DISCOURSES ON THE PREGNANT BODY IN CANADIAN CONSTITUTIONAL LAW: A POST-STRUCTURALIST AND ANTHROPOLOGICAL ANALYSIS

BY

SIOBHAN KARI

A Thesis

Submitted to the Faculty of Graduate Studies
In Partial Fulfillment of the Requirements for the Degree of

MASTER OF ARTS

Department of Anthropology

University of Manitoba

Winnipeg, Manitoba

THE UNIVERSITY OF MANITOBA

FACULTY OF GRADUATE STUDIES

*****

COPYRIGHT PERMISSION

Discourses on the Pregnant Body in Canadian Constitutional Law: A Post-Structuralist and Anthropological Analysis

BY

Siobhan Kari

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirement of the degree

Of

MASTER OF ARTS

Abstract

Pregnancy has theoretical and political import because it is sexual difference made visible and because it is marked by historical, social, political, and cultural contexts. The ever-increasing availability and use of reproductive and genetic technologies affect popular, theoretical, and legal conceptions of the pregnant body. Two decisions rendered by the Supreme Court of Canada, namely *Dobson v. Dobson* (1999) and *Winnipeg Child and Family Services (Northwest Area) v. D. (F.G.)* (1997), were read deconstructively to analyze legal discourses on the pregnant body. These legal discourses represented the pregnant body through an individualistic model of liberal subjectivity. This thesis argues that the pregnant body is presented in these discourses as both a *container* (a legal person who stores the foetus) and as *contained* (the pregnant body as an untouched and bordered whole). These representations of pregnancy naturalize and privilege the contained liberal legal subject instead of exploring the multiplicity of pregnancy and thus recontextualizing and reworking the legal discourses on pregnancy. Pregnant subjectivity is examined through these Supreme Court decisions which deal with the legal relationship between the pregnant women and the foetus, the legal status of the foetus, the behaviour of the pregnant woman, judicial intervention in pregnancy, and the discourses of legal personality, property, and bodily integrity.

The theoretical paradigm or framework for this analysis was a feminist post-structuralist approach that presumed the importance of gender in social relations and emphasized problems in representing lived experience through language, specifically through legal discourse. These Supreme Court of Canada decisions were read

deconstructively along with other Canadian legal decisions. The focus was on examining binaries, margins, ignored passages of a text, silences, supplements, and gaps in order to explore and expose how these elements reinforced or contradicted the dominant discourse that the decisions overtly asserted.

The objective of this thesis was to produce a theoretically informed descriptive case study of the legal status of the pregnant body in the cultural context of Canadian constitutional jurisprudence and to present some of the ways that pregnant subjectivity has been re-articulated as an embodied, active, temporal, contingent, and multiple subjectivity.

Acknowledgements

I would like to extend my gratitude to my advisor, Dr. Ellen Judd, for her guidance, patience, and keen editorial eye. I would also like to thank the other members of my committee, Drs. Lorna Turnbull and David Stymeist, for their advice and editorial input.

The women I worked with at the Canadian Women's Health Network deserve a special expression of thanks. Their dedication, acumen, and most importantly, their humour in their work to keep women's voices heard kept me inspired and motivated throughout the writing of this thesis. Their collective wisdom (and our lunchroom banter) was always astute and invigorating.

My greatest thanks are reserved for my family and my partner for their steadfast encouragement, support, and patience.

Thank you all.

Table of Contents

Chapter One: Introduction

1.1 Introduction

Reproductive and genetic technologies have brought forward new questions regarding the legal status of the embryo and foetus,[1] broader questions of the legal status of body parts, and an ensuing indeterminacy of possessory interests in these materials. Underlying the need for a more intensive critical analysis of the contexts of various biotechnologies are the legal, anthropological, and ethical questions that accompany the new ability to separate gametes (spermatozoa and ova) from the body, their continuing reproductive capacities once removed from the body, especially in the pre-embryo form, their manipulation in the laboratory, and their subsequent use in a clinical setting. The Supreme Court of Canada has not yet had to decide a case that specifically involved reproductive technologies; however, the issue of patenting higher forms of life as a result of biotechnological work came before the Supreme Court in 2002. The Supreme Court of Canada ruled in *Harvard College v. Canada (Commissioner of Patents)* (2002) that the genetically modified mouse, commonly referred to as the Oncomouse or the Harvard mouse, could not be patented in Canada because the mouse did not qualify as an invention under the federal *Patent Act*.

Reproductive and biological technologies increase options for both childbearing and medical treatments, but also raise legal and ethical questions. Reproductive and genetic technologies may be at once both emancipating and repressive. These new biotechnologies, like any technology, do not function free from context. At the very least, recent changes in biotechnology are dialectical, contextual, and ambivalent and compel the interrogation of concepts previously thought immutable and transcendental.

Many critical authors neither embrace nor reject the technologies as such but instead enter into a post-modern dialectic positing that "technological change will be creatively destructive, opening new avenues for equality, diversity, self-expression, resistance to hierarchy and control, while also offering new means for domination, exploitation, oppression and dehumanization" (Shevory, 2000:3). Many authors are addressing some of the fundamental concepts at the centre of legal and ethical debates and are interrogating and destabilizing what has been traditional and confining. The increased attention to post-modern and post-structuralist theory, to medical technologies, and to litigation on behalf of the foetus, combine in ways that compel a critical feminist analysis of the political positioning of pregnancy and of liberal subjectivity.

The central issues considered in this thesis are how the pregnant body is figured in Canadian jurisprudence under an existing legal framework that developed predominantly from liberal philosophies, and how changes in reproductive and genetic technologies compel further examination of Canadian case law. Such issues are approached here from feminist, anthropological, and post-structuralist perspectives where the body and body politic are problematized. This examination considers the site at which the pregnant body, law, and technology meet as a point of political possibility. The shifting understandings and interpretations of the pregnant body and the foetus engage a reconfiguration of the politics of pregnancy. The pregnant body is then a site of political and legal conflict implicating issues of power and subjectivity. Pregnant women are often located within normative frameworks of visibility in which images of contained, controlled, and disciplined bodies are the ideal. This thesis examines these interwoven concepts as they relate to the pregnant body in the current legal climate in Canada and

uses post-structuralist concepts of the self (and the related concepts of legal personhood and legal subjectivity, the individual, autonomy, and bodily integrity), containment, property, commodification, and the pregnant body. This approach, with a post-structuralist epistemology, takes these ostensibly self-evident concepts and seeks to expose their indeterminacy and dependency on cultural and political contexts.

As a way to explore the discourses and constructed meanings of the pregnant body, property, personhood, bodily integrity and foetal status that are central to reproductive technologies in Canada, this thesis focuses on two decisions of the Supreme Court of Canada that were decided with reference to the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the *Charter*), and on connected decisions, statute law, submissions, and related writings. The focal decisions are *Dobson (Litigation Guardian of) v. Dobson (1999) S.C.R. 753* (hereinafter referred to as *Dobson*) and *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* (1997) 3 S.C.R. 925 (hereinafter referred to as *G.*). These decisions cannot be examined in isolation from related precedents, legislation, submissions by intervenors, or the academic writing referred to by the Supreme Court. Therefore, this thesis also considers *R. v. Morgentaler, (1988) 1 S.C.R. 30* (hereinafter referred to as *Morgentaler*), *Jean-Guy Tremblay et al.* v. *Chantal Daigle* (1989) 2 S.C.R. 530 (hereinafter referred to as *Daigle*), the *Charter*, and applicable legislation. The primary decisions under examination distinguished or applied principles derived from the common law, the legislation and the various documentary evidence and submissions made available to the Supreme Court.

Using post-structuralist methods and decided case law as data or texts, this study offers a close examination of two judicial efforts at interpreting, defining, and clarifying

the *Charter* with respect to pregnant women's relationship to their bodies. The primary theme of this thesis is not to describe how techno-science or the legal system is practiced or dominated by patriarchal or phallogocentric cultural discourses, although that is unavoidably a part of the project. The purpose is to examine, in a deconstructive and anthropological manner, discourses of the pregnant body using Canadian law as a point of entry. The central focus of this thesis is on the ways in which pregnancy and the pregnant body are (re)shaped by contemporary Canadian legal discourse.

1.2 The Focus on *Charter* Cases

The strategic choice to focus on *Charter* cases reflects the assumption that these cases have significance both instrumentally and symbolically. By interpreting the *Charter* and articulating the definitions of rights therein, Supreme Court decisions are instrumentally significant because they have the potential to legitimize, normalize, or decriminalize actions. They are also symbolically significant because they legitimize or normalize concepts or groups of persons seeking recognition, and because they can also adversely affect actions or groups of persons by imposing sanctions or by failing to recognize a social group. As Carol Smart notes:

> Through the appropriation of medical categorizations and welfare oriented practices rather than judicial practices, law itself becomes part of a method of regulation and surveillance. Law therefore has recourse to both methods, namely control through the allocation of rights and penalties, and regulation through the incorporation of medicine, psychiatry, social work and other professional discourses of the modern episteme (Smart, 1989:96).

Charter decisions have other and further dimensions of significance. In and of themselves, they are precedents upon which future legislation and conduct might be challenged, interpreted, or condoned. On a more general level, decisions rendered by the

Supreme Court, especially *Charter* decisions, have a broad ripple effect, both practically and academically. These decisions guide extra-legal conduct when individuals, organizations, and governments alter their practices to be in compliance with Supreme Court decisions. Additionally, deconstructive readings of *Charter* cases and arguments have been performed on the issues of Section 15 equality protections (Kropp, 1997) and legal reasoning in *Charter* cases (Tingle, 1992).

The majority and dissenting opinions rendered by the Supreme Court in *Dobson* and *G.* include discourses on the relationship between the pregnant woman and the foetus, the legal status of the foetus, the behaviour of the pregnant woman, her legal duty of care toward the foetus, and the legitimacy of state interference to compel that care. Though the Supreme Court did not use the *Charter* issues that these cases raised to make its decisions, the issues of a pregnant woman's rights to security of the person, liberty, autonomy, and bodily integrity were discussed throughout.

1.3 The Focus on the Pregnant Body

The intention behind choosing the body and, specifically, the pregnant body, as a 'subject' for analysis is to interrogate it as a core symbol and a vehicle of identity and, at the same time, a focus of power and locus of struggle. It requires an interrogation about what role the pregnant body plays in legal personhood (Strathern and Lambeck, 1998:6). Deconstructive analysis has also been criticized as rendering women invisible as it is accused of reducing everything to 'text' (Scott, 1988). However, considerable effort has been made in appropriating and reformulating elements of deconstruction and other post-structuralist works to pursue their use and possibilities for women (Scott, 1988; Spivak, 1989; Elam, 1994; Jagger, 1996). The strategic decision to use the phrases 'pregnant

bodies' and 'pregnant women' in this thesis is intentional and meant to highlight the ways that the Supreme Court decisions rendered invisible the lived experiences of the women whose actions were at issue in the two cases under examination. Strathern and Lambeck (1998:7) warned against disembodiment and suggested instead that anthropological analyses take care to "examine how cultural concepts impact on bodily experiences and practices and likewise how our embodied condition affects cultural concepts and social practices." Using the language of pregnant bodies in examining the experience of pregnancy before the law starkly corroborates the points made by Strathern and Labeck (1998). It also affirms the need for the kind of analyses that bring the lived experiences of pregnant women into theorizations of pregnancy and women's interactions with the law. Although difficult, it is both possible and necessary to incorporate concurrently both the lived experience of women and abstracted formulations in theorizations of pregnancy.

Because issues of power and resistance are implicated in any discussion of reproductive politics (Ginsburg and Rapp, 1991, 1995), a variety of critically oriented theories provides the background to this investigation. Informing this thesis are science and technology studies, specifically critical analyses of the medical model of reproduction. The ever-increasing availability and use of reproductive and conceptive technologies affect popular, theoretical, and legal conceptions of the pregnant body. As pregnancy increasingly becomes regulated under a medical model and technologies demystify and make visible the foetus, pregnancy is increasingly managed on behalf of the foetus whilst "pregnant bodies themselves remain concealed" (Stabile, 1994:84). As well, the Supreme Court of Canada has made mention of, or been reliant upon, the medical model of pregnancy and foetal viability in its decisions. Such prenatal

surveillance and the construction of the foetus as the primary obstetrical patient have implications for women's subjectivity and have stimulated an examination of the role of pregnancy in anthropological and legal thought. Accordingly, feminist and anthropological engagements with science, technology, reproduction, technologies of procreation and the body are also part of the groundwork of this investigation.

1.4 Pregnant Women, Foetuses and Legal Personality

For nearly 75 years the Canadian legal system has been interpreting the concept of legal personhood and developing the changing content of that phrase. In 1929, reversing a unanimous Supreme Court of Canada judgment, the British Privy Council ruled on the 'Person's Case'. The Privy Council expanded the liberal legal construct of "personhood" to recognize women's political status and legal identity in Canada. For much of the past century, many Canadian women have laboured to change the laws so that women would be considered, firstly, persons, and later, in legal control of their own persons and property. Although the women who struggled to gain legal status as persons so that they might serve in the Senate or hold political office were successful in 1929, other reforms have been slow and unsteady. For example, in Ontario, women were allotted separate legal personalities and allowed a part share in some of the property acquired during the marriage only when the *Family Law Reform Act* was enacted in 1976. The prospect of equally sharing the value of property acquired during marriage was delayed until passage of *Ontario Family Law Act*, in 1985. The other provinces followed similar paths in enhancing the rights of women to some forms of real and personal property.

Developments in biotechnology draw attention to the limitations in the concept of property and the ways that it can regulate access and relationships to human tissues. The discourses on reproductive technologies or, more specifically, on the status of both the foetus and the pregnant body in the light of these technologies, destabilize the political gains:

> [the] social nature of reproductive technology is made ever starker by the hearing of contentious cases in courts of law. Here, where reproductive practices enter the legal discourse, we see how notions of property and contract then shape our understandings of who 'owns' embryos and babies born of surrogacy arrangements (Zoloth-Dorfmnan, 1998:9).

In 1989, the legal status of the foetus was put to the Supreme Court of Canada in *Daigle*. The Supreme Court found that the foetus must be born alive to enjoy the rights of personhood. The legal status of a pregnant woman in Canadian law seemed, therefore, straightforward. However, the increasing technological visibility of the foetus, via techniques such as ultrasound and amniocentesis, accompanied by subsequent decisions in Canada and other jurisdictions, put the question of the legal status of the foetus, and hence of pregnant women, back into issue.

Through a deconstructive reading of the *Dobson* and *G.* cases, this thesis examines how foetal status emerges in juxtaposition to the status of pregnant women and examines the (in)applicability to pregnancy of the liberal legal framework of personhood, security of the person, and bodily integrity. This particular textual or analytical strategy is employed because "deconstruction provides a series of challenges and insights that may serve to make feminist theory more self-critical, more aware of necessary conceptual and political investments and the cost of these investments, and thus more effective and more incisive in its struggles than it may have been before or beyond deconstruction" (Grosz, 1997:75).

1.5 Pregnant Women, Foetuses and Property

Both feminists and those who employ the methodologies supplied by post-structuralism have exposed the violence of the binary oppositions that characterize western metaphysics. Feminists have long contended that these oppositions are ordered in such a way as to privilege the masculine over the feminine: public/private, mind/body, reason/emotion, political/personal, personhood/property. In most Canadian provinces, until the middle of the twentieth century or later, women lost upon marriage the right to manage their property under the doctrine of coverture, where "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything" (Blackstone, 1765:430,433). Thus, under coverture, a wife's "legal identity was obliterated at marriage and she was entirely under the power and control of her husband" (Chambers, 1997:3). By exchanging rights to personhood and property for the protection of marriage, "marriage, for women, represented civil death" (Chambers, 1997:3). In Canada, reforms to marriage and property law were incremental (Backhouse, 1988).

The debates on how the status of the foetus is defined centre largely on the dichotomous issues of personhood and property. When the foetus is defined as a person, what follows is a "maternal/foetal conflict" regarding rights. When the foetus is defined as property, then there are concerns about commodification and 'market alienation' of the body (Radin, 1987). That debate gives rise to a further concern that "poverty, limited life choices, and the marketplace itself can shape the purchase, sale, and use of the various pieces of the reproductive process, all of which rely on the compliant female body as the only available location for the technology itself and all of which make the

ideal of 'inalienable rights' suspect" (Zoloth-Dorfmnan, 1998:9). The increasing visibility of the foetus afforded by reproductive technologies renders the foetus both familiar and knowable and potentially fosters the relational and participatory claims to it from third parties. Indeed, even the phrase 'third party' is problematic in legal discourses of pregnant subjectivity.

The political, legal, and ethical discourses surrounding the status of the foetus, whether framed in terms of its status as property or as person, shows that each definition is unsatisfactory and incomplete and is burdened with inappropriate implications. The concept of "person" is not an equivalent but opposite alternative to the concept of "property." The better pairing is, rather, person/non-person. Similarly, "property" does not have an actual opposite other than "not property." When dealing with property concepts, if a thing does not belong to an identifiable individual or collective (the state, a corporate person, or held in common), then the only recourse within the legal framework is to conceive of it as *res nullius*, or "that which belongs to no one." That the concept of "property" should have no immediate, obvious opposite suggests its transcendental character. This thesis examines this oppositional framework using deconstruction as a textual strategy or method of critique and examines some of the alternatives and (re)conceptions of the *conceptus* or foetus and the pregnant body. Legal discourses about foetal rights, a woman's right to bodily integrity, and other related issues raise implications for the larger question of whether there are property rights or possessory interests in one's own body and body parts and how these issues might play out in a Canadian context as reproductive and genetic technologies continue to develop. To modify the Foucauldian concept of *biopolitics* (Foucault, 1984:262), it would seem that

there exists a kind of *creatiopolitics* where public, legal, and legislative (in)decisions are engaged in a political and dialectical process of (re)definition and interpretation. These challenges created the basis for this thesis which looks, in an exploratory and deconstructive fashion, at the way legal discourse constructs the pregnant body. In an early cross-cultural study of reproduction, Brigitte Jordan wrote that "birth is everywhere socially marked and shaped" (in Davis-Floyd and Sargeant, 1996:111), and, indeed pregnant women are socially, materially, and discursively shaped and marked.

1.6 Chapter Outline

Chapter Two provides a literature review for the theoretical context that informs the research including science and technology studies, with anthropological and feminist analyses of science, reproduction, and reproductive and genetic technologies. Chapter Three describes the methodology used to scrutinize the legal decisions and outlines the salient points in post-structuralism for a deconstructive reading. The aim of this investigation is to provide a theoretically informed descriptive and interpretive case-based study of legal discourses on the pregnant body. This thesis is not meant as a corrective or definitive interpretation and acknowledges its partiality. Post-structuralist inquiry does not provide for totalizing explanations, but "can offer partial and located theory and practice...[it] is grounded by the specificity of the phenomenon or practice which it seeks to explain" (Weedon, 1987:111). Chapter Four applies the deconstructive reading to the legal decisions, *Dobson* and *G.*, and summarizes other intersections of the pregnant body and the law. Finally, Chapter Five explores emergent theories of the body and pregnancy in light of the analysis of the legal decisions.

Chapter Two: Theoretical Context

2.1 Introduction

Since the 1970s the body, and especially the pregnant body, has become ever more technologically accessible. The first part of this section reviews the technologies themselves, and the second part reviews recent scholarship on the interpretations and impacts of these technologies.

2.2 Reproductive and Genetic Technologies

Artificial insemination in humans has been practiced since the early part of the twentieth century and hormone therapies for over 60 years. The first "test tube baby" was delivered in 1978. However, interventions designed to promote, palliate, and prevent fertility, gestation or birth have long been part of human reproduction. What is relatively new about human intervention and control in the birthing process is the appropriation of this role by allopathy and evidence-based medicine that supports the use of many of the newer techniques. Reproductive technologies are commonly thought of as those that can be considered "assisted reproductive technologies," that is, those interventions designed to induce fertilization. These include ovulation inducement and control, gamete harvesting and donation, *in vitro* fertilization, and gestational surrogacy. Reproductive technologies, in the larger sense, comprise a host of interventions or actions for control over fertility, gestation and birth with contraceptives and abortion-induction technologies, fetal monitoring and assessment, including amniocentesis and ultrasound, reproductive cloning, and an extensive array of birthing methods, techniques, tools, pharmaceuticals, and practices.

What are commonly referred to as reproductive and genetic technologies (RGT) are comprised of several kinds of therapeutic and clinical interventions into conception, pregnancy, and human reproductive materials. The use of these technologies may become far more prevalent as the age at which Canadian women give birth is increasing. Between 1986 and 1997, the age-specific fertility rate (the number of live births in each age group divided by the total population of women in that age group) decreased for Canadian women under the age of thirty, but increased amongst women thirty and over (Statistics Canada, 1998).

The reports of the *Royal Commission on New Reproductive Technologies* were delivered in 1993 and they were followed three years later by Bill C-47: *The Human Reproductive and Genetic Technologies Act*, which was introduced into Parliament in November of 1996. Bill C-47 died on the order paper when an election was called and Parliament dissolved before it reached third reading and a vote on its passage. There was however, a wealth of discussion within the House by various Members of Parliament and expert submissions from members of various organizations to the House Standing Committee on Health. In 2002, The Minister of Health introduced revised legislation to the House of Commons, Bill C-6: *An Act Respecting Assisted Human Reproduction and Related Research* (formerly Bill C-13) which addressed the regulation of reproductive and genetic technologies, surrogacy agreements, and scientific experimentation with reproductive materials.

2.2.1 Ethical Issues of Reproductive and Genetic Technologies

The use of the various technologies of procreation is imbued with many complicated ethical, social, and political issues that are not easily resolved. Some of the

issues raised by the use of these technologies are the interests of the potential offspring in terms of their medical, genetic and social history contrasted with donor anonymity. What is also at question is the appropriateness of pre-implantation genetic diagnosis and possible termination of pregnancy in relation to changing and political definitions of "disease" and "disability." Reproductive and genetic technologies also question the adequacy of informed consent by patients when full disclosure cannot be perfect (as some of these procedures are still experimental with limited long-term assessment of safety). Consideration must also be given to the patient's understanding of risk, success and failure rates. Accompanying these technologies are the possibilities of sub-optimal outcomes including medical complications in the patient and potential offspring, higher order pregnancies, pregnancy loss, or no pregnancy at all. Issues of social justice are raised with reproductive and genetic technologies as they impact access to treatment which can be limited by cost, restriction of public funding, distribution of resources, and social criteria with the potential to limit treatment on the basis of social biases regarding same-sex couples or single and older women, and the potential for commercialization of reproductive tissues. Of anthropological interest is the expansion of kinship and the problematic category of parent (Cannell, 1990; Edwards et al., 1993), where a single child might claim as 'parents' ovum donor, semen donor, surrogate gestatrix, and the persons who undertake antenatal care. Cloned offspring would further complicate these relations (Mykitiuk, 2002).

2.2.2 Regulation of Reproductive and Genetic Technologies

In Canada, the regulation of RGTs is a complex patchwork of provincial and federal laws. The handling of sperm is regulated under the *Food and Drug Act* of 1996,

the *Excise Tax Act* (for imported sperm) and the *Family Acts* of Quebec, Newfoundland and the Yukon Territory. Each province has its own Act to regulate the donation of non-reproductive tissues. Quebec regulates ovum donation where the gestational mother is the legal mother. Canada does not have a registry of data on IVF outcomes. The federal Minister of Health proposed a national register and a regulatory body for reproductive and genetic technologies. By early 2004, legislation passed in the Canadian Parliament. Health Canada regulates medications used in fertility treatments. The use of foetuses, foetal tissue, embryos, zygotes, and gametes in scientific research is regulated by the *Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans.* Clinical procedures are self-regulated by guidelines set out by various medical professional societies at the provincial level.

2.3 Anthropology and Technology Studies

One element informing and serving as a background to this study is the growing field of 'Science and Technology Studies' (STS), often referred to as Social Studies of Science or Sociology of Scientific Knowledge (SSK). D. J. Hess describes science and technology studies "as an interdisciplinary field with constituent disciplines in anthropology, cultural studies, feminist studies, history, philosophy, political science, rhetoric, social psychology, and sociology of science and technology. Furthermore, because there is a tradition of "anthropological" or "ethnographic" studies within SSK, it should be of particular interest to anthropologists" (Hess, 1997:144). A common theme throughout STS is a rejection of 'objectivism' and an effort to understand the ways in which scientific facts are 'constructed' in social, cultural, political, commercial, and technological contexts. Thomas Kuhn's *The Structure of Scientific Revolutions* (1962),

was influential in this field as he discussed the way scientific paradigms change in relation to and under the influence of social factors. Bruno Latour called "technoscience" (Latour, 1987:174) that which encompasses the natural sciences, its tools and techniques as well as the practical and social contexts of scientists and sciences. "I will use the word technoscience," Bruno Latour writes, "to describe all the elements tied to the scientific contents no matter how dirty, unexpected or foreign they seem" (Latour, 1987:174). One of the key contributions of STS is elucidating how science, both as a discipline and in technological applications, is an activity interwoven in both culture and politics, and is thus open to both interpretive and activist understanding as well as transformation.

Science and technology studies are often centred on a specific technology or tool. For instance, the use of ultrasound for foetal monitoring (Rapp, 1997; 1999) has been described in its social constructionist context, through the use of ethnographic research (and other qualitative methods), and shows how ideas and relationships frame the technology and how the technology shapes ideas and relationships. Ian Hacking (1999) makes a very valuable contribution to the understanding of the social construction 'bandwagon'. It is not the object (i.e. the tool itself), but the idea of the tool (or self, or woman refugee, or literacy, or pregnancy etc.) that is constructed. Many concepts, beliefs, or ideas taken for granted to be a 'fact', such as the concepts of gender or sex, exist in a matrix of historical, social and other forces.

Casper and Koening (1996) outline the various ways in which anthropologists are becoming involved in technoscience studies. One of the challenges to anthropologists interested in studying Western biomedicine is the "inadequacy of theoretical frameworks for understanding such practices" (Casper and Koening, 1996:525), hence the adoption

of various interdisciplinary approaches by anthropologists. One of the perspectives for the analysis of technology increasingly used by anthropologists is that of social constructionism. Casper and Koening provide a summary of the development of constructionist perspectives or approaches whereby adherents "asserted that scientific and biomedical knowledge should be understood as social products. In contrast to the armchair theorizing of the philosophy of science, the new approaches stress *empirical* investigations, both historical and contemporary" (Casper and Koening, 1996:528). This interdisciplinary approach to science and technology studies has an interesting and varied history (Hacking, 1999; Hess, 1997). This reconfiguration of science and culture, and science as culture (Franklin, 1995), has led to what can be called "more nuanced analyses of the social and cultural nature of science, technology, and medicine... This field extends beyond the confines of the laboratory or operating room to encompass a variety of resources in the 'wider' culture... to a view that the influence of technology can only be understood in terms of the meanings that people ascribe to it. The reality is much more complicated, and this complexity is reflected in emergent perspectives that emphasize both meaning and materiality" (Casper and Koening, 1996:528-9).

Sarah Franklin recapitulated the importance of science and technology studies and sees the "biomedical technologies as agents, sites, lenses, or intersections," which offer "important alternatives to the notion that such instruments are 'simply tools' - the 'mere vehicles' of instrumental reason, experimental science, or clinical therapies" (Franklin, 1996:683).

One of the first to introduce and incorporate science and technology studies to anthropology was Bryan Pfaffenberger (1992a). He outlined the history of early

anthropological study of material culture and how it was 'revived' by other disciplines in the guise of science and technology studies. The meanings embodied in or ascribed to technologies are but one part of Pfaffenberger's description of the *sociotechnical system* or *technological drama* (Pfaffenberger, 1992a; 1992b). For research in science and technology studies "[c]onstructionist and anthropological approaches are used to analyze technology and its embeddedness in complex sociotechnical systems. These perspectives elucidate the social, cultural, economic, and political dimensions of technology development and use in medicine and other areas, recognizing that the use of technology cannot be independent of its social and cultural contexts" (Casper and Koening, 1996:529).

Biological and social reproduction can both be understood in a variety of ways that are all variously implicated in the discourses of the pregnant body. The most straightforward discourse of biological reproduction is the technical description of the reproduction of the species: medical and biological accounts of fertilization, gestation, and birth. STS writers expand this realm to examine how the medical and biological accounts are imagined and managed, especially in an era of reproductive technologies (Martin, 1997, 1990, 1991). Social reproduction encompasses the various theories of how social knowledge and relations are developed and transmitted or re-produced in a given culture. It is also useful to think of social reproduction in terms of discourses that make reproduction a social or public act. It is questionable that, even if ectogenesis were possible, reproduction would ever be non-social or non-public. Reproductive technologies open up new spaces and raise questions about how social formations, especially inequalities, might be reproduced or transformed. After a survey of the

writings on the imagined and actual impact of reproductive technologies on women's lives and experiences, there is nothing about their impact that is unequivocal.

The anthropology of science has more recently embraced a "third culture" of communication between the humanities and science in the works of such writers as Laura Nader (1996), Donna Haraway (1991), and Paul Rabinow (1996). It is an anthropology that interrogates the cultural authority of scientific disciplines and critiques the cultural assumptions in these disciplines. It also renders explicit the idealized separation of science from social formations through assumptions that scientific knowledge is 'discovered,' free of actors and values, and, consequently, free of responsibility.

2.4 Feminism and the Politics of Reproduction

Contemporary feminist concerns with the intersections of reproduction, power, and technologies rhizomatically stem from early accounts that theorized motherhood and reproduction as patriarchal institutions (Firestone, 1970; Rich, 1976; Donninson, 1997; O'Brien, 1981) and has included a number of analyses concerned with the control of reproduction and the implications of reproductive technologies (Arditti, Duelli-Klein, and Minden, 1984; Baruch, D'Adamo, and Seager, 1988; Corea, 1986; Hartmann, 1987; Homans, 1986; Klein, 1989; Martin, 1987; Overall, 1989; Purdy, 1989; Rothman, 1986, 1989; Spallone, 1989; Spallone and Steinberg, 1987; Stanworth, 1987). The debate surrounding these technologies diversified in the 1990s and examined issues of fetal testing and sonography (Rapp, 1997, 1999), kinship (Strathern, 1992a, 1992b), infertility, (Franklin, 1991, 1992a, 1992b) surrogacy (Ragone, 1994), ethical implications of these technologies (Rodin and Collins, 1991); and related critical feminist analyses (McNeil, Varcoe, and Yearley, 1990; Scutt, 1990; Hartouni, 1991; Martin, 1991, 1994; Holmes,

1992; Rowland 1992; Spallone, 1992; Stacey, 1992; Pfeffer, 1993; Raymond, 1993; Adams, 1994). These among other theorists have problematized and interrogated subjects once considered immutable and natural, such as nature, technology, gender, and the body.

2.5 Feminism, Technology, and the Gendered Body

A variety of recent scholarship crosses the boundaries between medical anthropology and science studies (Dumit, 1997). Medical anthropology has been taken in new directions by joining simple ethnographic and comparative studies of medical knowledge and practices to interpretive approaches, critical theory, and cultural studies of science. Many studies in this field generally assume the social construction of scientific knowledge although this epistemic position is also contested (Good, 1994; Hess, 1997; Rouse, 1992; Traweek, 1993). Some of the issues addressed in this area are studies on phenomenology, illness, and healing (Csordas, 1994; Benner, 1994), the postcolonial production of bodies (Harding, 1993), the ethnography of contemporary biotechnological research (Dubinskas, 1988; Martin, 1994; Rabinow, 1996) and clinical psychological research (Eisenberg, 1995; Young, 1995).

The study of science and technology and its implications for women are an important but ambiguous project for feminist researchers. Many feminist authors have critically explored the images and intersections of gender, science and technology (Jordanova, 1989; Martin, 1991, 1994; Schiebinger, 1993). Judy Wajcman (1991) outlined some of the positions taken by feminist research toward the study of science and technology. Wajcman herself located technology in an elite masculine culture where "women's exclusion from, and rejection of, technology is made more explicable by an

analysis of technology as a culture that expresses and consolidates relations among men" (Wajcman, 1991:22). For Wajcman, technology is subject to political and social relations and "technological change is a process subject to struggles for control by different groups. As a result, the outcomes depend primarily on the distribution of power and resources within society" (Wajcman, 1991:23). She outlined the implications of technology for the gendered division of labour, arguing that "[a]lthough new technologies do represent a force for change... the outcomes are constrained by the pre-existing organization of work, of which gender is an integral part" (Wajcman, 1991:28). Reproductive technologies must be analyzed contextually and historically because, although "technologies operate within and reinforce pre-existing social inequalities" (Wajcman, 1991:78), the effects of these technologies are often contradictory and multiple. Further, she contended that "sexual relations in combination with population policies and market forces have shaped contraceptive technology. And, in turn, the design or form of the technology has been crucial to its use" (Wajcman, 1991:78). Wajcman also considered domestic technologies (the mechanization of housework) and the household itself as gendered, where "[s]exual divisions are literally built into houses and indeed the whole structure of the urban system" (Wajcman, 1991:110). She argued for a feminist theory of technology while mindful that technology is specific to context and social relations and therefore "the relationship between technological and social change is fundamentally indeterminate" (Wajcman, 1991:163).

Jana Sawicki, in *Disciplining Foucault: Feminism, Power, and the Body* (1991) provided a concise summary of the prevailing feminist views on reproductive technologies. She noted that radical feminism either embraced reproductive technologies

as a means of liberating women in making reproductive choices, or, more frequently, feminism largely dismissed the technologies as social control or domination over women under the rubric of patriarchy, capitalism, or both. Sawicki herself proposed a different framework within which to place analyses of reproductive technologies, that of a Foucauldian perspective where:

> The history of women's procreative bodies is a history of multiple origins, that is, a history of multiple centers of power, multiple innovations, with no discrete or unified origin. It is a history marked by resistance and struggle. Thinking specifically about the history of childbirth in America, a Foucauldian feminist does not assume a priori that the new reproductive technologies are the product of a long standing male "desire" to control women's bodies or to usurp procreation. This does not mean that such motives do not play a role in this history of medicalization, but it does deny that they direct the process overall.
>
> Foucault described the social field as a network of intersecting practices and discourses, an interplay of non-egalitarian, shifting power relations. Individuals and groups do not possess power but rather occupy various and shifting positions in this network of relations – positions of power and resistance. Thus, although policies governing reproductive medicine and new reproductive technologies in the United States today are largely controlled by non-feminist and anti-feminist forces, it is plausible to assume that women and feminists have played a role in defining the past and current practices, for better or worse. It is also the case that these non- and anti-feminist forces are not unified or monolithic. Their control is neither total nor centrally orchestrated.
>
> Employing a bottom-up analysis, a Foucauldian feminist analysis would describe the present situation as the outcome of a myriad of micro-practices, struggles, tactics and counter-tactics... (Sawicki, 1991:80-81).

