

Commercial Contractual Pregnancy : A Kantian Argument Against Acceptance

by

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A Thesis Submitted to the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements for the Degree of

MASTER OF ARTS

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Abstract

In my thesis I have applied relevant concepts found in Kantian ethics such as reason, good will, the second and third formulations of the categorical imperative as well as the duties of respect, beneficence, and sympathy to the practice of commercial contractual pregnancy. Unlike Kant, I have also extended practical rationality and autonomy to include every rational adult regardless of gender. By applying Kant's deontological theory to commercial contractual pregnancy, I argue that this type of reproductive arrangement should not be legally permitted.

In the second chapter I have presented some of the objections raised by feminist philosophers against both commercial and non-commercial contractual pregnancy arrangements. Of the three criticisms I show why only one adopts a Kantian-feminist approach. In this chapter I also present Lori B. Andrews and John Robertson's arguments in support of procreative liberty. I contrast their arguments with the feminist objections that are presented by Sherwin, Overall, and Anderson.

In the third chapter I discuss the legal issues associated with commercial contractual pregnancy. I respond to the two criticisms which state that by legislating against reproductive liberty I am also infringing upon the moral and legal autonomy of women and that this type of legislation impairs the Kantian framework for justice. I also present the reasons why I believe non-commercial pregnancy arrangements should be legally permitted.

This thesis presents and defends the argument that--when grounded on Kantian ethics and a respect for the personhood of women--pregnancy should not be commercialized under the capitalist free-market system.

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INTRODUCTION

Like Rachel, who, in Genesis, cried out to Jacob "Give me children, or I shall die!" increasingly individuals who are unable to conceive a child in a "traditional" way are choosing other, non-conventional, methods of reproducing.¹ By selecting one of the many treatment options currently available, infertile individuals believe that their overwhelming desire to become parents will be satisfied. Out of necessity and perhaps even the desperation of childlessness, technologically assisted reproductive procedures--procedures such as *gamete intrafallopian transfer* and *intracytoplasmic sperm injection*--have become popular methods of resolving the issue of childlessness.² In addition to these treatment options, some infertile individuals are selecting a reproductive method that has been employed for centuries. This method is *surrogate motherhood*.

While the incidence of surrogate births in Canada is not as high as in the United States, the fact that this method could foreseeably be viewed as a socially accepted reproductive practice raises several ethical (normative) questions.³ In this thesis I will present the principal Kantian objections to the commercial surrogate pregnancy arrangement. I will argue that notwithstanding the fact that commercial surrogate motherhood (hereinafter referred to as commercial contractual pregnancy) is an attractive way of overcoming the issue of human infertility, because it is an ethically questionable practice--one where commercial surrogate mothers are defined merely as subjects rather than as ends-in-themselves--it should not be viewed as an acceptable solution in combating childlessness.⁴ Commercial contractual pregnancies should therefore not be permitted, under Canadian law, as an acceptable form of assisted human reproduction. My argument is thus similar to the position that was advocated in Bill C-47.

Under proposed Canadian legislation, Bill C-47, s. 5(1-4), on the use of new reproductive and genetic technologies, commercial contractual pregnancy arrangements would be legally impermissible.⁵ Furthermore, healthcare providers or "baby brokers" who initiate commercialized contractual pregnancy arrangements would be subject to criminal charges.⁶ Though some of my readers may not be sympathetic to this position, since, after all, responsible autonomous adults (especially women) should have the freedom to choose whether or not and how they will reproduce, one would hope that regardless of one's reproductive capabilities, a consensus can be reached that supports a ban on the commodification of human life. Unlike apples, corporate stocks or clothing, human life is unique. Because it is unique we are morally prohibited from associating economic activity--activity based on the capitalist free-market model--with women, men, and children.

While "traditional" or unassisted childbirth, public adoption and non-commercial contractual pregnancy arrangements support the prohibition against equating money with human life, like some private adoption arrangements, commercial contractual pregnancies rely on money and profit as a principal reason for action. It is because of the commercial aspect that is attached to pregnancy that some consequentialists argue against the practice. They believe that the harm to the individual happiness of surrogate mothers and to the well-being of society as a whole--a harm produced when surrogate mothers are exploited by individuals who can afford to pay for their reproductive services--outweighs any benefit that is produced through this type of arrangement.

Notwithstanding the fact that the primary objective in my thesis is to argue against commercial contractual pregnancy by employing Kant's ethical and legal theories,

I will also appeal to consequentialist arguments. By appealing to consequentialist arguments it is not my intention to show how the individual happiness of surrogate mothers or the well-being of society is compromised, but rather to indicate how the consequences produced through commercial contractual pregnancy arrangements do not support the Kantian definition of humanity.

In the *Report on New Reproductive and Genetic Technologies* (1993), which served as the basis for the proposed Bill C-47, on the issue of commercial contractual pregnancy, the commissioners argued that "commercial and paid preconception arrangements and any advertising connected with the practice be legally prohibited."⁷ While the commissioners stopped short of criminalizing non-commercial pregnancies, they did, however, affirm that they would be "void and unenforceable".⁸ Thus, although it would not be a criminal offence for one to participate in a non-commercial pregnancy arrangement under the proposed legislation, a non-commercial surrogate mother would also not be contractually obligated to surrender custody of her child upon giving birth. In other words, the Government of Canada would not assist individuals by passing legislation that would ensure that the stipulations set out in non-commercial pregnancy arrangements would be observed by each of the contracting parties involved.

As I have stated above, in my thesis I will adopt a position that is consistent with the viewpoint that was endorsed in Bill C-47. The only major difference between the two positions is that I will argue in support of guidelines that permit non-commercial contractual pregnancy arrangements. Unlike the propositions stipulated under Bill C-47, my position demands a greater amount of governmental involvement (positive legislation/guidelines) in assisting individuals with non-commercial contractual

pregnancies. I will argue that even though non-commercial contractual pregnancy arrangements should not be viewed as an ideal alternative when addressing the problem of human infertility--primarily because there is no iron-clad guarantee that the guidelines governing non-commercial pregnancy contracts will be consistently honored in every non-commercial arrangement--only commercial pregnancy arrangements should be illegal. Under this type of legislation women would be free to act as surrogate mothers. Furthermore, by allowing non-commercial pregnancy arrangements, one could effectively accommodate a greater degree of individual reproductive freedom without compromising other equally important ethical and legal concepts.

ORGANIZATION OF THESIS

When arguing against commercial contractual pregnancy arrangements, I have organized my thesis into four chapters. I have done this principally for reasons of clarity. When reading my thesis it will become readily apparent that even though the chapters are interconnected--they rely on one another's criticisms when arguing against commercialized contractual pregnancy--the approach in each chapter is distinct. The following is a brief overview of the arguments that will be discussed.

In the first chapter, I will employ a specific philosophical perspective as a method of analysis. This perspective, a deontological one, is closely identified with the German philosopher Emmanuel Kant (1724-1804).⁹ Citing, specifically, his writings in the *Foundations of the Metaphysics of Morals (Grundlegung Zur Metaphysik Der Sitten, 1785)*, I will examine the issue of commercial contractual pregnancy. To do this I will apply relevant concepts found in Kantian normative theory such as reason, good will,

the second and third formulations (formulae) of the categorical imperative (the principle of humanity and the principle of autonomy), and the duties of respect, beneficence, and sympathy. Employing these concepts, I will argue against what is, in part, a utilitarian defence of commercial contractual pregnancy. There is, of course, also a utilitarian critique of commercial contractual pregnancy. (Some utilitarians argue that commercial contractual pregnancy arrangements should not be permitted because they do not promote the best interests or happiness of either surrogate mothers or society.)

Together with the emotional appeal attached to childbirth, the procreative argument in favour of commercial contractual pregnancy is utilitarian in nature. It is a utilitarian argument because it is formulated on the basis of the utilitarian moral principle for action. This principle states that "what makes an action right is its maximizing total or average utility."¹⁰ Referring to commercial contractual pregnancy, a utilitarian proponent would claim that it is morally right to engage in this type of autonomous (self-determining) reproductive activity because it provides for increased happiness (parenthood) for a greater number of otherwise unhappy (childless) individuals.

In opposition to the utilitarian argument, the deontological position states that "the goodness of the ultimate consequences does not guarantee the rightness of the actions which produced them."¹¹ Thus, although commercial contractual pregnancy arrangements might satisfy/meet specific reproductive desires, desires which when satisfied/met increase individual well-being or happiness, this does not mean that the activity of commercial contractual pregnancy itself is morally right. Moral rightness itself should be determined primarily on the basis of reason and by acting in accordance with duty-based activity.

When presenting my objections to the commercial contractual pregnancy arrangement, and the negative impact that this arrangement has on women who act as surrogate mothers, I will initially argue that surrogate mothers who engage in this type of reproductive arrangement are denied their own rational agency. Denied rational agency, surrogate mothers are forced to relinquish their freedom or autonomy. The loss of freedom in turn minimizes or negates the third formulation of Kant's categorical imperative. It is in the third formulation that Kant states that "the rational being must regard himself always as legislative in a realm of ends possible through the freedom of the will...."¹²

While my criticism of commercial contractual pregnancy as an activity that denies complete female rational agency and autonomy may seem straightforward enough, it is complicated by an important fact. This fact is that in relation to ethical decision-making, Kant did not extend the concept of rational practical agency to include women. This is clearly evident in a statement that appeared in his *Lectures on Ethics (Eine Vorlesung Kants uber Ethik*, 1780), where he said that "womenfolk have little wisdom, but much prudence...."¹³ Unlike Kant, I will claim that women are capable of rational thought and autonomous action. Based on this claim I will support the idea that women--with the exception of women who are severally psychologically impaired--are equally capable with men of employing reason and good will when making ethical decisions.¹⁴ This ability contributes to autonomous female action. Once I have defended this claim (extended the idea of practical rationality and autonomy to include every rational adult regardless of gender), I will then indicate how commercial contractual pregnancy arrangements deny women complete rationality and autonomy. Next I will argue that

because commercial reproductive contracts deny female rational agency, we have ethical justification for actively discouraging future surrogate mothers from engaging in this type of reproductive activity. This justification serves as the basis for invoking legislation against the practice.

In addition to my argument in support of female rationality, I will also argue that those who would permit commercial contractual pregnancy arrangements are thereby committed to rejecting the second formulation of Kant's categorical imperative. It is in the second formulation of the categorical imperative (the principle of humanity) that Kant says "act so that you treat humanity, whether in your own persons or in that of another, always as an end and never as a means only."¹⁵ He argues that "it is not sufficient that the action not conflict with humanity in our person as an end in itself; it must also harmonize with it."¹⁶ Thus, as moral agents, we should act in a way that individuals are defined as ends-in-themselves. By defining individuals this way, we ensure individual dignity.

It is apparent that by denying the significance of the second formulation of the categorical imperative--the principle of humanity--one must also reject the duties of respect, beneficence, gratitude, and sympathy. Their rejection is inevitable because the "four duties are entailed by the principle of humanity."¹⁷ When we negate the importance of the duties of respect, beneficence, gratitude, and sympathy it becomes that much easier to objectify and thus dehumanize women.

In the second chapter I will present some of the objections raised by feminist philosophers against both commercial and non-commercial contractual pregnancy. Specifically, I will cite the criticisms presented by Susan Sherwin, Christine Overall, and

Elizabeth Anderson. Of the three feminist criticisms, only Elizabeth Anderson adopts a Kantian-feminist approach. The remaining two objections endorse both a radical (Susan Sherwin) and a liberal--with restrictions--(Christine Overall) feminist approach to this issue.

In addition to the three feminist criticisms, I will also present Lori B. Andrews' and John Robertson's arguments in support of procreative liberty. By contrasting Andrews' and Robertson's arguments with feminist objections, I intend to show that although women should have control over their own reproductive functions--because women are understood to be autonomous they should be able to exercise their own procreative choices--there are valid feminist moral reasons why commercial contractual pregnancy arrangements must be discouraged. These objections are based on a consequentialist argument that current methods of assisted reproduction typically do not place women on an equal footing with men, but rather promote gender discrimination on the basis economic incentives, desire, and socially prescribed reproductive expectations. Based on these criticisms I will then argue that this type of activity merely reinforces the idea that men can treat women merely as a means-to-an-end and not as ends-in-themselves. I will then conclude by arguing that even though women should not be encouraged to enter into commercial reproductive contracts--commercial contractual pregnancy arrangements should therefore not be permitted under Canadian law--provided that specific guidelines are followed, non-commercial contractual pregnancies should be allowed.

In the third chapter, I will discuss the legal issues associated with commercial contractual pregnancy. I will begin this section by presenting and responding to two

criticisms that are used when arguing against state interference with individual reproductive liberties. The first criticism claims that by legislating against practices like commercial contractual pregnancy, one is also arguing in support of restrictions placed on female autonomy. Because women are capable of rational autonomous decision-making, this type of legislation is therefore morally impermissible. The second criticism is based on Kantian justice. Some critics argue that imposing additional external legislation, legislation that Kant would surely object to because it limits individual autonomy, the Kantian framework for justice is impaired.

When I have presented and responded to the two principal criticisms, I will then outline Immanuel Kant's theory of justice as described in the *Metaphysical Elements of Justice* (*Die Metaphysik der Sitten*, 1797). In my discussion I will argue that when employing a Kantian framework for judicial freedom--where in exercising one's autonomy one must act in accordance with the universal law of justice--one can on occasion justify restricting individual liberties. Individual liberties can be curtailed because the free will of every individual (all women) is not respected. As I have stated in the previous sections of my paper, in this section I will argue that commercial contractual pregnancy arrangements should not be legally permitted because they do not define women and children as ends-in-themselves.

In addition to my discussion on Kantian justice, I will present John Robertson's legal argument in favour of procreative liberty. I will indicate why I disagree with his claim that reproduction is a negative right and not a positive right.¹⁸ I will support my argument by citing Laura Shanner's theory on the relationship between positive legal rights and technologically-assisted human reproduction.¹⁹

At the end of this chapter I will cite Canadian, American, British, and Australian legislation on commercial contractual pregnancy arrangements. I will also present a list outlining the guidelines that should be followed by individuals and agencies who choose to participate in non-commercial contractual pregnancy arrangements. If these guidelines are followed, non-commercial pregnancy arrangements will remain truly voluntary.

In the final chapter I will discuss the relationship between religion (theology) and bioethics. I will also present the positions of several religious denominations on the issue of commercial and non-commercial contractual pregnancy. I have included this chapter for two reasons. The first reason is that although many Canadians no longer attend religious services on a regular basis, in Canada, traditionally, Judaeo-Christian religious beliefs and values have influenced our moral opinions. The second reason is that many health care facilities in Canada are affiliated with specific religious denominations. By including this section, I intend to recognize the importance of religious beliefs in assisting these facilities with their missions to provide medical care in the context of specific religious beliefs and values.

In the end, my thesis is a resolute defense of the argument against the practice of commercial contractual pregnancy. It is also an attempt to counter the criticism that by arguing against this type of "arrangement," individual liberties--most importantly, the moral and legal autonomy of women--are being compromised by outmoded thinking and legislation. Like American legal scholar Margaret Jane Radin I intend to prove that "when items [such as human sexuality or childbirth] are personal, they are not interchangeable with like items or with money. They cannot be replaced with a like item or with money without affecting self-constitution. Personal items are not understood

instrumentally, as a means to satisfy the owner's needs and desires...they are not valued--or not valued only--in market terms...."20 It is in connection with our ability to make this type of assessment that Canadian bioethicist Christine Overall says that in the same way that "the buying and selling of a human corpse would be *prima facie* wrong, not so much because of what it is but because of what it was...the commodification of reproduction...seems to be inherently as well as instrumentally wrong because of its violation of the *prima facie* obligation not to buy or sell what is, was, or will be a person."21 Thus, in the same way that society should not promote the idea of paying for blood or sperm donations, we should not commercialize human reproduction at the expense of such inherent/intrinsic concepts as defining individuals as ends-in-themselves (respecting the personhood/humanity of every individual), promoting human dignity, and encouraging an appreciation among all individuals for human life.

WHAT IS COMMERCIAL CONTRACTUAL PREGNANCY?

"*Surrogate*" means "a substitute; a thing or person that takes the place of something or someone else, as a drug used in place of another, or a person who takes the place of another in someone's affective existence."22 As the woman who "steps in" and fulfills a biological function that another woman is unable to fulfill, or in a minority of cases is unwilling to fulfill, in both commercial and non-commercial pregnancy arrangements a *surrogate* mother is often referred to as the *host* or *primary* mother. As the *host* or *primary* mother she may have a *gestational* (complete surrogate) or a *genetic* (partial surrogate) link with the child that is born. In cases of *gestational* pregnancy, an embryo (fertilized egg) or an egg that is taken from the commissioning woman is

implanted into the *host* mother's uterus, where it is then artificially inseminated and establishes an indirect biological link between the *host* mother and the child.

Alternatively, a *host* mother may also be a *genetic* mother. Here, because her own egg is used, a direct genetic link is established between the mother and the child. In both *gestational* and *genetic* contractual pregnancy, the woman who commissions the *surrogate* is the *social mother*. She is the woman who will raise the child after it is born. "The relationship of parents to a child is said to be symmetrical when each parent has both a genetic and social relationship to the child. Otherwise, the relationship is said to be asymmetrical."²³

In addition to the distinction made on the basis of the biological function of the *host* mother, contractual pregnancy arrangements can be distinguished on the basis of economic incentive. Unlike commercial contractual pregnancies, a surrogate pregnancy that is performed without any "lump-sum" payment to the *host* mother is classified as a non-commercial pregnancy. While some non-commercial contractual pregnancy arrangements will subsidize all medical expenses and possibly even any lost wages that would have been earned by the *host* mother, they do not include an additional fee for producing a child.

Now that I have shown how commercial and non-commercial contractual pregnancy arrangements differ from one another, it is important that I distinguish between the two types of non-commercial contractual pregnancy arrangements. In the first type of non-commercial contractual pregnancy arrangement a woman will agree to act as a surrogate simply because she enjoys being pregnant or because she enjoys the attention that she receives while she is pregnant. In this type of situation a woman will

agree to act as a non-commercial surrogate mother on the basis of purely selfish or hedonistic motives. In the second type of non-commercial contractual pregnancy arrangement, a woman will agree to participate in a pregnancy contract solely on the basis of kindness towards or empathy with the *social* parents. In this type of contract one sister or close friend will agree to act as the *gestational* or *genetic* mother for another sister or friend who is unable to produce an ovum or carry an embryo to full-term.

When referring to *non-commercial* pregnancy contracts throughout the remainder of my thesis, I will not distinguish between the two reasons for establishing non-commercial contractual pregnancy contracts. I will avoid making this distinction because I believe that for many non-commercial surrogate mothers there is a mixture of both selfish and altruistic or empathic reasons for agreeing to participate in this type of contract.

