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A Relational Defence of Surrogate Motherhood

By

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A thesis submitted for the degree of PhD at the University of Durham

Department of Theology and Religion

University of Durham

2011

Abstract

A Relational Defence of Surrogate Motherhood

Pauline Everett

This thesis explores surrogate motherhood using Christian ethics within a relational framework. A surrogate mother is a woman who has a child for a commissioning couple who are usually infertile. Chapter one explores how surrogacy is presented in three secular and three Church reports by focusing upon the surrogate, the commissioning couple and the child. The key theological and ethical objections to surrogacy are briefly explored: that it undermines motherhood, involves baby selling, coercion, exploitation and commodification. Chapter two analyses motherhood according to three secular feminists and three theologians. The secular feminists are criticised for not recognising the complexity of motherhood. By contrast, motherhood in Christianity is presented as multidimensional. Chapter three analyses whether paid surrogacy commodifies, exploits and coerces the participants. Theologically the chapter explores human beings as created in the image of God and as having dignity, which can mean that payment does not always have to lead to commodification, exploitation or coercion. Chapter four explores whether paid surrogacy involves baby selling. Theologically the chapter explores the concepts of the self and other in Augustine and Aquinas. It also explores *agape* in Anders Nygren and Gene Outka, arguing that self-interest and altruism can co-exist with care for the self and the other in a relational framework without detriment. Comparisons are made with blood donation to suggest that paid and unpaid surrogacy can operate together without paid surrogacy being regarded as baby selling or the purchase of parenthood. Finally, chapter five outlines three models towards surrogacy: a contract model, an adoption model and my relational approach, influenced by Louis Janssens' personalism. My relationalism aims for a more sophisticated ontology of the relationship between the self and the other and calls for various solutions in a surrogacy custody dispute.

Declaration

I declare that this PhD thesis is all of my own work. Even though I submitted a dissertation on surrogate motherhood as part of my MTh, this PhD has not included any of that material.

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2011

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Technical Abbreviations:

AID artificial insemination by donor

AIH artificial insemination by husband

ARM annual representative meeting

BMA British Medical Association

COTS Childlessness Overcome Through Surrogacy

IVF *In vitro* fertilisation

NRT New Reproductive Technologies

PCT Primary Care Trust

ST *Summa Theologiae*

VFN *The View from Nowhere*

INTRODUCTION

A Relational Defence of Surrogate Motherhood

1. Definitions

The aim of this thesis is to defend surrogate motherhood by using a relational framework. The thesis will explore some of the key major ethical issues in surrogacy within a Christian theological context. A surrogate mother is a woman who agrees to have a child for a (usually infertile) commissioning couple, married or unmarried, with the intention that they will raise it. Surrogacy has also been used, though less frequently, by single people, and is starting to become more frequent among same-sex couples.¹ There are two main types of surrogates. A genetic surrogate is a woman who is inseminated with the sperm of the commissioning father or with the sperm of a donor (who is usually anonymous, though may not be). In genetic surrogacy, the surrogate provides her own ovum and is typically inseminated either in her own home by herself, the commissioning mother or in a registered fertility clinic by medical personnel. Genetic surrogacy is sometimes called straight surrogacy, traditional surrogacy or partial surrogacy. The second type of surrogacy is called gestational surrogacy where a surrogate is inseminated with the embryo of the commissioning couple or a donated embryo using *in vitro* fertilisation (IVF) in an infertility clinic. If the embryo is donated, it can be deliberately created using the gametes of separate donors or it could be a 'spare embryo', left over from the IVF treatment of another couple. With IVF the surrogate has to undergo invasive medical treatment to ensure that the procedure is a success. Gestational surrogacy is sometimes known as full surrogacy, host surrogacy or complete surrogacy.

¹ The thesis will assume, for the sake of argument that the commissioning couple are married and their surrogate is too.

Surrogates are expected to hand the child over to the commissioning couple as soon as possible after the birth - indeed couples are often present at the birth. The majority of surrogacy cases involve frequent contact between the surrogate and the commissioning couple, with both parties residing in the same country. However, surrogacy has been known to occur anonymously without the surrogate or the commissioning couple meeting, with the child being handed over through a third party such a surrogacy agency worker. Due to the difficulties of finding a surrogate - for example surrogacy is illegal in France - some commissioning couples turn to international surrogacy. In international surrogacy a couple from one country will arrange to use a surrogate from another country. Sometimes the commissioning couple may only meet the surrogate a few times or not at all, while others decide to live in the surrogate's country in the expectation that this will give them domicile status. However, there can be great problems regarding the child gaining the citizenship of the commissioning couple, due to surrogacy laws clashing between countries. For example Ukrainian surrogacy law regards the commissioning couple as the legal parents, whereas English law regards the surrogate and her husband as the legal parents, thus leaving the child stateless because both laws cancel each other out and there are no international agreements on surrogacy.

2. Surrogacy Background

In the UK, under the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Act 2008, the surrogate is the legal mother for giving birth to the child and her husband is regarded as the child's father. If the surrogate is single, usually the commissioning father is listed as the father

on the birth certificate.² The commissioning couple, if one of them is genetically related to the child, can apply for a Parental Order within six months of the child being born if the surrogate agrees to hand the child over. If the commissioning couple are not related to the child, then they can apply to adopt it. If the surrogate refuses to hand the child over the commissioning couple will probably take her to court and seek custody based upon the best interests of the child. Courts usually though grant custody to the surrogate as the birth mother, taking into account the bonding she may have experienced to the child and the fact that she is probably already looking after the child. However, if courts believe the child would be better off with the commissioning couple, especially if the surrogate has deceived them, then custody will go to the commissioning couple.

Most surrogacy arrangements in the UK occur through a surrogacy agency such as Childlessness Overcome Through Surrogacy (COTS) or Surrogacy UK. A surrogate will approach the agency, who will give her a selection of commissioning couples to pick one from. It is illegal to advertise for a surrogate in the UK and if a commissioning couple do not use an agency they might approach a family or friend to act as a surrogate for them. Legally, surrogacy is a void contract and cannot be enforced. Most surrogacy arrangements involve the surrogate handing over the child to the commissioning couple, with about 2% of cases involving the surrogate keeping the child, because she may have changed her mind and wants to keep it, sometimes due to bonding to the child. Most commissioning couples tell or plan to tell the child of the arrangement, thus reducing the sense of the child being 'abandoned' by their birth mother. Often the surrogate will keep a type

² If a single genetic surrogate is injected with donor sperm the commissioning couple are unable to gain a Parental Order as the child is not genetically related to them. However, if a single gestational surrogate gestates an egg of the commissioning mother 'through a HFEA licensed clinic', the surrogate can 'elect' the commissioning father or the commissioning mother as the second parent, before applying for a Parental Order (email correspondence with Nicola Scott at Natalie Gamble Associates, 19 and 28 July 2011).

of contact with the commissioning couple after the birth and be informed of the child's development. For example, a child born of surrogacy later prayed for her surrogate and the surrogate intends to provide a sibling for her.³

Traditionally the Christian churches have been opposed to surrogacy, for reasons we will explore. Similarly, most governments and legislatures have been reluctant to have specific surrogacy laws which would force the surrogate to hand the child over against her will. However, in the UK at least, public opinion over the years has become more accepting of surrogacy as the practice has increased. The five chapters of this thesis will explore some of the key ethical and theological objections to surrogacy. It will suggest that the current paradigms – whether a contractarian model, an adoption model, or a best interests of the child model – are inadequate. It will propose that an alternative framework needs to be developed to ensure justice for the surrogate, the commissioning couple and the child. One of the reasons why an alternative model is needed, I will argue, is because motherhood is multidimensional. The main ethical issue which has been selected to focus upon is that of payment in surrogacy. This is often regarded as baby selling and involving exploitation, commodification and coercion of the surrogate. However it will be suggested that self-interest is important and can operate alongside altruistic motivations for another thus allowing for paid surrogacy without commercialisation.

3. Thesis Overview

Before outlining each particular chapter in greater detail, the five chapters of the thesis can be summarised as follows. Chapter one explores the three main British secular government reports and three church reports regarding surrogacy. Chapter two analyses the concept of motherhood, chapter three

³ Joan Einwohner, 'Who Becomes a Surrogate: Personality Characteristics', in Joan Offerman-Zuckerberg, *Gender in Transition: A New Frontier* (New York: Plenum, 1989), 123-32, at 127.

investigates the ethical concepts of commodification, exploitation and coercion for the child, the surrogate and the commissioning couple respectively. Chapter four considers the issues of self-interest, altruism and baby selling in paid and unpaid surrogacy. Finally, chapter five studies three ways to manage surrogacy and surrogacy custody disputes in particular including a contract model, the adoption model which includes the best interests of the child and a final relational model. A relational theme runs throughout the thesis, which allows for various emphases upon the self and the other, thus giving a spectrum of various outcomes, which can include different types of mothering.

4. Chapter One

Each of the five chapters will now be outlined. The aim of chapter one is to provide a background to official responses and attitudes towards surrogacy from the government and from the churches. Chapter one will explore six major British reports into surrogacy. Three of the reports are secular and three are Christian. Two of the secular reports were initiated by British Governments. These are the *Warnock Report*,⁴ commissioned in 1982 by the Conservative Government and published in 1984. The second one is the *Brazier Report*⁵ commissioned in 1997 by the Labour Government and published in 1998. The third secular report, called *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain*,⁶ was written by the British Medical Association (BMA) which is the professional body for medical practices in the UK. The three church reports were theological responses to the developing new reproductive technologies including surrogacy. Each of the church reports was written by a different denomination namely the Free Churches, the Church of

⁴ Department of Health and Social Security, *Report of the Committee of Enquiry into Human Fertilisation and Embryology (The Warnock Report)* (London: HMSO, 1984).

⁵ Department of Health and Social Security, *Surrogacy (The Brazier Report)* (London: HMSO, 1998).

⁶ British Medical Association, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (London: BMA, 1996).

England and the Roman Catholic Church. Each of the reports explores childlessness and the theology and ethics of the new reproductive technologies including surrogacy. The Free Churches' document was called *Choices in Childlessness*⁷ and was published in 1982 by the Free Church Federal Council. The Church of England's document was called *Personal Origins*⁸ and was originally published in 1985, but with a revised second edition, published in 1996. *Personal Origins* was written by the Church of England Board of Social Responsibility, part of the General Synod of the Church of England, as part of its submissions to the *Warnock Report*. The third and final Christian report to be analysed is *Donum Vitae*,⁹ published in 1987 by the Congregation for the Doctrine of the Faith as part of the Roman Catholic Church.

Chapter one is divided into two halves, considering how government and the Church have considered surrogacy. The background to each of the six reports is given and how each of them regards surrogacy - by focusing upon the practice of surrogacy, the surrogate, the commissioning couple and the child. Particular attention is also given to important themes in surrogacy which will be developed later in the thesis, namely motherhood, baby selling, coercion, exploitation, commodification and surrogacy management. Criticisms in two of the secular reports towards surrogacy will be investigated specifically in the *Warnock Report* and the *Brazier Report*. Criticisms of the three Church reports will also be provided. In addition the issue of surrogacy legislation is explored in the secular reports, while theological themes are also explored in the Church reports. An evaluation of the secular reports will be given as well as an evaluation of the Church reports too, with an overall conclusion. Chapter one therefore provides a basis for the main ethical and theological themes of

⁷ The Free Church Federal Council, *Choices in Childlessness* (London: The Free Church Federal Council, 1982).

⁸ The Board for Social Responsibility of the General Synod of the Church of England, *Personal Origins* (London: Church House, 2nd ed., 1996).

⁹ Congregation for the Doctrine of the Faith, *Donum Vitae* (London: Catholic Truth Society, 1987).

motherhood, paid surrogacy and surrogacy management to be discussed later in the thesis.

5. Chapter Two

As surrogacy involves a woman acting as a surrogate mother for a commissioning mother to become a mother, the main aim of chapter two is to explore the concept of motherhood. Like chapter one, the chapter is divided into two halves reflecting a secular approach and a Christian approach. First of all, the issue of who is a mother is explored. Various factors can be used to decide when a woman becomes a mother such as intention, conception, gestation, birth or bringing up the child as a social mother. For the secular half of the chapter, the concept of motherhood is analysed using the work of three secular feminists: Caroline Whitbeck, Sara Ruddick and Barbara Katz Rothman. Each of these three feminists tends to focus primarily upon a particular aspect of motherhood. Whitbeck concentrates upon a biological model of mothering, emphasising women's biology to determine motherhood such as labour, childbirth and lactation. Ruddick, in contrast, downplays the importance of pregnancy experiences for determining motherhood and instead highlights mothering as a nurturing social practice which occurs after birth and is linked to maternal thinking as a basis for other areas such as politics. Rothman as a radical feminist highlights the gestational, birth and social aspects of mothering, rejecting the idea that a genetic connection to the child can determine a mother's identity. Of the three feminists, Rothman is the only one to explore the topic of surrogacy in particular and she is very critical of the practice. Rothman regards the surrogate alone as the child's mother, regardless of whether the surrogate is a gestational surrogate or a genetic surrogate. Each of the secular feminists' views towards surrogacy is explored along with the inadequacies of their views of mothering. After this, an overall evaluation of

the secular feminists is made by looking at their positive points, along with how the secular feminists agree with each other. However, criticisms of Whitbeck, Ruddick and Rothman are also made, including where they disagree with each other.

After analysing the three secular feminists' views towards motherhood, attention turns to two Christian feminists and a male theologian who has written on motherhood and the family. The two Christian feminists to be investigated are the Protestant Bonnie Miller-McLemore and the Roman Catholic Rosemary Radford Ruether. For each of the Christian feminists, an analysis of their theology and views of mothering will be made, unlike the critique of the secular feminists which just focused upon their views of mothering. A comparison between the Christian and the secular feminists will be made which will suggest that the Christian feminists offer a more holistic approach towards mothering unlike their secular counterparts who tend to highlight just one aspect of mothering over another. Advantages of the Christian feminists will be put forward, but also problems which are to be found in the work of Miller-McLemore and Ruether. The work of Protestant theologian Don Browning will be explored to see how he views the family. Browning is influenced by the work of Roman Catholic theologian Louis Janssens. Both Browning and Janssens can be used as a basis for the relational framework for surrogacy which is being developed within the thesis. Finally chapter two explores how motherhood has been presented in Christianity in general with evidence being drawn from theologians, the Bible and the Church. It is found that motherhood has a wide ranging basis including the creation of life, conception, gestation, birth, lactation and nurturance, all of which can be used to suggest that motherhood is multidimensional and is not just about one function in isolation.

6. Chapter Three

The third chapter of the thesis deals with three major ethical concerns regarding paid surrogacy, which are commodification, exploitation and coercion. The focus of the chapter is on the possible effect on the child of commodification and on the surrogate of commodification, exploitation and coercion. Attention is also given to the effect of payment in surrogacy upon the commissioning couple. As the thesis is a thesis in Christian bioethics, the start of chapter three deals with the issue of human beings as made in the image of God (the *imago Dei*) and the importance of the theological concept of human dignity for paid surrogacy. The concept of the *imago Dei* is explored with reference to the work of theologians Helmut Thielicke and Paul Ramsey. A relational view of human dignity is mentioned with reference to the work of Roman Catholic moral theologian Janssens.

Commodification is the concern that paying for a surrogate's service could lead to the child or the surrogate being treated wrongly as a replaceable object, as a mere means to an end. The fear is that surrogacy participants could find that they gain a high monetary value if they have desirable traits such as beauty or intelligence, whereas those with less desirable attributes such as lower intelligence could be considered to be worth less. Children could become expensive fashion accessories or status symbols, used as an object and as mere means to satisfy the demands of wealthy commissioning couples to play happy families. The existing children of the surrogate could suffer, fearing that they could be sold if they misbehave, for example. Children born of surrogacy could become degraded by being valued according to their monetary worth, leading to a domino effect, where all children would be classified according to how much they cost or how much their particular features are worth. The same effects could be observed for women too, with paid surrogacy possibly

leading to the commodification of all women. Paid surrogates could become objects and treated as a mere means to an end. Paid surrogates could be degraded by being treated as just a vessel to ensure that a richer commissioning couple do not have to go through the inconvenience or suffering of pregnancy. However, the commodification section will also investigate the evidence for commodification in surrogacy and whether commodification has to occur as part of paid surrogacy.

The other two major concerns of paid surrogacy are exploitation and coercion. The issue of possible exploitation for surrogates and for commissioning couples in surrogacy is explored by defining four types of exploitation in section 3.5.1-3.5.5. Firstly, exploitation can be wrong for involving disparity of value if the surrogate is underpaid or if the commissioning couple are overcharged. Secondly, surrogacy could involve a potentially problematic mutual exploitation which could harm participants. Thirdly, there are concerns regarding consent in exploitation, while, fourthly, exploitation can involve commodification. An unpaid surrogate may feel as though she is being exploited if she is not paid; however, others may regard surrogates as exploited if they are paid, thereby creating a 'double bind'. Coercion involves a threat and the concern is that some surrogates may be coerced to enter surrogacy especially from family members. Again both exploitation and coercion are assessed to see if they really do or if they have to happen in paid surrogacy. Chapter three concludes with a call for more research, more regulation and more guidelines to ensure that paid surrogacy does not involve commodification, exploitation or coercion.

7. Chapter Four

Chapter four continues the theme of analysing the ethics of paid surrogacy. In order to ensure clarity, surrogacy involving no payment to the surrogate, which is sometimes called altruistic surrogacy, will be referred to as unpaid surrogacy. This is done to ensure that altruism refers to its ethical term of concern for the other. One of the aims of the chapter is to see if it is possible for a surrogate to be paid but to have concern for the other at the same time. The chapter begins by emphasising the role of self-love and an ordered love in St Augustine of Hippo and St Thomas Aquinas. The purpose behind presenting the views of Augustine and Aquinas is to demonstrate that within Christianity it is possible to have concern for the self and concern for the other co-existing without detriment to each other. Further investigations are made concerning the definition of altruism. Attention focuses upon the work of philosopher Thomas Nagel and his presentation of altruism. Comparison is made with the work of Anders Nygren and his work on the theological concept of *agape* as love for the other, which is rectified by Gene Outka who believed that Nygren's version of *agape* tended to focus too much upon self-abnegation. In contrast to altruism and *agape*, the term mutuality is analysed as a possible alternative concept. However emphasis is placed upon an alternative relational framework which includes relational altruism. Relational altruism, as part of a relational framework, allows for a variety of emphases upon the self and the other through discourse and negotiation. It is possible therefore for a moral agent to take care of others while taking care of themselves, which could mean that a paid surrogate is caring for herself while caring for another.

The chapter goes on to explore attitudes towards paying surrogates in surrogacy by analysing how the *Brazier Report* thought of the issue of payment of expenses in surrogacy. Some of the major ethical concerns of paid surrogacy centre on whether the practice inevitably involves baby selling or not. An investigation is made into whether rights language is appropriate for surrogacy

in order to assess whether the commissioning father buys his parental and custody rights to the child if he pays the surrogate. Chapter four also investigates whether surrogates can be paid for providing just a gestational service or whether paid surrogacy inexorably involves paying for the child as well as the gestational service. In order to assess the financial attitudes towards surrogacy an analysis is made of the motives of the surrogates entering surrogacy, which questions whether financial reimbursement is their sole motive or whether they combine wanting payment with other motives. In order to focus upon whether it is possible to combine self-interest in the form of wanting financial compensation with an altruistic concern for the other an investigation into blood donation is made. Attention focuses upon the work of social scientist Richard Titmuss and the research he conducted comparing paid blood donation services in the United States of America with unpaid British blood donation services. Titmuss' arguments are supported by the work of Peter Singer, who favours unpaid services to ensure that altruism is able to prevail since he fears payment undermines altruistic motives. However, this chapter uses examples from the voluntary sector to suggest that both paid and unpaid activities can co-exist without detriment.

8. Chapter Five

The final chapter of the thesis continues to develop the relational theme which has been developed throughout and explores how surrogacy is to be managed. The chapter is divided into three sections. The first section explores traditional contractarian approaches to surrogacy, the second section analyses the adoptive model of surrogacy and the third section develops my own relational framework for surrogacy which draws upon the personalism of theologian Janssens.

