

---

* Associate Professor, Trinity Law School; 2017–18 Visiting Fellow, James Madison Program in American Ideals and Institutions, Princeton University. I thank Robert P. George, the James Madison Program, and Trinity Law School for the opportunity to develop this research as part of the Program. I thank Adam MacLeod, Jennifer Lahl, Paige Comstock Cunningham, C. Scott Pryor, Myron S. Steeves, Matthew J. Franck, Katy Doran, and the visiting fellows of the James Madison Program for their help with and feedback on the Article. I thank Duanyi Wang for her research assistance. The positions taken in this Article and any errors or omissions are mine alone.

INTRODUCTION

A gestational surrogacy contract is an arrangement between commissioning parents and the woman who carries the baby in pregnancy, the birth or gestational mother (sometimes called the surrogate mother).[1] The baby is conceived through in vitro fertilization ("IVF") using the genetic material of the commissioning parents, a donor, or a combination thereof, and subsequently implanted in the birth mother's womb.[2] She then carries the baby to term, gives birth to the baby, and, under the contract, hands over the baby to the commissioning parents,

1. *See* David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 283, 315 (2016).

2. *See* Emily Koert & Judith C. Daniluk, *Psychological and Interpersonal Factors in Gestational Surrogacy*, *in* HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 70 (E. Scott Sills ed., 2016).

having no right or responsibility to the child.[3] In exchange, the birth mother is paid for her services.[4]

Such contracts are big business: an estimated $6 billion global industry,[5] $4 billion in the United States alone.[6] It is on the rise; sought by couples with infertility issues, singles,[7] and same-sex couples[8]—especially in light of the redefinition of

3. *See* Smolin, *supra* note 1, at 283, 315; Wesley J. Smith, *A Right to the Baby* We Want, FIRST THINGS (Oct. 27, 2017), https://www.firstthings.com/web-exclusives/2017/10/a-right-to-the-baby-we-want [https://perma.cc/C5MD-PCW5].

4. *See* Anemona Hartocollis, *And Surrogacy Makes 3: In New York, A Push for Compensated Surrogacy*, N.Y. TIMES (Feb. 19, 2014), https://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html [https://perma.cc/3KW8-Q9R6].

5. Kathleen Sloan, *Surrogacy Reaches the Supreme Court*, PUB. DISCOURSE (Sept. 25, 2017), http://www.thepublicdiscourse.com/2017/09/20130/ [https://perma.cc/CG25-WRJS].

6. *See* Kathleen Sloan, *Trading on the Female Body: Surrogacy, Exploitation, and Collusion by the US Government*, PUB. DISCOURSE (Apr. 24, 2017), http://www.thepublicdiscourse.com/2017/04/19109/ [https://perma.cc/9M55-4MR2].

7. *See* I. Glenn Cohen & Katherine L. Kraschel, *Gestational Surrogacy Agreements: Enforcement and Breach*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 85, 85; *see also* MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 106 (2001); BREEDERS: A SUBCLASS OF WOMEN? (Ctr. for Biolethics & Culture 2014) *available at* https://vimeo.com/ondemand/breeders/852173 [https://perma.cc/8VXF-DFLK]; Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate [https://perma.cc/G39F-J2EB].

8. One surrogacy agency used the term "surrogaycy" in advertising its business to gay couples. *See* Leslie M. Whetstine & Bradley G. Beach, *Surrogacy's Changing Social Profile*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 33, 34; Tamara Audi & Arlene Chang, *Assembling the Global Baby*, WALL ST. J. (Dec. 10, 2010), https://www.wsj.com/articles/SB10001424052748703493504576007774155273928 [https://perma.cc/7JYK-MEFC]; *see also, e.g.*, Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come To Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 814 (2012); Cohen & Kraschel, *supra* note 7, at 85; Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 149–50 (2000); Eduardo Corral Garcia, *Saying No to Surrogacy: A European View*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 78, 78–79; Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 SANTA CLARA L. REV. 999, 1015 (2008).

marriage by the Supreme Court of the United States in *Obergefell v. Hodges*.[9]

Often, the arrangement is viewed through the lens of freedom of contract.[10] Indeed, that is how California's highest court decided to interpret the gestational surrogacy arrangement at issue in *Johnson v. Calvert*[11]: the parties' intent governed. The arrangement to which the commissioning parents and the birth mother consented before pregnancy and birth, in their freedom to contract with each other, controlled.[12]

The practice is unregulated at the federal level,[13] and disagreement among the states has led to "jurisdictional chaos."[14]

---

9. 135 S.Ct. 2584 (2015); *see also* Jennifer Lahl, *Gestational Surrogacy Concerns: The American Landscape*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 287, 287, 291; Hartocollis, *supra* note 4.

10. *See* SHANLEY, *supra* note 7, at 106–07; *see also* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION xv, 77, 80 (2006); Arshagouni, *supra* note 8, at 837; Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interest of Children?*, 26 WHITTIER L. REV. 429, 468–72 (2004); April L. Cherry, *The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, 17 U. PA. J.L. & SOC. CHANGE 257, 258 (2014); Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 427, 429 (2014); BREEDERS, *supra* note 7; Hansen, *supra* note 7.

11. 851 P.2d 776, 782 (Cal. 1993); *see also* Stephanie M. Caballero, *Gestational Surrogacy in California*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 296, 296–97; SPAR, *supra* note 10, at 85; Smolin, *supra* note 1, at 315.

12. *See Johnson*, 851 P.2d at 782–85; *see also* SPAR, *supra* note 10, at 84–85; *see also* Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J. L. & HUMAN. 37, 40–47 (2009) (discussing freedom of contract); Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 281–82 (2008) (discussing the role of parties' intent in freedom of contract); Smolin, *supra* note 1, at 315 (discussing the centrality of the parties' intent in a surrogacy contract to proponents of surrogacy); Jennifer Lahl, *Contract Pregnancies Exposed: Surrogacy Contracts Don't Protect Surrogate Mothers and Their Children*, PUB. DISCOURSE (Nov. 1, 2017), http://www.thepublicdiscourse.com/2017/11/20390/ [https://perma.cc/6YFN-2HEC].

13. *See* Cohen & Kraschel, *supra* note 7, at 87; *see also* SPAR, *supra* note 10, at xviii, 71, 84; Emily Gelmann, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government To Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 165 (2011); Michelle Elizabeth Holland, Note, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right To Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 1, 4 (2013); BREEDERS, *supra* note 7; Sloan, *supra* note 5.

14. Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED. & ETHICS 300, 302–03 (2007); *see also* SPAR, *supra* note 10, at 71, 84, 94; Arshagouni, *supra* note 8, at 800, 805–13, 844–46; Browne-Barbour, *supra*

Indeed, the surrogacy industry has been called the "Wild, Wild West" by a prominent surrogacy attorney, headed to a federal prison for her involvement in baby-selling schemes masquerading as legitimate surrogacy arrangements.[15] The disbarred attorney said that she was but "the tip of the iceberg" with regard to the abuses of the surrogacy industry in the United States.[16] She was not alone in the baby-selling ring: another high-profile surrogacy attorney and a surrogate mother were also part of the operation.[17] A surrogacy agency owner, sentenced to imprisonment for fraud,[18] put it this way: "Here is a little secret for all of you. There is a lot of treachery and deception in I.V.F./fertility/surrogacy because there is [sic] gobs of money to be made."[19]

The current landscape of patchwork surrogacy laws across the states lends itself to jurisdiction-shopping for surrogacy.[20]

---

note 10, at 443–60; Gelmann, *supra* note 13, at 160–62; Holland, *supra* note 13, at 4–5; Margalit, *supra* note 10, at 425, 439. For a list of treatment of surrogacy by state, see Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 8–11, 55–85 (May 2016), http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf [https://perma.cc/VB4N-KXJT]. Professors Cohen and Kraschel note six legal statuses of surrogacy contracts across the jurisdictions: "criminalize," "void," "voidable," "enforceable," "judicially preapproved," and "legally valid to determine parentage." Cohen & Kraschel, *supra* note 7, at 86–87.

15. *See* BREEDERS, *supra* note 7; *see also* Rory Devine & R. Stickney, *Convicted Surrogacy Attorney: I'm Tip of Iceberg*, NBC SAN DIEGO (Feb. 29, 2012), http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html [https://perma.cc/S86E-N23A].

16. Devine & Stickney, *supra* note 15.

17. *See* Smolin, *supra* note 1, at 330; *see also* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 415–17 (2012); *Baby-Selling Ring Busted*, FBI (Aug. 9, 2011), https://archives.fbi.gov/archives/sandiego/press-releases/2011/baby-selling-ring-busted [https://perma.cc/KAN7-DVWB].

18. *See Surrogacy Agency Founder Gets Prison for Exploiting Desperate Parents*, FOX 5 SAN DIEGO (Aug. 7, 2017), http://fox5sandiego.com/2017/08/07/surrogacy-agency-founder-gets-prison-for-exploiting-desperate-parents/ [https://perma.cc/AN6N-KF7L].

19. Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, N.Y. TIMES (July 27, 2014), https://nyti.ms/1l5VkkC [https://perma.cc/W6CN-MRL5].

20. *See* SPAR, *supra* note 10, at 71; *see also* Michelle Ford, Note, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition To Procreate*, 10 BARRY L. REV. 81, 96 (2008); Hartocollis, *supra* note 4.

California, for example, is becoming the surrogacy capital of America due to its lax laws on surrogacy.[21] Nationally, the United States is the number two destination for surrogacy worldwide, second only to India.[22] Foreigners commission an estimated forty to fifty percent of surrogacy arrangements in the United States.[23]

As society increasingly views consent as the ingredient that legitimatizes all kinds of arrangements and relationships, be it for good or ill—indeed, much of the discourse in law journals argues *for* surrogacy based on the parties' consent in freedom of contract[24]—a reasoned articulation as to why some arrangements are not proper and against public policy, regardless of consent, is called for.

This Article will show that commercial surrogacy arrangements do not properly belong in the realm of freedom of contract, but rather in the *limitation* to freedom of contract. Human flourishing and the common good require both the affirmation and limitation of that freedom, given that parties to a contract are rational beings, but imperfectly so. Specifically, with regard

---

21. *See* Caballero, *supra* note 11, at 296, 298; *see also* SPAR, *supra* note 10, at xiv, 85; Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1265 (2013); Smolin, *supra* note 1, at 325; Lahl, *supra* note 12; Tamar Lewin, *Coming to U.S. for Baby, and Womb To Carry It*, N.Y. TIMES (July 5, 2014), https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html [https://perma.cc/KYJ5-CPPX]; Andrew Vorzimer & David Randall, *California Passes the Most Progressive Surrogacy Bill in the World*, PATH2PARENTHOOD (Jan. 25, 2013), http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world/ [https://perma.cc/Y8Y9-GXYX]; David Whiting, *Surrogate Mom Fears for Triplets After Allegations of Abuse by Father*, OC REG. (Sept. 20, 2017), http://www.ocregister.com/2017/09/20/surrogate-mom-fears-for-triplets-after-allegations-of-abuse-by-father/ [https://perma.cc/9TEQ-9TTH].

22. Sloan, *supra* note 5; *see also* SPAR, *supra* note 10, at 85–86; Lewin, *supra* note 21.

23. Sloan, *supra* note 5; Lewin, *supra* note 21.

24. *See, e.g.*, Arshagouni, *supra* note 8, at 847; Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2308 (1995); Gelmann, *supra* note 13, at 183; Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 108–14 (1991); Holland, *supra* note 13, at 26–27; Jennifer Jackson, *California Egg Toss: The High Costs of Avoiding Unenforceable Surrogacy Contracts*, 15 J. HIGH TECH. L. 230, 256–60 (2015); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22 (1989); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987); Peter H. Schuck, *Colloquy: Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1800 (1988).

to surrogacy, although it is a deep-seated human desire to have a genetic child, the absence of whom can be deeply disappointing and painful, surrogacy contracts inherently exploit the birth mother and the child. After weighing the competing interests and costs of surrogacy against each other, this Article concludes that surrogacy should be prohibited in the United States as against public policy that is oriented toward human flourishing, or toward being more fully human.

Part I of this Article explores the tension between freedom of contract and public policy and the relationship between contracts and human flourishing in the tradition of natural law. Part II examines what it means to be human in the context of surrogacy. Part III analyzes how surrogacy affects and dehumanizes the birth mother and the child. The Article concludes by situating surrogacy within the larger context of freedom of contract and its limitation in contract law, public policy, the common good, and human flourishing.

This Article is focused on commercial gestational surrogacy contracts in the United States,[25] wherein the birth mother is paid by the commissioning parents[26] to carry a child conceived using the genetic material of the commissioning parents, a donor, or a combination thereof[27] through the use of IVF,[28] as distinguished from traditional or complete surrogacy, wherein the birth mother is also the genetic mother of the child.[29]

This Article does not focus on traditional surrogacy, as it is increasingly rare.[30] As far back as 2003, gestational surrogacy made up ninety-five percent of surrogacy arrangements in the

---

25. Surrogacy is nevertheless a booming international business. *See, e.g.*, SPAR, *supra* note 10, at 86; Cherry, *supra* note 10, at 258–265; Lewin, *supra* note 21.

26. *See* SHANLEY, *supra* note 7, at 104; *see also* Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 22 (2005). For a thoughtful discussion on the different terminologies referring to the parties involved, see Smolin, *supra* note 1, at 284–87.

27. These were the facts of the landmark California case *Johnson v. Calvert*, 851 P.2d at 778; *see also* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 130 (1994); SHANLEY, *supra* note 7, at 9; Browne-Barbour, *supra* note 10, at 434–35.

28. *See* SPAR, *supra* note 10, at 21–28, 78–82; Lahl, *supra* note 12.

29. These were the facts of the landmark New Jersey *Baby M* case. In re Baby M, 537 A.2d 1227, 1235–39 (N.J. 1988); *see also* Lahl, *supra* note 12.

30. *See* Hansen, *supra* note 7; *see also* SHANLEY, *supra* note 7, at 111; BREEDERS, *supra* note 7; Lahl, *supra* note 12.

United States.[31] The focus on commercial surrogacy in this Article also excludes altruistic surrogacy, wherein the birth mother carries the child at no cost to the commissioning parents.[32]

I. CONTRACTS AND PUBLIC POLICY

A. Tension Between Freedom of Contract and Public Policy

At the heart of the issues surrounding surrogacy is the tension between freedom of contract and public policy oriented toward human flourishing. People are free to enter into contracts, and generally speaking courts respect freedom of contract and enforce them.[33] People generally enter into a contract because the agreement improves life in some way; indeed, contracts are important to human flourishing.[34] Thus it is good for the state not to stand in the way of the fulfillment of such arrangements.

But the law has long recognized that certain contracts are unenforceable as against public policy; certain things are not properly predicated on the parties' consent in their freedom of contract.[35] An obvious example is contract killing.[36] Another more fact-specific example is a contract involving unconscionability.[37] The question of interest then is what makes certain

---

31. *See* JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 426 n.4 (2d ed. 2006); *see also* SHANLEY, *supra* note 7, at 130; Browne-Barbour, *supra* note 10, at 435–38; Smolin, *supra* note 1, at 311; David P. Hamilton, *She's Having Our Baby: Surrogacy Is on the Rise*, WALL ST. J. (Feb. 4, 2003), https://www.wsj.com/articles/SB1044305510652776944 [https://perma.cc/QH9B-K8E5].

32. Browne-Barbour, *supra* note 10, at 439. For purposes of this Article, surrogacy arrangements in which the birth mother is paid for out-of-pocket expenses incurred during pregnancy and birth are considered altruitistic. For concerns that such paid expenses constitute a loophole for altruistic surrogacy, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932–34, 1934 n.291 (1987); Smolin, *supra* note 1, at 339; *see also* SHANLEY, *supra* note 7, at 110; Catherine Lynch, *Ethical Case for Abolishing All Forms of Surrogacy*, SUNDAY GUARDIAN LIVE (Oct. 28, 2017), http://www.sundayguardianlive.com/lifestyle/11390-ethical-case-abolishing-all-forms-surrogacy [https://perma.cc/BX6F-U8Q4].

33. *But see* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

34. *See* Jennifer Roback Morse, Address at Acton University: The Economic Way of Thinking (June 18, 2014).

35. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (AM. LAW INST. 1981); *cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES *162.

36. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 192 (AM. LAW INST. 1981).

37. *See id.* § 208.

contracts belong not in the great open space of freedom of contract, but properly outside the boundaries to that freedom.

B. Contracts and Human Flourishing

Thomas Aquinas states that law is "an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community."[38] He adds that law "is simply a sort of prescription of practical reason *in the ruler* governing a complete . . . community."[39] This Section will sketch the relationship between law (in particular, contract law), justice, the common good, and human flourishing in the tradition of natural law.