To conclude my discussion on the social, psychological, and economic differences between commercial and non-commercial contractual pregnancy contracts, commercial contractual pregnancy arrangements are not created on the basis of hedonistic inclinations or benevolent feelings, but rather, are based on a purely economic contract that is usually established between strangers. In this situation the common bond that connects the contracting individuals to one another is the financial reward earned by the *host* mother when she produces a child. Therefore, unlike a woman who acts as a *gestational/genetic* mother on the basis of non-commercial reasons alone

[a] commercial surrogate mother is someone who is commissioned and paid to undertake the labour of pregnancy in order to produce a child that will be delivered to the commissioning parties (usually a couple), who will raise the child....²⁴

In Canada, in 1994, it was estimated that commercial contractual pregnancies garnered "\$15,000 for the *surrogate* and \$20,000 for lawyers who drew up the contracts."²⁵ For some women, women who live at or under the poverty line, the financial prospects associated with commercial pregnancy may be quite attractive. In its report presented to the Government of Canada, the Royal Commission on New Reproductive Technologies noted that "preconception arrangements have the potential to exploit women's vulnerability because of race, poverty or powerlessness...."²⁶ Unlike all other exploitative and dangerous contract work--work such as distributing newspapers at 4 a.m. or coal mining--I would add to the objections presented in the report submitted by the Royal Commission on New Reproductive Technologies and argue that commercial contractual pregnancy undermines an aspect that is integral to the female self and that contributes to the definition of what it is that defines women as persons/humans--it undermines their sexuality.

In her argument against commercializing pregnancy, American legal scholar Margaret Jane Radin argues that "it is important to realize that in a larger scheme that accords special recognition to core personhood interests in general, some personhood interests not embodied in property will take precedence over claims to fungible property."²⁷ Distinguishing between something being fungible and personal, Radin states that "a fungible object can pass in and out of the person's possession without effect on the person as long as its market equivalent is given in exchange....Bodily integrity is an attribute and not an object. We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object."²⁸ While the capitalist economic system forces individuals to work in occupations

that exploit their physical and/or psychological qualities, commercial contractual pregnancies not only exploit these qualities, but they also estrange women from what it is that defines them as persons. As with every other free-market venture, the primary objective when trading is not to protect the services being traded--in the case of women their personhood--but rather emphasis is placed on securing a healthy profit margin. It is unreasonable for one to assume that commercial pregnancy contracts are so unique that they will escape from the very same pressures that determine how every other object is traded on the open market--the capitalist system forces individuals to work in jobs where they are defined merely as instruments. More importantly, it is imprudent for one to assume that, once humans are commercialized, their personhood can be recovered at some distant point in the future.

ARGUMENTS USED AGAINST AND IN DEFENSE OF COMMERCIAL CONTRACTUAL PREGNANCY

Several different arguments are employed when arguing against or in defense of commercial contractual pregnancy. As I have briefly mentioned, there are seven principal arguments that are used when arguing against commercialized contractual pregnancy.

- Commercial contractual pregnancy violates the third formulation (principle of autonomy) of Kant's categorical imperative. (Kantian argument)
- Commercial contractual pregnancy violates the second formulation (principle of humanity) of Kant's categorical imperative. By denying the significance of the second formulation of the categorical imperative, the duties of respect, beneficence,

gratitude and sympathy are minimized. This has a negative impact upon individual dignity. (Kantian argument)

- Commercial contractual pregnancy reinforces oppressive gender discrimination because it uses the female body solely for the purpose of reproduction. Women are not seen as ends-in-themselves. (Kantian and radical feminist arguments)
- Commercial contractual pregnancy reinforces the myth that women are only "complete" when they become mothers. Essentially, women are valued only for their reproductive capabilities. (Radical Feminist argument)
- Commercial contractual pregnancy uses financial coercion to take advantage of economically disadvantaged women. (Marxist Feminist and Radical Feminist arguments)
- Commercial contractual pregnancy does not take into consideration the best interests/happiness of women or society. (Consequentialist argument)
- Commercial contractual pregnancy exploits the poor. (Consequentialist argument)
- Commercial contractual pregnancy, unlike unassisted reproduction, is not based upon a legal right to procreate. (Legal argument)
- Commercial contractual pregnancy violates specific religious moral teachings. It does not view human life as something that is sacred and must be treated with dignity. (Religious argument)

The following arguments are used to support universal access to this reproductive procedure.

- Commercial contractual pregnancy enables individuals/couples to fulfill their desire to become parents. (Libertarian argument)
- Commercial contractual pregnancy promotes female autonomy because it allows women to have complete control over their reproductive functions. (Liberal feminist argument)
- Commercial contractual pregnancy does not harm children and therefore it is useful in resolving the issue of human infertility. Children are not harmed because they are "wanted" by their social parents. (Consequentialist argument)
- Legal restrictions prohibiting commercial contractual pregnancy arrangements are paternalistic. Paternalism itself is a greater harm to individuals than is commercial contractual pregnancy because it denies women freedom-of-choice. (Libertarian and liberal feminist arguments)
- Commercial contractual pregnancy is based on a legal right that gives adults the freedom to contract with other adults. (John A. Robertson's argument)
- Religious teachings and beliefs on assisted reproduction are outdated and therefore commercial contractual pregnancy is permissible. Judaeo-Christian Biblical precedents such as Hagar and Abram/Sarai support contractual pregnancy. (Libertarian argument)
- Commercial contractual pregnancy arrangements are similar to other practices such as invitro-fertilization and adoption; therefore, they should be allowed. (Libertarian argument)

CHAPTER 1

I. KANTIAN ETHICS

Within Kantian ethics "there is a conceptual connection between the notion of what one ought to do, and the notion of one's having a reason."²⁹ This is because for Kant "all moral concepts have their seat and origin entirely a priori in reason."³⁰ For one to claim that one is acting in an ethical way, Kant believes, one must understand "the act not merely by reference to a prior cause, e.g., an inner impulse, but by constructing a rationale for it."³¹ In turn, it is the rationale or reasons that one constructs that determines the will: that is, the moral disposition or attitude that is free of any empirical bias. This moral disposition is an unconditional intrinsic quality that directs one to do one's duty because it is one's duty. Describing the relationship between reason and good will, Kant states that "reason's proper function must be to produce a will good in itself and not one good merely as a means...."³² He says that once this is achieved one's good will becomes something "which is to be esteemed as good in itself without regard to anything else."³³ Kant believes that individual action performed on the basis of good will establishes "a contentment of its own kind (i.e., one that springs from the attainment of a purpose determined by reason), even though this injures the ends of inclination."³⁴

In his discussion on the relationship between reason, good will and moral activity, Kant says that action that originates out of human inclination (desire or feeling) is something which is not always readily rejected. He states that "man is affected by so many inclinations that, though he is capable of the idea of a pure practical reason, he is

not so easily able to make it concretely effective in the conduct of his life".³⁵

Notwithstanding this weakness, Kant maintains that moral "law alone implies the concept of an unconditional and objective and hence universally valid necessity... which must be obeyed even against inclination."³⁶ Universally valid necessity is achieved through the categorical imperative and by obeying moral maxims.

In the *Foundations of the Metaphysics of Morals*, Kant states that "there is, only one categorical imperative. It is Act only according to that maxim by which you can at the same time will that it should become a universal law."³⁷ The significance of the categorical imperative in relation to moral decision-making in Kantian ethics cannot be over-emphasized. For Kant, "if the action is good only as a means to something else, the imperative is hypothetical, but if it is thought of as good in itself, and hence as necessary in a will which conforms to reason as the principle of the will, the imperative is categorical."³⁸ Different from non-moral hypothetical imperatives, such as "rules of skill"(rules that lead to some purpose/end) or "rules of prudence" (rules that promote individual well-being/happiness), "the categorical imperative is a formula which sets forth the conditions that must be fulfilled in order to justify the subjective principle on which we act."³⁹ When fulfilling the conditions set by the categorical imperative, moral maxims serve as rules or reasons for objective duty-based activity or what Kant calls rules of "practical constraint."

When defined in connection with the categorical imperative, according to Kant "a maxim is a subjective principle of acting...."⁴⁰ Because they are subjective, moral "maxims are not just any chosen practical rule but are rules which are integrated with the attitude of thought of the subject."⁴¹ Unlike Kant, who states only that a maxim "contains

the practical rule which reason determines according to the conditions of the subject.", British deontologist Onora O'Neil argues that maxims are much more than just practical rules. She claims, and I agree, that "to have maxims of a morally appropriate sort we will not be adopting a set of moral rules at all, but rather some much more general guidelines for living."⁴² Under this definition maxims serve as general instrumental guidelines that shape one's attitudes. As instrumental guidelines, maxims become important not only in connection with one's inner or cognitive understanding of ethical issues, but also in connection with one's outward performance (compliance) with ethical activity itself.

Thus far, I have described Kant's definitions of reason, good will, the categorical imperative and moral maxims. Another concept that is absolutely crucial within Kantian ethical theory, and in my argument against commercialized contractual pregnancy, is Kant's definition of autonomy. In his definition autonomy "is not mere self-assertion or independence, but rather thinking or acting on principles that defer to no ungrounded "authority," hence on principles all can follow."⁴³ For Kant, "reason is indeed the basis of enlightenment, but enlightenment is no more than autonomy in thinking and acting that is, of thought and action that are lawful yet assume no lawgiver."⁴⁴ Autonomous decision-making therefore originates with the individual and not from external factors.

In the *Foundations for the Metaphysics of Morals*, specifically in the third formulation of the categorical imperative, Kant states that "the will is not only subject to the law, but subject in such a way that it must be conceived also as itself prescribing the law, of which reason can hold itself to be the author...."⁴⁵ Thus, "for Kant, the term 'autonomy' denotes our ability and responsibility to know what morality requires of us and our determination not to act immorally."⁴⁶ Unlike heteronomous action, which

typically is formulated on the basis of hypothetical empirical causal factors such as inclination, desire or social expectation, and as such is based not on the categorical imperative, "freedom in the full, moral sense is a transcendental idea of reason, for it refers to what (purportedly) lies beyond all possible sensory experience and therefore can originate only in our own reason."⁴⁷ It is because pure practical reason is exercised that autonomous actions, unlike heteronomous ones, are said to be free-willed and moral.

In addition to the distinction made on the basis of empirical and purely rational factors, Kant states that, unlike heteronomy, autonomy leads to what he says is a "realm of ends."⁴⁸ In the realm of ends Kant believes that "all contingent facts about individuals--and our subjective, affective relationships with them--are completely irrelevant both to their inherent value and to the respect that we owe them."⁴⁹ When understood "in relation to individual action, rational ethical objectivity not only promotes autonomy (self-sufficiency) for every individual, because it is based on reason and free will, but it also supports the categorical imperative. For Kant, "being a person is a pure practical idea of reason that is defined in a completely impersonal, formal manner, so that it in effect is equivalent to the requirement of universality of the first formula."⁵⁰

The causal connection between reason, the realm of ends and the categorical imperative reinforces autonomous rational deliberation and action-guiding constraint when making ethical decisions. Additionally, it establishes what Kant says is "the idea of the dignity of a rational being."⁵¹ He states that "autonomy is thus the basis of the dignity of both human nature and every rational nature."⁵² Based on the distinction made between hypothetical empirically-based heteronomous action (i.e., action performed on the basis of inclination or desire) and rational autonomy, Kant states "that which is

related to general human inclinations and needs has a market price. That which, without presupposing any need, accords with a certain taste (i.e., with pleasure in the purposeless play of our faculties) has a fancy price. But that which constitutes the condition under which alone something can be an end in itself does not have mere relative worth (price) but an intrinsic worth (dignity)."⁵³ It is precisely because all humans possess an intrinsic worth or dignity and all humans (excluding individuals who are severely psychologically impaired) are autonomous that I believe that commercial contractual pregnancy arrangements are ethically unsound.

II. RELEVANT CRITICISMS OF KANT'S ETHICAL THEORY

Kant's ethical theory has been criticized in many ways. I will limit my discussion to two criticisms that are especially relevant to women, children and the practice of commercial contractual pregnancy. The first criticism, a criticism which I will argue is valid, claims that Kantian ethics discriminates against women because Kant does not believe that women can act on the basis of the categorical imperative. The second criticism, a criticism that I will argue against, claims that Kantian ethics is too narrow because it states that "ethical duties can be carried out only from a pure motive."⁵⁴ For a decision to be considered as truly ethical, Kant argues that it must be free of sentiment. He states that moral "agents may in many cases have empirical motives for doing their duty; only if these empirical motives are determining are their actions not morally worthy."⁵⁵ Thus, factors such as inclination or desire must not subjugate the categorical imperative.

III. KANT WAS WRONG: WOMEN DO POSSESS REASON

A central criticism directed against Kantian ethical theory is that it excludes (discriminates against) women. While in the *Foundations of the Metaphysics of Morals* Kant does not explicitly state that women are incapable of exercising complete rational thought in the same way as men, throughout his other writings Kant certainly does not instill in his readers the idea that women and men are equal in terms of their ability to be rational moral agents. For example, in his *Lectures on Ethics (Eine Vorlesung uber Ethik, 1789)*, Kant states that "for the most part we have the greatest love for those we revere less, for example, the female sex, whose very weaknesses we forgive for the sake of their beauty... ." ⁵⁶ Similarly, in *Anthropology from a Pragmatic Point of View (Anthropologie in pragmatischer Hinsicht, 1798)*, Kant "maintains that boys and men are capable of a deep understanding, of noble virtue, and of leading a life according to rational moral principle. In contrast, woman's morality should essentially be one of sentiment, governed by irrational moral feelings of aversion and beauty." ⁵⁷ Statements/ideas like these have led some critics of Kantian ethical theory, in particular feminist theorists, to claim that Kant was a misogynist. Arnulf Zweig states that "it is understandable why Kant's conservative views about women's rights and roles... his uncritical endorsement of male responsibility and male supremacy within the family and within society are offensive to many feminists. For it may not be clear to these critics that Kant's attitudes toward women, sometimes bordering on misogyny, are merely incidental features of his orientation in ethics." ⁵⁸

In spite of Zweig's attempt to minimize the misogynist criticism by arguing that Kant's stance on the absence of female rationality is merely an "incidental" feature in his ethical theory, Kant's belief that females are basically irrational is evident throughout his writings. Clearly this is what Kant means/believes when he says that "womenfolk have little wisdom, but much prudence... men (if they have not, by laxity, become womanish) are able to choose better ends, and avoid doltishness."⁵⁹ In another example, he states that because "reasoning is always a form of work and effort...it eventually becomes onerous. So the conversation naturally descends into a mere play of wit.... This pleases the ladies present, since the mischievous but not shameful little sallies against their sex enable them to show their own wit to their advantage."⁶⁰ The supposed imperfection in female character, based on what Kant describes as a "delicacy of feeling..." prohibits women from engaging in autonomous moral decision-making.⁶¹ In Kant's assessment of female abilities, "a woman, regardless of her age, is under civil tutelage [or incompetent to speak for herself (unmundig)]; her husband is her natural curator."⁶²

In response to the statements made by Kant on female rational agency or, rather, absence thereof, I will support the discriminatory/ misogyny criticism. Unlike some philosophers I will not argue that "the problem with K.E. is not that it is misogynist per se; rather, K.E. is discriminatory...."⁶³ Notwithstanding the fact that to classify a theorist as a misogynist entails a greater sense of hatred for women than merely labeling him as one who holds discriminatory opinions, I will not distinguish between these two concepts. I will avoid making this distinction because regardless of whether or not Kant's argument is misogynist or discriminatory, the conclusion is similar. Kant wants us to believe that women are genetically idiotic, non-persons. Based on a difference in socially

prescribed male and female roles--where, as tradition has it, men rule while women take care of the home--Kant incorrectly assumes that women are ineffective agents when they are required to act on the basis of the categorical imperative.

The fact that Kant claimed that "we call feminine ways weaknesses, and joke about them" is disturbing, but hardly unique.⁶⁴ Sadly, "Kant was for the most part not in advance of his time. Kant took it for granted that men and women are innately different in their talents and dispositions...."⁶⁵ I intend to disregard the statements Kant made about women and argue that women are able moral decision-makers. I will do this by acknowledging that Kant was wrong to assume that women are any less capable of exercising reason than men are. This acknowledgment does not minimize the significance of Kantian ethics. One can accept Kantian ethical theory and reject his rather narrow opinion of women. I will argue that when based on an amended Kantian moral framework, where women are moral decision-makers, commercial contractual pregnancy arrangements are ethically impermissible because they deny surrogate mothers the opportunity to exercise pure reason. Not only does this denial have a negative impact on the concept of female rationality itself, but when based on a Kantian definition of moral autonomy--where emphasis is placed on the relationship between reason, respect for the categorical imperative and autonomous activity--commercial contractual pregnancy arrangements effectively prohibit surrogate mothers from exercising their own moral autonomy.

IV. FEMALE REASON, AUTONOMY AND COMMERCIAL PREGNANCY

As I have stated in the previous section, Kant is simply wrong when he suggests that women are incapable of purposeful rational thought. Like men, women, because they can exercise reason, are certainly capable of reaching moral decisions. On the basis of this claim I believe that commercial contractual pregnancy arrangements should be prohibited. Prohibition itself can be justified because, above everything else, the primary focus of commercial pregnancy contracts is acquisition. It is not how we as a society, by defining women as rational independent agents, can be encouraged to preserve the humanity of women. What is important in commercial pregnancy is that the surrogate mother complies with the requirements set out in the contract so that she produces a child. These requirements only further the interests of the commissioning parents, physician, child broker, and the surrogate who believes that she will gain more from the arrangement than she loses.

Kantians argue that commercial contractual pregnancies exploit the personhood/humanity of surrogate mothers by not treating them as ends-in-themselves. Unlike other contracts, for example, a contract to empty bedpans which is exploitative and perhaps dehumanizing, commercial contractual pregnancies involve the whole being. They involve the whole being because commercial surrogate mothers are seduced to surrender their autonomy (exercising one's sexuality is connected to one being able to function autonomously) something that a worker is not forced to do when emptying bed pans.

In the third formulation of the categorical imperative Kant states that for a decision to be considered as truly morally autonomous, "a will which is subject to laws can be bound to them by an interest, but a will giving the supreme law cannot possibly depend upon any interest...."⁶⁶ He says that a moral "will can have no interest as its foundation."⁶⁷ Clearly, in the case of commercial contractual pregnancy arrangements, it is impossible for a surrogate mother to act without any interest. Her interests--the principal interest being financial security--could possibly overshadow what are misconstrued as autonomous moral considerations. Once again, it is important to emphasize that "the core idea of personal autonomy is an extension of political self-rule to self-governance by the individual: personal rule of the self while remaining free from both controlling interferences by others..."⁶⁸ In commercial contractual pregnancy--because surrogate mothers are not free from the controlling interferences of others--what proponents classify as autonomous activity is in fact nonautonomous coerced action. Unlike emptying bedpans where the individual, notwithstanding her/his activity, is still treated by the rest of society as an end-in-her/himself (her/his personhood/humanity is respected), commercial contractual pregnancy entices women to become mere instruments in the baby-making process. Surely, one cannot then argue that this type of activity is morally acceptable.