In order to understand the contractarian approach to surrogacy a legal understanding of contract is outlined, by focusing upon the four key concepts to a contract: offer, acceptance of an offer, financial consideration and the intention to create legal relations. Analysis is then made of how a hypothetical legal contract can be applied to surrogacy. Problems of an idealised contract are outlined, followed by an exploration of the reality of legal surrogacy contracts.

The second section of chapter five analyses the adoption model which tends to concentrate upon the surrogate keeping the child as the child's birth mother. Attention focuses upon the work of Protestant theologian Scott Rae who is an advocate of the adoption model for surrogacy. He is critical of the contractarian approach for surrogacy. He concentrates upon the role of the commissioning couple, the surrogate and the child in surrogacy, and gives support for gestation as the crucial determinant of motherhood. An outline of how surrogacy custody disputes would be solved using Rae's adoption model are given, along with problems with the work of Rae and the adoption model. In traditional adoption, a closed adoption system involves the birth mother handing the child over to the adopters without further contact, whereas an open adoption system allows the birth mother to keep in contact with the child. It must be borne in mind that surrogacy is not adoption and there are differences between the two systems.

The third section of the thesis outlines different types of relationalism and develops my relational framework for surrogacy, which is influenced by the work of the theologian Janssens. I also develop my view of relationalism, which allows for a variety of emphases upon the self and other. I outline what my relationalism does not involve and how it differs from Janssens' personalism. I go on to apply my relationalism to surrogacy by making

recommendations and applying it to custody disputes, embodiment and payment issues. I also outline what my relationalism does not mean for surrogacy and also contrast my relationalism with a 'best interests of the child' approach. Some of the problems of a relational framework are also provided before leading to the conclusion. The main conclusion of the thesis will outline some possible implications of a relational approach for surrogacy.

9. Scope and Focus

Having outlined the thesis, I would now like to make three clarifications of its overall scope and argument.

First, I will indicate why certain theological and ethical concepts, themes, theories and scholars were selected over others. As this thesis is a thesis on surrogate motherhood from a Christian ethical perspective, it can be difficult to find a balance between the need to cover firstly, theological issues connected with the Bible, the Church, writings of patristic and modern theologians, secondly, Christian and secular ethical concerns, as well as thirdly, multi-disciplinary themes relating to surrogacy such as the law, psychology and sociological concerns. Some very difficult decisions had to be made as to which areas to focus upon. It was decided to include both secular and theological reports on surrogacy in chapter one, as these represent the key major reports in the UK on surrogacy in order to compare and contrast their main concerns. Reports from outside the UK such as the European report into the new reproductive technologies by the philosopher Jonathan Glover¹⁰ or the Canadian Episcopalian report into surrogacy¹¹ were not included due to wanting to keep the focus upon the UK situation, even though these and other reports are important. Both the secular and the theological reports chosen had

¹⁰ Jonathan Glover and others, *Fertility and the Family: The Glover Report on Reproductive Technologies to the European Commission* (London: Fourth Estate, 1989).

¹¹ John Baycroft (ed.), *Whose Child Is This? Ethical, Legal, and Theological Dangers of "Surrogate Motherhood"* (Toronto, Ontario: Anglican Book Centre, 1990).

common themes regarding the ethical practice of surrogacy, especially relating to motherhood, commodification, exploitation, coercion, baby selling and the management of the practice, as well as the effect upon the people involved namely the surrogate, the child and the commissioning couple. These important ethical themes represent some of the major common concerns about surrogacy and are therefore addressed throughout the thesis. It needs to be borne in mind that the Church reports by the Free Church Council and the Church of England about the new reproductive technologies, including surrogacy, were written as contributions to the secular debate and as evidence to the government commissioned Warnock Report. *Donum Vitae* was also written in light of the practice of the reproductive technologies in order to provide theological comment. The agenda therefore for the reports was, to some extent, set by secular society. Even so, the Church reports were able to bring in their theological concerns relating to natural law, the status of the embryo, the unitive and procreative aspects of marriage and the right to a child.

Not only did difficult questions have to be made as to which areas to focus upon, similar questions had to be made regarding what would be left out, due to space restrictions. The priority in the thesis was to answer the ethical concerns raised in chapter one from the secular and Church reports namely the issues of motherhood, commodification, exploitation, coercion, baby selling and the management of surrogacy.

In order to focus upon the relational framework in relation to the ethical themes of motherhood, commodification, exploitation, coercion, baby selling and surrogacy management, certain other areas connected with a Christian ethical relational approach unfortunately had to be left out. Regrettably, there was not the space to develop the theological Trinitarian influences behind the

relational framework, as this would have detracted from the ethical concerns involved in surrogacy. However, in the three paragraphs below I briefly outline some of the relational influences involved in the trinity. In the background to the presentation of the relational framework in chapter five, attention focuses upon how relationalism is influenced by the personalism of Louis Janssens. Unfortunately, there was not the room to include the research which had been done into the influences upon Janssens such as the writings of Max Scheler and the similarities and differences between Janssens and Scheler. I was unable to include the influence of the theology of the former Pope John Paul II on the theory of personalism, or provide an historical background to the issue of personalism or pragmatism. Space restrictions meant that I was unable to include all of the research I had done into the various types of relational models from theologians such as Margaret Farley, Catherine Keller, Beverly Harrison, H. Richard Niebuhr, James Keenan or J. Kellenberger, as well as secular relational models from Stephen Mitchell, Lewis Aron, Sally Gadow, Margaret Urban Walker, including Lorraine Code's friendship model and Virginia Held's mother-child model. These and other relational frameworks are briefly mentioned in chapter five, so that further reading can be done if required.

Within Christian theology, relationality has often been used to describe God. The New Testament suggests that God is 'three persons in relation'.¹² Relationality is found in the incarnation and in the trinity.¹³ Debates in the early church concentrated on relations between God and humans through Jesus, and the relations between the three *hypostases* (persons) Father, Son and Holy Spirit.¹⁴ Western tradition had translated the Greek *ousia* (being) by *substantia* (substance), thus indicating God's real, single substance as 'the being

¹² F. LeRon Shults, *Reforming Theological Anthropology: After the Philosophical Turn to Relationality* (Grand Rapids, MI: Eerdmans, 2003), 240.

¹³ *Ibid.*, 11.

¹⁴ *Ibid.*, 33.

that underlies the particular persons',¹⁵ i.e. *hypostasis* (a single person).¹⁶ Arius considered the one, unbegotten God as non-relational.¹⁷ However, Tertullian (160-225) developed the idea of there being '*una substantia – tres personae*' (one God and three persons),¹⁸ in his treatise against Praxeas (c. 215).¹⁹ The Cappadocians used relation instead of substance to describe God.²⁰ Gregory of Nazianzus (329-389, one of the Cappadocians), believed that the divine being involves the three persons, with a 'shared, relational, being'.²¹ The Cappadocians regarded the trinity as demonstrating God's *ousia* as being in communion;²² the three persons 'in relation to each other'.²³ *Ousia* reflects God's distinction, unity and plurality.²⁴ *Ousia* deals with God's general being which relates to the relationship between the three persons in *perichōrēsis*.²⁵ *Perichōrēsis* was used by the early church to describe 'relational spiritual unity', translated in Latin by *circumincessio*, suggesting 'a movement in, through, and with one another'.²⁶ Cappadocian theology sees the *hypostases* as persons who are particulars who make up God's being.²⁷ The Cappadocians defined *hypostasis* and *ousia* separately, thus allowing the particular to take priority over universality.²⁸ Care is used to prevent 'tritheism' where the three persons of the trinity are individuals, who later enter into a relationship together,²⁹ with

¹⁵ Colin E. Gunton, *The One, the Three and the Many: God, Creation and the Culture of Modernity The Bampton Lectures 1992*, (Cambridge: Cambridge University Press, 1993), 191.

¹⁶ *Ibid.*, 197.

¹⁷ Colin E. Gunton, *The Promise of Trinitarian Theology* (Edinburgh: T and T Clark, 2nd ed., 1997), 198.

¹⁸ Jürgen Moltmann, *The Trinity and the Kingdom of God: The Doctrine of God* (London: SCM Press, 1981), 177.

¹⁹ *Ibid.*, 137.

²⁰ David S. Cunningham, *These Three are One: The Practice of Trinitarian Theology* (Malden, MA: Blackwell, 1998), 27.

²¹ Gunton, *The One, the Three and the Many*, 214.

²² Gunton, *The Promise of Trinitarian Theology*, 94.

²³ *Ibid.*, 74.

²⁴ *Ibid.*, 10.

²⁵ Gunton, *The One, the Three and the Many*, 191.

²⁶ Shults, *Reforming Theological Anthropology*, 92.

²⁷ Gunton, *The One, the Three and the Many*, 197.

²⁸ *Ibid.*, 191.

²⁹ Moltmann, *The Trinity and the Kingdom of God*, 175.

distinct wills.³⁰ *Perichōrēsis* means that personhood and relations to others in the trinity are inseparable, but they are separated in us.³¹ The three participate in each other³² and become the persons in relationship to each other, as they are dependent on each other,³³ by 'what they give to and receive from each other'.³⁴ The three different Trinitarian persons mutually manifest each other in their relations,³⁵ making them one³⁶ and equal.³⁷ God's substance is in the particular and distinctive three persons and the mutual relations which make them up.³⁸ God's being is unified and plural, i.e. God is one and many in 'dynamic interrelations'.³⁹ The Trinitarian God includes 'plurality in relation'⁴⁰ and 'particularity and relatedness'.⁴¹ God is not a collectivity, nor an individual, but a communion; 'a unity of persons in relation.'⁴² God is what he is only as a communion of the persons.⁴³ In God, the three persons completely live in each other, so they cannot be divided from each other.⁴⁴ Even though all the parts of the trinity are equal,⁴⁵ divine particularity does not mean that the three are identical to each other.⁴⁶ The three persons have a common divine substance, but differ from each other.⁴⁷ Despite the trinity involving mutually

³⁰ Gunton, *The Promise of Trinitarian Theology*, 198.

³¹ Shults, *Reforming Theological Anthropology*, 92.

³² Cunningham, *These Three are One*, 165.

³³ Moltmann, *The Trinity and the Kingdom of God*, 172.

³⁴ Gunton, *The Promise of Trinitarian Theology*, 143.

³⁵ Moltmann, *The Trinity and the Kingdom of God*, 176.

³⁶ *Ibid.*, 175.

³⁷ *Ibid.*, 176.

³⁸ Gunton, *The One, the Three and the Many*, 191.

³⁹ *Ibid.*, 163-164.

⁴⁰ *Ibid.*, 177.

⁴¹ *Ibid.*, 152.

⁴² *Ibid.*, 225.

⁴³ *Ibid.*, 191.

⁴⁴ Cunningham, *These Three are One*, 169.

⁴⁵ *Ibid.*, 113.

⁴⁶ *Ibid.*, 197.

⁴⁷ Moltmann, *The Trinity and the Kingdom of God*, 16.

participative relations, a particular activity can be linked to one of the three,⁴⁸ in a relational whole,⁴⁹ as they are simultaneously three and One.⁵⁰

Theologians agree with regard to God's relationality but differ on the terms to describe it.⁵¹ Augustine used the term 'three relations'.⁵² However, Colin Gunton believes that Augustine focused on God's oneness instead of the trinity's plurality,⁵³ as Augustine said: '[t]he Father is called person in respect to himself, not in relation to the Son or the Holy Spirit'.⁵⁴ Recent Trinitarian theology also emphasises relationality as an alternative position to seeing God as an isolated 'single divine substance'.⁵⁵ Trinitarian relationality is also a criticism of the Enlightenment view of a person as 'an isolated individual consciousness' who is detached from the world.⁵⁶ Jürgen Moltmann develops a 'social' understanding of the trinity⁵⁷ and supports the 'interpersonal reality of God'.⁵⁸ Similarly, Catherine LaCugna argues that: 'person, not substance, is the ultimate ontological category....the ultimate source of all reality is not a 'by-itself' or an 'in-itself' but a person, a toward-another....God is self-communicating existing from all eternity in relation to another'.⁵⁹ Elizabeth Johnson comments that the 'primary of relation in the idea of the triune God...challenges classical theism's typical concentration on singleness in God....Since the persons are constituted by their relationships to each other, each is unintelligible except as connected with the others. Relation is the very

⁴⁸ Cunningham, *These Three are One*, 215.

⁴⁹ *Ibid.*, 215.

⁵⁰ *Ibid.*, 218.

⁵¹ *Ibid.*, 27.

⁵² *Ibid.*, 28.

⁵³ Gunton, *The One, the Three and the Many*, 138.

⁵⁴ Augustine, *De Trinitate* VII.vi (11) cited in Gunton, *The Promise of Trinitarian Theology*, 95.

⁵⁵ Cunningham, *These Three are One*, 20 and 25.

⁵⁶ *Ibid.*, 27.

⁵⁷ Moltmann, *The Trinity and the Kingdom of God*, xvi.

⁵⁸ Gunton, *The Promise of Trinitarian Theology*, 21.

⁵⁹ Catherine Mowry LaCugna, *God For Us: The Trinity and Christian Life* (San Francisco, CA: Harper/Collins, 191), 14-15, cited in Cunningham, *These Three are One*, 26.

principle of their being'.⁶⁰ Robert Jenson suggests that: "The original point of trinitarian dogma and analysis was that God's relations to us are internal to him, and it is in carrying out this insight that the 'relation' concept was introduced to define the distinction of identities. If God is 'one substance,' this is a 'substance' with internal relations to other substances".⁶¹ Francis Jacques believes '...God is relationality. God is the One who is, the One who makes relations possible, because God is a relation'.⁶² Gunton suggests that relationality can give 'due weight to both one and many, to both particular and universal, to both otherness and relation', since God is 'both one and three, whose being consists in a relationality that derives from the otherness-in-relation of Father, Son and Spirit'.⁶³ However, David Cunningham regards relationality as 'misleading' because relations usually exist between independent entities.⁶⁴ The three are not separate individuals acting independently of each other.⁶⁵ The three do not enter into relation, but they are just relations i.e. 'a subsistent relation'⁶⁶ and they refer to a real and relational act or being.⁶⁷ Nicolas Lash points out that humans have relations but God 'is the relations that God has'.⁶⁸ God is 'a relational being',⁶⁹ i.e. 'a being in relation',⁷⁰ as he 'is *wholly constituted* by relationality'.⁷¹

Cunningham suggests that the trinity encourages people to see themselves not as individuals who choose to enter relationships or not, but as 'mutually

⁶⁰ Elizabeth A. Johnson, *She Who Is: The Mystery of God in Feminist Theological Discourse* (New York: Crossroad, 1992), 216, cited in Cunningham, *These Three are One*, 26.

⁶¹ Robert W. Jenson, *The Triune Identity: God According to the Gospel* (Philadelphia, PA: Fortress Press, 1982), 120, (identities here means three in God) cited in Cunningham, *These Three are One*, 26.

⁶² Cunningham, *These Three are One*, 189-190.

⁶³ Gunton, *The One, the Three and the Many*, 6-7.

⁶⁴ Cunningham, *These Three are One*, 165.

⁶⁵ *Ibid.*, 167.

⁶⁶ *Ibid.*, 61-62.

⁶⁷ *Ibid.*, 197.

⁶⁸ *Ibid.*, 71.

⁶⁹ Gunton, *The Promise of Trinitarian Theology*, 144.

⁷⁰ *Ibid.*, 143.

⁷¹ Cunningham, *These Three are One*, 165.

indwelling', like the three, therefore 'all pretensions to wholly autonomous existence are abolished'.⁷² Cunningham prefers to use 'participation' instead of relation, because relation is linked to individualism and allows us to leave relations without consideration.⁷³ Whereas 'participation' means that the self's existence as a person occurs by participating in others, and others participating in us,⁷⁴ as an 'imitate mutual indwelling',⁷⁵ with the self giving themselves 'completely and absolutely' to the other.⁷⁶ Cunningham does not think that Trinitarian theology can be located on a spectrum ranging from oneness to difference because the spectrum does not exist.⁷⁷ However, Gunton acknowledges that the Trinitarian relations are diverse, involving dynamic and asymmetrical giving and receiving and not just reciprocity.⁷⁸ My relational approach has similarities to a Trinitarian relationality by acknowledging the interaction between the self and the other. However, as will be seen below, my relationality involves humans, who even though they can have fulfilling relationships, may have to leave a relationship for their own well-being and possibly for the well-being of the other too. Even in the trinity the three persons do not just work in one set pattern of Father-Son-Spirit⁷⁹ and in Gethsemane the Father left the Son alone⁸⁰ and withdrew.⁸¹ Cunningham admits that sometimes some activities are the work of just one of the three⁸² and even though he favours 'participation' over relationality, he suggests that in order to talk about a person it may be necessary to construct them as an individual.⁸³ My relationalism allows for a spectrum of emphasis upon the self

⁷² *Ibid.*, 166.

⁷³ *Ibid.*, 190.

⁷⁴ *Ibid.*, 189.

⁷⁵ *Ibid.*, 166.

⁷⁶ *Ibid.*, 294.

⁷⁷ *Ibid.*, 293.

⁷⁸ Gunton, *The One, the Three and the Many*, 225.

⁷⁹ Moltmann, *The Trinity and the Kingdom of God*, 51.

⁸⁰ *Ibid.*, 76.

⁸¹ *Ibid.*, 77.

⁸² Cunningham, *These Three are One*, 116.

⁸³ *Ibid.*, 203.

and the other and for dialogue and interaction between them, with more flexibility, including individuality sometimes and also mutuality, but without encouraging the self to be completely absorbed into the other.

Despite examining the research into the issue of bonding in surrogate motherhood, especially empirical studies into the experiences of surrogates while pregnant, it was decided to focus upon the relational management of surrogacy cases if a surrogate does bond instead. Unfortunately, the research conducted into the law and case law in both England and the United States of America, had to be considerably reduced, including other relevant laws too. Likewise, a detailed comparison between a legal contract and a philosophical contract, as presented in philosophy by philosophers such as Hobbes, John Rawls and David Gauthier, was also left out. This comparison would have focused upon the differences between a legal and a philosophical contract by looking at the structure of the contract, the aim of the contract, the motivation to enter the contract, the role of authority and political influence, the issue of informed consent and the position of women. Similarities between a philosophical and legal contract were also left out which focused upon the issue of consideration, the issue of impartiality, the issue of reasonableness, the lack of emphasis upon the family or emotions and the fact that contracts are usually enforceable and are made in advance. In order to focus upon the role of the three key models for surrogacy namely a contractarian model, an adoption model and a relational model in chapter five, the research done on the relationship between law and morality was also not added.

Other important areas which were left out include issues relating to globalisation and race in surrogacy,⁸⁴ especially the attitudes of the surrogate to gestating or the willingness to gestate an embryo of a different ethnic origin, as

⁸⁴ See France Winddance Twine, *Outsourcing the Womb: Race, Class, and Gestational Surrogacy in a Global Market* (New York: Routledge, 2011).

well as the legal response to this issue if she wants to keep the child. Due to wanting to focus upon the theological and ethical aspects of surrogacy, references to empirical studies done on surrogacy and the new reproductive technologies were kept to a minimum and were used to support the ethical debates. Since a surrogate is not a prostitute, it was decided not to include comparisons between surrogacy and prostitution as a practice. Likewise, discussions relating to the concepts of alienation, prudence and paternalism were also reduced, in order to focus upon issues which affected all the participants in the practice of surrogacy (i.e. the surrogate, the commissioning couple and the child) such as commodification and exploitation and not just those which affected the surrogate for example.

As the topic of surrogacy raises so many ethical and theological issues, some key theological concerns had to be sacrificed in order to allow space to develop the relational framework. One area which could have been explored in relation to personalism could have been the philosophy and theology of John MacMurray. It was decided to focus upon the writings of Janssens due to his influence in the work of Don Browning and Bonnie Miller-Mclemore on the family, as well as the fact that Janssens wrote on the issue of the new reproductive technologies too. Another area which could have been explored is the issue of the continuing desire to have children of one's own and the issue of the maternal desire of the commissioning mother. There can be great disappointment to a commissioning couple if they have repeated IVF failures and many suffer with depression if they are infertile. Not all commissioning couples are suitable to adopt a child who may have special needs, but this is not to say that they would not make good parents, just that the needs of the child could be met by someone more able to provide for them. After researching the issue of covenant as a possible framework for surrogacy, it was decided not to use it as it was too similar to the issue of contract with its

emphasis upon obligation, duty and responsibility, despite being used in many flexible arrangements and relationships. As the thesis is focusing upon surrogate motherhood, it was decided to leave out the research which had been done on exploring the theology and ethics of the other reproductive technologies such as AIH, AID and IVF. Other significant areas left out include a detailed analysis of the theology of the body and issues such as the surrogate's pregnant bodily integrity and embodiment or a detailed analysis of natural law's understanding of the use of the body to gestate another's child.