Sawicki further applied a Foucauldian perspective to reproductive technologies, asserting that they fit one form of Foucault's model of biopower, that of disciplinary power. This form of biopower is constituted of disciplinary technologies that:

> are not primarily repressive mechanisms. In other words, they do not operate primarily through violence against or seizure of women's bodies or bodily processes, but rather by producing new objects and subjects of knowledge, by inciting and channeling desires, generating and focusing individual and group energies, and establishing bodily norms and

> techniques for observing, monitoring, and controlling bodily movements, processes, and capacities. Disciplinary technologies control the body through techniques that simultaneously render it more useful, more powerful, and more docile (Sawicki, 1991:83).

The argument that reproductive technologies can be better understood as disciplinary practices is furthered by Sawicki's detailed examination of the technologies as they 'fit' the model (Sawicki, 1991:84-86).

There is a second element to Foucault's biopower. It is not only constituted of "anatomo-politics of the human body" or disciplinary power focusing on the disciplining of the individual body of the subject, but is also constituted of "biopolitics of the population" or regulatory power which focuses on the organization and management of the population (Foucault, 1984:262). Regulatory power is instituted by the state and works through the art of government, or governmentality. Foucault further explained this aspect of biopolitics where:

> the true object of the police becomes, at the end of the eighteenth century, the population; or in other words, the state has essentially to take care of men as a population. It wields its power over living beings as living beings, and its politics, therefore, has to be BIOPOLITICS. Since the population is nothing more than what the state takes care of for its own sake, of course, the state is entitled to slaughter it, if necessary. So the reverse of biopolitics is thanatopolitics (Foucault, 1988:160).

Sawicki further claimed that reproductive technologies are representative of "the most recent set of discourses (systems of knowledge, classification, measurement, testing, treatment and so forth) that constitute a disciplinary technology of sex" (Sawicki, 1991:83) and the body. Much of the interpretation of Foucault's biopower is restricted to discourses of "the body" and "body politics" (Hekman, 1996; McNay, 1992). Sawicki noted, however, that the field is broad and that "there are many discourses and practices in the contexts of medicine, law, religion, family planning agencies, consumer protection

agencies, the insurance and pharmaceutical industries, the women's health movement, and social welfare agencies that struggle to influence reproductive politics and the social construction of motherhood" (Sawicki, 1991:81).

As part of her commentary on the relationship of technology and social relations, Donna Haraway's "Cyborg Manifesto" is an attempt at "ironic political myth" (Haraway, 1991:149) for which the concept of the 'cyborg' is central. Haraway describes a cyborg as "a cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction" (Haraway, 1991:149). Haraway asserted that in "the late twentieth century, our time, a mythic time, we are all chimeras, theorized and fabricated hybrids of machine and organism; in short, we are cyborgs" (Haraway, 1991:150). By using the metaphor of cyborg, Haraway unmasks both the politics of identity as well as the lived reality of technologies and she is "making an argument for the cyborg as a fiction mapping our social and bodily reality and as an imaginative resource suggesting some very fruitful couplings" (Haraway, 1991:150). Haraway argued that what is perceived of as 'natural' was never actually so and criticized the notion of an organic self. For Haraway, the cyborg is situated as a hybrid of nature and culture with indiscriminate boundaries and it "is a creature in a post-gender world; it has no truck with bisexuality, pre-oedipal symbiosis, unalienated labour, or other seductions to organic wholeness through a final appropriation of all the powers of the parts into a higher unity" (Haraway, 1991:150). The cyborg can also be used as a locus for political action because, Haraway asserted, the cyborg myth is "about transgressed boundaries, potent fusions, and dangerous possibilities which progressive people might explore as one part of needed political work" (Haraway, 1991:154). Haraway cautioned against a pretense of

singularity or unity to understand the "limits of identification" (Haraway, 1991:157) because "[t]axonomies of feminism produce epistemologies to police deviation from official women's experience" (Haraway, 1991:156). She criticized the totalizing project of taxonomy in feminism, and with the Manifesto, aimed "to contribute to socialist-feminist culture and theory in a postmodernist, non-naturalistic mode ... imagining a world without gender" (Haraway, 1991:150). Haraway advocated polymorphism and polyvocality and thus condemned the Western/ Humanist/ Enlightenment paradigms as an "informatics of domination" (Haraway, 1991:161). The cyborg myth is about partiality, fracture, fusions, and transgressed boundaries that Haraway hopes will represent "lived social and bodily realities in which people are not afraid of their joint kinship with animals and machines, not afraid of permanently partial identities and contradictory standpoints" (Haraway, 1991:154). Haraway restated her central arguments at the end of the Manifesto which are, firstly, that "[t]he production of universal, totalizing theory is a major mistake that misses most of reality, probably always, but certainly now," secondly, that "[t]aking responsibility for the social relations of science and technology means refusing an anti-science metaphysics, a demonology of technology... embracing the skilful task of reconstructing the boundaries of daily life, in partial connection with others, in communication with all of our parts," and lastly, that the cyborg image suggests a "way out of the maze of dualisms in which we have explained our bodies and our tools to ourselves" (Haraway, 1991:181).

The imagery of the cyborg has been fetishized in popular culture and taken hold in contemporary scholarship where "[a]nyone with an artificial organ, limb or supplement (like a pacemaker), anyone reprogrammed to resist disease (immunized) or drugged to

think/behave/feel better (psychopharmacology) is technically a cyborg" (Gray et al., 1995:322). Cyborg technologies can affect lives because they "can be restorative, in that they restore lost functions and replace lost organs and limbs; they can be normalizing, in that they restore some creature to indistinguishable normality; they can be ambiguously reconfiguring, creating posthuman creatures equal to but different from humans... and they can be enhancing" (Gray et al., 1995:3). Cyborg imagery or 'cyborgology' opens up intriguing possibilities as an icon that permits interdisciplinary theorizing about the transgression of boundaries, multiple identities, the discourses of scientific and cultural knowledges, and their interaction.

Judith Squires (1996) noted that the critique proffered by Haraway is sufficient without the image of the cyborg because "one can reject the homogenizing strategies of grand narratives and challenge the universal pretensions of modernist thought ... one can explore the possibilities of flexible, transitory identities... without ever making recourse to cyborg imagery" (Squires, 1996:206). Rose Braidotti's (1994) feminist figuration of the "nomad" is influenced by Haraway's cyborg, but unlike the cyborg, the nomad is equipped with both gender and the Lacanian psychoanalytic unconscious which "develops the notion of a corporeal materiality by emphasizing the embodied and therefore sexually differentiated structure of the speaking subject" (Braidotti, 1994:3).

Another important contributor to the project of theorizing the relationship between technology and gender is Anne Balsamo, who, in *Technologies of the Gendered Body* aimed to "describe how certain technologies are, to borrow Wajcman's phrase, ideologically shaped by the operation of gender interests and, consequently, how they serve to reinforce traditional gendered patterns of power and authority" (Balsamo,

1996:10). The 'body' for Balsamo is both a product and a process: "[a]s a *product*, it is the material embodiment of ethnic, racial, and gender identities, as well as a staged performance, of beauty, of health...As a *process*, it is a way of knowing and marking the world, as well as a way of knowing and marking a 'self'" (Balsamo, 1996:3). In her analysis of the representations and practices of the gendered body, Balsamo is aware of the contradictory discourses of technology where "the popularization of body technologies disseminates new hopes and dreams of corporeal reconstruction and physical immortality, it also represses and obfuscates our awareness of new strains on and threats to the material body" (Balsamo,1996:2). Balsamo is also concerned with the intersection of gender with technologies that challenge naturalized boundaries. Balsamo found Haraway's concept of the cyborg useful where the cyborg "connects a discursive body with a historically material body by taking account of the ways in which the body is constructed within different social and cultural formations" (Balsamo, 1996:33).

2.6 Pregnant Bodies and Technology

Much of the feminist literature on Western representations of pregnancy and birth criticizes the dominant discourse which describes these as pathological events necessitating medical intervention resulting in women's sense of alienation from their pregnant bodies and the birth experience (Oakley, 1984; Jordan, 1993; Martin, 1987, 1990) and a devaluation of the embodied knowledge of pregnant women (Duden, 1993). As an example, if medical procedures to overcome infertility are medical treatments to 'cure' the disease of childlessness, then it is possible to consider adoption as a medical treatment rather than a social formation. This speaks to the discourses that pathologize

women's experience of childlessness into a disease that must be 'cured' rather than as a (perhaps deliberately chosen) state-of-being.

Anne Balsamo discussed the complexity of the relationship between technology and the maternal body and regarded reproductive technologies as providing "the means for exercising power relations on the flesh of the female body" (Balsamo, 1996:82). These technologies introduce mechanisms for the discipline and not only surveillance of pregnant women, but of all women as if "they were all potential maternal bodies, and maternal bodies as if they were all potentially criminal" (Balsamo, 1996:83). Balsamo echoed the concerns of some other feminist writers who suggested that these technologies deprive women of their bodily sovereignty, erase the material pregnant body and constitute the active subjectivity of an imagined foetus, and valorize pregnancy while discounting the difficulties and pain many women experience. However, Balsamo urged that technologies be regarded not as static tools, but as 'formations' which "are not monolithic structures that impose a singular reality or set of consequences on all women equally" (Balsamo, 1996:96).

Marilyn Maness Mehaffy (2000) used Haraway's concept of 'cybernetic organism' to describe the "sonographic fetus" which "straddles the conventional boundary between an organic body and a digital text. It is, in Haraway's terms, a 'hybrid,' occupying the space of virtuality" (Maness Mehaffy, 2000: 181). The sonograph (or ultrasound) confers visibility and authenticity and reifies "an assertion of autonomous fetal subjectivity" (Maness Mehaffy, 2000: 181). Imaging technology such as sonography "carries the potential for 'infinitely mobile vision' and different patterns of (inter)subjectivity" (Maness Mehaffy, 2000: 190). The body, then "ceases to be a stable

spatial map of normalized functions and instead emerges as a highly mobile field of strategic differences" (Haraway, 1991:211). The foetus can then be seen as an independent image on a monitor, erasing, or at least absenting, the body of the woman carrying the foetus. Drawing on Michel Foucault, Rosalind Pollack Petchesky (1987) summarized the impact of sonography as "a kind of panoptics of the womb" (Petchesky, 1987:69) or both a self and social surveillance of the pregnant body. However, Petchesky cautioned that sonography and other reproductive technologies should not simply be regarded as "an omnivorous male plot to take over their [women's] reproductive capacities," because this view denies the possibility of women as "agents of their own reproductive destinies" (Petchesky, 1987:72). Paula A. Treichler, Lisa Cartwright, and Constance Penley also contended that imaging technologies have a "performative character" and that these technologies are a "staging ground" in a struggle for agency and control (Treichler, Cartwright, and Penley, 1998:3). The "new ways of imaging, controlling, intervening, remaking, possibly even choosing bodies have participated in a complete reshaping of the notion of the body in the cultural imaginary and a transformation of our experience of actual human bodies" (Lenoir, 2000).

The discourse of the ultrasonically-constructed whole baby encourages women to view their foetuses as children well before birth. The importance of this self and social surveillance to this thesis is that it is an important component in enabling the legal regulation of the pregnant body. It is a process that mediates and facilitates foetal subjectivity. The foetus is not only constructed as a legal person, but also as a patient or 'work object' (Casper, 1998), where foetal tissue is scientific play-doh in medical discourse (Casper, 1995:191), as a cultural sign (Duden, 1993:10), as a manipulable,

public object (Hartouni, 1997), and as a speculum that exposes discourses (Haraway, 1997).

For Carol Stabile, the "enduring pervasiveness of woman/nature, man/culture binarism... and its implications for feminist approaches to technology and modernity" (Stabile, 1994:1) is of central importance. She found two problematic responses characteristic of feminist scholarship on technology: technophobia, or "reactionary essentialist formations," and technomania as "political strategies framed around fragmentary and destabilized theories of identity" (Stabile, 1994:1). Stabile was also concerned with the invisibility of class as a unit of analysis in these approaches to technology. In addressing the concept of foetal photography, Stabile contended that foetal representations through visual technologies transform the pregnant body from "a benevolent, maternal environment into an inhospitable waste land, at war with the 'innocent person' within" (Stabile, 1994:70). Stabile was concerned with how visual technology renders invisible the pregnant body, constructing it as hostile to an imagined person. The surveilled "[p]regnant bodies remain potently and patently hierarchical systems that must be governed with an iron hand from outside, but through the mediating construct of the fetus" (Stabile, 1994:89). Stabile argued for an approach that would situate the pregnant body as real, contradictory and material, and an understanding of women's reproduction as labour (Stabile, 1994:94).

In an analysis of the abortifacient RU 486, Janice Raymond (1997) asserted that women's reproductive bodies are increasingly organized through chemical intervention. Raymond drew on themes of surveillance and medicalization of the pregnant body and contended that the erasure of the pregnant body can also be identified in reproductive

medical discourses of pain and complication management which "transforms women's pain into insignificance" (Raymond, 1997:123), and where women are prepared to "*endure anything to become pregnant or to prevent pregnancy*" (Raymond, 1997:124, emphasis in original). Important to the discourses surrounding reproductive technologies is the concept of choice, which Raymond finds problematic, asserting that the privileging of the individualized concept of 'free will' functions as "smoke screens for what is really medical experimentation and medical abuse" (Raymond, 1997:126).

2.7 Anthropological Investigations of Legal Proceedings

Writers such as Laura Nader (2002) are further developing the rapprochement between legal studies, anthropology, and cultural studies. Nader summarized the history of legal anthropology and the ways in which legal models are naturalized. Elizabeth Mertz (1992) encouraged the use of linguistic tools and an appreciation of the language of the law in legal anthropology.

Laws regulate relations between governments and citizens as well as reflect cultural norms. This investigation assumes that an examination of the *Dobson* and *G.* cases can provide insight and reveal specificities of cultural discourses. The legal realm is an important site of anthropological inquiry because it is part of a complex cultural system and can be studied as such, and not in isolation.

Although the language used in the legal setting is not immutable, but contextually created, legal institutions have a considerable impact on the definition and regulation of normative behaviour. In the context of institutional settings, such as medical and legal settings, power imbalances and normative behaviours are actualized because, as Eric Wolf (1982) explained:

> The ability to bestow meanings – to "name" things, acts and ideas – is a source of power. Control of communication allows the managers of ideology to lay down the categories through which reality is to be perceived. Conversely, this entails the ability to deny the existence of alternative categories, to assign them to the realm of disorder and chaos, to render them socially and symbolically invisible (Wolf, 1982:338).

Similarly, Gordon argued that "[t]he power exerted by a legal regime consists less in the force it can bring to bear upon violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live" (Gordon, 1984:109). Carol Smart (1989), in her analysis, *Feminism and the Power of the Law*, asserted that the law, like science, sets itself apart from other discourses and makes a claim to the Foucauldian concept of 'truth' and the exercise of power (Smart, 1989:9). Instead of conceiving of the law as 'sexist' or 'male', Smart contended that the law is gendered and is therefore implicated in a process of fixing gender identities or producing gender difference rather than applying laws to previously gendered subjects (Smart, 1989:10).

Jacques Derrida encouraged the applicability of deconstruction to law and notes the worth of "a critique of juridical ideology, a desedimentation of the superstructures of law that both hide and reflect the economic and political interests of the dominant forces of society. This would be both possible and always useful" (Derrida, 1990:941). Post-structuralist questions and deconstructive analyses have been taken up in the Critical Legal Studies movement:

> to point to the blind spots, conflicts and antinomies that plague the discourse of received legal wisdom ... rejecting any version of the formalist view which holds law to be a system of neutral precepts and principles, possessed of its own self-validating logic and untainted by political interests. Such beliefs they regard as mere legitimating ruses in the service of an authoritarian discourse which smuggles in all manner of prejudicial values under cover of its own, self-serving objectivist rhetoric. The main object of the Critical Legal Theorists is to show how this

> discourse in fact gives rise to various disabling contradictions (Norris, 1989: 17).

Common law decision-making relies upon codified phrases such as "bodily integrity" that are vague, and thus constitutional interpretation will necessarily be culturally and politically shaped. Post-structuralist interrogations of the law "analyze the unspoken assumptions, the conflicts and aporias of mainstream legal discourse" (Norris, 1989: 18).

Supreme Court decisions in Canada have become texts that are "read and wielded as highly political documents that not only reflect partisan political struggles but also, occasionally, trigger debates about the deep structuring that our Constitution embodies" (Olchowy, 1999:649). This thesis provides neither a traditional legal analysis nor covers all of the issues pertaining to reproduction and technologies that arise out of legal interpretations of these cases. These have been provided elsewhere (Shewchuck, 1993; Diduck, 1998; Shanner, 1998; Turnbull, 2001) Such critical assessments of the law identify the ways in which these decisions guide the practice of scientists, medical professions, and industry.

2.7.1 Critical Legal Studies

Critical legal studies (CLS) proponents interrogate legal notions of legitimacy and authority as well as underlying, unstated assumptions in case law. CLS writers insist that the apparent unity of legal narrative can be contested by alternate narratives and multiplicity of meanings. Case law examination methods have been influenced by many post-structuralist and post-modernist theories, especially that of deconstruction as

developed by Jacques Derrida. J.M. Balkin (1998) offered three reasons for the applicability of deconstructive inquiry in law:

> First, ...deconstructive reading can show how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule. Second, deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking. This can be of value not only to the lawyer who seeks to reform existing institutions, but also to the legal philosopher and the legal historian. Third, deconstructive techniques offer both a new kind of interpretive strategy and a critique of conventional interpretations of legal texts (Balkin, 1998).

Both CLS and feminist legal theory are also informed by and critically engaged with Foucault's power/knowledge matrix (Bunting, 1992).

2.8 Conclusion

This thesis might be best thought of as mapping a small part of the cultural and legal narratives that regulate the flow of bodily components in Canada. This thesis rests on the assumption that a deconstructive reading of legal texts can provide insight into social formations and preoccupations. It also rests on what Catherine MacKinnon (1982) called the 'modernist legal myth' that laws are a reflection of and are based on 'natural' laws.

Chapter Three: Methodology

3.1 Introduction

The theoretical paradigm or framework for this analysis is a feminist post-structuralist approach (Denzin and Lincoln, 1994:13). This paradigm presumes the importance of gender in social relations and emphasizes the "problems with the social text, its logic, and its inability to ever represent fully the world of lived experience" (Denzin and Lincoln, 1994:13). Guba and Lincoln (1994:109) labelled both post-structuralist and feminist inquiry as "critical theory," but this might better be thought of as 'critical social theory' to distinguish it from the assemblage of work derived from the Frankfurt School of critical theory. The paradigms within critical social theory are diverse but share some common epistemological and ontological differences from positivism, post-positivism, and constructivism (Guba and Lincoln, 1994). Ontologically, critical social theories assume a reality "that was, over time, shaped by a congeries of social, political, cultural, economic, ethnic, and gender factors, and then crystallized (reified) into a series of structures that are now (inappropriately) taken as 'real,' that is, natural and immutable" (Guba and Lincoln, 1994:110). Critical social theory is epistemologically transactional and subjectivist where the knower and the known are "interactively linked" and thus findings are "value mediated" (Guba and Lincoln, 1994:110). Methodologically, critical social theory is dialogic and dialectical, and is directed at critique and transformation "to uncover and excavate those forms of historical and subjugated knowledges that point to experiences of suffering, conflict, and collective struggle ... to link the notion of historical understanding to elements of critique and hope" (Giroux, 1988 quoted in, Guba and Lincoln, 1994:110). Evaluation of qualitative

inquiry within this framework is a contested field as the positivist concepts of validity, reliability, and objectivity are challenged by the theoretical positions of post-structuralism itself (Smith and Deemer, 2000). Non-foundational or relativist research recognizes "the need for and value of plurality, multiplicity, the acceptance and celebration of differences, and so on" (Smith and Deemer, 2000:894), and thus "judging inquiry is a practical and moral affair, not an epistemological one" (Smith and Deemer, 2000:894). The 'goodness or quality criteria' for this thesis follows propositions of 'transgressive' forms of validity outlined in Lincoln and Guba (2000:180-182) and is guided as well by historical situatedness (Lincoln and Guba, 2000:170) and interpretive sufficiency (Christians, 2000:145-149).

The qualitative research strategy is, in a double sense, a case study. The method or "the technique for (or way of proceeding in) gathering evidence" (Harding: 1987:2) consists of a deconstructive reading or textual analysis of publicly available legal decisions and uses archival and scholarly work to inform the thesis. This research is library based and does not involve human subjects or artifacts.

What follows in this section is a description of the theoretical rationale of this thesis including a brief summary of some of the contributions of post-structuralist theory and a discussion on the 'method' of discourse analysis used, namely, deconstruction.

3.2 Reflexivity and Intersectionality

In critiquing what she called the "discursive colonialism" of much of Western feminist scholarship, Chandra Talpede Mohanty (1991) proposed the use of the theoretical model of "intersectionality" to construct the category of 'woman' in "a variety of political contexts that often exist simultaneously and overlaid on top of one another"

(Mohanty, 1991:65). She maintained that such analyses would be politically focused and context-specific and that feminist scholars must be critical and aware of how their work is implicated in the reproduction of cultural domination and ethnocentrism. Although at times, issues such as race, class, sexuality, and disability will be noted in this analysis, it is limited in its context and in its attention to these and other issues. This thesis is positioned as political and feminist and is informed by and opportunistically draws upon, many feminisms, including Marxist, materialist, and post-colonial feminisms, albeit with little explicit attention to all but post-structuralist feminisms. This research is critical in its orientation because of the real world implications of anthropological investigations, and an interest in social justice and the political positioning of women. It is also feminist research because women are placed at the centre of inquiry, the choice of pregnancy as a research topic reflects a feminist perspective, and it methodologically challenges patriarchal research traditions.

3.3 Post-Structuralism/Post-Modernism and Anthropology

In 1972, Dell Hymes warned anthropologists not to rush to cry "That's not Anthropology" because, though the phrase may have been useful as a "union label," he considered it to have become "an omen of intellectual death" (Hymes, 1972:45). Hymes called for the expansion of the discipline because:

> A social or cultural anthropology competent to deal with contemporary societies must integrate itself with the main line of social theory that has attempted to deal with the shaping of the modern world – the line from Marx, Weber, Durkheim and others through to contemporary sociology, ...political science, economics, and aspects of history and law (Hymes, 1972:41).

In the same volume, Laura Nader called upon anthropologists to 'study up', or study those in power, and the organizations who wield power because such an enterprise might, as a result, provide an "energizing and integrating effect for many students; scientific adequacy, and democratic relevance of scientific work" (Nader, 1972:284). Eric R. Wolf affirmed these sentiments, chastising an anthropology that had "systematically disregarded the problems of power" arguing that we must educate "ourselves in the realties of power" (Wolf, 1972:261).

Because of the emergence of various challenges to the ideas of authority, representation, and relevance in anthropology (Barrett, 1996:150-151), many anthropologists began to develop and draw upon post-modernist and post-structuralist themes (Clifford, 1988; Clifford and Marcus, 1986; Marcus and Fischer, 1986; Sangren, 1988; Sanjek, 1990; Tyler, 1984; Tyler, 1986). There are points of convergence as well as differences between 'post-modernism' and 'post-structuralism' although they are often used interchangeably. This thesis refers to the latter as the theoretical foundations of post-modernity, although others use the term 'post-modern social theory' (Kincheloe and McLaren, 2000:283). In a rejection of the limitations of orthodox anthropology, Rosemary Coombe stated that "cultural anthropology – in its dominant guises known as 'symbolic,' 'interpretive,' or 'hermeneutic' anthropology – is a modernist intellectual project" (Coombe, 1992:188). For Coombe, post-modernism:

> provokes us to reconceive the concept of culture in terms that integrate it into a study of power; it asks us to consider meaning in terms of relations of struggle embodied in everyday practice, and it demands that we view these cultural practices in local contexts, related in specific ways to historical conjectures in a multinational global economy (Coombe, 1992:188).

The structuralist project of classical anthropology limits our understanding because it:

> could recognize, respect, and celebrate differences between cultures, only, it appears, by effacing differences within cultures. Shared patterns are emphasized at the expense of internal inconsistencies, conflicts, and contradictions. By defining culture as shared meanings, zones of difference and the intersections of age, status, class, race, and gender, where different cultural interpretations and oppositional meanings are articulated appear as annoying exceptions rather than central areas of inquiry. By defining it as a system or a text, we remove it from the processes of its creation and the agencies of its construction (and deconstruction) (Coombe, 1992:190).

In outlining the cross-disciplinary history and uses of the concept of "structure," John Carlos Rowe asserted that "[w]hat poststructuralists like Jacques Derrida recognized as a problem in structuralism is the tendency to transform the *regulative function* of cultural signs into a totalizing explanatory system, such as those comprehensive approaches to cultural representation associated with *semiotics*" (Rowe, 1995:31, emphasis in original). Judith Butler echoed this view as "the question of whether or not a position is right, coherent, or interesting, is in this case, less informative than why it is we come to occupy and defend the territory we do, what it promises us, from what it promises to protect us" (Butler, 1995: 127-128).

Central to the post-modern concerns with reflexivity and representation is the move to redefine the concept of 'culture'. James Clifford and George Marcus argued that "culture is contested, temporal, and emergent...[one cannot] occupy, unambiguously, a bounded cultural world from which to journey out and analyse other cultures. Human ways of life increasingly influence, dominate, parody, translate, and subvert one another" (Clifford and Marcus, 1986:19,22).

Susan Wright described 'culture' as a "contested process of meaning-making" (Wright 1998:9). In this way, anthropological analyses examine key terms and concepts, their definitions, who has the power to define them, and how they are "used and contested by differently positioned actors who draw on local, national and global links in unequal relations of power" (Wright 1998:10). Wright further explained that for the critical anthropologist who wishes to engage and influence national and international politics that disempower and marginalize, it might be through "anthropological analyses of how politicians, policy advisors and decision-makers are deploying old and new meanings of 'culture'...[that we] might learn from our analyses of the political strategies of others how to intervene more effectively ourselves in the politicization of 'culture'" (Wright, 1998:14).

The figurations and formations of power are centrally positioned in a post-modern anthropology where "[c]ulture does not stand apart from the socially organized forms of inequality, domination, exploitation, and power that exist in society but is implicated in and inscribed by these practices, which are maintained and contested symbolically as well as instrumentally, discursively, as well as forcefully" (Coombe, 1992:190). Coombe suggested that a post-modern anthropology needs to "be sensitive to the workings of power-in-representation" (Coombe, 1992:193), such that it examines the "languages, systems of metaphors, and regimes of images that seem designed to silence those whom they embody in representation" (Connor, 1989:232).

The post-modernist position for anthropologists is also "one which contests or debates the continuing worth of the universal propositions of modernity's dominant discourses...These would include self consciousness and reflexiveness, an exploration of

the paradoxical, ambiguous, and open-ended nature of reality, and a rejection of the idea of integrated personality in favour of an emphasis upon the multiple cultural intersections that constitute a conflicted subjectivity" (Coombe, 1992:192). Post-modernism rejects totalizing accounts of culture, society and history as well as the search for foundational truth claims (Coombe, 1992:192).

Anthropologists have traditionally been involved in describing the dimensions of the 'peripheries' or margins. This is, on one level, consistent with the post-modernist strategy of deconstructing modernism "in order to rewrite it, to open its closed systems... to the 'heterogeneity' of texts, to rewrite its universal techniques... in short, to challenge its masternarratives with the 'discourses of others'" (Foster, 1983:xi).

Not only does a post-modernist anthropology posit that knowledge is socially and historically constructed, it concerns itself with the "cultural politics of quotidian practice" (Coombe, 1992:194). Here, according to Coombe, post-modern anthropology is concerned with local, fractured, and multiple practices of everyday life that comprise the 'cultural' (Coombe, 1992:194). Notwithstanding the concern for the interrogation of local, everyday cultural practices, post-modernist anthropology must also investigate the larger political economy where "culture must be understood politically in a late capitalist context where capitalist exchange relations and commodification are increasingly constitutive of knowledge, information, cultural exchange, and perhaps consciousness itself" (Coombe, 1992:195).

There is a variety of anthropological research that includes textual/discourse analysis, a social constructionism perspective, and is influenced by Foucauldian and other post-structuralist concepts (Chock, 1991; Chock, 1995; Clarke and Montini, 1993; Gupta,

1995; Helleiner, 1998; Iannatuono and Eyles, 1997; Mertz, 1988; Mertz, 1994a; Mertz, 1994b; Mulkay, 1994; Wajcman, 1994; Schneider, 1998; Stenson and Watt, 1999).

3.4 Texts

Anthropologists have collected and examined texts and narratives within and across cultures as well as analyzed their production (Bernard and Ryan, 1994:596-7). Often these texts have been indigenous literatures, oral histories and performances but have more recently included contemporary Western texts. Interpretations of these texts have included the use of structuralist methods such as grounded theory (Glaser and Strauss, 1967) and content analysis to code and identify metaphors (Lakoff and Johnson, 1980), schemas, and cultural themes (Spradley, 1979). Other approaches to textual analysis include rhetoric, hermeneutics, literary criticism, discourse analysis, and semiotics.

Structuralism, both theoretically and methodologically "derived from Sassurean linguistics, sees social reality as constructed largely by language, and language forms the material from which social research is fashioned" (Manning and Cullum-Swan, 1994:467). This 'linguistic turn' in social theory "sees 'documents' ... as 'texts,'... analytic phenomena produced by definitions and theoretical operations. Texts, ... become real and decipherable through a set of institutionally generated codes, or interpretive frames" (Manning and Cullum-Swan, 1994:467). This search for 'deep structure' has been characterized as "dehumanizing" (Manning and Cullum-Swan, 1994:467). Post-structuralism, however, is a modification of these themes because it "turns attention to the margins and reverses the usual adherence to dominant cultural values" (Manning and Cullum-Swan, 1994:468). In post-structuralism, a 'text' "is not an

object or thing, but an occasion for the interplay of multiple codes and perspectives. One must seek to extract and examine the operations or means by which meaning is conveyed" (Manning and Cullum-Swan, 1994:468). George Marcus and Michael Fischer (1986:26) contended that there has been a shift in emphasis in ethnography "from behaviour and social structure, undergirded by the goal of 'a natural science of society,' to meaning, symbols, and language, and to a renewed recognition, central to the human sciences, that life must fundamentally be conceived of as the negotiation of meanings." In this sense, 'texts' and 'narratives' are terms that are used metaphorically as artefacts of social formations. Greater importance is also placed on the reading of these texts (reader-response theory, i.e. Tompkins, 1980) than on their authorship (the concept of the 'death of the author', i.e. Barthes, 1977) as meaning in text is not 'discovered' so much as 'constructed' by the reader.

3.5 Language

Language, both verbal and non-verbal, its uses and meanings, are "situational, social, and cultural" (Bonvillain, 1993:1). From a social constructionist perspective, language represents and constitutes lived realities, and it mediates experience. That is, in any particular cultural context, language, as well as texts, may be indicative of what is culturally salient, but may also limit or influence what is culturally significant. This is not to say that language is static; culture change and linguistic innovation and plasticity result in linguistic change. However, language is also bound by culturally shared symbolic meaning (Bonvillain, 1993:71) and concepts are better understood as cultural constructs than as 'natural' or 'self-constitutive'. This basic presupposition of the social construction of reality is one where "[c]ultural assumptions, values and attitudes are not a

conceptual overlay which we may or may not place upon experience as we choose. It would be more correct to say that all experience is cultural ... we experience our 'world' in such a way that our culture is already present in the very experience itself" (Lakoff and Johnson, 1980:57). This approach differs from the empirical wherein language is a transparent medium for neutral description. Language, then, is not an objective lens through which one can formulate a disinterested presentation. Language is, rather, interested representation. Social constructionism "refers to constructing knowledge about reality, not constructing reality itself" (Shadish, 1995: 67), and underscores the ontologically relativistic position that there is no "direct access to a singular, stable, and fully knowable external reality," but rather, "understandings are contextually embedded, interpersonally forged, and necessarily limited" (Neimeyer 1993:1-2). Language, as a vehicle in a search for truth or meaning, offers no direct access to, or documentation of, the physical world because language itself varies across time and space and is implicated in issues of power and representation. Post-structuralist theory challenges "the assumption that there is no such thing as natural or given meaning in the world. Language does not reflect reality but gives it meaning" (Weedon, 1987: 102)

3.6 Discourse and Power

When setting out to locate meaning through language, the concept of 'discourse' and its analysis comes into play. Riggins (1997) described the traditionally understood notion of discourse as an utterance that is usually longer than a sentence. However

> in the humanities and social sciences in recent years, the term has come to have a more elusive meaning that usually takes the work of Foucault (1972, 1984) as a starting point. Foucault has emphasized the structural nature of statements, including those that are spontaneous, and the way in which all statements are *intertextual* because they are interpreted against a

> backdrop of other statements...A more technical definition might be to say that a discourse is a systematic, internally consistent body of representations (Riggins, 1997:2)

Discourse has come to mean the "language used in representing a given social practice from a particular point of view" (Fairclough, 1995:56). Jorgensen and Phillips (2002:9) explained that once meaning is ascribed to a material fact, "it is no longer outside discourse." As well, it is impossible to speak from a position outside discourse and representation (Jorgensen and Phillips, 2002:14).