V. IS KANTIAN ETHICS TOO NARROW?

In addition to his rather limited definition of female reason, another criticism directed against Kantian ethical theory is that "Kant greatly underestimated the importance of a philosophical account of man's empirical nature."⁶⁹ Critics argue that

"despite its overwhelming importance rationality is only one component in the nature of man."⁷⁰ They claim that Kant is wrong to assume that individuals, by employing reason and good will and by acting on the basis of the categorical imperative, can formulate their moral decisions independently of empirical considerations. It is argued that this assumption produces a particular problem. The problem is that Kantian ethics does not provide an adequate account of situations--situations such as commercial contractual pregnancy--where typically individuals will act on the basis of desire, inclination and outcome when formulating moral decisions. To eliminate this problem it is said that "the intentionality of moral volition must be integrated with the intentionality of empirical motivation. They cannot be regarded as processes which take place side by side, nor can they be related only externally as higher to lower faculty."⁷¹ To be effective "normative ethical theory...requires a theory of empirical motivation which includes the autonomous will as a legislative power."⁷²

Responding to this criticism, one can defend Kant's disapproval of empirical evidence as the sole component of moral decision-making, in a number of ways. First, one can argue that pure reason is more important than either sentiment or outcome. Reason is more important because it contributes to objective autonomous moral decision-making. Clearly this is what Kant means when he says that "for beings who, like ourselves, are affected by the senses as incentives different from reason, and who do not always do that which reason by itself alone would have done, that necessity of action is expressed as only an ought. The subjective necessity is thus distinguished from the objective."⁷³ Unlike sentiment or outcome, reason gives us the ability to reach autonomous decisions based on "the capacity to step back from our desires, and to reflect

critically on the ends that they propose."⁷⁴ This capacity allows individuals--who have good will--to act in accordance with the categorical imperative and to universalize the principles associated with moral judgement. Kant's refusal to recognize empirical sentiment and outcome, as the only feature of moral decision-making, is indicative of his belief that only "pure reason reserves for itself the absolute totality in the use of concepts of the understanding and seeks to carry the synthetic unity of thought in the category to the plain unconditioned."⁷⁵ He believes that empirical considerations make "the moral value of action dependent upon the contingent presence or absence of those considerations. This attaches moral value to the action in the context of external considerations...."⁷⁶ It is in connection with external considerations such as individual happiness, the satisfaction of desires or reproductive freedom/liberty that we "create" theories that make commercial contractual pregnancy morally acceptable. Because these theories seek to satisfy specific sentiments or ends they are neither completely objective, purely rational, nor are they autonomous. Thus, one must question the moral acceptability of universalizing procedures such as commercial contractual pregnancy.

Responding to Kant's criticism of empirical evidence, one could say that assuming that moral judgments were indeed best formulated on the basis of autonomous objective pure reason alone, it seems highly unlikely that every individual would be capable of this type of activity. Because every individual (excluding children and mentally challenged adults) is neither capable of freeing her/himself from empirical sentiment and outcome, nor willing to do so, Kant's moral theory becomes an ineffective foundation for moral action.

In the *Foundations of the Metaphysics of Morals* Kant does not preoccupy himself with the ways in which individuals actually form their moral decisions on the basis of pure reason alone. What is important for Kant is to show why objective a priori judgements are superior to judgments that are "tainted" by empirical sentiment. For Kant "the success or failure of this argument does not hinge on whether or not there are in fact any other rational beings. Rather, the point is that if there are such beings and if one recognizes them as being rational then (in order to be reasonable) one must regard and treat these beings as ends-in-themselves."⁷⁷

To conclude my discussion of the criticism that Kant wrongly ignores the significance of empirical evidence in the context of rational objectivity, I noted that Kant believes that "the notion of a non-desire-based reason for action is tied to the notion of an agent who is positively free - an autonomous agent."⁷⁸ In the third formulation of the categorical imperative, Kant states that "autonomous legislation ought to harmonize with a possible realm of ends..."⁷⁹ In turn, he says, "autonomy is thus the basis of the dignity of both human nature and every rational nature."⁸⁰ Certainly the preservation of one's personhood and human dignity is vitally important, not only in relation to reproductive procedures like commercial contractual pregnancy, but in biomedical ethics in general as well as in work life.

Notwithstanding the fact that the Kantian definition of rational autonomy promotes human dignity, critics argue that "the rigor of the notion of autonomy... seems too great. To be a practical notion, autonomy must allow that a person be able to incorporate external influences into his action, rather than requiring complete detachment from them."⁸¹ Thus for one to be completely autonomous one must, in part, formulate

one's ethical decisions on the basis of sentiment and outcome. In relation to commercial contractual pregnancy this means that, as an autonomous ethical decision-maker, it is perfectly acceptable for one to formulate one's ethical decision on the basis of external factors such as the desire to become a parent or the desire to secure additional financial security. One's autonomy is severely compromised when it is limited solely to objective pure reasoning.

In response to this last objection one could argue that even though external influences may be significant when formulating hypothetical or non-moral decisions, for a moral decision to be truly autonomous, one must be able to reason independently of any experiential considerations. This type of objective reasoning--based on the categorical imperative--ensures that moral decisions are truly clear and purposeful. As philosopher Thomas May states, when "alien causes are eliminated from affecting the moral value of action the moral value of a particular action becomes as consistent a determination as a mathematical deduction."⁸² This type of precision is absolutely necessary when making the moral choice to speak the truth, applying legal principles, or addressing specific bioethical dilemmas.

VI. KANTIAN PURE REASON AND COMMERCIAL CONTRACTUAL PREGNANCY

When applied to the argument against commercial contractual pregnancy, Kantian theoretical consistency promotes the idea that all women should be defined as ends-in-themselves--it discourages individuals from treating commercial surrogates merely as means or tools. In place of the capitalist instrumental definition that is assigned to

women, Kantian ethics promotes a greater awareness of the humanity (personhood) of commercial surrogate mothers. It connects autonomous activity with a respect for the humanity of all persons. In the third chapter, on the legal issues associated with commercial contractual pregnancy arrangements, I will discuss at length how Kantian ethics strengthens the legal argument against commercial contractual pregnancy. In addition to this discussion I will also present Margaret Jane Radin's argument on the preservation of bodily integrity. Through both of these arguments I intend to strengthen and support my claim that commercial contractual pregnancy arrangements should not be legally permitted.

CHAPTER 2

I. FEMINIST PHILOSOPHY AND COMMERCIAL CONTRACTUAL PREGNANCY

Unlike Kantian ethics, whose primary focus is the ethical conduct of men as moral agents, in feminist ethics emphasis is placed on women as moral actors. In her book *Ethics and Human Reproduction: A Feminist Analysis*, Christine Overall states that "it is possible to outline the minimal but essential components of a feminist perspective."⁸³ Overall lists five components that she believes define feminist ethical theory. The first component, which should be true of any major moral theory, "involves a commitment to understanding women's experience, beliefs, ideas, relationships, behaviour, creations, and history."⁸⁴ It is by understanding these aspects of female morality that care giving becomes an important aspect in feminist ethics. Despite the importance that care giving plays in the lives of women, Susan Sherwin states that "feminists have reason...to be cautious about the place of caring in their approach to ethics; it is necessary to be wary of the implications of gender traits within a sexist culture."⁸⁵ Because some men continue to believe that female care giving contributes to a weakness in the moral character of women, I believe that Sherwin is right to caution feminists against placing too great an emphasis on female gender traits.

The second aspect of ethics, one which J.S. Mill recognized in his book *The Subjection of Women*, 1873, Overall says, "is founded upon and fully informed by an awareness that women as women have been and are the victims of oppression under patriarchy, the system of male dominance."⁸⁶ She states that the victimization of women

by men is not a recent development, but rather has become more apparent with the transition of women from the home into the labour force. In *A Vindication of the Rights of Men*, 1790, Mary Wollstonecraft, a British feminist philosopher who wrote during the same period as Immanuel Kant, described what it meant to be an oppressed female in the 1700s. Wollstonecraft says, "China is not the only country where a living man has been made a God. Men have submitted to superior strength to enjoy with impunity the pleasure of the moment - women have only done the same, and therefore till it is proved that the courtier, who servilely resigns the birthright of a man, is not a moral agent, it cannot be demonstrated that woman is essentially inferior to man because she has always been subjugated..."⁸⁷ It is as a result of the historical subjugation of women by patriarchal ideology that feminist writers argue they must promote a different type of thinking. A type of thinking that encourages equality among men and women.

The third component of feminist ethics describes "the ways in which that oppression is maintained and perpetuated, as well as attention to the agents--both individual and institutional--of oppression."⁸⁸ In connection with commercial contractual pregnancy arrangements, factors such as the male dominated market model of goods exchange, female poverty, and baby brokers are targeted as oppressive elements that feminists believe take advantage of women and their reproductive capabilities. Of the different forms of feminist thinking, Marxist feminists are the most vocal on the issue of the economic exploitation of commercial contractual mothers. "Marxist feminists typically argue that when a woman consents to sell her reproductive services to an infertile couple, her consent is more often the product of economic coercion than of free choice."⁸⁹ (This argument is an extension of the argument that Marxist feminists employ

against the economic exploitation of women in other work contracts as well as in some marriage contracts.) Laura Shanner, although not a Marxist feminist herself, concedes that the institutional structures present within contemporary society contribute to the oppression of women. She states that "when women are at an...economic, or social disadvantage at the outset of the bargaining, it is reasonable to fear that they will be exploited."⁹⁰ It is precisely because there is a risk that commercial surrogate mothers will be exploited that commercial contractual pregnancy arrangements should be prohibited under Canadian law. They should be prohibited so that women are treated as persons first.

In addition to the three previous components, the fourth objective of feminist ethics is to propose various solutions that change current inequalities between men and women. Thus feminist theorists embrace a visionary approach with regards to the future status of women. Susan Sherwin states that "without such analysis, women would be left with the morally unsatisfactory prospect of insisting on equal access to the existing positions of power and dominance."⁹¹ In her early visionary feminist writings, Mary Wollstonecraft said "that women, considered not only as moral, but rational creatures, ought to endeavor to acquire human virtues (or perfections) by the same means as men, instead of being educated like a fanciful kind of half being...."⁹² Certainly, Wollstonecraft's idea that women should be defined as moral and rational humans is as much a part of current feminist ideology as it was during the 1700s.

The final component of feminist ethics is its contribution to changing how we (men and women) think. Overall states that "in its most developed form it fosters the creation of new or alternate epistemic, ontological, ethical, and cultural systems."⁹³

When applied to bioethical issues--issues such as commercial contractual pregnancy--this component raises the question of whether or not technologically assisted human reproduction is something that should be accepted as part of our ethical and cultural framework.

II. DIFFERENT APPROACHES IN FEMINIST ETHICS

In feminist ethics three principle approaches are employed when arguing in support of the feminist perspective. The first approach, liberal feminism, "is committed to making the formal legal and political changes necessary to guarantee women rights that are equal to those of men, including rights to education and to all opportunities."⁹⁴ Unlike other feminists, liberal feminists are unique in that they believe that women should have the right to utilize all available methods of reproductive assistance. On the issue of commercial contractual pregnancy, liberal feminist Lori B. Andrews "argues that no matter what their reservations about contracted motherhood are, women should be adamantly opposed to a legal ban on it."⁹⁵

Like Andrews, Canadian philosopher Christine Overall classifies herself as a liberal feminist. Unlike Andrews, however, Overall says that she is "profoundly suspicious, where liberals are often complacent, about the proliferation of reproductive technologies, the harms of reproductive engineering, and the manipulation of reproductive needs, interests, and goals."⁹⁶ Overall's suspicions of current reproductive practices, and the implications that they hold for women, lead her to conclude that women should not be permitted, legally, to enter into commercial contractual pregnancy arrangements. Her argument is based on the idea "that there are two forms of the right to

reproduce: a weak (or liberty) right not to be interfered with in procreative behaviour, and a strong (or welfare) right to assistance in reproduction."⁹⁷ Overall states that "in Canadian society, no right can require the work of women as breeders, or the subjugation of women's bodies to men or to the state."⁹⁸ Women can consent to act as breeders, but not within the perimeters of the capitalist market economy framework. Thus, the argument that reproductive practices like commercial contractual pregnancy should be permitted is false.

The second approach favoured by some feminists is based on Marxist ideology. As I have stated, Marxist feminists believe that women are coerced and exploited through the male-dominated capitalist economic system. Based on economic factors such as maximizing profit and supply and demand, Marxist feminists argue "that most contracted mothers, like most prostitutes, are much poorer than their clients."⁹⁹ In an American study, "one of the few psychological studies so far undertaken on the characteristics of women who apply to be surrogate mothers, it was discovered that 40 percent of the sample were unemployed or receiving some form of financial aid or both."¹⁰⁰ Based on studies like this one, which suggest that lower income women risk being singled out and treated as commercial labour, Marxist feminists argue that commercial contractual pregnancy arrangements should be prohibited.

Although this last Marxist feminist argument against commercial contractual pregnancy is substantiated by empirical evidence, it is nevertheless a weak argument. It is a weak argument simply because the claims that are directed against commercial contractual pregnancy arrangements also hold true for every capitalist commercial contract. Whether a woman is exploited while working at a fast food restaurant or while

she is working in a fish processing plant, this type of exploitation is just as economically damaging to women as being exploited as a commercial surrogate mother. To strengthen the feminist argument against commercial contractual pregnancy arrangements, feminists must show that unlike other capitalist commercial contracts, commercial contractual pregnancy contracts sacrifice the bodily integrity of commercial surrogate mothers, thereby minimizing their personhood.

The third major approach in feminist ethics, one which Canadian philosopher/feminist Susan Sherwin supports, is radical feminism. Similar to Marxist feminists, radical feminists believe that the male dominated capitalist economic framework exploits women. In their book *Controlling our Reproductive Destiny: a technological and philosophical perspective*, Lawrence Kaplan and Rosemarie Tong state that unlike Marxist feminists, radical feminists "broaden the feminist analysis of exploitation to include cases of noneconomic exploitation."¹⁰¹ This analysis critically assesses the framework of society itself. Radical feminists argue that society is structured in such a way that women are consistently at an economic, social and political disadvantage when compared to men. Susan Sherwin believes that the subordination of women to men merely reinforces the moral and social problem of gender inequality. She states that "because dominance structures demand dichotomies, natural differences are exaggerated and embellished...to justify the hierarchy, differences must be established and emphasized."¹⁰² In connection with the practice of commercial contractual pregnancy, the dominance structure demands that we embellish the obvious natural/biological difference between men and women which is that women can reproduce while men can't. By encouraging commercial reproduction the male capitalist

economic hierarchy is reaffirmed and the differences between men and women are amplified.

The final type of feminist ethics, a type that I will classify as Kantian ethical feminism, is not always defined as a "pure" form of feminism at all. One is therefore hard pressed to find a theorist who admits to being both a Kantian and a feminist. The principal reason why many feminists reject Kantianism is that they believe that it is theoretically incompatible with the objectives set out in feminist moral theory. Susan Sherwin states that "most women experience the world as a complex web of interdependent relationships, where responsible caring for others is implicit in their moral lives. The abstract reasoning of morality that centres on the rights of independent agents is inadequate for the moral reality in which they live."¹⁰³

Despite the problem that some feminists have with Kantian ethics, a problem which I will address in the following paragraph, feminists like Elizabeth Anderson have successfully incorporated aspects of Kantian ethical theory--specifically the second and third formulations of the categorical imperative--into their argument in support of gender equality. For example, in her argument against commodifying female reproductive capabilities, Anderson says "the application of commercial norms to women's labour reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use."¹⁰⁴ Clearly, in this example, Anderson is invoking the distinction that Kant and Radin make between treating individuals merely as means rather than as ends-in-themselves. This distinction supports the feminist argument that "reproductive capacities...are too close to personhood to be treated merely as market commodities."¹⁰⁵ Women cannot be classified as objects.

III. WHY SOME FEMINISTS REJECT KANTIAN ETHICS

As I have stated, for some feminists Kantian ethics simply cannot be combined with contemporary feminist ideology. There are several reasons why they believe this is so. Perhaps the most obvious reason is Kant's reluctance to extend the concept of rational moral agency to include women. Feminists argue that this major flaw in Kantian ethical theory is typical of the way that some moral philosophers have subordinated women to men. They claim that theories like Kant's--moral theories that do not place men and women on an equal footing in terms of their ability to be moral agents--must be rejected outright. Canadian philosopher Kathryn Pauly Morgan argues that there is also a second reason that some feminists reject Kantian theory. Morgan states that "feminist ethics challenges the model of the moral subject as an autonomous, detached, rational subject, often seeing this hyper-masculinist ideal of the moral self as both psychologically and morally flawed."¹⁰⁶ Thus not only is Kant's ethical theory prejudicial against women, but it seems that it is also somewhat sterile. It is sterile because it does not capture the complete meaning of what it is that makes women human. Although Susan Sherwin would most certainly argue that, if accepted, Pauly Morgan's definition of feminist ethical theory would result in a prejudicial stereotyping of women by men, she agrees with Pauly Morgan's assessment that Kantian ethical theory places too great an emphasis on rational moral agency. Sherwin states that "people do not...deliberate about moral laws as purely rational beings, as Kant presumes."¹⁰⁷

IV. KANTIAN ETHICS AND FEMINIST IDEOLOGY: A SUITABLE COMBINATION

In response to the previous criticisms made by some feminists against Kantian ethics, there are two principal ways that Kantian ethical theory and feminist ideology can be combined together. First, one can acknowledge, as I have already done, that Kant was wrong to assume that women are incapable of acting as rational moral agents. The underlying idea in Kantian ethics that women are morally subordinate to men should be rejected as an unsound argument or idea. By rejecting Kant's narrow view of women, one can salvage the crucial components in Kantian ethics, principally the three formulations of the categorical imperative. One can then extend these concepts to include every individual regardless of gender.

A second way that a revised Kantian ethics can be fused together with feminist ideology is to argue that Morgan and Sherwin are wrong when they say that Kantian ethics is overly-rational, hyper-masculinist and overly-dutiful. In relation to purposeful (consistent) moral action Kant was correct when he argued in favour of moral activity that is formulated on the basis of objective reason, rational autonomy and duty. Factors such as empirical evidence (psychological factors such as sentiment and desire) or outcome (consequences of action) may be significant in relation to hypothetical (non-moral) decision-making; however, as Onora O'Neil, in her assessment on the primary objective of Kantian ethics, states

Kant's main concern is to distinguish the good in the sense of the useful or pleasant from the morally good and to explicate the latter concept. If ethics could be heteronomous, if it could be based on human desires or preferences,

then the good in the sense of the useful or pleasant might be prior to obligation. This is the assumption in utilitarian ethical theories. But since ethics cannot be heteronomous, we cannot form a determinate concept of the morally good without referring to the moral law. The only concept of a good object which is compatible with the will's not being determined by an object of desire (i.e., heteronomously) is the indeterminate concept of an object (whatever it may be) suitable to determine the will a priori.¹⁰⁸

When one accepts Kant's definition on the meaning of ethical activity, applied together with feminist theory, one can promote gender equality based on feminist principles and on a Kantian deontological ethical framework. In connection with issues such as commercial contractual pregnancy, one can argue against men or women using women merely as reproductive machinery and thus define women as ends-in-themselves rather than merely as a means-to-an-end. Additionally, in relation to non-commercial pregnancy arrangements, as long as the decision is autonomous, Kant "does not prohibit such uses of consenting persons. He insists only that they be treated with the respect and moral dignity to which every person is entitled."¹⁰⁹ The feminist argument against the rapidly expanding area of technologically assisted reproduction is not challenged or defeated by Kantian ethics. Feminist arguments against Kantian ethics, arguments like Morgan's and Sherwin's, focus on the rather stale criticisms that other philosophers have used in their arguments against Kantians and other deontologists. When viewed in an objective way, a revised Kantian ethics can promote equality between men and women through objective pure reason, rational autonomy, the principle of humanity and the emphasis that Kant places on the dignity of human beings. Kantian ethics does not prohibit feminists from attaining their objectives. Susan Sherwin states "that feminist ethics involves a commitment to considerations of justice, as well as to those of caring."¹¹⁰ I believe that a revised Kantian moral framework--a framework where both

men and women are active moral agents--is committed to the very same considerations that Sherwin speaks about.