10. Theological Orientations

Another area that should be clarified is that this thesis is in applied Christian theological bioethics. In the thesis, references are made to the Bible, the teachings of the Patristic fathers, the writings of the modern day Churches on surrogacy and the views of Christian ethicists and theologians on motherhood and the family. The thesis discusses theological concepts and themes throughout, including: the unitive and procreative aspects of marriage, the issue of natural law, the *imago Dei*, human dignity, Augustine and Aquinas' ordered love or '*caritas ordinata*'.

The theological emphasis of the thesis can also be seen from a summary of the theological dimensions of each of the chapters. In Chapter one, three Christian reports on surrogacy are explored. Each of the following key themes are given a theological understanding in these reports: the use of natural law, nature, the role of mothering, the unitive and procreative aspects of marriage, the status of the embryo, the issue of childlessness and the rights to a child in light of God's will, purpose and providence. The church reports criticise surrogates for not continuing to mother the child after birth, believing that family life and marital fidelity are affected, as well as the surrogate's dignity. However, they do not acknowledge that a gestational surrogate could possibly act as a steward of

God's creation by gestating an embryo if the commissioning couple who keep having miscarriages or by saving the life of a spare embryo, thus giving them a child to spread God's kingdom. After all, *Donum Vitae* allows procedures to save the embryo but not surrogacy.

Chapter two explores motherhood in the writing of three secular and three theologians. The chapter also describes the Biblical accounts of surrogacy in Genesis as including rape, concubinage, polygamy and slavery, with fear, invalid consent and jealousy, unlike modern day surrogacy. Discussion is also made of the use of simile and metaphor to describe God for being 'like a mother' or 'is a mother'.

Protestant theologian Bonnie Miller-McClemore criticises theology for ignoring women's maternal experiences, thinking and feelings and for including self-sacrifice and idealising mothers. She develops a protestant feminist maternal theology, incorporating women's experiences and problems, while emphasising love, grace, redemption, and mutuality, since mothers have self-worth for being made in God's image. Family life is seen as a vocation and children are to be loved as God's blessing and gift. In addition to the use of the Bible, the church, theology and women's experience she uses the concept of generativity by psychologist Erik Erikson within a theology of creation and procreation.

Roman Catholic theologian Rosemary Radford Ruether, stresses equality and fairness but not patriarchalism from God's image. She highlights mutuality, sacrament, covenant, redemption, grace and blessing while calling for diverse postmodern families including cohabitation.

Protestant Don Browning in his writings on the family develops two main themes of love as equal regard and critical familism. Firstly, love as equal regard is influenced by the mutuality of Janssens' and gives equal weight to self-regard and other regard. Theologically, man and woman are seen as being created in the image of God, which gives them equality and allows them to share God's goodness and dignity within a context of grace, forgiveness and redemption. Equal regard is connected with Christ's command for us to love our neighbours as we love ourselves. Secondly, he develops the concept of 'critical familism' which is profamily and promarriage by supporting a committed intact married family with justice and equality within and between families. Marriage as a covenant and a sacrament encourages the husband and wife to love each other equally and fulfil each other as part of the unitive and relational aspects of the marital relationship. He includes Trinitarian concepts within the family for the mother, the father and the children, since the family is part of God's creation and children are gifts from God who we love thus reflecting God's love for us. However, he recognises the reality of families today too.

Browning's theological method involves dialogue and conversation in four points: firstly describing concrete questions, secondly giving an interpretative concern of historical theology, thirdly seeing systematic theology as an ordered reflection or an interpretive process and fourthly a strategic practical theological reflection on how to proceed with concrete and faithful action. His practical theology is normative, involves obligation, moral principles such as loving your neighbour and also premoral goods, such as food, wealth, health, shelter, self-regard. He adopts a flexible Catholic view in a Protestant way; he allows contraception and AID, prioritises covenant over sacrament, revises natural law with philosophy, psychology and social science evidence, but rejects patriarchy.

Motherhood, as presented in Christianity in the Bible, Church history and by theologians, is regarded as complex, multi-dimensional and diverse. Motherhood is connected with creation, conception, gestation, birth, lactation and nurturance. God in the Bible is seen as a creator, a birthing mom and as a nurturing mother who weans, nurses and shows love, compassion and mercy. The Church is regarded as the mother of all Christians, who gives birth since the font was regarded as a watery womb. The Church is also regarded as a lactating mother who nourishes the faithful. Mary is regarded as a mother who loves with a compassionate, womblike love and priests are regarded as mothers too. However, a flexible relational framework is needed to deal with the different types of mothering.

In chapter three, in order to highlight the theological basis to prevent commodification, exploitation and coercion in surrogacy, the concepts of the *imago Dei* (the image of God) and human dignity are discussed. Helmut Thielicke believes that we have an alien dignity from God's love and can reflect the image of God and his glory because we are made in this image, giving us self-worth, equality, uniqueness and a responsibility to others, while in relationship to God. Paul Ramsey also develops a relational understanding of the *imago Dei* by believing that humans are able to reflect God's image, his will and action due to Christ's love which transforms us.

Chapter four develops the theological aspects of relationship between the self and the other. Both Augustine and Aquinas believed that 'ordered love' (*caritas ordinate*) orders the love between God, the self and the other and includes charity and grace, but is not the same as *agape* or altruism. Negative love involves rebellion against God such as pride. Neutral love includes self-love as a rational natural choice to seek your own good. Positive self love

involves loving God first because God loves us and also promotes our true welfare in God. Aquinas' love is proportional and he allows a partial love where we can love the family over others. The theological virtues of faith, hope and charity (love) are seen as superior to the cardinal virtues of justice, prudence, fortitude and temperance. Charity is regarded as the prime virtue and guides the other virtues by reason, but is beyond reason. Charity is not acquired or natural, but is infused in us by God and includes self-love and neighbour love, as well as being connected to a rational soul.

In contrast to the ordered love of Augustine and Aquinas, the *agape* of Anders Nygren is rejected for regarding self-interest as selfish sin for not putting others first. The mutual *agape* of Gene Outka is also criticised for its balanced egalitarianism. These theologians are criticised for not having a varied emphasis upon the self and the other, which is to be found in my alternative flexible relational framework. My relationalism responds to the needs of participants by incorporating an ordered love which includes God, the self and the other in dialogue, but without egoism.

In chapter five three models towards surrogacy are explored: a contractarian model, an adoption model and a relational model. In chapter five, the relationalism of certain Christian theologians is summarised including Margaret Farley, James Keenan, J. Kellenberger and H. Richard Niebuhr who focused on people's responsive relations with God and particular others. The personalism of Roman Catholic Janssens is explored which includes mutuality, a teleological ethic with a final end and a proportionalist theology which incorporates conscience. Janssen believes we are created in God's image and therefore are to reflect it. He wants us to know, worship and glorify God, with hope and love, prioritising our spiritual life over our temporal and material

life. Therefore we are to live in faith, respond to God's will and fulfil our humanity in mutual relationships with God and others.

My relationalism is more open ended based on ongoing negotiation and discussion and therefore may not involve a predetermined proportionalism. My relationalism can involve God, as found in the hearts of those involved, in dialogue and by acknowledging that people are made in the image of God. It is not dependent upon conscience, as this is regarded as too individualistic, too subjective and as relying on negative or guilty feelings after the event, since social interaction and discussion are need too. Natural law is not to be regarded as a fixed end with rules coming from nature, however, nature does matter and is dynamic, allowing things to change.

References to natural law are first found in the work of the Greek playwright Sophocles and aspects of it are also developed in Stoic philosophy. It is believed that law is found in nature and that humans can use their reason to know it. A similar sort of theme appears to be present in the Bible in Psalm 19, Romans 1:20 (which is congruent with God's nature being seen through his creation) and Romans 2:15 (Christians believe God places his law within human hearts). The tradition of natural law is most fully developed in Aquinas and for Aquinas the moral law reflects the eternal law in God's mind and expresses the natural law.⁸⁵ It is found by reason and conscience.⁸⁶ Natural law or the law of creation (*lex creationis*) deals with how God orders creation.⁸⁷

⁸⁵ James M. Gustafson, *Protestant and Roman Catholic Ethics: Prospects for Rapprochement* (Chicago: The University of Chicago Press, 1982), 13.

⁸⁶ Carl E. Braaten, Reclaiming The Natural Law for Theological Ethics, <http://www.elca.org/What-We-Believe/Social-Issues/Journal-of-Lutheran-Ethics/Issues/October-2007/Reclaiming-The-Natural-Law-for-Theological-Ethics.aspx>, assessed 27th June 2012, paragraph 2

⁸⁷ *Ibid.*, paragraph 15.

Roman Catholics tend to believe that the moral law is 'a gift of grace' from God.⁸⁸

11. Relational Framework

Finally, I now outline how relationalism as a theme is developed throughout the thesis. Relationalism is suggested as an alternative model to deal with surrogate motherhood in contrast to contractarian and adoption models. Relationalism is a methodology incorporating a framework or spectrum, allowing for a variety of emphasis upon the self and the other. Relationalism encourages discussion and negotiation between participants to express the importance and priority of their particular needs and interests resulting in various outcomes. Relationalism does not necessarily aim at a final fixed end which must be achieved. The focus within relationalism is on the people and their needs and interests, it does not insist upon one solution such as mutuality or self-sacrificial *agape*. Relationalism is a revised personalist ethic, influenced by the personalism of the Roman Catholic Janssens, but differs from his theological basis of conscience and proportional outcomes.

Theologically both Augustine and Aquinas have developed an ordered love which incorporates God, the self and the other. However, some theologians such as Anders Nygren focus upon a particular concept, in his case *agape*. Nygren believed that Christianity should focus upon self-sacrifice and love for the other instead of self-interest or self-love. In contrast theologian Gene Outka focuses upon mutuality, wanting there to be an equal regard given to the self and the other. Don Browning and Bonnie Miller-Mclemore take the theme of equal regard and apply it to families to encourage egalitarianism and mutuality.

⁸⁸ Gustafston, *Protestant and Roman Catholic Ethics*, 12.

Relationalism, as an ethical framework, can be seen as emerging from ethical thought which has tended to focus on one concept at the expense of other concepts. Within philosophy, Aristotle for example, focused upon a proportionate mean as the way to deal with the interaction between the self and the other, encouraging balanced outcomes. Thomas Hobbes highlighted the importance of self-interest to the detriment of acting for the genuine needs of the other and allowed the self to use the other instrumentally for self-gain. In contrast, Auguste Comte developed altruism, with the emphasis being all upon the other and not the self. Therefore, when a person acts altruistically, they cannot combine self-interest with interests for the other. Likewise, Kant was sceptical of allowing the self to use their own emotions as a basis for acting for the other, preferring altruistic acts to be motivated by duty alone. Neo-Kantian Thomas Nagel also believed that when a moral agent acts altruistically for the other they must be motivated by the needs of the other alone and not by subjective reasons such as self-interest. Even when Nagel changed his mind from objective reasons overruling subjective reasons, thus allowing both objective and subjective reasons to act together, he still thought that when acting altruistically for the other self-interest cannot be included. Likewise, Hegel tended to focus upon the needs of the community and society over the individual self and believed that the self is not able to exist outside of social discourse. In contrast, existentialism tends to focus too much upon the self as an isolated individual being, instead as a person in relationship with others. The modernist philosopher Jürgen Habermas uses a constructive dialogue theory to encourage consensus between the self and the other. Post-modernism as a theory, with its emphasis upon deconstruction has tended to strip away the particular aspects of the self which make people unique and different. Broadly speaking, within ethics, the interaction between the self and the other has tended to be for the other, with little opportunity for varying emphasis upon both the self and the other.

Relationalism needs to be seen out of this general theological and philosophical background. Relationalism is developed gradually as theme throughout the thesis, culminating in the presentation of a relational model for surrogacy in chapter five. Each chapter has an implicit relational theme highlighting the relationship between the self and the other. Participants are allowed to agree to disagree and if a consensus is not reached then the discussion has not necessarily been wasted. Unlike Hegel, the self is able to exist outside of the discourse and can try to choose to try to revert back to a time before entering a particular discourse, such as fleeing an abusive relationship, even though this may be difficult.

Chapter one highlights the lack of relationality between the self and the other by suggesting that motherhood is not seen as multidimensional, since motherhood is seen as being defined by birth alone. The Church reports regard surrogacy as distorting motherhood and overlook the commissioning mother. Paid surrogacy is regarded as being against human dignity and ignores the reciprocity a commissioning couple may feel towards their surrogate by wanting to give money as a sign of their appreciation or gratitude. Therefore the rest of the thesis concentrates on how to deal with these themes and highlights the need for a relational framework.

Chapter two focuses upon motherhood and suggests that motherhood is multi-dimensional and diverse, according to the Bible, the Church and theologians, therefore suggests an alternative relational framework to deal with its complexity. This view contrasts with secular feminists who tend to focus upon one aspect of mothering, such as gestation, biology, nurturance to the detriment of other aspects such as genes. A relational view also contrasts to the position of theologians Bonnie Miller-Mclemore and Don Browning who want

to see the family incorporated into a mutuality model based upon Gene Outka's equal regard, thus sidelining self-sacrifice and encouraging egalitarianism. Similarly, Rosemary Radford Ruether calls for harmony, balance and mutuality in families. A relational model is more flexible, allowing for supererogatory acts and acknowledging that relationships are not always mutuality.

A relational theme is developed in chapter three by exploring the theological concepts of the *imago Dei* and human dignity in order to lay the foundations to suggest that paid surrogacy does not have to involve commodification, exploitation or coercion. Paul Ramsey uses *imago Dei* to encourage a responsive relationship to God, but he tends to have a more negative attitude towards self-interest. Therefore, a relational framework for surrogacy will draw upon the *imago Dei* and dignity to encourage positive self-interest, respect and care for the other, while preventing human objectification and degradation.

The aim of Chapter four is to explore whether paid surrogacy involves baby selling and if both self-interest and altruism can co-exist, thus allowing both paid and unpaid surrogacy. The chapter continues the relational theme by analysing the concept of ordered love, '*caritas ordinata*', found in both Augustine and Aquinas. Ordered love therefore differs to altruism (all for the other) or *agape* (self-abnegation) as it includes God, the self and the other. The chapter outlines Comte's altruism which prioritises the other in light of Hobbes' egoism, but Comte tends to regard self-interest and self-love as ulterior motives. Nagel also wants to ensure that our altruistic acts are motivated by concerns for the other only and not by self-interest. The theologian Anders Nygren downplays self-interest as a sin and focuses on *agape* instead, whereas Gene Outka endorses self-interest by encouraging

mutuality, equal regard and harmony between the self and the other, thus reducing the self-abnegation of Nygren.

My relationalism allows for an ordered love including God, the other and the self but with more flexibility, without requiring mutuality. Chapter four develops 'relational altruism', where altruism is able to include acting out of self-interest while being motivated to act from concern for the other too, without being regarded as acting from ulterior motives. Paid surrogacy could be regarded relationally as an opportunity for the commissioning couple to show their gratitude to the surrogate and for the surrogate to benefit by receiving money for her self-interest while demonstrating altruistic concern for the commissioning couple.

Finally, in chapter five, the relational theme culminates in a relational framework being revealed for surrogacy as an alternative to a contractarian or an adoption model. A surrogate contract model tends to take the needs of the commissioning couple only into consideration by ensuring the surrogate hands the child over. Adoption models tend to focus upon the surrogate only, allowing her to keep the child as the birth mother. Alternative secular and theological relational theories are summarised. As my relationalism is influenced by the personalism of Janssens, I outline his personalism and how its influences from other scholars. My relationalism includes a relational framework, the self, the self and the other, exclusion of some concepts, differences to Janssen's Roman Catholic personalism, allows for relationships to end and has more emphasis upon emotion. My relationalism is applied to surrogacy by focusing upon surrogacy custody disputes, suggested recommendations, the issues of embodiment and money and what my relationalism excludes when applied to surrogacy. My relational framework for surrogacy, unlike a best interests of the child approach which focuses upon

the needs of the child only, tries to be flexible by including the needs, interests and priorities of the surrogate, the commissioning couple and the child. The chapter closes with a discussion of the best interests of the child approach and some possible problems of a relational approach to surrogacy.

CHAPTER ONE GOVERNMENT AND CHURCH REPORTS

INVESTIGATING SURROGATE MOTHERHOOD

1.1 Introduction

The aim of this chapter is to explore six major secular and Church reports on their attitude towards surrogacy. Other key themes such as motherhood, payment and baby selling, exploitation and commodification, and the management of surrogacy are also studied. As some of the key ethical, philosophical and theological issues within surrogacy, they form the basis of this and subsequent chapters of this thesis, with chapter two focusing on motherhood, chapter three on commodification, exploitation and coercion, chapter four on payment and baby selling, and chapter five on surrogacy management. Concerns include surrogacy as contractual baby selling, which 'distorts' motherhood and leads to the commodification of women and children. These and other ethical concerns will be mentioned in chapter one and discussed throughout the thesis.

The six reports to be studied are divided into two sections: secular reports and Church reports. The first three secular reports to be studied are the *Warnock Report*,¹ the *Brazier Report*² and the 1996 British Medical Association (BMA) report called *Changing Conceptions of Motherhood*.³ The other three reports are Church reports: *Choices in Childlessness*⁴ from the Free Church Federal Council,

¹ Department of Health and Social Security, *Report of the Committee of Enquiry into Human Fertilisation and Embryology (The Warnock Report)* (London: HMSO, 1984).

² Department of Health and Social Security, *Surrogacy (The Brazier Report)* (London: HMSO, 1998).

³ British Medical Association, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (London: BMA, 1996).

⁴ The Free Church Federal Council, *Choices in Childlessness* (London: The Free Church Federal Council, 1982).

*Personal Origins*⁵ from the Church of England, and *Donum Vitae*⁶ from the Roman Catholic Church. This chapter explores the reports' backgrounds; why and when they were written; their ethics, philosophy and theology; criticisms of them, along with an evaluation of them.

1.2 Background to the Secular Reports

Investigating the background of the secular reports sets the scene for some of the major ethical concerns and practical issues regarding surrogacy which are developed throughout the thesis. This section focuses on three issues for each report: why the report was written, their ethical concerns and their views of the relationship between law and morality. All the reports considered it morally wrong to ban surrogacy outright and wanted to prevent the law from interfering in the procreative liberty of commissioning couples. The reports only made recommendations concerning surrogacy and other reproductive technologies.

1.2.1 The Warnock Report

The Warnock Report was commissioned in 1982 by the Conservative British Government and chaired by the moral philosopher Mary Warnock. It published its recommendations on 'the social, ethical and legal implications' (1.2)⁷ of the new reproductive technologies in 1984 along with dissenting comments from some members concerning surrogacy and embryo research. Of the three secular reports, it was the most critical towards surrogacy, wanting

⁵ The Board for Social Responsibility of the General Synod of the Church of England, *Personal Origins* (London: Church House, 2nd ed., 1996).

⁶ Congregation for the Doctrine of the Faith, *Donum Vitae* (London: Catholic Truth Society, 1987).

⁷ Throughout chapter one bracketed numbers refer to the relevant pages (paragraphs for *Warnock* and *Brazier*, with pages in these two reports indicated as p. or pp.) of the report being discussed.

both non-profit-making and profit-making agencies banned. However, it allowed the practice to go ahead privately, as part of the procreative liberty of individuals. The majority of the Warnock Committee rejected the licensing and regulation of surrogacy, even though their dissenters approved. Since the publication of the report, Dame Mary Warnock has conceded that the dissenters were right to call for licensing for surrogacy, with specific terms and conditions for the practice.⁸

Due to the complexity of morality in a pluralistic society, they were unsure how to deal with the moral issues involved. It suggested that 'correct' moral judgements did not exist, only 'better and worse' ones (p. 96), and that moral judgements are not to be imposed on others as the only right one. It refused to dictate morality to the public based on the committee's opinions but suggested legislation based on moral judgements with reasoned discussion of the issues allowing for compromises. Ethically, it forsook an international unified approach to the 'difficult ethical issues' involved (1.8). The report regarded surrogacy as a risky practice (8.12) and used a Kantian type argument to criticise it for treating participants as a means to an end, regardless of the circumstances, especially in convenience surrogacy⁹ (8.17). Proposed legislation appealed to utilitarian arguments, with the principle of utility justifying actions if more people were benefited than harmed, for example if happiness increased when infertile couples had children. However, it stated that such a utilitarian calculation does not define whether an action is right or wrong (even though utilitarians tend to believe such calculations do define whether actions are right or wrong). *The Warnock Report* suggested that moral conclusions are connected to moral feeling and that '[r]eason and sentiment are

⁸ Mary Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press, 2002), 87-93.