Paul A. Bové, whilst trying to describe the concept of "discourse," held that "one cannot provide definitions, nor can one answer what comes down to essentializing questions about the "meaning" or "identity" of some "concept" of "discourse." To attempt to do so would be to contradict the logic of the structure of thought in which the term "discourse" now has a newly powerful critical function" (Bové, 1995:53). This 'critical function' is that which is put forth by post-structuralists, namely, examining the 'discourses' that are embedded in our languages and their "relation to social institutions, systems of power, and the role of intellectuals" (Bové, 1995:53). Bové then suggested that rather than ask what discourse 'is', it is more appropriate to ask what it 'does'. The function of discourse then, is to provide:

> a privileged entry into the poststructuralist mode of analysis precisely because it is the organized and regulated, as well as the regulating and constituting, functions of language that it studies: it aims to describe the surface linkages between power, knowledge, institutions, intellectuals, the control of populations, and the modern state as these intersect in the functions of systems of thought. (Bové, 1995:54-55)

In post-structuralist thought, "discourse is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs" (Scott, 1988:35). From Michel Foucault, the concept of socially

constructed and regulatory power is introduced into the theory of discourse because "[d]iscourse transmits and produces power: it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it" (Foucault, 1978:101). Central to the concept of discourse are the inextricable concepts of power and knowledge. Foucault portrayed the relationship of power to knowledge as one where:

> power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These "power-knowledge relations" are to be analyzed, therefore, not on the basis of a subject of knowledge who is or is not free in relation to the power system; but, on the contrary, the subject who knows, the objects to be known, and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power-knowledge and their historical transformations. In short, it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge (Foucault, 1984:175).

This coupling of power/knowledge with discourse illuminates the relations between the two. Determining the positioning of power and representation in language or discourse is a necessary step in a post-structuralist analysis as it is this exercise of power and representation that controls "the very categories of reality that are opened to consciousness" (Patton, 2002:100). Power/knowledge produces and constrains discourses and regulates the relations between discourses. Because of the instability of meaning in language, there is *discursive struggle*, as a "discourse is not a closed entity: it is, rather, constantly being transformed through contact with other discourses" (Jorgensen and Phillips, 2002:6). Discourses are, according to Jorgensen and Phillips (2002:7), in a constant struggle to fix meaning. This has implications for the social world. As Jorgensen and Phillips (2002:9) noted, "*changes* in discourse are a means by which the

social world is changed. Struggles at the discursive level take part in changing, as well as in reproducing, the social reality."

3.7 Deconstruction

The questions raised in this thesis about the concepts of containment, bodily integrity, personhood, and property, in the context of the *Dobson* and *G.* decisions, are threefold and concern the semiotic, the historical, and the political. Semiotically, how do the signs (or the terminology) used in these decisions carry and convey meaning and what are the meanings that are conveyed? Historically, how did these meanings develop? And politically, which perspectives or discourses are present or absent, and what are the concomitant political and practical underpinnings and ramifications? The aim is not to determine the 'truthfulness' of any particular discourse, but to explore "patterns in and across the statements" in order to identify "the social consequences of different discursive representations of reality" (Jorgensen and Phillips, 2002:21). The post-structuralist 'method' of deconstruction provides a framework for a close reading of the two cases to unpack the legal discourses of personhood and property. The concepts of deconstruction that were used to read the decisions, such as binaries and the metaphysics of presence, are outlined below.

The classificatory schemes, especially the binary schemes, of structuralism impose a sense of intrinsic order that Foucault (1970) and others have described, and that feminist scholarship (Heckman, 1990) has elaborated upon and found troubling. For example, binary categorization has been applied to such concepts as culture/nature, mind/body, rational/irrational, subject/object, and also male/female where the first is the

privileged and primary term. In the male/female binary, the female is then secondary, and:

> One term in the distinction will end up being defined more loosely. For instance, woman will be the more loosely defined term in the distinction man/woman. This method of defining has the important effect of making the more loosely defined term less vulnerable to unusual situations and making those defined by this term seem less important. So, sticking with the same example, manliness will be defined more clearly and will be treated as a clear type while womanliness will be defined more loosely, as being more or less subservient to manliness, and therefore as an inferior type to manliness (Spinosa and Dreyfus, 1995: 758).

Jacques Derrida posited that these binaries form a "violent hierarchy. One of the terms dominates the other (axiologically, logically, etc.), occupies the commanding position. To deconstruct the opposition is above all, at a particular moment, to reverse the hierarchy" (Derrida, quoted in Culler, 1982:85). Post-structural critiques interrogate language, often through deconstruction, to show how language functions to create and maintain these distinctions, and maintain that there is not a direct representational correspondence between language and the world. However, as Derrida says, one "cannot *criticize* metaphysics radically without still utilizing [it] in a certain way" (Derrida, 1976: 35).

J.M. Balkin suggested that any hierarchy is an:

> invitation for a deconstructive reversal--to show that the property we ascribe to A is true of B and the property we ascribe to B is true of A. Our deconstruction will show that A's privileged status is an illusion, for A depends upon B as much as B depends upon A. We will discover, then, that B stands in relation to A much like we thought A stood in relation to B. Indeed, it is possible to find in the very reasons that A is privileged over B the reasons that B is privileged over A (Balkin, 1998).

Derrida uses the concept of writing 'sous rature', or 'under erasure' as a tactic to suggest that that a word is 'inaccurate yet necessary to say' (Spivak intro. to Derrida, 1976:xiii-xiv). Gayatri Chakravorty Spivak, in her introduction to Derrida's *Of*

Grammatology, explained that "... the authority of the text is provisional, the origin is a trace; contradicting logic, we must learn to use and erase our language at the same time" (Spivak intro. to Derrida, 1976:xviii) and that "[t]he predicament of having to use resources of the heritage that one questions is the overt concern of Derrida's work" (Spivak in Derrida, 1976:n318). A concept under erasure is often presented graphically by crossing out the ~~word~~.

Important to this understanding of language is Ferdinand de Saussure's theory of the sign and Derrida's (1974) reading of same. Chris Weedon explained that:

> Saussure theorized language as an abstract system, consisting of chains of signs. Each sign is made up of a signifier (sound or written image) and a signified (meaning). The two components of the sign are related to each other in an arbitrary way and there is therefore no natural connection between the sound image and the concept it identifies. The meaning of signs is not intrinsic but relational. Each sign derives its meaning from its difference from all the other signs in the language. It is not anything intrinsic to the signifier 'whore', for example, that gives it its meaning, but rather its difference from other signifiers of womanhood such as 'virgin' and 'mother' (Weedon, 1987: 23).

Derrida challenged the assumed fixity of the sign, the logocentrism. This is the idea that "signs have an already fixed meaning recognized by the self-consciousness of the rational speaking subject" (Weedon, 1987:25). Thus, Derrida's neologism *différance* has a double meaning: to differ and to defer (Culler, 1982:97). Signs *differ* because they have "no essential features. They gain their identity only through their differences from elements in their system" (Powell, 1997:45). Signs *defer* because meaning is never really present, it is always deferred as an endless chain of signifiers. Representation, then, is only a "temporary retrospective fixing" of meaning (Weedon, 1987: 25) and the concept of temporality is then introduced to counter de Saussure's synchrony. This does not deny the existence of a physical world, but asserts an appreciation that meaning is

contextual, shifting, dynamic, and always circulating. There are two further important implications of *différance*: Derrida's critique of the metaphysics of presence in Western philosophy and his concern for the exclusions, repressions, and margins. These ideas are developed in Derrida's (1974) *Of Grammatology*. Derrida argued that Western philosophy is grounded in a 'logic of presence', a search for "origins', 'essences', or 'transcendental signifieds' such as 'Truth', 'God', or 'logos' that are explanatory meanings that lie behind or exist before everything and stand outside discourse. Deconstruction rests on the 'undecidability of meaning' in all texts; that language is unstable and arbitrary and words have meaning only by "*différance*" from other words. Deconstruction denies the 'metaphysics of presence' or the idea that there are some essential meanings outside of or *a priori* language. Deconstruction destabilizes the hierarchy of binary opposites and undermines the binaries themselves to reveal the inherent indeterminacy of the text that is being scrutinized. J.M. Balkin (1998) offered a simplistic, but useful, representation to explain Derrida's concept of the metaphysics of presence:

A is the rule and B is the exception;

A is the general case and B is the special case;

A is simple and B is complex;

A is normal and B is abnormal;

A is self-supporting and B is parasitic upon it;

A is present and B is absent;

A is immediately perceived and B is inferred;

A is central and B is peripheral;

A is true and B is false;

A is natural and B is artificial.

These transcendental signifieds are positioned as coherent centres, but both function to and are constituted by repressing the other term in the hierarchy. This produces a violent hierarchy and fixes the 'play' of binary opposites when "the centralized member of the pair ... becomes instituted as the Real and the Good ... at first we see only one possibility" (Powell, 1997:21). Where there is a binary, the privileged term, which is present, represses the secondary term, rendering it absent, excluded, or marginalized. The privileged term gains additional meaning by differing from its opposite, therefore the secondary term is implicitly present in the privileged one. What a word differs from becomes an absent part of its presence. Or, a word means by differing from what it is not. In the male/female binary, for example, part of the meaning of 'male' can be defined by what is it not, and that is 'female'. There is always an 'instituted trace', an infinite referral (Culler, 1982:99) of non-present meaning and "[t]he structure of the sign is determined by the trace or track of that other which is forever absent" (Spivak, 1974:xvii). For Derrida, "[n]othing, ... is anywhere simply present or absent. There are only, everywhere, differences and traces of traces" (quoted in Culler, 1982:99)

Deconstruction is an analytic tool in a critique of the Enlightenment or humanist logic of presence. Deconstruction is not a methodology, per se, but rather it is a textual strategy or a way of reading texts in an effort to identify, disassemble and critique the ideological essentialisms, structures, or, more accurately, transcendentals which underpin the text. It is a technique that is used to reveal the underlying ideology of conceptual oppositions and, when it is applied, exposes the inconsistencies and limitations of the categories offered in the text. As well as destabilizing hierarchy, a deconstructive analysis reveals how the discourse "undermines the philosophy it asserts, or the

hierarchical oppositions on which it relies" (Culler, 1982:86). It can provide a provocative account of a text because deconstructive analysis "works within the terms of the system ... in order to breach it" (Culler, 1982:86). G. Spivak vividly introduced and explained deconstruction:

> How to dismantle these structures? By using a signifier not as a transcendental that will unlock the way to truth but as a bricoleur's or tinker's tool -- a "positive lever." If in the process of deciphering a text in the traditional way we come across a word that seems to harbor an unresolvable contradiction, and by virtue of being one word is made sometimes to work in one way and sometimes in another and thus is made to point away from the absence of a unified meaning, we shall catch at that word. If a metaphor seems to suppress its implications, we shall catch at that metaphor. We shall follow its adventures through the text and see the text coming undone as a structure of concealment, revealing its self-transgression, its undecidability. It must be emphasized that I am not speaking simply of locating a moment of ambiguity or irony ultimately incorporated into the text's system of unified meaning but rather a moment that genuinely threatens to collapse that system (Spivak, 1974: lxxv).

Deconstructing an opposition is not nihilistic towards the concrete. It does "not destroy it, leaving a monism according to which there would be only absence or writing or literature, or metaphor, or marginality. To deconstruct an opposition is to undo and displace it, to situate it differently" (Culler, 1982:150). Culler identified the moves required in a deconstructive analysis of a conceptual opposition as:

> (A) one demonstrates that the opposition is a metaphysical and ideological imposition by (1) bringing out its presuppositions and its role in the system of metaphysical values –a task which may require extensive analysis of a number of texts – and (2) showing how it is undone in the texts that enunciate it and rely on it. But (B) one simultaneously maintains the opposition by (1) employing it in one's argument (the characterizations of speech and writing or of literature and philosophy are not errors to be repudiated but essential resources for argument) and (2) reinstating it with a reversal that gives a different status and impact (Culler, 1982:150).

Deconstructive analysis does not seek to reverse a hierarchy or to centre the 'female' and repress the 'male', but aims to destabilize the hierarchy by acknowledging

mutual constitution and the multitude of meanings, each of which denies the primacy of the other. The terms are "momentarily present, ... emerged out of a *prior* configuration and [are] already dissolving into a *future* configuration. And the **play** goes on endlessly...We should attempt to see this **free play** in all our language and texts – which otherwise would tend toward fixity, institutionalization, centralization, totalitarianism" (Powell, 1997:29, emphasis in original). It is a useful strategy "because attempts to reverse and thus displace major hierarchical oppositions of Western thought open possibilities of change that are incalculable" (Culler, 1982:158). Deconstruction demonstrates the contingency of foundational truths and the presence of transcendentals. While this may seem paralyzing or nihilistic, many, such as Judith Butler (1995), find in this political opportunity. She wrote:

> This urge to have philosophy supply the vision that will redeem life, that will make life worth living, this urge is the very sign that the sphere of the political has already been abandoned. For that sphere will be the one in which those very theoretical constructions -- those without which we imagine we cannot take a step -- are in the very process of being lived as ungrounded, unmoored, in tatters, but also, as recontextualized, reworked, in translation, as the very resources from which a postfoundational politics is wrought. Indeed, it is their very ungroundedness which is the condition of our contemporary agency, the very condition for the question: which way should we go (Butler, 1995:131)?

Because of the contingencies of foundational truths, what has customarily been taken to be 'natural' can be discerned as a construction and therefore open to change. This anti-foundationalism invigorates new sets of questions, and in a deconstructive or post-structuralist analysis, "[t]he questions that must be answered in such an analysis, then, are in what specific contexts, among which specific communities of people, and by what textual and social processes has meaning been acquired? More generally, the questions are: How do meanings change? How have some meanings emerged as

normative and others have been eclipsed or disappeared? What do these processes reveal about how power is constituted and operates?" (Scott, 1988: 35). Post-structuralism does not require reaching a deliberate 'end point' or result. Rather, the goal is to open up paths of inquiry and to explore possibilities, opportunities, perceptions, and alternatives.

As deconstruction is applied in the examination of the decisions as set out below, the focus is on examining binaries, margins, ignored passages of a text, silences, supplements, and gaps in order to explore and expose how they reinforce or contradict the dominant discourse that they assert. Implicit in this process is an examination of the relations and implications of knowledge and power contended in those discourses.

3.8 Reading the Cases

The deconstructive reading of the *Dobson* and *G.* decisions in this thesis opens the possibility of challenging prevailing notions of pregnancy and the pregnant body in a non-hierarchical and non-stable formation. The objective of this thesis was to produce a theoretically informed descriptive case study of discursive formations regarding the legal status of the pregnant body that exist in the cultural context of Canadian constitutional jurisprudence. More generally, the analysis uses the textual strategies provided by deconstruction to scrutinize legal discourses about pregnancy.

As Judith Butler stated, "the juridical structures of language and politics constitute the contemporary field of power" (Butler, 1990:5). For this reason, it is necessary to critique the "legitimating practices and the categories of identity that contemporary juridical structures engender, naturalise, and immobilise" (Butler, 1990:5). The relations of language and politics to the law are explored by reading the decisions alongside theoretical texts in a deconstructive approach:

> by destabilizing, complicating, or brining out the paradoxes of values like those of the proper and of property in all their registers of the subject, and so of the responsible subject, of the subject of law (*droit*) and the subject of morality, of the juridical or moral person, of intentionality, etc., and of all that follows from these, such as a deconstructive line of questioning is through and through a problematisation of law and justice. A problematisation of foundations of law, morality and politics (Derrida, 1990:931).

Derrida posited that law is both a performative and interpretive force that rests only upon itself (through precedent, iterability, and citationality) and thus is deconstructible (1990:941-943), and that is why he distinguished justice from law by presenting:

> justice as the possibility of deconstruction, the structure of law (*droit*) or of the law, the foundation or the self-authorization of law (*droit*) as the possibility of the exercise of deconstruction ((Derrida, 1990:945).

The law's very foundations of force and authority open law up to deconstruction which takes place in the space separating it and justice which Derrida finds to be undeconstructible as "justice exceeds law and calculation" (Derrida, 1990:971). Justice, for Derrida (1990:959) is "infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic" while the exercise of justice as law is "right, legitimacy, legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions." It is in this space that Derrida finds that deconstruction is an affirmative strategy where "transformations, indeed juridico-political revolutions take place" (Derrida, 1990:957). It is this space where the undecidable appears. Undecidables are unsettled concepts that resist solutions between two oppositions. It is the presence of neither one nor the other term but of both terms in a binary that are in the play of difference at the same time. They are:

> not merely the oscillation between two significations or two contradictory and very determinate rules, each equally imperative... not merely the

> oscillation or the tension between two dimensions, it is the experience of that which, though heterogeneous, foreign to the order of the calculable and the rule, is still obliged... to give itself up to the impossible decision, while taking account of law and rules " (Derrida, 1990:963).

The iterability and citationality of legal texts function within 'intertextuality' where texts endlessly graft, refer, depend upon, and contain traces of one another in an endless chain of signifiers. As Derrida wrote, "there is nothing outside of the text ... there has never been anything but writing; there have never been anything but supplements; substitutive significations which could only come forth in a chain of differential references" (Derrida, 1976: 158-59). Even the dissents in judicial opinions can also be read as 'supplements' for they are at once additions to something already complete in itself, an exteriority, and are as well a surplus to something incomplete, an interiority (Derrida, 1976:14-45).

Reading 'deconstructively' resists definition, reduction, and regulation which can be maddening because presenting "deconstruction as if it were a method, a system or a settled body of ideas would be to falsify its nature and lay oneself open to charges of reductive misunderstanding" (Norris, 1982:1). Deconstructive reading favours polyvocality, ambiguity, heterogeneity, and ceaselessness. As such, deconstructive readings are always provisional (Dobie, 2002:147) and thus open to further readings. Ann B. Dobie (2002, 148-150, 154) suggested that in reading texts deconstructively, readers might ask: What values and ideas do the hierarchies reflect? What elements in the work support the privileged term? What other hierarchies do they lend to? How do the binary terms supplement each other? How do they reinforce presence and absence? Are the privileged terms inconsistent? Do they present conflicting meanings? What new possibilities of understanding emerge when you reverse the binary oppositions? What is

left unnoticed or unexplained? How does the focus of meaning shift when you make marginal figures central? The deconstructive moves outlined by Culler (1982), together with the explanation of Derrida's metaphysics of presence and deconstructive reversal provided by Balkin (1998), and the questions suggested by Dobie (2002) come as close to a recipe or method as the concept of deconstruction permits, and thus these functioned as strategies for reading the decisions. This type of focused reading is but one step in deconstructive analyses, where the overall purpose is to interrogate and resituate what is taken to be the natural order of things, and to search for and destabilize "fixed meaning, unified subjectivity, and centred theories of power" (Weedon, 1987:100).

Chapter 4: Deconstructive Readings of the Supreme Court Decisions in *Dobson v. Dobson* (1999) and *Winnipeg Child and Family Services (Northwest Area) v. D.(F.G.)* (1997)

4.1 Introduction

> Law reaches every silent space. It invades the secrecy of women's wombs. It breaks every silence, uttering itself. Law-language, juris-diction. It defines. It commands. It Forces (Ashe, 1989:355).

> Where women resort to law, their status is already imbued with specific meaning out of their gender. They go to law as mothers, wives, sexual objects, pregnant women, deserted mothers, single mothers and so on. They are not simply women (in distinction to men) and they are most definitely not ungendered persons (Smart, 1990:7).

The discourses that produce women as legal subjects by North American courts and the effects of these decisions on the popular imagination have been analyzed in relation to sexual assault (Coombs, 1993) and woman abuse (Mahoney, 1990). The legal treatment of issues concerning pregnancy and the workplace, such as maternity leave and foetal protection policies, and legal discourses about motherhood are not the focus of this thesis, as thorough analyses are found in Whitaker (1999), Daniels (1993), Samuels (1995), Gonen (1993), and Ladd-Taylor (1998). Instead, the focus is the politico-juridical representation of pregnant bodies, their cultural contestation, and the conceptualization of control of, ownership, and access to these bodies, for as Catharine MacKinnon bluntly stated, "Whoever controls the destiny of a fetus controls the destiny of a woman" (1989:246). It is also important to note that in Canada, the legal system and women's experiences with the law have often worked to advance the security of women and their bodies. The cases under review herein had direct effects on women's lives and formed a lens through which courts can interpret what is legally permissible to do with and to women's bodies. The Supreme Court of Canada rulings in *Dobson* and *G.* meant

that, in Canada, (competent) pregnant women cannot be forced into medical treatment nor are they liable for damages done to their foetus while it is *in utero*. However, this is not to suggest that there is little left to accomplish. This thesis relies on the direction set forth by Carol Smart and Julia Brophy who argued that:

> the law is not in fact a unity, organized with the specific purpose of oppressing women, although clearly this is how it may be experienced. This is because we do not analyze the law as if it were an homogeneous unit with a unitary purpose... Our argument is that it is important to distinguish between the law and the effects of the law and legal processes in order to identify the contradictions which allow space for change (Brophy and Smart, 1985:17).

To explore the configuration of the pregnant body, and thus in part, the sexed subject in Canadian legal discourse, some of the primary terms in the legal discourse on pregnancy are deconstructed. Analyzing these terms though deconstruction "is in no sense to censor their usage, negate them, or to announce their anachronicity. On the contrary, this kind of analysis requires that these terms be reused and rethought, exposed as strategic instruments and effects, and subjected to a critical reinscription and redeployment" (Butler and Scott, 1992:xv). With the assumption that language is a place where meaning is socially constructed and contested, deconstruction emphasizes complexity and *différance* by demonstrating how an apparently unitary or cohesive concept is grounded in and supported by contradictory and multiple meanings. This exposes the betrayal and subversion of that central concept by the peripheral concept. It also exposes the relations of power that pervade language through oppostional hierachies and sets the stage for the exploration of counter-discourses and the identification of strategies for change.

In the cases examined herein, it is suggested that the Supreme Court attempted to fit the pregnant body into the atomistic and individualistic model of liberal subjectivity

that it knew and valorized through discourses on the pregnant body as a *container* (a legal person who stores the foetus) and as *contained* (the pregnant body as an untouched and bordered whole). What follows is an exploration of how the pregnant body resists liberal subjectivity and how the Supreme Court had difficulties in reconciling pregnancy into that model of subjectivity. The pregnant body is the rupture, paradox, and *aporia* ("something that does not allow passage. An aporia is a non-road" (Derrida, 1990: 947)) of the model of liberal legal subjectivity because it can expose both how some concepts in liberal subjectivity are privileged and others subordinated and how the subordinate concepts define and are implicated in the privileged ones. Further, recognizing the oppositions in the hierarchy and the privileged terms reliance on the subordinate ones, opens up the possibility of theorizing and conceptualizing the pregnant body outside of the hierarchy.

4.2 The *Dobson* and *G.* Decisions

The two decisions examined herein, *Dobson v. Dobson* (1999) and *Winnipeg Child and Family Services (Northwest Area) v. D. (F.G.)* (1997), share remarkable similarities. In both decisions at issue are: the relationship between the pregnant women and the foetus, the legal status of the foetus, the behaviour of the pregnant woman, her legal duty of care toward the foetus, and the legitimacy of state interference to compel that care. These decisions rely on the interpretation of certain legal rights and how gender difference impacts on these rights. As such, the facts of the two cases and recent theorizations on the discourses of rights and difference in Canadian law are outlined herein.

4.2.1 Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)

In 1996, the Winnipeg Child and Family Services (C.F.S.) brought a motion to the court for authority to detain *G.*, a pregnant mother of three, in a health facility for treatment citing the need to protect the foetus from harm due to *G.*'s addiction to solvents. Two of her children were already disabled as a result of her addiction to solvents. The Manitoba Court of Queen's Bench granted the motion brought by the Winnipeg C.F.S., ruling that *G.* was not mentally competent because of her addiction. Counsel for *G.* appealed the decision, but in the interim, *G.* voluntarily entered a hospital for treatment. Two psychiatrists found *G.* to be fully competent. The order of the initial court was first stayed by the Manitoba Court of Appeal and then set aside when that court ruled that her mental incompetence had not been established. The Supreme Court of Canada granted leave to hear the appeal taken by the Winnipeg C.F.S. from the decision of the Manitoba Court of Appeal even though the child had been born, apparently healthy, by the time the Supreme Court of Canada actually heard the case. Eleven interveners, including the Women's Legal Education and Action Fund, the Winnipeg Women's Health Clinic, and several aboriginal, human rights and religious groups, were permitted to make submissions to the Supreme Court of Canada. The Supreme Court ruled 7-2 that because the foetus was not a legal person the C.F.S. could not seek an order to detain *G.*, the appellant, on the foetus' behalf. The Supreme Court also found that it did not have *parens patriae* jurisdiction, the state's interest in the protection of those who cannot protect themselves, over a foetus (as it has after a child is born) and thus could not support an order to detain a pregnant women to prevent harm to her foetus.

The Supreme Court in *G.* gave little attention to the woman's lived reality as an aboriginal woman and the discrimination and disadvantage she might have faced in the

judicial and child welfare systems. The child welfare system itself has been described as a novel method of colonization, replacing that of residential schools (Hamilton and Sinclair, 1991:520). The near invisibility of *G.*'s aboriginal identity in the Supreme Court's decision reinforces the claim that "[e]conomic disadvantage, underemployment, substance abuse, and other factors that are used to explain aboriginal over-involvement in crime are not the source of the problem but symptoms of the problems of a society that is structured on discriminatory values, beliefs, and practices" (Monture-Angus, 1996:347).

4.2.2 Dobson (Litigation Guardian of) v. Dobson (1999)

This decision was the result of a civil action brought by the maternal grandfather of Ryan Dobson (the Litigation Guardian) for injuries sustained while Ryan was a foetus. Cynthia Dobson, the mother and appellant, was 27 weeks pregnant when she was involved in a car accident in 1993. The child, Ryan Dobson, was delivered by emergency caesarean section and was diagnosed with mental and physical impairments including cerebral palsy. The Litigation Guardian of Ryan Dobson alleged that these injuries were caused by the mother's negligent driving and launched a tort claim for the child's injuries. The New Brunswick Court of Queen's Bench ruled that the child had a right to sue his mother for injuries he sustained prenatally. Counsel for Cynthia Dobson appealed the decision to the New Brunswick Court of Appeal which upheld the decision of the lower court and stated that the appellant, Cynthia Dobson, had a general duty to drive carefully. The counsel for Cynthia Dobson sought leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada granted intervener status to the Canadian Abortion Rights Action League and two religious organizations. In July 1999, the Supreme Court of Canada ruled unanimously that a child cannot sue its mother for

injuries incurred before birth and that a legal duty of care cannot be imposed on a pregnant woman toward her foetus or subsequently-born child. Mesdames Justices L'Heureux-Dubé and McLachlin delivered separate reasons that detailed their position that imposing common law liability on a pregnant woman would violate her liberty and equality interests under the *Canadian Charter of Rights and Freedoms.*

In both cases, the Supreme Court of Canada rendered decisions based on matters of public policy arguing that the extension of the Supreme Court's *parens patriae* jurisdiction and/or a pregnant woman's duty of care to include the protection of a foetus would be changes of such magnitude that, for policy reasons, would be best left to the legislature (*Dobson*, 1999:77). Thorough legal analyses of the issues raised at trial have been accomplished elsewhere (Bell, 1997; Dawson, 1998; Diduck, A., 1998; Baylis, F., 1998; Shanner, L., 1998; Caulfield, T., et. al., 1998; Elman, B.P., et. al., 1998; DeCoste, F.C., 1998; Rodgers, S., 1998; Randall, M., 1999; McCormack, T., 1999; McInnes, M., 2000; Malkin, I., 2001; Ginn, D., 2001.) Though the Supreme Court did not use the *Charter* issues that these cases raised to make its decision, the issues of a pregnant woman's rights to security of the person, liberty, autonomy, and bodily integrity were discussed.

4.2.3 Rights

The focus of this thesis, legal discourses of pregnant subjectivity, applies to the *Dobson* and *G.* decisions because they contain the discourses on legal personhood, property, and security of the person or bodily integrity as they relate to the pregnant body. Even though such discourses are often formulated within a rights framework, this thesis "does not advance a critique of 'rights' per se but of their form and content as

male, hence exclusionary and limited and limiting" (MacKinnon, 1989:xiii). The types and understandings of rights have changed over time and not all are legal rights. What is commonly called the "first generation" of rights include negative civil and political rights (freedom from government intrusion). The second generation expands rights to include positive social, cultural and economic rights (rights to social equality). The third generation of rights involve collective rights and the fair distribution of resources with concepts of self-determination, peace, environmentalism, and humanitarianism. In the development of rights and their analysis, medical technologies have also contributed to the controversial claims of 'genetic essentialism' (Knoppers, 1991; Dreyfuss and Nelkin, 1992) in which it is claimed that rights reside in genes as the 'essence' of humanness. However, genetic essentialism links and thus mistakes genetic identity for personal identity. Although first generation rights derived from the seventeenth and eighteenth century political philosophy of liberal individualism and related economic and social doctrines, many of them are relevant to the examined discourses, such as: the freedom from discrimination on the basis of gender, racial, and other forms of discrimination; the right to life, liberty, and the security of the person; freedom from slavery or involuntary servitude; the freedom from arbitrary arrest, detention, or exile; freedom from interference in privacy; and the right to own property and not arbitrarily be deprived thereof. The origins and universality of these rights has been scrutinized where:

> cultural relativists see the Universal Declaration on Human Rights as enumerating rights and freedoms which are culturally, ideologically, and politically non-universal. They argue that current human rights norms possess a distinctively "Western" or "Judeo-Christian" bias, and hence, are an "ethno-centric" construct with limited applicability. Conversely, universalists assert that human rights are special entitlements of all persons. They are grounded in human nature and as such, are inalienable (Pries, 1996:288).

Arguing a post-structuralist middle-ground between the relativist and universalist positions, Ann Belinda Pries (1996) considered human rights to be 'signifiers in action' and favoured an approach that sees the attribution of meaning to rights as a practice in culture so that:

> we must attempt to renew and refocus our analytical perspectives in order to enlarge the understanding of the contemporary, globalized conditions of cultural complexity, in which human rights enter as both a defining, and defined set of values. One way to begin is to identify more yielding ways of exploring how, when, and why human rights become attributed with meaning in various contexts, including how they are put to work in the everyday life situations of men and women. In short, we need to come to grips with the question of human rights as 'cultural practice (Pries, 1996:308-310).

Recently, the effects of these rights have also been examined through feminist discourse which suggests that:

> [r]ights are not fruitfully conceived as possessions. Rights are relationships not things, they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing rather than having, to social relationships that enable or constrain action (Young, 1990a: 23).

Not only do some feminist theorists and other critics reassert rights in a relational context, they also critically assess rights as an "antagonism of interests" (Ahmed, 1998:41) and search for relations of power to "question 'who gains' in order to restore the opaqueness and conflict concealed by the metaphysics of the governmental right" (Ahmed, 1998:42). Rights are then "a product of a discursive and institutionally mediated process, functioning as signs which are exchanged and which over-determine subject mobility" (Ahmed, 1998:35).

4.2.4 Difference

A long-contested issue among feminist theorists is the place of 'difference' in the political positioning of women. Early liberal feminism advocated for equal treatment for both women and men and that they should have the same rights, but in this politics of sameness:

> A striking feature of the advance of liberal and epistemological theory and practice over the past three hundred years has been the increase in the ranks of the politically and epistemically enfranchised. It would seem that the loopholes have been successively narrowed, that fewer and fewer are being relegated to the hinterlands of incompetence or unreliability....
>
> In the logic of political identity, to be among the privileged is to be among the same, and for the different to join those ranks has demanded the willingness to separate the difference-bearing aspects of their identity (Scheman, 1997:343–44).

In Canada, the courts have distinguished between 'formal' equality and 'substantive' equality. Formal equality is equality of treatment where likes are treated alike. For substantive equality, the focus is to achieve equality of both treatment and result. In this way, disadvantage is remedied and not all persons who come before the court are simply treated alike. The substantive equality interpretive framework in Section 15 of the *Canadian Charter of Rights and Freedoms*[2] was set out in 1989 in *Andrews* v. *Law Society of British Columbia* and "includes any discriminatory impact that a law may have" (Knoppers, 1991:40). James R. Olchowy argued that the changeover to a framework of substantive equality is an indication that the Supreme Court is "importing key postmodernist insights into *Charter* analysis, insights that result in modifications to the *Charter's* deep [liberal] political structuring" (Olchowy, 1999:674) and is partaking in a philosophy of inclusive justice. The *Charter* is somewhat limited by already determined 'categories of discrimination' to which rights claimants must identify

(Stychin, 1995), although the Supreme Court has identified 'analogous grounds' of discrimination to those listed in Section 15, such as sexual orientation (*Vriend*, 1998), citizenship (*Andrews*, 1989), and off-reserve Indian band status (*Corbiere*, 1992).

Michael Ignatieff (2000) criticized individualistic 'rights talk' in Canada as diversionary because it obscures inequalities, although Ignatieff also noted that Canada has been uniquely positioned to negotiate between collective and individual rights. Catharine MacKinnon (1990:223) argued that the realities of women's experiences are masked and obscured by an individualist law. Reading the law through a deconstructive lens has prompted Bruce A. Arrigo and Christopher R. Williams (2000:322) to argue that the notion of 'equality' in human rights law is a 'gift':

> procured through state legislative enactments as an emblem of democratic justice, embodies true (legitimated) power that remains nervously secure in the hands of the majority. The ostensible empowerment of minority groups is a facade; it is the ruse of the majority gift. What exists, in fact, is a simulacrum of equality (and by extension, democratic justice): a pseudo-sign image (a hypertext or simulation) of real sociopolitical progress.

Without the overt distinction between formal and substantive equality in American law, Zillah Eisenstein (1988) and Drucilla Cornell (1992) have both theorized the treatment of 'difference' in United States jurisprudence. They posited that formal equality fails to take social and biological difference into account and uses a masculine standard of measurement. They argued for a re-conceptualization of difference as heterogeneity and multiplicity, rather than as a male/female gender binary. According to Eisenstein:

> [w]e need to adopt a radical pluralist method for thinking about how difference constitutes the meaning of equality. Such an approach assumes that differences and plurality constitute society but understands that hierarchy and unequal relations of power presently structure those differences. A feminism rooted in radical pluralism aims to destroy the hierarchy and the oppositions that hierarchy constructs, and it seeks to

> create a view that recognizes a multiplicity of individuals who are free to be equal and are equal in their freedom (Eisenstein, 1988:222).