V. FEMINIST ARGUMENTS AGAINST COMMERCIAL CONTRACTUAL PREGNANCY

In addition to the feminist criticism that commercial contractual pregnancy exploits women--specifically, women who are from a lower social economic group--by offering surrogate mothers economic incentives to bear children, there are four other major arguments that feminists use when arguing against commercial contractual pregnancy.

Perhaps the strongest objection (some feminists claim that non-commercial surrogacy promotes the very same problem) is that commercial contractual pregnancy is simply another form of female prostitution. Like prostitution and some other occupations, commercial contractual pregnancy merely uses women for their bodies.¹¹¹ In her book *Right-Wing Women*, American feminist Andrea Dworkin states that commercial reproduction effectively produces a situation where "women can sell reproductive capacities the same way old-time prostitutes sold sexual ones but without the stigma of whoring because there is no penile intrusion."¹¹² She says that, like prostitution, when a woman's reproductive capabilities are bought the "individual woman is a fiction as is her will..."¹¹³ This situation "is created by material conditions outside of herself."¹¹⁴

Unlike other manual/dangerous work, such as working as a construction laborer or as a prison guard, both prostitution and commercial contractual motherhood require

that women relinquish control over their personhood in order to receive payment for their services. Christine Overall states that commercial "surrogate motherhood is no more a real job option than selling one's blood or one's gametes or one's bodily organs can be real job options. All of these commercial transactions involve an extreme form of personal and bodily alienation."¹¹⁵ While construction labourers or prison guards may become alienated from their work (this may occur when their jobs become mundane and repetitive) they are not alienated from their bodies in the same personal way that commercial contractual mothers are. The only way that construction labourers or prison guards can be alienated from their bodies in the same way, is if performing sexual services for other individuals were part of their job contract.

I have stated that some feminists extend the prostitution criticism, directed against commercial contractual pregnancy, to cover non-commercial contractual arrangements as well. Janice Raymond supports this type of argument. Raymond states that "altruistic pregnancy exchanges leave intact the status of women as a breeder class. Women's bodies are still the raw material for others needs, desires, and purposes."¹¹⁶ She claims that "those who endorse altruistic surrogacy as an alternative to commercial surrogacy accept, without comment or criticism, that it is primarily women who constitute the altruistic population called upon to contribute gestating capacities."¹¹⁷

Although I support the feminist criticisms against commercial contractual pregnancy arrangements, and I also support the second formulation of Kant's categorical imperative, I do not believe that Raymond's argument is correct. There are two reasons why Raymond's argument is flawed. The first reason is that Raymond's argument against non-commercial contractual pregnancy is an argument that can be directed against human

reproduction in general. Because only women are capable of producing children, they will be the raw material in every situation. There is nothing special about how a woman's body is defined in a non-commercial pregnancy contract. The second reason why Raymond's argument is weak, is that she does not properly show how non-commercial pregnancy contracts are distinguished from commercial contracts. Unlike commercial contractual pregnancies, where the surrogate mother exchanges her bodily integrity for money, non-commercial pregnancies will exhibit a higher level of autonomous decision-making because the personhood of non-commercial surrogate mothers is respected.

It is imprudent for one to rule out non-commercial pregnancy altogether by appealing solely to objections that are specific to commercial arrangements. Thus, I agree with Margaret Jane Radin who states that "once we recognize that commodification and noncommodification can pervasively coexist, assuming that we judge that in some circumstances the coexistence can be stable, a broad range of policy alternatives becomes available."¹¹⁸ Radin also claims that "rather than merely assuming that money is at the core of every transaction in 'goods,' thereby making commodification inevitable and phasing out the non-commodified version of the 'same' thing... we should evaluate the domino theory on a case-by-case basis."¹¹⁹ I believe that when evaluated this way, feminist objections to non-commercial contractual pregnancy are no longer as appealing. Rather than merely stating that every non-commercial pregnancy arrangement is like every commercial one, we must emphasize how the personhood of non-commercial mothers is retained in spite of open market considerations. When this is achieved, non-commercial contractual pregnancy will be correctly described as an autonomous reproductive activity.

In addition to reaffirming the distinction between commercial and non-commercial contractual pregnancies, I believe that by implementing stringent rules and regulations, rules that I will outline in the following section, one can effectively show how the personhood of non-commercial surrogate mothers can be protected. These rules and regulations will ensure that all non-commercial pregnancy arrangements are indeed voluntary; they will provide the surrogate mother with sufficient information about possible risks that she may face, and they will stipulate that the surrogate mother will not benefit financially (directly or indirectly) from her pregnancy. While proponents of commercial contractual pregnancy argue that the same rules and regulations can be used to govern reproductive transactions, I believe that this is not easily achieved. Unlike non-commercial pregnancy arrangements, commercial contractual pregnancies are highly unpredictable. They are highly unpredictable because the bottom line in any commercial transaction--the bottom line in capitalist society in general--is to accumulate profit. Typically, profit seeking may motivate individuals to act not on the basis of reason or objective thinking or in accordance with rules and regulations, but on the basis of total financial benefit. To avoid profit seeking in connection with human reproduction, Canadians should therefore prohibit the practice of commercial contractual pregnancy altogether.

Notwithstanding the fact that non-commercial pregnancies respect the personhood of women, Margaret Jane Radin raises an important reason why society might consider prohibiting non-commercial pregnancies. This reason--a reason which is not part of the Kantian feminist argument, but which appeals to the consequences associated with alternate or "non-traditional" reproductive action--claims that "there is a danger that

unwanted children might remain parentless... because those seeking children will turn less frequently to adoption."¹²⁰ The possibility that a group of children might remain parentless is a very real problem that should be considered.

There are three ways that one can criticize the distinction that I have drawn between non-commercial and commercial contractual pregnancy arrangements. First, one can argue that even though commercial pregnancies should be prohibited because they are based on economic incentives that may corrupt objective thinking and encourage individuals to disregard rules and regulations that govern rights and contractual obligations, medicine itself is based on profit. Typically, especially in the United States where health care is viewed as simply another type of business venture, scientists/physicians experiment with new medications and new forms of medical treatment so that they can attract individual corporations to "invest" in their ideas and in upgrading their medical facilities.

One can respond to this criticism and argue that although the current situation in American medicine is based on profit seeking or economic incentives, this does not mean that it is an ethically suitable way/method of practicing medicine. Ideally, economic benefit, be it personal or corporate, should not be a determining factor in the type of medical treatment that patients receive. Ideally, medicine should not be simply another type of business venture.

The second criticism that might be employed when arguing against distinguishing between commercial and non-commercial pregnancies, is that like commercial reproductive arrangements, non-commercial reproduction requires the assistance of paid professionals.

One can respond to this criticism and argue that while non-commercial pregnancy must rely on the services of paid professionals (i.e.: fertility specialists, nurses, counselors, and lawyers), unlike commercial reproductive arrangements, in non-commercial pregnancies woman who agree to act as a gestational/genetic mothers do so without expectation of any future financial compensation for their services. Because the primary concern in commercial contractual pregnancy arrangements is that women will be exploited--treated merely as a means--by individuals who can "pay for pregnancies," non-commercial pregnancies circumvent this problem. When regulated under the law, the personhood of women in non-commercial pregnancies can be protected by ensuring that any money spent is spent only to pay for necessary medical and legal expenses and compensation for lost wages. Direct financial payments to surrogate mothers and to child brokers is prohibited.

The third criticism, based on Kant's theory, states that because Kant permitted individuals to act on the basis of personal profit, the distinction between non-commercial and commercial reproductive contracts is false.¹²¹ Commercial reproductive contracts should therefore be permitted in the same way that non-commercial reproductive contracts are.

Responding to this criticism, one can argue that notwithstanding the fact that Kant permitted individual profit, he also said that the "principle of humanity, and in general of every rational creature an end in itself, is the supreme limiting condition on the freedom of action of each man."¹²² I maintain that, unlike commercial contractual pregnancy arrangements, non-commercial contractual pregnancies are distinct because they respect the Kantian definition of defining individuals solely as ends-in-themselves. In non-

commercial contractual pregnancies the personhood of non-commercial mothers is preserved.

In addition to the criticism that commercial contractual pregnancy is simply another form of female prostitution, some consequentialists argue that "the development of artificial reproduction... may in fact exacerbate what has been called the "moral pressure to have children."¹²³ Related to this moral pressure they claim that "contract pregnancy reinforces stereotypes about the proper role of women in the reproductive division of labour. [They say that] at a time when women have made strides in labour force participation, moving out of the family into other social spheres, pregnancy contracts provide a monetary incentive for women to remain in the home. Under present conditions, pregnancy contracts entrench a traditional division of labour--men at work, women in the home--based on gender."¹²⁴ This division is simply another way for men to subordinate women so that their needs are met.

When defined in relation to Kantian ethics--a revised system of Kantian ethics where women are defined as rational agents--the "traditional" division in labour negates the significance of the third formulation of the categorical imperative. In the *Foundations of the Metaphysics of Morals* Kant states that "autonomy is ... the basis of the dignity of both human nature and every rational nature."¹²⁵ By reinforcing the "traditional" division of labour, commercial contractual pregnancy arrangements underestimate the importance of defining women as rationally autonomous individuals who possess dignity.

The third feminist objection to commercial contractual pregnancy--one which Kantian feminists employ against any type of activity where women are viewed purely as

instruments--is that women who encourage women to participate in commercial reproductive ventures are treating women merely as a means to satisfy their own desires rather than defining women as ends-in-themselves. This argument is also extended to cover children as well. It is argued that "what distinguishes women's reproductive labour from other forms of labour ...[is that] the product of their labour is not something but someone."¹²⁶ Unlike other types of labour, the end products of commercial contractual pregnancies must therefore be viewed as sacred. They must be treated with respect and dignity--their personhood must be ensured.

A final feminist argument that is used against both non-commercial and commercial contractual pregnancy appeals to the consequences or harms that women must endure as a result of reproductive intervention. I will not spend a significant amount of time on this criticism. It is important to note, however, that "although sperm donors face virtually no physical risks, donors of eggs or embryos and surrogate mothers do face serious physical risks in order to help provide another individual or a couple with a child."¹²⁷

VI. THE ARGUMENTS IN SUPPORT OF REPRODUCTIVE LIBERTY

As stated at the beginning of this section, some liberal feminists and other non-feminist theorists like John A. Robertson argue that women should be permitted to participate in both non-commercial and commercial contractual pregnancy arrangements. There are several reasons why they believe that contractual pregnancy arrangements, specifically commercial contractual pregnancy arrangements, should not be criminalized. Their strongest reason is based on the autonomous right of women to procreate and the

freedom to contract. Both liberal feminists and non-feminists like Robertson argue that contractual pregnancy arrangements should be permitted because they are based on what American philosopher Thomas Nagel defines as an inviolable right.

In his discussion on individual rights, Nagel says that for one to argue that one possesses an inviolable right to something or to perform some sort of action "does not mean that one will not be violated. It is a moral status: It means that one may not be violated in certain ways - such treatment is inadmissible, and if it occurs, the person has been wronged."¹²⁸ Liberal and non-feminist theorists alike believe that when women are denied the opportunity to manage their bodies they are wronged in a moral way. This situation can be reversed by allowing women to have control--a type of control where women have a moral, social and legal opportunity to participate in commercial contractual pregnancy arrangements--over their own reproductive functions.

In response to the feminist and non-feminist appeal to the moral, social and legal freedom of women, I believe that as members of society we also have a moral duty to act in such a way that the personhood of women is respected. This is best achieved by acting in accordance with the formulations of Kant's categorical imperative. Typically, by acting so that the third formulation of the categorical imperative is preserved, we ensure that the individual moral autonomy of every rational adult in society is recognized. Men and women are defined as individuals who possess both reason and dignity. Similarly, by respecting the second formulation of the categorical imperative, we uphold the true meaning of the intrinsic worth of individuals described by Kant in the *Foundations of the Metaphysics of Morals*. It is here that Kant says that "all rational beings stand under the law that each of them should treat ...all others never merely as means, but in every case

at the same time as an end in himself. Thus there arises a systematic union of rational beings through common objective laws."¹²⁹ Objective laws themselves do not hinder individual liberty unless by exercising one's liberty the individual liberties of other individuals are oppressed. For example, laws prohibiting murder limit the murderer's liberty because his/her liberty limits the liberty of individuals (law-abiding citizens) in society. In his theory on justice Kant adamantly opposed unnecessary state intervention into private matters. He opposed unnecessary external legislation because it denied the rational autonomy of men and women. The purpose of external objective legislation--legislation that is upheld through dutiful action--is to establish a degree of moral and social stability while protecting individual liberties. In this way Kant's theory of justice is similar to J.S. Mill's argument on individual freedom and liberty.¹³⁰

In addition to the arguments on the autonomous right to procreate and the freedom to contract, Elizabeth Anderson states that by appealing to basic facts on the current practices and procedures of reproduction, commercial contractual pregnancy arrangements are said to be permissible. The first of these facts states that commercial contractual pregnancy should be permitted because there is a "shortage of children available for adoption and [because of] the difficulty of qualifying as adoptive parents."¹³¹ This argument should not be accepted as a valid reason for encouraging individuals to participate in commercial contractual pregnancy arrangements. It is not a valid reason because it is based solely on emotion and the immediate gratification of the desire to have a child.

A second fact, one which is significant in relation to non-commercial pregnancy rather than commercial reproductive contracts, claims that non-commercial pregnancy

should be allowed because "the labor of the surrogate mother is said to be a labor of love."¹³² Because non-commercial pregnancy arrangements are not based on money, the argument that love or a pre-contract affective relationship is the basis for acting holds greater credibility than in commercial arrangements.

A third fact, which is used in support of commercial contractual pregnancy, states that because "commercial surrogacy is no different in its ethical implications from many already accepted practices which separate genetic, gestational, and social parenting... consistency demands that society accept this new practice as well."¹³³

In the same way that I do not support the argument that "two fundamental human rights support commercial surrogacy: the right to procreate and freedom of contract," I do not believe that we must accept commercial contractual pregnancy as simply another form of assisted human reproduction.¹³⁴ Ideally, if one is going to argue in support of consistent action in connection with technologically-assisted reproductive practices, one must first focus on ensuring that women are defined as ends-in-themselves rather than merely as instruments or incubators. To argue otherwise is to place greater emphasis, greater priority, on scientific engineering or technology rather than on the relationship of women to science.

As I have briefly mentioned, both Lori B. Andrews and John A. Robertson support commercial contractual pregnancy. In her argument, "Lori B. Andrews argues that the right to reproduce in the strong sense is probably founded upon the right to marital privacy, which, she claims, protects the full range of married people's choices about both sexual and reproductive behaviour."¹³⁵ Andrews claims that in the United States "a ban on payment to surrogates would inhibit the exercise of the right to produce

a child with a surrogate. For such reasons, it could easily be argued that the couple's right to pay a surrogate is constitutionally protected...."¹³⁶

Unlike Kantian feminists, who maintain that commercial contractual pregnancy exploits surrogate mothers because they are not defined as ends-in-themselves, liberal feminists like Andrews defend the commercialization of reproduction by appealing to the idea that society should support the unimpaired exchange of goods between individuals. That is, women should be treated as autonomous commercial contractors. American philosopher Debra Satz states that "liberalism requires state neutrality among conceptions of value. This neutrality constrains liberals from banning free exchanges...."¹³⁷ Kantians and Kantian feminist theorists disagree with the liberal position. As I have stated, within the Kantian ethical framework it is acceptable (if not in fact sometimes necessary) to restrict the exchange of goods or services so that personhood--that promotes a respect for the principle of humanity--is protected. This definition places Kantian feminist theories, theories like Elizabeth Anderson's, in conflict with liberal feminist thinking on issues such as commercial contractual pregnancy.

Like Andrews, American lawyer John A. Robertson takes a liberal approach when defending the right of individuals to engage in commercial reproductive arrangements. Robertson claims that "the state's power to block exchanges that interfere with the exercise of a fundamental right is limited."¹³⁸ He argues that "the right of married persons to use noncoital and collaborative means of conception to overcome infertility must extend to any purpose, including...transferring the burden of gestation to another."¹³⁹ On the practice of commercial contractual pregnancy Robertson says that "surrogate mothering for a fee is neither the evil nor the panacea that many have thought.

It is barely distinguishable from the many practices that separate biological and social parentage and that seek parenthood for personal satisfaction."¹⁴⁰

In his quest to preserve individual rights and the liberal free exchange of goods and services, Robertson makes the very same mistake that Andrews has. The mistake that he makes is that of not showing how women and children can be defined and treated as ends-in-themselves rather than simply as means that satisfy individual desires. Like Andrews, Robertson's legal argument in support of the rights of infertile individuals overlooks the philosophical moral criticism made by Kantian feminists. Women should not be viewed merely as instrumental reproductive vessels. Unlike other commercial ventures, ventures that are not based on reproductive ability alone, commercial contractual pregnancy pays women for their biological functions. This is why commercial contractual pregnancy arrangements are inherently degrading and dehumanizing to women.

In addition to the Kantian feminist objection, Robertson's defense of commercial contractual pregnancy is problematic for liberal feminists. The primary objective of liberal feminists is to create a social structure where power is equally distributed between men and women. Medicine, liberal feminists argue, continues to serve as the source of power for men. Robertson's argument, based on the right to medical intervention to treat human infertility, is therefore based on a structure that promotes the domination of men over women. While direct childbirth and non-commercial pregnancy risk reinforcing this domination of women by men, in non-commercial pregnancies--because the personhood of surrogate mothers is respected--there is one less element (money) to compound what may already be an oppressive situation.

In her article on female social inequality and the medicalisation of pregnancy, feminist Barbara Sichtermann states that "the medicalisation and professionalisation of childbirth and child rearing...represents a major transfer of power from women to men."¹⁴¹ While the opposite of what Sichtermann is claiming may indeed be true, on the assumption that it is not, if one supports equality between men and women, it is prudent for one to limit a type of activity that merely exacerbates what may already be a precarious situation.