⁹ Convenience surrogacy involves commissioning mothers capable of pregnancy using a surrogate.

not opposed to each other' (p. 1), but they preferred their views to be based on argument instead of sentiment (p. 2).

Warnock differentiated between law and morality, acknowledging that law applies to all, and is not merely based on moral feeling. It was based on the view that clear laws can control and prevent disputes. It was suggested that the law needs to be 'beneficial', 'intelligible' and 'enforceable' without causing 'outrage' to people's feelings, but regarded making law with reference to the common good as an 'imprecise goal' (p. xvi). Regarding the relationship between the law and morality they favoured the view of H. L. A. Hart who separated the question of the act's morality from the question of whether the law is right to stop the liberty of those involved from doing it (p. xi). Thus the report allowed individual liberty to treat infertility and thought it would be morally wrong to use the law to prevent people using or participating in surrogacy. However, arguing from the diverse public opinion they received, Lord Devlin's view - of a common moral view binding society together and reflecting public opinion which the law must uphold - was regarded as a myth.

1.2.2 The Brazier Report

The second governmental report to be assessed is the 1998 *Brazier Report*, commissioned by the Labour Government in 1997 and chaired by Margaret Brazier, Professor of Law at Manchester University. The review team considered payments to surrogates, regulation and the law for non-commercial, non-contractarian and unenforceable surrogacy arrangements. The report was more accepting of surrogacy than *Warnock*, but conservative in its approach towards payments, wanting surrogates to be paid clearly defined expenses only. Of the three secular reports, *Brazier* is the only one to propose that surrogacy agencies are registered (8.1).

Instead of explicitly stating its own theoretical moral focus, *Brazier* concentrated upon ethical themes in surrogacy such as exploitation, the welfare of the child, procreative liberty and commodification (4.22-4.37). It believed paid surrogacy commodifies childbearing, in effect turning it into the purchasing of children, and rejected suggestions that payment is for the surrogate's services. The report seemed to use a combination of Kantian moral theory, utilitarianism and pragmatism. For example, *Brazier* expanded the Kantian argument used by *Warnock* of surrogacy treating someone as a 'means to an end', by adding the word 'mere' so it reads as 'a mere means to an end' (4.22-4.23). *Brazier* wanted people to be treated as an end in themselves, allowing them to use their moral agency and make a free and informed choice. Appealing to utilitarian type arguments, *Brazier* sought to minimise harm, physical and psychological risks and possible dangers (4.16, 4.47, 7.25 and 8.6) due to the vulnerabilities of participants (7.9). Revealing its pragmatism, it aimed for realistic and practical recommendations (1.4 and 1.49). Pragmatism was reflected in the comments of the governmental minister Tessa Jowell who wanted the review to 'provide a sensible and sensitive way forward'.¹⁰

Brazier's approach towards the law resembled *Warnock's*, in that it did not want surrogacy to be illegal, on the basis that this would drive it 'underground' (4.38). Unlike the majority of the *Warnock* committee, *Brazier* supported the regulation of surrogacy and recommended that surrogacy agencies be registered and follow a new Code of Practice (8.1). *Brazier* analysed current surrogacy law to see if it safeguarded the welfare of the child and 'adequately' protects the interests (p. ii.7 and 4.6) and the 'real needs' of participants (7.6). It wanted to ensure surrogacy law had the 'confidence and support' of the public (1.17) by meeting the 'legitimate interests of society' (7.6). However, it rejected a single mandatory regulatory system; therefore they did not require

¹⁰ Hansard, HC deb., (11 June 1997), vol. 295, cc. 478-9 (Tessa Jowell, Minister for Public Health, announcing the review in answer to a Parliamentary question).

commissioning couples to use a surrogacy agency. The report was reluctant to use regulation to prevent procreative liberty and the autonomous choice of women to become surrogates, unless this harmed their welfare. Despite wanting to encourage procreative liberty, at times it appears a little paternalistic and draconian. Its suggested Code of Practice to regulate surrogacy stipulated a maximum age for the commissioning couple (8.4).

1.2.3 The BMA's *Changing Conceptions of Motherhood*

Over time, the BMA has changed their approach towards surrogacy. In 1984 they regarded doctors' involvement in surrogacy as 'unethical' due to 'difficulties' involved, but doctors had a 'duty of care' towards a pregnant surrogate.¹¹ In 1985 at their Annual Representative Meeting (ARM), surrogacy was accepted as a 'last resort'.¹² In 1987 they published *Surrogate Motherhood*¹³ which concluded that the interests of the children involved could not be guaranteed. However at the 1987 ARM, even though a vote supporting surrogacy was maintained, doctors were advised not to participate in surrogacy until 'ethical safeguards' were met.¹⁴ In 1990, *Surrogacy: Ethical Considerations* was published which approved professional involvement in anonymous surrogacy arrangements only,¹⁵ to prevent the possible 'deleterious effects' and complicated family relationships¹⁶ caused by known surrogacy arrangements. *Changing Conceptions of Motherhood* published in 1996, updated the 1990 report. It is a guide for medical professionals to assist those seeking surrogacy and was written without public consultation. Surrogacy is now considered not necessarily to damage the child, involve disputes, or cause any

¹¹ British Medical Association, 'Surrogacy: Ethical Considerations', *Occasional Paper - Ethics* (London: BMA, Number 1, 1990), 1-47, at 3.

¹² *Ibid.*, 3.

¹³ British Medical Association, *Surrogate Motherhood* (London: BMA, 1987).

¹⁴ BMA, 'Surrogacy', 4.

¹⁵ *Ibid.*, 29.

¹⁶ *Ibid.*, 25.

additional problems than other types of assisted reproduction. Anonymity is not considered practical, as secrets can cause problems in families, especially due to the increased openness by those using surrogacy and the use of Parental Orders (32-4).

Like *Brazier, Changing Conceptions of Motherhood* did not explicitly state its moral position, but it expressed similar ethical concerns such as the exploitation of poor women and child commodification. It acknowledged that surrogacy is complex due to the competing interests of participants. It advised the use of ethics committees to discuss difficult dilemmas (35). It also used a combination of utilitarianism and pragmatism when discussing surrogacy. Its utilitarian type arguments involve wanting participants to be aware of the possible pain and distress of surrogacy – for example psychological and health risks, such as multiple births. Calls were made for risks to be minimised by the medical screening of participants to prevent disease spreading (13). Pragmatically, it requested for relevant and practical information on the legal, medical and emotional aspects of surrogacy to be given to participants, including counselling, risks (psychological and medical), pregnancy management and insurance for the surrogate (59-61).

As *Changing Conceptions of Motherhood* is a document for health professionals, it focused upon the ethical virtues and principles of surrogacy and not upon legislation. Health professionals are encouraged to have ‘mutual trust and openness’ with participants (20), with obligations and duty towards providing ‘advice and care’, and an awareness of confidentiality issues (21). They are to provide care sympathetically and non-judgementally and without proposing firm rules. Although someone has to have overall management of the pregnancy, those with a conscientious objection to surrogacy have an ethical duty to refer patients to other colleagues. It suggested that health professionals

have differing levels of ethical responsibility in surrogacy, depending upon whether the woman comes with a pregnancy already established, or if the procedure involves self-insemination or IVF (*in vitro* fertilisation) to start a pregnancy (59). It regarded the ethical obligations and duty of care to a surrogate woman and child to be the same as other pregnancies, but with more information and psychological support, if problems develop. It advocated sharing information, e.g. about the commissioning couple, but also keeping confidentiality sometimes, unless the child's welfare is at risk, since they believed 'no single ethical principle is absolute' (24).

Changing Conceptions of Motherhood reflects the increasing popularity of surrogacy. It clarified surrogacy practice for participants and outlined potential risks to promote discussion regarding surrogacy management. However, the report tended to lack some theoretical depth.

1.3 Surrogate Motherhood in the Secular Reports

Having looked at the background to the reports, attention turns now to their views of surrogacy by considering four themes: surrogacy practice, the surrogate, the commissioning couple and others, and finally the child. All the reports supported the view that surrogacy should be an unenforceable non-legal contract; but they all allowed surrogacy to be used by infertile couples as a last resort, if the commissioning mother has a medical condition preventing pregnancy, such as no uterus.

1.3.1 The Practice of Surrogacy

The majority of *Warnock* acknowledged surrogacy as a risky practice due to consequences for the child, especially convenience surrogacy. To avoid

surrogacy, they rejected surrogacy agencies operating under license or inspection. They wanted commercial surrogacy, agency recruitment of surrogates and their organisation of surrogacy arrangements to become a criminal offence for being exploitative. Medical professionals establishing a surrogate pregnancy would be 'criminally liable' (8.18). However, they permitted private surrogacy arrangements to prevent stigmatising children born of surrogacy (8.19). Despite its negative surrogacy conclusions, *Warnock* cited some positive arguments for surrogacy, admitting that for some couples it could be their only opportunity to have a genetically related baby. They acknowledged surrogacy could be a deliberate and thoughtful act of generosity from one woman to another, despite the risks. Surrogates could carefully choose surrogacy, and 'altruistic' and paid surrogacy are not assumed to be necessarily exploitative. People who regard surrogacy as an intrusion of a third party into a marriage did not have to use it, but were not to prevent others accessing it. It was admitted that little was known about bonding in the womb. However, they indicated that adoptions only occur if the mother consents, despite bonding to the child during pregnancy (8.13-8.16).

Two members of *Warnock* dissented from the majority's perspective on surrogacy. Like the majority they disapproved of convenience surrogacy and profit-making surrogacy agencies. However, the dissenters suggested that medical professionals should be allowed to help with arrangements and offer medical services. They also wanted non-profit-making surrogacy agencies to be controlled by regulation and licensing to protect the best interests of participants. Surrogacy agencies would be optional and would provide participants with information. The dissenters also endorsed surrogacy anonymity to protect participants from legal and emotional complications. They proposed (pp. 87-9) that not all surrogacy contracts should be illegal, but

that courts could decide each case on its 'own merits', since public opinion they believed had not been 'fully formed' on surrogacy (p. 89).

Brazier cautiously approved surrogacy but without encouraging it. It admitted that infertility can be 'extremely distressing' and that surrogacy could 'provide a solution for some infertile couples' (5.22). It called for practical surrogacy regulation to reduce harm, but without major state intrusion into the lives and bodily integrity of individuals. *Brazier* opposed a mandatory state-regulated licensing system, which prevents people making their own choices. Therefore, it allowed commissioning couples to use family and friends instead of a licensed agency. *Brazier* did not regard procreative autonomy as an absolute right, as this can conflict with the rights of others. It wanted to balance the procreative liberty, autonomy and privacy rights of the commissioning couple alongside the 'welfare of the child', and the surrogate's rights and those of her children (4.32-4.33).

Therefore, *Brazier* proposed a new Code of Practice to regulate surrogacy, which would be binding for surrogacy agencies and would set out details regarding advice for participants (8.1). *Brazier's* Code of Practice aimed to protect the welfare, interests and expectations of all participants. The children's welfare - including the welfare of the surrogate's existing children (4.21), was their 'highest priority' (4.50) and of 'paramount concern' (p. ii.7). Surrogacy agencies not following the Code would be deregistered and liable for prosecution even though the Code was unenforceable in the criminal courts. It would also be an advisory Code for private arrangements to ensure altruistic and family surrogates give free and informed consent. As part of the Code, it suggested a new non-contractarian 'memorandum of understanding' explaining the expectations of the surrogate and the commissioning couple (6.25, 8.12 and 8.13). It would clarify details of the screening and conception

process, pregnancy management and expected support from the commissioning couple. It would outline how the child is to be handed over and informed of their background and contact arrangements between the surrogate and the child. A new statutory Surrogacy Act was proposed too, allowing payment for predetermined expenses only to prevent inducement and exploitation, as well as suggesting changes to the Parental Orders. All surrogacy agencies would be 'required' to register with the Department of Health (6.23).

Changing Conceptions of Motherhood regarded egg donation as preferable to surrogacy so that the surrogate could avoid pregnancy risks. Participants are to think about 'the potential medical, social and legal issues both for themselves and for other people' (53). It acknowledged surrogacy can be complex, possibly leading to depression, miscarriage, disability or the surrogate keeping the child. It proposed counselling within surrogacy, by a trained infertility counsellor. Due to practical requirements at the time (commissioning couples had to be married to acquire a Parental Order) they preferred that surrogacy is undertaken by 'two parents', however those in different family arrangements could ask for advice (6).

1.3.2 The Surrogate

Each of the reports expressed apprehension towards surrogacy, both genetic and gestational due to concern regarding the surrogate, even though they did not go into detail comparing the ethics of the two types of surrogacy. *Warnock* suggested surrogacy is 'the wrong way to approach pregnancy' because the woman 'deliberately' becomes pregnant with the intention to give the child up (8.11). *Changing Conceptions of Motherhood* advised that surrogates should have previously given birth, have completed their family, and have a partner for

support during and after the pregnancy (61). It admitted there is limited information on surrogacy practice, but acknowledged fewer surrogates keep the child than mothers who planned to have their child adopted. The BMA admitted that the surrogate's feelings of 'attachment' can change and increase during the pregnancy, making relinquishment of the child difficult, and that the surrogate could worry whether the child is being loved by the commissioning couple. It expressed concern that once a surrogate has handed the baby over she could have postnatal depression. They cited a study of surrogates by Nancy Reame where 75% had 'moderate or severe depression' for 2-6 weeks (47).¹⁷ Brazier acknowledged that some surrogates who handed the child over have experienced 'uncertainty and unhappiness' (6.2).

1.3.3 The Commissioning Couple and Others

Concern was expressed over the commissioning couple and other family members of the surrogate. *Changing Conceptions of Motherhood* noted that the commissioning couple may worry over the child's health and whether the child will become theirs. It was suggested that the surrogate's own children were told of the arrangement, to prevent confusion at the baby's disappearance, fearing they also could be 'rejected and "discarded"' (48). The surrogate's parents could find it difficult not being grandparents to the child (48). Warnock indicated that surrogacy threatened marital procreation and its 'loving partnership' by the 'intrusion' of a third party (8.10); the BMA, in *Surrogate Motherhood*, regarded surrogacy as 'controversial', challenging society and distorting the family.¹⁸ Brazier, however, found few rejected surrogacy due to third party involvement in marriage: it believed the private choice of marital exclusivity for some should not become public policy (4.5).

¹⁷ Nancy E. Reame, 'Maternal Adaptation and Postpartum Responses to a Surrogate Pregnancy', Abstracts of the 9th International Congress of Psychosomatic Obstetrics and Gynaecology, *Journal of Psychosomatic Obstetrics and Gynaecology* 10, Supplement 1, (1989), 86.

¹⁸ BMA, *Surrogate Motherhood*, 7-8.

1.3.4 The Child

The majority of *Warnock* disapproved of surrogacy as morally wrong, due to bonding in pregnancy and possible damage for the child (8.11). *Brazier* stressed the welfare of the child, but without an undue incursion into the rights of the commissioning couple to privacy. *Brazier* highlighted the rights of the surrogate and her children, along with the claims of the commissioning couple to procreative liberty (4.33). *Changing Conceptions of Motherhood* suggested some children born from surrogacy could be teased, but indicated that these could be proud and grateful for their parents' courage for using surrogacy for their birth. It recommended that the child is told of surrogacy and its genetic background (for example if related to the surrogate), on the basis that secrecy is impractical. It suggested surrogate children are psychologically similar to adopted children and those born from gamete donations since they are not genetically related to their parents (43). Such views contrasted with previous BMA policy such as their *Surrogate Motherhood*. Here they argued against surrogacy being made public policy because they were concerned over the psychological effect on the child being separated from its gestational mother, the effect on the child being told of its origins, and the effect on the surrogate of relinquishing the child or the effect if the surrogate decided to keep the child instead. *Surrogate Motherhood* did not think that it was in the child's best interests to be handed over 'in the short term', but admitted the 'long-term interests' depended on each case.¹⁹ They approved surrogacy if the child's welfare was protected.²⁰

1.4 Motherhood, Payment, Exploitation, Surrogacy Management and Legislation in the Secular Reports

¹⁹ *Ibid.*, 9.

²⁰ *Ibid.*, i.

1.4.1 Motherhood

Having looked at the issue of surrogacy generally, attention now turns to motherhood in surrogacy. Five areas of concern are presented. Firstly, the surrogate's identity, secondly, the relationship between the surrogate and the child, thirdly, the legal position of the commissioning mother, fourthly, the relationship of the commissioning mother towards the child and fifthly, a lack of support for multiple-motherhood. Motherhood as a concept will be explored more fully in chapter two.

Firstly, all the reports identified the surrogate as the child's legal mother by giving birth. They allow the surrogate to keep the child, unless, as the BMA in 'Surrogacy' suggested, she is an 'unsuitable' mother; therefore, the social services might 'intervene'.²¹ The BMA in *Surrogate Motherhood* commented: '[i]t is unthinkable that any civilised country could countenance removing a newborn baby from a mother who was willing and able to look after it'.²² *Changing Conceptions of Motherhood* suggested the surrogate might provide an 'information profile' allowing the commissioning couple to inform the child of its background (50).

Secondly, in *Warnock* the relationship between the surrogate and the child, is thought to be broken by surrogacy. Surrogacy is seen to distort motherhood by breaking the relationship and maternal bonds between the mother and child at the point of relinquishing the child. However, it admitted little is known about the extent of pregnancy bonding and that no great claims can be made regarding the breaking of the bonds. *Warnock* regarded 'the contribution of the

²¹ BMA, 'Surrogacy', 13.

²² BMA, *Surrogate Motherhood*, 22.

carrying mother [as] greater, more intimate, and personal' than sperm donation (8.10).

Thirdly, the commissioning mother has no legal standing in relation to the child, which as *Brazier* suggested, could be a problem if the commissioning couple divorced (7.15). The same applied if she is single or her husband died before the Parental Order could be given, since she had to be married to the commissioning father to gain legal status, otherwise she would have to adopt. In order to receive a Parental Order, which makes a commissioning couple the child's legal parents, they can only pay their surrogate reasonable expenses. However, *Brazier* acknowledged that some commissioning couples do not register the birth of the child, in order to allow higher payments to be paid to the surrogates, which lead to the commissioning mother not gaining legal status in relation to the child. *Brazier* proposed a new statutory Surrogacy Act (7.1-7.2) which included revised Parental Orders. Motherhood, therefore, for a commissioning mother, became dependent upon being married,²³ being over 18, having UK domesticity for at least 12 months and either she or her husband having a genetic connection to the child. Becoming a parent through surrogacy also involved compliance with their recommended new Surrogacy Act and its Code of Practice by paying reasonable expenses only to the surrogate and limiting payments (7.3 and 7.11). However, courts issuing Parental Orders now use the Parenting Orders 2010 Act which decides whether a Parental Order should be given using the child's welfare as paramount, with payments made to the surrogate as a secondary consideration.

Fourthly, the commissioning mother is regarded as lacking a relationship to the child. *Warnock* treated gestational surrogacy like egg donation or embryo donation. Therefore, the commissioning mother, like an egg donor, has no

²³ This differs from paragraph 2.5 in *The Warnock Report*, which says that the lack of marriage should not prevent access to treatment.

parental rights or obligations to the child; it assumed the surrogate wanted to be the mother like the recipient of an egg or embryo donation, even though she is not genetically related to it. Instead of dealing with the complexity of motherhood in surrogacy, such as whether the genetic or gestational woman is the mother, and in order to prevent arguments over inheritance and citizenship, *Warnock* tried to prevent gestational surrogacy occurring by banning professional involvement, making professionals such as doctors 'criminally liable' (8.18). It did not consider that some surrogates may only want to be a gestational donor or just an egg donor and may not wish to gain parental status. Most commissioning mothers regard themselves as a mother of the child and not just an egg donor. *Brazier* proposed that an arrangement in which a surrogate gestated a donated embryo, not related either to her or to the commissioning couple, would be regarded as 'pre-natal adoption arrangements' and treated by adoption law instead of a Parental Order (7.24). However, *Changing Conceptions of Motherhood* admitted that some people prefer gestational ('full') surrogacy to genetic ('partial') surrogacy as the surrogate is not genetically related to the child, which may make it easier to hand the child over (45-6), as it may not 'remind her of her own children' (46).