Cornell advocated for an appreciation of differences with a "new choreography of sexual difference" where gender is perceived as multiple articulations without a system of hierarchy (Cornell, 1992:280). Eisenstein sought remedy in sex-specific legislation to recognize difference and "decenter the privileged position of the male body" (Eisenstein, 1988:1), although she was mindful of the potential of it to subjugate women (Eisenstein, 1988:205). She argued that both sex-specific and sex-neutral legislation "need to be assessed in terms of the particular issues at hand, for their strategic effect" (Eisenstein, 1988:205). Cornell proposed that difference could be acknowledged through what she called "equivalent rights" (Cornell, 1992:291-93) which are rights that recognize feminine sexual difference to avoid any "demand that the basis of equality be likeness to men" (Cornell, 1992:283). Cornell's approach echoes the Canadian position on substantive equality. It is one that does not necessarily further stigmatize women for requiring special treatment and it is an approach which values the nuances and multiplicities of gender and suggests that different contexts require different and situational remedies.

4.3 Presence and Absence in the Discourses of Pregnancy

The following sections examine how the Supreme Court favoured or privileged certain concepts in deciding these two cases and how these privileged positions were undermined by or rely on the subordinate positions. In the discourses on pregnancy and foetal relationality the Supreme Court privileged the pregnant woman's legal personality which was founded upon the rights to security of the person and bodily integrity. These

rights are based on a certain privacy or freedom from the interference of others, including the state. This requires formulating the legal subject as a discrete and autonomous subject that is legally discernable and separable from others.

The Supreme Court's discourses on themes articulated in the list below are examined through an overlaying conceptual matrix of how the Supreme Court articulated the pregnant body as both contained (a bordered legal person) and as a container (for the foetus). The themes that are present are those that are articulated by the Supreme Court in its decisions. The themes that are listed as absent are those discourses that are not explicitly discussed by the Supreme Court, but which, because of the silences, either rupture or are a hidden, formative part of the privileged themes.

Present:	**Absent**
Bodily integrity	Property rights in the body
Women's legal personhood	Fluid and discursively constructed identities
Imagery of the foetus	Foetus' legal personhood
Propriety: discourses on what constitutes a good mother	Discourses on pregnancy and multiple oppression, multiple subject positions, contradictory subject positions, relationality, situationality, and hybridity
Unity of the pregnant women and foetus	Imagery of pregnant woman as multiple
Pregnant woman as contained, bordered, untouched, integrity	Pregnant woman as leaky, unbordered
Representations/Language about the pregnant woman and the foetus	Corporeality and lived experience

The pregnant body is figured in these discourses as one which is lacking because it is unable to fully realize liberal legal subjectivity. The Supreme Court did not venture into articulating the plurality of pregnancy, its excess. It forces the discourses on the pregnant body, through the language of containment, into the model of the contained,

bordered liberal legal subject. In the analysis below, it is argued that in *Dobson* and *G.*, personhood is privileged over property and this produces the pregnant body as a container. Bodily integrity and wholeness are privileged over the unbordered and plural body and this presents the pregnant body as contained.

4.4 Legal Personhood and Subjectivity

Legal personhood is a fluid concept. Women's legal personality[3] was recognized in 1929 via the Persons Case. Until then, in Anglo-Canadian law, women had little legal status or recognition except as being an "object of property" (Williams, 1998). As legal persons, women won access to civic participation, rights and obligations, as legal personality:

> refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities... Just as the concept 'one' is arithmetic is essential to the logical system developed... so a legal system must be provided with a basic unit before full legal relationships can be devised which will serve the primary purpose of organizing social facts. The legal person is the unit or entity adopted (Paton, 1972:392).

Legal personality, then, ascribes legal responsibilities and capacities to a single "basic unit" engaged in a society which was, according to Sir Henry Maine, shifting from "'status' to contract' (Maine, 1861:Ch5) and "has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the family as the unit of which civil law takes account" (Maine, 1861:Ch5). The importance of the individualization of western law was explained as foundational because:

> [t]he concept of the legal person or legal subject defines who or what the law will recognize as a being capable of having rights and duties. As Pashukanis clearly recognized, this concept is the foundation... of all legal ideology. It allows legal doctrine to spin intricate webs of interpretation of

> social relations, since the law defines persons in ways that empower or disable, distinguish and classify individuals for its special regulatory purposes. For example, children, slaves, mentally disordered individuals, prisoners or married women may be partially or wholly, invisible to the law in particular societies and eras; not recognized as persons at all, or treated as possessing only limited legal capacities to contract, to own property, or to bring legal actions. In this way, throughout history, law has not merely defined social relations, but defined the nature of the beings involved in them. Alongside law, religion and various forms of ideology similarly serve to define personality... Thus, historically, legal doctrine has struggled in parallel with religion and philosophy, to define individuality and humanity and the relationships between collective and individual life. Further, it has done so in ways which necessarily reflect the interests and concerns of those with power to influence or control legal institutions (Cotterrell, 1992:123-4, emphasis in original).

The ways in which the law recognizes the individual and her rights and responsibilities in law was expressed by Madam Justice Wilson in relation to the *Charter*, which:

> is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence (Morgentaler, 1988:164).

The Supreme Court explicitly stated that it would not address the legal personality of the foetus in *G.* as:

> [t]he task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties -- a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature (*G.*, 1997:12).

However, the successful application of the law to these cases requires that the pregnant woman and the foetus must be split into two separate legal persons, the appellant (the pregnant woman) and the respondent victim (the foetus, or the born-alive child). In order to allege a pregnant woman's duty of care toward a foetus and rule on whether one is responsible for damages done to the other, as in *G.* and *Dobson*, the court must assume individuation, or, that the foetus and pregnant woman are separate, autonomous legal beings. In both Canadian criminal law (*R. v. Sullivan*, 1991) and the Quebec *Charter of Rights* (*Tremblay v. Daigle*, 1989), the foetus is not a person until born alive, but in the Supreme Court's reasons in *Dobson*, the Court explored the possibility of treating the foetus and the pregnant woman as separate legal entities to determining a legal duty of care. The *Kamloops* test, set out by the Supreme Court in *City of Kamloops v. Nielsen* (1984), requires that even if a duty of care exists, it must not be imposed by a court if that court finds a public policy reason that would dictate against it. The *Kamloops* test requires that,

> before imposing a duty of care, the court must be satisfied: (1) that there is a sufficiently close relationship between the parties to give rise to the duty of care; and (2) that there are no public policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise (*Dobson*, 1999:19).

In *Dobson*, the Supreme Court explicitly pursued the hypothetical argument of individuation in order to see if the *Kamloops* test could be satisfied and stated that:

> it is appropriate in the present case to assume, without deciding, that a pregnant woman and her foetus can be treated as separate legal entities. Based on this assumption, a pregnant woman and her foetus are within the closest possible physical proximity that two "legal persons" could be. With regard to foreseeability, it is clear that almost any careless act or omission by a pregnant woman could be expected to have a detrimental impact on foetal development. Indeed, the very existence of the foetus depends upon the pregnant woman (*Dobson*, 1999:20).

The Supreme Court ultimately decided that even if the first criterion was satisfied, namely, that the foetus and pregnant woman were separate legal beings in a sufficiently close relationship, the more relevant branch of the test was the second, where the Court determined that public policy considerations disallowed the imposition of a duty of care on the pregnant woman. These matters of public policy "militate against the imposition of maternal tort liability for prenatal negligence. These relate primarily to (1) the privacy and autonomy rights of women and (2) the difficulties inherent in articulating a judicial standard of conduct for pregnant women" (*Dobson*, 1999:21).

4.4.1 Foetal Personhood and Foetal Rights

The concept of the legal status of the foetus in Greek, Roman, and English Law as well as in the Canadian common and criminal law prior to 1989 (including a preliminary analysis on the effects of the *Morgentaler* (1988) Supreme Court of Canada ruling that struck down the abortion section (251) of the Criminal Code) has been summarized in Linden et al. (1989) and will not be duplicated herein. Generally however, abortion was not explicitly prohibited as the foetus was viewed as part of its mother until it was discernable through quickening (when the foetus could be felt to move). Stemming from concern for the health of the mother, prohibitions were placed not on abortion, but on the procurement of them. Restrictions on abortion were relatively recent and also influenced by Judeo-Christian traditions.

In 1989, the Supreme Court of Canada directly addressed foetal personhood in *Tremblay v. Daigle* (1989). It found that the foetus was not a person in its normative interpretation of both the *Civil Code of Québec* and the *Quebec Charter* and ruled that a "foetus would appear to be a paradigmatic example of a being whose alleged rights

would be inseparable from the rights of others, and in particular, from the rights of the woman carrying the foetus" (*Daigle,* 1989:554). It is interesting to note that the Supreme Court specified the 'woman carrying the foetus' as one of the 'others' to whom foetal rights might be inseparable. That distinction raises the question of whom the Supreme Court considered might be the other 'others'? In *R. v Sullivan* (1991), the Supreme Court found that the foetus in the birth canal was not a separate person and was a part of the mother in the language of the Canadian *Criminal Code*. However, as long as a foetus is born alive, it has a contingent interest upon birth and Canadian common law permits both tort actions on third parties for prenatal injuries and foetal inheritance of property "Canadian courts have recognized the juridical personality of the foetus as a fiction which is utilized, at least in certain contexts, to protect future interests. Although a foetus is not a legal person, certain rights accrue and may be asserted by the infant upon being born alive and viable" (*Dobson*, 1999: 6). The foetus must cross a legal borderline to become a legal person as:

> ...[t]he common law has always distinguished between an unborn child and a child after birth. The proposition that biologically there may be little difference between the two is not relevant to this inquiry. For legal purposes there are great differences between the unborn and the born child, differences which raise a host of complexities (*G.*, 1997:25).

However, Mr, Justice Major articulated a different position in his dissent in *Dobson*. In his reasons, Mr. Justice Major argued that

> The parties to the present action are a mother and her born alive child, not a pregnant woman and her foetus. The parties are separate legal entities. This distinguishes the appeal from cases dealing with abortion (see *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530) and the autonomy rights of pregnant women (see *Winnipeg*, supra) (*Dobson*, 1999: 98).

Mr. Justice Major further reasoned that,

> The special relationship between a pregnant woman and her foetus is a biological fact. This biological fact is significant for the mother-defendant. But it is also deeply significant for the born alive child-plaintiff. The legal or social policy implications to be drawn from that biological fact cannot be ascertained in the absence of equal acknowledgment of the rights of the child (*Dobson*, 1999: 129).

The majority rulings of the Supreme Court have all maintained that distinctions about foetal personhood "based upon broad social, political, moral and economic choices are more appropriately left to the legislature" (*Daigle*, 1989:554). The common law in Canada on Section 7 of the *Charter of Rights and Freedoms*[4] is no less clear about the legal status of the foetus as Mr. Justice Bastarache, for the majority in *Harvard College v. Canada (Commissioner of Patents)* (2002) noted that while this section:

> would have some impact on the patenting of human life, it is unlikely to resolve many of the more specific issues that may arise. Section 7 states that everyone has the right to "life, liberty and security of the person". Because the section deals only with "person[s]", it leaves the status of foetuses uncertain (*Harvard College*, 2002:179).

The concept of legal personality is important because this is the status that confers the rights, obligations, and claims of citizenship. Barbara Katz-Rothman observed that:

> The fetus in utero has become a metaphor for "man" in space, floating free, attached only by the umbilical cord to the spaceship. But where is the mother in that metaphor? She has become an empty space (Katz-Rothman 1986: 114).

P. Lealle Ruhl posited that the idea of foetal personhood splits rights and obligations between the pregnant woman and the foetus:

> On what grounds could one possibly argue that the foetus is an individual with rights? In liberal theory, rights are irretrievably tied to obligations; an individual gains certain rights and with them corresponding obligations. But how can the foetus have obligations? Indeed, what we witness in this description of pregnancy is not two liberal subjects in one body, but rather *one* liberal subject in two bodies. The pregnant woman has all of the obligations of a 'normal' or typical liberal subject but none of the rights. The foetus, on the other hand, has all of the rights of a typical liberal

> subject but none of the obligations. A strange situation indeed (Ruhl, 2002: 39).

Naffine (2003) summarized the many ways that the law characterizes the legal person as either legal artifice, "natural (and to some) even God-given character" through ensoulment, or "intelligent and responsible subject, that is a moral agent" (349-350). The Supreme Court denied that the foetus is a legal person and reiterated the common law position that "[t]he law sees birth as the necessary condition of legal personhood" (*G.*, 1997:55). However, the Supreme Court did refer to foetal subjectivity repeatedly, both explicitly and by implication. Ultimately, the Supreme Court's perspective was that the foetus is a part of the mother, and because she has a right to security of the person, by which they refer to the right to bodily integrity, the pregnant woman has *de facto* control over the foetus. The Supreme Court's sole reasoning for preventing the state apprehension of the foetus in *G.*, and for denying a that a pregnant woman has a special duty of care in *Dobson*, is that the foetus is inside the pregnant woman, and a part of her such that to have control over the foetus would necessitate control over a legally recognized person. The pregnant woman is allowed control over the foetus only by the inability of the state to lawfully invade her body. There are instances where the courts may recognize that a person's right to bodily integrity may be trespassed such as when she is found to be mentally unfit to make decisions (as was argued in *G.*) or when she may be a danger to others (as was argued in *Dobson*).

Mr. Justice Major appealed to the Persons Case to say that law can be changed to encompass the foetus as a person:

> Precedent that states that a foetus is not a "person" should not be followed without an inquiry into the purpose of such a rule. In the well-known case of *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, the Privy Council overruled precedent and a unanimous Supreme Court of Canada,

> [1928] S.C.R. 276, and held that women were "persons" with respect to s. 24 of the *British North America Act, 1867.* Rigidly applying precedents of questionable applicability without inquiry will lead the law to recommit the errors of the past (*G.*, 1997:118).

Françoise Baylis (1998) has commented that the dissenting judgement in *G.* is especially important because of its intuitive appeal and because it indicates a possible future movement of the Supreme Court. The dissent in *G.*, delivered by Mr. Justice Major for both himself and Mr. Justice Sopika, provides insight into the influence of medical technologies on the Supreme Court's thinking. Mr. Justice Major called the 'born alive rule', where a foetus does not have the rights and obligations of a legal person until born alive, a "legal anachronism" (*G.* 1997:102). He further wrote that:

> Present medical technology renders the "born alive" rule outdated and indefensible. We no longer need to cling to an evidentiary presumption to the contrary when technologies like real time ultrasound, fetal heart monitors and fetoscopy can clearly show us that a foetus is alive and has been or will be injured by conduct of another. We can gauge fetal development with much more certainty than the common law presumed. How can the sophisticated micro-surgery that is now being performed on foetuses in utero be compatible with the "born alive" rule? (*G.* 1997:109)

The reliance on the medical model of foetal development and the capabilities of diagnostic and therapeutic technologies, combined with his interpretation of *parens patriae*, provided Mr. Justice Major with a justification and a formula for state intervention in a pregnancy.

In separate reasons delivered in *Morgentaler* (1988), Madam Justice Wilson suggested that because of the 'potentiality' of the foetus, the state might have a processual interest in the protection of the foetus:

> It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an

> infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. ... balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms (*Morgentaler*, 1988:182-183).

Under a processual approach, women would have the right to abort in the early stages of pregnancy but might be liable criminally and civilly for such actions later in the pregnancy because of the foetus' increased development. Mr. Justice Major favoured such an approach in his dissent in *G.* when he suggested that there would be a greater duty of care imposed on the pregnant women towards the foetus once she has 'chosen' not to have an abortion, although she would retain the right to do so at any time (*G.*, 1997:93-96). His position neglected the fabric of particularities that combine to result in pregnancy as women:

> often do not control the conditions under which they become pregnant. If intercourse cannot be presumed to be controlled by women, neither can pregnancy. Women have also been allocated primary responsibility for intimate care of children yet do not control the conditions under which they can rear them, hence the impact of these conditions on their own lives (MacKinnon, 1989:246).

A processual approach to the legal status of the foetus raises the possibility of conceptualizing the legal relationship between the pregnant woman and her foetus as a relationship amongst individuals regulated by law. This relationship might then be one with an antagonism of interests and rights leading to a maternal-foetal conflict in deciding cases such as *G.* and *Dobson.*

4.4.2 The Legal Subject and the Pregnant Body

The recognition of the discriminatory effects of formal equality stem from the contention that important differences are erased and made invisible by the formal equality approach and that this may lead to further hardship imposed by flawed laws on persons belonging to certain recognized groups. In *Andrews* (1989:146), the Supreme Court recognized that identical treatment frequently produces serious inequality and with this focus on the impact of the law, rejected a formal equality (equality before the law) interpretation of Section 15 of the *Charter* in favour of an interpretation of substantive equality (equal protection and benefit from the law). This paradigm of formal equality before the law rested heavily on the paradigm of liberal subjectivity where the normative, neutral, and pre-discursive body was the male body (Allen, 1987; Edwards, 1981; Lacey, 1998) and which:

> demands an unequivocal and clear division between persons. That is to say, the liberal individual is posited on an abstraction; such an individual has no specific (meaningful) body, no history, no attachment to specificity (Ruhl, 2002:41).

The interpretation of the body before the law as masculine is understood in feminism as rooted in Western liberal philosophy where the body:

> is the non-self, the base material which grounds the self to the worldly plane of existence. It is constructed as animal, appetite, deceiver, and jailer of the self, undermining the strivings of the self. The self is the soul, the spirit, the mind, the noble strivings, the highest, the closest to God, whereas the body is the lowest, the depraved, the obstacle to self realization (Lester, 1997:481).

Feminist analyses of various Western liberal canons have questioned the consequences of absenting gender in the formation of the liberal subject where "aspirational nonhierarchical constructs of abstract personhood are revealed deeply unchanged. Gender as a status category was simply assumed out of legal existence,

suppressed into a presumptively pre-constitutional social order through a constitutional structure designed not to reach it" (MacKinnon, 1989:163). Such polarization of body and spirit precludes the feminine embodied self from full subjectivity for the reason that:

> Within the systems of hierarchically arranged dualities which characterise Western thought, women are in effect disqualified from full subjectivity by the very condition of their embodied femininity and thereby excluded from moral agency. The foundational distinction between male and female authorises an infinite set of binary differences based supposedly on natural masculine and feminine qualities, women are perceived as falling outside the closure of moral agency (Shildrick, 1997:146).

This is paralleled in legal discourses about the pregnant body where women are more often associated with their corporeality such as the historical legal recognition of pregnancy at quickening, when the presence of the foetus could be physically ascertained. P. Lealle Ruhl contended that the notion of the liberal subject and pregnancy are incompatible to the extent that "[i]t is not possible to speak of the pregnant woman as a liberal subject" (Ruhl, 2002:38). Liberal subjectivity requires a Cartesian split of mind and body thereby separating "oneself from the particularities that bodily experience invites" (Ruhl, 2002:42). The concept of subjectivity is itself problematic as the designation of 'subject' confers legal personality and all who are not so designated are excluded from legal personality. Liberal subjectivity is further exclusionary in that the universal 'human' is masculine, based on reason, agency, and autonomy such that "only males occupy the unmarked universal category 'human'; women are not 'human' but the 'other', that is, the marked – and denigrated –subcategory" (Peterson and Parisi, 1998:132). There also are multiple meanings in the term 'subject': the subject of action, who is a subject with rights of citizenship, and the subject to action, who is a subject of an authority, or subjected.

Formal equality is unable to deal with the particularities of pregnancy as pregnancy "represents the moment when women can no longer disguise their bodily difference from men; in pregnancy, women can no longer "pass" for men" (Ruhl, 2002:43). This does not sit easily with a liberal subjectivity that relies on the concept of persons as 'individuals' who are masculine, "disembodied and contextless" (Ruhl, 2002:44), able-bodied, and white. Liberal subjectivity is even further complicated by the pregnant body which is not-one-but-not-two (Karpin, 1992: 325), embodied, and at once "self- and other-regarding" (Ruhl, 2002:43), and:

> [t]he ambiguity inherent in a model of pregnancy which understands the woman to be enmeshed in a complex set of relationships including but not limited to the fetus, is simply not possible within a conventional liberal framework. This is so because liberalism tends to individualize both experience and responsibility. Pregnancy is simultaneously profoundly private and profoundly social... Pregnancy, equally stubbornly, resists all efforts to remove it from the particularities of context and embodiedness (Ruhl, 2002:57).

In *G.*, the majority was unwilling either to extend its *parens patriae* jurisdiction to include protection of the foetus or to extend tort law to permit an order to detain a pregnant woman with the intention of preventing harm to the foetus. The Supreme Court appeared to consider that it was dealing with two separated beings firstly by speaking of the foetus as if its needs and interests were separate from those of the pregnant woman, secondly, by referring to the foetus as a 'child', 'unborn child' and 'born-alive child', and thirdly, by exploring their separate legal standing under the examination of the *Kamloops* test. Similarly to the Supreme Court's determination in *Dobson*, the Court in *G.* observed that for the *Kamloops* test:

> The first criterion is met in the present case. The relationship between a woman and her fetus (assuming for the purposes of argument that they can be treated as separate legal entities) is sufficiently close that in the reasonable contemplation of the woman, carelessness on her part might

> cause damage to the fetus. The more difficult questions arise within the second branch of the test. A host of policy considerations may be raised against the imposition of tort liability on a pregnant woman for lifestyle choices that may affect her unborn child.
>
> Most obviously, recognizing a duty of care owed by a mother to her child for negligent prenatal behaviour may create a conflict between the pregnant woman as an autonomous decision-maker and her fetus (*G.*, 1997:36-37).

The dissent in *Dobson* went even further as Mr. Justice Major declared that "[t]he parties to the present action are a mother and her born alive child, not a pregnant woman and her foetus. The parties are separate legal entities" (*Dobson*, 1999:98).

Instead of moving forward by examining the ramifications of the separation it endorsed, or of rejecting such a separation, the Supreme Court sidestepped the issue by examining the nature of the remedy sought by the Winnipeg C.F.S. The majority stated that the cost of invading the liberty rights of the pregnant woman to protect the foetus was of "major impact and consequence" (*G.*, 1997). In stark contrast to their reference to the separation of the foetus as and pregnant woman, the majority also refused to create a foetal right to sue the mother carrying the foetus because "the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself" (*G.*, 1997:27).

The decision in *G.*, like that of *Dobson*, maintained the potentially incompatible dual position that the foetus and pregnant woman were simultaneously both separable and a single entity. The pregnant woman and the foetus may be 'one' but they were also referred to by the Supreme Court as separate beings. The Supreme Court determined a unity of the pregnant woman and the foetus and that determination is plainly stated. However, when the Supreme Court examined the rights of the pregnant woman, it relied

on the model of the atomistic, liberal individual to recognize and accord liberty rights to the woman separated from her pregnancy. The incompatibility between liberal and pregnant subjectivities that is present in these decisions shows that women cannot fully transcend either their bodies or their pregnancies to achieve liberal subjectivity without a fictive expulsion of the polluting Other from their bodies and thus they cannot be fully distanced from a maternal/foetal conflict over respective rights. The *Dobson* court similarly treated the (in)separability of the pregnant woman and the foetus. In the context of generating assumptions to determine the applicability of the *Kamloops* test regarding a duty of care, the majority speculated that a pregnant woman and her foetus were "within the closest possible proximity that two 'legal persons' could be" (*Dobson*, 1999:20). That court also restated the violation of liberty rights that would occur should a pregnant woman be subject to a special duty of care (*Dobson*, 1999:24).

The majority opinion of the Supreme Court in *Dobson* reiterated the 'unity' of the pregnant woman and the foetus in the law and did not find a duty of care as the:

> pregnant woman cannot have a duty of care to her own foetus, which is at law but a part of herself. Thus, it is argued that the *sui generis* nature of the relation between a pregnant woman and her foetus does not permit the application of the holdings in *Montreal Tramways*, ... and *Duval*, ... to the instant case. The legal unity of pregnant woman and foetus precludes the finding of a duty of care (*Dobson*, 1999:95).

In *Montreal Tramways Co. v. Léveillé* (1933) and *Duval v. Seguin* (1972), the concept of a 'duty of care' to a foetus was set forth as the Supreme Court found, in *Montreal Tramways*, that a child could recover damages for injuries sustained prenatally caused by third party negligence and, in *Duval*, that injuring an 'unborn child' was a foreseeable risk. The *Dobson* court distinguished and did not apply either *Montreal*

Tramways or *Duval*, because of the difference in relationship to a foetus between a 'third party' and the pregnant woman.

The pregnant woman's purported choice not to terminate her pregnancy figures centrally in this formula as if "women might have thoroughgoing autonomy in the initial stages of pregnancy, but having made the decision to continue the pregnancy, this autonomy is necessarily circumscribed by what is in the best interests of the fetus" (Ruhl, 2002:55). The lack of real options can render informed choice meaningless and the concept of choice is also contested as it relates to the rational, liberal subject (Hadfield, 1995; Meyers, 2001).

Madam Justice L'Heureux-Dubé also recognized the problems implicated in using a framework of choice to describe pregnancy, as she noted that:

> To say women choose pregnancy is no answer. Pregnancy is essentially related to womanhood. It is an inexorable and essential fact of human history that women and only women become pregnant. Women should not be penalized because it is their sex that bears children: Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219. To say that broad legal constraints on the conduct of pregnant women do not constitute unequal treatment because women choose to become pregnant is to reinforce inequality by the fiction of deemed consent and the denial of what it is to be a woman. (*Dobson*, 1999: 87)

Although the concepts of 'choice' and 'free will' are intrinsic to liberal subjectivity, it is exactly the existence of that choice which would abrogate a pregnant woman's autonomy under the formula proposed by Mr. Justice Major, namely impose a pregnant woman's duty of care towards the foetus once she has 'chosen' not to have an abortion (*G.*, 1997:93-96). Liberal subjectivity, in this formula, would be contingent upon the problematic notion of choice where "women have the autonomy of liberal subjects up to and including the decision to reproduce. Having taken this step, however, women abrogate their full liberal citizenship" (Ruhl, 2002:56). Mr. Justice Major

commented about *G.*: "She chose to remain pregnant, deliver the child, and continue her substance abuse" (*G.* 1997:65). The majority decision in that case, apparently recognized the dangers in describing *G.*'s experience as choice, (leaving aside the implications of describing addiction as a lifestyle choice):

> A further problem arises from the fact that the lifestyle "choices" like alcohol consumption, drug abuse, and poor nutrition may be the products of circumstance and illness rather than free choice capable of effective deterrence by the legal sanction of tort (*G.* 1997:41).

The dissent in *G.*, although not descriptive of the present law, illustrates the contingent application of liberal subjectivity for pregnant women and the consequences this contingency may have for future judicial intervention in pregnancy.

4.5 Properties and Propriety

The etymological derivation of the word property is instructive. The Latin sources are *proprius* meaning "one's own, particular to itself," *proprietatem* meaning "special character," and the Greek source *proprietas* meaning "ownership, attribute" (O.E.D.). The concept of 'property' invokes the notions of possession, of appropriation, of quality, of 'propriety' or matters of civility and manners and of the French '*propre*' as appropriate, suitable, or clean. The term functions to distinguish and prioritize one from the other. These meanings are all ascribed to property and are used at various moments in particular discourses. Further, what is 'one's own' is personal, what is unowned is impersonal or public. In Derrida's writing, he "draws on the Greek association between the household *(oikas)* and the proper *(oikeios)*" (Wigley, 102-102). This relationship between the private (household and family) and the public (economy and law) is structured by Derrida as one where:

> Economy: the law of the family, of the family home, of possession. The economic act makes familiar, proper, one's own, intimate, private. The sense of property, of propriety, in general is collected in the *oikeios*. (Derrida, 1986:133).

Transferred to the legal discourses on the pregnant body, bringing the pregnant body into the legal sphere makes that private body even more familiar and public. It also makes impropriety and the unowned foetus impersonal and public. Positing the pregnant body in this framework then, the private is not separate from the public and what is proper(ty) is not separate from the improper. They are bound together such that they are mutually constituted and, because of the implicit relations of power and control over the pregnant body, political.

The concepts of property and propriety are addressed in this thesis because they are intimately tied up in the discourse on the legal subjectivity of pregnant women. What the Supreme Court says about her authority and autonomy is intimately tied to what is constituted as her 'own' and as what is constituted as 'proper'. How the Supreme Court determines the legal subjectivity of the foetus and of the pregnant woman also has tremendous implications on the Supreme Court's disposition of any future matters related to the control of reproduction (i.e. surrogacy) and reproductive and genetic technologies (i.e. biological materials).

4.5.1 Property Rights in the Body

There are two distinct types of property in legal discourse: real property, which is land and the structures on it, and personal property, which is everything else, tangible and intangible. Property rights are often referred to as legal relationships, or bundles of rights, between individuals with regard to objects. The general characteristics of property are

that it has monetary value, is transferable or movable, is separable from the person/personality, and rights in it are terminable upon death. A property right in one's own or another's (slaves, women, corpses) body is not specifically encompassed in this general definition, although the ownership of self is a contested and often favoured concept in debates about the impact of reproductive technologies and the right to self-determination within the context of reproductive rights.

The most influential theory of self-property rights in Western economies is that of John Locke's *Two Treatises of Civil Government* (1690) where the right to exclude others from one's property stems from (men) mixing their labour with the land. It was also an effort to ground these rights as 'natural' as opposed to 'constructed' or 'contracted' between men and the government. As Locke writes:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. (Locke, 1690: 305-6)

In Locke's construction, to be propertied, to own and work the land, is to be entitled to the products of one's labour and thus to have the political, civil, and economic rights that derive from property ownership. In such a social formation, where the market, property rights, and freedom of contract are acknowledged as the sources of legitimate authority, if there are no property rights in the body then there is no legitimate authority in/over the body. These rules of liberty and property, which constitute the market culture, limit what is socially possible and serve social functions.

Liberty rights are negative rights in that they are 'freedom from' the interference of others. Rights imply that something ought to be the case and that someone, usually

government, has a corresponding duty to enforce that right. Property rights confer entitlements to some people by denying those entitlements to others. This sets up a relationship of dependence. Detailed accounts of the philosophical context of property rights can be found in Harris (1996) and Penner (1997). The rights to full civic participation accorded by citizenship have been incrementally won by Canadian women and members of certain disadvantaged groups. Historically, civil and political rights belonged only to those who were privileged by property – the propertied, or those who owned land. Property owners were those who were in control of the means of production. The logical connection is that a woman, who(se) own(s) means of (re)production is pregnancy and labour, could be said to be propertied, in that she is in control of the means of (re)production. The logic falters because it has often been argued and held that a woman did not, and perhaps still does not, fully control her own reproduction.

The Supreme Court of Canada suggested that economic rights were not expressly excluded in their interpretation from Section 7 of the *Charter*:

> What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person.' Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of

> Charter interpretation seems to us precipitous. We do not, at this moment, choose to pronounce upon whether these economic rights fundamental to human life and survival are to be treated as though they are of the same ilk as corporate-commercial economic rights (Irwin Toy, 1989:1003-1004).

The explicit exclusion of a right to property in the *Charter* was, according to Alexander Alvaro (1991), an overt political act by the Canadian federal government to ensure that the *provinces ratified the Charter*. The provincial governments had "argued that a property rights clause threatened to limit the scope of the economic legislation" (Alvaro, 1991:319), such as provincial zoning laws and powers of expropriation.

4.5.2 Legal Precedents for Property Rights in the Human Body and Body Parts

Perhaps because of the connotations with slavery, Canadian courts have been reluctant to recognize self-ownership within a property rights framework and refer to decisions on this issue made by American and British courts. The most oft-cited decisions for the 'no-property rule' in these countries are cases that dealt with slavery: the *Cartwright Case* (1569), and *Somerset v. Stewart* (1772). Two other influential cases were the *Haynes Case* (1614), where the question was whether a deceased person could own property, and the *Dr. Handyside Case* (1749), where the issue was the theft of a corpse (Matthews, 1983).

Canadian common and statute have law generally recognized that there is no property in the body; however, there are significant exceptions for particular purposes (Létourneau et al., 1992:66) that can be construed as property rights in other's bodies and body parts (Cates, 1998). Although a grave robber is not charged with theft, grave robbing is a larcenous crime (Matthews, 1983). Next of kin have quasi-property rights to control what happens to a corpse. There is a 'work and skill' exception where a third

party has, through labour, differentiated the body or body part from a mere corpse into something novel. Along similar grounds as the 'work and skill' exception, where there is an anthropological or other knowledge value, some bodies such as mummies and medical cadavers have been found to be the property of the institutions in which they resided. Human biological material has also been treated as property that can be stolen (U.S. Congress, Office of Technology Assessment, 1987:69-89; Griggs, 1994). However, for theft to be considered, the body/part often (but not exclusively) must be stolen from those for whom the 'work and skill' exception already applies, and not from the person from whom it originally belonged (*Moore v. Regents of the University of California*, 1990). It has been argued that although Western law claims not to use a property rights framework in relation to the disposition of bodily materials,

> [i]t would seem that the courts will start with the 'no property in a body' proposition and then modify it according to the circumstances of the case. They will accept and recognise limited property rights in human tissue taking into account the purposes for which an individual wished to exert a proprietary right and the nature of the tissue over which a property right is sought to be exerted (Lynch, 1999:352).

The United States courts in *Davis v. Davis* (1992) took an intermediate position on the status of the foetus as property:

> We conclude that preembryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law (*Davis*, 1992:63).

Interestingly, the phrase 'potential for human life' characterizes the embryo as a person, or at least a potential person. Quasi-property rights to the embryo are invested in the parents as a 'nature of ownership' and they are given 'decision making authority'

because these are possessory rights and function to exclude others from the embryo. The appropriate location for foetal subjects and bodily tissues in law is also unclear. These issues have been variously examined in contract law, torts, property law, and family law. Part of the reluctance to examine foetal subjects within the framework of property law is the supposed 'potentiality' of foetal tissue (potential human life) that distinguishes it from other bodily tissues.

Control over extra-corporeal tissues based on privacy rights or rights to the security of the person is often referred to as a personal rights approach in an apparent opposition to an approach based on propriety interests or property rights. The *Royal Commission on New Reproductive Technologies* recommended that extra-corporeal tissues be legally characterized in a *sui generis* (of its own kind) regime. Marie Fox (2000) suggested a variant of the *sui generis* regime for embryos such that they should be considered in their cybernetic and biotechnological matrix. However, when the disposition of these materials is at question, elements of a property regime will enter into a *sui generis* regime (Litman and Robertson, 1993:244-245). Some authors assert that a property regime is a more appropriate framework to address the ambiguity of the legal regulation of biological materials (Beyleveld and Brwonsword, 2000; O'Donnell, 2000). Alternative propositions for the legal treatment of extra-corporeal tissues include a *res communes omnium* (common property) approach (Maryusyk and Swain 1989:381) and a 'gradual distancing' approach where the farther the tissue is alienated from the source body, the less control the source person would have over the tissue (Goulet, 1993:595).