VII. SHERWIN, OVERALL, AND ANDERSON ON COMMERCIAL CONTRACTUAL PREGNANCY

As I have stated, there are three different approaches used by feminists in their arguments against commercial contractual pregnancy. I have already described the individual ideologies that distinguish each of the approaches from one another. In this section I will focus on the radical, liberal and Kantian feminist criticisms against commercial contractual pregnancy. I will do this by citing the three arguments presented by Susan Sherwin, Christine Overall, and Elizabeth Anderson. Before I do this, however, it is important to note that like commercial pregnancy "to some feminists...to allow gift surrogacy on altruistic grounds drives a wedge into the feminist claim that women's constitutive attributes are inalienable."¹⁴² As I have previously argued, I do not support this argument. Non-commercial contractual pregnancies do not alienate women from themselves. This is primarily because when a woman decides to carry a child she is required to relinquish her personhood. Unlike commercial pregnancy arrangements, non-commercial arrangements are not performed with the expectation that there will be some

sort of future financial gain. Non-commercial pregnancies, although risky, are not as hazardous to women as selling one's reproductive functions on the open-market.

Susan Sherwin's Radical Feminism

When arguing against commercial contractual pregnancy, Susan Sherwin states that she is "persuaded by many of the theorists who are usually pegged as radical feminists."¹⁴³ Her argument against commercial contractual pregnancy, which is not so much an argument against commercial pregnancy but rather is an argument against pregnancy altogether, is based on the widespread imbalance of power that exists between men and women.

Sherwin states that "one of the prominent areas of difference between the sexes is the domain of sexuality. Sexuality is socially constructed...that is, we are taught specific patterns of sexuality...we shape ourselves to certain social expectations."¹⁴⁴ One of the ways that women are shaped so that they can better meet the expectations that society (males) impose on them is through motherhood. She says that unlike men, who are encouraged to establish careers for themselves, "women are persuaded that their most important purpose in life is to bear and raise children; that they are lacking in fulfillment if they do not have children."¹⁴⁵ For infertile women the pressure to have children has fostered practices such as IVF and commercial contractual pregnancy.

Sherwin says that in the debate over whether or not commercial contractual pregnancy contracts should be recognized as legally binding, an important factor is being overlooked. She states that "from a feminist perspective, it is obvious that we need to clarify the role of such a practice within the broader patterns of woman's subordinate

status in society. Surrogacy contracts cannot be evaluated simply by seeing whether they fit within the norms of voluntary legal contracts."¹⁴⁶ They cannot be evaluated this way because not every seemingly voluntary legal contract promotes equality between men and women. Thus, Andrews and Robertson's liberal arguments in support of the free exchange of goods and services seem to be somewhat misguided. Like Sherwin, Laura Shanner states that "in a society that values free market forces, the weaker the bargaining position of one of the parties, the greater the danger of exploitation and objectification."¹⁴⁷

On the problem of sexism in society Andrea Dworkin states that "the state has constructed the social, economic, and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of women; and yet the selling is seen to be an act of individual will - the only kind of assertion of individual will in women that is vigorously defended as a matter of course by most of those who pontificate on female freedom."¹⁴⁸ If we are to avoid the use and abuse of women that Sherwin, Shanner, and Dworkin talk about, then society must reorganize itself in such a way that women are defined as individuals who are equal to and possess the very same rights as men. This new freedom allows women to select options other than motherhood.

Thus, before we defend the importance of the freedom to exchange goods and services, before we claim that the individual rights of infertile individuals to procreate must be respected in the same way that the rights of fertile individuals are, we must first objectively address and solve the problem of sexism. Only by challenging and abolishing sexist attitudes, will we be able to ensure that women are accorded the same basic social rights that men currently enjoy.

Christine Overall's Liberal Feminism

Unlike Lori B. Andrews, Christine Overall's liberal feminist argument does not support commercial contractual pregnancy. Overall states that "the commodification of reproduction creates the potential for manipulation, corruption, exploitation, and the misuse of power."¹⁴⁹ In this way, Overall's criticism against commercial contractual pregnancy is very similar to Susan Sherwin's. Like Sherwin, Overall argues that commercial contractual pregnancy must be rejected because it is based on an oppressive sexist framework. Overall says that "in Canadian society, no right can require the work of women as breeders, or the subjugation of women's bodies to men or to the state."¹⁵⁰ She echoes Sherwin's argument when she says, "surrogacy is an arrangement that manifests both class and sex inequalities."¹⁵¹

In addition to her argument on how commercial contractual pregnancy promotes a distinction of power between men and women, Overall is also critical of Robertson's argument in support of procreative liberty. She says that in spite of Robertson's plea that infertile individuals have a right to assistance so that they may reproduce, "the reproductive-freedom argument is ambiguous: it fails to distinguish among different senses of 'right to reproduce'."¹⁵² Overall believes that before one can argue in support of reproductive rights, one must first distinguish strong reproductive rights from weak ones. One must make this distinction because when strong reproductive rights are separated from weak ones, strong rights force the law to change so individuals receive appropriate legal assistance. In her analysis of the argument on reproductive-freedom, Overall says that the argument made by Robertson is based on a weak right. She argues that when defined properly, "the weak sense of the right to reproduce is the entitlement

not to be interfered with in reproduction, or prevented from reproducing...in its strong sense, the right to reproduce would be the entitlement to receive all necessary assistance to reproduce, including...the gestational services of women...."¹⁵³ Clearly, based on this distinction, Overall believes that for commercial contractual pregnancy to be recognized under the law, it would be sufficient were it recognized simply as a weak right by the rest of society. Because commercial pregnancy contracts do not respect the personhood of surrogate, this cannot be allowed to happen.

A final aspect or component of Overall's argument against commercial contractual pregnancy is the argument of potentiality. Unlike Sherwin, Overall believes that "the commodification of reproduction--at least in regard to the embryo/fetus--seems to be inherently as well as instrumentally wrong because of its violation of the prima facie obligation not to buy or sell [or destroy] what is, was, or will be a person."¹⁵⁴ By appealing to the future characteristics of the foetus, Overall defines the foetus not merely as an object that satisfies particular desires but as a potential person who possesses specific qualities that are integral to personhood. These intrinsic qualities prohibit one from contracting to commodify human life.

Elizabeth Anderson's Kantian Feminism

Like Overall, Kantian feminist Elizabeth Anderson argues against treating children as commodities. Anderson extends her criticism and concludes that the practice of commercial contractual pregnancy devalues the inherent or intrinsic qualities possessed by women. Unlike Sherwin, Anderson places less emphasis on the social,

economic and political inequalities that exist between men and women, and greater significance on defining women and children as ends-in-themselves.

As part of her argument safeguarding the intrinsic bodily integrity of women, Anderson says "that many objects which are worthy of a higher mode of valuation than use are not properly regarded as mere commodities."¹⁵⁵ This statement, however, is unpersuasive when arguing against the legal permissibility of commercial contractual pregnancy arrangements. As I have explained earlier in my thesis, there are many ways that the capitalist open market exploits both women and men by forcing them to relinquish their physical and psychological qualities--qualities that most individuals believe are worthy of a higher mode of valuation even if they are not connected to one's personhood. To clarify her argument against commercial contractual pregnancy Anderson states that unlike other commercial exchanges "[the] implied hierarchy of values, according to which one's sexuality is a higher and deeper (more intimate) value than any commodity, is founded on the public meanings embodied in our social practices...."¹⁵⁶ She states that in commercial pregnancy contracts this meaning is cast aside--thus women are dehumanized--because like all service contracts "each party...views one's relation to the other as merely a means to the satisfaction of ends defined independently of the relationship and of the other party's ends."¹⁵⁷ The implied hierarchy of values, where a woman's sexuality is defined and valued as an intimate aspect of her personhood, is not recognized.

In commercial pregnancy contracts the primary objective--as in every capitalist endeavor--is to satisfy the particular desires/requirements that motivate the individuals who engage in the market transaction. This type of desire satisfaction does not foster

emotional bonds between the contracting parties and it does not encourage individuals to define one another as anything other than instruments. For the commissioning parents the commercial surrogate mother is defined not as a person, but merely as a reproductive incubator.¹⁵⁸ For the commercial surrogate mother the commissioning parents are the instruments that provide her with goods and money.

Like Sherwin and Overall, Elizabeth Anderson also addresses the argument in support of reproductive rights and procreative liberty. Anderson states that in spite of the arguments presented by individuals like Andrews and Robertson, commercial contractual pregnancy simply cannot be permitted. Defending her position, she says that the argument in support of the right or freedom to contract "provides weaker grounds for supporting commercial surrogacy. This freedom is already constrained, notably in preventing the purchase and sale of human beings."¹⁵⁹ One cannot argue that this statement is false or inaccurate. In North America most individuals agree that it is morally and legally impermissible for one to buy or sell other individuals. We believe that unlike objects, every human life deserves to be treated with respect and dignity.

A second point that Anderson raises against the liberal free contract model is based on the balance between individual rights and liberties and the good achieved through common social well-being. Anderson claims that "the mistake in the libertarian picture seems to lie in the view that individual freedom is always increased when the common is divided into parcels over which individuals have exclusive control. This conception of freedom fails to grasp the point that some freedoms can only be exercised in spaces over which no individual has more control than others."¹⁶⁰ In the case of reproductive freedom, the complete freedom of women is achieved by actively

discouraging women from selling their reproductive capabilities. By disallowing commercial reproduction--by limiting female autonomy where the buying and selling of human life is concerned--all women will achieve greater freedom because every woman will be defined as an end-in-herself. While Andrews and Robertson would argue that this type of action is restrictive and possibly even dangerous, I believe that this type of legislation can be justified if it supports Kant's categorical imperative. Through the three formulations of the categorical imperative, individuals--women and children--attain greater liberty. Factors such as desire or inclination are ignored because they enslave women and children to men.

To conclude this section on feminist moral theory and commercial contractual pregnancy, I believe that Susan Sherwin and Christine Overall have raised some extremely valid criticisms against the commodification of women and children. Their criticisms are based on the political, social, and capitalist economic domination of women by men. Unlike Sherwin's and Overall's, Elizabeth Anderson's argument against commercial contractual pregnancy goes beyond the empirical inequities that women have had to endure and is based on inherent or intrinsic qualities that originate in Kantian moral theory. When defined in relation to the categorical imperative, commercial contractual pregnancy arrangements are not an acceptable way of resolving the problem of human infertility. They are unacceptable because they do not acknowledge that women should be treated as persons who deserve to be treated as ends-in-themselves. Anderson is correct when she says that "when market norms are applied to the ways we treat and understand woman's reproductive labour, women are reduced from subjects of respect and consideration to objects of use."¹⁶¹ If the dignity of women and the children

that they produce is to be respected, then we as a society must pass legislation that protects the intrinsic qualities that every woman and foetus possess. Instead of arguing in support of procreative legal rights, we should discuss the need for legal measures that encourage/promote responsible action in connection with non-conventional methods of human reproduction--we should discuss how we can promote a respect for the personhood of every individual.

CHAPTER 3

I. LEGAL ISSUES ASSOCIATED WITH COMMERCIAL CONTRACTUAL PREGNANCY ARRANGEMENTS

In their report submitted in 1993 by the Canadian Royal Commission on New Reproductive Technologies to the Government of Canada, the commissioners noted that "anything that has material existence is a thing, unless it is a person. A person is a non-thing and can never be property since he or she has no patrimonial value. If we accept that the person is unique, then we must also agree that it forms an indissociable unit, body and soul, in whole and in part."¹⁶²

In this chapter I will not attempt to ascertain which parent--the surrogate mother or the commissioning parent(s)--should be defined as the legal guardian(s) of the surrogate child.¹⁶³ Thus, I will not debate the issue of whether or not motherhood or parenthood is based on gestational or on genetic ties. Instead I will focus solely on the issue of whether or not commercial contractual pregnancy arrangements should be legally permissible in Canada. As in the previous sections of my paper, in this section I will argue that to ensure that the personhood of women is protected we must legislate against the buying and selling of humans. There are two important reasons why some individuals claim that my argument against commercial contractual pregnancy is problematic.

First, as indicated by the commissioners in their argument, some women believe that it is offensive to impose additional legislation that limits a woman's access to non-conventional forms of reproduction.¹⁶⁴ They state that this type of legislation is offensive because it restricts a woman's ability to make an autonomous choice. In her argument on

contractual pregnancy and female autonomy, American philosopher Christine Sistare says that the autonomy of women must not be compromised with respect to decisions that affect how women will reproduce. She states, "that gestation is a reproductive role exclusive to women should not, now, be used as grounds for invading the privacy or limiting the choices of women who wish to become parents through different means."¹⁶⁵ For Sistare any additional legislation that restricts the reproductive autonomy of women cannot be justified on moral or legal grounds.

A second criticism--foreseeably one that could be made by individuals who support a Kantian liberal approach against state interference with individual autonomy--states that any legislation that would prohibit commercial contractual pregnancy negates the Kantian definition/meaning of the role of justice. Some critics claim that if one is following a Kantian deontological philosophical perspective, as a way of understanding the legal issues associated with specific medical procedures, one simply cannot impose additional restrictive legislation and declare that it is consistent with Kant's model for legal action. As I stated earlier, in the *Foundations of the Metaphysics of Morals* Kant argues that "autonomy is... the basis of the dignity of both human nature and every rational nature."¹⁶⁶ Respect for the autonomy of individuals is not only significant in Kant's moral theory, but it is also a crucial component in his theory of justice. Kantian scholars generally agree that in his theory of justice "it was Kant's aim to invest many of the rights claimed by classical liberalism with the special status that men are obliged to assign to the conditions of their rational agency."¹⁶⁷ There is little disagreement that "Kant's most significant contribution to the development of classical liberal theory... is his claim that the justification of the state ultimately must rest on moral grounds, on the

innate freedom of each person, and on the obligation of each to recognize and respect the freedom of everyone else."¹⁶⁸ By arguing in favour of legislation that limits reproductive freedom, I could be criticized for assailing Kantian liberalism and the Kantian framework for legal activity.

There are two ways that I can respond to the criticisms that I have raised. First, in response to the initial criticism, in arguing in support of additional legislation that prohibits the use of commercial contractual pregnancy, it is not my intent to diminish or negate the importance of female autonomy. On the contrary, by arguing in favour of legislation--legislation that restricts a woman's choice by separating reproductive functions from the capitalist model of goods exchange--I believe that female autonomy can be furthered in a way that it cannot when women act as commercial surrogates. It is furthered because in spite of the fact that non-commercial pregnancy contracts permit the use of a surrogate mother's body, because the personhood of non-commercial surrogate mothers is defined as infungible or inalienable (the personhood of non-commercial surrogate mothers prohibits the capitalist system from commodifying them in the same way that other commodities are traded in the capitalist open-market), non-commercial surrogate mothers are not defined as commodities. In turn, because the personhood of non-commercial surrogate mothers is inalienable, the reproductive autonomy of women who consent to act as non-commercial surrogate mothers is not lost--their autonomy is not immobilized by the pressures that are routinely placed upon individuals who live in capitalist society.

Unlike Christine Sistare, who claims that "if we do not like capitalism, we should do something about capitalism, as a system [and that] our dislike for the system or its

beneficiaries ought not to be a reason for restricting the freedom of women..." I believe that until (if) the capitalist system is reformed so that one can confidently state that commercial transactions like commercial contractual pregnancy are indeed truly autonomous, the Kantian ideal of autonomy, based on pure rational autonomy, is best secured by legislating against commercial contractual pregnancy.¹⁶⁹ Indeed, it is vital that we prohibit commercial contractual pregnancy because as Kantian philosopher Sara Ann Ketchum rightly points out, "the market is a hegemonic institution; it determines the meanings of actions of people who chose not to participate as well as those who chose to participate."¹⁷⁰ By arguing that the supremacy and power of the capitalist economic system determines how individuals interact with one another, Ketchum is warning against the possibility that once human life is commercialized every individual will be forcibly assigned a monetary value. This type of monetization (in commercial contractual pregnancy arrangements woman's reproductive organs are given a monetary value) will have a negative impact on bodily integrity. Surely, in the interest of preserving the personhood of all women, we should not allow this to happen.

In response to the second criticism, that by arguing in favour of legislation that prohibits commercial contractual pregnancy I am also arguing against Kantian liberalism, I believe that in connection with commercial contractual pregnancy one can support the need for additional legislation without negating the significance of the Kantian framework for justice. This can be accomplished, first of all, by appealing to the true/complete meaning that Kant assigns to freedom/autonomy. Under this definition freedom/autonomy (good will) are real only when the freedom/autonomy (good will) of every individual is respected. (One will recall that unlike Kant I have argued that the

concept of good will should be extended to include both men and women.) In *The Metaphysical Elements of Justice* (*Die Metaphysik der Sitten*, 1797), Kant states that "justice is...the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with the universal law of freedom."¹⁷¹

In their quest to dissuade governments from legislating against commercial contractual pregnancy, proponents, some of whom incorrectly say that they are Kantian liberals, argue that legislation can only be justified when it does not impinge upon individual freedoms. They argue that Kant's emphasis on freedom from external legislation is a key concept in his theory of justice. I do not dispute Kant's concern with creating and preserving individual freedom/autonomy. What can be disputed, however, is the argument that is used by some libertarians in support of the individual freedom/autonomy of commercial surrogate women.

In the Kantian legal framework, "the independence from the constraint of another's will is an intelligible conceptual constituent for the universal principle of justice."¹⁷² In connection with practices like commercial contractual pregnancy, I believe that freedom/autonomy as defined under the universal principle of justice is hindered by financial considerations. Some individuals (individuals who have money) are indeed acting in an autonomous way--they are exercising their free will as commissioning parents--while other individuals (commercial surrogate mothers) are not. As I have stated earlier in my thesis, what distinguishes this type of exploitative illegitimate contract from other exploitative but legitimate contracts is that in the illegitimate contract one's actions cannot be truly autonomous because one's personhood or humanity is taken away.¹⁷³

A second way that one can argue in support of legislating against commercial contractual pregnancy, without relinquishing the Kantian moral and judicial framework for action, is to argue that individual autonomy can be restricted in those cases in which when acting we do not treat other individuals as ends-in-themselves. In *The Doctrine of Virtue (Tugendlehre, 1797)*, Kant states that "the concept of an obligatory end, a concept that belongs exclusively to ethics, establishes a law for the maxims of actions by subordinating the subjective end (which everyone has) to the objective end (which everyone ought to adopt as his own)."¹⁷⁴ To ensure that individuals act on the basis of the objective ends that Kant speaks of, both in how they treat other individuals and in how they define themselves, I believe, that, additional legislation is warranted. Therefore, what we should be discussing is the type (formulation) of law that will prohibit commercial contractual pregnancy and not whether or not this type of legislation should be permitted.

In his book *Kant's Theory of Justice*, Allen Rosen states that in the Kantian framework for justice, "the main difficulty lies in determining exactly what counts as an infringement of the rightful liberty of others. Remarkably, Kant never addressed this issue directly."¹⁷⁵ This problem--the problem of when the liberty of other individuals is harmed--is not unique to Kantian legal theory. In their discussion on individual autonomy, members of the Royal Commission on New Reproductive and Genetic Technologies noted that "autonomy theories essentially take preferences as given and are not concerned to inquire whether some preferences are more genuine or worthy than others. Indeed, where preferences come from and how they are shaped and reshaped over time, and the legitimacy of the sources that shape and reshape them, are of little or no

concern to classical autonomy theorists."¹⁷⁶ In this section I intend to argue that the preference and worthiness of defining individuals as ends--especially in connection with commercial transactions--overrules the right to engage in "autonomous" commercial contractual pregnancy arrangements. Unlike other contracts that exploit individuals either physically, psychologically, or both, commercial pregnancy contracts infringe upon the autonomy of surrogate mothers. They do this by separating one of the most basic elements that defines every woman as an autonomous being, her sexuality, from what little is left of her personhood. Commercial contractual pregnancy arrangements are thus closer to prostitution (the capitalist economic market uses the sexuality of prostitutes as a money making scheme) rather than to other economically exploitative work such as coal mining or frying hamburgers in a fast food restaurant. Whether or not prostitution, along with commercial contractual pregnancy arrangements, should be defined as an illegal type of activity is a topic that should be discussed in another paper.