Fifthly, multiple-motherhood is unsupported. *Brazier* suggested that a commissioning mother could be 'made insecure by continuing contact with the surrogate' and could find it hard to mother the child (4.21). It questioned the possible effect of having two mothers on the social, emotional and identity development of the child. It admitted there could be family and psychological conflict if the aunt is the mother of the child. The report cited the psychologist Eric Blyth who suggested possible difficulties between the surrogate and the commissioning couple (4.20).²⁴ However, it indicated evidence (without giving details) which suggested that surrogates remain in contact with the

²⁴ Eric Blyth, "'Not a Primrose Path": Commissioning Parents' Experiences of Surrogacy Arrangements in Britain', *Journal of Reproductive and Infant Psychology* 13 (1995), 185-96.

commissioning couples and the child, as in open adoption, where the birth mother remains in contact with the adoptive parents. But some feared open adoption affected the security of the child's relationship with their adoptive parents. Even so, it thought a direct comparison with open adoption is difficult, as often in open adoption the child already has a close relationship to the biological mother before adoption. They state that, although some expected that staying in contact with the surrogate could be positive for the child in understanding its origins, nevertheless the surrogate's involvement could distress the child and could 'undermine' its relationship with the commissioning couple, especially in genetic surrogacy (4.12-4.13).

1.4.2 Payment and Baby Selling

Another key theme in surrogacy is the ethics of paying surrogates and the effect of payment on the surrogate, the child and the commissioning couple. All the reports opposed commercial surrogacy and profit-making agencies, fearing exploitation, risk and harm to the participants (e.g. *Brazier* 4.25). *Warnock*, unlike the other two reports, advised banning non-profit-making surrogacy agencies as well (8.17-8.18).

Firstly, regarding surrogates and payment, *Warnock* acknowledged that surrogates could be paid expenses, a substantial fee, or nothing. Paid surrogacy was regarded as 'inconsistent with human dignity', for using a uterus for profit and treating it as an 'incubator' for another person's child (8.10). Curiously though, it recommended that gametes and embryos could be sold and purchased under license (13.13). It assumed the 1976 Adoption Act section 57 would prevent payment to surrogates since it outlaws payment or reward in the adoption or in the handing over of a child; likewise section 50 of the 1958 Adoption Act (8.4). However, section 57(3) of the Act gave judges

discretion to sanction payment in appropriate cases, therefore some surrogates in private arrangements received up to £12,000.²⁵ Concern was expressed regarding the motivation of surrogates. *Changing Conceptions of Motherhood* believed surrogates act for many reasons; for some financial need was their only motive but for others their motive included valuing motherhood, or needing money for a particular purpose (40% had this as their main reason).²⁶ It is important to note that some surrogates may be motivated to act for the commissioning couple and for a particular purpose such as buying a car, which would not necessarily mean they were doing the action out of financial desperation. Other surrogates are motivated by sympathy with the childless, enjoyment of pregnancy (without having to rear the child), 'enhanced self-esteem' and overcoming traumatic birth experiences in the past, such as an abortion (44).²⁷ Similarly, *Brazier* expressed the view that 'many' women are 'primarily motivated by payment' to become surrogates (5.14).

Secondly, concerning the child and payment, *Brazier* did not recommend fining paid surrogates or paying commissioning couples, to prevent children being born with a taint of criminality,²⁸ fearing parents would not register the child. It believed children born from paid surrogacy became commodities and would prefer not to know that they were born for high commercial payments; believing this would be psychologically damaging to their identity, self-esteem and family relationship. Likewise, *Warnock* suggested that surrogacy degraded children who are 'bought for money' (8.11). However, this comment is not

²⁵ Dame Mary Warnock now approves of 'an official non-profit-making surrogacy agency', see Warnock, *Making Babies*, 88.

²⁶ The report here (pp. 43-4) refers to seven articles, references 23-9 on pp. 71-2. The 40% reference comes from Joan Einwohner's research, but she goes on to say: '[a]lmost never, however, is money the sole motive. Almost all mentioned other feelings' see Joan Einwohner, 'Who Becomes a Surrogate: Personality Characteristics', in Joan Offerman-Zuckerberg (ed.), *Gender in Transition: A New Frontier* (New York: Plenum, 1989), 123-32, at 130.

²⁷ Einwohner, 'Who Becomes a Surrogate', 125-7 and 129. The motives of the surrogates will be discussed in chapter four of this thesis.

²⁸ See also *The Warnock Report*, 8.19.

literally true, as otherwise it would be child-selling. It must be remembered that the child is commissioned and is usually genetically related to one of the commissioning couple, who pay for the surrogate's gestational services. The commissioning couple do not buy an already existing child from the surrogate and her husband. *Changing Conceptions of Motherhood* admitted that surrogates could regard the child as a 'gift of a treasured baby' (32) and that most surrogates have 'altruistic' and financial motives (30).

Thirdly, regarding the commissioning couple and payment, *Brazier* acknowledged a Parental Order may not be granted if more than reasonable expenses were paid. *Brazier* proposed new legislation which only allowed payment for predetermined expenses, thus preventing commissioning couples paying their surrogates and preventing surrogates asking for extra money. *Brazier* approved unpaid surrogacy, as a voluntary free gift donation like blood and live organ donation. It believed such 'altruistic' arrangements are 'less likely to break down' (5.21). Strikingly, it acknowledged that medical staff, counsellors and lawyers can be paid (3.26 and 3.28), unlike surrogacy agencies who cannot 'charge for their services' (3.32).

1.4.3 Fears of Coercion, Exploitation and Commodification

Other key ethical concerns in surrogacy include fears of coercion, exploitation and commodification of participants. Firstly, money could coerce the unemployed and as *Brazier* said: 'relatively poor and less educated women' to become surrogates (5.17). *Changing Conceptions of Motherhood* feared unintentional coercion in family relationships, where some surrogates feel 'emotionally coerced' (30). *Brazier* believed not paying surrogates reduced pressures upon them. It believed surrogacy should be a 'free act of giving' (4.37) as a 'gift relationship' (4.36), similar to blood and live organ donation,

since it believed payment could induce vulnerable, poorer women to become surrogates without understanding or predicting the risk involved, thus increasing harm (4.19, 4.36-4.39 and 6.5).

Secondly, *Warnock* regarded commercial surrogacy as exploitative and therefore wanted it made illegal (8.17-8.18). Money could prevent a free choice, leading to 'inducement' and the surrogate may not understand, as *Brazier* suggested, 'the physical and psychological risks' involved (4.19). *Brazier* said that some surrogates suffered 'distress', have made decisions they have 'regretted' and 'were treated in a demeaning way by the commissioning couple' (4.18). Part of the ethical discussion as to whether surrogacy is exploitative, is the issue whether surrogacy treats the participants involved as an end or not. The BMA's 'Surrogacy' warned that surrogates 'would be used as a means' to another's 'selfish ends'.²⁹ They were concerned that the surrogate was taking risks for others and not for herself.³⁰ Convenience surrogacy, was rejected as unethical by *Warnock* due to possible exploitation, '[e]ven in compelling medical circumstances' (8.17) and possibly because of potential risks to surrogates (8.12). *Brazier* commented on the lack of evidence of convenience surrogacy (4.7). So far, it appears that no convenience surrogacy cases have occurred in Britain.³¹

However, it is acknowledged that exploitation is complex. The BMA's 'Surrogacy' regarded exploitation as preventable and noted that the commissioning couple's end may not be selfish, but they may respect the surrogate.³² *Brazier* admitted surrogacy can be exploitative if people are unpaid. Some occupations are acknowledged as risky and monetary

²⁹ BMA, 'Surrogacy', 16

³⁰ *Ibid.*, 23.

³¹ Private email from Professor Olga van den Akker, psychologist and surrogacy researcher at Middlesex University, 12 August 2011.

³² BMA, 'Surrogacy', 16.

compensation in these jobs is not exploitation; therefore *Brazier* did not want to encourage exploitation where women are denied financial recompense for their time and effort in surrogacy. *Brazier* acknowledged that people can consent to risky jobs if they are aware of the dangers involved and therefore, are not induced against their better judgement nor exploited for being paid. Informed consent seemed to ease the possibility of exploitation for them. *Brazier* recommended that commissioning couples are to pay only expenses to prevent exploitation of participants (4.36, 5.16 and 5.24).

Thirdly, another ethical concern is that payment in surrogacy leads to commodification with participants being treated as objects. *Warnock* warned of commodification through the practice of using profiles to select the characteristics of the potential child, which could devalue children and lead to disappointment if these are unmet. However, it approved donor profiles to specify 'ethnic group' and 'genetic health' (4.20-4.21). *Brazier* rejected paid surrogacy for involving children being bought and sold as commodities, because it is difficult to separate payment for purchasing a child and payment for 'a potentially risky, time-consuming and uncomfortable service' (5.11); in effect it regarded paid surrogacy as baby selling. The BMA's 'Surrogacy' indicated that some reject surrogacy as child buying, seeing the money instead as payment for the woman's reproductive services, but admitted such a service could become commodified. However they also suggested that some valuable things can be bought and sold without damage occurring.³³

1.4.4 Surrogacy Management

Of the three reports, *Changing Conceptions of Motherhood* went into the most detail regarding surrogacy management. It admitted that surrogacy is

³³ *Ibid.*, 19.

unenforceable (14), and is aware of the 'hazards of promise-making' (30). Even so, it called for surrogacy to be regarded as 'prenatal adoption' allowing for participants to be 'bound by normal parental obligations of care and support' in order to reduce the incidence of child abandonment (13). As for surrogacy management, it focused upon four points: individual decision making, joint decision making, the surrogate's decision making and responsibility to the child. Firstly, it highlighted individual decision making by recommending that one person has overall management of the pregnancy. Health professionals were not to propose 'firm rules' (33), but 'to help individuals make informed choices' (20).

Secondly, it recommended joint decision making between the participants, up until the child is handed over, since participants are to decide how their own arrangement proceeds. It emphasised mutual openness and a mutual agreement which supports a balance between the rights and needs of participants as autonomous adults or as children. Participants are to decide their own 'level of contact' between them and the children afterwards (50). Health professionals and individuals are called to make careful joint decisions (21), since the health professionals are told they have 'moral responsibilities' to the adults and the child born (4). It recommended discussion between participants and the health professionals regarding the birth plan, etc., but admitted that views could clash. It questioned whether the pregnancy should proceed if agreement over issues such as handicap and abortion cannot be resolved prior to the arrangement. It suggested trust can come through personal contact between the surrogate and the commissioning couple, who could remain in contact after the birth with mutual support, openness and truth-telling. It wanted relationships between individuals to be based on 'respect for the needs and rights of others' (30).

Thirdly, it also wanted health care workers to give primary obligation to the surrogate and the foetus, but with 'predominant duty' to the 'potential child' (27). In a dispute, the surrogate and the health team are to make final decisions over issues such as delivery method. The decisions of the surrogate and her well-being and that of the foetus take precedence and supersede any agreement between the parties up to when the child is six-weeks-old. However, once the child is handed over, decision making rests with the commissioning couple (41).

Finally, despite supporting a balance between the rights and needs of participants as autonomous adults, and despite saying the surrogate takes ultimate responsibility for decision making, the BMA also suggested that health professionals have special obligations to the children. The child's interests and welfare take precedence, are paramount and are not just one of several factors. It regarded it as essential that all decisions were seen from the child's best interests, subordinating interests of the adults. Nevertheless, surrogates are allowed to have full control over pregnancy termination. It admitted surrogacy is ethically complex leading to possible conflict between the interests of participants such as the woman and the child. Health professionals are to consider the effects of surrogacy upon other children of the surrogate and the commissioning couple. They are to consider whether a child born of surrogacy is 'disadvantaged' by losing its gestating mother (23). However, the report seemed to lack a clear decision-making framework, with priority being given to the surrogate at some points and to the child at others. The BMA's *Surrogate Motherhood* advocated an adoption model for surrogacy arrangements to ensure the interests of the child.³⁴

1.4.5 The Legislation of Surrogacy

³⁴ BMA, *Surrogate Motherhood*, 21.

All the reports regarded the woman giving birth as the child's legal mother (e.g. *Warnock* 6.8); since surrogacy contracts are unenforceable and void, the surrogate does not have to hand the child over to the commissioning couple. *Warnock* suggested courts would allow surrogates to keep any money received during the pregnancy. It anticipated custody disputes would be resolved in court according to the child's best interests and that surrogates would not be forced to hand a child over against her will (8.5-8.6), except 'in very exceptional circumstances' (8.6). Unusually though, the *Warnock* dissenters proposed that not all surrogacy contracts are illegal, but courts should have discretion to decide each individual case on its 'own merits' (p. 89).³⁵

Brazier recommended regulating and monitoring surrogacy, in order to legally protect the interests of vulnerable parties and to prevent risks of harm, by a new statutory Surrogacy Act to replace the Surrogacy Arrangements Act 1985 and a revision of Parental Orders section 30 of the Human Fertilisation and Embryology Act 1990 (implemented 1st November 1994). The new Act would still make surrogacy contracts non-enforceable, surrogacy advertising illegal and commercial surrogacy agencies banned (7.3). However, the criteria which the commissioning couple would have to meet for Parental Orders were changed; they would have to have followed the surrogacy Code of Practice and pay only genuine, predetermined and provable expenses, with documentary evidence, to the surrogate and without excessive payments. However, if a Parental Order was refused, it suggested the commissioning couple could adopt the child to prevent detrimental effects on the child's welfare. The new Act would allow Guardians *ad litem* to check the criminal records of the commissioning couple, to see if they could harm the child. Surrogacy

³⁵ *The Warnock Report*, 'Expression of Dissent: A. Surrogacy', pp. 87-9, where they agreed 'with paragraphs 8.1 to 8.16 as a fair summary of these issues', but started 'to part company with' the majority 'in paragraphs 8.17 to 8.19' (p. 87).

outcomes would be monitored by research, record keeping and statistics (6.26). However, most of *Brazier's* recommendations (pp. 71-3) did not become law, but unmarried commissioning couples can now apply for a Parental Order.

Changing Conceptions of Motherhood is critical of UK surrogacy law, calling it 'piecemeal' (13). It criticised the 1985 Surrogacy Arrangements Act: for not monitoring surrogacy, for not stipulating the need for expertise to run an agency, for insisting that only married couples can request a Parental Order and for having no provisions to protect the child's interests (13). It criticised voluntary surrogacy agencies as 'unmonitored, unregulated' with no formal complaints procedure or formal method to ensure the information provided is 'accurate and comprehensive' (11). Unlike *Brazier*, they did not want formal licensing of agencies, but 'monitoring' to ensure 'credibility' (3), see also (12). Concern was expressed over insufficient social and psychological research into surrogacy including the child's welfare and the long-term effects of surrogacy. Therefore, it called for health professionals to check the health of the commissioning couple to ensure the couple can care for the child. The report called for 'honesty and openness' and tell the child of the arrangement (34).

1.5 Criticisms of the Secular Reports

The previous section analysed surrogacy management. Attention now turns to problems in the reports towards surrogacy, which conflict with previous approaches towards other reproductive technologies and other attitudes. But the contexts in which the reports were written must be borne in mind. *Warnock* was written at a time when the new reproductive technologies such as IVF were new and surrogacy was uncommon, therefore it may have been too controversial for them to endorse it. *Brazier* was commissioned due to media publicity in 1997 regarding paid surrogacy and therefore focused upon

recommendations for expenses and regulation. As will be shown in later chapters of the thesis, the reports can be criticised in many respects: as inadequate for not seeing motherhood as multidimensional; for not considering that self-interest and altruism can co-exist in paid surrogacy; for not realising that surrogacy does not have to include baby selling; and for not acknowledging that surrogacy does not have to operate as a contract. Due to space restrictions, consideration will focus upon five problems in *Warnock* and six in *Brazier*, but not upon the BMA's report, as it was fairly consistent.

1.5.1 The Warnock Report

Firstly, despite the majority finding surrogacy to be wrong, it defended the legal right of individuals to found a family and of couples to use surrogates. However, by banning professional involvement in gestational surrogacy (8.18) they denied the procreative liberty of a woman with a deformed uterus, for example, requiring a gestational surrogate to found her family. The report was probably reluctant to endorse gestational surrogacy, as IVF itself was new and surrogacy was very controversial at the time and hardly used, especially gestational surrogacy.

Secondly, *Warnock* allowed a husband whose wife received AID (artificial insemination by donor) to be the child's legal father as the intending social father, despite lacking a genetic connection. A child born from embryo donation to an infertile married couple is theirs legally (7.6). However, the principle of intent to parent, without genetic relation to the child, was not applied to surrogacy. In surrogacy, the woman giving birth is the child's mother, regardless of her intentions and her husband has to disapprove of his wife being a surrogate in order not to be considered the legal father. The commissioning couple are treated as gamete donors with no rights to the child

even if genetically related (8.9). This however would not have been considered a problem for most of the Committee as they believed that the gestational mother is the legal mother.

Thirdly, *Warnock* refused to let public opposition to AIH (artificial insemination by husband), AID, IVF and embryo experimentation prevent them from being used. However, it argued that 'the weight of public opinion' was behind them in condemning surrogacy, despite providing no evidence (8:10). Fourthly, due to the risks involved in surrogacy, it thought that no one ought to be asked to undertake a pregnancy for another in order to earn money. However, it allowed embryo donation, despite a possible impact upon the child and despite possible risks to the egg donor (7.2). This is presumably explained by their moral differentiation between performing a service for free and performing a service for money, even though the risks in pregnancy would be the same.

Fifthly, *Warnock* failed to suggest that surrogacy could be positive for children, despite highlighting positive effects with AIH and AID. AIH allows children to be born within 'a stable relationship' (4.4). AID allows a wanted child to be brought up by parents as their own. It suggested that it is better for the child to have a father and a mother, but ignored the possibility of surrogacy creating a family for a couple who are (in most cases) genetically related to the child. It condemned surrogacy as being morally wrong due to the possible consequences for the child, despite there being no empirical studies on the impact of surrogacy upon the child. However, such arguments of impact upon the child were rejected with AID, egg donation and embryo donation even though it admitted that with AID a child could be deceived about its origins and that this could undermine family relationships, harming the child if it found out accidentally. Even so, in light of surrogacy being a new practice, with little evidence, they were cautious about its practice.

1.5.2 The Brazier Report

The way in which *Brazier* has suggested surrogacy should be organised, leads to six possible problems. Firstly, commissioning couples following the proposed new Surrogacy Act and Code of Practice could apply for a Parental Order, if 'they have complied with the statutory limitations on payments', as judges cannot approve 'impermissible payments' (pp. 72-73.9 (vii)). However, it admitted that no Parental Orders have been refused when payment has been involved, which is how it did not want the law to be enforced. Even so, the High Court regards the welfare of the child as having 'paramount consideration' which takes priority even if the commissioning couple have paid their surrogate, thus still allowing them to have a Parental Order. Secondly, parents not following the law on banned excessive payments would be subject to criminal sanctions. However, it suggested commissioning couples who pay would not be subject to criminal sanctions because it would not be in the child's best interest, as couples might not register the child. Also, it did not want to give a child a 'taint of criminality' by legally banning surrogacy (4.38).

Thirdly, even though the Code of Practice is an advisory code, it is to be 'binding on any surrogacy agency' (p. ii.7). Fourthly, surrogacy agencies not following the Code would be deregistered and liable for prosecution. However, it said that the Code of Practice will not be enforced in the criminal courts (4.48). Fifthly, it said that the Code will aim to protect, consider and clarify the welfare, interests, safety and expectations of all participants. It suggested protecting vulnerable participants in surrogacy by reducing hazards (6.3 and 6.5-6.6). However, legally a commissioning mother might be left without legal standing to the child if the surrogate has the main custody. Even

so it did not regard the commissioning mother's status because they regarded the surrogate as the legal mother.