Human flourishing—the well-being of individuals and the communities they form—has to do with reasonableness, which Aquinas defines as doing and pursuing what is good and avoiding what is evil.[40] Indeed, for Aquinas, man's *telos* is fulfilling the divine calling of flourishing (*beatitudo* or *felicitas*), by steps he has freely chosen for himself.[41] Flourishing is the "fulfilment *of the nature*," that is, the fulfillment of the capacity of reason and freedom with which each human being is created.[42]

There are basic goods in life that contribute to human flourishing: life and health, marital-procreative union, friendship, knowledge, play, aesthetic appreciation, skillful performance, religion, and practical reasonableness.[43] Each good is basic in that it is common or universal ("good for any and every per-

---

38. John Finnis, *Aquinas and Natural Law Jurisprudence*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 17, 37 (George Duke & Robert P. George eds., 2017); *see also* THOMAS AQUINAS, TREATISE ON LAW: THE COMPLETE TEXT (SUMMA THEOLOGIAE I–II, QUESTIONS 90–108) 7 (Alfred J. Freddoso trans., St. Augustine's Press 2009) (1265–1274) (I-II, q.90, a.4); JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 255–56 (2d. ed. 2004).

39. Finnis, *supra* note 38, at 37; *see also* AQUINAS, *supra* note 38, at 8 (I-II, q.91, a.1), 20 (I-II, q.92, a.1).

40. *See* AQUINAS, *supra* note 38, at 40 (I-II, q.94, a.2); *see also* Finnis, *supra* note 38, at 18–19; Robert P. George, *Natural Law, God and Human Dignity*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 38, at 57, 59.

41. *See* Finnis, *supra* note 38, at 19, 24, 34; *see also* Christopher Tollefsen, *Natural Law, Basic Goods and Practical Reason*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 38, at 133, 156.

42. Finnis, *supra* note 38, at 34.

43. *See id.* at 18–19; *see also* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 86–90 (Paul Craig ed., 2011); George, *supra* note 40, at 59; Tollefsen, *supra* note 41, at 135–36.

son"[44]), an intelligible end in and of itself, and intrinsically valuable,[45] or self-evidently known: "[I]t is better to be reasonable than to be unreasonable."[46] Aquinas calls basic goods *indemonstrabile* and *per se notum*, that is, "known in themselves and not through the mediation of some further proposition."[47] These basic goods are to be taken together or integrally, and they are incommensurable—not reducible to each other.[48]

Private property is a basic human good through the architectonic, basic good of practical reasonableness (*bonum rationis*, *prudentia*).[49] It is "architectonic" in that it "orders the other goods and therefore plays a special role in shaping norms of morality and law"[50] and gives "supervision and structuring of deliberation and conscience."[51] Legal philosopher and professor John Finnis calls practical reasonableness the "master virtue."[52] Without it, the other virtues cannot be had—with one particular virtue of interest here: justice.[53]

This basic good of practical reasonableness is the good of the capacity to deliberate about valuable possibilities and prudence in choosing well between those possibilities, that is, making choices that are *oriented toward* reasonableness.[54] It is uniquely human in that "the natural human capacities for reason and freedom are fundamental to the dignity of human beings."[55] This capacity for reason and freedom is "God-like (literally *awesome*)."[56] The Book of Genesis puts it as man bearing the

---

44. FINNIS, *supra* note 43, at 155.

45. *See* Finnis, *supra* note 38, at 20; *see also* George, *supra* note 40, at 57–58.

46. ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 13 (2015).

47. Finnis, *supra* note 38, at 20; *see also* Tollefsen, *supra* note 41, at 135.

48. *See* George, *supra* note 40, at 59; *see also* MACLEOD, *supra* note 46, at 23, 217–18; Tollefsen, *supra* note 41, at 135–36.

49. *See* Finnis, *supra* note 38, at 20, *see also* MACLEOD, *supra* note 46, at 91.

50. MACLEOD, *supra* note 46, at 28.

51. Finnis, *supra* note 38, at 19.

52. *Id.* at 20.

53. *See id.* at 20–21.

54. *See id.* at 18; *see also* FINNIS, *supra* note 43, at 12; MACLEOD, *supra* note 46, at 28; Tollefsen, *supra* note 41, at 154.

55. George, *supra* note 40, at 63; *see also* Finnis, *supra* note 38, at 24–25.

56. Finnis, *supra* note 38, at 31; *see also* LEON R. KASS, LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE FOR BIOETHICS 241 (2002); George, *supra* note 40, at 67; Tollefsen, *supra* note 41, at 134.

very image of God.[57] Tellingly, for Aquinas, flourishing is a state of blessedness that is "a form of intellectual union with the Divine Creator."[58] Practical reasonableness, then, is the guide for making choices that are consistent with justice, among other things.[59]

Moral principles, in turn, are the product of the requirements of practical reasonableness.[60] Professor Finnis says morality is "another name for a fully reasonable concern for human flourishing in all its basic aspects, integrally considered."[61] Put another way, it is "integral, unfettered reasonableness."[62]

Choosing in accordance with practical reasonableness in turn leads to good habits, which engender character and virtues. These lead to the flourishing of both the individuals exercising choice and the communities they form, which constitutes the common good.[63] The common good "entails a reference to standards of fittingness or appropriateness relative to the basic aspects of human flourishing."[64] In other words, practical reasonableness is oriented toward reasonableness[65] (again, good to be pursued and done, evil avoided[66]), which then brings about basic human goods, which in turn advances the common good, which ultimately promotes human flourishing.

---

57. *See Genesis* 1:27; George, *supra* note 40, at 67.

58. Tollefsen, *supra* note 41, at 156.

59. *See* Finnis, *supra* note 38, at 51.

60. *See* FINNIS, *supra* note 43, at 103–27; MACLEOD, *supra* note 46, at 29–30.

61. John Finnis, *The Nature of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW (John Tasioulas ed., forthcoming 2018); *see also* 1 JOHN FINNIS, *Commensuration and Public Reason*, *in* REASON IN ACTION 233, 243 (2013); Finnis, *supra* note 38, at 19–20; George, *supra* note 40, at 59; Tollefsen, *supra* note 41, at 151, 153.

62. Finnis, *supra* note 61, at 249.

63. *See* Finnis, *supra* note 38, at 32–34; Finnis, *supra* note 61, at 239–40; George, *supra* note 40, at 74; Tollefsen, *supra* note 41, at 151. *See generally* George Duke, *The Common Good*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE, *supra* note 38, at 369, 378–84 (analyzing different strands of conception of the common good in the natural law tradition). The common good is the good for each individual in the community *and* the community itself, not "the greatest good for the greatest number in the community." FINNIS, *supra* note 43, at 168; MACLEOD, *supra* note 46, at 117.

64. FINNIS, *supra* note 43, at 164.

65. *See* Tollefsen, *supra* note 41, at 149 ("[T]he goodness of choice is to be found in its choosing in accordance with reason.").

66. *See* AQUINAS, *supra* note 38, at 40 (I-II, q.94, a.2); *see also* Finnis, *supra* note 38, at 18–19; George, *supra* note 40, at 59.

If private property is a good according to practical reasonableness, contract, in turn, is one of the major means by which private property is shared and property rights are transferred.[67] In contracts, humans exercise dominion over private property,[68] manifested through the sharing of resources for the good of self and others.[69] Contract law is the legal means by which "at least one of the parties acquires a right in relation to some person, thing, act, or forbearance."[70] In other words, "[c]ontract law ratifies and enforces our joint ventures" regarding possessions and personal services according to how we see fit.[71] Private property and contract together have been identified as the "legal infrastructure of capitalism," because there must be private entitlements to resources and a means to transfer those entitlements between private actors for the market system to function.[72] John Stuart Mill understood property as inextricably bound up with contracts, as property constitutively assumes contracts.[73]

Through contract, people deliberate about, choose for, and create a previously non-existent state of affairs relating to their resources in an exercise of their rational capacity.[74] Put another way, "[c]ontracts are a means of achieving the goal of practical reasonableness—the flourishing and the development of a '*coherent plan of life*.'"[75] Contract and freedom of contract are im-

---

67. *See, e.g.*, Ogden v. Saunders, 25 U.S. 213, 346 (1827) (Marshall, J., dissenting) (asserting contract rights are derived from property rights); *id.* at 281–82 (Johnson, J. concurring).

68. *See* MACLEOD, *supra* note 46, at 2.

69. See *id.* at 79, 82.

70. REUBEN M. BENJAMIN, GENERAL PRINCIPLES OF THE AMERICAN LAW OF CONTRACT § 2 (2d. ed. 1907); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 292 (1986) ("[C]ontract law deals with transfers of rights between rights holders."); Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 289 (2008).

71. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1–2 (1981); *see id.* at 7.

72. Radin, *supra* note 32, at 1888.

73. *See* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY 218–20 (W. J. Ashley ed. 1909); *see also* RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 555 (1914); Radin, *supra* note 32, at 1889.

74. *See* Finnis, *supra* note 38, at 24; George, *supra* note 40, at 63; *see also* FRIED, *supra* note 71, at 7.

75. Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV.

portant to human flourishing because people generally enter into contracts to improve life in some way through the sharing of private property.[76] *Freedom* of contract is important to flourishing because no one but the individual should make the choice to enter into the contract freely for his own benefit, which is an exercise of the "requirements of practical reasonableness."[77] Professor Adam J. MacLeod, in his work exploring the relationship of property to practical reasonableness, observes that "free choice is an essential ingredient of well-being."[78] This is because one's choices constitute oneself.[79] In

---

839, 891 (1999) (quoting FINNIS, *supra* note 43, at 103–05) (tracing the connection between contract law and Finnis' practical reasonableness). This understanding has been present throughout the history of the church, which in turn informed the development and doctrines of contract law. *See* HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 190–208 (1993).

The Catholic Catechism states that God created the world in the beginning and entrusted its resources to the stewardship of humans. But as humans fell into sin and their stewardship was correspondingly marred by sin, "appropriation of property is legitimate for guaranteeing the freedom and dignity of persons and for helping each of them to meet his basic needs and the needs of those in his charge." CATECHISM OF THE CATHOLIC CHURCH ¶ 2402 (1994). Moreover, "[a] significant part of economic and social life depends on the honoring of contracts between physical or moral persons—commercial contracts of purchase or sale, rental or labor contracts." *Id.* ¶ 2410. "Contracts are subject to commutative justice which regulates exchanges between persons in accordance with a strict respect for their rights. Commutative justice obliges strictly; it requires *safeguarding property rights* . . . ." *Id.* ¶ 2411 (emphasis added).

In the same vein, the Reformed view as stated by Philip Melanchthon, one of the major figures of the Reformation and one of Martin Luther's close associates, is that law recognizes that living life in society fundamentally requires humans to have some possessions. *See* PHILIP MELANCHTON, THE LOCI COMMUNES OF PHILIP MELANCHTON 113–16 (Charles Leander Hill trans., Boston Meador Publ'g Company 1944) (1521). It is best for things to be shared freely among friends, but because human greed does not always allow for this to happen, sharing of property must be governed by the principle of doing no harm to others. *See id.* Contract, then, is one of the ways for property to be shared, recognizing the reality of fallenness of human beings. *See id.*

Professor MacLeod has noted that arms-length resource-sharing creates a weaker moral connection than sharing with family members or sharing through charity because in an arms-length transaction such as the classic contract, each party looks out for his own interest, so each party must provide something of value to the other. *See* MACLEOD, *supra* note 46, at 82.

76. *See* MACLEOD, *supra* note 46, at 184–85; *see also* Morse, *supra* note 34.

77. *See* MACLEOD, *supra* note 46, at 24–25, 30, 107–10.

78. *Id.* at 157; *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 369, 370, 386–87, 390–95 (1986).

this way, free choice is freedom toward flourishing itself, or toward being fully human.[80] Thus it would be good for the state not to stand in the way of contracts but enforce them.

But boundaries in contract law are appropriate and, indeed, necessary. This is because humans, being rational (or having the capacity for reason) but imperfectly so, do not always enter into contracts consistent with the requirements of reason. In other words, they enter into contracts with non-rational motivations ("factors that . . . fetter reason")[81] or with practical *un*-reasonableness, which is inhospitable to the common good and thus inconsistent with human flourishing.[82]

Property and contract law are for "ends that are objectively good" for the individual and those around him.[83] This reality, then, justifies both freedom of contract *and* limitation to that freedom.[84] If the ancient principle of loving one's neighbor as oneself (that is, willing the good of that neighbor) underlies reasonableness, then contracting with non-rational motivations does not bring about the good of one's neighbor.[85] Perhaps love of neighbor is worked out practically in the Golden Rule: do unto others what you want them to do unto you, which also entails not doing to others what you do not want them to do to you.[86] To that end, a few laws are moral absolutes, or exceptionless norms. They are derived from deductions from moral precepts and guard the boundaries of contract. Hence, the law

---

79. *See* FINNIS, *supra* note 61, at 239–40; MACLEOD, *supra* note 46, at 101; George, *supra* note 40, at 74.

80. *See* MACLEOD, *supra* note 46, at 33–34; Finnis, *supra* note 38, at 24.

81. Tollefsen, *supra* note 41, at 151. Compare Aristotle's "*orthos logos*" with his students' "*recta ratio*," best understood as "unfettered reason." 1 JOHN FINNIS, *Legal Reasoning as Practical Reason*, *in* REASON IN ACTION, *supra* note 61, 212, 215.

82. *See* FINNIS, *supra* note 81, at 215, 245; MACLEOD, *supra* note 46, at 27, 31, 32, 34–35, 55, 146, 160; George, *supra* note 40, at 66, 68; Tollefsen, *supra* note 41, at 151.

83. *See* MACLEOD, *supra* note 46, at 20.

84. *See id.* at 20, 33, 34–35.

85. *See* Barger v. Barringer, 66 S.E. 439, 442 (N.C. 1909); MACLEOD, *supra* note 46, at 151; *see also* Finnis, *supra* note 38, at 21, 39. The common law, of which contract law is a part, embodies this. The common law is rooted in reason: What was reasonable will typically always be reasonable, regardless of era. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 9 (1966); MACLEOD, *supra* note 46, at 51. It was understood that common law judges patrol the boundaries of reason. *See* HOGUE, *supra*, at 9–10; MACLEOD, *supra* note 46, at 52.

86. *See* FINNIS, *supra* note 81, at 227.

recognizes no such thing as a contract to murder another or a contract to enslave oneself.[87] Freedom of contract would not be honored in these situations.

But many other laws, which Aquinas calls *determinatio*,[88] are not deductive and are thus more permissive than rationally compelling. They are still derived from natural law or the requirements of practical reason, but they require context-dependent judgment. These laws *still* justify boundaries. While these laws have a qualified nature, they are still appropriate and needed because of their "rational connection with some principle or precept of morality,"[89] when considered in their context.[90] In this way, these "[c]ontext-dependent norms guide deliberation toward more reasonable choices and actions and away from less reasonable choices."[91]

One example of *determinatio* cited by Professor Finnis is traffic laws. Although a traffic law is in a sense authoritative, laid down as law by lawmakers, and in a sense arbitrary, because the law could have prescribed for driving on the left as opposed to the right side of the road, it is in another sense rooted in the good of practical reason: safety is a good thing, traffic can be dangerous, and traffic laws promote safety.[92] Property law is another example. Laws regarding and protecting private property are justified and called for if material things are conducive to well-being.[93] But exactly what shape these laws take is not dictated by moral precepts. It is rather informed by the particular circumstances of a community—all still serving the good of practical reason.[94]

Professor MacLeod poses an even more specific hypothetical with regard to use of one's property and practical reason. Suppose a car wash business owner draws water for his business

87. *See id.* at 226–27, 246; *see also* FINNIS, *supra* note 43, at 283–84; MACLEOD, *supra* note 46, at 31, 169, 204; Finnis, *supra* note 38, at 43–44.

88. *See* AQUINAS, *supra* note 38, at 52 (I-II, q.95, a.2). The word could be translated as "implementation." FINNIS, *supra* note 43, at 284 n.16.

89. FINNIS, *supra* note 38, at 267.

90. *See* FINNIS, *supra* note 43, at 284–89; MACLEOD, *supra* note 46, at 4, 7, 20, 21, 146, 158, 169, 205; RAZ, *supra* note 78, at 120, 381; Finnis, *supra* note 38, at 38.

91. MACLEOD, *supra* note 46, at 205.

92. *See* FINNIS, *supra* note 43, at 285.

93. *See id.* at 169–73; MACLEOD, *supra* note 46, at 12–13.