When arguing that commercial contractual pregnancy contracts should not be permitted because they do not treat women as complete autonomous persons, I will support my claim by citing specific arguments made by Kant (arguments which are sometimes overlooked in the attempt to prove that Kant was a liberal) in his moral theory and in his theory of justice. Additionally, I will appeal to Erich H. Loewy's definition of communal justice. In his definition Lowey states that "if one sees justice as being a means toward a social end and if one acknowledges that to be served social ends require a sturdy and vital community, then the operative definition of justice must include a sense of compassion and strive to aim for communal solidarity."¹⁷⁷

Like Lowey, in the report submitted by the Royal Commission, the commissioners have recognized the importance of balancing individual autonomy with communal responsibilities. They state that "although individual autonomy is central to ethical decisions in the area of NRGTS, each individual is part of a larger society and the actions of the individual may affect that collectivity."¹⁷⁸ By arguing in support of legislation that prohibits commercial contractual pregnancy, it is my intent to promote a sense of compassion for and understanding of the autonomy of women and to instill a knowledge of and respect for these qualities among all individuals within the type of secure, sturdy, and vital community that both Lowey and the commissioners speak of.

II. EMPLOYING KANTIAN ETHICAL THEORY IN SUPPORT OF THE LEGAL ARGUMENT AGAINST COMMERCIAL CONTRACTUAL PREGNANCY

In Kant's theory of ethics, the second formulation of the categorical imperative--the principle of humanity--advises us that surrogate mothers and the children that they produce "are not merely subjective ends whose existence as a result of our action has a worth for us, but are objective ends...."¹⁷⁹ With this increased objectivity, we no longer view women and children simply as means or tools that satisfy particular desires (in commercial contractual pregnancy the desire to be a parent); rather, women and children are valued and respected in themselves, regardless of what they can provide for others. Christine Korsgaard, a Kantian philosopher, states that "the feeling of respect is the natural result of keeping the humanity of others and so their capacity for good will always before our eyes."¹⁸⁰

In commercial contractual pregnancy arrangements the feeling of respect, awareness of humanity and the capacity for good will of surrogate mothers and children is lost. It is lost because, as noted in the report submitted by the Canadian Royal Commission on New Reproductive Technologies, in the practice of commercial pregnancy "the producer, assisted by the technologists, is expected to deliver the desired product according to specifications. In this way, pregnancy becomes a paid service and the child a product."¹⁸¹ While specifications such as abstaining from using substances and eating well are indeed beneficial for both the surrogate mother and the surrogate child, this type of situation does not support the idea that surrogate mothers should be treated as autonomous individuals who are valued as ends-in-themselves. Surrogate mothers continue to be treated as producers and not as persons.

In the *Foundations of the Metaphysics of Morals* Kant states that "man, however, is not a thing, and thus not something to be used merely as means; he must always be regarded in all his actions as an end in himself."¹⁸² Unlike mindless objects, humans have specific intrinsic qualities--qualities such as pure reason and moral autonomy--that distinguish them from non-rational inactive objects. (This is something that the capitalist market place culture does not recognize.) Based on this distinction Onora O'Neil states that "it is the ideal of treating persons as ends and avoiding using them as means...that has become part of our culture."¹⁸³ One must ask whether it is indeed beneficial to cast this ideal aside so that we can promote reproductive freedom through the practice of commercial contractual pregnancy. I believe that, regardless of the reproductive freedoms that some individuals argue most individuals should possess, protecting the second formulation of the categorical imperative is what is indeed significant when

speaking of preserving individual freedom. One cannot be free--in the sense that one's personhood/humanity is respected--if one is being treated merely as a means (as an object) to an end.

While defenders of the commercial contractual pregnancy arrangement argue that women should have the autonomous right to contract freely, I maintain that the right to contract should be extended only to situations where both the contractor and the individual who is being contracted are treated as ends-in-themselves. In situations where one of the contracting parties is not defined as an end-in-her/himself, the contract is not truly autonomous. In this type of situation, one cannot claim that the contract is established on the basis of autonomous free will.

In addition to the distinction made between means and ends, Kant also says, "in the realm of ends everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price and therefore admits of no equivalent, has dignity."¹⁸⁴ If one holds, as many individuals do, that women and children are indeed above market price and that they should be treated in a dignified manner, presumably one would also embrace the idea that it is morally impermissible to treat women and children merely as commodities. One cannot tailor the concept of personhood so that it suits the market model of exchanging goods. One cannot sacrifice personhood on the basis of a desire, however strong the desire may be, so that it becomes morally acceptable to "temporarily" relinquish human dignity in the interest of "acquiring" a child. It is permissible for one to use another individual as a means-to-an-end, but only if in so doing we do not treat him or her merely as such.

While the problem of human infertility can be psychologically and socially disagreeable for the individuals involved, it is misleading for physicians, child brokers, and contracting parents to assume that they can restore the personhood of surrogate mothers and surrogate children once the child is "claimed" by the social parents. "All contingent facts about individuals--and our subjective, affective relationships with them--are completely irrelevant both to their inherent value and to the respect that we owe them."¹⁸⁵ Unlike non-commercial contractual pregnancy arrangements, which attempt to preserve the personhood of all of the individuals involved by not putting a price on human life, the financial aspect associated with commercial contractual pregnancy inflicts irreparable harm on human life. Once our personhood is lost, it cannot be recaptured at some point in the future.

In her discussion of commercial contractual pregnancy, Margaret Jane Radin reaches a conclusion that is similar to mine. Although Radin, who is not a Kantian, is concerned with the impact of commercial contractual pregnancy upon human integrity and not on the concept of humanity, nevertheless, I believe her argument is relevant. Radin states that "for someone who conceives bodily integrity as "detached," the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after loss."¹⁸⁶ Clearly if one substitutes Radin's concept of bodily integrity for Kant's concept of humanity, my objection to commercial contractual pregnancy becomes that much clearer.

While one could argue that Radin's concept of bodily integrity rules out not only commercial contractual pregnancy but non-commercial contractual pregnancy as well, I would disagree. Unlike commercial contractual pregnancy arrangements, in non-

commercial pregnancy arrangements bodily integrity (personhood) is retained because the contract itself is usually based on an existing "pre-pregnancy" relationship between the surrogate mother and the commissioning parents. While the non-commercial surrogate mother may or may not experience a loss when she "gives" the child to the individuals whom she has contracted with, her bodily integrity remains intact simply because she has not received direct payment for producing a child.

Notwithstanding the fact that commercial pregnancy contracts satisfy specific desires and inclinations, and thus are sensitive to empirical data, I believe that they do not acknowledge the importance of the moral duty to treat individuals as ends-in-themselves, to treat individuals with respect or the moral worth associated with preserving human personhood. For these reasons, reasons that are the very basis of Kantian ethical theory, the practice of commercial contractual pregnancy should not be legally permitted.

III. KANTIAN JUSTICE

When defining Kant's theory of justice, initially, it is important that one describe why/how Kant distinguishes ethical duties from legal ones. In *The Metaphysical Elements of Justice* Kant states that "ethics teaches only that, if the incentive that judicial legislation combines with duty, namely, external coercion, were absent, the idea of duty alone would still be insufficient as an incentive."¹⁸⁷ Thus, unlike judicial legislation, which is imposed by rulers upon individuals to control their actions, ethical duties are based on pure inner reason and in turn are expressed in an external way. In her description on the difference between ethics and the law, Kantian scholar Mary J. Gregor states that for Kant "law is independent of ethics in the sense that it has no need of ethical

obligation in determining duties. But it cannot be independent of the supreme moral principle; for if its laws were not derived from the categorical imperative, then the constraint exercised in judicial legislation would not be legal obligation but mere arbitrary violence."¹⁸⁸ Gregor's description is important because it shows that despite the difference in origin between ethics (internal) and the law (external), for laws to be considered just--for rules to be considered laws--they must be based on the categorical imperative. One could argue that, ideally, it is as a result of the influence of the categorical imperative that laws are rational and objective.

Now that I have outlined the distinction that Kant makes between ethical duties and judicial legislation, I will present a comprehensive account of Kant's theory of justice. The first significant concept in the Kantian framework for justice is based on a distinction that Kant draws between natural and positive laws. He states that "among external laws, those to which as obligation can be recognized a priori by reason without external legislation are natural laws, whereas those that would neither obligate nor be laws without actual external legislation are called positive laws."¹⁸⁹ In *The Doctrine of Virtue* Kant says that when speaking of positive laws "we are not speaking here of the ends man sets for himself according to the sensuous impulses of his nature, but of the objects of free choice under its laws - objects man ought to adopt as ends."¹⁹⁰ Positive laws are therefore external commands that provide individuals with rights. They compel individuals to recognize the natural rights of other men and women in society. Innate rights--based in natural law--ensure what Kant says is "independence from being bound by others to do more than one can also reciprocally bind them to do... ." ¹⁹¹ Unlike acquired rights, innate rights merely recognize that individuals have the right to be free.

In addition to the distinction between natural and positive laws and innate and acquired rights, Kant also differentiates between wide and narrow duties and imperfect and perfect action. He says that unlike ethical obligations, the law must be based on a system of narrow and perfect duties. For Kant "legal duties must be narrow, i.e., must prescribe or proscribe acts, because others exact from us only specific acts or omissions, and not the pursuit of any end."¹⁹¹ Different from wide duties and imperfect action, narrow duties and perfect action demand a greater degree of individual objectivity and compliance. In the *Foundations of the Metaphysics of Morals* Kant defines perfect duties as "the condition of the will good in itself, whose worth transcends everything."¹⁹² When incorporated into his theory of justice, narrow legal duties are perfect because they are not influenced by secondary/extraneous inclinations. The ability to separate oneself from one's subjective inclinations--i.e., an inclination such as the desire to be a parent--is therefore necessary if one is to act in accordance with the law.

Although Kant disapproves of coercive external legislation, because he believes that it impedes individual autonomy, in *The Metaphysical Elements of Justice* Kant argues that in order to protect freedom, sometimes "coercion is just."¹⁹³ In his essay, "Idea for a Universal History with a Cosmopolitan Purpose" (*Idee zu einer allgemeinen Geschichte in weltburgerlicher Absicht*, 1784), Kant states that "the greatest problem for the human species... is that of attaining a civil society which can administer justice universally. This purpose can be fulfilled only in a society which has not only the greatest freedom, and therefore a continual antagonism among its members, but also the most precise specification and preservation of the limits of this freedom..."¹⁹⁴ Similarly, in *The Metaphysical Elements of Justice* he states that "the general will of the people has

united itself into a society in order to maintain itself continually, and for this purpose it has subjected itself to the internal authority of the state..."¹⁹⁵ Kant believes that as members of society, the autonomy of some individuals may occasionally be limited by the state so that the autonomy of other individuals is permitted to flourish.

As I have previously stated, Kant's theory of justice revolves around the preservation of autonomy. His theory of justice is thus similar to the liberal approach that John A. Robertson adopts in his defense of procreative liberty. Unlike Robertson, however, in *The Metaphysical Elements of Justice* Kant also states that "if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, it is unjust), then the use of coercion to counteract it... is consistent with freedom according to universal laws."¹⁹⁶ When this argument is applied to commercial contractual pregnancy arrangements I would argue that commercial surrogate mothers are treated in an unjust way. Commercial surrogate mothers are treated unjustly because unlike other licit risk-taking contracts such as coal mining or working as a prison guard, the personhood of commercial surrogate mothers is implicitly compromised. It is implicitly compromised because as American philosopher Martha C. Nussbaum argues "to treat deep parts of our identity as alienable commodities is to do violence to the conception of the self that we actually have and to the texture of the world of human practice and interaction revealed through this conception."¹⁹⁷ To protect a woman's personhood, there is justification for imposing coercive legislation.

For Kant, coercive legal measures can be justified when individuals are treated merely as instruments. As in *The Foundations of the Metaphysics of Morals*, in *The Metaphysical Elements of Justice* Kant emphasizes that "a human being can never be

manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things."¹⁹⁸ He states that to ensure that individuals are not used merely as a means--to ensure that they are treated as ends-in-themselves--we should follow the universal law of justice. When defined, "the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law."¹⁹⁹ As I have stated earlier in this chapter, I believe that in response to the argument made by proponents of unrestricted procreative liberties--that commercial contractual pregnancy arrangements should be permitted because they are merely another way for women to exercise their own autonomy--one can appeal to Kant's universal law of justice (one's free will is compatible with the freedom of everyone else) and to the importance of creating legislation that ensures that individuals are treated as ends-in-themselves. Commercial surrogate mothers lose their autonomy (they lose their free-will) when they enter into commercial pregnancy contracts. Autonomy (free-will) is lost because the pressures of the capitalist open market force us to view commercial surrogate mothers as less than complete selves.

Libertarian theorists, be they moral philosophers, feminists or lawyers, are correct when they argue that an important component in the Kantian framework for justice is the respect and protection that is awarded to preserving individual autonomy. In addition to this point, however, it is crucial that one also recognize that in his moral theory (I have already stated that Kant's moral theory serves as the basis of his theory of justice) Kant also says that the "principle of humanity, and in general of every rational creature as an end in itself, is the supreme limiting condition on the freedom of action of each man."²⁰⁰

Thus, although individual autonomy is a vital component of rational ethical action, it is ludicrous for one to suggest that Kant would support the idea that autonomy is the sole significant component that individuals should base all of their decision-making on. To respect/understand the true/complete meaning of Kant's theory of justice, one must also understand the emphasis that Kant places on other concepts--important concepts such as the principle of humanity. As American bioethicist James F. Childress argues, "the principle of respect for autonomy is very important...[however] it is not the only principle and it cannot be assigned unqualified preeminence."²⁰¹ It cannot be assigned unqualified preeminence because ideally ethical decisions should not be formed on the basis of autonomy alone.

IV. JOHN A. ROBERTSON'S PROCREATIVE AUTONOMY

In his argument in support of reproductive autonomy, John A. Robertson argues in support of unrestricted procreative freedom. He states that "full procreative freedom would include both the freedom not to reproduce and the freedom to reproduce when, with whom, and by what means one chooses."²⁰² For Robertson, the legal argument against technologically-assisted methods of reproduction is not sound. He claims that "if bearing, begetting, or parenting children is protected as part of marital privacy or liberty, those experiences are no less important when they are achieved noncoitally with the assistance of physicians, donors of gametes and embryos, or even surrogates."²⁰³

On the issue of contractual pregnancy, Robertson maintains that surrogacy is simply another way for couples to become parents. Although he does not claim that unmarried individuals should not participate in contractual pregnancy arrangements,

Robertson does state that commercial contractual pregnancy "serves the purposes of the marital union."²⁰⁴ Additionally, he suggests that we should favour commercial contractual pregnancy arrangements over non-commercial ones. He claims that for women who act as surrogates "it is only fair to pay them for their labour, especially when sperm donors and all sorts of other physical laborers are paid."²⁰⁵

Robertson's argument in support of procreative liberty has been criticized in a number of different ways. Of these criticisms only one is valid. American philosopher Maura A. Ryan states that for one to accept the procreative argument not only must one accept the idea that individuals have a legal right to reproduce without state interference, but that they also have "the right to acquire a human being... with particular characteristics."²⁰⁶ In non-commercial contractual pregnancy arrangements, unlike commercial pregnancy contracts which are part of the capitalist market of goods exchange and are therefore not as easily regulated, the problem of human selection is minimized through guidelines that prohibit this sort of activity.

Robertson's argument certainly does seem to suggest that individuals should be free to choose what kind of children they will have. When he says that "if bearing, begetting, or parenting children is protected as part of marital privacy or liberty, those experiences are no less important when they are achieved noncoitally with the assistance of physicians, donors of gametes and embryos, or even surrogates," Robertson is essentially defending the right of individuals to engage in genetically-engineered reproduction.²⁰⁷ The procreative argument is therefore not merely an argument in support of individual autonomy. It is an argument where genetically perfect children are created to satisfy the desires of near perfect adults. There is one critical reason why

society cannot afford to permit this type of reproduction. This reason is, were genetically engineered reproduction deemed permissible society would eventually only recognize and protect the rights of genetically perfect individuals. Genetically imperfect individuals would become second or third class non-autonomous citizens.

V. AUTONOMY, POSITIVE AND NEGATIVE RIGHTS, AND COMMERCIAL CONTRACTUAL PREGNANCY

I have shown that, in the quest to legalize reproductive practices like commercial contractual pregnancy, proponents of the procreative argument appeal to the concept of individual autonomy as the basis for their arguments. Although there are many different definitions that delineate autonomous activity, the following four factors must be present if one's decisions are to be truly autonomous. "An autonomous decision (1) is based on the individual's values, (2) utilizes adequate information and understanding, (3) is free from coercion or restraint, and (4) is based on reason and deliberation."²⁰⁸ In addition to these four factors I would add a fifth one. This factor, based in Kantian philosophy, states that for one to be truly autonomous action must be founded on the categorical imperative. I have included this point because when lobbying governments to legislate in support of practices like commercial contractual pregnancy, defenders of the procreative argument do not associate autonomous decision-making with action that is based on the categorical imperative. Their primary objective is to further the reproductive rights of individuals by prohibiting state interference with reproductive decisions.

In the preceding section I noted that, when arguing in support of legislation that permits reproductive methods like commercial contractual pregnancy, individuals like

John A. Robertson argue that because fertile individuals have the autonomous right to bear children, infertile individuals should be allowed to make the same sort of choice. They should therefore be legally permitted to establish contracts that alleviate the issue of childlessness.²⁰⁹ An important reason why people like Robertson follow this type of argument is the emphasis that is placed on preserving/furthering the liberty, freedom, and autonomy of individuals in legal documents like the *XIV Amendment of the American Bill of Rights (1868)*.²¹⁰ Similarly, in Canada, in the *Canadian Human Rights Act (1985)*, it is stated "that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have... without being hindered in or prevented from doing..."²¹¹ Notwithstanding the difference in legal systems, Canadians have the same sort of expectations as Americans do regarding the protection and exercise of individual rights and freedoms.