Sixthly, like *Warnock*, it was concerned about the welfare of the child (p. ii7) and it claimed surrogacy could have 'negative effects' on a child's 'psychological well-being' (5.18), including the welfare of the surrogate's children, especially if they see her repeatedly giving up a sibling for money (4.15). However, it admitted the review was done without empirical data on what happens to children born from surrogacy and the effect on the surrogate's other children (4.27) as there is 'uncertainty about the long-term effects of a surrogacy arrangement on the child' (6.3). It is important that such concerns are raised, despite a lack of empirical data; further evidence-based research in this matter is needed too.

1.6 Evaluation of the Secular Reports

Having looked at some problems in the reports, evaluation of the three secular reports is now possible. Four common themes can be found, namely: the issue of payment; not going far enough to protect the welfare of all participants; being paternalistic towards participants; and making conclusions despite a lack of empirical evidence.

Firstly, the guidance offered with regard to payment does not go far enough. In *Warnock* the advice given was unclear, since surrogates could be paid even though commercial agencies were banned. In *Brazier*, even though surrogates are protected from exploitation and inducement by banning payment (other than 'genuine expenses' [5.24]) from the commissioning couple (4.19 and 4.24-4.25) no consideration or redress was given to commissioning couples who might be exploited by the surrogate and be out of pocket for paying high

expenses to her, especially if she keeps the child and prevents them from having access rights to the child. It is possible that it feared that if compensation was given to the commissioning couple it would turn surrogacy into 'child purchase' (4.35). Chapter three of the thesis discusses the ethics of commodification, exploitation and coercion in surrogacy and chapter four analyses the issue of baby selling.

Secondly, it is questionable whether the aims of the reports to safeguard participants' welfare go far enough. With *Warnock*, it seems that the Conservative Government's own recommendations of setting up the Committee (to offer safeguards and policy and to consider the social, ethical and legal aspects of surrogacy) were not fully met, since commissioning couples would not be safeguarded if the surrogate kept the child. Even though surrogacy was not the main reason for setting up the Committee of Enquiry, perhaps more emphasis could have been placed upon the ethical solutions of resolving surrogacy conflicts. Instead, it preferred to stress argumentation over sentiment, overlooking the emotional aspects involved in settling child custody disputes. It argued that the courts should leave surrogacy cases as they find them, which does not solve the ethical issues of commissioning couples, who have an emotional involvement and want to have access. Perhaps it needed to offer an alternative framework, instead of an unenforceable contract which would tend to give custody to the surrogate. Chapter five of the thesis explores the contract model, the adoption model and an alternative model for surrogacy.

Brazier assessed whether existing surrogacy law safeguarded and protected the 'welfare of the child...the surrogate, her family and the commissioning couple' (4.6). However, by maintaining the surrogate as the legal mother, the commissioning mother may still be denied access and visiting rights. If its

recommendations had been implemented, commissioning couples may not have sought adoption or a Parental Order fearing they would be denied legal parentage of the child for paying the surrogate. However, courts could still make the commissioning couple legal parents in the best interests of the child, limiting the significance of the proposed legislation. Since the Code of Practice is unenforceable in the criminal courts and since commissioning couples have no obligation to use the 'advisory Code' (7.18), if they do not use a surrogacy agency (4.48 and 7.18), its power to regulate surrogacy arrangements and protect commissioning couples is limited.

Thirdly, the reports can sometimes be paternalistic towards surrogacy participants. *Brazier* realised that surrogacy is an intimate and private issue dealing with procreative liberty by limited legal and state interventions. However, its proposed surrogacy Code of Practice is possibly draconian, since surrogates have to be 21, under a maximum age, must have their own child, leaving a two-year age gap between pregnancies (8.7-8.8). Likewise, *Changing Conceptions of Motherhood* at times seemed paternalistic towards surrogacy participants. It wanted surrogacy to be used as a last resort, after the commissioning couple have tried other treatments. Commissioning mothers are to try egg donation before asking a surrogate to undertake the risks of pregnancy. However, a surrogate as an autonomous adult woman could give valid informed consent to decide if she wants to undertake the risks of pregnancy; for example she may choose to be a surrogate for a sister who has a fear of pregnancy. It was also paternalistic towards commissioning couples, by being critical if one of them has a terminal illness (44-5). No mention is made that the surviving partner could raise the child well if the one partner dies.

Fourthly, both *Brazier* and *Changing Conceptions of Motherhood* are aware of the lack of empirical research on surrogacy, but still make claims about surrogacy

without the evidence being there. *Brazier* admitted there is a lack of empirical research into the effect of money in surrogacy and commented that it found no evidence that surrogacy resulted in significant harm, but failed to acknowledge this included paid surrogacy too. Even though it called for a ban of payments above expenses to surrogates, it admitted that it did not know how a child would react to finding out if their surrogate had been paid, due to no research being conducted (4.11, 4.14 and 5.21). Some of their concerns are *prima facie* understandable because at the time, little empirical evidence was available especially on the effects of surrogacy upon the child. However, it could have suggested another review once more evidence was found. Chapter three of this thesis discusses whether children and surrogates are commodified in surrogacy or not. The appendix offers suggested questions for further research.

Analysis of the secular reports was presented in five main sections. Section 1.2 provided a background to the three secular reports focusing upon why they were written, their ethical concerns and their views on the relationship between law and morality. Section 1.3 looked at surrogacy in the reports, focusing upon the practice of surrogacy and the particular people involved i.e. the surrogate, the commissioning couple and the child. Section 1.4 analysed important concepts which will be explored later in the thesis namely: motherhood, payment and baby selling, coercion, exploitation and commodification, surrogacy management and legislation. Criticisms of the *Warnock* and the *Brazier* reports were presented in section 1.5, followed by an evaluation of all three of the reports in 1.6. Section 1.6 focused upon the issues of payment, welfare of participants, paternalism and the lack of empirical evidence.

Overall all three reports opposed commercial surrogacy agencies and a statutory governmental agency, but acknowledged the procreative liberty of the commissioning couple to use unenforceable, unpaid surrogacy as a last resort with the surrogate as the legal mother. They all shared common ethical themes such as pragmatism, preventing exploitation and harm to the surrogate and the child. They all condemned convenience surrogacy, but without banning all surrogacy to prevent harming the child. The reports did not regard motherhood as multidimensional, did not consider the needs of the commissioning couple enough or acknowledge that a paid surrogate could act with mixed motives of concern for the self and the other.

1.7 Background to the Church Reports

The first half of this chapter considered the three secular reports of *Warnock*, *Brazier* and *Changing Conceptions of Motherhood*. Attention now turns to three Church reports in order to assess how the Free Churches, the Church of England and the Roman Catholic Churches have dealt with surrogacy.

The three Church reports to be analysed, represent the writings of three Christian denominations towards surrogacy. Analysis will be made of their attitudes towards surrogacy, the issues of motherhood, payment, exploitation and commodification and surrogacy management issues. Criticisms of the reports and an evaluation of them will also be made. In addition the reports' theological views will be presented, looking at issues such as the unitive and relational aspects of procreation within marriage. The first section below explores the background to the Church reports by looking at four areas. Firstly an overview of the reports, secondly their views towards infertility, thirdly their ethical and theological attitudes to infertility and fourthly their attitude towards science and the use of reproductive technologies will be given.

First then, a brief overview of the three Church reports is given. The first Church report to be assessed is *Choices in Childlessness*, published in 1982 by the Free Church Federal Council, which investigated attitudes towards the '[p]sychological, social, ethical, and legal aspects of childlessness' (v) including theological aspects (vii). The second Church report to be analysed is *Personal Origins* by the Church of England, originally published in 1985, although the edition considered here is the revised second edition, published in 1996. The working party of the Anglican Board of Social Responsibility, part of the General Synod of the Church of England, submitted evidence to the Warnock committee in 1983, publishing their findings as *Personal Origins*. The second edition of *Personal Origins* kept the moral and theological considerations unchanged, but the Board updated it in light of the 1990 Human Fertilisation and Embryology Act, since the Act was modified in 1994 (and not 1995 as they state on page 14 of the report). The report concentrated on three areas of debate: (a) the status of the fertilised egg, the theology of the early embryo, and the protection it is to be given; (b) the nature of the marital bond, the effect of introducing a third or fourth party with AID or egg donation; and (c) '[t]he nature and extent of divine providence and human responsibility' (2). *Personal Origins* accepted that some Christians disapproved of IVF and donated gametes. On the whole the report accepted the use of the new reproductive technologies but not surrogacy, which is a similar view taken by *Choices in Childlessness* and represents the typical Protestant church view. The third and final Christian report to be considered is *Donum Vitae*, published in 1987 by the Congregation for the Doctrine of the Faith of the Roman Catholic Church. *Donum Vitae* is the most conservative of the reports, not generally accepting any new reproductive technology including surrogacy.

Secondly, each of the reports explored infertility. Due to the controversial issues involved, both *Choices in Childlessness* (vii) and *Personal Origins* (vi)

admitted that they did not always agree due to different approaches and judgements. Indeed, *Personal Origins* commented that different theological and ethical approaches gave rise to different interpretations and conclusions. The Church is called not to be 'rigid and negative', but that judgements of the 'complex moral questions' are to be made sensitively and sympathetically (65). *Choices in Childlessness* wanted the Church to offer support and counselling to the involuntarily childless (53) since it believed in reducing unhappiness by 'sympathy and benevolence' (19). It suggested the community could be 'acting responsibly' in helping infertile couples (32), because human beings have powers of 'imagination, inventiveness, intellect and practical skill' to be creatively used in community service as 'God's stewards and co-creators' (39). Children are not possessions owned by one person, but belong to the community and God, entrusted as a gift, by parents to the community, which the childless can share in nurturing. It believed 'God has given us the curiosity, inventiveness and power' to transcend limits to create a 'better world' (39).

In comparison, the more conservative document *Donum Vitae* tended to agree with previous Roman Catholic documents of the Magisterium, giving a unanimous condemnation of the general use of the new reproductive technologies, unless assisting the natural conjugal act on rare occasions. Due to concerns that human beings become the givers and takers of life, children are not to be conceived by medical intervention despite 'good intentions' (25) and despite admitting that 'the desire for a child is natural' (33). The ban on these techniques is to allow children a 'secure and recognized relationship' with their own parents (23). Neither the good intention of a desire for a child nor fertilisation willed as the expression of a specific conjugal act, are acceptable, since the spouses are not deemed to be co-operating with God (29-30). It

completely condemned the practice of surrogacy and did not discuss the issue of payment in surrogacy or management of surrogacy arrangements.

Thirdly, each of the reports was keen to apply the principles of its ethical tradition to the issue of infertility. *Personal Origins* applied '[b]iblical understanding and Christian ethical tradition in light of scientific knowledge' (1) and also discussed issues of 'human dominion and pastoral theology' (vii). *Donum Vitae* by contrast focused upon principles derived from its anthropology and natural law moral. The natural moral law is seen as expressing and outlining purposes, rights and duties, based on the human being's true nature as an embodied soul. Natural moral law is regarded as the rational order wherein man is called by God the creator to direct, regulate and use his body. Man is to work within the limits of a reasonable domain over nature. Rationality and the teachings of the Magisterium are to be used to reflect on the 'values of life and of human procreation' (10) to decide whether an artificial reproductive technology is 'morally admissible' (10).

Each report also focused upon the theological significance of marriage and childlessness when discussing the use of the new reproductive technologies. *Choices in Childlessness* acknowledged marriage as a vocation, which traditionally includes children, but realised that some couples may have a vocation to remain childless, serving God in other ways. Others may have a vocation to have children (52) and try to overcome their infertility (13). *Personal Origins* acknowledged that some couples do not want a family, while others do and cannot, but that surgery, medicine and assisted conception can help. It admitted that some regard marriage as involving a commitment to having children (66-7). *Donum Vitae* wanted procreation and birth to occur within marriage and from the conjugal marital act alone, uniting the unitive and procreative parts of sexual intercourse. The marital conjugal act which

allows spouses to become one flesh is seen as the preferable way for children to be conceived, reflecting their love for each other (23).

Finally, the reports also commented upon their Church's attitudes towards science and the use of the new reproductive technologies. *Choices in Childlessness*, for example, regarded medical science as a gift from God, and the Church is encouraged to change its attitude to procreation, family life, parenting and childlessness. It admitted that human beings can adapt nature to their needs, within limits (42). *Donum Vitae* did not regard science and technology as morally neutral, but as needing a conscience to be guided by the moral law in order to serve human beings, to respect man's inalienable rights and to know God's will and design. Artificial procreation is to be seen in connection with the existence and transmission of life in marital life, and is under God's holy laws. Technical means or medicine can take into account human dignity and can aid and serve conjugal acts but not replace them (32-3).

1.8 Ethical and Theological Themes in the Church Reports

Having looked at the background to the reports, we now turn to how the reports use Christian ethics and theology when investigating the new reproductive technologies. Attention will focus upon five themes. Firstly the role of ethics, secondly whether there is a right to a child, thirdly the issue of dignity, fourthly the procreative and unitive aspects of marriage and finally views on natural law and nature.

Firstly, *Choices in Childlessness* suggested Christian decision making is shaped by Christian ethics, which is influenced by Christian views towards nature, human destiny and creation, which are in turn shaped by the gospel and God's dealings with the world. The morality of the actions and methods to alleviate

infertility are assessed by looking at the ends and the means, since not all means are morally justified regardless of the good ends. It suggested that we have priorities of interest and moral boundaries and limits. The report implied that more than one moral principle is often taken into account, since there are no clear-cut moral solutions, and our own assessments and judgements have to be made. It wanted to prevent harm, guard rights, enhance the common good; they were concerned about human happiness in response to God's purposes (51). *Personal Origins* wanted to be faithful to biblical understanding and Christian ethical tradition along with scientific knowledge to specify relevant principles. It placed problems in historical and theological context, but remained open to new thought and possibilities, by reflecting and revising previous ways of moral thinking in light of medical, scientific, ethical and social consequences. It admitted that moral traditions need to be 'extended and rethought' with some maintained (53), since it wanted to be 'faithful to the truth' and was aware of 'adapting our ethics to scientific advances' (21).

Secondly, none of the reports supported the view that the infertile have a right to a child. *Choices in Childlessness* believed rights are about fulfilling basic needs and a child is not a basic need (22-4), therefore 'parenting and childlessness' are to be seen in light of God's 'will and purpose' (24). *Personal Origins* believed the Bible does not talk of rights and prefer responsibilities, duties and other privileges (4). Likewise, *Donum Vitae* did not consider marriage as giving spouses a right to a child, as this would be against a child's 'dignity and nature', but spouses only have a right to the conjugal act (34).

Thirdly, *Choices in Childlessness* considered whether the techniques dehumanise and offend humanity or enhance human dignity; whether the consequences foreseen are 'morally acceptable' and whether 'social attitudes and expectations' or interests are affected (32) and damaged (42). It suggested that

we need time and space to develop self-identity and relationships with others (33). Christological emphases can be seen in the reports. *Choices in Childlessness* proposed that medicine can continue Jesus' healing ministry, allowing procreation where impediment occurs (41). *Personal Origins* suggested we can learn from Christ about the interdependence of social life, the 'worth and dignity' of life and the 'possibilities for human relationships' (28).

Fourthly, all three reports focused upon the theological themes of procreative and unitive issues in marriage. *Choices in Childlessness* indicated that Church tradition, in the past, regarded children as the good or the primary end of marriage (the *bonum prolis* of Augustine), with the unitive ends of marriage seen as secondary. In 1930 Pope Pius XI supported the 1917 Code of Canon Law, which also prioritised the end of marriage as firstly for procreation and secondly for 'mutual help' and to prevent lust, in his encyclical *Casti Connubii* (1930).³⁶ However, the Second Vatican Council with *Gaudium et Spes* (1965) recognised that the two functions of marriage, 'the procreative and the unitive, had equal dignity'.³⁷ Pope Paul VI with *Humanae Vitae* (1968) regarded the procreative and unitive functions of marriage as having an 'inseparable connection, established by God, which man on his own initiative may not break'.³⁸ *Humanae Vitae* believed that 'the precepts of natural law...teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life',³⁹ since this is regarded as part of God's plan.⁴⁰

³⁶ Cited in Susan A. Ross, 'The Bride of Christ and the Body Politic: Body and Gender in Pre-Vatican II Marriage Theology', *The Journal of Religion* 71 (1991), 345-61, at 346.

³⁷ Bernard J. Cassidy, 'Essays in Honor of Judge John T. Noonan, Jr.: An Introduction', *Journal of Law and Religion* 11 (1994-1995), 143-50, at 145.

³⁸ Paul VI, *Humanae Vitae* (San Francisco, CA: Ignatius Press, 1968), section 12.

³⁹ *Ibid.*, 11.

⁴⁰ *Ibid.*, 13.

Pope John Paul II endorsed *Humanae Vitae* which sees the joining of the procreative and unitive parts of sex as part of natural law.⁴¹

Personal Origins believed the purpose and end of marriage are based upon the three traditional goods of marriage: procreative, moral and relational. St Augustine called them 'offspring, fidelity and sacrament' (46) and they are traditionally held together (46-7). Roman Catholics believe marital sexual intercourse should include these three goods each time. Therefore, the Roman Catholic document *Donum Vitae* wanted procreation and birth to occur from the conjugal marital act alone (33-4), as 'a gift and blessing of God' (23), so that spouses become parents through each other's 'mutual self-giving' and love (23). Spouses cannot use artificial contraceptives as these would break the inseparable procreative and unitive goods of the conjugal marital act which have been 'willed by God' as ends of marriage (26-7). The conjugal act reflects the unity of humans as body and soul, expressed in the body, and needs to remain open to procreation and to 'the gift of life' (27). Therefore, the new reproductive technologies are generally not approved.

By contrast, *Choices in Childlessness* suggested that Protestant churches see the procreative and unitive aspects of marriage as held together within creation. However, it allowed contraception, in order to choose when to have children. Contraception separates the procreative and unitive aspects of sex, since children are not seen as inevitable or an essential aspect of marriage. The husband and wife relationship is the *esse* of marriage and the relationship between children and parents is seen as the *bene esse* of marriage. *Choices in Childlessness* admitted that traditionally children are expected in marriage, but want to develop tradition by accepting deliberate childlessness as a vocation (8

⁴¹ John Paul II, *The Theology of the Body: Human Love in the Divine Plan* (Boston, MA: Pauline Books and Media, 1997), 387, cited in Agneta Sutton, 'The Symbolism of Marriage and of the Parent-Child Relationship: A Comparison Between Karl Barth and John Paul II', *New Blackfriars* 84 (2003), 64-79, at 66.

and 32). *Personal Origins* indicated that some believe procreation is intended by God as 'a proper good' and purpose of marriage and is not optional, 'except for very good reasons' (48).

Therefore, in *Personal Origins* some supported the new reproductive techniques which do not involve sexual intercourse or a relationship with the genetic donor. It admitted that gamete donation separated procreation genetically from the marital relationship. Technology can be used in a loving context to fulfil the good of marriage by strengthening the relational bond which has been affected by handicap. IVF can maintain the procreational and relational aspects of marriage. It wanted human life protected as bearing God's image some from the moment of conception, but others on the Committee wanted embryos protected later, calling for 'free and informed consent' from all research subjects and 'infertility services' (55 see also 32-45).

Finally, views on nature and natural law tended to fall into two camps in the Protestant reports. Firstly, as *Personal Origins* indicated, some Christians respect nature and natural law as indicating God's purpose with set boundaries and limits; therefore they are cautious of accepting technology. This is similar to the Aristotelian perspective which sees an essential fixed nature with a final end (24). Secondly, however, *Choices in Childlessness* proposed we are God's stewards and co-creators, using our natural powers of imagination, inventiveness, intellect and our practical skills to serve humanity and to fulfil our God given potential in his Kingdom. It is suggested that we can overcome limitations, with creative transcendence. The report regarded it as wrong 'to condemn...medical intervention as "unnatural" simply because it is artificial' (42). As *Personal Origins* suggested, such Christians see nature as an ongoing creation; open to God's future work (25) and which can be used for our own good ends with an active participation in God's creative order (26-8

and 58) and dynamism by 'active stewardship' (6).⁴² These Christians are open to new possibilities with God's providential care changing the world. The natural order is seen as advancing God's purpose towards an unachieved goal, since God is not seen as permanently fixing nature. It suggested human beings can 'co-operate with God' to remedy nature's flaws and natural deficiencies and therefore medical technology can help start a family (58).