94. *See* FINNIS, *supra* note 43, at 285; *see also* MACLEOD, *supra* note 46, at 91.

from a stream on his property.[95] How should he draw water so that his business is provided for while leaving water for his downstream neighbors?[96] He needs the good of practical reasonableness to guide his decisions in acting reasonably toward his family, for whom he is providing through his business, as well as his customers, his employees, and his downstream riparian neighbors.[97] With regard to contract law, the common law doctrine of unconscionability has been a matter of *determinatio*. Through the unconscionability doctrine, the law has historically recognized that, having weighed the circumstances bearing on the facts of the case, certain things are not properly predicated on the parties' consent in their freedom of contract.[98]

Ultimately, contract law is concerned about justice, and justice is a necessary component of the common good and flourishing.[99] To revisit, Aquinas says law is an ordinance of *reason* for the *common good* of a community, promulgated by the person responsible for looking after that community.[100] Additionally, he says "law is nothing other than a certain dictate (*dictatem*) of *practical reason* on the part of a ruler who governs some complete community."[101] Indeed, Aristotle thought that without *justice* as a political good, there would be no *eudaimonia*, or flourishing of members of the polis (political community).[102] Thus justice is constitutive of the common good because "[t]he requirements of justice . . . are the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities."[103] It is an "other-directed virtue."[104]

---

95. *See* MACLEOD, *supra* note 46, at 29–30.

96. *See id.*

97. *See id.*

98. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

99. *See* Finnis, *supra* note 38, at 38, 41, 46, 51, 53.

100. AQUINAS, *supra* note 38, at 7 (I-II, q.90, a.4); *see also* FINNIS, *supra* note 38, at 255–56; Finnis, *supra* note 38, at 37.

101. AQUINAS, *supra* note 38, at 8 (I-II, q.91, a.1), 20 (I-II, q.92, a.1) (emphasis added); *see also* Finnis, *supra* note 38, at 37.

102. Duke, *supra* note 63, at 373.

103. FINNIS, *supra* note 43, at 164.

104. Duke, *supra* note 63, at 392.

Law fits into this as "the most effective instrument for achieving the morally obligatory goal of the common good."[105] Law is the result of the lawmakers' deliberations of the greater and lesser good (or evil), which involves weighing and *prioritizing* the available options before them.[106] In laws that are *determinatio*, these considerations include a host of principles fulfilling the requirements of practical reason, some of which are more intimate and some more remote to practical reason.[107] The standards by which lawmakers should weigh and prioritize options, in turn, are moral standards—the specification of what makes people flourish, with all the elements of flourishing and basic goods taken together.[108] On law, justice, the common good, and human flourishing, Professor Finnis remarks:

> [W]hat is needed to attain great goods such as a community living in peace, *justice* and prosperity rather than in anarchy, general poverty, unchecked injustices, and/or tyranny[?] . . . [T]hose great goods cannot be had without *laws*, property, and *contracts*; so we need laws and fidelity to laws; and we need systems (legal or conventional) of allocating and upholding property rights, and of promising and respecting promises.[109]

II. WHAT IT MEANS TO BE HUMAN

Interestingly, opposition to surrogacy makes for strange bedfellows: feminists;[110] the Catholic Church;[111] bioethicists and

---

105. *Id.* at 390. This is due to its power in resolving coordination problems among members of a community. *See id.* at 383, 390 (discussing John Finnis' view of the subject); *see also* FINNIS, *supra* note 81, at 219; FINNIS, *supra* note 43, at 232. Thus law enables the "fair and peaceful coordination which fully respects the rights of every member of the community." Finnis, *supra* note 61, at 252.

106. Finnis, *supra* note 61, at 234, 243 (emphasis added).

107. FINNIS, *supra* note 43, at 286.

108. Finnis, *supra* note 61, at 243.

109. Finnis, *supra* note 38, at 39 (emphasis added).

110. *See* RENATE KLEIN, SURROGACY: A HUMAN RIGHTS VIOLATION i, 102–03 (2017); MARGARET JANE RADIN, CONTESTED COMMODITIES 150 (1996); Lahl, *supra* note 9, at 292; Hartocollis, *supra* note 4; Anna Momigliano, *When Left-Wing Feminists and Conservative Catholics Unite*, ATLANTIC (Mar. 28, 2017), https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968 [https://perma.cc/M37F-HFK5]; Sloan, *supra* note 5.

111. *See* CATECHISM, *supra* note 75, ¶ 2376; Momigliano, *supra* note 110.

medical professionals;[112] academics;[113] progressive European nations such as France, Germany, Italy, Spain, Sweden, and Switzerland;[114] and conservative nations such as Thailand and Cambodia.[115] What unites these seemingly disparate groups? What common cause of humanity do they see? And of particular interest to this Article, what is the relationship between surrogacy contracts and justice, the common good, and human flourishing?

First, what does it mean to be more fully human, not less, in the context of the issue of surrogacy—that is, toward, and not away from, flourishing? Of the nature of human beings and procreation, ethicist and professor Oliver O'Donovan says,

> 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.[116]

---

112. Lahl, *supra* note 9, at 287; Lewin, *supra* note 21.

113. *See, e.g.*, Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 148–49 (1990); Smolin, *supra* note 1, at 269; BREEDERS, *supra* note 7 (featuring Professor O. Carter Snead's concerns regarding surrogacy); Lewin, *supra* note 21 (quoting Professor Abby Lippman's concern about the commodification of women and their bodies in surrogacy).

114. *See, e.g.*, Finkelstein et al., *supra* note 14, at 86–87; Lewin, *supra* note 21; Momigliano, *supra* note 110; *see also* Garcia, *supra* note 8, at 79–83. The European Parliament called surrogacy "an exploitation of the female body and her reproductive organs." Resolution on Priorities and Outline of a New EU Policy Framework to Fight Violence Against Women, EUR. PARL. DOC. P7_TA0127 (2011). The Parliamentary Assembly of the Council of Europe also declined to legalize (or even allow with regulations) surrogacy across all member states. *Council of Europe Rejects Surrogacy*, ADF INT'L (Oct. 11, 2016), http://adfinternational.org/detailspages/press-release-details/council-of-europe-bans-surrogacy [https://perma.cc/R7FU-TH5A].

115. *See* Kajsa Ekis Ekman, *Cristiano Ronaldo: Women Are Not Your Baby Factories*, STOP SURROGACY NOW, http://www.stopsurrogacynow.com/cristiano-ronaldo-a-woman-is-not-a-factory/ [https://perma.cc/C44G-TAF5].

116. OLIVER O'DONOVAN, BEGOTTEN OR MADE?: HUMAN PROCREATION AND MEDICAL TECHNIQUE 1–2 (1984); *see also id.* at 15.

If we are begotten and not made, what might be some boundaries as to what we should not do to ourselves and to our children in the realm of procreation? In the exploration that follows, this Article submits with Professor O'Donovan that human flourishing is found within, not without those boundaries.[117] Physician and professor Leon R. Kass puts it this way in an analogy: it is the limitation of gravity that allows the dancer to dance.[118]

That there would be boundaries makes sense given the framework already laid out above. Practical reasonableness requires contract law, for example, to encompass *both* the boundaries around contract law *and* robust freedom of contract within it. These demarcations promote justice, a necessary component of the common good, which in turn leads to human flourishing.[119] When we deny these boundaries, we actually become *less* of ourselves, *less* than fully human: We *de*humanize ourselves—we "imperil[] what it is to be human."[120] This, of course, does not contribute to the common good.[121]

The irony of justifying surrogacy arrangements on the basis of freedom of contract is that instead of becoming freer, we paradoxically become *less* free when proper boundaries are ignored. Professor O'Donovan remarks:

> [T]o enjoy any freedom of spirit, to realize our possibilities for action of any kind, we must cherish nature in this place where we encounter it, we must defer to its immanent laws . . . . Human freedom has a natural substrate, a presupposition. Before we can evoke and create new beings which conform to the laws we lay down for them by our making,

---

117. *See id.* at 5.

118. KASS, *supra* note 56, at 18.

119. *See* O'DONOVAN, *supra* note 116, at 28. In a chapter entitled "Sex by Artifice" and speaking particularly about transgenderism, Professor O'Donovan makes the following point, which is also applicable to surrogacy by way of parties' consent:

> [T]he fact of the patient's voluntary co-operation in such a procedure, though important, is not all-important. Not everything to which people will consent, or which they will even demand, is the right thing for *medicine* to undertake. For Western medicine is premissed on a principle of Western Christian culture, that bodily health is a good to be pursued and valued for its own sake.

Id.

120. *Id.* at 3.

121. *Id.* at 29.

> we have to accept this being according to its own laws which we have not laid down. If, by refusing its laws and imposing our freedom wantonly upon it, we cause it to break down, *our freedom breaks down with it*.[122]

How we naturally reproduce is "given to us in the structure of human nature as we have received it."[123] But our technological culture has transformed human procreation,[124] and is itself wedded to the "abolition of limits which constrain and direct us."[125] That is, when a culture understands human nature and human bodies as raw material or an artifice, out of which something is to be *made*, "there is no restraint in action which can preserve phenomena which are not artificial."[126] This raw materialistic view has been extended to sexuality;[127] to the process of reproduction, through the use of IVF[128] and surrogate wombs;[129] and to the children who are made, not begotten.[130]

Several aspects of surrogacy are of interest here. First, the procedures involved in surrogacy are categorized as medical procedures.[131] But while medicine used to be about treating illness, biotechnology or medical technique within the context of the technological culture is now applied to healthy bodies, such

---

122. *Id.* at 5 (emphasis added).

123. *Id.* at 15.

124. *Id.* at 2.

125. *Id.* at 6; Professor O'Donovan goes on to identify the technological culture with the scientific culture:

> To achieve the goal of freedom, we objectify ourselves; we take our biology from being that which we *live*, to be that which we *observe*, and so to be that which we *conquer*. This is the way of human self-transcendence that is proposed to us within a liberal scientific culture . . . . In a scientific culture it is by making things the object of *experimental knowledge* that we assert our transcendence over them.

Id. at 62; *see also* KASS, *supra* note 56, at 32–33, 35, 134, 138.

126. O'DONOVAN, *supra* note 116, at 3; *see also id.* at 19.

127. *See id.* at 29.

128. For O'Donovan's observations on IVF, see *id.* at 31–48.

129. *See id.* at 46.

130. *Id.* at 85–86.

131. *See, e.g.*, *Medical Procedures*, SURROGACY EXPERIENCE, http://www.thesurrogacyexperience.com/medical-procedures.html [https://perma.cc/CLD2-KBUH]; *Surrogates: 8 Steps of the Surrogate Medical Process*, SURROGATE.COM, https://surrogate.com/surrogates/pregnancy-and-health/medical-process-for-a-surrogate [https://perma.cc/X2ZJ-DFD7].

as pregnancy.[132] To the extent that surrogacy is used to overcome infertility for the commissioning parents, it is used not as a cure, but as a circumvention.[133] Scholars have questioned the propriety of using medicine and technology to encroach upon such matters, even when the circumstances involved are as heartbreaking as infertility.[134]

A second aspect of surrogacy is the unlinking of marital intimacy and procreation. This has led to being *less* human and *less* free.[135] It has injured marriages;[136] artificialized sex;[137] set up "primal sexuality"[138] as its own "fully autonomous"[139] end; and furthered the pornographic culture that debases sexual intimacy.[140] Professor Finnis has remarked that the decoupling of intimacy and procreation reduces marital union to nothing more than "mutual masturbation."[141] If the birth-control pill has made possible sex without babies, IVF and surrogacy have made possible babies without sex.[142]

III. SURROGACY AND DEHUMANIZATION

Although a deep desire for a genetic offspring is etched into our being, there are costs to surrogacy that must be weighed. Commissioning parents have a strong and innate desire to have a child of their own genetic make-up—and after the deep pain and devastation of infertility, the child obtained through surrogacy is very much wanted and loved.[143] But at what cost

---

132. *See* O'DONOVAN, *supra* note 116, at 6, 28.

133. *Id.* at 32, 68; *see also* KASS, *supra* note 56, at 109–10; Garcia, *supra* note 8, at 79; Smolin, *supra* note 1, at 288, 298 (referring to technology as a "double-edged sword").

134. O'DONOVAN, *supra* note 116, at 69–70; *see also* KASS, *supra* note 56, at 109–10.

135. *See* O'DONOVAN, *supra* note 116, at 17; Smolin, *supra* note 1, at 281–82.

136. O'DONOVAN, *supra* note 116, at 17–18.

137. *Id.* at 19.

138. MARK REGNERUS, CHEAP SEX: THE TRANSFORMATION OF MEN, MARRIAGE, AND MONOGAMY 33 (2017) (internal quotation marks omitted).

139. ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY 27 (1992).

140. O'DONOVAN, *supra* note 116, at 20, 74.

141. JOHN FINNIS, *C.S. Lewis and Test-Tube Babies*, *in* HUMAN RIGHTS & COMMON GOOD 273, 281 (2013).

142. *See* KASS, *supra* note 56, at 99 n.**.

143. *See* KASS, *supra* note 56, at 95–96; Sarah-Vaughan Brakman & Sally J. Scholz, *Adoption, ART, and a Re-Conception of the Maternal Body: Toward Embodied Maternity*, 21 HYPATIA 54, 60 (2006); *see also* ROBERTSON, *supra* note 27, at 24, 32, 98, 119,

to the individual and common good is the arrangement made? Put another way, against the worthy interest of one party to the surrogacy contract (the commissioning parents), how might surrogacy affect the other party to the contract (the birth mother)? Furthermore, how might it affect the resulting child, whom the contract brings into being and whose existence is affected greatly by the contract, but who is not a party to it?[144]

A. Surrogacy and the Birth Mother

1. Important Bonds Between Birth Mother and Child Are Trivialized

Professor Margaret Jane Radin, in examining certain things that should be inalienable in the market, speaks of "a deep bond between a baby and the woman who carries it . . . created by shared life," apart from DNA or genetic connection.[145] The birth mother is undeniably a mother to the child,[146] a "physiological" one,[147] and he is forever a part of her. Carrying a child and sustaining his life in the womb is an unseverable part of being a mother. But due to the surrogacy contract, the child is intentionally and contractually severed from a relationship with her.[148]

To elaborate, although the baby is his own being,[149] he is both separate and not separate from the birth mother.[150] There is a "fluidity of the boundary between [mother] and [child]

137; Ford, *supra* note 20, at 81–82; Radin, *supra* note 32, at 1931; BREEDERS, *supra* note 7; Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES MAG. (Nov. 28, 2008), https://nyti.ms/2jE7muq [https://perma.cc/WY28-Q6KG]; Smith, *supra* note 3.

144. Lahl, *supra* note 9, at 289. With regard to focusing on birth mother and child, see, for example, SHANLEY, *supra* note 7, at 104. Far from being concerned with mere "notions of right behavior" in surrogacy contracts, as Professor Robertson suggests is the case with critics of surrogacy, ROBERTSON, *supra* note 27, at 41, this Article attempts to consider how surrogacy affects the birth mother and child.

145. Radin, *supra* note 32, at 1932 n.284; *see also* BREEDERS, *supra* note 7.

146. Smolin, *supra* note 1, at 309; *see also* Lahl, *supra* note 12.

147. O'DONOVAN, *supra* note 116, at 44.

148. *See* ROBERTSON, *supra* note 27, at 22, 32–33; *see also* BREEDERS, *supra* note 7.

149. *See* ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 196 (2013); ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE 27–56 (2008).

150. SHANLEY, *supra* note 7, at 112.

during the pregnancy."[151] This embodiment matters and ought to be gravely considered in the context of contracting away gestational services.[152]

Medical sociologist Barbara Katz Rothman states:

> If you are pregnant with a baby, you are the mother of the baby that you're carrying. End of discussion. The nutrients, the blood supply, the sounds, the sweep of the body. That's not somebody standing in for somebody else to that baby. That's the only mother that baby has.[153]

Although the child's genetic make-up (often of the commissioning parents) is indisputably important and fundamental as a matter of identity, the growing science of epigenetics, sketched as follows, testifies to the biological parentage of the birth mother.

Oxytocin, a hormone present in higher quantities in pregnancy and released in labor and birth to promote bonding between mother and newborn child, "imprints the baby on the mother, and the mother on the baby."[154] Fascinatingly, scientists have also found DNA from male babies on their mothers' brains—potentially remaining there for life.[155] Other studies

---

151. *Id.*; *see also* ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 47 (1976); IRIS MARION YOUNG, *Pregnant Embodiment: Subjectivity and Alienation*, *in* ON FEMALE BODY EXPERIENCE: "THROWING LIKE A GIRL" AND OTHER ESSAYS 46, 49 (2005).

152. SHANLEY, *supra* note 7, at 123; *see also* Cherry, *supra* note 10, at 280.

153. Sloan, *supra* note 5. Catherine Lynch, an Australian attorney and scholar on surrogacy, agrees:

> The gestational mother is the only person the child knows when [he is] born . . . . [T]he destruction of [the mother-child relationship] damages both mother and child. The gestational mother is the natural parent of her own child, whether or not she used her own eggs or implanted a donor embryo.

Lynch, *supra* note 32.

154. Paige Comstock Cunningham, *Taking Another Look at Surrogacy*, 21 DIGNITAS 2, 2 (2014); Ari Levine et al., *Oxytocin During Pregnancy and Early Postpartum: Individual Patterns and Maternal-Fetal Attachment*, 28 PEPTIDES 1162, 1167–68 (2007); Miho Nagasawa et al., *Oxytocin and Mutual Communication in Mother-Infant Bonding*, 6 FRONTIERS HUMAN NEUROSCI. 1, 5–6 (2012); Linda Palmer, *Bonding Matters . . . The Chemistry of Attachment*, BABYREFERENCE.COM (Aug. 6, 2013), http://babyreference.com/bonding-matters-the-chemistry-of-attachment/ [https://perma.cc/D94Y-Q9KT].