The Latin phrase *res nullius* means 'belonging to no one' and refers to that which is in the public domain or public trust, and the Latin phrase *res communis* refers to things

that 'belong to all'. Yet these are neither accurate nor complete descriptions of non-propertied social formations because they hinge on the existence of a property regime for comparison. If "the western approach to property is shown to be characterised by the radical disjunction between 'persons' and things', between 'subject' and 'object'" (Hirschon, 1984:2), then it is also instructive to examine the varied and complex relations of women both to property and as property, cross-culturally (Hirschon, 1984). The appropriateness of a property framework in anthropological analyses is debated and questioned (Strathern, 1984), as is the legitimacy of either universalist or particularist applications of human rights frameworks (Peters and Wolper, 1995; Lindgren Alvea, 2000). Recent research has also included ethnographic work on embodiment and personhood (Lambeck and Strathern, 1998). Nonetheless, civil, political and economic rights are more directly domestic in orientation because they are citizen's rights held by state-recognized persons. As they are specific to a nation-state they are, at least in part, cultural artifacts.

Whether the notion of property is universal to all social formations has been an area in which anthropological ethnography has explored. However, as Maranhão and Streck (2003) point out, it is difficult to translate concepts such as 'not having a property regime' without using the constraining words of property in a language that has no such concepts. As Hirschon noted:

> Broadly speaking, our attitudes to property are associated with the development of capitalism and with the notion of the commodity. Property for us is based on the idea of 'private ownership' which confers on the individual the right to use and to disposal. Property is thus seen as valued goods/objects which can be transferred between legally-constructed individuals. But what we take for granted – the idea of an individual actor having defined rights vis-à-vis others, and the notion of property as consisting in objects or things – is far from being universal.

> On the contrary these concepts are historically and culturally situated in the western tradition. This very familiarity may blind us to fundamental differences in concepts of 'property' and 'persons' in other social groups (Hirschon, 1984:2).

In Canada, rights to 'security of the person' or 'bodily integrity' are the rationales used to protect against bodily intrusion, instead of a property rights approach, and are discussed later in this chapter.

4.5.3 Gender, Property Rights in the Body, and Commodification

A gendered discussion of the concept of property rights (Schroeder, 1998) is useful to analyze the applicable nature of these rights and the ways in which property relations mediate relations between people and toward objects. What is owned and who is capable of ownership is elastic and varies through time and space. New forms of property such as mutual funds, intellectual property, and biological materials demonstrate the elasticity of what is deemed to be 'property' and the debates about the applicability of a property regime to these new forms expose them as contested sites. C.B. Macpherson (1978:1) commented that the "meaning of property is not constant. The actual institution, and the way that people see it, and hence the meaning they give to the word, all change over time." The legal realm has been the principal site in negotiating the contest over these new forms of property. The ways in which women are represented (and rarely do they represent themselves) by the language of counsel and the justices in courts of law suggests the ways in which concepts such as the body, kinship, and the self will be discursively and culturally constructed and (de)limited.

Property rights to a thing entail the presence of control and dominion over that thing. They also entail the right to exclude others from that thing, or, to absent them from

it. The right to private property is a means to public power. As participatory rights (civil and political rights and public office) were tied to property ownership, they also facilitated access to status and power. When viewed in a critical light, these civil rights (to property, to enter into a contract, and to bring legal action) were the minimal requirements necessary to carry on a business, and are thus enmeshed in and supplement the workings of a market economy.

As property ownership was historically necessary to hold political and civil rights, property ownership guaranteed the presence of power, and those without property rights were absent from or outside of the political community. The ownership of property and the attendant rights facilitated access to power. While civil and political rights have been extended to all Canadian citizens, regardless of land ownership, access to wealth still facilitates access to power. Donna Dickenson (1997) formulated a 'woman-centred theory of property' that removed the body fully where women might have 'property in her own *person*' rather than in her body. Patricia Williams (1998) maintained that 'neutral' concepts in American contract law, such as individual, property, and market, are products of specific political discourses wherein "contract law reduces life to a fairy tale" (Williams, 1998:224). Kate Green (1995), building upon Hélène Cixous' concept of a feminine, fluid, gift economy, highlights the gendered aspects of property rights, where citizenship and property remain locked in a 'masculine economy'. Jeanne Schroeder (1998) combined her reading of Hegel's understanding of property relations and Lacan's psychoanalytic account of the Feminine to show how property relations are gendered. In these formulations, property relations are relations of power rather than relations to tangible items.

4.5.4 Commodification

The process of commodification is the transformation of previously non-exchangeable and inalienable things into objects for the market where property rights and monetary and instrumental (or use) values are attached. Social relations are likely to be reorganized with the creation of new bodily commodities. Kinship and the conventional boundaries between the natural and artificial are two such affected discourses (Sharp, 2000). Commodification itself is also gendered as human biological materials are not static, neutral objects, but are gendered or subject to gendered discourses in two ways. Biological materials are derived from gendered subjects and these materials are often discursively constructed along gender lines.

A regime in which property rights in the body are endorsed raises the spectre of facilitated commercialization and exploitation as values or prices can be assigned to bodies and body parts. A regime that prohibits property rights in one's own and others' bodies might both guard against commercialization or commodification or, conversely, facilitate exploitation. If body parts cannot be transacted in the marketplace, then they have no monetary value in a capitalist economy and this guards against trade in bodies and body parts. On the other hand, a property rights regime protects an owner from the interference of others and the absence of such rights would offer no standing for state protection from interference. Alan Hyde (1997:95) observed that "[b]ody commodification or property is not a metaphor but a performative: the slave's body really was a commodity and treated as such at law." The commodified body also has the potential to introduce seemingly absurd, but not impossible, avenues for the disposition of body parts. Could the laws that govern the exchange of real and personal property apply to the body such that pregnancy might be considered a temporary easement? Or,

alternatively, some sort of residential tenancy? There are precedents for such interventions as patents are already awarded for gene sequences and those who want to use those sequences for clinical or research purposes must pay license fees (Kaplan, undated). Mr. Justice Bastarache warned, "that reference to s. 7 of the *Charter* alone cannot dispose of concerns associated with the patenting of human life" (*Harvard College*, 2002:179).

4.5.5 Propriety: What is Proper for a Person

In the *G.* and *Dobson* majority opinions and dissents, pregnancy is both valorized and sanctified because, as observed by the majority in *Dobson*, "[f]rom the dawn of history, the pregnant woman has represented fertility and hope ...Usually, a pregnant woman does all that is possible to protect the health and well-being of her foetus. On occasion, she may sacrifice her own health and well-being for the benefit of the foetus she carries" (*Dobson*, 1999:24). At the same moment of glorification, the woman carrying the foetus may as easily be subjected to mother-blame with an eye to protecting the "foetus she may potentially harm" (*Dobson*, 1999:27), as if the woman herself can be separated from her pregnancy. Women's inclusion and visibility within the law has been fluid and contextual to their social roles. As regards maternity, the decisions in *Dobson* and *G.* do little to distinguish gestation from motherhood leaving a "jurisprudential void concerning the articulation of the ways in which a woman may legally become a mother" (Mykitiuk, 2002:787). The courts have traditionally relied upon the principle that *mater est puma gestation demonstrate* (by gestation the mother is demonstrated) (Mykitiuk, 2002:786-7) to articulate maternity. What impact reproductive technologies, which help to divide maternity into "genetic/chromosomal, uterine/gestational, and social/legal

aspects" (Mykitiuk, 2002:791), will have on this discourse of maternity is still undefined. The discourses around the (in)separability of pregnancy and motherhood, and of the pregnant woman and the foetus are examined more fully later in this chapter.

The *G.* and *Dobson* decisions discuss the possibility of "articulating a judicial standard of conduct for pregnant women" (*Dobson*, 1999:21) and refer to good maternal behaviours as proper, sacred, clean, and appropriate, and conversely, references to bad mothering as improper, unclean, and inappropriate. M. Ashe stated "in defining or naming 'bad mothers,' law operates to erase realities of class, of race, of inequality and of danger that variously define the lives of different bad mothers" (Ashe, 1995:142). The Supreme Court identified activities that, if a maternal duty of care were articulated, pregnant women might find themselves subject to scrutiny for such "negligent prenatal behaviour" (*G.*, 1997:37) as negligent driving, substance abuse,

> smoking, drinking, and dietary and health-care decisions ... [and] various other activities that may place the pregnant woman in harm's way. The examples range from an unhealthy work or home environment to activities as extreme as bungy jumping (*Dobson*, 1999:119).

This good/bad mother oppositional perspective on maternity "fuses genetic, gestational, and caregiving roles in a unitary construction of 'natural' motherhood, [and] the failure to care for a child 'denaturalizes' a woman and renders her 'unfit' as a mother" (Mykitiuk, 2002:790). This pregnant-woman-blame is evident throughout the dissent authored by Mr. Justice Major in both *Dobson* and *G.* Mr. Justice Major's representation of the facts of the case in *G.* (1997:68-88) leaves the impression that many saintly social service workers worked tirelessly in a futile attempt to provide health care and social support for the ungrateful, selfish, and self- and other- destructive appellant. In they eyes of Mr. Justice Major, *G.* was ultimately to blame for any potential damage done to the

foetus as a result of her addiction because she "was unable to stabilize her lifestyle" (*G.* , 1997: 69). Framing addiction as abuse, and *G.* as an uncaring mother, Mr. Justice Major advised that "[a] foetus suffering from its mother's abusive behaviour ... deserves protection" (*G.*, 1997:91). In *Dobson*, Mr. Justice Major argued that the appellant's negligent driving, which caused injury to her foetus, was something she should have reasonably avoided to prevent such injury and "the duty of care owed by the mother to her born alive child is obvious, providing she knows or ought to know that she is pregnant at the time of the act" (*Dobson*, 1999:106). In such a formulation the pregnant woman would have a legal obligation to prevent harm to the foetus, according to Mr. Justice Major as,

> [s]he was not legally free to operate a motor vehicle without due care. She did not have the freedom to drive carelessly. Therefore, it cannot be said that the imposition of a duty of care to her born alive child would restrict her freedom to drive. The respondent child cannot take away from his mother a freedom she did not have (*Dobson*, 1999:113).

The woman, separated from her pregnant body can be contrasted with instances where normative 'good' mothers who 'share' their bodies (Hyde, 1997:91) are worthy of protection and are simultaneously powerful with rights (Diduck, 1998:207) as articulated in *Dobson* where:

> Pregnancy speaks of the mystery of birth and life; of the continuation and renewal of the species. The relationship between a pregnant woman and her foetus is unique and innately recognized as one of great and special importance to society. In the vast majority of cases, the expectant woman makes every effort to ensure the good health and welfare of her future child. In addition, the sacrifices made by the mother for her newborn child are considerable. (*Dobson*, 1999: 1).

Normative 'good' motherhood simultaneously renders invisible another way that women 'share' their bodies: through their sexuality. Pregnant women are sexed subjects, but an essentialized view of good motherhood ignores her sexuality. Pregnant women

who are 'unruly' and sexual are hypervisible and are characterized as bad mothers. The Supreme Court of Canada decision made numerous references to the fact that *G.* was pregnant for the fourth time (*G.*, 1997:1, 5, 64, 65, 75).

Characterizations of mothers as 'bad' or 'unruly' also imply that there is a party on the receiving end of the damage that she does. In these cases, it is the silent, vulnerable foetus in need of protection from bad motherhood. Mr. Justice Major, in *G.*, assumed that foetuses are silenced in the language of the law, and that it is the court's jurisdiction to articulate its needs:

> If a foetus is a "person" for purposes of the *parens patriae* jurisdiction, he or she is in a particularly vulnerable position. A foetus, absent outside assistance, has no means of escape from toxins ingested by its mother. The *parens patriae* jurisdiction exists for the stated purpose of doing what is necessary to protect the interests of those who are unable to protect themselves. Society does not simply sit by and allow a mother to abuse her child after birth. How then should serious abuse be allowed to occur before the child is born (*G.*, 1997:103)?
>
> Someone must speak for those who cannot speak for themselves (*G.*, 1997:140).

Mr. Justice Major also assumed that the foetus' needs differ from those of the pregnant body carrying the foetus:

> The special relationship between a pregnant woman and her foetus is a biological fact. This biological fact is significant for the mother-defendant. But it is also deeply significant for the born alive child-plaintiff. The legal or social policy implications to be drawn from that biological fact cannot be ascertained in the absence of equal acknowledgment of the rights of the child. (*Dobson*, 1999: 2129)

This positions the pregnant body and foetus engaged in an adversarial legal relationship as a maternal-foetal conflict over needs and rights. It is a conflict that Mr. Justice Major did not seem to recognize as he advanced the proposition that "the pregnant woman's perspective is not the only legally recognized perspective. It competes with the

recognized perspective of her born alive child" (*Dobson,* 1999:109). Writing about two American cases, Patricia Williams made an observation that could well be applied to *G.* and *Dobson*: "...it seems to me, the Idea of the child (the fetus) becomes more important than the actual Child ... or the actual condition of the woman of whose body the real fetus is a part. In both cases the idea of the child is pitted against the woman; her body, and its need for decent health care, is suppressed in favour of a conceptual entity that is innocent, ideal, and all potential" (Williams, 1993:185).

Throughout both decisions *Dobson* and *G.* are referred to as "mothers." The characterization of a pregnant woman as a mother is based on the presence of a constructed 'child', be it foetus, born child, or a subject acting as a surrogate child. However, 'mother' is not a metaphorically singular idea, it is always already a supplemented entity, supplemented and defined by, the presence of a child. By the time these cases were heard by the Supreme Court of Canada, both women had given birth, but at issue for both was their conduct while they were pregnant but there was no mention in the decisions if the appellants felt themselves to be 'mothers' during their respective pregnancies. The concept of 'motherhood' invokes cultural assumptions and social meaning to the role of women as mothers. The sanctified but 'irrational' love and nurturance relationship with metaphors of investment assumed by an essentialized view of motherhood is at odds with the traditional legal relationships between 'rational' legal subjects who interact based on rights and obligations.

The dissent in *G.* reinforced the assumption that a mother ought to care for the vulnerable foetus because, "[h]aving chosen to bring a life into this world, that woman must accept some responsibility for its well-being" (*G.*, 1997:116). This essentialized

view of motherhood as embodied altruism provided justification for intervention if a woman fails in her duty to provide nurturance. The private realms of both family and her body become public spaces for intervention. The law constructs "in opposition to the bad mother her precise other in the figure of her extremely sympathetic, vulnerable, injured or needy, tender, and--above all--innocent child." (Ashe, 1995:152). Essentialized motherhood figures the pregnant body centrally as the nurturing container or shelter to the foetus. At the same time, motherhood is constructed in opposition as marginal to a foetus constituted as a (potential) child.

The institutionalization of the concept of 'state protection of the unborn' as an extension of *parens patriae* is evident in Supreme Court of Canada decisions when it utters comments such as "protection of foetal interests by Parliament is also a valid governmental objective" (*Morgentaler*, 1988:75). The prevalence of these comments suggests that, although the majority decisions of the Supreme Court have consistently ruled against foetal personhood, the concept has some resonance and, at the very least, remains in the legal imagination of the Supreme Court of Canada. Mr. Justice Major stated in *G.* that he would:

> include a foetus within the class of persons who can be protected by the exercise of the parens patriae jurisdiction. However, clearly, the only person by law able to choose between an abortion or carrying to term is the mother. She too has the right to decide her lifestyle whether pregnant or not. The court's ability to intervene must therefore be limited. It will only be in extreme cases, where the conduct of the mother has a reasonable probability of causing serious irreparable harm to the unborn child, that a court should assume jurisdiction to intervene. (*G.*, 1997:121)

In both *G.* and *Dobson*, the Supreme Court deliberately considered the argument that the foetus was a separate legal person or a distinct legal entity to determine a duty of care under the *Kamloops* test (*Dobson*, 1999:20). The Supreme Court also often referred

to the foetus as a separate party, if not a legal one, and referred to it as a potential or unborn child (*G.*, 1997:1 and elsewhere; *Dobson*, 1999:25 and elsewhere). Wendy Chavkin (1992) attributed this focus on the foetus and the supervision of pregnant women to the continuing debate over abortion, developments in pre- and peri-natal medicine, and the increasing medical surveillance of pregnancy that results from medical malpractice suits. Lorna Turnbull (2001) observed that the legal characterization of pregnancy and mothering in Canadian legislation and jurisprudence is one which diminishes the physicality of pregnancy, relies on the medical model of pregnancy and birth, positions rights in a maternal-foetal conflict, disregards the context of pregnant women's lives, and overvalues the foetus.

4.5.6 Judicial Intervention in Pregnancy: Foetal Protection and Mother-Blame

Judicial intervention in pregnancy raises the question of what sorts of stories Canadian jurisprudence has encouraged, discouraged, or contributed to, in the public formulation of the problem of 'foetal abuse'. The Supreme Court, in *Morgentaler* (1988), spoke repeatedly about the state's interest in protecting the foetus, but was particularly silent about why the state should have that interest:

> I think s. 1 of the *Charter* authorizes reasonable limits to be put upon the woman's right having regard to the fact of the developing foetus within her body. The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern? (*Morgentaler*, 1988:181)

If pregnancy were an appropriate subject for law, then there would be an increased level of intervention in pregnancy as well as litigation about the legality of any

such intervention. This triggers related issues about the legislative and court protection and the balancing of identified interests of those such as the foetus, the mother, the father, and various sectors of health care systems and social services. If the foetus is to have legal protection before birth it necessarily requires some legal recognition. The forms of protection could include protection from unlawful abortion, liability for prenatal injuries by the pregnant woman or some third party, wrongful birth and wrongful life (Robertson et al., 1995; Sneiderman et al., 1995). Before and after assigning legal status to the foetus, any protection of the foetus would require balancing its interests against the rights of the pregnant women to determine the course of her pregnancy and pursue her own lifestyle. In his dissent in *Dobson*, Mr. Justice Major 'balanced' the rights of the appellant with the born-alive child's right and asserted that, "[i]t is no answer to the plaintiff in this case that unilateral concerns about a pregnant woman's competing rights are sufficient to "negative" a negligent violation of his physical integrity. His rights, too, are at stake." (*Dobson*, 1999: 127). And in his dissent in *G.*, Mr. Justice Major argued that an order of confinement made against a pregnant woman should be made "on a balance of probabilities that no other solution is workable or effective" (*G.*, 1997:124). Alan Hyde (1997:82) recognized that rights are often conceptualized as spaces and boundaries that are balanced or "*weighed* against other interests." This balancing act was laid bare in *Morgentaler* (1998) when the Supreme Court inquired as to what the threshold point was:

> The question is: at what point in the pregnancy does the protection of the foetus become such a pressing and substantial concern as to outweigh the fundamental right of the woman to decide whether or not to carry the foetus to term? At what point does the state's interest in the protection of the foetus become "compelling" and justify state intervention in what is otherwise a matter of purely personal and private concern? (*Morgentaler*, 1988, 181).

Mr. Justice Major, in his dissenting opinion in *G.*, balanced the prevention of a 'terrible harm' of injuring a potentially born-alive child *in utero* and the pregnant woman's 'temporary' loss of liberty by forcible confinement. He characterized that as a remedy that was 'modest' and 'slight' (*G.*, 1997:132-138).

Foetal apprehension, by definition, requires the detention of the pregnant woman and the *G.* court did acknowledge the "incompatibility between wardship of the unborn and the pregnant woman's freedom" (*G.* 1997:53). There have been, as yet, few court-ordered caesarean sections reported in Canada (Hanigsberg, 1991). P. Leall Ruhl (2002) summarized some of the many cases where Canadian child welfare agencies applied to intervene in a woman's pregnancy in order to apprehend the foetus. The predominant reason offered for detaining pregnant women is an allegation of their illicit drug use. Apprehension, by definition, requires the detention of the pregnant woman. The justifications offered for the detention of pregnant women are gendered "rescue fantasies" (Hanigsberg, 1991). Both criminal and child welfare sanctions:

> against drug-abusing mothers are justified on the dual grounds of her own irresponsibility and her transgressions of the natural—her refusal of the traditionally self-sacrificing and noble maternal role. Also significant is the deployment of the idea of harm to the fetus—a deployment that is solely applied against women. (Ruhl, 2002: 51).

Lynn M. Paltrow (1999) has argued that treatment success for drug-using persons, especially pregnant women, is defined as complete and immediate abstinence. This standard requires that anything less than complete and immediate abstinence is a failure. Paltrow et al. (2000) have also noted the widely held view of 'presumptive neglect', where a single instance of a positive drug test indicates a child welfare injury.

This is not to say that the Supreme Court did not at all recognize the context of addiction. Madam Justice McLachlin addressed the "prosaic but all too common story of

people struggling to do their best in the face of inadequate facilities and the ravages of addiction" (*G.*, 1997:5) but in his dissent, Mr. Justice Major asked whether the state should stand "idly by and watch the birth of a permanently handicapped child who has no future other than as a permanent ward of the state" (*G.*, 1997:63). That the Supreme Court in Canada is reluctant to intervene directly in pregnancy is shown in the majority decision in *G.*, written by Madam Justice McLachlin:

> Courts will not extend the common law where the revision is major and its ramifications complex. To extend the law of tort to permit an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child would require major changes, involving moral choices and conflicts between fundamental interests and rights.... Taken together, the changes to the law of tort that would be required to support the order at issue are of such magnitude, consequence, and difficulty in policy terms that they exceed the proper incremental law-making powers of the courts. These are the sort of changes which should be left to the legislature (*G.*, 1997:25).

By appealing to the legislature to resolve such issues, the Supreme Court of Canada ignored the fact that marginalized groups have not, historically, been involved in the drafting and reform of legislation. What the Supreme Court recognized was the limitation on its power in the social context that was familiar to it. The Supreme Court made only tacit reference to the lived experiences of women and the appropriate remedies such that:

> where women do engage in self-destructive behaviour that will harm the fetus (for instance, substance abuse during pregnancy), it is still not a case of the woman's best interests conflicting with the best interests of the fetus. Instead it is a case of the woman needing help. Providing that help is also the most effective way of protecting the fetus. (Ginn, 1994: 45)

The construction of the "deviant pregnant women distracts society from addressing such issues as racial and class bias, 'foetal protection' policies, the poor maternal health and infant mortality rates in the United States, and the lack of services

and resources" that address the conditions of women's lives" (Boyd, 1999:24). Other authors have underscored the invisibility of the social and economic conditions of women's lives where foetal alcohol syndrome is concerned (Loney, Green, & Nanson, 1994; Armstrong & Abel, 2000; Plant, 2000; Greaves, Poole, & Cormier, 2002).

In *G.*, there was tacit recognition of the context of her addiction to solvents in the majority reasons delivered by Madam Justice McLachlin:

> Treating pregnant substance abusers as fetal abusers ignores the range of conditions that contribute to problems like drug addiction and lack of nutrition, such as limited quality pre-natal care, lack of food for impoverished women, and lack of treatment for substance abusers (*G.*, 1997:41).

And in *Dobson*, the appellant's negligent driving was considered in the context of:

> the scope of the role of a parent. Driving is an integral part of parenting in a great many families. For instance, a parent must often drive to pick up children from school or child care, to take them to the dentist or doctor, or to hockey practice or swimming lessons (*Dobson*, 1999:57).

However, the Supreme Court preferred instead to repeatedly call these activities 'lifestyle choices'. The Supreme Court also entertained, but did not rely, on the idea of a "reasonable pregnant woman standard" (*Dobson*, 1999:49) to examine whether negligent driving was a reasonably foreseeable risk such that it would support holding a pregnant woman liable for prenatal injuries. The examination of *G.*'s mental competency (because of her addiction), and the 'reasonable pregnant woman standard' in *Dobson*, frame the appellants actions in mental health terms. Doing so pathologizes the appellants and characterizes them as bad mothers because, "[f]or many women, the term madness continues to be used as a disciplinary mechanism to ensure confinement to culturally sanctioned feminine roles. To stray beyond the boundaries of acceptable feminine behaviour ... gives rise to psychological pathology which in turn becomes the

justification for psychiatric intervention" (Keywood, 2000: 335). The contexts of the appellants' respective lives, although noted, were overshadowed by a tendency where "medical management has replaced moral management as a way of containing women's suffering without confronting its causes" (Showalter, 1995:249). The lived realities of pregnant women, although noted, were still framed under the paradigm of the liberal legal subject where tort liability for lifestyle choices would "undermine the privacy and autonomy rights of women" (*Dobson*, 1999:39).

Diana Tietjens Meyers used the phrase "discourse of matrigyno-idolatry" to impart a concept that encompasses "(1) the fact that cultures systematically bond womanhood to motherhood in a single ideal; (2) the reverence this ideal inspires; and (3) the utter misguidedness – indeed, the downright sinisterness – of this reverence" (Meyers, 2001:759n). The dissenting opinion in *G.* offered praise, but only slight, because the appellant stayed in hospital and delivered a healthy child:

> it is somewhat enlightening that once she was confined, her behaviour improved. She voluntarily remained in the hospital after the order of Schulman J. was stayed by the Court of Appeal. To the date of this hearing, she has apparently stayed free of solvents. Her child was born healthy and she is raising him primarily alone, but with the aid of C.F.S. and others (*G.*, 1997:129).

Meyers identified the metaphor of mother-child fusion as one which cements the view that maternity is a result of voluntary choice or willed pregnancy and "posits an original state of unfailing succor, harmony, and security" (Meyers, 2001:760-761). These types of sentiments were evident in the reasons delivered in *Dobson,*

> So far as the foetus is concerned, this relationship is one of complete dependence. As to the pregnant woman, in most circumstances, the relationship is marked by her complete dedication to the well-being of her foetus. This dedication is profound and deep. It affects a pregnant woman physically, psychologically and emotionally. It is a very significant factor in this uniquely important relationship (*Dobson*, 1999:29).

Meyers suggested the use of 'matrigyno-iconoclasm' to counter this trope with "alternative images of maternity and femininity ...For instance, spotlighting the mother who laughs, the mother who knows sexual pleasure, and the mother who is angry would help to displace the baneful tropes of the beatific, selfless mother and mother-child fusion" (Meyers, 2001:768). Articulating the many subject positions involved in pregnancy in this way would open up possibilities for reformulating the notions of the pregnant legal subject and the intersections of the law and the pregnant woman.

4.5.7 Container: Privileging Personhood over Property in Dobson *and* G.

In neither *Dobson* nor *G.* does the Supreme Court overtly discuss whether or not the foetus is a form of property. In fact, the only mention of property law is in its relation to the foetus' potential future financial interests:

> In the field of property law, Anglo-Canadian law, like Quebec law, has allowed a foetus to be a beneficiary of a will or a donation but it has only protected a foetus' interests where the foetus has been born alive and viable (*G.*, 1997:14).

Assuming that the Supreme Court sees the foetus as neither legal person nor a 'thing' to which some legal person may have property rights, what remains for the legal status of the foetus is that it is an object of the state's, and by extension the larger society's interests:

> Whether it be considered a life-giving miracle or a matter of harsh reality, it is the biology of the human race which decrees that a pregnant woman must stand in a uniquely different situation to her foetus than any third-party. The relationship between a pregnant woman and her foetus is of fundamental importance to the future mother and her born alive child, to their immediate family and to our society (*Dobson*, 1999:29).

To recapitulate, the Supreme Court, while denying the foetus legal personality, individuated and wrote about the foetus as if it were a party to the cases. The Supreme

Court also reaffirmed the appellants' legal personality such that had the Supreme Court made opposite decisions, the pregnant women's rights would have been violated (*Dobson*, 1999:30, 84). Throughout the Supreme Court decisions, the idea of the pregnant body was described as an atomistic, singular legal person who was also a container or carrier of the foetus (*Dobson*, 1999:30) and observed that the "fetus' complete physical existence is dependent on the body of the woman" (*G.*, 1997:37). She was a legal person but the foetus was not. She had no property rights in her person, and the foetus was not her property but was something else insider her body, despite the *Dobson* Court's repeated reference to the foetus as "*her* foetus" (emphasis added). Referring to the foetus as *hers* implies both the passivity of the foetus and that the pregnant woman had some measure of possession over it. In contrast, one thing that does distinguish the *G.* majority decision from *Dobson* is that in *G.*, the foetus is more often referred to as an "unborn child" and thus an active participant in the case and a potential legal person.

The normative 'good mother' does what is proper and appropriate for a pregnant woman "bonded in a union" with the foetus (*Dobson*, 1999: 25). This contained 'unity' of the pregnant woman as a legal subject was diluted by the Supreme Court's focus on the potential legal personality of the foetus, its needs, and a pregnant woman's obligations to it. The legal subjectivity of the pregnant woman was also made more invisible by the unyielding focus on the foetus. The Supreme Court also entertained, although did not rely on, the argument that the pregnant woman may have a duty of care to her foetus and explored what was improper and inappropriate behaviour for a pregnant

woman. The dissent in *G.* was the most explicit about the state's interest in the foetus if there is inappropriate maternal behaviour:

> Once the mother decides to bear the child the state has an interest in trying to ensure the child's health. What circumstances permit state intervention? The "slippery slope" argument was raised that permitting state intervention here would impose a standard of behaviour on all pregnant women. Questions were raised about women who smoked, who lived with a smoker, who ate unhealthy diets, etc. In response to the query of where a reasonable line should be drawn it was submitted that the pen should not even be lifted. This approach would entail the state to stand idly by while a reckless and/or addicted mother inflicts serious and permanent harm on to a child she had decided to bring into the world (*G.*, 1997:95).

In Canadian family law hearings, fathers, in the main, have often little more than a commodity relationship to the child, wherein he has no debt beyond financial obligations. The mothers are often seen as having a gift relationship to the child with presumptions of reciprocity and social debt. The same may be said of reproductive materials, where, at present, men are often paid for sperm donation and women are supposed to 'gift' both their ova and the much more painful and invasive procedure of ovum retrieval. In practice, women have often been partially compensated either in non-monetary ways for these 'gifts' with gratitude from the recipients, or monetarily, especially in the case of surrogacy, where the compensation is not for their labour, but for expenses and lost wages. Men's reproductive capacity is often codified as a sexual act rather than as a reproductive act. Such discourses on the relationship of child, and especially of foetus, to mother or father both reflect and propel more intense legal and medical discourses as:

> Women are still accorded legal maternal status only if they are able to fulfil *both* the biological requirement and the normative behavioural requirements established within law. Law's absolute alignment of maternity with 'nature' has rendered the construct both unitary and indivisible. Moreover, the ability to 'recognize' offspring reflects an asymmetrical power, as choice is available only to men. While a man has

> the power to actively recognize his off spring, a woman has no choice in the matter and is passively assigned the status of motherhood through the 'facts' of birth (or gestation) (Mykitiuk, 2002:790).

The expectation that women (mothers) have a gift relationship to a child also advances the expectation that her pregnancy is also a gift to the larger society. The foetus is not her property to which she can assign a monetary value, trade, transfer, and determine its use, or from which can she exclude others. Women are expected to go through pregnancy and labour or painful and dangerous ovarian harvesting procedures with no reimbursement other than the benefits of altruism such as the satisfaction that arises from helping. Women's reproductive labour is codified as gifting to the child, gifting to another (vis à vis reproductive material donations). Although she is always gifting, this does not imply that the foetus is her property to gift. Rather, the state's interest in the well being of the foetus implies that there is some social and legal obligation to give the foetus and give of herself to the larger society "as though we were packing crates or Petri dishes or parking lots" (Williams, 1995:232)

It implies that the pregnant body, it is not actually private property, her own, but a communal space for the reproduction of society as the Supreme Court noted that:

> Pregnancy represents not only the hope of future generations but also the continuation of the species. It is difficult to imagine a human condition that is more important to society. (*Dobson*, 1999: 24)

However, the Supreme Court earlier warned of treating the pregnant woman as a means to an end in *Morgentaler*:

> [s]tate enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity.... In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. This is not, in my view, just a matter of interfering with her right to liberty.... [I]t is a direct interference with her physical "person" as well. She is truly being treated

> as a means--a means to an end which she does not desire but over which she has no control (*Morgentaler*, 1988:173)

These rights, then, are fully implicated in relations of power and issues of control. The pregnant woman's rights to ownership and control of her own body hinge on the language used by the Supreme Court to define these rights. Were the foetus considered property of the pregnant woman, there would be no tension between the pregnant woman and foetus as the latter would have no legally recognized rights. This is only partly the case under the current approach to legal personality as the foetus does have limited rights related to its potential interests if born alive. The application of a property rights regime to foetal and other reproductive materials, though, threatens to commodify the body and open up relations between the market and the personal. Reproductive and genetic technologies, and the questions they provoke of authority over and control of foetal tissue and other reproductive materials as they are separated from the body, would, if regulated under a property regime, raise questions about the organization of novel social relations. The practice of post-mortem maternal ventilation, for example, figures the foetus as "an organic passenger inside the space capsule of a dead woman's body (Casper, 1995:190). Such an approach would raise questions about the boundaries of the 'natural' and the 'artificial' as well as advance the interests of the tissue genitors as owners thereby fully transforming women from their historical position as property to a position of being propertied. If the foetus did enjoy legal personality and have the attendant bundle of rights, including property rights, then the mother's body could foreseeably become the property of the foetus.