In his discussion on the preservation of autonomy and individual rights, American philosopher Thomas Nagel says that "the recognition of rights...expresses that aspect of morality which sees persons not only as objects of benefit and protection but also as inviolable and independent subjects..."²¹² It is as a result of the emphasis placed on the autonomy and inviolability of individuals that other equally important concepts and responsibilities associated with objectively rational decision-making are weakened. For example, in the *Canadian Human Rights Act*, in addition to equality and the preservation of autonomous decision-making, the Act also says that one should tailor one's actions in such a way so that they are "consistent with...[one's] duties and obligations as a member of society..."²¹³ Similar duties and obligations are also outlined in the *Canadian Charter of Rights and Freedoms (1975)* as well as in the *Universal Declaration (1948)*.²¹⁴

The conflict between exercising individual rights, one's duties/responsibilities to the rest of society, the duties/responsibilities of society (government) to protect the rights of individuals, and the need for individuals to define one another as ends rather than merely as a means complicates the issue of how much legal autonomy and what kind of legal (governmental) assistance individuals should expect in connection with the issue of human reproduction. In his argument Robertson states that "the state's power to block exchanges that interfere with the exercise of a fundamental right is limited... Blocking this exchange stops infertile couples from reproducing..."²¹⁵ In opposition to this argument Laura Shanner argues that the claim made in support of procreative liberty, based on negative rights where government must refrain from limiting the exercise of individual autonomy, is not quite accurate. She says that "the rights claims involved in medically assisted reproduction... have both positive (resource requirement) and negative rights aspects..."²¹⁶ I believe that Shanner is right. The legal argument used in support of reproductive arrangements like commercial contractual pregnancies is not founded on negative rights alone. What individuals like Robertson may be asking governments to do, in addition to not interfering with reproductive autonomy choices, is to provide infertile individuals with the necessary medical resources so that they may establish commercial contractual pregnancy arrangements. As I have argued, by doing this government would essentially be contributing to the erosion of a respect for the personhood of commercial surrogate mothers.

Canada's legal system has attempted to balance individual interests with its responsibility to all Canadians. The Canadian legal system is thus similar to what Erich Lowey says that ideally it should be. Lowey states that "justice... is far more than leaving

each other alone: it critically includes obligations of mutual support and aid."²¹⁷ By rejecting the call to legalize reproductive practices like commercial contractual pregnancy, the Government of Canada would not be saying that it is not sympathetic to the concerns of infertile individuals. What it would be saying is that it is not willing to curtail its obligation of providing support and aid to society as a whole. I have argued that because the personhood of commercial surrogate mothers is not respected, commercial contractual pregnancy arrangements should not be legally permitted in Canada. On the basis of this argument, were the Government of Canada to provide for the commercialization of humans it would then be forced to concede that its commitment to society as a whole (its commitment to support the bodily integrity or personhood of every individual) would no longer hold true. In effect, the Canadian Government would impede its obligation to every individual in society with little help from special interest groups. By permitting commercial contractual pregnancy arrangements the Canadian Government would impede its obligation to creating a type of society where the personhood of every Canadian is valued apart from any commercial considerations.

One cannot deny that "the right to choose one's lifestyle and medical treatment are among the most private aspects of human life."²¹⁸ Similarly, one cannot deny that human infertility is psychologically painful. Notwithstanding these two significant factors, other equally important issues must be considered. As I have argued, these are the issues: (1) individuals should be treated as ends-in-themselves (the personhood/humanity of every woman and man should be safe-guarded), (2) we have a duty to treat human life with dignity and respect, and (3) in addition to securing their own individual rights,

individuals have duties and obligations that they must perform as members of a community or nation.

In his procreative argument John A. Robertson focuses solely on furthering individual autonomy. He does not ask "whether some matters are by nature unsuitable objects of a contract."²¹⁹ Fortunately, many countries have considered this question. Contrary to what Robertson would have us believe, opponents of unlimited reproductive liberties have not argued that individuals do not have a right to procreate. What they have said is that individuals do not have a right to reproduce by commodifying human life.

VI. LEGISLATION AND CONTRACTUAL PREGNANCIES

Globally, several countries have made it a criminal offence for humans to reproduce by commodifying human life. In Canada, because Bill C-47 was not passed by the Canadian Parliament, there is currently no legislation in the federal *Criminal Code* that states that individuals are prohibited from establishing commercial contractual pregnancy contracts. Since 1996, however, an interim moratorium has been in effect that limits and monitors how Canadians can reproduce.²²⁰ This moratorium will remain in place until comprehensive legislation is passed that outlines what the ethically and legally acceptable forms of human reproduction are.

In terms of Canadian provincial legislation--in Canada family and adoption laws fall under the jurisdiction of provincial legislative assemblies and courts--only the Province of Quebec has addressed the issue of commercial contractual pregnancy. In Section Three, Articles 538-542 of the *Quebec Civil Code*, individuals are prohibited

from participating in commercial pregnancies. Non-commercial contractual pregnancy arrangements are said to be permissible; however, several guidelines must be followed by both parties who are involved.²²¹ The guidelines are as follows: First, every participating individual must acknowledge that the contribution of genetic material does not establish any parental bond or claims. Second, both parties must consent to the contract. Third, procreation agreements cannot be made on behalf of another person. Fourth, all information regarding altruistic contractual pregnancies is confidential. Perhaps the most interesting article in this legislation is Article 540. Under Article 540 once a child is born as a result of medically-assisted reproduction, the commissioning parents are responsible for both the surrogate mother and the child. This article is important because should a child be born with a physical and/or mental disability, the commissioning parents cannot legally abandon the child.

In addition to Quebec, the only other Canadian Province that has examined the issue of contractual pregnancy is Ontario. In 1985, the Ontario Law Reform Commission, in its *Report on Human Artificial Reproduction and Related Matters*, argued that "legislation should be enacted to establish a regulatory scheme governing surrogate motherhood arrangements."²²² The commissioners also stated that they were not persuaded by the deontological argument against treating individuals as merely a means to another end. They claimed that "as an abstract principle, the proposition [appeared only] attractive as a ringing rejection of a utilitarian approach to humanity."²²³ Like Bill C-47, the recommendations that were presented by the Ontario Law Reform Commission have also not been passed into law by the Ontario provincial legislature.

Currently, in the Province of Ontario, both commercial and non-commercial contractual pregnancy arrangements are impermissible.

In the United Kingdom, the Warnock Report on Human Fertilisation and Embryology (1984) laid the groundwork for the *Surrogacy Arrangements Act* (1985). This Act was later amended and is now the *Human Fertilisation and Embryology Act* (1990). As was argued in the *Warnock Report*, the possibility that commercial contractual pregnancy arrangements could potentially become an accepted method of human reproduction in the United Kingdom was the primary reason it was felt that legislation was needed.²²⁴ Under the current amended Act, s. 2(a-c), commercial contractual pregnancy arrangements are illegal. Unlike other jurisdictions, such as some of the American States, in the United Kingdom an individual who is found guilty of contravening the *Human Fertilisation and Embryology Act* by initiating, participating in, or advertising commercial reproductive arrangements can be fined and/or incarcerated according to s. 4(a-b). Under the *Human Fertilisation and Embryology Act* non-commercial pregnancies are exempt from any sort of criminal charges.

As in the United Kingdom, in the State of South Australia it is a criminal offense for one to "procure" or to participate in a commercial contractual pregnancy arrangement. Unlike the British legislation on contractual pregnancy, the *South Australian Family Relationships Amendment Act* (1988) s.10g(1-3) stipulates that both commercial and altruistic contractual pregnancy arrangements are illegal. Under s.10h(c-iii) a person who is found guilty of violating the Act will be fined and/or imprisoned.

In the United States, as in Australia, legislation covering contractual pregnancy arrangements is a state responsibility. Consequently, among the American states there is

little uniformity on the issue of contractual pregnancy. In states where there is legislation which stipulates that commercial contractual pregnancy arrangements are illegal, the penalties for violating the state ban on purchasing children are weak or nonexistent. For example, in the State of Arizona (1989, Ariz. Sess. Laws 14) where both commercial and non-commercial contractual pregnancy arrangements are illegal, there is no penalty.²²⁵ Unlike Arizona, in New Hampshire (1990 Law 87) and in Florida (Fla. Sta. Sec. 63.212(1) 1988) commercial and non-commercial pregnancy contracts are permitted; however, they must first be approved by the courts to be considered legally valid and binding.

While American legislation on contractual pregnancy arrangements may be somewhat useful to Canadians, when it comes to establishing its own legislation, Canada must strive to achieve a greater degree of legal uniformity between the different regions. This will promote a respect for the personhood of all Canadian women regardless of where they live. Because family and adoption laws fall under provincial jurisdiction, the type of legal uniformity that I support may not be easily achieved. Despite the seemingly insurmountable political and legal obstacles, it is absolutely vital that Canadian politicians work towards achieving this goal. Not only will this minimize national political dissention it will also eliminate the possibility that Canadians will participate in the same type of inter-regional "procreative tourism" that occurs in the United States.²²⁶

VII. LEGAL GUIDELINES GOVERNING ALTRUISTIC CONTRACTUAL PREGNANCIES

In her argument on the market-inalienability of human life, Margaret Jane Radin states that "if we wish to avoid the dangers of commodification and, at the same time, recognize that there are some situations in which a surrogate can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain, we could prohibit sales but allow surrogates to give their services."²²⁷ Provided that the personhood (humanity) of women is respected in a non-commercial arrangement, I believe that Kant would find little fault with Radin's claim.

Like Radin, throughout my paper I have argued that non-commercial contractual pregnancy arrangements should be permitted. Thus, I believe that the Government of Canada, in association with the provincial governments, should create legislation that stipulates the conditions that must be met if individuals should choose to form voluntary non-commercial contractual pregnancy arrangements. (In some non-commercial pregnancy arrangements there is a risk that women will be pressured by family members to act as surrogate mothers.)

In his discussion on providing for individual autonomy, James F. Childress states that "to be autonomous and valid, society needs to make sure that the conditions of understanding and voluntariness have been met. Otherwise, the appeal to presumed donation may only be expropriation."²²⁸ Ideally, it would be admirable if we could achieve the same type of understanding and voluntariness in Canada that Childress talks about. Assuming that a majority of Canadians would support the idea that government could use their tax dollars to fund non-commercial pregnancy arrangements, the

Government of Canada could help by sanctioning non-commercial pregnancy contracts. By instituting guidelines that govern non-commercial contractual pregnancies, the Government of Canada together with provincial governments could, in effect, minimize the likelihood that women would be exploited or coerced into acting. Furthermore, government could ensure that the personhood of non-commercial surrogate mothers is respected. This would circumvent the single most important Kantian and consequentialist objections against contractual pregnancy.

As I have stated in the previous section, several jurisdictions have developed, and some have implemented, guidelines that govern non-commercial contractual pregnancy arrangements. I do not intend to provide a detailed account of how these guidelines operate. I merely wish to present an outline that indicates what the guidelines governing non-commercial contractual pregnancies might be.

LEGAL GUIDELINES GOVERNING NON-COMMERCIAL CONTRACTUAL PREGNANCIES

The following guidelines are loosely based on the guidelines that were presented by the Ontario Law Reform Commission in their *Report on Human Artificial Reproduction and Related Matters*.²²⁹

- To be legally permissible, every non-commercial pregnancy contract must be approved by the court (provincial family court).
- All non-commercial surrogates must be of the age of majority so that they can legally consent to the contract.

- Financial payment, other than indirect compensation for medical expenses, lost wages or support for living costs, to the non-commercial surrogate is prohibited. Any direct payment made by commissioning parents, child-brokers, medical personnel, or lawyers, to the surrogate mother may result in the child's being removed from the care of the commissioning parents and placed with an adopting family.
- Non-commercial contractual pregnancy contracts shall respect the religious traditions of the surrogate mother and the commissioning parents. Human life must be viewed as sacred and it must be treated with dignity. (Religious traditions may clash with the level of sacredness and/or dignity that is accorded to human life.)
- Every non-commercial pregnancy contract must be documented in writing. Both the surrogate mother and the commissioning parents must provide written consent.
- There must be a legitimate medical reason why the commissioning parents are seeking to form a non-commercial pregnancy contract. Assisted non-commercial procreation is permissible so that infertile couples are provided with an opportunity to become parents.
- A court appointed counselor/therapist shall assess the commissioning parents and the non-commercial surrogate mother and they must be deemed competent to form and execute a non-commercial pregnancy contract.
- The non-commercial surrogate mother and the commissioning parents must undergo a thorough medical examination including possible testing for

genetically-transmitted diseases (i.e., Tay-Sachs, Sandhoff disease, and Down's Syndrome).²³⁰ The purpose of genetic testing is not to encourage the creation of genetically perfect children, but rather to prepare non-commercial surrogate mothers and commissioning parents for any future special needs (i.e., medicine or medical treatment) that may be required by the surrogate child. It is also to alert the non-commercial surrogate mother to any possible medical risks that she may face throughout the duration of her pregnancy.

- The use of donor gametes (a gamete that is neither the commissioning mother's or the non-commercial mother's) is permissible, provided that the donor has undergone a medical examination.
- A non-commercial donor shall have no legal claim to parenthood once the gamete is donated.
- Medical confidentiality surrounding non-commercial pregnancy contracts shall be preserved.
- Should a child of a non-commercial pregnancy contract be born with a physical or mental disability, the commissioning parents will be responsible for the well-being of the child for the duration of the child's life.
- The birth of a child born as a result of a non-commercial pregnancy contract shall be registered under the provincial *Vital Statistics Act*.
- A penalty and/or fine shall be imposed on individuals who knowingly disregard the legal guidelines stipulated for non-commercial pregnancy contracts.

- An independent committee shall review the guidelines governing non-commercial pregnancy contracts on an annual basis.

VIII. ALTRUISTIC CONTRACTUAL PREGNANCY: THE LAST OPTION

Although I have argued in support of regulated non-commercial pregnancy contracts, there is one important reason why non-commercial pregnancies should not be viewed as a leading alternative to childlessness. This reason is that as with any legal contract, there is a possibility that the contracting parties in a non-commercial reproductive arrangement may disregard one of one or more of the legal clauses. In this type of situation the individual(s) would then be subject to criminal charges. These charges would impede the contract itself. Therefore, as with every major contractual decision, the risks associated with non-commercial pregnancy arrangements must be considered before the contract is established.

CHAPTER 4

I. THEOLOGY AND BIOETHICS

There are two reasons why I have chosen to include a chapter on theology and bioethics in my thesis. As I stated earlier, the first reason is that in addition to ethical (philosophical), feminist, and legal concerns, to understand specific bioethical issues, one must also recognize the significance of religious beliefs. The connection between religion (moral theology) and our understanding of bioethical concerns is underscored in two ways. First, despite the fact that there has been an overall decline in the number of individuals who attend religious services on a regular basis, many Canadians claim that they do have religious beliefs.²³¹ For these individuals, religious beliefs are influential when interpreting bioethical dilemmas. Second, many Canadian health care facilities are affiliated with a specific religious denomination. These denominational religious traditions (religious missions) determine the type of medical services that are provided by the health care facility. For example, in the City of Winnipeg there are seven personal care facilities, one general hospital, and one community health care centre that are owned and operated by the Roman Catholic Church. These facilities deliver medical care in the context of Catholic religious beliefs and values. In addition to Roman Catholic health care facilities, there are also facilities in Winnipeg that are run by the Mennonite religious community, the Salvation Army, and by the Jewish community.²³²

The second reason why I have included this chapter in my thesis is to defend my thinking in support of non-commercial contractual pregnancy arrangements against the thoughts held by some religious moralists. Unlike me, some religious moralists believe

that non-commercial contractual pregnancy arrangements minimize the significance of specific religious beliefs and values--I will argue against this claim.

To understand how contemporary moral theology enriches our understanding of issues such as commercial contractual pregnancy, it is crucial that my readers understand that when talking about the connection between religion and bioethics, in association with Judaeo-Christian religious beliefs and values, one must be open to the idea that an ultimate or higher power does indeed exist. This power, God, satisfies the religious convictions of individuals sufficiently so that they will organize both their own lives as well as their communal existence in such a way that they are respectful of specific religious teachings. Thus, when one accepts that God exists--when one rejects the claim that our knowledge of God's existence is empirically invalid--one can then truly appreciate the role of moral theology in relation to bioethics. Describing the association between moral theology and bioethics, American theologian Bernard Haring says that "moral theology...is not concerned first with decision-making or with discrete acts. Its basic task and purpose is to gain the right vision, to assess the main perspectives, and to present those truths and values which should bear upon decisions to be made before God."²³³

In his discussion on the contribution of theology to the growth of bioethics as a distinct and specialized area of interest, American philosopher Daniel Callahan claims that notwithstanding the fact that the writings of theologians like Bernard Haring and Richard McCormick (Roman Catholic), Paul Ramsey (Protestant), and Seymour Siegel (Jewish) were influential in the 1970s, a time when society began to take a greater interest in bioethical issues, to a certain extent, the influence of theology in contemporary

bioethics has lessened. Callahan says that this is primarily because "the discipline of medicine is as resolutely secular as any that can be found in our society."²³⁴ As a consequence of the secular approach adopted by medicine (the natural sciences in general), the role of moral philosophers--as agents that assist us with our understanding of bioethical issues--has expanded.

Partly as a result of the increasingly significant secular approach adopted by moral philosophers in bioethics, moral theologians are occasionally criticized for placing too great an emphasis on following religious doctrine and not enough on understanding contemporary bioethical issues. In his article "The Contributions of Theology to Medical Ethics," Christian theologian James M. Gustafson responds to this criticism. Gustafson says that although moral theologians understand bioethical issues in connection with a belief in an ultimate power, nevertheless "the theologian who concentrates on ethics has the same two tasks as the moral philosopher: to analyze the necessary conditions for moral activity to occur, and to indicate normatively what moral principles and values ought to govern action."²³⁵ Jewish theologian Byron L. Sherwin supports Gustafson's claim. Byron Sherwin states that "for many Jewish ethicists... God has the initial word, but human beings have the last word. Though fallible by nature, their task is to apply divine wisdom--using human intelligence and intuition--to particular human situations. Objective divine revelation and subjective human speculation coalesce to produce guidelines for correct moral behaviour."²³⁶ Moral theology is therefore not removed from our understanding of everyday ethical concerns. Rather, it incorporates religious teachings--it relies on the wisdom that can be learned through religion--as well as emphasizing the importance of human reasoning.

In addition to the advantages acquired through religious teachings and the emphasis placed on human reasoning, James Gustafson argues that theology provides us with "several attitudes or dispositions" that assist us when we are formulating our own bioethical decisions.²³⁷ Briefly, the three attitudes or dispositions that Gustafson talks about are as follows: 1)An attitude of respect for life. An attitude where human life (creation) is defined as something that is sacred and therefore it deserves to be treated with dignity. 2)An attitude of openness towards new possibilities. An attitude where we are willing to discuss how the use of new medical procedures together with theological teachings may result in new forms of medical action. 3)An attitude of self-criticism of choices and actions. An attitude where humans acknowledge their limitations and frailties.²³⁸ When incorporated together with a knowledge of specific medical facts, these three attitudes effectively illuminate or broaden our position on a given bioethical dilemma. Thus, theology, when understood in connection with bioethical decision-making, is not simply about applying God's laws. It is a framework that guides us to attain well thought-out responses to complex bioethical issues.

II. DENOMINATIONAL PERSPECTIVES ON CONTRACTUAL PREGNANCY

As I stated in the preceding section, both Jewish and Christian theologians believe that religious beliefs and values can contribute to a better understanding of complex bioethical issues. By incorporating religious-based arguments on issues like euthanasia or human cloning, both Jews and Christians believe that individual decision-making will be rational as well as mindful of such concepts as respecting the sanctity of human life and the importance of preserving the dignity of every individual. Notwithstanding this

similarity, on the issue of contractual pregnancy Judaism and Christianity have adopted two opposing positions.