Nevertheless limits are still needed and *Choices in Childlessness* believed limits are part of the order of things, providing a framework for development and growth. It suggested that limits are crossed if the intervention makes humanity less than human and that moral judgement and assessment has to decide where and what the limits are. It indicated that an 'ethical distinction' is made between the natural and unnatural, which is based upon 'what is in keeping with human nature and what is not'; they did not see it as a distinction about what is natural and what is artificial (42). Likewise, *Personal Origins* acknowledged that human action is subjected to 'moral limits', and suggested we use prudence to ensure evil is not intended, since 'God's purposes for nature' impose 'moral limits' upon our power over nature (29).

1.9 Surrogacy in the Church Reports

The section above explored the ethical and theological themes in the Churches' reports. I turn now to their approaches to surrogacy, focusing attention upon four points: firstly how the Churches consider surrogacy, secondly how they define the practice, thirdly positive comments about surrogacy and fourthly negative comments about surrogacy.

⁴² John Mahoney, *Bioethics and Belief* (London: Sheed and Ward, 1984), 16.

Firstly, all three of the Church reports disapproved of the practice of surrogacy. *Choices in Childlessness* called for the practice to be made illegal (55) even though it suggested there has been ‘no attempt’ to solve ‘the ethical and legal problems’ of surrogacy (17). *Personal Origins*, likewise, regarded surrogacy as a morally unacceptable practice for Christians (53). Similarly, *Donum Vitae* regarded participation as gestational or genetic surrogates as morally illicit (25), and called for prohibitive legislation to ban surrogacy (37). In light of section 1.8 above, the reports could have discussed the ethics and theology of surrogacy more. Little attention was paid to biblical presentations of surrogacy (e.g. Genesis 16 and Genesis 30), the social context of surrogacy or ways harm could be prevented in surrogacy. No mention was made of surrogacy as possibly reflecting God’s purpose or surrogacy being used as a common good for society and individual couples.

Secondly, each of the reports defined surrogacy, reflecting how they regarded the practice. *Choices in Childlessness* did not define surrogacy exactly, but regarded a surrogate as a mother who enjoys pregnancy, but not parenting, who is impregnated with the sperm of the commissioning father and after the birth, hands the child over for a fee (17). Genetic surrogacy is called ‘surrogate motherhood’ and gestational surrogacy ‘womb-leasing’ which involved ‘the conception and carrying of a child at the wish of another couple, whether for monetary gain or not’ (55). ‘Womb-leasing’ is defined as a woman contracting to lease her womb to deliver a foetus she did not produce. With gestational surrogacy, it suggested there could be ‘moral problems’ if an embryo from the commissioning couple is implanted into another woman and ‘presented to them as their child’ after the birth (55). *Personal Origins* acknowledged that surrogacy can be performed using the gametes of the commissioning couple as well as egg and donor sperm (14), but without explicitly stating that surrogacy involves the surrogate using her own ovum. *Donum Vitae* made a definitional

distinction between gestational and genetic surrogacy. Both types of surrogacy are seen as involving the 'surrender' of a baby (25 [a] and [b]). Gestational surrogacy is regarded as involving the gametes of donors and no distinction is made between gametes of third party donors and gametes from the married couple (25 [a]). In relation to section 1.8 above, the reports tended not to discuss possible ethical differences between genetic and gestational surrogacy, or for different types of commissioning couples such as single or married.

Thirdly, two of the reports gave some positive affirmations of surrogacy before condemning the practice. *Choices in Childlessness* indicated that some regard women as having 'the right to lease their wombs' as their right over their bodies, but it did not endorse this (23). *Personal Origins* admitted that surrogacy could possibly be medically justified to overcome infertility, a defective uterus, a hysterectomy, handicap, or a 'medical condition such as heart or kidney disease' where pregnancy could be dangerous (14). However, *Donum Vitae* made no positive comments regarding surrogacy. As seen in section 1.8, the reports did not regard a child as a right. Even so, no mention was made of the possible right for the commissioning couple to associate with the child once born. They did not discuss that some commissioning couples may regard a child as a need to fulfil God's will for their marriage.

Fourthly, however, overall the three reports are extremely negative towards surrogacy, giving a unanimous deontological condemnation in all cases. All were concerned about the relationship between the child and the surrogate, and how this relationship affects the family and the child. *Choices in Childlessness* believed surrogates regard surrogacy as a paid job and that once the child is born she will leave. It considered both paid and unpaid surrogacy to demean the surrogate and the child, because the surrogate conceives and carries the child on the wish of the commissioning couple (55). As seen in

section 1.8, *Choices in Childlessness* referred to Jesus' healing ministry and also the importance of self-identity. No consideration was given to a surrogate willing to help heal the consequences of infertility for a commissioning couple by gestating their gametes for them, thus enhancing their dignity from the possible depression of infertility. The report regarded surrogacy as dehumanising the surrogate, with unacceptable consequences.

Personal Origins, despite accepting other reproductive technologies, agreed unanimously that surrogacy fundamentally endangers the Christian institution of the family. It assumed that strong bonding occurs gestationally between the woman and the foetus, which could lead to problems handing the child over to the contracting couple, especially as it regarded the surrogate as severing all relationship to and responsibility for the child. However, despite such views of severance, it pointed out that the surrogate has to agree to relinquish the child by allowing the commissioning couple to use a Parental Order (14). Therefore, legally, power rests with the surrogate who can keep the child and be the child's legal mother. In consequence of section 1.8 above, they could have regarded surrogacy as an interdependent relationship between the surrogate and the commissioning couple, if the surrogate was treated with dignity. A gestational surrogate could help the commissioning couple procreate and achieve an end of their marriage by gestating a child for them.

Donum Vitae is also concerned about how surrogacy affects the family and the child. Its condemnation focused upon issues important to them such as ensuring procreation from marital unity. Surrogacy is therefore considered as 'contrary to the unity of marriage and to the dignity of the procreation of the human person' (25). Surrogacy is specifically rejected for representing:

an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and the right of the child to be

conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families (25-6).

In light of section 1.8, *Donum Vitae* was unlikely to support surrogacy because it wanted procreation from the conjugal marital act only, as a mutual sign of the spouses self-giving, thus maintaining the procreative and unitive aspects of marriage.

1.10 Motherhood, Payment, Exploitation and Surrogacy Management in the Church Reports

1.10.1 Motherhood

The section above looked at how the Churches considered surrogacy; their definitions of the practice, along with their positive and negative comments about surrogacy. Attention now turns to how each of the three reports considered motherhood and payment in surrogacy.

Firstly, *Choices in Childlessness* calls gestational surrogacy 'womb-leasing', seeing the gestational surrogate as a 'nurse' instead of a mother (48). Womb-leasing is assumed to involve the woman contracting her womb to gestate a foetus, which the report regards her as not producing (17), i.e. not procreating. It argued that because gestational surrogates lack a genetic link to the child, they were less likely to become emotionally involved towards it and not want to continue nurturing it, even if they have enjoyed the pregnancy and birth. Surrogacy is regarded as an irresponsible and inhumane act for deliberately disrupting and damaging the pre-birth relationship between the mother and child; changing its character and damaging its potentiality. It wanted the 'mother-child relationship' to be 'continuously growing' from pre-birth to post-

partum, with its 'mother's continuing love and care' (48). It regarded surrogacy as breaking the identity between the biological and social mother. Procreation is considered to be reduced to just 'a biological process', with surrogacy regarded as 'hardly motherhood' (48). However, the surrogate is seen as being involved in 'a deepening relationship' with the child up to the birth (48). Earlier, it suggested mothering can be provided 'in different ways, involving different persons and different institutions', including a single mother (20). It failed to realise, as indicative of its approach, that a surrogate could mother the child with care and attention on behalf of another or encourage the commissioning mother to mother the embryo.

Secondly, *Personal Origins* regarded motherhood as normally involving the natural parents as 'the genetic and social parents', with the wife as the 'physiological mother', but the new reproductive technologies allowed different parts of motherhood to be performed by different people (9). It pointed out that with egg donation, the woman receiving the egg is regarded as 'the social and physiological mother' who nurtures 'the child prenatally' and delivers it (13). It admitted that with egg donation, the child is not genetically related to the birth mother and has three parents. Some regarded this as a basic confusion of the Christian understanding of parenthood. It was undecided about whether egg donation raised further ethical problems. With embryo donation, the receiving couple are not genetically related, but are 'the social parents' and the social mother provides prenatal nurturing before birth (14).

Concerning its view towards motherhood in surrogacy, it suggested that the commissioning couple are the genetic and social parents but the commissioning mother is not 'the physiological mother' for she has not gestated the child (14). It indicated that in surrogacy, parents take 'the duties and privileges of parenthood only after the child has been carried in the womb

by another woman' (52). The report gave some support for gamete donation as non-adulterous (57), but they questioned surrogacy because of the 'multiple' 'practical and moral problems' involved, including an irresolvable confusion and 'complexity of relationships' (59).⁴³ They supported the use of ovum donation by suggesting that the genetic role is not as important as the gestatory role or the social role (52). It admitted that a child born of egg donation is not related to the mother who bears it (58). Concerning surrogacy however, they indicated that some regarded the genetic contribution as having overriding importance. It admitted that for some the separation of the two female contributions to the biological origins of the child - i.e. the genetic and gestatory contributions - is unacceptable. However, it allowed this separation with embryo donation. Concern was expressed that surrogacy minimises the 'gestatory role' of motherhood; the report suggested that the mother bearing the child has a 'true parental and...social role', with transference of parental responsibility by adoption (52-3).

Thirdly, *Donum Vitae* rejected the use of donor gametes (24) on the grounds that this separates genetic, gestational and social parenthood, which damages 'personal relationships' in families and society by creating 'dissension, disorder and injustice' (25). Donor gametes are regarded as denying the vocation of those 'called to fatherhood and motherhood' (24), by denying the 'unity and integrity' (24-5) of 'conjugal fidelity' in marriage (24). *Donum Vitae* identified a mother as the one who carries and provides maternal shelter to the embryo. Only married women can become mothers, by their 'reciprocal self giving' in their loving conjugal union with their spouses (23). It rejected surrogacy for not meeting the obligations of maternal love, for denying conjugal fidelity and for not being responsible motherhood. It also believed that surrogacy denies the dignity - and the child's right - of conception and gestation within the

⁴³ Chapter two (on mothering) clarifies some of the roles in surrogacy.

womb. Surrogacy is considered to prevent the child being parented by their 'own' parents (26).

It seems therefore that the reports are keen to maintain a continuation between gestational and social motherhood in surrogacy. However, the Protestant churches accept the division of genetic parenthood from gestational and social parenthood by accepting AID, egg donation and embryo donation, where the genetic donor differs to the social parents or the gestational mother. However, they were not willing to accept the break between gestational motherhood and social motherhood in cases where the surrogate gestates a donated egg or her own genetic egg. They wanted the woman who gestates to become the child's social mother too. Chapter two explores motherhood in more depth, suggesting that motherhood can be multi-functional, incorporating biological motherhood, gestational motherhood and a social relationship.

1.10.2 The Issue of Payment

The previous section analysed how the reports regarded motherhood. As with the secular reports, the issue of payment is a key ethical concern for the Church reports. In this section we discuss the churches' concern with how both paid and unpaid surrogacy demean the dignity of the surrogate. Both *Choices in Childlessness* and *Personal Origins* treated the issue of payment in surrogacy; *Donum Vitae* did not. Payment is seen to demean the surrogate, affect her dignity and commodify the child. Preference is therefore given to surrogacy being conducted as an unpaid gift.

Choices in Childlessness opposed the view that children are commercialised commodities to be bought and sold (50 and 55). Instead, children are seen as gifts of God's providence, entrusted to the Christian community, though

human beings are involved in planning, deliberation, decision making and choice. It saw surrogacy as a free service and gift to a childless couple and regarded paid surrogacy as unnatural and inhuman. However, *both* unpaid and paid surrogacy were regarded as 'demeaning' and they called for them to 'be made illegal' (55). It indicated that surrogacy involves 'an agreed fee' for the surrogate to hand the child over to the commissioning couple (17) and after receiving her fee they expect her to 'fade out of the picture' (48). *Personal Origins* argued that when surrogacy involved payment for the gestational service, the money undermined the women's dignity, who bear children 'they have no intention of mothering' (59). It was opposed to a child being created for adoption, especially if payment was used (53). *Personal Origins* indicated that from a Christian view point it is seen as 'inappropriate' for donors to 'sell their gametes for gain' (9).

1.10.3 Exploitation and Commodification

The section above explored how the Church reports considered payment as a key ethical concern, believing that both paid and unpaid surrogacy demeans the dignity of the surrogate. Attention here turns to how the three Church reports believe payment leads to exploitation and commodification. Chapter three explores the concepts of commodification, exploitation and coercion and chapter four explores the issue of payment and baby selling in more depth.

Firstly, *Choices in Childlessness* believed paying surrogates leads to a commercial business transaction involving large monetary exchanges and the sale of babies (50). Children are to be seen as 'a gift', belonging to 'the community and to God' (30). It wanted women and children to be treated with dignity and respect, without harm. Procreation is not to be a business with children regarded as possessions. Babies are not commodities, and it would be

'unnatural and inhuman' for family life - which emphasises care, uniqueness and the invaluable - to be substituted for the market place where all things have their price (50). However, it suggested that medical technology can help overcome limitations by creatively promoting the common good, if used wisely with restrictions and without taking an instrumental approach to life (35).

Secondly, despite *Personal Origins* not explicitly discussing exploitation as such, its authors were opposed to gametes being sold as commodities (9). It acknowledged that some are opposed to anonymous embryo donation, where parents rear a child without a genetic relation to them, on account of the possibility that the process treats the child as a product (which in turn could affect the child badly). It believed we can learn from Christ about the interdependence of social life, the worth and dignity of life, and the possibilities of human relationships. It was implied that in the Judaeo-Christian tradition, individuals have dignity and responsibility and have a personal response to a loving God. The report accepted that for Christians, human dignity includes acknowledging the body's dignity (30).

Thirdly, *Donum Vitae* sought to ensure that adults and embryos are respected with dignity, not exploited and commodified. Dead embryos are to be respected for their humanity and are not to be used in 'commercial trafficking', since IVF embryos have dignity and the right to life from conception (18). The report regarded as 'immoral' the production of human embryos which are 'destined to be exploited as disposable "biological material"' (18). The embryo is not to be exploited or used for commercial purposes as this is opposed to human dignity. Human beings are to be respected and not used as an instrument for others' advantage. A child is not an object which people can have rights to, or an object of ownership. Therefore, children are not to be

'desired or conceived' as a 'product' of medical intervention, as this makes him 'an object of scientific technology' (28).

1.10.4 Surrogacy Management

The last section looked at how the Churches believe payment leads to exploitation and commodification. Unlike the secular reports, the Church reports do not go into much detail regarding the management of the practice because they are negative towards it and do not advocate it as a practice for Christians. Even so, they tended to regard surrogacy as an unenforceable contract. *Choices in Childlessness* pointed out that a judge described surrogacy as a 'pernicious' and an unenforceable contract (17). *Personal Origins* regarded surrogacy as an unenforceable contractual or quasi-contractual agreement,⁴⁴ which can be paid or not. Surrogacy is regarded as an arrangement involving a woman, who bears a child to be handed over at birth to a couple who will be its parents. The arrangement is seen as having 'unique features' (59), as surrogacy could be used without requiring medical reasons for its use. However, previously it stated that decision making is to include the interests of donors, professionals, the family, the community, in order to make choices and to be aware of the responsibilities involved (70). Similarly, *Donum Vitae* did not go into detail regarding the management because it rejected surrogacy as a practice.

1.11 Criticisms of the Church Reports

Each of the Church reports contained statements which contradicted their attitudes towards surrogacy and which could possibly have led them towards a more positive attitude concerning accepting surrogacy as a practice to alleviate infertility. Attention now focuses upon criticisms of the Church

⁴⁴ Chapter five explores whether surrogacy has to operate as a contract.

reports. Four criticisms of *Choices in Childlessness* are explored concerning payment, regulation, use of third parties and mothering. Five criticisms of *Personal Origins* are investigated concerning the use of discussion, dynamic natural law, allowance for differing views, acceptance of other new reproductive technologies (especially embryo donation) and minimising the significance of genetic (but not gestational) motherhood. Finally, three criticisms of *Donum Vitae* are considered including the saving of embryos, the use of medicine to help the sick, and how a child is the fruit of its parents' love.

1.11.1 Choices in Childlessness

Choices in Childlessness contradicted its position towards the other reproductive technologies, including its attitude towards surrogacy. Firstly, despite not allowing payment in surrogacy (55), it implied paid AID donation enabled emotional distance (45). Allowing payment could help gestational surrogates keep a distance to the child they are gestating, even though it could be considered unwise to encourage emotional distance to a pregnancy with a foetus needing attention. A study of paid surrogates in Israel demonstrated they deliberately distanced themselves from the embryo, but encouraged the commissioning mother to bond and interact with it.⁴⁵ Surrogates act on behalf of another and psychologically it could be healthy for them not to be too emotionally attached to the foetus to prevent bonding, but such emotional distance does not necessarily mean that they are uncaring to the foetus.

Secondly, it called for a Code of Practice with 'principles and conditions' to be developed for IVF (47), while for AID they called for 'social and legal safeguards' (54). However, for surrogacy it called for the practice to be made illegal, admitting that no attempt had been made to solve the ethical and legal

⁴⁵ Elly Teman, *Birthing a Mother: The Surrogate Body and the Pregnant Self* (Berkeley, CA: University of California Press, 2010), 130.

problems. Thirdly, AID is accepted despite using a third party, on the grounds that it could strengthen a couple's marriage, since both spouses give consent. However, surrogacy is criticised for using a known third party, with more involvement compared to anonymous AID donors (43-6 and 47-8). Fourthly, despite admitting that mothering can be provided in different ways, it criticised surrogacy for being irresponsible and inhuman, and for deliberately disrupting and damaging the relationship between a mother and a child (48).

1.11.2 Personal Origins

Personal Origins can also be criticised for its views towards surrogacy. Firstly, it called for 'observation and discussion' to see if the reproductive practices 'threaten marriage' or the child (53). However, such discussion seemed missing with regard to surrogacy, especially as they did not seem to make an ethical distinction between gestational and genetic surrogacy, and also because at the time no research had been conducted into surrogacy. With gestational surrogacy the surrogate does not procreate and the embryo is usually from the gametes of the married couple. Secondly, despite their positive affirmations of a dynamic natural law - of seeing God as caring for an individual's needs within the interdependence of life - it did not consider surrogacy as part of a dynamic natural law or responding to the particular needs of others, even if involving the gametes of the commissioning couple. Some of them may have felt it was unnatural for a woman to hand over a child she has gestated, as she may have bonded to the child. Thirdly, even though it admitted that 'different but seemingly valid Christian conclusions can be drawn from the available data' (2), allowing them to have different views towards IVF for example, it would not allow different and valid conclusions to be made about surrogacy. It could be that, due to the lack of empirical evidence about surrogacy, the report's authors were hesitant to draw conclusions.

Fourthly, it seems illogical for them to accept the use of other reproductive technologies without accepting that surrogacy could also be used in some circumstances, especially as the report considered it logical to accept embryo donation after accepting AIH, AID and egg donation. However, it did not regard surrogacy as being directly parallel to these other practices. Fifthly, regarding their understanding of motherhood, it seems illogical to be prepared to minimise one type of biological parenthood (i.e. the genetic connection) when allowing egg donation and not the other (i.e. the gestational connection) in order to allow surrogacy, especially as they suggested we can use our bodies for God's service (30). However, it should be noted that they might well argue that there is a substantial difference between genetic and gestational motherhood.

1.11.3 *Donum Vitae*

Firstly, despite allowing procedures to occur on an embryo, which improve its health or survival (15), *Donum Vitae* would not allow a gestational surrogate to gestate an embryo instead of it being carried by a woman who has had repeated miscarriages. If they did allow gestational surrogacy, the surrogate could possibly save an embryo's life. Secondly, even though it believed that medicine can work for the good of human beings and assist those who are ill and infirm, while respecting the person's 'dignity as a creature of God' (9), they would not allow a woman to act as a surrogate, as a type of medicine, for the benefit of a commissioning mother, with an infirm and non-functioning womb for example. Thirdly, a child is considered to be the fruit of their parents' love (27-8); however, a couple could still love each other if their gametes are taken from each other and fused together and implanted into a surrogate to fulfil their marital duty to procreate.