Some feminist re-conceptions of the legal status of, and relationship between, women and the foetus include various arguments against its conceptualization as a

property relationship. Margaret Davies (1994) argued that self-ownership dichotomizes selves into subject and object, mind and body. Margaret Radin (1987) proposed the concept of 'market inalienability' to describe those things that are unsuitable for commodification to counter the alienation that is intrinsic to a property rights regime. Rosalind Pollack Petchesky (1995:389-390) offered a reformulation of the individually-based, Lockean 'self-propriety" such that there is a care-taking relationship between persons, community, and the environment such that what is 'owned' are "notions of sexual autonomy, gender equality, and communal identities and with democratic participatory values and radical political movements." For Petchesky, "self-ownership and proper caregiving go hand in hand with shared ownership of the commons" (Petchesky, 1995:403). Jennifer Nedelsky argued that the choice to locate foetal subjectivity in any particular paradigm is a "strategic choice. There is no one concept, such as property, which is intrinsically appropriate or inappropriate" (Nedelsky, 1993:344). Instead, Nedelsky (1993) suggested a relational analysis of the legal status of the foetus. Feminist theory has also re-engaged the concept of autonomy, refiguring it relationally rather than atomistically (Nedelsky, 1989; Benhabib, 1999; Meyers, 2000). However, relationality may not be the most emancipating strategy for women because, as Roxanne Mykitiuk warned, law translates kin relations into obligations because "the law recognizes that blood can create legal ties" (Mykitiuk, 2002:776). An understanding of pregnancy as a "process of transcendence, gradual development, recognition, and commitment" was proposed by Laura Shanner (1998:765) although she warned against adopting this model directly as a legal standard given the real context in which women make, or do not make, decisions about their reproductive lives.

In current Canadian law, there are no overt property rights in the self or in human tissue. It could be argued that this is in part due to the state's interest in them as a form of community property. Firmly ruling in favour of no-property formation invokes the potential for the state to encroach on women's legal personality. Liberal subjectivity assumes a verticality of mind over body, thought over flesh, and exemplifies a power hierarchy. There is the same downward verticality in the dyad of person over property. The person is in the head (or soul) and owns (or grasps) the property (or flesh). The body is the container for the self and, in the case of pregnancy, it is also the container for the foetus. But the flesh is necessary for physical possession. Ownership or possession necessitates physicality, as the corporeal is already present in the possession. For the person (mind) to own the body, she must already be in full possession of that body, the situation only and completely recognized. Historically, women have not had full possessory rights that exclude others from claims, such as marital obligation, to their bodies. Liberal subjectivity almost as completely erases the relational aspects of lived experience as it dissociates the individual from her context. If the foetus is not the property of the pregnant woman, then how is her decision-making authority over it interpreted? In Canadian common law, this authority is vested in the *Charter* principle of security of the body and thus bodily integrity.

The exclusion of any right to the usual and narrow notions of property in the *Charter* forestalls its explicit applicability to property rights in the body. However, property rights imply ownership, and those in turn are reliant on dominion or control, and control is centred on freedom from intrusions and the right to exclude. This expanded notion of property reads very similarly to the definition of autonomy provided by Madam

Justice Wilson as the freedom to "make fundamental personal decisions without interference from the state" (*Morgentaler*, 1988:166). The Supreme Court's reliance on the language of security of the person, bodily integrity, and autonomy (discussed more fully in the next section) reflects an ambiguity toward the claims a woman might have to control her own body. The right to non-interference based on the notion of security of the person assumes, at least in part, that bodily integrity is a quasi-property right in the body that is grounded in self-ownership. Self-ownership is already present as a necessary element in the notion of the security of the person. Distinguishing the body from the owning self (the mind) facilitates alienation of organs and tissues without compromising the 'nature' of the self, and consequently, the body might then be viewed as a repository of usable parts. The notion of the body as property renders the body incidental, rather than intrinsic, to personal identity.

4.6 Bodily Integrity and Security of the Person

The concept of bodily or physical integrity has been a cornerstone of the ability to defend the right to abortion and to formulate rape as a violation of a woman as a person rather than a trespass upon a woman-as-property. Because the model of bodily integrity has provided such power for women's advancement, it is little wonder that it has not been actively and critically engaged theoretically. Andrea Dworkin, somewhat controversially, extended the concept of bodily integrity to argue that heterosexual sex violated women's physical integrity such that "[t]here is never a real privacy of the body that can coexist with intercourse: with being entered.... She is occupied—physically, internally, in her privacy" (Dworkin, 1987:122). Dworkin's analysis provokes a further interrogation of the applicability of bodily integrity to the pregnant body. It raises the

question as to whether pregnant subjectivity can legitimately claim bodily integrity as it has been so far formulated in law. The etymology of the word *integrity* is comprised of "in" meaning "not" and the Latin verb *tegrere* or "to touch" (O.E.D) and together they denote an untouched whole or entirety that implies virginity or chastity. Does pregnant subjectivity, as "not-one-but-not-two" (Karpin, 1992: 325), and as an entered body (either by intercourse, *in vitro* fertilization, or even 'divine hand') disrupt the model of bodily integrity? This has especial ambivalence because bodily integrity has been relied upon exactly to prevent third party interference in women's reproductive lives. According to Hyde, women's bodies in law are not touched by intervention, but their 'bodily integrity' has been touched or its space/boundaries have been invaded and thus "women lose their bodies, which become rights or zones" (Hyde, 1997:84). Ruhl argued that the legal discourse of the pregnant body is already one without bodily integrity:

> Pregnant women confound the liberal model of subjectivity whereby bodily integrity grounds individual rights, because liberal models of pregnancy assume that the pregnant body has lost its integrity. When the pregnant body in question is already perceived as compromised in its ability to behave in a rational, responsible, liberal manner - that is, when it is already marked by race or class as more vulnerable to irrationality (in liberal terms) - it is that much easier to deny the individual liberal rights (Ruhl, 2002:56).

Bordo (1993: 71- 97) argued that pregnant women have been treated as 'fetal incubators' in the American legislation and case law, and not as subjects. Bordo (1993) argued for the importance of bodily integrity to reclaim reproductive subjectivity. The opinion delivered by Madam Justice Wilson, in *Morgentaler* (1988), addressed Section 7 liberty rights in this manner. Madam Justice Wilson interpreted liberty rights tied to personal autonomy as "the right to make fundamental personal decisions without interference from the state" (*Morgentaler*, 1988:166) and included women's reproductive

decisions in this set of rights as well as the framework of the 'security of the person'. In Canadian common law, women have procreative autonomy in their decisions to terminate a pregnancy. Madam Justice Wilson further developed an argument that approached a feminist and post-structuralist position addressing 'difference' and the choices a woman faces in pregnancy:

> The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.
>
> It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma (Morgentaler, 1988:172).

The jurisprudence behind bodily integrity is derived from the English common law protection from the tort of assault or battery and the action of trespass as it relates to patient consent to medical treatment (Létourneau et al., 1992:64). The underlying principle in battery is autonomy defined in physical terms. In Canadian *Charter* jurisprudence, bodily integrity is encompassed in Section 7 rights to 'security of the person'. In *Mills v. The Queen* (1986) Justice Lamer interpreted 'security of the person' widely to include not just the freedom from physical intrusion but also freedom from state-imposed psychological stress, and wrote that

> security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" . . . These include

> stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction (Mills, 1986:919-20)

The Supreme Court addressed the concept of integrity again in *Morgentaler* (1988) in a ruling on the constitutionality of Section 251 of the *Criminal Code of Canada* which prohibited the procurement of an abortion (with exceptions). Chief Justice Dickson saw the right to security of the person in terms of physical integrity and psychological well-being:

> [n]ot only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person (*Morgentaler*, 1988:56).

In a separate opinion, Madam Justice Wilson also noted that "security of the person may encompass more than physical and psychological security; this we have yet to decide" (*Morgentaler*, 1988:163). In *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand (1996)*, the Supreme Court also addressed the meaning of the word 'integrity' but within the context of Section 1 of the *Quebec Charter of Human Rights and Freedoms*[5]. Madam Justice L'Heureux-Dubé delivered the Supreme Court's reasons and its lengthy interpretation of *intégrité* in the French language version of the *Quebec Charter*, (translated as 'inviolability' in the English version):

> Section 1 of the *Charter* guarantees the right to personal "inviolability". The majority of the Court of Appeal was of the opinion, contrary to the trial judge's interpretation, that the protection afforded by s. 1 of the *Charter* extends beyond physical inviolability. I agree. The statutory amendment enacted in 1982 (see *An Act to amend the Charter of Human Rights and Freedoms*, S.Q. 1982, c. 61, in force at the time this cause of action arose) which, *inter alia*, deleted the adjective "*physique*", in the

> French version, which had previously qualified the expression "*intégrité*" (inviolability), clearly indicates that s. 1 refers inclusively to physical, psychological, moral and social inviolability. The question is rather one of determining what the concept of "inviolability" must be understood to mean.
>
> The *Petit Robert 1* (1989) defines the word "*intégrité*" as follows, at p. 1016: [TRANSLATION] "**1** (1530). Condition of a thing that has remained intact. **See Intégralité, plénitude, totalité.** *The integrity of a whole, of an entire thing. Integrity of a work. "The integrity of the organism is essential to the manifestations of consciousness*" (CARREL). *The integrity of the territory.* REM. *Integrity* is more qualitative than *integrality*, which is generally reserved for that which is measurable". Having regard to this definition, the Superior Court made the following comments in *Viau v. Syndicat canadien de la fonction publique*, [1991] R.R.A. 740, at p. 745:
>
> [TRANSLATION] When applying this concept to persons, we find that it is a threshold of moral damages below which there is no interference with personal inviolability. This threshold will be exceeded when the interference has left the victim less complete or less intact than he or she previously was. This diminished condition must also be of some lasting, if not permanent nature. [Emphasis in original.]
>
> This approach to the interpretation of the concept of inviolability set out in s. 1 of the *Charter* appears to me to be appropriate. The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some sequelae which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner. Moreover, the objective of s. 1, as it is worded, makes it much more similar to a guarantee of inviolability of the person and, accordingly, to protection against the certain consequences of the violation (*Quebec* (Public Curator), `996:95-97).

Just as, historically, property rights made possible the pursuit of civil and political rights, rights to bodily integrity, or security rights, were formulated as basic and enabling other rights (Brysk, 2002). However, a security-based formulation of bodily integrity implies that women have equal rights to control their sexual and reproductive lives. In Canada, the interpretation of 'security of the person' in Section 7 of the *Charter* was defined, in part, as freedom from state-imposed psychological stress (*Rodriguez*,

1993:587-588; *Morgentaler*, 1998:173). 'Liberty' has been broadly defined by the Supreme Court of Canada as "autonomy in making decisions of fundamental personal importance" (*Morgentaler*, 1988:166) and narrowly defined as freedom from physical restraint (*B. (R.)*, 1995:347-348; *Morgentaler*, 1988:51). The Supreme Court further acknowledged that, like liberty, "security of the person is capable of a broad range of meaning" (*Singh*, 1985:206).

As applicable to a discussion on security of the person is Section 8 of the *Charter* which states that: "Everyone has the right to be secure against unreasonable search or seizure." Although this is part of the protection from unlawful search and seizure in a criminal context, it developed from the common law to protect the property and privacy of citizens against intrusion by state agents (Craig, 1997:57). Hyde (1997:165) described the 'legal vagina' as "the least private, most specularized body" in law. In an analysis of an American case regarding a search warrant sought for a woman's vagina for the purposes of preventing drug trafficking, Hyde asserted that the law sees women as more porous and partible than men and views:

> a female body fetishized as a vagina that stands in for the body; specularized by law's gaze; empty except as constituted by its relations with men; dangerous to women except as tamed by male authority (Hyde, 1997:172).

The Supreme Court interpreted Section 8 to include the protection of privacy and to encompass the protection of an individual's reasonable expectation of privacy (Hunter, 1984) and, because it is "[g]rounded in man's [sic] physical and moral autonomy, privacy is essential for the well-being of the individual" (*R. v. Dyment*, 1988:427). The right to privacy has not been utilized with respect to reproductive rights in Canada as it has been in the United States, especially as regards reproductive freedoms under the influence of

Roe v. Wade (1973). However, even if privacy rights were to be applied, the reliance on privacy rights to guarantee reproductive freedoms is not sufficient or without struggle. Feminist theorizations have engaged the impact of framing women's individual reproductive decisions within the public/private dichotomy and are aware that "individual rights are framed [in *Roe v. Wade*] in terms of 'privacy' (the right to non-interference from public bodies). This concept of the private is precisely that which conceals the political nature of the gendered subject's access to resources" (Ahmed, 1998:39) on reproductive health issues. Shielding women's reproductive lives in a private realm preserves them as subordinate in relations of power and positions them as hidden such that:

> [t]he personal is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. Women are not inviolable. Women's sexuality is not only violable, it is – hence, women are – seen in and as their violation ... The right to privacy looks like an injury presented as a gift, a sword in men's hands presented as a shield in women's (MacKinnon, 1989:191).

As pregnancy is the "most visible and physical mark of sexual difference" (Stabile, 1994:64), it is a private situation that is already very public. Pregnancy is a situation that destabilizes the public/private dichotomy and does so increasingly as medical and judicial interventions mount.

4.6.1 Contained: Privileging the Untouched Whole over Leaky, Multiple Subject Positions in Dobson *and* G.

The image of the pregnant body as both container and contained is remarkably explicit in *Dobson.* There, the majority described the pregnant woman "in addition to being the carrier of the foetus within her – is also an individual whose bodily integrity,

privacy and autonomy rights must be protected" (*Dobson*, 1999:24). That court did not seem to recognize the dichotomy it emphasized and it made no effort at synthesis. In *G.*, what is more remarkable, perhaps, is the invisibility of the pregnant body and much articulation of the pregnant woman as a legal subject. Where the appellant does garner much attention in *G.* is in Mr. Justice Major's dissenting opinion, which was discussed earlier as regarded judicial intervention and mother-blame. The Supreme Court relied heavily on the right of the pregnant woman to bodily integrity in the decisions in both *Dobson* and *G.* such that this:

> respect for bodily integrity suggests that the body is contoured by fixed boundaries which, when acted upon or penetrated without lawful authority, give rise to civil and/or criminal liability. The body of legal discourse is figured as universal and with fixed boundaries, yet it is suggested that this universal, bounded body is represented as male (Keywood, 2000: 320).

The contained, bordered body is a recurring theme in these cases because it functions to discern one legal subject from the other. The discourses on the pregnant body as a container outlined above show that the "female body is differentially constituted as a signifier of volatility and fluidity, in need of containment by the regulatory forces which stabilise and determine the limits of identity in Western culture" (Keywood, 2000: 320).

Pregnancy, forced into the ill-fitting paradigm of liberal legal subjectivity highlights the assertion that "the indeterminacy of body boundaries challenges that most fundamental dichotomy between self and other, unsettling ontological certainty and threatening to undermine the bases on which the knowing self establishes control" (Shildrick, 1997:34).

In an effort to figure the pregnant body as a contained whole, the Supreme Court attempts to fix the borders of the unruly pregnant body by characterizing maternal-foetal relations as a "unique and special relationship between a mother-to-be and her foetus" (*Dobson*, 1999:25). It is this:

> inseparable unity between an expectant woman and her foetus [that] distinguishes the situation of the mother-to-be from that of a negligent third-party ... It is only after birth that the fetus assumes a separate personality. Accordingly, the law has always treated the mother and unborn child as one. To sue a pregnant woman on behalf of her unborn fetus therefore posits the anomaly of one part of a legal and physical entity suing itself" (*Dobson*, 1999:25).

If discourses on the pregnant body were reconceptualized as other than an inseparable unity:

> [t]his constitution of unruly would-be maternal bodies means that the strategies of containment are never fully secured. The conceptual leakiness of the female body means that there is always an excess which avoids containment, which poses a persistent threat to the legal order and which, in turn, becomes seen as the necessary justification for regulatory and prohibitory legal mechanisms (Keywood, 2000: 325).

The Supreme Court relied on the language of the bodily integrity as an untouched contained whole to assert the autonomy rights of the pregnant woman:

> Permitting judicial intervention therefore has serious implications for the autonomy of individual women and for the status of women collectively in our society. All individuals have the right to make personal decisions, to control their bodily integrity, and to refuse unwanted medical treatment. These are not mere legal technicalities; they represent some of the most deeply held values in society and form the basis for fundamental and constitutional human rights. ... A woman has the right to make her own choices, whether they are good or bad, because it is the woman whose body and health are affected, the woman who must live with her decision, and the woman who must bear the consequences of that decision for the rest of her life (*Dobson*, 1999: 32).

Although the Supreme Court relied on the notion that the pregnant woman and the foetus were an inseparable unity, the Supreme Court continually referred to the foetus as

a separate, albeit non-legal, person and referred to the "unique relationship" (*Dobson*, 1999:23 and elsewhere) between the pregnant woman and the foetus. The pregnant woman's "legitimacy before the law can be read as being contingent on the continued (ghostly) presence" of her foetus (Keywood, 2000: 328). This was reiterated in *G.* where the Supreme Court assumed "for the purposes of argument that they can be treated as separate legal entities" (*G.*, 1997:36). The pregnant woman alternates in the Supreme Court opinions between two legal identities: the autonomous legal subject, and the legal subject whose identity is figured in a 'unique relationship'. In the latter, the pregnant body is a "lack, in need of complement by a [foetal] presence to be culturally and legally viable" (Keywood, 2000: 328). In other words, the foetus is necessary to the definition of pregnancy. The Supreme Court's constitution of the pregnant woman as a rights-bearing autonomous agent is simultaneously present with the conceptualization of her as a container for the foetus whose "whose liberty is intimately and inescapably bound to her unborn child" (*G.*, 1997:35).

The pregnant body can be figured as dual not only because of the foetus, but also because of the Cartesian split of mind and body where this "'disembodiment' is frequently coded as a phallogocentric fantasy articulated through a dualist and specular representational economy that finds its most perfect expression in the Cartesian cogito" (Bray and Colebrook, 1998:47). Pregnancy resists the clear split of mind and body because, in the first place, the privileging of mind over flesh, the disembodied self, has been problematized as explicitly masculine by many theorists (Lloyd, 1993; Bordo, 1987; Grosz, 1995). Secondly, pregnancy challenges the body's borders and boundaries; bodily substances (blood, nutrients, meconium) intermingle between the foetus and the pregnant

woman, and other substances (breast milk, blood, the foetus itself) are expelled from the body (Shildrick, 1997).

Thus the duality of the embodied pregnant women can never achieve the alienation of mind from body, can never fully achieve the distance between mind and body required for the rationality that is required of the separate(d) individual. The pregnant body can thus never fully take the conceptual shape of the autonomous, disembodied legal fiction of right-holding person and can never fully escape the embodiment, the body, the flesh that repeatedly brings her to a space where her status as a rights-holder is at issue. When the pregnant body is figured as a unified and whole legal subject by the Supreme Court, and the foetus is conceptualized as a 'part' of the mother, this also invokes the image of the "monstrous" (Shildrick, 2002). The monstrous are those beings that "traverse the liminal spaces that evade classification" (Shildreck, 2002:5). Locating the monstrous is necessary for articulating different subjectivities because it is "the corporeal ambiguity and fluidity, the troublesome lack of fixed definition, the refusal to be either one thing or the other, that marks the monstrous as the site of disruption" (Shildrick, 1999:78). Understood in this way, the pregnant body is a body that is an uncontainable and unbordered being with two heads, four arms and four legs whose different fluids pass between its parts.

4.7 Conclusion

The legal status of pregnant women in Canada can be seen to be, in the first reading of the Supreme Court decisions, a coherent, comprehensible, and non-contradictory autonomous agent. Her rights are recognized, unlike the foetus, which must be 'born alive' to enjoy the rights of citizenship. As a legal subject, she is present

before the court, unlike the foetus, which must be reified or imagined to exist in the Supreme Court's reasons. The initial appearance is that the Supreme Courts' reasons were grounded in the *Charter* principles of the pregnant woman's rights to autonomy, privacy, and bodily integrity. A deconstructive reading of the *Dobson* and *G.* cases reveals that the legal status of the pregnant body is, in fact, entangled, unresolved, and contradictory. A pregnant woman's right to her own private body is made possible through public (judicial and legislative) and social recognition. The boundaries of her body in relation to the foetus are determined by social relationships and thus are not pre-existing, *a priori*, in the state of nature. Her uncontained, indefinite, leaky body is contained and subject to regulation through the creation of legal categories that create boundaries. However, a pregnant woman's subjectivity is structured through discourses that are located in multiple and historically specific discursive fields. The pregnant body is a site of struggle and contestation; it is complex and multiple, with unresolved differences.

The pregnant body resists the categorizations that the law privileges. The Supreme Court advanced the opinion that state interference in both *G.* and *Dobson* would interfere with the rights to bodily integrity of the appellants. It privileged a right to integrity that a pregnant body transgresses by being touched, modified, unbordered, and leaky. The Supreme Court privileged the unity of the bodies of the appellants, but spoke of the rights and obligations of two persons before the court, the pregnant woman and the foetus. The Supreme Court legitimized this legal personification of the foetus by speaking of it as if it were a legal person requiring the state's protection. Tremendous effort was made by the Supreme Court to deny the legal personality of the foetus but at

the same time the Supreme Court was fully engaged in describing foetal individuality and its connection to the pregnant woman as host or container. This discourse functioned to reify and separate the foetus from the pregnant woman, erasing her from the discourse. The Supreme Court did tackle the idea of the relationality of the foetus to the pregnant woman, but it did not do so in a way that factored in the lived experience of the pregnant women. There was little mention of how the appellants experienced and lived their pregnancies.

The Supreme Court saw the pregnant woman as a liberal subject, unified, whole, and unpartible. Most importantly, it saw her as inviolable and her rights to bodily integrity were themselves inviolable. However, the Supreme Court's own reasoning undermines this discourse. The Supreme Court privileged the privacy and decision-making authority attendant in the bodily integrity of the pregnant woman while simultaneously undermining this by engaging in a discourse on what is publicly proper. Ownership and control over the pregnant body was framed in terms of bodily integrity and was privileged by the Supreme Court over the concept of property in the body, as evidenced by the Supreme Courts' silence on a property regime in the body. However, both bodily integrity and property rights are negative rights that exclude others from intrusion into one's space. Bodily integrity is based upon a kind of self-determination or self-ownership and control over access to the self, as is property rights approach. The practical difference between the two is that bodily integrity has none of the connotations of commodification and the marketplace. In a sense, bodily integrity is Property-Lite. Property in the body then, is an absent but constituting part of bodily integrity. There are

traces of the concepts inherent in a property rights approach, such as ownership and control, implicit in the formulation of the concept of bodily integrity.

The discourses in these decisions privilege the legal personality of the pregnant woman as a contained untouched whole. Her legal personhood is founded upon the recognition of her as singular and in control of her identifiable, bordered body. However, as outlined above, pregnancy exceeds the paradigm of the liberal legal subject. The Supreme Court did not speak of fluidity and plurality in deciding these cases and thus it relied on the discourses of the pregnant body as a container of the foetus instead. By using the language of containment the Supreme Court can bind the pregnant body to the familiar borders of the liberal legal subject. The pregnant woman is present before the law as a contained, unified, bordered, and untouched legal person, but she can only be that subject through the discourses of the body as a container.

These discourses about the pregnant body as a container are implicitly present in the discourses about her as contained. Mr. Justice Major exemplified this in his dissent where wrote that:

> [a] pregnant woman and her foetus are physically one, in the sense that she carries her foetus within herself. Virtually every aspect of her behaviour could foreseeably affect her foetus. Thus the vindication of a born alive child's right to sue his mother in tort would severely constrain a pregnant woman's freedom of action. The physical unity of pregnant woman and foetus means that the imposition of a duty of care would amount to a profound compromise of her privacy and autonomy (*Dobson*, 1999:96).

A pregnant woman cannot be a contained and untouched whole if pregnancy exceeds the language of integrity and exists outside definable borders. Discourses on the pregnant body as a container function to reinforce and naturalize the privileged discourse of the contained liberal legal subject instead of exploring the multiplicity of pregnancy and thus recontextualizing and reworking discourses on pregnancy. An explanation as to

why the Supreme Court did not fully engage in this type of reworking of the law may be found in part because,

> [o]ur reluctance to engage with law reform in order to rethink female subjectivity may be grounded in part on an understandable scepticism of the ability of modernist legal institutions to think themselves differently. Law reform must be approached reflexively, critically and with considered assessment of its risk and gains (Keywood, 2000: 340).

The resistance that pregnancy presents to contained bodily integrity also subverts it. The plural, leaky, and unbordered pregnant body disrupts the concept of the pregnant legal person as a self-contained unit such that:

> Law can never fully contain and sustain that which it purports to regulate, as the unruly femininities abjected from the symbolic order perpetually pose a threat to the integrity of the subject. Abjected femininities constitute the necessary outside of the regulatory domain and are always therefore implicated in the formation of the sexed subject. The very indeterminacy of the category of woman – its conceptual volatility – provides the means to reconfigure identity beyond the dualistic conception of sex as currently constituted in legal discourse. The task is not to seek to return to an essentialist feminine experience, but rather to disrupt the discursive formation of male and female subjectivity (Keywood, 2000: 339).

There were discordant discourses on the pregnant body pervading the decisions in *G.* and *Dobson*. These decisions offered indeterminate images of the pregnant body, treating it as both sacred and requiring invasion or intervention, and as a container and self-contained. The tensions between the atomism or unity of the pregnant body as a liberal subject and themes of separation and the partible body played off against one another in these cases.

The Supreme Court of Canada has left undefined and incomplete the legal status of the foetus and the legal status of the pregnant body. Both of these are defined by what they are not: the foetus is not a legal person with rights, there is no special duty of care towards the foetus by a pregnant woman, and a pregnant woman does not have explicit

property rights in her own body. What pregnant women do have under the *Charter* and common law are the right to autonomy and bodily integrity and a special relationship to the foetus. However, according to Hyde:

> The body as property, the body as human need, the body as integrity – all are social constructions that create the very foundation they invoke. None rests on bodily experience, or at least, nothing in our experiences of our bodies leads necessarily to either Lockean property or communism or abortion rights...bodily autonomy is an oxymoron. Bodies may indeed be experienced as autonomous, but, where this is so, this is because of their social, discursive construction as autonomous (Hyde, 1997:11)

Discourses on the body as property, as private, and as an atomistic liberal subject all "efface the physical body and refigure it as an abstraction" (Hyde, 1997:87). To explore the possibilities that are opened up in discourses that address the multiplicity of pregnancy, the concluding chapter summarizes feminist reconfigurations of the pregnant body that look toward locating and making visible both embodiment and women's lived experience in theory on the pregnant body.

Chapter Five: Emerging Theory on the Pregnant Body

5.1 Introduction

The central theme that emerges from this deconstructive analysis of the *Dobson* and *G.* decisions, as well as other texts, is that figuring the pregnant body at law is an unfinished project and control over one's body is no closer than the horizon. Patrice DiQuinzio (1999:xv) called for feminist accounts of mothering to engage in the "paradoxical politics of mothering," where feminist theory engages subjectivity based on difference. That activity may risk the gains already won from existing conceptions of liberal subjectivity but it will also challenge and re-work them. Challenging and reworking those concepts of equality and autonomy that have secured the emancipation of women and the security rights to control their own bodies is a challenge that is taken on with hesitation and careful deliberation because it has the potential to hurt what has helped women. Consequently, such theorizations can address the legal subjectivity of the pregnant body moving it from decisions about "where the subject begins or ends in pregnant embodiment" (Ahmed, 1998:39) as well as:

> from the realm of the individuated subject who 'owns' rights and towards an understanding of the political subject as contingent and relational, as always embedded in relationships with others who cannot be relegated to the outside...[and] shifts the debate ... from the question of abstract rights to the question of power relations (Ahmed, 1998:39).

The literature that tackles the risk-filled and paradoxical politics of pregnancy and mothering has taken form with provocative and tenacious theorizing about both the gendered or sexed body and the pregnant body. The insights from that literature are what will generate movement toward that distant horizon. Some of the main themes of this literature are presented here to suggest directions toward filling the conceptual void left

by the abandonment of a liberal model of subjectivity for pregnancy. Compelling feminist theorizations of the body and pregnancy, cross-cultural accounts of pregnancy, and the legal and practical implications of reproductive and genetic technologies can all influence new formulations of the intersection of the pregnant body and the law.

5.2 Theorizing the body

Theorizing about the body is central to an understanding of women's experiences because it depicts the body as neither fixed nor pre-social. Anne Balsamo, in recent theorizing of the female body, has described it as not a neutral entity but as "1) a conceptual placeholder, 2) discursively constructed, 3) threatening to male systems of knowledge; but also attendant to the way the female body's constructedness organizes the perception of its materiality and the effects of this in women's lives" (Balsamo, 1996:35). The body has been theorized as culturally defined, as political multiplicity, as excess, and as a disruption to the hierarchical system of sexual dualism. In feminist theory, the body occupies a dual position as it is "considered as that which as been belied, distorted, and imagined by masculine representational logic. At the same time, the body has been targeted as the redemptive opening for a specifically feminine site of representation." (Bray and Colebrook, 1998:35).

Ruhl asserted that bodies "are never transparently knowable but always interpreted through a complex overlay of cultural expectations and assumptions" (Ruhl, 2000:17-18).. The question of theorizing the body has by no means been concluded. Some of the note-worthy formulations of the body include Susan Bordo's (1993) concept of the body as a material site of feminist struggle, Judith Butler's (1990; 1993) formulation of the body as mutually constituted by both discourse and materiality through

'performativity', Elizabeth Grosz's (1994) concept of 'volatile bodies', Rose Braidotti's (1994) specifically located bodies, Moira Gaten's (1996) 'Imaginary bodies', and Margrit Shildrick's (1997) 'leaky bodies'. These formulations see the body as dynamic and contextual rather than static so that "the body must be seen as a series of processes of becoming, rather than as a fixed state of being" (Grosz, 1994:12). Grosz (1993:204) challenged feminists to "make knowledges and technologies work for women rather than simply reproducing them-selves according to men's representations." It is these methods of representation, such as language, and in this thesis law-language

> ...that the body cannot take any form without being subjected to representation. The human body is never just a natural body, but always has imaginary and symbolic dimensions. This symbolized body is necessary not only for a sense of self, but for relations with oneself and with others. It is symbolism that brings us into being, and hence the necessity for bodies to be brought into relation with representation and with language. This is not just another way of saying that bodies are socially constructed, but is rather to say that the very experience of embodiment entails a confrontation with the imaginary and symbolic (Moore, 1999:163).

The psychoanalytic notion of the 'Imaginary' body, revised from Freud and Lacan by writers such as Julia Kristeva, Luce Irigaray, Elizabeth Grosz, and Moira Gatens, is a re-conceptualization of the the way the body has been represented and visualized. This always-sexed (masculine or feminine) imaginary body is:

> socially and historically specific in that it is constructed by: a shared language; the shared psychical significance and privileging of various zones of the body (e.g. the mouth, the anus, the genitals); and the common institutional practices and discourses (e.g. medical, juridical, and educational) on and through the body. (Gatens,1983:152)

Moira Gatens (1988:41) considered the self as constituted through gendered images of the body. Gatens' reformulation of Spinoza's monist system is grounded by

thinking-through-the-body such that the "body is not part of passive nature ruled over by an active mind but rather the body is the ground of human action" (Gatens, 1998:68).

Many feminist theorists have speculated upon the fluidity and metamorphosis of the female body and the pregnant body (Longhurst, 2001) and considered how discourses of the body contributed to masculine discourses that devalue the feminine. Margrit Shildrick suggested that the notions of flow, fluidity, and leakiness, such as bleeding without dying in menstruation, have evoked horror as "the male response finds everything flowing abhorrent... [as it] threatens to deform, propagate, evaporate, consume him" (Shildrick,1997:237). This theme of fluidity requires speculation about notions of containment and borders because this fluidity in women is often characterized as a lack of self-control (Shildrick, 1997:34) and because this dis-order also appears to authorize medical intervention (Shildrick, 1997:27). The modernist models of 'containment' and defined 'borders' are tied to the notion of 'rights to bodily integrity' upon which Canadian women's claims to freedom from intervention in pregnancy are reliant. The pregnant body and the birthing body necessarily resist this model of contained and bordered corporeality. Even though the pregnant body contains the foetus and the pregnant body may be conceptualized as a vessel or receptacle, it continually changes shape, leaks, expels, and explodes the forces of containment.

5.3 Theorizing the Pregnant Body

Feminist theorists are analyzing how pregnancy genders the body and how the pregnant body is imagined. Earlier ethnographies of pregnancy and childbirth often focused almost solely on experiences of labour and delivery (MacCormack, 1982; Martin, 1987; Davis Floyd, 1992a). Those studies of reproduction helped initiate the

shift from anthropological analyses of the rituals surrounding pregnancy and childbirth to theorizing about pregnancy itself. Rosalind Pollack Petchesky suggested that pregnant women were often seen as an "abstraction" and not "within their total framework of relationships, economic and health needs, and desires" (Petchesky, 1997:147). The development in anthropological studies of women's experiences of reproduction have increasingly focused on and theorized about women's subjectivity (Tsing, 1990; Browner and Press, 1995).

Until recently, pregnancy has been little theorized, usually because of its perceived 'naturalness', in political, philosophical, and anthropological thought. These developments have shown that pregnancy has theoretical and political import because it is the "most visible and physical mark of sexual difference" (Stabile, 1994:64). Sexed bodies, including pregnant bodies, are sites of difference marked by historical, social, political, and cultural contexts. The claims that were based on neutrality or anti-essentialism depoliticized the pregnant body. In these developments, Michelle Boulous Walker (1998) related the maternal body to the silenced body in her examination of the ways in which women's identity is connected to the maternal. Among other authors, Rose Braidotti, Mary O'Brien, and Iris Marion Young have engaged in the project of theorizing and articulating pregnancy and the pregnant body.

Rose Braidotti's 'monster' is a metaphor for "the in between, the mixed, the ambivalent... both horrible and wonderful, object of aberration and adoration" (Braidotti, 1994:77). She offered a critique of biomedicine that perceives the pregnant body as 'monstrous'.

In these developments, pregnancy has been actively refigured as a bio-social experience that emphasizes the relational aspect of pregnancy. Theorizing reproduction, Mary O'Brien asserted that reproduction was a gendered, social, and dialectical process (O'Brien, 1981) and she used the term 'moments' (i.e. the moment of menstruation, the moment of ovulation, the moment of alienation, the moment of gestation, the moment of labour) rather than the customary linear 'stages'. Her use of moments underlines the "sense of determining, active factors which operate in a related way at both the biological and conceptual levels...Also a non-isolated *event in time*, a happening which unifies the sense of the two words 'momentous' and 'momentary'" (O'Brien, 1981: 47). Barbara Katz Rothman (1989) further criticized the application of the liberal model of the atomistic individual to pregnancy. Rothman maintains that not only is pregnancy social or relational between the pregnant woman and those around her, but that there is a relational aspect, both social and physical, between a woman and the "unseen other," the foetus (Rothman, 1989:97). Motherhood, for Rothman, is:

> the physical embodiment of connectedness. We have in every pregnant woman the living proof that individuals do not enter the world autonomous, atomistic, isolated beings, but begin socially, begin connected. And we have in every pregnant woman a walking contradiction to the segmentation of our lives: pregnancy does not permit it. In pregnancy, the private self, the sexual, familial self, announces itself wherever we go (Rothman, 1989:59).