155. Cunningham, *supra* note 154, at 2; Fred Hutchinson Cancer Research Ctr., *Male DNA Commonly Found in Women's Brains, Likely from Prior Pregnancy with a*

have observed a similar phenomenon: the presence of male DNA in mothers' bloodstreams, as long as twenty-seven years after birth.[156] One science writer put it this way: "The connection between mother and child is ever deeper than thought."[157] These findings suggest that a child is, quite literally, a part of the mother long after she carries him in her womb and gives birth.

Dr. Ingrid Schneider of the University of Hamburg's Research Center for Biotechnology, Society and the Environment agrees.[158] Surrogacy has been made illegal in Germany for good reason:

> [T]he bonding process between a mother and her child starts earlier than at the moment of giving birth. It is an ongoing process during pregnancy itself, in which an intense relationship is being built between a woman and her child-to-be. These bonds are essential for creating the grounds for a successful parenthood, and in our view, they protect both the mother and the child.[159]

Indeed, science suggests that the term "biological parents" in surrogacy should include the birth mother as well as the genetic parents.

Relatedly, Harold J. Cassidy, the lead attorney who represented Mary Beth Whitehead, the birth mother in the Baby M case, stated: "The report [by the New Jersey Bioethics Commission] strongly condemned all forms of surrogacy, including so-called 'gestational carrier' arrangements . . . . It noted that *every evil associated with surrogacy where the birth mother is genetically related to the child is also present in gestational surrogacy*, where she is not genetically related."[160]

Male Fetus, SCI. DAILY (Sept. 26, 2012), https://www.sciencedaily.com/releases/2012/09/120926213103.htm [https://perma.cc/V3H2-3JWR]; Robert Martone, *Scientists Discover Children's Cells Living in Mothers' Brains*, SCI. AM. (Dec. 4, 2012), http://www.scientificamerican.com/article/scientists-discover-childrens-cells-living-in-mothers-brain/ [https://perma.cc/2UMJ-XQXN].

156. *See* Diana W. Bianchi et al., *Male Fetal Progenitor Cells Persist in Maternal Blood for As Long As 27 Years Postpartum*, 93 PROCEEDINGS NAT'L ACAD. SCI. U.S. 705, 706–07 (1996); Vijayakrishna K. Gadi & J. Lee Nelson, *Fetal Microchimerism in Women with Breast Cancer*, 67 CANCER RES. 9035, 9037–38 (2007).

157. Martone, *supra* note 155.

158. *See* Lewin, *supra* note 21.

159. *Id.*

160. Lahl, *supra* note 9, at 290 (emphasis added); Harold Cassidy, *The Surrogate Uterus: Baby M and the Bioethics Commission Report*, PUB. DISCOURSE (Sept. 6, 2012),

Forfeiture of the powerful bonds between mother and child through surrogacy contracts constitutes extreme alienation—it is an "invasion of the market" in a deep, very private realm.[161] This is so because the womb should not be thought of or treated as "raw material[]."[162] Studies show many women would consider themselves to be a mother to a baby they carry in their wombs, even if the baby is not related to them genetically; in their minds, the gestational tie binds them to the baby as much as a genetic tie.[163] Certainly birth mother Anna Johnson felt that way in the *Johnson v. Calvert* case with regard to the baby she carried and gave birth to under contract with the Calverts.[164] The California Supreme Court did not disagree with her in holding that "two women each have presented acceptable proof of maternity,"[165] although it ultimately ruled that the genetic tie trumps the gestational tie.[166] The story of another birth mother, Diane, is illustrative: "Because she was [previously] a mother, she recognized that she had bonded as a mother with the child in her womb, and she felt responsible for him."[167] Another birth mother, Heather Rice, gave birth to a child whose commissioning parents had asked to be aborted due to a cleft in the brain. She did not know what happened to the child after he was born;[168] it is possible that the commissioning parents ultimately gave up the child for adoption.[169] Ms. Rice's sentiments were revealing. In her words: "I don't know where he is, and it kills me every day."[170] In yet another example, a woman recounts a birth mother's experience: "What broke my heart was that she did not even know if she had given birth to a girl

---

http://www.thepublicdiscourse.com/2012/09/6211/ [https://perma.cc/YXA7-FY7J] (emphasis added). Professor Smolin would agree with this. *See* Smolin, *supra* note 1, at 322–25. If that is the case, the objection to surrogacy due to baby-selling takes on greater significance. *See infra* notes 205, 326.

161. SHANLEY, *supra* note 7, at 113; *see* Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 75 (1990).

162. *See* SHANLEY, *supra* note 7, at 121.

163. *See id.* at 114; BREEDERS, *supra* note 7 (documenting birth mothers' testimonies).

164. 851 P.2d 776, 781 (Cal. 1993); Lahl, *supra* note 9, at 290; Lahl, *supra* note 12.

165. *Johnson*, 851 P.2d at 782.

166. *Id.*; *see also* SHANLEY, *supra* note 7, at 115.

167. Lahl, *supra* note 9, at 288.

168. *See* Lewin, *supra* note 21.

169. *See id.*

170. *Id.*

or boy. They took the baby away before she was allowed to even catch a glimpse of her own child."[171]

Perhaps it would be wise to heed the following from Jennifer Lahl, President of the Center for Bioethics and Culture Network: "Women aren't just empty vessels. The womb isn't arbitrary . . . . Women aren't breeders."[172] Given the background understanding that human beings should be begotten, not made, and that how we procreate to that end matters very much,[173] the womb is not arbitrary indeed.

How do birth mothers fare after birth? There is, unfortunately, not an abundance of data, but the available evidence does not unequivocally affirm that birth mothers are doing well.[174] A longitudinal study from 2015 assessed birth mothers ten years after birth. It revealed mainly positive experiences reported by the birth mothers, albeit with methodological limitations.[175] The authors of the study concede that the study was disadvantaged by its small sample size and assert that it is unclear whether its generally positive findings should be applied to surrogacy arrangements beyond the United Kingdom.[176] The authors also underscore the need for more studies of commercial surrogacy arrangements, whose outcomes may be less beneficial than those of the altruistic arrangements on which the study was based.[177]

---

171. Julie Bindel, *Women in India Suffer as They Serve as Surrogates*, STOP SURROGACY NOW, http://www.stopsurrogacynow.com/women-in-india-suffer-as-they-serve-as-surrogates/ [https://perma.cc/3UC9-C2HL].

172. BREEDERS, *supra* note 7.

173. *See supra* Part II.

174. Studies and accounts of how birth mothers fare after birth often conflict. *Compare* Ciccarelli & Beckman, *supra* note 26, at 31–35 (2005), *and* Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPROD. 2196, 2203–04 (2003) (documenting mainly positive overall experiences with surrogacy, though not categorically so), *with* BREEDERS, *supra* note 7 (documenting negative experiences in surrogacy). The authors of the studies that report overall positive experiences acknowledge that despite the generally positive findings, the studies are disadvantaged by limited data and various methodological problems, including small sample size, recall bias, and risk of social desirability bias. Ciccarelli & Beckman, *supra* note 26, at 24, 29; Jadva et al., *supra*, at 2203–04.

175. Jadva et al., *Surrogate Mothers 10 Years on: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child*, 30 HUM. REPROD. 373, 377–78 (2014).

176. *Id.* at 378.

177. *Id.*

IVF and surrogacy inevitably introduce the messy question of who ought to occupy parental roles.[178] Legal philosopher Anca Gheaus argues that if children are products of scientists' laboratory work,[179] then the person who has the strongest claim to parenthood is the one who has paid the greatest cost in bearing the child through pregnancy and who is, therefore, the most intimate with that child through the shared experiences of pregnancy, birth, and the post-partum process.[180] Gheaus traces the "uniquely privileged context for developing a bond" that is "rooted in bodily experiences" between birth mother and child—including pregnancy, labor, birth, and the post-partum process—leading to maternal instinct.[181] Thus she asserts that the birth mother has a stronger claim to keep, raise, and parent the baby than the commissioning parents in gestational surrogacy, *despite* the commissioning parents' genetic relationship to the baby.[182] It should be noted, though, that she remains "agnostic" about whether such a parental right can be alienable in a surrogacy contract.[183]

And what of women who do *not* develop a bond with the baby they are carrying for the commissioning parents? Gheaus asserts that, because the intimate bond between the birth mother and the baby is the norm rather than the exception, that normative bond is sufficient as the basis of a right of the birth mother to keep and rear the baby.[184] She even goes a step further and asserts that if the birth mother, as an outlier, does *not* develop a bond with the baby *but the baby does* with her, it may

178. *See* O'DONOVAN, *supra* note 116, at 45, 48; *see also* SPAR, *supra* note 10, at 71

179. *See infra* Section III.B.1.

180. *See* Anca Gheaus, *The Right to Parent One's Biological Baby*, 20 J. POL. PHIL. 432, 446–51 (2012).

181. *See id.* at 449–50.

182. *See id.* at 446–51. This weakens the argument made by some that the birth mother is not a mother to the child she is carrying. That argument is also reductionistic in that it devalues her as no more than an incubator. *See* Arshagouni, *supra* note 8, at 814; BREEDERS, *supra* note 7. The argument that gestating a child for someone else is a mere difference of degree from, say, babysitting for or being in charge of someone else's child at a boarding school, *see* Arshagouni, *supra* note 8, at 831–32, is unpersuasive. Being a gestational or birth mother is different in *kind* from the aforementioned hypotheticals.

183. Gheaus, *supra* note 180, at 454.

184. *See id.* at 450–52.

be sufficient to give rise to the right of the birth mother to be the one who raises the child.[185]

Given the above, is it right to contract away one of the parents of the child? A child is fragmented and damaged by not being raised, known, and loved by his biological parents (that is, his genetic parents[186] *and* his birth mother) in the practice of surrogacy. A birth mother loses a part of herself as well when her intimate connection with the child is severed. These are strong reasons to favor prohibition of commercial surrogacy.

2. Inalienability of the Womb and Gestational Services

The popular 1990's sitcom *Friends* put it this way when Phoebe, one of the characters in the show, became a surrogate for her half-brother and his wife: "I'm just the oven; it's totally their bun."[187] But certain things are not appropriate to be contracted away—they are too sacred.[188] The womb and gestational services ought not be alienable,[189] because pregnancy or gestating is unlike other kinds of labor that women do which they may offer in a contract.[190] It is part of who the woman is, down to her core.[191] It is not and should not be thought of as an em-

185. *See id*. at 452 n.46.

186. Professor Melissa Moschella has argued compellingly that children have a fundamental right to their genetic parents. *See* Melissa Moschella, *Rethinking the Moral Possibility of Gamete Donation*, 35 THEORETICAL MEDICINE & BIOETHICS 421, 433–37 (2014) [hereinafter Moschella, *Rethinking*]; Melissa Moschella, *The Wrongness of Third-Party Assisted Reproduction: A Natural Law Account*, 22 CHRISTIAN BIOETHICS 104, 105 (2016) [hereinafter Moschella, *Wrongness*]; Melissa Moschella, *The Rights of Children: Biology Matters*, PUB. DISCOURSE (Feb. 20, 2014), http://www.thepublicdiscourse.com/2014/02/11620/ [https://perma.cc/2UL2-VP4K] [hereinafter Moschella, *The Rights of Children*].

187. *Friends: The One with Phoebe's Uterus* (NBC television broadcast Jan. 8, 1998); *see* Gelmann, *supra* note 13, at 159.

188. *See* Lahl, *supra* note 9, at 292.

189. *See* KASS, *supra* note 56, at 114 (in the context of bioethics in general, including the practice of surrogacy), 190 (in the related context of thinking of the body in a proprietary sense with regard to organ sale); Browne-Barbour, *supra* note 10, at 475–80; Radin, *supra* note 32, at 1933; Lahl, *supra* note 9, at 292.

190. *See* SHANLEY, *supra* note 7, at 108, 111–13; Healy, *supra* note 24, at 114. This is especially true as a response to the feminist position of "her body, her right." *See* SHANLEY, *supra* note 7, at 105–07; *see also* ROBERTSON, *supra* note 27, at 141.

191. *See* KASS, *supra* note 56, at 190 (in the related context of thinking of the body in a proprietary sense with regard to organ sale).

ployment contract.[192] Those who argue that a surrogacy arrangement is nothing other than a service contract miss this point.[193] Indeed, the human body is not appropriately thought of in quantitative measures.[194] Surrogacy, by contrast, treats the birth mother's womb as the object with which to "maximize monetizable wealth."[195] Surrogacy "employs women to produce children"[196] and creates a market in womb-renting.[197] Professor Mary Lyndon Shanley, writing from a feminist perspective, asserts that the objectification and alienation of the woman in selling gestational services are so extreme that the contract is by nature illegitimate.[198] In a surrogacy contract, it is motherhood itself that is exchanged for money.[199] Thus the birth mother's contractual arrangement in surrogacy exploits her by objectifying and commodifying her. She is reduced from a whole person to a commodity: a rent-a-womb, raw material.[200]

That the birth mother is reduced to a rent-a-womb is evidenced by how her lifestyle and health are of interest only to

192. SHANLEY, *supra* note 7, at 121.

193. *See, e.g.*, Arshagouni, *supra* note 8, at 822–26, 843.

194. *See* KASS, *supra* note 56, at 194. It is worthwhile to contrast that while organ-selling is illegal, commercial surrogacy is not. *See* Lahl, *supra* note 12. Womb-renting is arguably even more objectionable than organ-selling, *see* KASS, *supra* note 56, at 190–96, as gestational services are intrinsic to matters of genesis and identity of the persons involved. *See* RADIN, *supra* note 110, at 161; *supra* Section III.B.2.

195. Radin, *supra* note 32, at 1885–86, 1928–36 (analyzing surrogacy and other related matters through the lens of universal market rhetoric).

196. SPAR, *supra* note 10, at 94. A U.K. couple said the following about two Indian women who were each pregnant with twins for them in a commercial surrogacy arrangement: "She's doing a job for us[;] how often do you communicate with your builder or your gardener?" Poonam Taneja, *The Couple Having Four Babies by Two Surrogates*, BBC (Oct. 28, 2013), http://www.bbc.com/news/uk-24670212 [https://perma.cc/5HKV-BV5Q]. It should be noted that commercial surrogacy is prohibited in the U.K., which is why the couple went outside the country for these commercial surrogacy arrangements. *See id*. With regard to how the birth mother is treated in the industry, a feminist who is critical of surrogacy says, "She is not the appendage of the machine, she *is* the machine." Ekman, *supra* note 115.

197. *See* SPAR, *supra* note 10, at xv.

198. *See* SHANLEY, *supra* note 7, at 113–14.

199. Even proponents of surrogacy recognize the motherhood of the birth mother. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); SPAR, *supra* note 10, at 93; Margalit, *supra* note 10, at 426.

200. *See* KASS, *supra* note 56, at 100, 101. One reason that such a view is reductionistic is that it is the woman's entire body that is working to sustain the pregnancy, not just the womb. *See* Lahl, *supra* note 9, at 293; *see also* BREEDERS, *supra* note 7.

the extent that they affect the baby that she is supposed to gestate per the contract.[201] One birth mother, being interviewed about her experience, said that she had been "classified as an incubator" and discussed not as a person with a name, but simply as a surrogate uterus.[202]

Scholars have noted the similarities between surrogacy and prostitution,[203] slavery,[204] and baby-selling.[205] The argument advanced by proponents of surrogacy that a surrogacy contract is not slavery or baby-selling, but merely the contract for *services* of a woman to gestate, is disturbingly similar to the argument made by nineteenth-century proponents of slavery: they were not in the business of buying and selling human beings, but rather the *labor* of those human beings.[206] Speaking in the context of the ancient practice of surrogacy in the story of Abraham and Hagar told in the book of Genesis, Professor O'Donovan aptly remarks:

> If we have doubts about the possibility of personal representation in the work of procreation, are our doubts not precisely the same doubts that we have about the institution of slavery itself—namely a repugnance at the thought that the personal powers of any human being, such as the power to beget children, could come to be regarded as the property of another?[207]

3. The Large Print Giveth Not, and the Small Print Taketh Away

Contrary to how some characterize the birth mother as nothing more than a gestational carrier who was never a mother to begin with,[208] even proponents of surrogacy recognize that it is

---

201. *See* SPAR, *supra* note 10, at xvi, 81; Lahl, *supra* note 12.

202. *See* BREEDERS, *supra* note 7 (documenting the experience of a birth mother named Gail).

203. *See, e.g.*, RADIN, *supra* note 110, at 140; SPAR, *supra* note 10, at 82–83; Radin, *supra* note 32, at 1921, 1925, 1934–35 (in the context of traditional surrogacy); Smolin, *supra* note 1, at 282–83; Lewin, *supra* note 21.