In Judaism, *Halacha* (Jewish religious law) "forbids commercial trade in human life...."²³⁹ Other practices such as commercial doctoring or wet nursing are said to be permissible simply because in Judaism individuals are obligated to help save the lives of other individuals. The "obligation to save lives is not only individual but also communal."²⁴⁰ Among the three major North American Jewish denominations (Orthodox, Conservative, and Reform) it is unanimously agreed that *oshek* (economic exploitation) is impermissible where childbirth is concerned.²⁴¹ This argument is based on both religious teachings (teachings of the Torah/Hebrew Bible) and on Maimonides' philosophical discussions on marriage, family, and fertility.²⁴²

On the practice of non-commercial contractual pregnancies, the issue becomes somewhat more complicated. Notwithstanding the fact that some Orthodox and Conservative Rabbinical scholars argue (arguments found in the Torah) that non-commercial pregnancies may affect the integrity of the marriage bond, the human dignity of the surrogate and the child, and that there is a possibility that a non-commercial pregnancy contract may not be honoured, generally, non-commercial pregnancies are permissible. They are permitted because, unlike in Christianity, "in Judaism infertility is considered to be an illness...."²⁴³ Should an infertile couple, however, decide to participate in a non-commercial pregnancy contract--ideally, this decision is made so that it will strengthen the marriage bond and help create a unified family unit--complete (gestational) arrangements are preferred over partial (genetic) ones. Complete non-commercial pregnancies are preferred because in Judaism one's religious identity is

passed from the mother to her child. In situations where a partial surrogate is not Jewish (the surrogate mother was not born Jewish or prior to being artificially inseminated with the father's sperm the surrogate has not voluntarily converted to Judaism) the child will also not be considered Jewish.

Among the Christian denominations, both commercial and non-commercial contractual pregnancies are deemed impermissible. Amidst the different churches there is agreement "that surrogate motherhood is contrary to the unity of marriage and to the dignity of the procreation of the human."²⁴⁴ Two Christian denominations, Roman Catholicism and the Anglican Church of Canada, have been the most forthright in their opposition to contractual pregnancy. For example, Article 50 of the *Catholic Health Care Ethics Guide* stipulates that "surrogate mothers are not permitted because such procedures violate the unity and dignity of marriage and the natural bonding involved in pregnancy."²⁴⁵ Similarly, in the report on assisted reproduction, submitted to the 1989 General Synod of the Anglican Church of Canada, it was argued that "surrogate motherhood...removes the creation of new life from the sacramental relationship of woman and man in mutual love. It leaves a legacy...which in all likelihood will be hurtful and destructive."²⁴⁶

While it is not my intent to depreciate the positions of the Christian churches on the practice of commercial contractual pregnancy arrangements, I believe that there is a way that one can accommodate Christian religious concerns and provide for non-commercial pregnancy contracts. It is the very same method that I advocated in my previous chapter on the legal issues associated with contractual pregnancy. I believe that by implementing guidelines that govern non-commercial contractual pregnancies, we can

effectively address religious concerns. Assuming that these guidelines are followed in a diligent manner, human life can be defined as sacred and treated with dignity.

Additionally, these guidelines will preserve the importance that both Judaism and Christianity attach to marriage and the familial unit.

My argument in support of permitting non-commercial contractual pregnancy, in connection with a respect for Christian religious beliefs, is not original. As I have shown, in Judaism non-commercial contractual pregnancies are permissible when they exhibit an understanding and respect for religious teachings. Perhaps this is largely because Judaism views infertility as an illness and not as something that one must reluctantly accept and subsequently live with for the rest of one's life.

In her discussion on sanctioning technologically-assisted reproduction, within the perimeters of traditional religious beliefs and values, Maura Anne Ryan says "we need not accept admonitions about "playing God"...[provided] that in whatever possibilities for reproduction we consider, we continue to ask what it means to be created by God and entrusted with the responsibility for furthering that creation."²⁴⁷ I believe that non-commercial contractual pregnancy arrangements, when they are properly planned, will remind us of our connection with God. Additionally, when a child that is born as a result of a non-commercial pregnancy arrangement is nurtured within a loving family, it will strengthen a crucial religious principle. This principle is that human life should always be viewed as something that is sacred.

CONCLUSION

Among moral philosophers it is frequently argued that because there is currently no single ethical theory that can be applied to understand and resolve specific bioethical dilemmas--there are only competing theories like consequentialism and deontology--we should refrain from interfering in the medical world. For some moral philosophers the area of applied ethics has not yet evolved into a field where a specialized group of experts are qualified to help other individuals decide on ethically charged issues like euthanasia or technologically-assisted human reproduction. In my thesis, by arguing against commercial contractual pregnancy, I have attempted to disprove this claim. I have not done this by pitting consequentialism and deontology against one another. Instead I have chosen to apply Kant's ethical and legal theories in combination with a redefined form of consequentialism to an unfortunate but nevertheless all too real bioethical issue. I have redefined the consequentialist philosophical argument by showing how the consequences of engaging in commercial contractual pregnancy arrangements do not instill a respect for the humanity of commercial surrogate mothers rather than by emphasizing how they do not promote the happiness or the best interests of women. By appealing to this type of philosophical argument, what I have done is to show how deontology and consequentialism can help individuals who are infertile decide whether or not commercial contractual pregnancy should be viewed as an ethically acceptable alternative to childlessness.

By applying an amended version of Kant's deontological moral theory--unlike the original, my version of Kant's theory defines women as rationally autonomous moral

agents--to the issue of commercial contractual pregnancy, I have argued against the claim that all rational and autonomous adults have a moral and legal right to establish commercial pregnancy contracts. Citing the three formulations of Kant's categorical imperative I have stated that, despite the claim in support of procreative liberty made by individuals like John A. Robertson, commercial contractual pregnancy arrangements are an ethically unacceptable method of human reproduction. Therefore, they should not be legally permitted in Canada.

In addition to demonstrating the practical or applied side of Kant's moral theory, I have also responded to the popular criticism that is employed by empiricists against Kantian ethics. Briefly, empiricists argue that it is difficult to imagine a world where individuals deny such empirical factors as sentiment, inclination, and desire. In response to this criticism I have argued that, ideally, when we are formulating our own ethical decisions, we must strive to reject all subjective, irrational justifications for action. Deontologists claim that by formulating our decisions this way, our actions will then be truly ethical. Describing Kant's moral framework, Alasdair MacIntyre gives a short but precise definition of what Kant wanted to achieve. MacIntyre states that Kant's "wish [was] to exhibit the moral individual as being a standpoint and a criterion superior to and outside any actual social order."²⁴⁸ As a Kantian philosopher, notwithstanding the fact that in my thesis I have also appealed to a different form of consequentialism, I have supported this position and applied it to the problem of human infertility.

To further strengthen my argument against commercial contractual pregnancy, I have also shown why Kant, notwithstanding his assertion that it is wrong to limit the liberty of individuals by imposing unnecessary external laws, would argue in support of

legislation that prohibits against the buying and selling of the personhood of women. I have based my argument on the claim that Kant believed that law is influenced by moral principles--thus the categorical imperative is influential in relation to our opinions on what is and what is not legally permissible--and also on the idea that commercial contractual pregnancies disregard Kant's universal law of justice. By citing both Canadian and non-Canadian legislation on the practice of contractual pregnancy, inadvertently, I have demonstrated the importance that Kant's concepts--specifically the second formulation of the categorical imperative and his universal law of justice--have in legislation.

In addition to applying Kant's ethical and legal theories, I have also shown why many consequentialist feminist philosophers, although not all, argue that women who act as contractual mothers are likely to be exploited by the arrangement. Although I support this criticism in connection with commercial contractual pregnancy, simply because commercial contractual pregnancies define women as commodities (women are classified in the same way as we classify other commodities i.e., cattle and cars) by instituting legal guidelines I have argued that one can minimize the chances that this will occur in arrangements that are truly non-commercial.

Unlike some feminist philosophers, who have incorrectly consolidated non-commercial pregnancy contracts with commercial ones, I believe that non-commercial contractual pregnancies should be viewed differently. My argument is thus similar to the argument made by Margaret Jane Radin. Distinguishing non-commercial from commercial contractual pregnancies, Radin states that "the rhetoric of commodification has led us into an unreflective use of market characterizations and comparisons...."²⁴⁹

She claims that if we follow the feminist argument against all forms of contractual pregnancy, "we cannot make progress toward the noncommodification that might exist exist under ideal conditions of equality and freedom...."²⁵⁰ Consequently, both Radin and I believe that some feminists must reconsider their arguments.

When writing my chapter on feminist philosophy and commercial contractual pregnancy, specifically when writing about how historically women have been exploited by the male-dominated capitalist economic market and how commercial contractual mothers could potentially fall prey to the reproductive desires of higher income commissioning couples, I have purposely omitted an important issue. Notwithstanding the fact that I have not explored this issue, simply because it goes beyond the scope of my paper, it is important to recognize that in addition to the valid feminist concerns that contractual pregnancies merely reinforce the oppression and exploitation of women by men, a percentage of individuals who commission women to act as commercial surrogate mothers may be single women or women who have chosen an alternate lifestyle.

On the issue of prohibiting commercial contractual pregnancy arrangements and non-traditional family arrangements, it is important that one recognize that the legal ban against commercial contractual pregnancies is directed not only towards married and unmarried heterosexual couples, but that it also extends to include heterosexual single men and women and to lesbian and gay couples. Correspondingly, should the Government of Canada legally permit non-commercial contractual pregnancies, the legal right to form this type of contract might possibly include individuals who are in alternate relationships. (I suspect that it would be more difficult for single men and women to legally support their claim to engage in non-commercial contractual parenthood.)

Whether or not Canadians are willing to accept the idea that non-traditional families may be permitted to reproduce through non-commercial contractual pregnancy arrangements, must be discussed and subsequently addressed in the legal guidelines that make this type of human reproductive arrangement possible.

To conclude, by arguing in support of new legislation that prohibits commercial contractual pregnancy but provides for non-commercial contractual pregnancies, I have called on the Canadian federal and provincial governments to amend their current legal statutes on technologically-assisted human reproduction. Because Canadians are turning to medical technology in increasing numbers, as a way of overcoming the problem of human infertility, new legislation is urgently needed. Like medicine, law must also evolve because "without the ability to accommodate change, a legal system... can soon become irrelevant to the ongoing life of the community."²⁵¹ When this type of situation is allowed to occur, ethical judgements become clouded. Uncertain of what is right and what is wrong, individual ethical decision-making becomes chaotic. In turn, this places the principles that we value and have attached to human life--namely, a respect for the humanity and dignity of people as well as a view of life as something that is sacred--in a rather precarious position.

NOTES

1)Genesis 30:1

2)First performed in the early 1970's, gamete intrafallopian transfer (GIFT) occurs when "freshly collected oocytes and spermatozoa are placed together in the oviduct, where fertilization occurs.....Laparoscopic and trans-cervical methods of oocyte aspiration and replacement are performed with a high degree of surgical skill in the correct performance of GIFT."(Brody, Steven A.and Edwards, Robert G. 1995. *Principles and Practice of Assisted Human Reproduction*, Pennsylvania: W.B. Saunders Company, pp.482.

For men who undergo intracytoplasmic sperm injection (ICSI) prepared spermatozoa are injected directly into oocytes. Since 1995, "ICSI has transformed the treatment of severe male infertility.... It is effective for men producing only highly malformed spermatozoa and for those with no mobile spermatozoa."(Brody, Steven A. and Edwards, Robert G. 1995. *Principles and Practice of Assisted Human Reproduction*, Pennsylvania: W.B. Saunders Company, pp.386.

3)Patricia Baird, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood* (Ottawa, 1993), pp.465-466.

4)Commercial contractual pregnancy is a term that has been popularized by Canadian feminist philosopher Susan Sherwin.

5)Bill C-47, The Human Reproductive and Genetic Technologies Act, was introduced in the Canadian Parliament in June 1996. After being debated in the House of Commons, it was defeated on the second reading and subsequently it was not passed into law. A revised version of Bill C-47, Bill C247, has been reintroduced in the Canadian Parliament and will be debated in the future. Under Bill C-247 commercial and/or non-commercial contractual pregnancy arrangements are not included as part of the proposed legislation.

6)Under Bill C-47. Section 8, any person who contravenes any of sections 4 to 7 is guilty of an offence and

(a) is liable, on summary conviction, to a fine not exceeding \$250,000 or imprisonment for a term not exceeding four years or to both; or

(b) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or imprisonment for a term not exceeding ten years or to both.

7)In 1989, the Royal Commission on New Reproductive Technologies was established by the Government of Canada. Its role was to "examine the social, medical, legal, ethical, economic and research implications of NRGTs, and to recommend policies and safeguards. Special attention was directed to their implications for women's reproductive health and well-being and the prevention of infertility. The Royal Commission issued its final report in November 1993." (*New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health*, Ottawa, 1996), pp.12., *Royal Commission on New Reproductive Technologies: Legal and Ethical Issues in New Reproductive Technologies Pregnancy and Parenthood* Vol.4 , (Ottawa, 1993) pp.461.

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158) In his book *Spheres of Justice*, American moral philosopher Michael Walzer talks about the moral incommensurability of equating humans with market exchanges. Walzer states that "human beings cannot be bought or sold." (pp.180) He says that "not persons or the liberty of persons, but only their labour power and the things that they make" can be sold. (pp.181) Similarly, British philosopher, Dame Mary Warnock, in *The Warnock Report on Human Fertilization and Embryology*, says that those who "treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved." (pp.182)

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236)Byron L. Sherwin, *In Partnership With God*, (New York, 1990), pp.51.

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238)Ibid., pp.56-69.

239)Rita Argus, "Surrogacy in Jewish Law", *Lilith*, No.19, Spring (1988), pp.31.

240)Fred Rosner, "Jewish Medical Ethics", *The Journal of Clinical Ethics*, Vol. 6, No.3 (1995), pp.203.

241)Rita Argus, "Surrogacy in Jewish Law", *Lilith*, No. 19, Spring (1988), pp.20.

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243)Fred Rosner, "Jewish Medical Ethics", *The Journal of Clinical Ethics*, Vol.6, No.3 (1995). pp.207.

244)Joseph G. Schenker, "Religious Views Regarding Treatment of Infertility by Assisted Reproductive Technologies", *Journal of Assisted Reproduction and Genetics*, Vol.9, No.1 (1992), pp.6.

245)Catholic Health Association of Canada. *Health Care Ethics Guide* (Ottawa, 1991), pp.39.

246)John Baycroft ed., *Whose Child is This?* (Ontario, 1990), pp.99.

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248)Alasdair MacIntyre, *A Short History of Ethics* (New York, 1996), pp.198.

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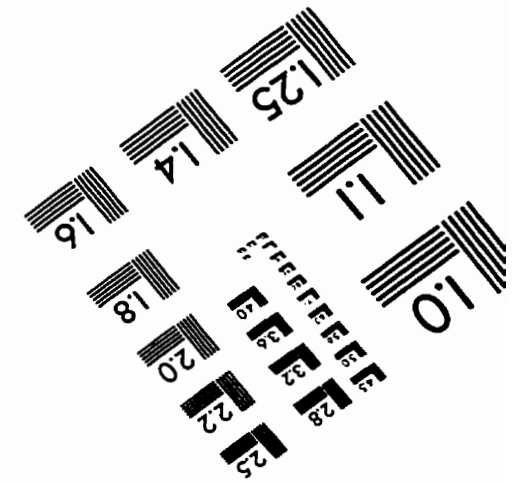
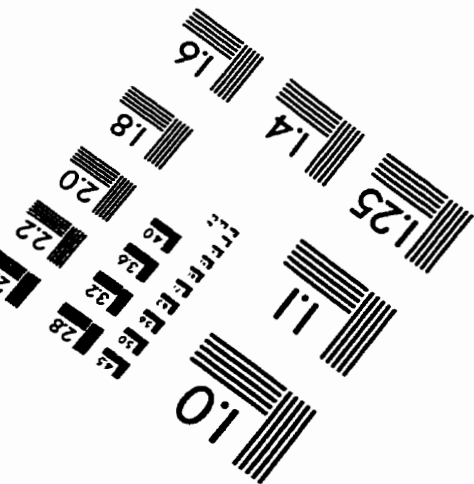
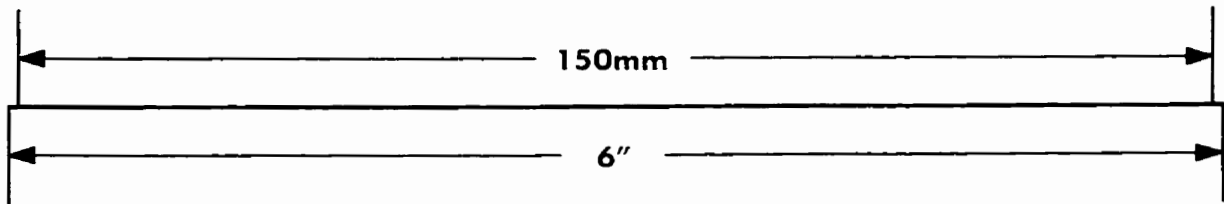
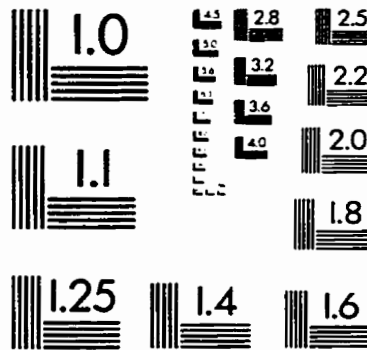
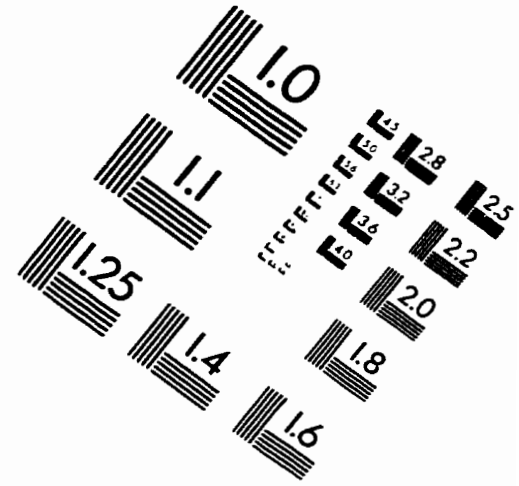
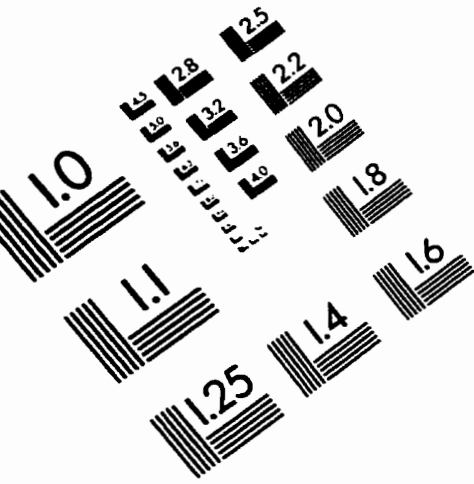
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