Pregnant women touch or talk with the foetus and actively create a social world for the foetus, because:

> [t]he fetus, for its part, is not yet a social being: these interactions with its mother are its first social experiences. In acting as if the baby "arrived" from outside, "entered" the world, we are making it sound like children start as separate people, arriving in our lives as babies. But there is a continuum from the single cell to the newborn child to the youngster. The fetus/baby/child's actions affect others, who respond socially. In the course

> of these interactions, the child eventually becomes a social being as well, someone with a sense of self (Rothman, 1989:98).

The Supreme Court of Canada, in its descriptions of the pregnant body as sacred and profane, and container and contained, did recognize, in a limited way, the relational aspect "between a mother-to-be and her foetus" as a "unique and special relationship" (*Dobson*, 1999:25). However, its appreciation of this relationship was still marked by the Supreme Court's imagery about the sacred mother and "her complete dedication to the well-being of her foetus. This dedication is profound and deep. It affects a pregnant woman physically, psychologically and emotionally" (*Dobson*, 1999:29). Madam Justice L'Heureux-Dubé, and some other justices, saw the social interaction between women and others to the foetus and attributed meaning to the foetus in a processual development towards a social being. Relationality, in Rothman's formulation, does not inevitably imply nor require that the foetus be imagined as a 'person' as:

> [t]he fetus's capacity for relationality is not determined by its intrinsic characteristics, its personality or biological functions, but by the meanings people give it in a social world. Relationality (like individualism) is a socially dynamic process; its parameters are set within historical and political contexts. The focus must turn, then to social and political practices (Morgan, 2001:64).

There has been a developing influence of phenomenology upon those who theorize pregnancy. Continental phenomenology "emphatically aims at the dissolution of the mind-body dichotomy' (van der Steen and Thung, 1988:198). By rejecting the objective reductionism and embracing subjective experience in theorizing the embodied self, the body can be seen as "neither an object immersed in the material world nor a consciousness positing the world" but rather as "a structure enabling the appearance of both world and consciousness" (van der Steen and Thung, 1988:155). Viewed from a phenomenological perspective, the physical changes signaling and accompanying

pregnancy indicate a different bodily subjectivity (Young, 1984). Changing notions of autonomy, bodily boundaries, and abilities must be negotiated with pregnancy as, "[i]n pregnancy my pre-pregnant body image does not entirely leave my movements and expectations, yet it is with the pregnant body I must move" (Young, 1984:49). Iris Marion Young (1990) re-conceptualized this phenomenology of the body in light of the experience of pregnancy because:

> Existential phenomenologists of the body usually assume a distinction between transcendence and immanence as two modes of bodily being. They assume that insofar as I adopt an active relation to the world, I am not aware of my body for its own sake. In the successful enactment of my aims and projects, my body is a transparent medium. For several of these thinkers, awareness of my body as weighted material, as physical, occurs only or primarily when my instrumental relation to the world breaks down, in fatigue or illness. ... Being brought to awareness of my body for its own sake, these thinkers assume, entails estrangement and objectification. ... These thinkers tend to assume that awareness of my body in its weight, massiveness, and balance is always an alienated objectification of my body, in which I am not my body and my body imprisons me. They also tend to assume that such awareness of my body must cut me off from the enactment of my projects; I cannot be attending to the physicality of my body and using it as the means to the accomplishment of my aims" (Young, 1990:410-411).

Young offered instead that:

> Pregnancy roots me to the earth, makes me conscious of the physicality of my body not as an object, but as the material weight that I am in movement. The notion of the body as a pure medium of my projects is the illusion of a philosophy that has not quite shed the Western philosophical legacy of humanity as spirit (Young, 1990:411-412).

Women's subjectivity and meanings ascribed to the experience of pregnancy figure into Young's characterization of 'pregnant embodiment' which are contrasted with "[t]he image of the uneventful waiting associated with pregnancy" (Young, 1990:413).

This outsider perspective of pregnancy reveals how the current legal discourse of pregnancy "leaves out the subjectivity of the woman. From the point of view of others

pregnancy is primarily a time of waiting and watching, when nothing happens" (Young, 1990:413). Young, however, saw pregnancy as a dialectic: "The pregnant woman experiences herself as a source and participant in a creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she is this process, this change. Time stretches out, moments and days take on a depth because she experiences more changes in herself, her body. Each day, each week, she looks at herself for signs of transformation" (Young, 1990:413). This processual approach to pregnancy in the construction and transformation of identity is echoed in other accounts of pregnancy (Smith, 1991; Kitzinger, 1995).

There have been complex and fascinating accounts of the maternal and maternity radiating from feminist analyses and re-workings of psychoanalysis. These extend far beyond the scope of this examination, for any deep appreciation of these accounts requires some familiarity with Lacanian psychoanalysis. However, snapshots of the concepts articulated by Julia Kristeva, Luce Irigary, and Hélène Cixous on the maternal body are useful to this examination. Julia Kristeva's (1986a: 297) notions of the abject, the maternal body, and the subject-in-process provide an account of pregnancy where a woman's identity nearly merges with another's. This merging contradicts the body's supposed rigid borders where "a woman or mother is a conflict—the incarnation of the split of the complete subject, a passion" and this split is a "threshold where 'nature' confronts 'culture'" (Kristeva, 1997:304). By writing the body into language and language into the body, Kristeva's "two-in-one" or "other within" exposes the inadequacy of language as a "mother is a continuous separation, a division of the very flesh. And consequently as a division of language - and it has always been so" (Kristeva,

1986:178). These ideas are echoed by Ewa Ziarek (1992:99) who admonished that "any attempt to transform the maternal body into a coherent signifying position is a fraud." For Luce Irigaray, women are already plural as:

> Woman 'touches herself' all the time, and moreover no one can forbid her to do so, for her genitals are formed of two lips in continuous contact. Thus, within herself, she is already two - but not divisible into one(s) – that caress each other (Irigaray, 1997:249).

Hélène Cixous celebrated pregnancy as replete with desire, pleasure, and power:

> We are not going to refuse, if it should happen to strike our fancy, the unsurpassed pleasures of pregnancy which have actually been always exaggerated or conjured away—or cursed—in the classic texts. For if there's one thing that's been repressed, here's just the place to find it: in the taboo of the pregnant woman. This says a lot about the power she seems invested with at the time, because it has always been suspected, that, when pregnant, the woman not only doubles her market value, but—what's more important—takes on intrinsic value as a woman in her own eyes and, undeniably, acquires body and sex.
>
> There are thousands of ways of living one's pregnancy; to have or not to have with that still invisible other a relationship of another intensity (Cixous, 1980:261-262).

5.4 Cross-cultural Accounts of Pregnancy

It would be naïve to assume that Western feminist philosophy, when it is only just beginning to theorize pregnancy, can have a conceptual hold on the subject. Cross-cultural accounts of mothering, pregnancy, and the social recognition of foetal life have been explored in works from such authors as Carol P. MacCormack, (1982), Sheila Kitzinger (1995), Michael Lambek and Andrew Strathern (1998), and Wendy R. James (2000). An example of how cross-cultural accounts could be productive in feminist theorizing on pregnancy is the concept of child-shifting. In the Caribbean, child-shifting is the practice of informal fostering where the 'mother' is any related woman who participates in childrearing (Rodman, 1971; Russell-Brown, Norville, and Griffith, 1997).

Cross-nursing, or shared breastfeeding (Krantz and Kupper, 1981), is another example of shared mothering where there may be two, three, or more (m)others. Looking to other representations of pregnancy and mothering, bearing in mind the problems inherent in translation, can also open up new possibilities for refiguring pregnancy in law outside of the Western model of liberal subjectivity.

5.5 Reproductive Technologies, the Law, and Pregnant Subjectivity

The construction of the pregnant body in law has repercussions for reproductive and genetic technologies because the technologies "disengage the processes of conception, pregnancy and birth from biological attachment to one woman: these processes no longer necessarily occur within the body of the birth mother. Women are thus only contingently linked to conception, pregnancy and birth" (Ruhl:2000, 18). Two of the issues to explore are the impacts of this contingent relationship of women to reproductive moments through reproductive and genetic technologies in a legal regime that relies on the liberal model of legal subjectivity, and how a reformulation of pregnant subjectivity interacts with these technologies and the law. Sara Ahmed (1998) noted that conceiving pregnancy subjectivity through embodiment and embodied rights:

> calls into question the possibility of not having a body (and hence the inevitability of contingency and particularity) as it describes the process whereby bodies become cited and hence constituted through legal demands. This process does not take the bodies of women for granted, or obliterate differences between women, or differences between feminisms. The focus on embodiment as a process, at once temporal and historical, both institutionally delimited as well as performatively inventive, is my call for feminism to deal with the question of how gender systematises itself through the law, as it imagines an alternative inscription of women's bodies in the process of re-inventing women as subjects *after* the law (Ahmed, 1998:43).

Refiguring pregnancy in the law through the perspective of embodiment would have implications on gamete donation and sale, on contract pregnancy and motherhood, on abortion, and on the disposition of foetal tissue. It would require a reformulation of the current approaches that regulate the body and reproductive and genetic technologies either under the market or under law (family, tort, contract, commercial, and constitutional). It would also call into question reproduction's presumed naturalness, and pre-existing social and political relations

The political possibilities for these theorizations on the pregnant body, developed both inside and outside of the law, can be made relevant to the practical application of the law. Applying the concepts in pregnant subjectivity to the laws would be a performative exercise, engaging all those who touch it, come before it and work within it. The laws that deal with pregnancy, such as those that regulate reproductive and genetic technologies, could then deal with the social, economic, political, and medical lived realities of those women and men who interact with the law. By acknowledging the influences of the model of the liberal legal subject and the threads of containment that are implicated in the present interpretations of Canadian common law, it can then be re-read and re-worked to better accommodate pregnancy as an embodied, active, temporal, contingent, and multiple subjectivity.

5.6 Conclusion

The imagery and the language of deconstruction, and post-structuralism generally, offers a productive and vibrant context to explore the language of the pregnant body at law. The case law is replete with images of presence and absence, lack and excess, and supplement. The pregnant body is present before the law as the subject under query, but

it is also absent physically from all higher levels of court proceedings where she is represented only by the language of counsel and justices. The foetal body, while present within the pregnant body, is also absented from legal recognition. The foetus is always both present and absent. It is a subject in the language of the justices when they adjudicate upon the disposition of the case. In the decisions, the foetus is written about as if it were somehow present as a party to the litigation and as a separate entity. In the same documents it is insistently denied presence as a legal person. The pregnant body is also one of lack. It is unable to fully realize liberal legal subjectivity, and at the same time, it exceeds this formulation of subjectivity as its plurality denies the singularity of liberal subjectivity. The foetus exists as a supplement to the pregnant body: it is both exterior and additional to a something already complete, the woman *enceinte*, girded and enclosed, and it is also a surplus, interior to the pregnant woman. Legal discourses, such as those examined in *G.* and *Dobson*, that figure the pregnant body as a container for the foetus reinforce and naturalize the privileged contained liberal legal subject instead of exploring the multiplicity of pregnancy and thus recontextualizing and reworking the legal discourses on pregnancy. In stressing the importance of a "substantive critique of universalist rights discourse" (Ahmed, 1998:38) especially as regards the implications of the construction of rights on feminist practice, Sara Ahmed suggested an approach to reformulating the competing rights claims, in the case of abortion, of the pregnant woman and a foetus which is characterized as a "subject with proprietal rights" (Ahmed, 1998:38). She suggested that:

> a feminist approach could base itself on the undecidability of where the body of the woman ends. The questions of the foetus becomes then a question of the integrity of the mother (is it inside or outside the body, is it an aspect of, or external to, her proper self, the rightful domain of her

> property?). The impossibility of answering this question without neglecting the instability of the boundaries of the mother's body does not simply negate the autonomy of the mother. More precisely, it establishes that autonomy (of the mother of the foetus) cannot be the grounds for the viability of abortion, as the lack of bodily integrity (and hence the instability of the boundaries of the social subject) leaves us without a proper subject to actualise its rights in a freedom of will and action. Indeed, thinking through pregnant embodiment may serve to question the model of the autonomous and integral subject central to the discourse of abstract rights (Ahmed, 1998:38-39).

Feminist theorists and legal theorists have been grappling with the paradoxical politics of the pregnant body before the law. However, they form an emerging consensus that the liberal model of legal subjectivity does not effectively address women's needs, experiences, and desires. Even with legislation specifically addressing reproductive and genetic technologies, it is not unreasonable to envisage that Canadian courts will be called upon to adjudicate matters related to both biotechnologies and pregnancy. In adjudicating, the courts will further interpret and define women's bodies before and in the law. How to reformulate a practicable solution for pregnant women who go before the courts in future matters is an immense task that will require a reformulation of subjectivity expressed in terms that are accessible by both the courts and the women whose lives it will affect. These articulations of pregnancy are different theorizations that have not yet been put before the court, but will inevitably affect what future courts will say.

Endnotes

1. A distinction is usually drawn between the terms 'embryo' and "foetus' where the former has been defined as " the product of human conception up to the end of the eighth week of pregnancy, during which time all the main organs are formed" and the latter as "the developing embryo from about the eighth week to birth, when organogenesis is complete and recognisable human features have formed" (Morgan and Lee, 1991:x-xi). The term "pre-embryo" has also been used to denote the embryo up to 14 days post fertilization. This date corresponds to when the embryo implants on the lining of the uterus and is also generally agreed upon as the cut-off date for embryonic experimentation. For the purposes of this thesis, I use the term 'foetus', and employ 'embryo', and 'pre-embryo' where they exist in original citations because, inasmuch as these terms denote some medical event, they are also used to promote various political positions.

2. *Constitution Act*, 1982 (79) Part I *Canadian Charter of Rights and Freedoms*
Section 15.
" (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

3. I use "legal personality" to refer to the ways in which the law recognizes and defines the legal subject. I use "legal subjectivity" to refer to ways that people bring fluid and discursively constructed identities [multiple oppression, multiple subject positions, contradictory subject positions, relationality, situationality, and hybridity (Friedman, 1996]) to the law.

4. *Constitution Act*, 1982 (79) Part I *Canadian Charter of Rights and Freedoms*
Section 7.
"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

5. *Quebec Charter of Human Rights and Freedoms*
Section 1.
"Every human being has a right to life, and to personal security, inviolability and freedom.
He also possesses juridical personality."

Works Cited

Adams, Alice. (1994) Reproducing the Womb: Images of Childbirth in Science, Feminist Theory, and Literature. Ithaca and London: Cornell University Press.

Ahmed, Sara. (1998) Differences that Matter: Feminist Theory and Postmodernism. Cambridge: University of Cambridge Press.

Allen, H. (1987) Justice Unbalanced: Gender, Psychiatry and Judicial Decisions. Milton Keynes: Open University Press.

Alvaro, Alexander. (1991) Why Property Rights were Excluded from the Canadian Charter of Rights and Freedoms. Canadian Journal of Political Science. 24:309-329.

Arditti, Rita, Duelli-Klein, Renate and Shelley Minden, eds. (1984) Test-Tube Women: What Future for Motherhood? London: Pandora.

Armstrong, E. and E. L. Abel. (2000). Fetal alcohol syndrome: The origins of moral panic. Alcohol & Alcoholism. 35(3): 276-282.

Arrigo, Bruce A. and Christopher R. Williams. (2000) The (Im)Possibility of Democratic Justice and the "Gift" of the Majority: On Derrida, Deconstruction, and the Search for Equality. Journal of Contemporary Criminal Justice. 16(3):321-343.

Ashe, M. (1989) Zig-zag Stitching and the Seamless Web: Thoughts on 'Reproduction' and the Law. Nova Law Review. 13(2):355-384.

Ashe, M. (1995) Postmodernism, Legal Ethics, and the Representation of 'Bad Mothers. In, Fineman, M. and I. Karpin, eds. Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood. New York: Columbia University Press. Pp142-166.

Backhouse, Constance. (1988) Married Women's Property Law in Nineteenth-Century Canada. Law and History Review. 6(2):211-57.

Balkin, J.M. (1998) Deconstructive Practice and Legal Theory. http://www.yale.edu/lawweb/jbalkin/articles/decprac1.htm.

Balsamo, Anne. (1996) Technologies of the Gendered Body: Reading Cyborg Women. Durham: Duke University Press.

Barrett, Stanley A. (1996) Anthropology: A Student's Guide to Theory and Method. Toronto: University of Toronto Press.

Barthes, Roland. (1977) The Death of the Author. In, Heath , Stephen ed. and translation. Image, Music, Text. New York: Hill. Pp.142-48.

Baruch, Elaine, Amadec, D'Adamo, and Joni Seager, eds. (1988) Embryos, Ethics and Women's Rights: Exploring the New Reproductive Technologies. New York: Harrington Park Press.

Baylis, Françoise. (1998) Dissenting with the Dissent: Winnipeg Child and Family Services (Northwest Area) v G (DF). Alberta Law Review. 36(3): 785-798.

Bell, R.D. (1997) Prenatal substance abuse and judicial intervention in pregnancy: Winnipeg Child and Family Services v. G. (D.F.) {{1996} 138 D.L.R.4th 238}. University of Toronto Faculty of Law Review. 55:321-40.

Benhabib, Seyla. (1999) Sexual Difference and Collective Identities: The New Global Constellation. Signs. 24:335-361.

Benner, Patricia, ed. (1994) Interpretive Phenomenology: Embodiment, Caring, and Ethics in Health and Healing. Thousand Oaks, CA: Sage.

Bernard, H. Russell and Gery W. Ryan. (1998) Text Analysis: Qualitative and Quantitative Methods. In, Bernard, H. Russell, ed. Handbook of Methods in Cultural Anthropology. Walnut Creek, California: Altamira Press. Pp. 595-646.

Beyleveld, Deryck and Roger Brwonsword. (2000) My Body, My Body Parts, My Property? Health Care Analysis. 8:87-99.

Blackstone, William. (1765) Commentaries on the Laws of England: Book the First, Chapter 15.

Bonvillain, N. (1993) Language, Culture, and Communication: The Meaning of Messages. New Jersey: Prentice Hall.

Bordo, Susan R. (1987) The Flight to Objectivity: Essays on Cartesianism and Culture. New York: State University of New York Press.

Bordo, Susan. (1993) Unbearable Weight: Feminism, Western Culture, and the Body. Berkeley: University of California Press.

Bové, Paul A. (1995) Discourse. In, Lentricchia, Frank and Thomas McLaughlin, eds. Critical terms for Literary Study: Second Edition. Chicago: University of Chicago Press. Pp.50-65.

Boulous Walker, Michelle. (1998) Philosophy and the Maternal Body: Reading Silence. New York: Routledge.

Boyd, Susan C. (1999). Mothers and illicit drugs: Transcending the myths. Toronto: University of Toronto Press.

Braidotti, Rosi. (1994) Nomadic Subjects. New York: Columbia University Press.

Bray, Abigail and Clair Colebrook (1998) The Haunted Flesh: Corporeal feminism and the Politics of (Dis)Embodiment. Signs: Journal of Women in Culture and Society. 24 (1):35-67.

Brophy, Julia and Carol Smart, eds. (1985) Women in Law. London: Routledge

Browner, Carole H. and Nancy Ann Press. (1995) The Normalization of Prenatal Diagnostic Screening. In, Ginsberg, Faye, and Rayna Rapp, eds. Conceiving the New World Order: The Global Politics of Reproduction. Berkeley: University of California Press. Pp.307-322

Brysk, Alison. (2002) Introduction: Transnational Threats and Opportunities. In, Brysk, Alison, ed. Globalization and Human Rights. Berkeley: University of California Press. Pp1-18.

Bunting, Annie. (1992) Feminism, Foucault, and Law as Power/Knowledge. Alberta Law Review. 30(3):829-842.

Butler, Judith. (1990) Gender Trouble: Feminism and the Subversion of Identity. New York: Routledge.

Butler, Judith. (1993) Bodies that Matter: On the Discursive Limits of 'Sex'. New York: Routledge.

Butler, Judith. (1995). For a careful reading. In, Benhabib, S., Butler, J., Cornell, D. and N. Fraser, eds. Feminist contentions: A philosophical exchange New York: Routledge. Pp. 127-143.

Butler, Judith and Joan Scott (1992) Introduction. In, Butler, Judith and Joan W. Scott, eds. Feminists Theorize the Political. New York & London: Routledge. Pp.xiii-xvii.

Cannell, Fenella. (1990) Concepts of Parenthood: The Warnock Report, the Gillick Debate and Modern Myths. American Ethnologist. 17(4): 667-88.

Casper, M.J. (1995) "Fetal Cyborgs and TechnoMoms on the Reproductive Frontier: Which Way to the Carnival?" In, Gray, Chris H., ed. The Cyborg Handbook, New York: Routledge. Pp.183-203.

Casper, M.J. and B.A. Koening. (1996) Reconfiguring Nature and Culture: Intersections of Medical Anthropology and Technoscience Studies. Medical Anthropology Quarterly. 10 (4):523-536.

Casper, M.J. (1998) The Making of the Unborn Patient: A Social Anatomy of Fetal Surgery. New Brunswick, N.J.: Rutgers University Press.

Cates, Christopher. (1998) Property in Human Tissues: History, Society and Possible Implementations. Appeal: Review of Current Law and Law Reform. 4:32-43.

Caulfield, T., et. al., (1998) Winnipeg Child and Family Services v. D.F.G. {{1997} S.C.J. 96}: a commentary on the law, reproductive autonomy and the allure of technopolicy. Alberta Law Review. 36(3):799-809.

Chambers, Lori. (1997) Married Women and Property Law in Victorian Ontario. Toronto: University of Toronto Press.

Chavkin, Wendy. (1992) Women and Fetus: The Social Construction of Conflict. In, Feinman, Clarice, ed. The Criminalization of a Woman's Body. New York: Harrington Press.

Chock, P. P. (1991) "Illegal Aliens" and "Opportunity": Myth-making in congressional testimony. American Ethnologist. 18:479-494.

Chock, P.P. (1995) Ambiguity in policy discourse: Congressional talk about immigration. Policy Sciences. 28:165-84.

Christians, Clifford G. (2000) Ethics and Politics in Qualitative Research. In, Denzin, Norman K. and Yvonna S. Lincoln, eds. Handbook of Qualitative Research, Second Edition. London: Sage Publications. Pp. 133-155.

Cixous, Hélène. (1980) The Laugh of the Medusa. In, Marks, Elaine and Isabelle de Courtivron, eds. New French Feminisms: An Anthology. University of Massachusetts Press. Pp.261-262.

Clarke, A. and T. Montini. (1993) The many faces of RU486: Tales of Situated Knowledges and Technical Contestations. Science, Technology and Human Values. 18(1):42-78.

Clifford, James. (1988) The Predicament of Culture. Cambridge: Harvard University Press.

Clifford, James and George Marcus, eds. (1986) Writing Culture: The Poetics and Politics of Ethnography. Berkeley: University of California Press.

Coombe, Rosemary J. (1991) Encountering the Postmodern: New Directions in Cultural Anthropology. Canadian Review of Sociology and Anthropology. 28(2):188-205.

Coombs, Mary I. (1993) Telling the Victim's Story. Texas Journal of Women and the Law. 2 :277-315.

Corea, Gena. (1986) The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs. New York: Harper and Row.

Cornell, Drucilla. (1992) Gender, Sex, and Equivalent Rights. In, Butler, Judith and Joan Scott, eds. Feminists Theorize the Political. New York: Routledge. Pp.280-296.

Cotterrell, Roger (1992) The Sociology of Law, 2nd ed. London: Butterworths.

Craig, John D. R. (1997) Invasion of Privacy and Charter Values: The Common Law Tort Awakens. McGill Law Journal. 42(2):355-402

Csordas, Thomas J. (1994) The Sacred Self: A Cultural Phenomenology of Charismatic Healing. Berkley: University of California Press.

Culler, J. (1982) On deconstruction: Theory and criticism after structuralism. Ithaca: Cornell University Press.

Daniels, Cynthia R. (1993) At Women's Expense: State Power and the Politics of Fetal Rights. Cambridge, Mass.: Harvard University Press.

Davies, Margaret. (1994) Feminist Appropriations: Law, Property and Personality. Social and Legal Studes. 3:365-383.

Davis-Floyd, Robbie E. (1992). Birth as an American Rite of Passage. Berkeley and London: University of California Press.

Davis-Floyd, Robbie E. and Carolyn F. Sargent, eds. (1997). Childbirth and Authoritative Knowledge: Cross-Cultural Perspectives. Berkeley: University of California Press.

Dawson, T.B. (1998) First person familiar: judicial intervention in pregnancy, again: G. (D.F.) {Winnipeg Child and Family Services (Northwest Area) v. D.F.G. {19{1997} S.C.J. 96}. Canadian Journal of Women and the Law. 10(1):213-28.

DeCoste, F.C. (1998) Winnipeg Child and Family Services (Northwest Area) v. D.F.G. {1997} S.C.J. 96}: the impossibility of fetal rights and the obligations of judicial governance. Alberta Law Review. 36(3):725-50.

Denzin, Norman K. and Yvonna S. Lincoln. (1994) Introduction: Entering the Field of Qualitative Research. In,. Denzin, Norman K. and Yvonna S. Lincoln, eds. Handbook of Qualitative Research. London: Sage Publications. Pp.1-17.

Derrida, J. (1976) Of Grammatology. Translated by G.C. Spivak. Baltimore: The Johns Hopkins University Press.

Derrida, J. (1986) Glas. Trans. John Leavey and Richard Rand. Lincoln: University of Nebraska Press.

Derrida, Jacques. (1990). Force of Law: The Mystical Foundation of Authority. Cardozo Law Review. 5-6:919-1047.

Dickenson, Donna. (1997) Property, Women and Politics: Subjects or Objects? New Brunswick, N.J.: Rutgers University Press.

Diduck, Alison. (1998) Conceiving the Bad Mother: The Focus Should be on the Child to be Born. University of British Columbia Law Review. 32:199-225.

DiQuinzio, Patrice. (1999) The Impossibility of Motherhood: Feminism, Individualism, and the Problem of Mothering. New York: Routledge.

Dobie, Ann B. (2002) Theory into Practice: An Introduction to Literary Criticism. Boston: Heinle.

Donnison, Jean. (1977) Midwives and Medical Men: A History of Interprofessional Rivalries and Women's Rights. New York: Schocken and London: Heinemann.

Dreyfuss, R. and D. Nelkin, (1992) The Jurisprudence of Genetics. Vanderbilt Law Review. 45: 313-48

Dubinskas, Frank A., ed. (1988) Making Time: Ethnographies of High-Technology Organizations. Philadelphia: Temple University Press.

Duden, Barbara. (1993) Disembodying Women: Perspectives on Pregnancy and the Unborn. Translation by Lee Hoinacki. Cambridge, Mass.: Harvard University Press

Dumit, Joseph, ed. (1997) Cyborgs and Citadels: Anthropological Interventions in Emerging Sciences, Technologies and Medicines. Santa Fe, NM: School of American Research Press.

Dworkin, Andrea. (1987) Intercourse. New York: Free Press.

Edwards, Jeanette, Franklin, Sarah, Hirsch, Eric, Price, Frances and Marilyn Strathern. (1993) Technologies of Procreation: Kinship in the Age of Assisted Conception. Manchester: Manchester University Press.

Edwards, S. (1981) Female Sexuality and the Law. Oxford: Martin Robinson.

Eisenberg, Leon. (1995) The Social Construction of the Human Brain. American Journal of Psychiatry. 152:1563-1575.

Eisenstein, Zillah R. (1988) The Female Body and the Law. Berkeley: University of California Press.

Elam, Diane. (1994) Feminism and Deconstruction: Ms. en Abyme. New York: Routledge.

Elman, B.P., et. al., (1998) The failure of dialogue: Winnipeg Child and Family Services (Northwest Area) G. (D.F.). Alberta Law Review. 36(3):768-84.

Fairclough, N. (1995). Media Discourse. London: Edward Arnold.

Firestone, Shulamith. (1970) The Dialectic of Sex: The Case for Feminist Revolution. New York: Morrow.

Foster, Hal. (1983) Post-modernism: A Preface. In, Foster, Hal, ed. The Anti-Aesthetic: Essays on Postmodern Culture. Seattle: Bay Press. Pp.ix-xvi.

Foucault, M. (1970) The order of things: An Archaeology of the Human Sciences. New York: Vintage Books.

Foucault, M. (1980) Power/Knowledge: Selected Interviews & Other Writings 1972-1977. Gordon, Colin, ed. New York: Pantheon Books.

Foucault, M. (1984) Right of Death and Power over Life. In, Rabinow, P. ed. The Foucault Reader. New York: Pantheon Books.

Foucault, M. (1988) The Political Technology of Individuals, in Technologies of the Self. Martin, L. H., Gutman, H. and P. H. Hutton, eds. Technologies of the Self. Amherst: University of Massachusetts Press.

Fox, Marie. (2000) Pre-Persons, Commodities or Cyborgs: The Legal Construction and Representation of the Embryo. Health Care Analysis. 8:171-188.

Franklin, Sarah. (1990) Deconstructing "Desperateness": The Social Construction of Infertility in Popular Representations of New Reproductive Technologies. In, McNeil, Maureen, Varcoe, Ian and Steven Yearley, eds. The New Reproductive Technologies. London: Macmillan.

Franklin, Sarah. (1992a) Making Sense of Misconceptions: Anthropological Perspectives on Unexplained Infertility. In, Stacey, Meg, ed. Changing Human Reproduction: Social Science Perspectives. London: Sage.

Franklin, Sarah. (1992b) Contested Conceptions: A Cultural Account of Assisted Reproduction. Ph.D. diss., Department of Cultural Studies, University of Birmingham. Birmingham, England.

Franklin, S. (1995) Science as Culture, Cultures of Science. Annual Review of Anthropology. 24:163-84.

Franklin, S. (1996) Commentaries: An Excellent Prognosis. Medical Anthropology Quarterly. 10 (4):683-690.

Friedman, Susan Stanford (1996) Beyond' Gynocriticism and Gynesis: The Geographics of Identity and the Future of Feminist Criticism. Tulsa Studies in Women's Literature 15(1):13-40.

Gatens, M. (1983) A Critique of the Sex/Gender Distinction. In Allen, J. and P. Paten, eds. Beyond Marxism: Interventions after Marx. Sydney: Intervention. Pp.143-60

Gatens, Moira. (1988) Towards a Feminine Philosophy of the Body. In, Caine, Barbara, Grosz, E.A. and Marie de Lepervanche, eds. Crossing Boundaries: Feminism and the Critique of Knowledges. Sydney: Allen and Unwin.

Gatens, Moira. (1996) Imaginary Bodies: Ethics, Power and Corporeality. New York: Routledge.

Ginn, Diana. (1994) Pregnant Women and Consent to Medical Treatment. Health Law in Canada 15:41-48.

Ginn, D. (2001) A balancing that is beyond the scope of the common law: a discussion of the issues raised by Dobson (Litigation Guardian of) v. Dobson {{1999} 174 D.L.R.4th 1}. Queen's Law Journal. 27(1):51-92.

Ginsburg, Faye, and Rayna Rapp. (1991) The Politics of Reproduction. Annual Review of Anthropology. 20:311-343.

Ginsburg, Faye D. and Rayna Rapp. (1995) Conceiving a New World Order: The Global Politics of Reproduction. Berkeley: University of California Press.

Glaser, Barney G. and Anselm Strauss. (1967) The Discovery of Grounded Theory: Strategies for Qualitative Research. Chicago, IL: Aldine Publishing Co.

Gonen, Julianna S. (1993) Women's Rights vs. Fetal Rights: Politics, Law and Reproductive Hazards in the Workplace. Women & Politics. 23(3-4):175-90.

Good, Byron J. (1994) Medicine, Rationality, and Experience. An Anthropological Perspective. Cambridge: Cambridge University Press.

Gordon, R.W. (1984) Critical Legal Histories. Stanford Law Review 36: 57-125.

Goulet, J. (1993) Appropriation of the Human Being: An Essay on the Appropriation of the Human Body and its Parts. In, Royal Commission on New Reproductive Technologies. Overview of Legal Issues in New Reproductive Technologies. Volume 3 of the Research Studies. Ottawa: Minister of Supply and Services Canada.

Gray, Chris Hables, Mentor, Steven and Jennifer Figueroa-Sarriera. (1995) Cyborg Handbook. New York: Routledge.

Greaves, Lorraine, Poole, Nancy, and Renee Cormier (2002). Fetal Alcohol Syndrome and Women's Health: Setting a women-centred research agenda. Final Report. Conference Proceedings, May 5-7, 2002. Vancouver: British Columbia Centre of Excellence in Women's Health.

Green, Kate. (1995) Thinking Land Law Differently: Section 70(1)(g) and the Giving of Meanings. Feminist Legal Studies. 3(2): 131-157.

Griggs, L. (1994) The Ownership of Excised Body Parts: Does the Individual Have the Right to Sell? Journal of Law and Medicine. 1:223-228.

Grosz, Elizabeth. (1993) Lived Spatiality: Spaces of Corporeal Desire. In, Boigon, Brian, ed. Culture Lab. New York: Princeton Architectural Press. Pp.179-206.

Grosz, Elizabeth. (1994) Volatiles Bodies: Toward a Corporeal Feminism. Sydney: Allen Unwin.

Grosz, Elizabeth (1995) Space, Time and Perversion: Essays on the Politics of Bodies. London: Routledge.

Guba, Egon G. and Yvonna S. Lincoln. (1994) Competing Paradigms in Qualitative Research. In, Denzin, Norman K. and Yvonna S. Lincoln. eds. Handbook of Qualitative Research. London: Sage Publications. Pp. 105-117.

Gupta, A. (1995) Blurred boundaries: the discourse of corruption, the culture of politics, and the imagined state. American Ethnologist 22(2):375-402.

Hacking, I. (1999) The Social Construction of What? Cambridge, Massachusetts: Harvard University Press.

Hadfield, Gillian K. (1995) The Dilemma of Choice: A Feminist Perspective on The Limits of Freedom of Contract. Osgoode Hall Law Journal. 33(2):337-351.