204. *See, e.g.*, O'DONOVAN, *supra* note 116, at 42; Allen, *supra* note 113, at 141–46; Smolin, *supra* note 1, at 283, 318–22.

205. *See, e.g.*, SPAR, *supra* note 10, at xix, 71, 82–83; Smolin, *supra* note 1, at 268; *see also infra* notes 325–26 and accompanying text. For a compelling response to the argument that surrogacy is not baby-selling because you cannot buy what is already yours, see Smolin, *supra* note 1, at 322–25.

206. *See* Smolin, *supra* note 1, at 322.

207. O'DONOVAN, *supra* note 116, at 42.

208. *See* Smolin, *supra* note 1, at 311–15.

the contract that strips the birth mother of her natural, intrinsic parental status and right to the child—otherwise, her status and right as mother to the child is inherent as the one who gave birth to the child.[209] Attorney Jeff Shafer puts it this way: "The *contract* is the decisive consideration, not genetics."[210]

This is true of the foundational case on surrogacy arrangements and freedom of contract.[211] In *Johnson*, the California Supreme Court did not take it as a given that genetic tie automatically trumped gestational tie as status of parenthood.[212] It was rather the *parties' intent* in their freedom to contract that was the key for the court in awarding the status and right of parenthood to the Calverts, denying Anna Johnson of hers.[213] Thus even in California, the United States' surrogacy capital, the birth mother is presumed to be the mother of the child.[214]

Professor David M. Smolin, in investigating the practice of surrogacy as the sale of children, has strong words for laws in jurisdictions that allow for surrogacy based on freedom of contract: "[T]he *law becomes a means by which human beings are bartered and sold, rather than a remedy against such evils*."[215] He likens it to the Supreme Court's grotesque use of "raw power" in *Plessy v. Ferguson*.[216] Does the birth mother's consent in the exercise of her freedom of contract negate the demeaning aspect of the contract? Professor O'Donovan suggests the answer is no. Again, in the context of the surrogacy account recorded in the ancient book of Genesis, he says, "The issue, as with slavery

---

209. *See id.* at 310, 314–15, 325–28, 331–34; *see also* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); Yasmine Ergas, *Babies Without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy*, 27 EMORY INT'L L. REV. 117, 170 (2013); *see also* Caballero, *supra* note 11, at 296.

210. Jeff Shafer, *Babies for Sale, in a Market Near You*, FEDERALIST (Oct. 6, 2015), http://thefederalist.com/2015/10/06/babies-for-sale-in-a-market-near-you/ [http://perma.cc/YT2W-LNU5].

211. *See Johnson*, 851 P.2d 776. For the proposition that *Johnson* is a foundational case in this area of law, see Smolin, *supra* note 1, at 326–28.

212. *Johnson*, 851 P.2d at 782; *see also* Smolin, *supra* note 1, at 326–28, 332–33.

213. *See* Smolin, *supra* note 1, at 326–28; *see also Johnson,* 851 P.2d at 782–83; Lahl, *supra* note 12.

214. *See* Smolin, *supra* note 1, at 328, 334, 336. This is true even according to the new surrogacy statute in California. *See* CAL. FAM. CODE §§ 7960–7962 (2017).

215. Smolin, *supra* note 1, at 334.

216. 163 U.S. 537 (1896) (using a hypothetical and sheer conjecture to dismiss the argument that segregation is inherently unequal); *see* Smolin, *supra* note 1, at 334.

itself, is not primarily the issue of whether this alienation [from her being a mother to the child] is voluntary or involuntary; it is whether it can happen at all, or be conceived to happen without a debasing and demeaning of the human person."[217]

4. Problems with Consent

The birth mother finds herself in a situation in which the almost always wealthier commissioning parents exercise their freedom of contract to reproduce by contracting with her. But *her* consent to the contract in such a case may be clouded by exploitation and is vulnerable to abuse.[218] Surrogacy disproportionately involves poorer, less educated women signing up to be birth mothers.[219] A good portion of women who sign up to be birth mothers in the United States are military wives (estimated to be between twenty and fifty percent) needing extra income.[220] Most are of modest income,[221] between $16,000 and $30,000 a year.[222] Payment to the birth mother for the surrogacy

---

217. O'DONOVAN, *supra* note 116, at 42–43.

218. *See* Lahl, *supra* note 9, at 289; Glenda Labadie-Jackson, *The Reproductive Rights of Latinas and Commercial Surrogacy Contracts—English Translation*, 14 TEX. HISP. J.L. & POL'Y 49, 64 (2008).

219. *See* KASS, *supra* note 56, at 188; ROBERTSON, *supra* note 27, at 139, 226; SHANLEY, *supra* note 7, at 115; SPAR, *supra* note 10, at 72, 87, 93–94; Browne-Barbour, *supra* note 10, at 475–80; Labadie-Jackson, *supra* note 218, at 60–66; Lahl, *supra* note 9, at 287–8; Radin, *supra* note 32, at 1930; *see also* RADIN, *supra* note 110, at 142; Whetstine & Beach, *supra* note 8, at 34 (comparing the education level of the birth mother with those of the commissioning parents in the *Baby M* case).

220. BREEDERS, *supra* note 7; Sloan, *supra* note 6; *see also* Sloan, *supra* note 5. Although the international surrogacy industry is beyond the scope of this Article, it is worth noting that it similarly employs poorer women as birth mothers. "In the Third World, they call this . . . baby farming; in the First World, they call it surrogacy." JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM at xxii (1993); SPAR, *supra* note 10, at 86–87; Bindel, *supra* note 172; Erica Tempesta, *'They Tried To Sell Us a Baby over Dinner': American Journalist Reveals Heartbreaking Details About the 'Dark Underbelly' of India's 'Embryo Outsourcing' Industry*, DAILY MAIL (Apr. 7, 2015), http://www.dailymail.co.uk/femail/article-3028043/American-journalist-reveals-heartbreaking-details-dark-underbelly-India-s-embryo-outsourcing-industry.html [http://perma.cc/MPD8-P8EP]. Relatedly, see Ekman, *supra* note 115, for how involuntary surrogacy, which involves abducting young women and holding them hostage as breeders, has been co-opted by Asian mafias as a money-making enterprise.

221. Lahl, *supra* note 9, at 288; Ciccarelli & Beckman, *supra* note 26, at 21, 30–31; BREEDERS, *supra* note 7.

222. Sloan, *supra* note 6; *see also* Whetstine & Beach, *supra* note 8, at 34.

contract tends to be around $20,000 to $30,000.[223] Meanwhile, the whole process costs about $90,000 to $150,000 for the commissioning parents.[224] At this price point, commissioning parents tend to be wealthy.[225] Indeed, surrogacy has been the reproductive route of choice for many celebrities, possibly filter-filtering down to the upper-middle class.[226]

The reality is few women would agree to offer their gestational services purely from altruistic motives, even though a desire to help may be mixed in with pecuniary interests.[227] It is estimated that altruistic surrogacy makes up less than two percent of all surrogacy arrangements.[228] Professor Debora L. Spar, writing about market forces on the reproductive industry, says "neither the rhetoric nor the motive," however altruistic, changes the manufacturing and transacting reality of the "commerce of conception."[229] Other issues that implicate unequal bargaining power between commissioning parents and birth mother include disparity in social class, ethnicity, gender hierarchy, politics, and women's derivation of fulfillment from pregnancy.[230]

---

223. SPAR, *supra* note 10, at 82, 87; Whetstine & Beach, *supra* note 8, at 37; Sloan, *supra* note 6. This income works out to be around $3 per hour at the high end. By comparison, the federal minimum wage is $7.25 per hour. *See Minimum Wage*, U.S. DEP'T LAB., https://www.dol.gov/general/topic/wages/minimumwage [https://perma.cc/VV8Z-8VA7].

224. Sloan, *supra* note 5; *Surrogate Mother Costs*, WEST COAST SURROGACY, https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost [https://perma.cc/JPY5-JYDA].

225. Hartocollis, *supra* note 4; Lewin, *supra* note 21; *see* Lahl, *supra* note 12. The assertion that some women who agree to be birth mothers are not in poverty does not invalidate the statistic that they are generally less well off than the commissioning parents. Ciccarelli & Beckman, *supra* note 26, at 30–31; Hartocollis, *supra* note 4.

226. Whetstine & Beach, *supra* note 8, at 37; *see* Jen Juneau, *Kim Kardashian West, Jimmy Fallon and 29 More Famous Families Who've Welcomed Children Through Surrogacy*, PEOPLE (Sept. 6, 2017), http://people.com/babies/celebrities-who-have-used-surrogates/kanye-and-kim-kardashian-west [perma.cc/66VJ-QJ7J].

227. *See* Lahl, *supra* note 9, at 288; ROBERTSON, *supra* note 27, at 140–41; Browne-Barbour, *supra* note 10, at 477–78, 480; *see also* Ciccarelli & Beckman, *supra* note 26, at 30–31; BREEDERS, *supra* note 7.

228. *See* Ekman, *supra* note 115.

229. SPAR, *supra* note 10, at xi, 2; *see also* BREEDERS, *supra* note 7.

230. *See* SHANLEY, *supra* note 7, at 115–16, 121; *see also* RADIN, *supra* note 110, at 142, 151; SPAR, *supra* note 10, at 82; Allen, *supra* note 113, at 139; Browne-Barbour, *supra* note 10, at 475–80; Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACK-LETTER J. 17, 29 (1991); Ciccarelli & Beckman, *supra* note 26, at 30–31; Labadie-Jackson, *supra* note 218, at 60–63, 64–66. In December 2017, U.S. Con-

With that background, disparity in bargaining power between the contracting parties is a procedural concern that could invalidate the transaction.[231] Insofar as surrogacy contracts use boilerplate agreements drafted by the surrogacy agency, which is common,[232] consent problems on the part of the birth mothers remain.[233] Additionally, surrogacy contracts are often very long—a fifty-page contract is not outside the norm.[234]

It does not help that surrogacy agencies have been plagued with conflicts of interest injurious to the birth mother. Legal, medical, or psychological representation for the birth mother are at times chosen and provided by the surrogacy agency.[235] Worse yet, some surrogacy agencies conduct unsavory business practices—from deception, to fraud, to outright baby-selling.[236]

With such consent problems, is it fair to say that it is her *freedom* of contract that the birth mother exercises when she enters into the surrogacy contract? Although one can say that the commissioning parents exercise *their* freedom of contract in consenting to the contract, the case for the birth mother is less clear.

5. Risks, Known and Unknown

The surrogacy procedure necessitates implanting the embryo in the birth mother's uterus through IVF.[237] Implantation presents risks to the birth mother, some of which are known[238] and

---

gressman Trent Franks resigned from office after reports surfaced of his having asked two female staffers to carry his child in surrogacy. Katie Rogers, *Trent Franks, Accused of Offering $5 Million To Aide for Surrogacy, Resigns*, N.Y. TIMES (Dec. 8, 2017), https://nyti.ms/2kGaOay [https://perma.cc/29PX-QEND].

231. *See* Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 226 (2012).

232. *See* BREEDERS, *supra* note 7; *see also* Lahl, *supra* note 12.

233. *See* Browne-Barbour, *supra* note 10, at 483–84; Margalit, *supra* note 10, at 464–65; *see also* SPAR, *supra* note 10, at 80. *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

234. *See* SPAR, *supra* note 10, at 80; *see also* BREEDERS, *supra* note 7.

235. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 513 (1996); Margalit, *supra* note 10, at 450; Sloan, *supra* note 5.

236. *See* Devine & Stickney, *supra* note 15; Lewin, *supra* note 21.

237. *See* SPAR, *supra* note 10, at 78, 79–80; Caballero, *supra* note 11, at 302.

238. *See Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies*, CTR. FOR BIOETHICS & CULTURE NETWORK, http://breeders.cbc-network.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf [https://perma.cc/VMH7-AADP].

others yet unknown.[239] Known risks include multiple gestation,[240] a fourfold increase in caesarean sections,[241] long-term hospitalizations,[242] gestational diabetes,[243] and stroke.[244]

Among the drugs and hormones administered to the birth mother as part of the preparation for IVF are Lupron, a drug needed to time embryo transfer, which has so many adverse effects that it is unapproved by the Food and Drug Administration for purposes of pregnancy.[245] Estrogen is needed to thicken the uterine lining, with side effects that include depression and cancer.[246] Steroids are needed for implantation of the embryo, which weaken the birth mother's immune system.[247] Furthermore, when the embryo implanted in the birth mother's uterus comes from a foreign egg, either from the commissioning mother or an egg donor, additional risks include a threefold risk of pregnancy-induced hypertension and pre-eclampsia.[248]

Once the baby is born, not being able to breastfeed the baby (since the baby is required by contract to be handed over to the commissioning parents) makes it harder for the birth mother's

---

239. Lahl, *supra* note 9, at 287, 289.

240. *See* Caballero, *supra* note 11, at 302; Lahl, *supra* note 9, at 293; T.A. Merritt et al., *Impact of ART on pregnancies in California: an analysis of maternity outcomes and insights into the added burden of neonatal intensive care*, 34 J. PERINATOLOGY 345, 348–49 (2014).

241. *See* Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49.

242. Merritt et al., *supra* note 240, at 348–49.

243. *See* Lahl, *supra* note 9, at 294; Esme I. Kamphuis et al., *Are we overusing IVF?*, 348 BRIT. MED. J. 252, 253 (2014).

244. *See* Lahl, *supra* note 9, at 294.

245. *See id.* at 294; Joshua Alexander & Leah Levi, *Intracranial Hypertension in a Patient Preparing for Gestational Surrogacy with Leuprolide Acetate and Estrogen*, 33 J. NEURO-OPTHALMOLOGY 310, 310 (2013); CTR. FOR BIOETHICS & CULTURE, *Public Policy and the Health of Young Mothers*, http://us7.campaign-archive2.com/?u=854a02957234313d134e9865d&id=1d59d6544c&e=f54339cbeb [https://perma.cc/ZUC3-ERVE].

246. *See* Lahl, *supra* note 9, at 294; CTR. FOR BIOETHICS & CULTURE, *supra* note 245.

247. *See* CTR. FOR BIOETHICS & CULTURE, *supra* note 245.

248. Lahl, *supra* note 9, at 294; Kamphuis et al., *supra* note 243, at 253; Ulrich Pecks et al., *Oocyte Donation: A Risk Factor for Pregnancy-Induced Hypertension: A Meta-Analysis and Case Series*, 108 DEUTSCHES AERZTEBLATT INT'L 23, 28–30 (2011); *Pregnancies following egg donation associated with more than 3-fold higher risk of hypertension*, SCI. DAILY (July 1, 2014), https://www.sciencedaily.com/releases/2014/07/140701091446.htm [https://perma.cc/N9D6-F6VK].

body to heal and recover from pregnancy and birth.[249] Being unable to breastfeed also introduces an elevated risk of hemorrhage and metabolic syndrome for the birth mother, putting her at an increased risk of heart disease and diabetes.[250] Denying breastfeeding to the birth mother keeps her from the benefits of doing so, which include a decreased long-term risk of breast cancer, cervical cancer, uterine cancer, and osteoporosis.[251]

Risk of a sense of deep loss after the baby is born is also present.[252] One birth mother puts it this way with regard to the grief she underwent after the baby was born: "She wasn't an idea anymore that we could . . . write out on paper . . . . She was a real baby."[253] This sense of deep loss is not surprising, given the deep bond between mother and child further revealed by the growing science of epigenetics—for example, how the child is quite literally a part of the birth mother long after she carried him in her womb and gave birth to him.[254]

One of the risks above, multiple gestation, increases risk of maternal death.[255] A notable case is that of Brooke Brown. The Idaho woman was a gestational mother who was pregnant with twins for commissioning parents from Spain, where surrogacy had been made illegal.[256] She was also reportedly a five-time gestational mother.[257] Brooke died from complications of the surrogacy pregnancy days before she was scheduled to deliver the twins.[258] Her death in 2015 is notable as the first re-

249. *See* DIANE WIESSINGER ET AL., THE WOMANLY ART OF BREASTFEEDING 5, 8 (8th ed. 2010); CTR. FOR BIOETHICS & CULTURE, *supra* note 245. One way to mitigate this is for the birth mother to try to pump breastmilk. *See* WIESSINGER ET AL., *supra*, at 340–43.

250. *See* WIESSINGER ET AL., *supra* note 249, at 5, 8.

251. *See id.*

252. *See* BREEDERS, *supra* note 7.

253. *Id.* (quoting a birth mother named Tanya).

254. *See supra* Section III.A.1.

255. *See id.*

256. Mirah Riben, *American Surrogate Death: NOT the First*, HUFFINGTON POST (Oct. 15, 2015), https://www.huffingtonpost.com/mirah-riben/american-surrogate-death-_b_8298930.html [https://perma.cc/CNE5-6ZDS].

257. Maggie Gallagher, *Death and Other Scandals of Surrogate-Mother Contracts*, NAT'L REV. (Oct. 16, 2015), http://www.nationalreview.com/article/425710/surrogate-mothers-death-health-risks [https://perma.cc/7YYY-FSE8].

258. *See* Riben, *supra* note 257.

ported gestational mother death in the United States.[259] She was thirty-four years old.[260] She is survived by her husband and their three sons.[261]

6. Surrogacy Dehumanizes the Birth Mother

Concern that women are exploited in surrogacy arrangements drives public policy considerations against them. If things in life are measured by their worth and monetized, it is supposed to be toward "the full flowering of human possibility," or toward human flourishing.[262] But commoditizing the womb, and hence the woman's body, leads to exactly the opposite of human flourishing.[263] It trivializes important, powerful bonds between the birth mother and child; treats the womb as no more than an artifice; makes motherhood transactional and alienable, even in the face of dubious consent in what is supposed to be the context of freedom of contract; and knowingly introduces risks to the birth mother related to surrogacy. These costs to surrogacy stand without supposing or requiring that commissioning parents think about the birth mother in such severe terms. They are, rather, intrinsic to the surrogacy contract. Certain things are not appropriate to be contracted away; they are too sacred. Because embodiment matters and is constitutive of our humanness, when we sell our bodies, we sell who we are: we sell our souls.[264]

B. Surrogacy and the Child

1. Children, Manufactured

When children are put together by scientists in a laboratory through IVF, a procedure necessary in surrogacy, it reduces

---

259. *See id.*

260. *Obituary: Brooke Lee Brown*, MAGICVALLEY.COM (Oct. 10, 2015), http://magicvalley.com/print-specific/obituary/obituary-brooke-lee-brown/article_4eb16ee6-7794-56ac-81ca-afb6b5af7817.html [https://perma.cc/P9SV-SJLM].

261. *Id.*

262. KASS, *supra* note 56, at 194.

263. *See id.*

264. *See id.* at 195.

them to "the status of a product" at conception.[265] These children are "*manu-factured*"—quite literally, "handmade."[266] As Professor O'Donovan similarly noted,[267] Professor Finnis remarks that "the relationship of product to maker is a relationship of radical inequality, of profound subordination."[268] This is not unlike the relationship of dominion between master and slave.[269] Contrast this with the child of a sexual union: he has "the status of radical equality with parents," which in turn is "a great good for any child."[270] It is thus a "grave injustice" for children to be manufactured through the use of a gestational mother, along with other make-a-baby components such as donor eggs or sperm.[271]

If children are products, they are also more "subject to quality control, utilization, and discard."[272] This explains how our society tends to treat frozen embryos related to the procedure of IVF: endangering, damaging, or destroying embryos for research, as well as active selection for implantation.[273] The most desirable embryos are used for implantation in the birth mother while the others are discarded, destroyed, or indefinitely frozen without concrete plans of transferring them for eventual implantation.[274]

---

265. John Finnis, *The Priority of Persons Revisited*, 58 AM. J. JURIS. 45, 56 (2013); *see also* FINNIS, *supra* note 141, at 276–79, 281; SPAR, *supra* note 10, at 78, 79–80; Caballero, *supra* note 11, at 302; BREEDERS, *supra* note 7.

266. *See* KASS, *supra* note 56, at 103.

267. *See* O'DONOVAN, *supra* note 116.

268. FINNIS, *supra* note 141, at 276–79.

269. *Id.* at 279, 281.

270. *Id.* at 276–77.

271. *See* Finnis, *supra* note 265, at 56.

272. FINNIS, *supra* note 141, at 278–79.

273. *Id.* at 278–80; Smith, *supra* note 3.

274. *See* FINNIS, *supra* note 141, at 280. See, for example, the case involving actress Sofia Vergara regarding the indeterminate future of the frozen embryos created from her eggs and her then-fiancé Nick Loeb's sperm through IVF. Christina Cauterucci, *Sofia Vergara's Ex Might Finally Be Out of Luck in His Battle for Custody of Their Frozen Embryos*, SLATE (Aug. 31, 2017), http://www.slate.com/blogs/xx_factor/2017/08/31/sof_a_vergara_s_ex_might_finally_be_out_of_luck_in_his_battle_for_custody.html [https://perma.cc/6FZ7-H5ED]. *See generally* GEORGE, *supra* note 149, at 196–97, 200–02 (explaining and tracing how each human being's life begins at conception and how human embryos are embryonic humans, along with the ethical implications).

These procedures treat the tiny human beings, the embryos, as a means to an end (although a worthy end of having one's own genetic children).[275] But both ends and means have to satisfy the requirements of practical reasonableness for justice to be achieved, and hence for the common good to be achieved.[276] In other words, good ends, even if they are very good, do not justify the means. The strong, innate, and legitimate desire of having one's own genetic children, however worthy, does not justify the stripping of another's basic dignity as a human being.[277] To justify it would be to affirm what is unjust.[278]

Furthermore, when children are put together the way products are manufactured, it is a slippery slope toward eugenics. Professor Radin notes that "[w]hen the baby becomes a commodity, all of its personal attributes—sex, eye color, predicted IQ, predicted height, and the like—become commodified as well."[279] 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?[280] The "quality control" aspect inevitably rears its ugly head once children are commoditized.[281]

Indeed, U.S. scientists are reported to have successfully modified the genetic code of human embryos in July 2017, using embryos from IVF specifically created for the purpose.[282] One commentator hailed this as "a milestone on what may prove to be an inevitable journey toward the birth of the first genetically modified humans."[283] The technology is usually presented as one developed for genetic disease prevention, but it is frankly

---

275. *See* FINNIS, *supra* note 141, at 280–81.

276. *See id.*

277. *See id.*

278. *See id.*

279. Radin, *supra* note 32, at 1925 (discussing the commodification effects of baby-selling in particular); *see also* Browne-Barbour, *supra* note 10, at 480–85.

280. GILBERT MEILAENDER, BIOETHICS: A PRIMER FOR CHRISTIANS 16 (3d. ed. 2013); Smith, *supra* note 3; *see also* Leon Kass, Address at the United States Holocaust Memorial Museum: A More Perfect Human: The Promise and Peril of Modern Science (Mar. 17, 2005).

281. *See* FINNIS, *supra* note 141, at 278–79; MEILAENDER, *supra* note 280, at 16.

282. *See* Steve Connor, *First Human Embyros Edited in U.S.*, MIT TECH. REV. (July 26, 2017), https://www.technologyreview.com/s/608350/first-human-embryos-edited-in-us/ [https://perma.cc/DV8V-ZJ5P].

283. *Id.*

equally available as one for the manufacturing of designer babies.[284] The market to manufacture perfect new children is not just coming—it is already here.[285] The baby, like the womb, is a commodity,[286] and surrogacy a market, a "commercial realm."[287]

The drive for perfect children is apparent in the case of birth mother Heather Rice. In Rice's case, the commissioning parents demanded that she have an abortion when the baby in her uterus was diagnosed with a cleft in his brain.[288] When she would not abort the baby, the commissioning father told her that "God was going to punish [her] for disobeying them."[289] In another case involving a birth mother named Melissa Cook, the commissioning father not only ordered that the baby produced be male, but he also demanded an abortion for one of the babies when the implantation procedure resulted in triplets—two more babies than he desired.[290] He said the third baby should be put up for adoption.[291] Similarly, although the famous Baby Gammy case took place outside the United States,[292] its facts are instructive. The Australian commissioning parents, having contracted with a Thai woman who became pregnant with twins for them, reportedly asked the birth mother to abort one of the twins when tests revealed that the baby had Down syndrome.[293] After the twins were born, the couple took the healthy baby girl to Australia and left behind Gammy, the baby boy with Down syndrome (and congenital heart defect), with the

284. *See* Smith, *supra* note 3.

285. *See* SPAR, *supra* note 10, at xiii.

286. *See id.* at 71.

287. *Id.* at 92; BREEDERS, *supra* note 7.

288. *See* BREEDERS, *supra* note 7; Lewin, *supra* note 21.

289. BREEDERS, *supra* note 7; Lewin, *supra* note 21.

290. *See* Sloan, *supra* note 5.

291. *See id.*

292. Heather Saul, *'Hope for Gammy' fund set up after Australian couple 'refuse to take Down's Syndrome baby' from Thai surrogate mother*, INDEPENDENT (Aug. 2, 2014), http://www.independent.co.uk/news/world/australasia/hope-for-gammy-fund-set-up-after-australian-couple-refuse-to-take-downs-syndrome-baby-from-thai-9642364.html [https://perma.cc/LL5Q-FBVS].

293. *Id.*; *see also* Jonathan Pearlman, *'Baby Gammy' was not abandoned in Thailand, court rules*, TELEGRAPH (Apr. 14, 2016), http://www.telegraph.co.uk/news/2016/04/14/baby-gammy-was-not-abandoned-in-thailand-court-rules/ [https://perma.cc/YJP8-ULZF].

Thai birth mother,[294] with whose family he has since remained.[295]

The commodification and manufacturing of children is also apparent in the price differential for different eggs, which is of interest because surrogacy sometimes involves the use of donor gametes.[296] The eggs of an Ivy League-educated donor would command more money in the market—as would eggs of a blonde woman, or one who plays the cello, or one with a graduate degree, or a model who also does calligraphy.[297] The age of eugenics, manufacturing children with choose-your-own-desirable-traits infused in surrogacy, is already here. Is this an age when parents and the fertility industry behind them say, "We can pay, and here's what we want?"[298] Professor Kass remarks:

> The pursuit of these perfections, scientifically defined and technically advanced, not only threatens to make us more intolerant of imperfection. It threatens to sell short the true possibilities of human flourishing . . . . Lacking any rich

294. Pearlman, *supra* note 293; Saul, *supra* note 292.

295. Brianne Tolj, *Baby Gammy's Thai mother forced to leave her Down Syndrome son as she flees from loan sharks who 'have threatened her with bodily harm'*, DAILY MAIL (Sept. 24, 2016), http://www.dailymail.co.uk/news/article-3805891/Baby-Gammy-s-Thai-mother-forced-leave-syndrome-son-flees-loan-sharks-threatened-bodily-harm.html [https://perma.cc/EL4E-38XH]. It is worth noting that after the surrogacy contract was drawn up, the twins were born, baby Gammy was left in Thailand, and the case proceeded to court, the following came to light: The commissioning mother did not provide the egg for the procedure after all; the Australian couple had used an anonymous donor egg. The commissioning father, on his part, was found to be a convicted child sex offender. A judge ordered that Pipah, the twin sister brought back to Australia, never be left alone with her commissioning father. *See Baby Gammy's parents could face jail for lying about their egg donor*, NEWS.COM.AU (Apr. 29, 2016), http://www.news.com.au/national/courts-law/baby-gammys-parents-could-face-jail-for-lying-about-their-egg-donor/news-story/a456bc988225546e82abfc71d2d6ae8a [https://perma.cc/M7R5-XWE6]; Smith, *supra* note 3; Paige Taylor, *Gammy's dad sex offender David Farnell granted custody*, AUSTRALIAN (Apr. 15, 2016), http://www.theaustralian.com.au/news/nation/gammys-dad-sex-offender-david-farnell-granted-custody/news-story/11bda4f050f12da08aade51f4c613b4b. For a discussion of how the surrogacy industry does not prioritize children and their best interest, see *infra* Section III.B.4.

296. *See* Elizabeth F. Schwartz, *LGBT Issues in Surrogacy: Present and Future Challenges*, *in* HANDBOOK OF GESTATIONAL SURROGACY, *supra* note 2, 55, 56–57; Smith, *supra* note 3.

297. SPAR, *supra* note 10, at 81; Smith, *supra* note 3.

298. Smith, *supra* note 3.

> view of human flourishing, ou[r] pursuit of a more perfect human is at best chimerical . . . . A dehumanizing account of human life can all by itself produce a holocaust of the human spirit.[299]

The domino effect of the commoditization of children is a cost we ought to consider. Commoditizing *some* children dehumanizes *all* children, not just those particular children affected by the transaction. This is so because the commoditization of *some* children inevitably shapes society in thinking about and treating *all* children as commodities, or what Professor Radin calls "measuring the dollar value of our children."[300] Thus when children are viewed as "raw material for manipulation," we dehumanize them.[301] In this way, the non-rational motivations underlying certain individual choices ultimately shape our society. Such choices, which are contrary to practical reasonableness, harm the common good and limit human flourishing.[302] The rationale that "if the technology exists, then it should be pursued" should be carefully scrutinized.[303]

2. Consent? What Consent?

As surrogacy trivializes the importance of the child to the birth mother,[304] so too with the importance of the birth mother to the child. The research on fetal origins, how the mother powerfully and deeply influences the growing baby in her womb, has been gaining momentum in recent years. Scientists are discovering that what the mother experiences—the diet she

---

299. Kass, *supra* note 280 (exploring "how modern science's pursuit of 'human perfection' paved the way for Nazi programs to eliminate the 'unfit'" in an address at the United States Holocaust Memorial Museum, related to museum exhibit "Deadly Medicine: Creating the Master Race").

300. RADIN, *supra* note 110, at 138; Radin, *supra* note 32, at 1926 (discussing the commodification effects of baby-selling in particular). It should be noted that Professor Radin thinks the danger of commodification of children is less urgent in traditional surrogacy than in the case of baby-selling. Having said that, Professor Radin thinks it is prudent to make surrogacy inalienable in the market. *See id*. at 1927–28, 1933; *see also* Oman, *supra* note 231, at 225.

301. Kass, *supra* note 280; *see also* Lahl, *supra* note 9, at 293; *supra* Part II.

302. *See supra* Section I.B; *see also* Radin, *supra* note 32, at 1927 (discussing human flourishing from the perspective of market inalienability). For background on market inalienability, see, for example, *id.* at 1851, 1937.

303. *See* KASS, *supra* note 56, at 38–40, 48–49.

304. *See supra* Section III.A.1.

has, the toxins to which she is exposed, the stress and emotions she goes through—"are shared in some fashion with her fetus."[305] If science has confirmed that the child is imprinted on the birth mother,[306] it has also confirmed that the birth mother is imprinted on the child.[307] This in utero bonding is an "important and necessary good."[308] What, then, might the effect on the baby be if the birth mother emotionally distances herself from him even from pregnancy,[309] knowing that she will have to surrender him to the commissioning parents at birth?[310]

One author asserts that part of our humanity is that "we can situate ourselves in time" and, specifically, "the human being is [made of] memory—affective memory, genetic memory, epigenetic memory, [and] historical memory."[311] Against that backdrop, surrogacy, in denying the birth mother's biological parenthood of the child, "knowingly deprive[s] a human being of what makes [him] human—genealogy."[312] The child's navel is forever a reminder that he owed his early life to his birth mother who, by design, is permanently a stranger to him.[313]

Professor Smolin notes that the commercial surrogacy industry is actively pushing for laws that would deny children born

---

305. Annie Murphy Paul, *What babies learn before they're born*, CNN (Dec. 11, 2011), http://www.cnn.com/2011/12/11/opinion/paul-ted-talk/ [https://perma.cc/BRA8-SUP9]; *see also* Douglas Almond & Janet Currie, *Killing Me Softly: The Fetal Origins Hypothesis*, 25 J. ECON. PERSP. 153, 154 (2011); Cunningham, *supra* note 154, at 2; Johan G. Eriksson, *The fetal origins hypothesis—10 years on*, 330 BRIT. MED. J. 1096, 1096 (2005); *Evidence of Learning and Memory in Fetuses Six Weeks Prior to Birth*, NEUROSCI. NEWS (July 8, 2015), http://neurosciencenews.com/fetus-memory-learning-2211/ [https://perma.cc/J93Y-2Z48]; Soc'y for Research in Child Dev., *Fetal Short-term Memory Found in 30-week-old Fetuses*, SCI. DAILY (July 15, 2009), http://www.sciencedaily.com/releases/2009/07/090715074924.htm [https://perma.cc/4VEF-H4PX].

306. *See supra* Section III.A.1.

307. *See* Sean Maloney et al., *Microchimerism of maternal origin persists into adult life*, 104 J. CLINICAL INVESTIGATIONS 41, 46–47 (1999) (finding that birth mother's cells are present in the child's blood well into adulthood); Bharath Srivatsa et al., *Maternal Cell Microchimerism in Newborn Tissues*, 142 J. PEDIATRICS 31, 34 (2003).

308. Lahl, *supra* note 9, at 294.

309. *See* Jadva et al., *supra* note 174, at 2203.

310. *See* Lahl, *supra* note 9, at 294; Cunningham, *supra* note 154, at 3; *see also* BREEDERS, *supra* note 7; Hartocollis, *supra* note 4.

311. Momigliano, *supra* note 110.

312. *Id.*; *see also* Lynch, *supra* note 32.