Hamilton, A.C. and C.M. Sinclair. (1991) Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg: Province of Manitoba.

Hanigsberg, Julia E. (1991) Power and Pregnancy: State Intervention in Pregnancy. Ottawa Law Review. 23:35-70.

Haraway, Donna. (1991) A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Centruty. In, Haraway, Donna. Simians, Cyborgs, and Women. New York: Routledge.

Haraway, Donna. (1997) Modest Witness@Second Millennium: FemaleMan© Meets OncoMouse(TM): Feminism and Technoscience. New York: Routledge.

Harding, Sandra. (1987) Introduction: Is there a Feminist Method? In, Harding, Sandra, ed. Feminism and Methodology. Bloomington: Indiana University Press. Pp. 1-14.

Harding, Sandra, ed. (1993) The "Racial" Economy of Science: Toward a Democratic Future. Bloomington: Indiana University Press.

Harris, J.W. (1996) Property and Justice. Oxford: Clarendon Press.

Hartmann, Betsy. (1987) Reproductive Rights and Wrongs: The Global Politics of Population Control and Contraceptive Choice. New York: Harper and Row.

Hartouni, Valerie. (1991). Containing Women: Reproductive Discourse in the 1980s. In, Penley, C. and A. Ross, eds. TechnoCulture. Minneapolis: University of Minnesota Press. Pp.27-56.

Hartouni, Valerie. (1997) Cultural Conceptions: On Reproductive Technologies and the Remaking of Life. Minneapolis: University of Minnesota Press

Health Canada. (1999) 2.1. Consultations. In, Reproductive and Genetic Technologies Overview Paper.

Hekman, S. J. (1990). Gender and knowledge: Elements of a Postmodern Feminism. Boston: Northeastern University Press.

Hekman, S.J. ed. (1996) Feminist Interpretations of Michel Foucault. University Park, Pennsylvania: Pennsylvania State University Press.

Helleiner, J. (1998) "For the Protection of the Children": The Politics of Minority Childhood in Ireland. Anthropological Quarterly. 71(2):51-62.

Hess, D.J. (1997) If You're Thinking of Living in STS. In Downey, G.L. and J. Dumit, eds. Cyborgs and Citadels: Anthropological Interventions in Emerging Sciences and Technologies. Santa Fe, New Mexico: School of American Research Press Pp.143-164.

Hirschon, Renée. (1984) Introduction: Property, Power and Gender Relations. In, Hirschon, Renée, ed. Women and Property: Women as Property. New York: St. Martin's Press. Pp 1-22.

Hirschon, Renée, ed. (1984) Women and Property: Women as Property. New York: St. Martin's Press.

Holmes, Helen Bequaert, ed. (1992). Issues in Reproductive Technology: An Anthology. New York: Garland.

Homans, Hilary, ed. (1986) The Sexual Politics of Reproduction. Aldershot, England: Gower.

Hyde, Alan. (1997) Bodies of Law. Princeton: Princeton University Press.

Hymes, Dell. (1972) The Use of Anthropology: Critical, Political, Personal. In, Hymes, Dell, ed. Reinventing Anthropology. New York: Vintage Books. Pp.3-79.

Iannatuono, A. and J. Eyles. (1997) Meanings in Policy: A Textual Analysis of Canada's "Achieving Health For All" Document. Social Science and Medicine 44(11):11611-21.

Ignatieff, Michael. (2000) The Rights Revolution. Toronto: House of Anansi Press.

Irigaray, Luce. (1997) This Sex Which Is Not One. In, Conboy, Katie, Medina, Nadia and Sarah Stanbury, eds. Writing on the Body: Female Embodiment and Feminist Theory. New York: Columbia University Press. Pp.248-256.

Jagger, Gill. (1996) Dancing with Derrida: Anti-essentialism and the Politics of Female Subjectivity. Journal of Gender Studies. 5(2)191-199.

James, Wendy R. (2000) Placing the Unborn: On the Social Recognition of New Life. Anthropology and Medicine. 7(2):169-189.

Jordan, Brigitte. (1993) Birth in Four Cultures: A Crosscultural Investigation of Childbirth in Yucatan, Holland, Sweden, and the United States. Fourth edition revised and expanded by Robbie Davis-Floyd. Prospect Heights, IL: Waveland.

Jordanova, Ludmilla J. (1989) Sexual Visions: Images of Gender in Science and Medicine Between the Eighteenth and Twentieth Centuries. London: Routledge.

Jorgensen, Marianne W. and Louise J. Phillips (2002) Discourse Analysis as Theory and Method. London: Sage.

Kaplan, Warren (Undated) Biotech Patenting 101. Cambridge, MA: Council for Responsible Genetics.
http://www.gene-watch.org/programs/patents/patenting101.html

Karpin, I. (1992) Legislating the Female Body: Reproductive Technology and the Reconstructed Woman. Columbia Journal of Gender and Law 3:1, 325-349.

Katz Rothman, B. (1986) The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood. New York: Viking.

Keywood, Kirsty (2000) More Than a Woman? Embodiment and Sexual Difference in Medical Law. Feminist Legal Studies. 8:319-342.

Kincheloe, Joe L. and Peter McLaren. (2000) Rethinking Critical Theory and Qualitative Research. In, Denzin, Norman K. and Yvonna S. Lincoln, eds. Handbook of Qualitative Research, Second Edition. London: Sage Publications. Pp. 279-313.

Kitzinger, Sheila (1995) Ourselves as Mothers: The Universal Experience of Motherhood, Reading, Massachusetts: Addison-Wesley Publishing Company.

Klein, Renate, ed. (1989) Infertility: Women Speak Out about Their Experiences of Reproductive Medicine. London: Pandora.

Knoppers, Bartha Maria. (1991) Human Dignity and Genetic Heritage: Protection of Life Series. Ottawa: Law Reform Commission of Canada.

Krantz, J.Z. and N.S Kupper. (1981) Cross-nursing: Wet Nursing in a Contemporary Culture. Pediatrics. 67:715-17.

Kristeva, Julia. (1986) Stabat Mater. In, Moi, Toril, ed. The Kristeva Reader. New York: Columbia University Press. Pp. 160-186.

Kristeva, Julia. (1986a) ' New Type of Intellectual: The Dissident. In, Moi, Toril, ed. The Kristeva Reader. New York: Columbia University Press. Pp. 292-300.

Kristeva, Julia. (1997) Motherhood According to Giovanni Bellini. In, Oliver, Kelly, ed. The Portable Kristeva. New York: Columbia University Press. Pp. 303-331.

Kropp, Douglas. (1997) 'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject. Queen's Law Journal. 23:201-230.

Kuhn, Thomas. (1962) The Structure of Scientific Revolutions. Chicago: University of Chicago Press.

Lacey, Nicola. (1998) Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law. Canadian Journal of Law and Jurisprudence. 11:47-68.

Ladd-Taylor, Molly and Lauri Umansky. (1998) "Bad" Mothers: The Politics of Blame in Twentieth-Century America. New York: New York University Press.

Lakoff, G. and. M. Johnson. (1980) Metaphors We Live By. Chicago: Univeristy of Chicago Press.

Latour, Bruno. (1987) Science in Action. Cambridge, Mass.: Harvard University Press.

Lambeck, Michael and Andrew Strathern, eds. (1998) Bodies and Persons: Comparative Perspectives from Africa and Melanesia. Cambridge: Cambridge University Press.

Law Reform Commission of Canada. (1989) Protection of Life: Crimes Against the Foetus. Working Paper 58. Ottawa: Law Reform Commission of Canada.

Lenoir, Timothy. (2000) Body Works Medicine, Technology and the Body in the Late 20th Century. http://www.stanford.edu/dept/HPS/BodyWorks/

Lester, Rebecca J. (1997) The (Dis)Embodied Self in Anorexia Nervosa. Social Science and Medicine. 44:479-489.

Létourneau, Gilles, Linden, Allen M., Picard, Ellen, Frecker, John, Rivet, Michèle, and Jacques Frémont. (1992) Procurement and Transfer of Human Tissues and Organs. Working Paper 66. Ottawa: Law Reform Commission of Canada.

Lincoln, Yvonna S. and Egon G. Guba. (2000) Paradigmatic Controversies, Contradictions, and Emerging Confluences. In, Denzin, Norman K. and Yvonna S. Lincoln, eds. Handbook of Qualitative Research, Second Edition. London: Sage Publications. Pp. 163-188.

Linden, Allen M. Létourneau, Gilles, Maingot, Joseph, Frecker, John and Michèle Rivet. (1989) Crimes Against the Foetus. Working Paper 58. Ottawa: Law Reform Commission of Canada.

Lindgren Alvea, José. (2000) The Declaration of Human Rights in Postmodernity. Human Rights Quarterly. 22(2):478-500.

Litman, G.G and G.B. Robertson. (1993) Reproductive Technology: Is a Property Law Regime Appropriate? In, Royal Commission on New Reproductive Technologies. Overview of Legal Issues in New Reproductive Technologies. Volume 3 of the Research Studies. Ottawa: Minister of Supply and Services Canada.

Lloyd, Genevieve (1993) The Man of Reason: "Male" and "Female" in Western Philosophy. Minneapolis: University of Minnesota Press.

Locke, J. (1690). Two treatises of civil government. In, Laslett, P. ed. London: Cambridge University Press.

Loney, E. A., Green, K. L., and J. L. Nanson. (1994). A health promotion perspective on the House of Commons' Report "Foetal Alcohol Syndrome: A preventable tragedy". Canadian Journal of Public Health, 85(4):248-251.

Longhurst, Robyn. (2001) Bodies: Exploring Fluid Boundaries. New York: Routledge.

Lynch, M. (1999) Property in Human Gametic Material and the New Reproductive Technologies. Journal of Law and Medicine 6:348-372.

MacCormack, Carol P. (1982) Ethnography of Fertility and Birth. London: Academic Press.

MacKinnon, Catharine A. (1982) Feminism, Marxism, Method, and the State: An Agenda for Theory. Signs. 7(3):515-544.

MacKinnon, Catharine A. (1989) Toward a Feminist Theory of the State. Cambridge: Harvard University Press.

MacKinnon, C. A. (1990). Legal perspectives on sexual differences. In, Rhode, D. L., ed. Theoretical Perspectives on Sexual Differences. New Haven, CN: Yale University Press. Pp.220-245.

Macpherson, C.B., ed. (1978) Property: Mainstream and Critical Positions. Toronto: University of Toronto Press.

Mahoney, Martha R. (1990) Legal Images of Battered Women: Redefining the Issue of Separation. Michigan Law Review. 90:1-94.

Maine,Sir Henry (1861) Ancient Law. Available online at: http://www.harvestfields.netfirms.com/etexts/30/06.htm

Malkin, I. (2001) A mother's duty of care to her foetus while driving: a comment on Dobson v Dobson {{1999} 174 D.L.R.4th 1} (and Lynch v Lynch {{1991} 25 N.S.W.L.R. 411}). Torts Law Journal 9(1):109-29.

Maness Mehaffy, Marilyn. (2000) Fetal Attractions: The Limit of Cyborg Theory. Women's Studies. 29:117-194.

Manning, Peter K. and Betsy Cullam-Swan. (1994) Narrative, Content, and Semiotic Analysis. In, Denzin Norman K. and Yvonne S. Lincoln, eds. Handbook of Qualitative Research. London: Sage Publications. Pp. 463-474.

Maranhão, Tullio and Bernhard Streck, eds. (2003) Translation and Ethnography: The Anthropological Challenge of Intercultural Understanding. Tucson: University of Arizona Press.

Marcus, George and Michael Fischer. (1986) Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences. Chicago: University of Chicago Press.

Martin, Emily. (1987) The Woman in the Body: A Cultural Analysis of Reproduction. Boston: Beacon Press.

Martin, Emily. (1990) The Ideology of Reproduction: The Reproduction of Ideology. In, Ginsburg, Faye D. and Anna Lowenhaupt Tsing, eds. Uncertain Term: Negotiating Gender in American Culture. Boston: Beacon Press. Pp. 300-314.

Martin, Emily. (1991) The Egg and Sperm. Signs. 16(3): 485-501.

Martin, Emily. (1994) Flexible Bodies: Tracking Immunity in American Culture from the Days of Polio to the Age of AIDS. Boston: Beacon Press.

Marusyk, R.W. and M.S. Swain. (1989) A Question of Property Rights in the Human Body. Ottawa Law Review. 21(2):351-358.

Matthews, P. (1983) Whose Body? People as Property. Current Legal Problems. 36:193-220.

McCormack, T. (1999) Fetal syndromes and the Charter: the Winnipeg glue-sniffing case. Canadian Journal of Law and Society. 14(2):77-99.

McInnes, M. (2000) Pre-natal injuries in the Supreme Court of Canada. The Law Quarterly Review. 116:26-29.

McNay, L. (1992) Foucault and Feminism: Power, Gender and the Self. Cambridge: Polity Press.

McNeil, Maureen, Varcoe, Ian, and Steven Yearley, eds. (1990) The New Reproductive Technologies. London: Macmillan.

Mertz, Elizabeth. (1992) Language, Law, and Social Meanings: Linguistic/ Anthropological Contributions to the Study of Law. Law and Society Review. 26(2):413-468.

Mertz, E. (1988) Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices. Anthropological Linguistics. 30 (3/4):369-394.

Mertz, E. (1994a) A New Social Constructionism for Sociolegal Studies. Law and Society Review 28(5):1243-65.

Mertz, E. (1994b) Legal Language: Pragmatics, Poetics, and Social Power. Annual Review of Anthropology. 23:435-55.

Meyers, Diana T. (1989) Self, Society, and Personal Choice. New York: Columbia University Press.

Meyers, Diana Tietjens (2001) The Rush to Motherhood – Pronatalist Discourse and Women's Autonomy. Signs: Journal of Women in Culture and Society. 26(3):735-773.

Mykitiuk, Roxanne (2002) Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies. Osgoode Hall law Journal. 39(4):771-815.

Mohanty, Chandra Talpade. (1991) Under Western Eyes: Feminist Scholarship and Colonial Discourses. In. Mohanty, Chandra Talpade, Russo, Ann and Lourdes Torres, eds. Third World Women and the Politics of Feminism. Indianapolis: Indiana University Press. Pp.51-81.

Morgan, D. and R. G. Lee. (1991). Abortion and Embryo Research: The New Law. London: Blackstone Press.

Morgan, Lynn M. (2001) Fetal Relationality in Feminist Philosophy: An Anthropological Critique. Hypatia. 11(3):47-70.

Medical Research Council of Canada, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada. (1998) Tri-Coucil Policy Statement: Ethical Conduct for Research Involving Humans Ottawa: Public Works and Government Services Canada.

Moore, Henrietta L. (1999) What Ever Happened to Women and Men? Gender and Other Crises in Anthropology. In, Moore, Henrietta L., ed. Anthropological Theory Today. Cambridge: Polity Press. Pp.151-171.

Monture-Angus, Patricia. (1996) Lessons in Decolonization: Aboriginal Over-representation in Canadian Criminal Justice. In, Long, David Alan and Olive Dickason, eds. Visions of the Heart: Canadian Aboriginal Issues. Toronto: Harcourt Brace Canada. Pp.335-354.

Mulkay, M. (1994) Women in the Parliamentary Debate over Embryo Research. Science, Technology and Human Values. 19(1):5-23.

Nader, Laura. (1972) Up the Anthropologist: Perspectives Gained from Studying Up. In, Hymes, Dell, ed. Reinventing Anthropology. New York: Vintage Books. Pp.248-311.

Nader, Laura. (1996) Naked Science: Anthropological Inquiry into Boundaries, Power, and Knowledge. New York: Routledge

Nader, Laura. (2002) The Life of the Law: Anthropological Project. Berkeley: University of California Press.

Naffine, Sgaire (2003) Who are Law's Persons? From Cheshire Cats to Responsible Subjects. The Modern Law Review. 66(3): 346-367.

Nedelsky, Jennifer. (1989) Reconceiving Autonomy: Sources, Thoughts, and Possibilities. Yale Journal of Law and Feminism. 1(1):7-16.

Nedelsky, Jennifer. (1993) Property in Potential Life? A Relational Approach to Choosing Legal Categories. Canadian Journal of Law and Jurisprudence. 6:343-365.

Neimeyer, Greg J. (1993) Constructivist Assessment: A Casebook. Newbury Park, California: Sage.

Nelson, E. (2000) One of these things is not like the other: maternal legal duties and the Supreme Court of Canada. Supreme Court Law Review (Canada). Second Series. 12:31-54.

Norris, Christopher. (1982) Deconstruction: Theory and Practice. London: Methuen.

Norris, Christopher. (1989) Deconstruction and the Interests of Theory. Norman: University of Oklahoma Press.

Oakley, Ann. (1984) The Captured Womb: A History of the Medical Care of Pregnant Women. New York: Basil Blackwell.

O'Brien, Mary. (1981) The Politics of Reproduction, London: Routledge and Kegan Paul.

O'Donnell, Kath. (2000) Legal Conceptions: Regulating Gametes and Gamete Donation. Health Care Analysis. 8:137-154.

Olchowy, James R. (1999) Inside McClung J.A.'s 'Closet' in Vriend v. Alberta: The Indignity of Misrecognition, the Tool of Oppressive Privacy, and the Ideology of Equality. Alberta Law Review. 37(3): 648:682.

Overall, Christine, ed. (1989) The Future of Human Reproduction. Toronto: Women's Press.

Oxford English Dictionary Online. http://www.oed.com

Paltrow, Lynn M. (1999) Punishment and Prejudice: Judging Drug-Using Pregnant Women. In, Hanigsberg, Julia E. and Sara Ruddick, eds. Mother Troubles: Rethinking Contemporary Maternal Dilemmas. Boston: Beacon Press. Pp 59-79.

Paltrow, Lynn M., Cohen, David S. and Corrinne A. Carey. (2000) Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs. http://advocatesforpregnantwomen.org/articles/gov_response_review.pdf

Paton,G. (1972) Textbook of Jurisprudence, 4th ed. London: Oxford University Press.

Patton, Michael Quinn. (2002) Qualitative Research and Evaluation Methods. Thousand Oaks, California: Sage Publications.

Penner, J. E. (1997) The Idea of Property in Law. Oxford: Oxford University Press.

Petchesky, Rosalind Pollack. (1987) Foetal Images: The Power of Visual Culture in the Politics of Reproduction. In Stanworth, Michele, ed. Reproductive Technologies: Gender, Motherhood, and Medicine. Minneapolis: University of Minnesota Press. Pp.57-80.

Petchesky, Rosalind Pollack. (1995) The Body as Property: A Feminist Re-vision. In, Ginsburg, Faye and Rayna Rapp, eds. Conceiving the New World Order: The Global Politics of Reproduction. Berkeley: University of California Press. Pp387-406.

Peters, Julie and Andrea Wolper, eds. (1995) Women's Rights: Human Rights. New York: Routledge.

Peterson, F. Spike and Laura Parisi. (1998) Are Women Human? It's Not an Academic Question. In, Evans, Tony, ed. Human Rights Fifty Years on: A Reappraisal. Manchester: Manchester University Press. Pp132-160.

Pfaffenberger, B. (1992a) Social Anthropology of Technology. Annual Review of Anthropology. 21:491-516.

Pfaffenberger, B. (1992b) Technological Dramas. Science, Technology and Human Values. 17(3):282-313.

Pfeffer, Naomi. (1993) The Stork and the Syringe: A Social History of Reproductive Control. Cambridge, England: Polity Press.

Powell, Jim. (1997) Derrida for Beginners. New York: Readers and Writers Limited.

Preis, Ann-Belinda S. (1996) Human Rights as Cultural Practice: An Anthropological Critique. Human Rights Quarterly 18(2):286-315.

Purdy, Laura, ed. (1989) Hypatia. Special issue on Ethics and Reproduction, 4(3).

Rabinow, Paul. (1996) Making PCR: A Story of Biotechnology. Chicago: University of Chicago Press.

Radin, Margaret Jane. (1987) Market-Inalienability. Harvard Law Review. 100(1849):1915-1916.

Ragone, Helena. (1994) Surrogate Motherhood: Conception in the Heart. Boulder and London: Westview Press.

Randall, M. (1999) Pregnant embodiment and women's autonomy rights in law: An analysis of the language and politics of Winnipeg Child and Family Services v. G. (D.F.), {{1997} S.C.J. 96}. Saskatchewan Law Review. 62(2):515-42.

Rapp, R. (1997) The Role of the Sonogram in the Age of Monitored Reproduction. In, Downey, G.L. and J. Dumit, eds. Cyborgs and Citadels: Anthropological Interventions in Emerging Sciences and Technologies. Santa Fe, New Mexico: School of American Research Press. Pp. 31-48.

Rapp, R. (1999) Testing Women, Testing the Fetus: The Social Impact of Amniocentesis in America. New York: Routledge.

Raymond, Janice G. (1993) Women as Wombs: Reproductive Technologies and the Battle Over Women's Freedom. San Francisco: Harper San Francisco.

Raymond, Janice. (1997) RU 486: A Case Study in the Ethics and Politics of New Reproductive Drugs. In, Berner, Boel, ed. Gendered Practices: Feminist Studies of Technology and Society. Linkoping, Sweden, Department of Technology and Social Change. Pp115-129.

Rich, Adrienne. (1976) Of Woman Born: Motherhood as Experience and Institution. New York: Bantam Books.

Riggins, Stephen Harold. (1997). The Rhetoric of Othering. In, Riggins, Stephen Harold, ed. The Language and Politics of Exclusion: Others in Discourse. Thousand Oaks: Sage Publications. Pp.1-30.

Robertson, Gerald, Miller, Jennifer, Howell, Tracey and Steven Penney. (1995) Legal Norms Relevant to the Practice of Human Genetics: A Background Paper. Health Law Journal. 3:187-211.

Rodgers, S. (1998) Winnipeg Child and Family Services v. D.F.G. {{1997} S.C.J. 96}: juridical interference with pregnant woment in the alleged interest of the fetus. Alberta Law Review. 36(3):711-24.

Rodin, Judith, and Aila Collins, eds. (1991) Women and New Reproductive Technologies: Medical, Psychosocial, Legal and Ethical Dilemmas. Hillside, NJ.: Lawrence Erlbaum Associates.

Rodman, Hyman. (1971) Lower Class Families: The Culture of Poverty in Negro Trinidad. New York: Oxford University Press.

Rothman, Barbara Katz. (1986) The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood. New York: Viking Press.

Rothman, Barbara Katz. (1989) Recreating Motherhood: Ideology and Technology in a Patriarchal Society. New York: Norton.

Rouse, Joseph. (1992) What Are Cultural Studies of Scientific Knowledge? Configurations 1:1-22.

Rowe, John Carlos. (1995) Structure. In, Lentricchia, Frank and Thomas McLaughlin, eds. Critical Terms for Literary Study, Second Edition. Chicago: University of Chicago Press. Pp.23-38.

Rowland, Robyn. (1992) Living Laboratories: Women and Reproductive Technologies. Bloomington and Indianapolis: Indiana University Press.

Royal Commission on New Reproductive Technologies. (1993) *Proceed with Care: Final Report of the Commission on New Reproductive Technologies.* Ottawa: Minister of Government Services Canada.

Ruhl, P. Lealle. (2002) Disarticulating Liberal Subjectivities: Abortion and Fetal Protection. Feminist Studies 28(1):37-61.

Ruhl, Lealle (2000) Natural Governance and the Governance of Nature: The Hazards of Natural Law Feminism. Feminist Review. 66(Autumn):4-24.

Russell-Brown, Pauline A., Norville, Beverly and Cheryl Griffith. (1997) Child Shifting: A Survival Strategy for Teenage Mothers. In, Roopnarine, Jaipaul R. and Janet Brown, eds. Caribbean Families Diversity Among Ethnic Groups Westport, Conn: Ablex Publishing.

Samuels, Suzanne Uttaro. (1995) Fetal Rights, Women's Rights: Gender Equality in the Workplace. Madison, Wisconsin: University of Wisconsin Press.

Sangren, P. Steven. (1988) Rhetoric and the Authority of the Ethnography: Postmodernism and the Social Reproduction of Texts. Current Anthropology. 29:405-24.

Sanjek, Roger, ed. (1990) Fieldnotes: The Making of Anthropology. Ithaca: Cornell University Press.

Sawicki, J. (1991) Disciplining Foucault: Feminism, Power and the Body. New York: Routledge.

Scheman, Naomi. (1997) 'Though This Be Method, Yet There Is Madness in It': Paranoia and Liberal Epistemology. In, Meyers, Diana Tietjens, ed. Feminist Social Thought: A Reader. London: Routledge. Pp. 342–67.

Schiebinger, Londa. (1993) Nature's Body: Gender in the Making of Modem Science. Boston: Beacon Press.

Schneider, D. (1998) "I know all about Emma Lazarus": Nationalism and its Contradictions in Congressional Rhetoric of Immigration Restriction. Cultural Anthropology 13(1):82-9.

Schroeder, Jeanne Lorraine. (1998) The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine. Berkeley: University of California Press.

Scott, J. (1988) Deconstructing Equality-Versus-Difference: Or, the Uses of Post-structuralist Theory for Feminism. Feminist Studies. 14(1):33-50.

Scutt, Jocelynne, ed. (1990) The Baby Machine: Reproductive Technology and the Commercialisation of Motherhood. London: Green Print.

Shadish, William R. (1995) Philosophy of Science and the Quantitative-Qualitative Debates: Thirteen Common Errors. Evaluation and Program Planning. 18(1):63-75.

Shanner, Laura. (1998) Pregnancy Intervention and Models of Maternal-Fetal Relationship: Philosophical Reflections on the Winnipeg C.F.S. Dissent. Alberta Law Review. 36(3) 751-765.

Sharp, Lesley A. (2000) The Commodification of the Body and its Parts. Annual Review of Anthropology. 29:287-328.

Shevory, Thomas C. (2000) Body Politics: Studies in Reproduction, Production, and (Re)construction. Westport, CT: Praeger Publishers.

Shewchuck, Tara Rayne. (1993) Regulation of Pre-Conception Agreements: A Synthesis of Individual Rights and Community Values. Health Law Journal. (1):147-189.

Shildrick, Margrit. (1997) Leaky Bodies and Boundaries: Feminism, Postmodernism, and (Bio)Ethics. Manchester and New York: Manchester University Press.

Shildrick, Margrit (1999) This Body Which Is Not One: Dealing with Differences. Body & Society. 5(2):77-92.

Shildrick, Margrit (2002) Embodying the Monster: Encounters with the Vulnerable Self. London: Sage Publications

Showalter, Elaine (1995) The Female Malady: Women, Madness and English Culture, 1830-1980. New York: Pantheon.

Smart, Carol. (1989) Feminism and the Power of the Law. London: Routledge.

Smart, Carol. (1990) Laws Truth: Women's Experience. In, Graycar, Regina, ed. Dissenting Opinions: Feminist Explorations in Law and Society. Sydney: Allen & Unwin. Pp.5-36.

Smith, John B. (1991) Conceiving Selves: A Case Study of Changing Identities During the Transition to Motherhood. Journal of Language and Psychology. 10(4):225-243.

Smith, John K. and Deborah K. Deemer (2000) The Problem of Criteria in the Age of Relativism. In, Denzin, Norman K. and Yvonna S. Lincoln, eds. Handbook of Qualitative Research, Second Edition. London: Sage Publications. Pp. 877-896.

Sneiderman, Barney, Irvine, John C. and Philip H. Osborne. (1995) Canadian Medical Law: An Introduction for Physicians, Nurses and other Health Care Professionals. Scarborough: Carswell Thompson Professional Publishing.

Spallone, Patricia. (1989) Beyond Conception: The New Politics of Reproduction. London: Macmillan.

Spallone, Patricia. (1992) Generation Games: Genetic Engineering and the Future For Our Lives. London: Women's Press.

Spallone, Patricia, and Deborah Steinberg, eds. (1987) Made to Order: The Myth of Reproductive and Genetic Progress. London: Pergamon Press.

Spinosa, C. and H.L. Dreyfus. (1996) Two kinds of Antiessentialism and their Consequences. Critical Inquiry. 22(4): 735-763.

Spivak, G.C. (1974) Translator's preface. In, Derrida, J. Of Grammatology. Translated by G.C. Spivak, Baltimore: Johns Hopkins University Press. Pp. ix- xc.

Spivak, G. C. (1989) Feminism and Deconstruction, Again: Negotiating with Unacknowledged Masculinism. In, Brennan, T., ed. Between Feminism and Psychoanalysis. New York: Routledge. Pp. 206-233.

Spradley, J. P. (1979). The Ethnographic Interview. New York: Holt, Rinehart, Winston.

Squires, Judith. (1996) Fabulous Feminist Futures and the Lure of Cyberculture. In, Dovey, J., ed. Fractal Dreams. London: Lawrence & Wishart. Pp. 360-373.

Stabile, Carol. (1994) Feminism and the Technological Fix. New York: Manchester University Press.

Stanworth, Michelle, ed. (1987) Reproductive Technologies: Gender, Motherhood and Medicine. Cambridge: Polity Press.

Statistics Canada. (1998) Age-Specific Fertility Rate 1986-1997. Catalogue no. 82F0075XCB.

Stenson, K. and P. Watt. (1999) Governmentality and the 'Death of the Social'? A Discourse Analysis of Local Government Texts in South-East England. Urban Studies. 36(1):189-202.

Strathern, Marilyn. (1984) Subject or Object? Women and the Circulation of Valuables in Highlands New Guinea. In, Hirschon, Renée, ed. Women and Property-Women as Property. London: Croom Helm. Pp 1-22.

Strathern, Marilyn. (1992a) After Nature: English Kinship in the Late Twentieth Century. Cambridge: Cambridge University Press.

Strathern, Marilyn. (1992b) Reproducing the Future: Anthropology, Kinship and the New Reproductive Technologies. Manchester: Manchester University Press.

Strathern, Andrew and Michael Lambeck. (1998) Introduction: Embodying Sociality: Africanist-Melanesianist Comparisons. In, Lambeck, Michael and Andrew

Strathern, eds. Bodies and Persons: Comparative Perspectives from Africa and Melanesia. Cambridge: Cambridge University Press. Pp.1-25.

Stychin, Carl F. (1995) Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada. Canadian Journal of Law and Jurisprudence. 8:49-66.

Tingle, Bryce C. (1992) Redeeming the Promise of Our Laws. Alberta Law Review. 30 (4):1324.

Tompkins, Jane P., ed. (1980) Reader-Response Criticism: From Formalism to Post-Structuralism. Baltimore: The Johns Hopkins University Press.

Traweek, Sharon. (1993) An Introduction to Cultural and Social Studies of Science and Technologies. Culture, Medicine and Psychiatry. 17:3-25.

Treichler, Paula A., Cartwright, Lisa, and Constance Penley. (1998) Introduction: Paradoxes of Visibility. In Treichler, Paula A., Cartwright, Lisa, and Constance Penley, eds. The Visible Woman: Imaging Technologies, Gender, Science. Pp.1-17.

Tsing, Anna Lowenhaupt. (1990) Monster Stories: Women Charged with Perinatal Endangerment. In, Ginsburg, Faye and Anna Lowenhaupt Tsing, eds. Uncertain Terms: Negotiating Gender in American Culture. Boston: Beacon Press. Pp.282-299.

Turnbull, Lorna. (2001) The Legal Characterization of Pregnancy and Mothering: Does Mother Know Best? Journal of the Association for Research on Mothering. 3(1):126-138.

Tyler, Stephen. (1984) The Poetic Turn in Postmodern Anthropology: The Poetry of Paul Friedrich. American Anthropologist. 86:328-36.

Tyler, Stephen. (1986) Postmodern Anthropology. In, Chock, Phyllis Pease and June R. Wyman, eds. Proceedings of the Anthropological Society. Discourse and the Social Life of Meaning. Washington D.C. and London: Smithsonian Institution Press. Pp.23-49.

U.S. Congress, Office of Technology Assessment (1987) New Developments in Biotechnology: Ownership of Human Tissues and Cells—Special Report, OTA-BA-337. Washington, DC: U.S. Government Printing Office.

van der Steen, Wim J. and P.J. Thung. (1988) Faces of Medicine. Boston: Kluwer Press.

Wajcman, Judy. (1991) Feminism Confronts Technology. Pennsylvania: Pennsylvania State University Press.

Wajcman, J. (1994) Delivered into Men's Hands? The Social Construction of Reproductive Technology. In, Wajcman, J., ed. Power and Decision: The Social Control of Reproduction. Cambridge: Harvard School of Public Health. Pp.153-175.

Weedon, Chris (1987) Feminist Practice and Poststructuralist Theory. Cambridge, MA: Basil Blackwell.

Whitaker, Lois D. (1999) The Family and Medical Leave Act (FMLA). In, Whitaker, L. D., ed. Women in Politics: Outsiders or Insiders? New Jersey: Prentice Hall, Pp.306-325.

Wigley, Mark (1993) The Architecture of Deconstruction: Derrida's Haunt. Cambridge: MIT Press.

Williams, Patricia (1993) The Alchemy of Race and Rights. London: Virago Press.

Williams, Patricia (1995) The Rooster's Egg. Cambridge: Harvard University Press.

Williams, Patricia (1998) On being the Object of Property. Signs. 14(1):5-23.

Wolf, Eric R. (1972) American Anthropologists and American Society. In, Hymes, Dell, ed. Reinventing Anthropology. New York: Vintage Books. Pp.251-263.

Wolf, E. (1982) Europe and the People Without History. Berkeley: University of California Press.

Wright, S. (1998) The Politicization of 'Culture'. Anthropology Today. 14(1):7-15.

Young, Allan. (1995) The Harmony of Illusions: Inventing Post-Traumatic Stress Disorder. Princeton: Princeton University Press.

Young, Iris Marion. (1984) Pregnant Embodiment: Subjectivity and Alienation. Journal of Medicine and Philosophy. 9: 45-62.

Young, Iris Marion. (1990) Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory. Bloomington: Indiana University Press.

Young, Iris Marion. (1990a) Justice and the Politics of Difference. Princeton: Princeton University Press.

Zoloth-Dorfman, Laurie. (1998) Our Bodies, Our Cells: Feminist Ethics and the New Reproductive Technology. Feminist Collections. 19(4):8-10.

Table of Cases

Canada

United Kingdom

United States

Table of Statutes and Regulations