313. *See* KASS, *supra* note 56, at 182–83.

of surrogacy the ability to investigate questions and longings regarding their identity and genesis through legal documents and other information.[314] So not only does the surrogacy contract inform the child that it matters not whose womb sustained and nourished him early in life, but the laws and circumstances of his genesis increasingly insist that he does not even have a reasonable claim to know her.[315] The problem is only compounded with the use of donor eggs or donor sperm in surrogacy, as the child is then intentionally deprived of his genetic parents *and* his birth mother—all of whom are his biological parents.[316] Especially to the extent that the identities of these parents are anonymous to the child, it leads to the further fragmentation of the child's identity.[317]

Moreover, in a surrogacy contract, it is by design that the newborn baby is separated from the birth mother, handed over to the commissioning parents.[318] But a newborn baby's need for his birth mother is instinctive and innate:[319] "[S]urrogacy demands the removal of the neonate from her or his gestational

---

314. *See* Smolin, *supra* note 1, at 338.

315. *See* G. Shane Morris, *On Surrogacy, IVF, Evangelicals Are Dropping the Ball Again*, PATHEOS (June 19, 2017), http://www.patheos.com/blogs/troublerofisrael/2017/06/on-surrogacy-ivf-evangelicals-are-dropping-the-ball-again/ [https://perma.cc/WQ8P-KTGR].

316. *See* Lynch, *supra* note 32. For the importance of genetic parents and the fundamental right of children to them, see Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Moschella, *The Rights of Children*, *supra* note 186.

317. Catherine Lynch remarks:

> When the commissioning parent is not the donor, this causes yet another fracturing in the child's identity between its genetic, gestational and legal parents. Such surrogate children are biologically unrelated in any way to their legal parents. With this comes the loss of identity: the forced ignorance of the self and of basic kinship and ancestral structures. This self-knowledge—so important and so intrinsic to self-identity—creates a sense of belonging and meaningful living within the fabric of kinship/familial connection and has been central to human culture for millennia.

Lynch, *supra* note 32; *see also* Katy Faust, *Don't Ignore The Child's Perspective On Gay Couples Commissioning Babies*, FEDERALIST (Jan. 30, 2017), http://thefederalist.com/2017/01/30/the-childs-side-of-the-story-when-gay-couples-commission-babies/ [https://perma.cc/2T3D-4VNQ]. *See generally* ALANA NEWMAN, ANONYMOUS US: 100+ STORIES FROM THE FRONT LINES OF THIRD PARTY REPRODUCTION (2016).

318. *See* Lahl, *supra* note 9, at 294; Smolin, *supra* note 1, at 283, 315.

319. Lahl, *supra* note 9, at 294.

mother when every aspect, every cell, every desire of that neonate, is geared toward being on the body of the gestational mother, to suckle and seek comfort and safety."[320] What, then, is the effect on the baby if skin-to-skin bonding at birth between birth mother and the baby, the benefits of which are well documented,[321] is denied?[322] As the birth mother is unable to breastfeed him, the baby is denied the nutrient- and antibody-rich colostrum and breastmilk, exposing him to an elevated risk of a whole host of illnesses and developmental problems including ear infection, jaw development problems, low IQ, diabetes, and heart disease.[323] In surrogacy, the earliest and most powerful bonds formed between a child and his birth mother are, by design and contract, severed, disregarded, and rendered irrelevant.[324] These are matters of the child's identity and genesis—they ought not be intentionally discarded.

Many have argued that the practice of surrogacy is akin to baby-selling, while proponents of surrogacy have sought to distinguish it.[325] To some, gestational surrogacy (as distinguished from traditional surrogacy) is even further removed

---

320. Lynch, *supra* note 32 (internal quotation marks omitted).

321. *See* Lahl, *supra* note 9, at 294. Catherine Lynch, herself separated from her birth mother at birth, testifies:

> I was removed at birth from my gestational mother, her breasts bound for three days in another room while I screamed for her, and my hospital records record my growing distress. Adoptees around the world testify to their battles with depression and rage, difficulties in trusting and attachment, and a profound sense of loss and grief caused by the loss of their mothers at birth. Scientific studies prove that maternal-neonate separation in the crucial months after birth disturbs the baby's heart rate and sleep and other biological systems, predisposing the child to difficulties later in life which can include relationship and emotional difficulties, mental disorders and illnesses.

Lynch, *supra* note 32.

322. *See* Cunningham, *supra* note 154, at 3; *see also* BREEDERS, *supra* note 7.

323. *See* WIESSINGER ET AL., *supra* note 249, at 5–8; CTR. FOR BIOETHICS & CULTURE, *supra* note 245. That is, unless the commissioning mother decides to take up induced lactation to try to breastfeed the baby. *See* WIESSINGER ET AL., *supra* note 249, at 358–61. Not having been pregnant with the baby herself, this is not an easy task. *See id.* Another way to mitigate is to feed the baby donated breastmilk. *See, e.g.*, MOTHERS' MILK BANK, *Milk Banking FAQs*, https://www.milkbank.org/milk-banking/milk-banking-faqs (last visited Oct. 24, 2017) [https://perma.cc/AY7U-4GBJ].

324. *See generally* BREEDERS, *supra* note 7.

325. *See* SHANLEY, *supra* note 7, at 107; *see also* Smolin *supra* note 1, at 322.

from the objection of baby-selling.[326] But consider the following poignant and unsettling account:

> In 1980 a New Jersey couple tried to exchange their baby for a secondhand Corvette worth $8,000. The used-car dealer (who had been tempted into the deal after the loss of his own family in a fire) later told the newspapers why he changed his mind: "My first impression was to swap the car for the kid. I knew moments later that it would be wrong—not so much wrong for me or the expense of it, but what would this baby do when he's not a baby anymore? How could this boy cope with life knowing he was traded for a car?"[327]

While some argue that gestational surrogacy is different than an express contract for baby-selling, the car salesman's point is well-taken regarding questions of identity, how one came into being, and money changing hands to bring one into existence through a surrogacy arrangement. While parties' consent in freedom of contract is the framework of the surrogacy arrangement, the child may well wonder to himself, "Consent in freedom of contract? What consent?" That is, while the parties in the contract consented to the arrangement that produced the child—with a whole host of consequences unique to surrogacy outlined above—*the child has consented to none of these things*, fragmentation in personhood and all.[328]

What of the objection that *no* child ever consents to having been born and come into existence at all?[329] The intentionality of the fragmentation of identity in a surrogacy contract is not erased or minimized by the fact that the child would not have existed without the contract; it is still wrong that surrogacy

---

326. *See* SHANLEY, *supra* note 7, at 110–11. *But see* Devine & Stickney, *supra* note 15 (describing hidden practices of surrogacy that can result and have resulted in baby-selling); Smolin, *supra* note 1, at 316–22 (arguing that surrogacy constitutes sale of children); *id.* at 322–25 (arguing that parties are involved in the buying and selling of children even when the child is the genetic child of the commissioning parents); *supra* note 162. Even for those who do not categorize gestational surrogacy as baby-selling, concern over the birth mother's renting her womb as a service is as strong as it is in traditional surrogacy. *See* SHANLEY, *supra* note 7, at 111–13; *supra* Section III.A.2.

327. LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 96 n.* (1983).

328. *See* Smolin, *supra* note 1, at 283.

329. *See* ROBERTSON, *supra* note 27, at 122.

brings a child into the world in a way that by nature fragments who he is as a person. Put another way, it is not inconsistent for a child *both* to be happy to have been born and to exist, *and* to grieve that the manner into which he came into existence wronged him.

3. Risks, Known and Unknown

Just as the surrogacy procedure introduces risks to the birth mother, so it does to the child, both known and unknown.[330] The procedure necessitates implantation of the embryo in the uterus by IVF, which carries risks to the child.[331] These risks include a four-to-fivefold increase in stillbirths,[332] near fourfold increase in premature births,[333] low or very low birth weights,[334] fetal growth restriction,[335] pre-eclampsia,[336] gestational diabetes,[337] a fourfold increase in caesarean sections,[338] and increase in NICU admission and prolonged hospital stay.[339]

Knowingly introducing a child to additional risks via IVF is an ethical matter not to be taken lightly.[340] Thus Professor O'Donovan says:

> God has evils at his disposal which he does not put at ours. Though he works good through war, death, disease, famine, and cruelty, it is not given to us to deploy these mysterious alchemies in the hope that we may bring forth good from them. There is the world of difference between accepting the

330. *See* Lahl, *supra* note 9, at 287.

331. *See* BREEDERS, *supra* note 7 (documenting Professor O. Carter Snead's concern).

332. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49; *see also* Kamphuis et al., *supra* note 243, at 253.

333. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49; *see also* Caballero, *supra* note 11, at 302; Kamphuis et al., *supra* note 243, at 253.

334. Laura A. Schieve et al., *Low and Very Low Birth Weight in Infants Conceived with Use of Assisted Reproductive Technology*, 346 NEW ENG. J. MED. 731, 734–36 (2002).

335. Kamphuis et al., *supra* note 243, at 253.

336. *Id.*

337. Lahl, *supra* note 9, at 294; Kamphuis et al., *supra* note 243, at 253.

338. Lahl, *supra* note 9, at 293; Merritt et al., *supra* note 240, at 348–49.

339. Caballero, *supra* note 11, at 302; Merritt et al., *supra* note 240, at 348–49; Yona Nicolau et al., *Outcomes of Surrogate Pregnancies in California and Hospital Economics of Surrogate Maternity and Newborn Care*, 4 WORLD J. OBSTETRICS & GYNECOLOGY 4 (2015).

340. *See* O'DONOVAN, *supra* note 116, at 80–84, 85–86.

> risk of a disabled child (where that risk is imposed upon us by nature) and ourselves imposing that risk in pursuit of our own purposes.[341]

4. The "Right To Procreate" . . . For Whose Benefit?

In recounting some of the risks of surrogacy, Paige Comstock Cunningham, Executive Director of the Center for Bioethics & Human Dignity, asks, "For whose benefit is this being done?" Indeed. Much of the discourse on surrogacy centers around the commissioning parents' wishes and desires, at times cast in the very language of the "right to procreate."[342] The focus there is inevitably not on the child and what is owed to him.[343] It is important to put the worthy and deep-seated longing for a child of one's own genetic make-up in perspective: it is one thing to desire a child, but it is another thing to elevate that desire to a right, as a "right to procreate." CanaVox, an organization dedicated to promoting marriage,[344] puts it this way: "Every child has a right to a mother and a father; no one has a right to a child."[345]

---

341. *Id.* at 83.

342. *See, e.g.*, Holland, *supra* note 13, at 4, 26–27; Lahl, *supra* note 9, at 289, 291; BREEDERS, *supra* note 7; Lahl, *supra* note 12; *cf.* ROBERTSON, *supra* note 27, at 16, 40, 42 ("procreative liberty"). In Professor Paul G. Arshagouni's criticism of Professor Vanessa S. Browne-Barbour's opposition to surrogacy, he asserts that she does not provide sufficient justification as to the reason the best interest of the child should take precedence over other interests involved. *See* Arshagouni, *supra* note 8, at 837; *see also* Browne-Barbour, *supra* note 10, at 439–43. But these other interests, of course, center around the commissioning parents' interests and intent in entering into the contract for the child's existence in the first place. *See* Arshagouni, *supra* note 8, at 821–44.

343. *See* KLEIN, *supra* note 110, at 34; SPAR, *supra* note 10, at 208; Lahl, *supra* note 9, at 289, 291; BREEDERS, *supra* note 7; Katy Doran & Chaney Mullins, *Ethics and Infertility*, JOHN JAY INST. (Feb. 9, 2017), https://www.johnjayfellows.com/news/2017/2/9/ethics-and-infertility [https://perma.cc/CBK7-BDF8].

344. *Who We Are*, CANAVOX, https://canavox.com/who-we-are/ (last visited Oct. 20, 2017) [https://perma.cc/3HJC-N292].

345. *What We Cheer For*, CANAVOX, https://canavox.com/what-we-cheer-for/a-deeper-look/#child [https://perma.cc/7X7D-K2CP]. The organization elaborates:

> [C]hildren are a blessing and a privilege, not something owed to us adults. As adults, we must be careful not to seek fulfillment through a child, but rather adjust our desires to meet the objective needs of children. This allows us to treat children as unique individuals, not as instruments of our own dreams or pursuits, to be bought or (have their genetic material) sold according to our purposes.

Canadian professor Abby Lippman comments on what she views as the difference between Canadian and American surrogacy practices: "There's a very general consensus that paying surrogates would commodify women and their bodies. I think in the United States, it's so consumer-oriented, so commercially oriented, so caught up in this 'It's my right to have a baby' approach, that people gloss over some big issues."[346] (Commercial surrogacy is prohibited in Canada.)[347] Professor Spar, examining the practice of surrogacy from the perspective of market forces, recognizes this too; there is tension between the good of the drive to have one's own genetic offspring and the less-than-virtuous means to procure them.[348]

Professor Smolin treats this tension well. The claimed right to procreate was established in the context and era of child-bearing and child-rearing within a man-woman conjugal marital union, wherein there was unity of marital intimacy and procreation.[349] Such a right *in that context* promotes, rather than harms, human dignity and flourishing.[350] Would such a claimed right apply to procuring a child through surrogacy? Professor Smolin says no: "[M]aintaining the core legal norm [in surrogacy] requires rejecting claims of a right to procreate through surrogacy."[351] The costs of surrogacy examined in this Article suggest that surrogacy undermines human dignity and flourishing.[352]

Anca Gheaus argues that a child-centered concern would lead to the birth mother having a stronger claim to parenthood than the commissioning parents.[353] This is because the child has

---

Id. See also KLEIN, *supra* note 110, at 69; RADIN, *supra* note 110, at 144 ("[M]any people seem to believe that they need genetic offspring in order to fulfill themselves.").

346. Lewin, *supra* note 21; *see also* Smith, *supra* note 3.

347. *See* Lewin, *supra* note 21.

348. SPAR, *supra* note 10, at 196; *see also* Smith, *supra* note 3. It should be noted that Professor Spar draws a different conclusion than this Article; she thinks given an existing market for womb-renting and children through surrogacy, among other related practices, the practice should be accepted, and the market for it should be made better. *See id.* at 96, 197, 200, 217–33.

349. Smolin, *supra* note 1, at 268.

350. *Id.* at 281–82.

351. *Id.* at 265 (specifically in examining the relationship between surrogacy and the sale of children).

352. *See id.* at 265, 269, 281–82.

353. Gheaus, *supra* note 180, at 449–51.

an interest in being raised by his birth mother, due to the embodiment and shared experiences of pregnancy, birth, and post-partum process between the birth mother and baby.[354] Having gone through all of it together, the birth mother emerges as the most prepared and best parent to care for and raise him, and the child has an interest in being and staying with her.[355] She even goes further to argue that if the birth mother lacks an emotional bond with the baby, *but the baby bonds anyway* with her, the child-centered concern may make it sufficient for the birth mother to be the one who rightfully raises the child.[356] Thus, any right to procreate does not fit well in a situation as vulnerable to the fragmentation of the child as surrogacy is.[357] Attorney Jeffrey Shafer of Alliance Defending Freedom, a non-profit legal organization, says,

> The surrogacy industry exists to decouple child-creation from conjugal relations, to separate gestation from enduring motherhood, and to make biological ties irrelevant to legal child custody. *Fragmenting persons, parts, and relations—submitting each to commercial negotiation—is its entrepreneurial essence* . . . The tenets interior to this venture are wholly . . . non-relational, parts-assembly technique.[358]

As mentioned earlier, Germany bans surrogacy entirely.[359] Dr. Schneider places a high importance on maternal-fetal bonding during pregnancy and considers it necessary to successful parenthood.[360] Because of this, Dr. Schneider believes that it is "in children's best interest to know that they have just one mother."[361] IVF and surrogacy introduce what has never been done before: "splitting [the child's] 'biological mother' in two" between the genetic mother and the birth mother.[362] This fragmentation harms the child—he cannot be raised, known, and

---

354. *Id.*

355. *Id.* at 448–51; *see also* Cunningham, *supra* note 154, at 2–3.

356. Gheaus, *supra* note 180, at 452 n.46.

357. *See id.* at 446–51; *see also* Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Smolin, *supra* note 1, at 268–69; Moschella, *The Rights of Children*, *supra* note 186; *supra* Section III.B.

358. Shafer, *supra* note 210 (emphasis added).

359. *See supra* note 159 and accompanying text.

360. Lewin, *supra* note 21.

361. *Id.*

362. Lynch, *supra* note 32.

loved by his biological parents (his genetic parents *and* birth mother[363]). Because of the harm that these non-rational choices impose on children, the practice of commercial surrogacy should be prohibited.

The children's best interest was expressly ignored in Melissa Cook's case, wherein the commissioning father was a fifty-one-year-old deaf and mute single man, earning $750 a week as a postal worker.[364] He and the resulting triplets from the surrogacy contract live in the basement of his elderly, disabled parents' home. One of the parents is a heavy smoker, filling the first floor of the house with thick smoke.[365] A nephew also frequently lives in the same house—while addicted to and using heroin.[366] The sister of the commissioning father, out of concern for the triplets, filed an affidavit against him.[367] Among the allegations is that the triplets are forced to eat off the basement floor and that their diapers are changed so rarely that they have been taken to the hospital for extreme diaper rashes.[368] When the attorney for the birth mother, asking for custody of the children, asked Judge Amy Pellman of the Superior Court of Los Angeles County whether the court was going to consider the well-being of the triplets in the case, the judge flatly said, "What is going to happen to these children once they are handed over to [the commissioning father], that's none of my business."[369] In the court's eyes, this was a contract case, after all. Once the birth mother, Melissa, and the commissioning father signed the surrogacy contract, Melissa was deemed not to be the mother to the children—end of discussion.[370]

---

363. For the importance of genetic parents and the fundamental right of children to them, Moschella, *Rethinking*, *supra* note 186, at 433–37; Moschella, *Wrongness*, *supra* note 186, at 105; Moschella, *The Rights of Children*, *supra* note 186.

364. Whiting, *supra* note 21.

365. *See* Sloan, *supra* note 5; Whiting, *supra* note 21.

366. Whiting, *supra* note 21.

367. *Id.*

368. *Id.*

369. Sloan, *supra* note 5.

370. *See supra* note 11; *supra* Section III.A.3.

If the birth mother is a part of the child for life,[371] what is the effect of severing the bond between the child and his birth mother—by design, at that? Research has shown that children who learn that they were conceived using surrogacy often start showing adjustment problems around the age of seven.[372] While the problems have not been characterized as a psychological disorder, the onset of adjustment problems at the age of seven is interesting as it coincides with the age at which children begin to make sense of the concept of biological inheritance.[373] The findings suggest that the absence of a gestational tie between commissioning mother and child is injurious to the child.[374] The thinking that the bond between birth mother and child matters little or that the embodiment of pregnancy matters little is reductionistic and materialistic.[375]

It is worth noting that criticism against surrogacy is not to be confused with criticism against adoption. In adoption, the biological parents are replaced by the adopted parents to redeem what is an already broken situation; the loss of the biological parents is not sought out.[376] In surrogacy, by contrast, the loss of the birth mother (and depending on the procedure and whether it utilizes a donor egg, sperm, or both, the loss of one or both of the genetic parents as well) is the very design and nature of the arrangement. Whereas adoption serves the child, surrogacy serves only the commissioning parents.[377]

---

371. For example, research has found birth mother's cells present in the child's blood well into adulthood. *See* Maloney et al., *supra* note 307, at 46–47; Srivatsa et al., *supra* note 307, at 34.

372. Susan Golombok et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 J. CHILD PSYCHOL. & PSYCHIATRY 653, 657 (2013).

373. *Id.*; Gregg E. A. Solomon et al., *Like Father, Like Son: Young Children's Understanding of How and Why Offspring Resemble Their Parents*, 67 CHILD DEV. 151, 167–68 (1996); Joanne M. Williams & Lesley A. Smith, *Concepts of Kinship Relations and Inheritance in Childhood and Adolescence*, 28 BRIT. J. DEV. PSYCHOL. 523 (2010).

374. Golombok et al., *supra* note 372, at 657.

375. *See* Kass, *supra* note 280.

376. *See* O'DONOVAN, *supra* note 116, at 35–38, 40.

377. *See* KASS, *supra* note 56, at 698. In the related context of artificial insemination, Professor O'Donovan writes:

> [C]hildren are not property to be conveyed . . . . [W]e do not have to introduce the notion of payment to make it repugnant. The suggestion of a commercial transaction merely underlines what is already present in the

Finally, what would be a logical next step for such a right to procreate? Much of the discourse in the reproductive industry has been on the pain of infertility and the longing for a child. But a twist on the motivations of commissioning parents in surrogacy and their right to procreate is this new trend: *social* surrogacy. That is, commissioning parents now can and do choose surrogacy so as not to disrupt their career—or figure.[378] Actress Lucy Liu, for example, revealed her rationale for choosing surrogacy: "It just seemed like the right option for me because I was working and I didn't know when I was going to be able to stop."[379] From the standpoint of market forces, it makes sense for a surrogacy agency to state expressly that it would not be the arbiter of the validity of commissioning parents' motivation to choose surrogacy.[380] After all, the surrogacy industry has been driven by the commissioning parents' wishes and desires. Social surrogacy only makes that all too clear.

5. Surrogacy Dehumanizes the Child

Thus, concerns that surrogacy exploits the child should drive considerations of public policy against surrogacy arrangements. The commodification of the child leads to dehumanization and the opposite of human flourishing: in reducing children to manufactured products in the processes and procedures inherent in surrogacy; in intentionally severing important, powerful bonds between the child and the birth mother; in fragmenting the child in matters of identity and personhood by design; in knowingly introducing risks to the child through the procedures in surrogacy; and in disregarding the

---

> deliberate purpose of incurring a parental relation in order to alienate it . . . .
> They do not act for adoptive parents; adoptive parents act for them.

O'DONOVAN, *supra* note 116, at 37; *see also id.* at 40.

378. *See* Whetstine & Beach, *supra* note 8, at 37–38; Lewin, *supra* note 21; *Too Posh To Push?: Breaking the Silence on Vanity Surrogacy*, SURROGACY L. CTR., https://www.surrogacy-lawyer.com/assisted-reproduction/too-posh-to-push-breaking-the-silence-on-vanity-surrogacy/ [https://perma.cc/UA3F-6YDA].

379. Mollie Cahillane, *Why Lucy Liu Chose Gestational Surrogacy: It Was the 'Best Solution for Me,'* PEOPLE (May 6, 2016), http://celebritybabies.people.com/2016/05/06/lucy-liu-gestational-surrogate-son-rockwell/ [https://perma.cc/W9ZE-8LKY]. Recall also the earlier discussion of a possible filter-down effect of surrogacy to the upper-middle class. *See supra* note 226; *see also* Whetstine & Beach, *supra* note 8, at 37.

380. *See* Lewin, *supra* note 21.

child's needs and best interest, while putting ahead the adults' wishes and desires instead—*all without the child's consent*—ironically within the very framework of consent in freedom of contract. These costs to the child in surrogacy stand without supposing or requiring that commissioning parents think about the child in such stark terms. These concerns are, rather, intrinsic to the kind of contract that surrogacy is.

IV. CONCLUSION

Professor O'Donovan, more than three decades ago, prophetically wrote:

> [T]he tragic situation is that unless some rule . . . is adopted, we shall be left with an inevitable and highly distressing outcome. *Parental ownership will be determined simply on the basis of contract*. The same practices will then yield different results for parental ownership depending on the terms of the contract in each case . . . . [T]he last shreds of a connection between procreation and being will be torn asunder. *Humanity will be made under contract, with all the component parts legally conveyable.* There will then be no reason to insist that parental ownership should reside in a person who had any physical stake in the child at all . . . .
>
> [B]y the time we get there we may have lost the humane sensibilities which make us so distressed to contemplate them now . . . . Where natural constraints are removed, more is left open to human decision; and in a liberal society, . . . that decision . . . will probably be left in private hands, which means, to individual contractual arrangements.[381]

In response to Professor O'Donovan's remarks, this Article proposes that the rule to be adopted in surrogacy is to prohibit it as against public policy. Contract is not appropriate as a framework of a relationship of procreation[382] as procreation has to do with the core of identity, origin, lineage, belongingness, loving, and longing; indeed, with the heart of what it means to

381. O'DONOVAN, *supra* note 116, at 47–48 (emphasis added).

382. *See* KASS, *supra* note 56, at 62 (asserting that the view of surrogacy as merely a contract issue is reductionistic); O'DONOVAN, *supra* note 116, at 42–43, 47–48.

be human.[383] When freedom of contract is applied to surrogacy contract such that the parties' consent and intent govern, "[b]irth becomes the subject of negotiation, and motherhood is exchanged in the market."[384] When birth mothers and children are thought of as raw material, they are reduced from whole beings to commodities. This coarsens us and dehumanizes us. As Professor Smolin has explained, it is the contract that strips the birth mother of her otherwise natural, intrinsic parental status and right to the child.[385] Should the parties' freedom of contract obliterate and rewrite the deep bond, longing, and humanness of both birth mother and child? If so, where might such a legal commitment lead us?

Proponents of surrogacy contracts have framed the issue from the perspective of freedom of contract and a claimed right to procreate.[386] But given the costs to birth mother and child outlined above—not to mention the *lack of* consent of the child within the framework of consent in freedom of contract—and given that desire for genetic offspring should not be elevated to a right to procreate, justifying surrogacy is not appropriate.

A weighing of the competing interest of the commissioning parents against the costs of surrogacy to the birth mother and child demonstrates that surrogacy leads not to human flourishing, but to dehumanization. The costs to both the birth mother and the child outlined above[387] are not consistent with the requirement of practical reasonableness because they are not oriented toward reasonableness: They are not oriented toward the good of birth mothers and children, and by extension, the common good. Put another way, these heavy costs to birth mothers and children make it inhospitable to human flourish-

383. *See* Oman, *supra* note 231, at 225; Radin, *supra* note 32, at 1850, 1928–36; *see also* O'DONOVAN, *supra* note 116, at 48 ("In the natural order we were *given to know* what a parent was. The bond of natural necessity which tied sexual union to engendering children, engendering to pregnancy, pregnancy to a relationship with the child, gave us the foundation of our *knowledge* of human relationships in this area. Now that we have successfully attacked the bond of necessity . . . we have destroyed the ground of our knowledge of the humane. From now on there is no knowing what a parent is.").

384. SPAR, *supra* note 10, at 93.

385. Smolin, *supra* note 1, at 310, 314–15, 325–26.

386. *See, e.g.*, ROBERTSON, *supra* note 27, at 16–17, 24, 30, 42, 119, 126, 131, 221, 227.

387. *See supra* Section II.B.

ing—to being more fully human. Thus, surrogacy contracts do not properly belong within the great open space of freedom of contract, but rather in the *limitation* to that freedom. It is this limitation, given the reality of the imperfect nature of humans' power to reason, that safeguards human flourishing.

Public policy should weigh the costs and interests involved in deliberation of the greater and lesser good, as Aquinas' *determinatio* law requires.[388] When weighed against the commissioning parents' worthy interest of having a genetic child of their own, the costs of surrogacy exacted of the birth mother and child should lead to prohibition of surrogacy as against public policy.

If this is the case, then proposing to permit surrogacy, albeit with regulations, is not appropriate. Surrogacy is inherently wrong, and as such it is wrong even in the "best-case scenario"—when there is no breakdown in the relationship between the birth mother and the commissioning parents, no felt bonding or regret on the part of the birth mother, nor any perceivable adjustment problems on the part of the child. Surrogacy is *inherently* dehumanizing to both birth mother and child by *fundamentally* reducing them to commodities and denying them what makes them flourish as humans *by design*—even in the best of intentions and circumstances.

Regulations would not be enough to address the inherent wrongs in surrogacy.[389] Where there *are* laws governing surrogacy, loopholes, abuse, and enforcement problems remain.[390] Rather, surrogacy contracts should be entirely prohibited as against public policy.[391] This is the path that the Parliamentary

388. *See* John Finnis, *Natural Law Theories*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2016) https://plato.stanford.edu/entries/natural-law-theories/ [https://perma.cc/HG7K-PRG3].

389. KLEIN, *supra* note 110, at 69–71; Lahl, *supra* note 9, at 287, 292; Lahl, *supra* note 12. Professor Smolin notes that more than seeking legitimacy for the newer reproductive practices, the commercial surrogacy industry is at this point actively pushing for nothing short of a legal regime that champions the wants and desires of the moneyed and powerful parties, the commissioning parents, at the expense of the more vulnerable parties, the birth mothers and the resulting children. Smolin, *supra* note 1, at 337–38.

390. *See* KLEIN, *supra* note 110, at 71, 97; Cohen & Kraschel, *supra* note 7, at 89–91; Lahl, *supra* note 12; Sloan, *supra* note 6.

391. Lahl, *supra* note 9, at 295.

Assembly of the Council of Europe took in 2016. It refused to legalize surrogacy across all member states, and refused even to compromise by allowing for legalization with regulations.[392]

In taking the position that surrogacy should be prohibited entirely, this Article comes to a different conclusion than that taken by some other scholars. Professor Spar, for example, thinks that given an existing market for womb-renting and children through surrogacy, among other related practices, there should be national laws regulating surrogacy.[393] This Article also takes a different position than Professor Shanley, who thinks freedom of contract should not be used as a trump card in surrogacy contracts, but nevertheless believes the contracts should be legal but unenforceable.[394] One issue that would be difficult to resolve given these two positions, aside from abuse and enforcement issues mentioned above, would be how to fashion an appropriate remedy in the case of breach of contract. Damage remedies are not appropriate, but neither is specific performance.[395] An interesting hypothetical is to ponder what would happen not only when the birth mother wants out, but also what would happen to the baby and birth mother if the commissioning parents back out after the birth mother becomes pregnant.[396] The hypotheticals are not far-fetched, considering the cases such as Heather Rice[397] or Baby Gammy,[398] often involving demands for abortion.[399] At other times, commissioning parents back out due to a change of

392. ADF INT'L, *supra* note 114.

393. SPAR, *supra* note 10, at 96, 197, 200, 217–33. This Article takes the position that acceptance of the market does not preclude limitation to freedom of contract. *Cf.* SHANLEY, *supra* note 7, at 123; Oman, *supra* note 231, at 188.

394. SHANLEY, *supra* note 7, at 104, 120; *see also* MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 75–150 (1990) (taking the position that surrogacy contracts should not be enforceable, and a birth mother who wants custody of the child despite the contractual terms should have custody of him).

395. *See* Lahl, *supra* note 9, at 292; *see also* RADIN, *supra* note 110, at 146–47; Radin, *supra* note 32, at 1935 n.294; Lahl, *supra* note 12.

396. *See* RADIN, *supra* note 110, at 146–47.

397. *See supra* note 288 and accompanying text.

398. *See supra* notes 292–95 and accompanying text.

399. Lewin, *supra* note 21; Smith, *supra* note 3.

mind[400] or simply never retrieve the baby they have commissioned into being.[401]

Thus, despite the worthy desire of having one's genetic offspring, surrogacy comes at too great of a cost of dehumanization of both birth mother and child by commoditizing them. These costs stand without supposing or requiring that every commissioning parent thinks about the birth mother and child in such severe terms. *De*-humanizing them strips birth mother and child of their dignity; it leads us as a society to precisely the opposite of what makes us human—it makes us *less*, not more fully human.[402] Surrogacy contracts are antithetical to the good of birth mothers and children, and thus antithetical to the common good and human flourishing.[403]

Applying practical reasonableness to surrogacy and contract, surrogacy arrangements then properly belong on the outside of the boundaries of contract law. Freedom of contract is found within the space of those boundaries, but what is not properly contracted for (even when based on consent) is on the outside. Practical reasonableness necessitates limitation to freedom of contract in surrogacy, even as it affirms that freedom generally. It is this limitation that safeguards flourishing,

---

400. Lewin, *supra* note 21.

401. Shafer, *supra* note 210; Tempesta, *supra* note 220.

402. KASS, *supra* note 56, at 100; Lahl, *supra* note 9, at 292. For a thorough and thoughtful account of why even the ancient surrogacy practice, understood in the context of its era, was more humane than the commercial industry today, see Smolin, *supra* note 1, at 289–302.

403. Professor Kass asserts that freedom of contract without the necessary underpinning of mediating and religious institutions can be corrosive to who we are as humans, thus leading us to become less human. KASS, *supra* note 56, at 92 (in the related context of thinking of the body in a proprietary sense with regard to organ sale); *see also id.* at 12, 18 (in the context of bioethics in general, including the practice of surrogacy). Professor Kass, a critic of surrogacy, called the practice "worrisome," and even "deplorable" and "repugnant," among other things. *Id.* at 66, 100. He thought the practice should not be encouraged, but nevertheless thought it may be foolish to prohibit it. He unfortunately did not elaborate on this position. *Id.* at 100.

Professor Radin discusses surrogacy and other related matters such as baby-selling and prostitution in light of human flourishing from the perspective of market inalienability. *See, e.g.*, Radin, *supra* note 32, at 1851, 1937; *see also* ROBERTSON, *supra* note 27, at 141–42. Professor Radin further writes about her understanding of the relationship of human flourishing and market rhetoric elsewhere. RADIN, *supra* note 110, at 79–101.

given that human beings are imperfectly rational beings. Practical reasonableness guides a community toward justice, toward the common good, and toward being more fully human—indeed, toward human flourishing itself.[404]

404. In this way, it is not quite accurate to say that introducing limitation to surrogacy contract would allow the state to define what counts as legitimate reproduction, as some opponents of limitation to surrogacy contracts may say. *See* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 94, 157 (1989); *see also* SHANLEY, *supra* note 7, at 109. Rather, the law should guard the common good, and the state enforces the law. The common good, rooted in basic human goods, precedes the law.