However, *Donum Vitae* rejects surrogacy for being objectively wrong as the body is not being used in the right manner. Being for them cannot be separated from meaning and therefore the womb, for example, can only be used in one way; for a wife to carry a child conceived with her own husband. Roman Catholic theology of the body does not allow the procreative and unitive aspects to be separated within marriage. Roman Catholics distinguish between an objective good and a subjective feeling about a good. Even though the married couple emotionally love each other, Roman Catholicism expects them to procreate by a biological self-giving through bodily sexual intercourse as an objective good of their married love. Consequently, the aims, intentions and desires of a commissioning couple wanting to procreate using a surrogate would be irrelevant, as surrogacy separates the procreative and unitive aspects of marriage.

1.12 Evaluation of the Church Reports

Having investigated criticisms of the Church reports, an evaluation of them is now made. Even though all three reports rejected surrogacy, they failed to consider whether surrogacy could reflect support for the infertile in four ways: (1) by failing to see surrogacy as helping infertility; (2) by failing to see surrogacy as a creative solution; (3) by not being consistent towards surrogacy; and (4) by failing to see that participants in surrogacy could be treated with dignity.

Firstly, they failed to see surrogacy as helping the infertile. All three Church reports unanimously condemned surrogacy as a means for Christians to alleviate infertility. Such disapproval comes despite *Choices in Childlessness* advocating the reduction of human unhappiness by '[s]ympathy and

benevolence' (19) and likewise *Personal Origins* calling for 'sympathy' and pastoral support for the infertile, along with requests for the Church not to be too 'rigid' or 'negative' (65). Even so, neither report considered that surrogates may be motivated by sympathy and benevolence to help overcome the suffering of infertility. After all, *Choices in Childlessness* acknowledged that infertility can cause suffering and that Christians can act responsibly by helping the infertile, and they called for the Church to give 'understanding and support' (53).

Secondly, they failed to see surrogacy as a creative solution to infertility. *Choices in Childlessness* suggested that wanting a child can be a vocation for parenthood and is a sufficient reason for others to help the infertile. It also believed that children are a gift of parents to a community; they are not owned by one person, but are from God and entrusted to a community as a gift. Indeed, it suggested we can creatively use our imagination and practical skills in service to our communities 'as God's stewards and co-creators', (39) to become like God. However, no suggestion is made that a Christian could become a surrogate, using IVF to gestate a commissioning couple's embryo as a creative and imaginative way to help overcome the suffering of infertility or that a child could be entrusted by a surrogate as God's gift to the commissioning couple and the community. An infertile commissioning woman, for example, might still feel she has a vocation to mother even after a hysterectomy, with help from a willing surrogate. Likewise, *Personal Origins* also claimed to be open to 'new possibilities...of God's providential care' (28), suggesting our bodies can be used for God's service. It suggested we can 'co-operate with God' to deal with natural deficiencies and the new reproductive technologies can help to start a family (58) and to fulfil the end of a marriage which has been affected by handicap (49). Some might consider a commissioning mother with a womb removed due to cancer as being disabled

and a surrogate as someone helping a married couple fulfil the ends of marriage.

Thirdly, they failed to be consistent. Within the Church reports, attitudes expressed elsewhere are not readily applied to surrogacy. Even though *Personal Origins* allowed for disagreement to occur over the moral and theological issues in human fertilisation and allowed for positive attitudes towards other reproductive technologies, they considered surrogacy to 'endanger' the Christian family and therefore to be morally unacceptable for Christians (53). Elsewhere, *Personal Origins* acknowledged that technology can separate motherhood into the genetic, social and physiological mothering roles (9). Egg donation is accepted, despite creating additional parentage but surrogacy is regarded as having multiple practical and moral problems which they believed can cause confused relationships. With surrogacy, it highlighted that some regard genetic contributions as having overriding importance, which they are prepared to down play in the case of egg donation. Arguments based on the separation of the gestation and genetic contributions are accepted to support the other technologies but not surrogacy (52-3). There is a danger that an infertile Christian couple, who need to use surrogacy as their only way to have a child, could feel the Church of England is not being responsive to their situation when other reproductive techniques are accepted.

Earlier, *Personal Origins* claimed that it wanted to be faithful to biblical understanding and challenge interpretations of the Bible and tradition if they are 'based on false premises' (21). However, no discussion occurs of the biblical presentations of surrogacy (e.g. Genesis 16 and Genesis 30), nor do they question these accounts as possible examples of rape and concubinage.⁴⁶ Theologically it accepted the separation of procreational and relational aspects

⁴⁶ See chapter two of this thesis, section 2.2.

of marriage by contraception and accepted gamete donation which separates the procreational from the gestational relationship, but keeps the relational and social aspects together in the rearing of the child (48-50). Nevertheless, it failed to apply these arguments to surrogacy. After all, in gestational surrogacy, even though the commissioning mother did not gestate the child, it comes from the one flesh union of the commissioning parents. In both gestational and genetic surrogacy, the parents can rear the child together as the social parents. Genetic surrogacy, like donor gametes, involves a procreational act of the surrogate separate from social parenting of the commissioning couple. However, despite accepting embryo donation using donor gametes, genetic surrogacy was rejected.

Finally, they failed to see that surrogacy could respect the dignity of participants. *Donum Vitae* regarded children as coming from the one flesh conjugal union of spouses, and as worthy of treatment with respect and dignity; surrogacy is rejected for breaking the procreative and unitive relationship. However, a sympathetic Christian friend might volunteer as a gestational surrogate to help fulfil the vocational calling to parenthood for a childless married Roman Catholic woman after her hysterectomy due to cancer of the uterus. The married couple could regard their gametes, fused using IVF, as representing their loving marital union. The surrogate could treat the embryo with respect and dignity, regarding her actions as working with God as a co-creator, co-operating with God. The couple might turn to surrogacy due to their extraordinary circumstances, though they would prefer to have procreated normally and do not regard the surrogate act as replacing their continued marital acts of conjugal love. The couple do not intentionally want to separate the conjugal act from procreation, but they intentionally want to ensure that procreation occurs out of their love for each other. The couple could aim to follow the teaching of *Donum Vitae* ensuring no embryos are

destroyed, no embryos are frozen and no spare embryos are created. They could masturbate together to produce the husband's sperm, as a unitive and possibly procreative act, out of love, instead of a solitary act performed by the man alone. Both they and the surrogate could regard surrogacy as a way to enhance their marriage, allowing them both to fulfil their natural desire for a child and to continue to care for it while as a foetus in the surrogate's womb and after the birth, allowing them to become a family. Of course under the teachings of *Donum Vitae* the couple would be acting in a morally illicit way for using a surrogate (25) as it breaks the procreative and unitive aspects to the commissioning couple's marriage; masturbation would also be criticised. Surrogacy is considered an objectively wrong way for a woman to use her body, as it breaks the expected natural law purpose and end of her womb to gestate her own child.

1.13 Conclusion

Chapter one has explored six major reports which have been written on surrogacy. It considered their backgrounds, their attitudes towards surrogacy, motherhood, payment and baby selling, exploitation and commodification, surrogacy management, the theology of the Church reports, criticisms and a critical evaluation of the reports.

Warnock and *Brazier* made practical recommendations for governmental ministers to legislate and regulate surrogacy in a clear and straightforward way, but without burdening the general public. However, ministers did not follow all of *Warnock's* recommendations and no action has been taken with *Brazier* apart from changing the criteria for Parental Orders to include unmarried couples. Both reports were affected by public opinion concerning the practice of surrogacy, without necessarily considering the wishes of

surrogacy participants (for example calls to pay surrogates a fair amount for their services). The difficulty both of these documents faced, was the tension between wanting to make suggestions for the legal organisation of surrogacy, without intruding too much into the individual private lives of citizens. *Changing Conceptions of Motherhood* gave advice to health professionals involved, but without offering solutions in cases involving ethical dilemmas between the surrogate and the commissioning couple.

Common themes within the reports towards surrogacy included fears of convenience surrogacy - despite no reported occurrence in the United Kingdom - and fears of risk to the surrogate's health, even though these are similar to the risks for most pregnant women. Concerns were expressed that if a third party is involved this constitutes adultery, even though both members of the commissioning couples agreed to the practice, and that the children would be affected psychologically, even though their family wanted them. Theologically, recurring themes occur: the separation of the procreative and unitive aspects of marriage, the exclusive union of marriage and the use of a third party donor. Other considerations include the status and possible destruction of the human embryo, the demeaning treatment of the surrogate and her dignity as a human being. Other issues included the discontinuous maternal care, the separation of motherhood into gestational, genetic and social parts (even though they tended not to recognise the role of the commissioning mother). Concern was expressed over the use of masturbation to produce sperm, the role of nature and the Bible, as well as concern that it is a contractual business arrangement with possible commodification of the surrogate and the child if payment is involved.

However, despite the risks, official reports have acknowledged that surrogacy has not had the negative effects first envisaged. *Changing Conceptions of*

Motherhood implied that their fears had not materialised since surrogacy was now more widely accepted amongst the public and participants were willing to inform the child of the arrangement (32). Likewise, *Brazier* argued that there were not enough problems to justify setting up a controlling body.⁴⁷ Often the reports failed to apply the same logic in their theological and ethical thinking to surrogacy, which they applied positively to other areas of reproductive technology. Indeed in a private conversation with Professor Brazier, she admitted that some form of payment could now possibly be made to surrogates,⁴⁸ which contrasted with her views in *Brazier*. Ongoing research is needed to assess the psychological effect of surrogacy on the surrogate, the commissioning couple, the children born of surrogacy and the surrogate's own children, especially when comparing altruistic and paid surrogacy practices. The focus for this thesis is on ethical issues involved in surrogacy. Over the next four chapters, further analysis will be made. Chapter two explores motherhood as multidimensional. Chapters three and four discuss key ethical themes in surrogacy such as commodification, exploitation, coercion, payment and baby-selling. Chapter five outlines how the practice is conducted with an analysis of the contractarian model, the adoption model and the relational model. Suggestions for possible research are made in the appendix.

⁴⁷ *The Brazier Report*, 6.2.

⁴⁸ Private conversation with Professor Brazier on 8 September 2008, at the Institute of Medical Law 4th Annual Conference entitled: 'Transformation/Transgression: The Legal, Medical and Cultural Regulation of the Body', at the University of Birmingham, England.

CHAPTER TWO

THE CONCEPT OF MOTHERHOOD

2.1 Introduction

Chapter one explored the concept of surrogacy in three secular reports and in three Church reports. It focused on the key themes of motherhood, payment, commodification, exploitation, coercion and surrogacy management. The aim of this chapter is to explore the concept of motherhood and its implications for surrogacy in greater depth. Other chapters in the thesis will develop the key themes established in chapter one. Chapter three explores commodification, exploitation and coercion for the child, surrogate and commissioning couple. Chapter four analyses whether paid surrogacy involves baby selling and chapter five investigates the management of surrogacy using a contract model, an adoption model and finally an alternative relational approach.

Attention in this chapter will focus upon those who have a view on mothering and think it is ethically significant. Firstly, the definition of motherhood is questioned: What makes someone a mother? When does mothering start? What does mothering entail? It will be proposed that the traditional monolithic understanding of motherhood - the assumption that there is only one '*real*' mother - is inadequate. It unnecessarily limits and oversimplifies the concept and fails to accommodate the intricate nature of motherhood. Instead, the concept of motherhood is deconstructed to reflect the diverse definitions, types and practices of mothering in existence including genetic, gestational and social mothering, as well as combinations of these. By examining the meaning of motherhood, new terms are made available to those involved in surrogacy to articulate the varying roles and practices involved. Indeed, one aim of this

thesis as a whole is to develop a framework that incorporates the complexity of motherhood in the context of surrogacy in particular.

The work of three secular feminists on motherhood is explored, namely Caroline Whitbeck, Sara Ruddick, and Barbara Katz Rothman, as well as problems with their work. Assessments will be made as to whether their mothering models are sufficiently detailed to deal with surrogacy. As in chapter one, distinctions will be made between genetic surrogacy and gestational surrogacy. In contrast to them, the work of two Christian feminist theologians, Protestant Bonnie Miller-McLemore and Roman Catholic Rosemary Radford Ruether on motherhood will be explored, along with the work of Protestant theologian Don Browning. Other Christian attitudes towards mothering will be presented, focusing upon the Bible and the Church. Suggestions are given that an alternative framework to accommodate motherhood as multidimensional needs to be explored. I have chosen not to consider feminists who do not regard mothering as ethically significant, such as Shulamith Firestone¹ or Jeffner Allen.²

2.2 Who is the Mother?

Questions can be asked to clarify the identity and meaning of motherhood. Who can - and how does one - become a mother? When does mothering begin? Is motherhood determined by intention, genes, commitment or duty? By egg donation, by the conception of an embryo, by implantation or gestation? Is mothering a gender specific practice or a psychological emotional connection? Is mother-child bonding a result of hormones, an innate maternal instinct, or socially constructed from an ultrasound scan? Motherhood could be defined

¹ Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Bantam Books, 1971).

² Jeffner Allen, 'Motherhood: The Annihilation of Women', in Joyce Trebilcot (ed.), *Mothering: Essays in Feminist Theory* (Totowa, NJ: Rowman and Allanheld, 1983), 315-30.

by pregnancy experiences such as quickening, giving birth as legally recognised motherhood, marriage, the financial and material standing of the carer, the amount or quality of social nurturing, a moral claim or right, a choice, socially constructed role, practices or qualities influenced by culture.³ Questions can be raised regarding the value, significance and priorities of each of these elements, in whatever combination they occur. Whether before, during or after a pregnancy, they are key questions for surrogacy participants, in constructing and attributing the identity, meaning and concept of motherhood.

Current terminology fails to describe the diverse meanings within mothering. Traditional motherhood involved a woman giving birth to her own genetic child and nurturing it. In England, a child is regarded as having one 'real', legitimate and natural mother since legally motherhood is determined by birth.⁴ Therefore, an infertile woman receiving an anonymously donated embryo or egg, but also a gestational surrogate gestating a commissioning couple's embryo for them, or a genetic surrogate, are the legal mothers on the grounds of having given birth. A woman gestating her daughter's embryo would be legally regarded as the child's mother and not as the child's grandmother. English Law is probably influenced by the 1839 'tender laws doctrine', which allows birth mothers to have custody of their children.⁵

³ Virginia Held, like Sara Ruddick, highlights that men can demonstrate mothering qualities, (*Feminist Morality: Transforming Culture, Society and Politics* [Chicago, IL: The University of Chicago Press, 1993], 80). However, we tend to call them fathers due to their socially constructed genders. Held uses 'mothering person' for inclusivity (197-8).

⁴ English law on motherhood is guided by these two principles: '*Mater semper certa est*', i.e. it is always certain who the mother is, and '*mater est quam gestatio demonstrat*', i.e. by gestation is the mother demonstrated or motherhood is demonstrated by birth.

⁵ The tender laws doctrine dates from 1839 in Britain and assumed the birth mother was the best parent of the child, over the father, see Joan Mahoney, 'An Essay on Surrogacy and Feminist Thought', *Law, Medicine and Health Care* 16 (1988), 81-8, at 86.

It can be difficult to identify one universal definition of one true or 'real' mother, as each case differs. Traditional motherhood can be deconstructed to clarify - as opposed to harmfully fragment - women's maternal identity. The meaning of motherhood can be classified according to its various components and the types of mothering activities, practices, functions, roles, relationships and people, - for example, in terms of the genetic, gestational, intentional, instinctual, biological, psychological and social dimensions. The meaning of motherhood can be analysed and terminology used to reflect its intricacy. It is possible to escape from essentialistic and naturalistic stereotypes towards motherhood, including the assumption that all mothers are genetically related to their children and nurture them.

Motherhood does not have to be essentialistic or naturalistic. Maternal instincts are not necessarily universal or natural. Genes or biological experiences such as gestation do not necessarily create a maternal attitude to the child. Not all women want to be mothers; some abort, abandon or have the child adopted, even if it is genetically related to the mother. Meira Weiss, after six years of research, found that mothers have been known to reject physically deformed new born infants for not matching their social expectations, but usually accepted them if they had an internal injury, thus suggesting a lack of a universalised maternal instinct.⁶ Cultural influences also affect mothering. Edward Shorter suggests that children in medieval Europe children were often abandoned or neglected, with little or no maternal love, since mothers often showed little grief on their death.⁷ However, Stephen Wilson argues that wet nursing was not as common as first thought and that it tended to be

⁶ Meira Weiss, 'Conditions of Mothering: The Bio-Politics of Falling in Love with Your Child', *The Social Science Journal* 35 (1998), 87-105, at 91-2.

⁷ Edward Shorter, *The Making of the Modern Family* (London: Collins, 1976), 169-72.

'localized'.⁸ An innate maternal instinct or nature does not exist for all women, but does for some alongside bonding or an emotional attachment to the child.

The law tends to take an essentialistic view of mothering by automatically regarding the woman who gives birth as the child's mother. The legal definition of a mother ignores the varying types of possible mothering relationship. Within extended families, mothering as a social nurturing function, can be performed by other family members, including aunts, sisters and grandmothers, with cultural variations. Apart from the widespread practice of adoption in Europe, within the Afro-Caribbean communities, the concept of 'othermother'⁹ exists; these have their own societal status and assist the genetic mothers to raise their children. Some are related such as '[g]randmothers, sisters, aunts, or cousins', but some are non-relatives – so-called 'fictive kin'.¹⁰ According to Judith Modell, the native people of Hawai'i engage in the cultural practice of '*hanai*', an 'informal adoption' where someone gives a child to another without going to court. This practice leads to the creation of families known as '*ohana*', who live together and regard themselves as kin.¹¹ Ken Daniels and Karyn Taylor indicate that in Maori society behaviour now labelled as surrogacy is 'long-standing and widespread',¹² while Moira Wright comments that surrogacy occurred within families of British ethnic groups, to overcome the 'tragedy' of having no family heir.¹³

⁸ Stephen Wilson, 'The Myth of Motherhood: The Historical View of European Child-Rearing', *Social History* 9 (1984), 181-98, at 195-6.

⁹ Patricia Hill Collins, 'Black Women and Motherhood', in Virginia Held (ed.), *Justice and Care: Essential Readings in Feminist Ethics* (Boulder, CO: Westview Press, 1995), 117-35, at 120-1.

¹⁰ *Ibid.*, 121.

¹¹ Judith Modell, 'Rights to Children: Foster Care and Social Reproduction in Hawai'i', in Sarah Franklin, and Heléna Ragoné (eds.), *Reproducing Reproduction: Kinship, Power, and Technological Innovation* (Philadelphia, PA: University of Pennsylvania Press, 1998), 156-72, at 159.

¹² Ken Daniels, and Karyn Taylor, 'Surrogacy: The Private Troubles and Public Issues', *Community Mental Health in New Zealand* 6 (1991), 28-50, at 41.

¹³ Moira Wright, 'Surrogacy and Adoption: Problems and Possibilities', *Family Law* 16 (1986), 109-13, at 111.

The Bible can demonstrate the complex nature of motherhood. The use of other women to act as mothers was a feature of Old Testament times. Traditionally, the biblical accounts of a woman bearing a child for an infertile woman - for example, Hagar for Sarai in Genesis 16, handmaid Bilhah¹⁴ for Rachel and handmaid Zilpah¹⁵ for Leah in Genesis 30:9-13 - have been called surrogacy. In Genesis 16 the barren Sarai offers her slave girl¹⁶ Hagar, to Abram who becomes a wife¹⁷ so Sarai could have a child through her and he could procreate. Hagar the slave becomes Abram's concubine without her recorded consent. A concubine (Hebrew *pileges*) was a female possession, with a lower social position to the main wife. Sarai is still described as Hagar's mistress even though Hagar has become a wife of Abram's and her social position has improved. Pregnant Hagar now feels contempt for her barren mistress (Genesis 16:4), reflecting the social significance of children, even though a handmaid was supposed to be subservient. Hagar does not hand the resulting child, Ishmael, over to Sarai. Due to the jealousy and competition between the two women, Sarai deals harshly with and disowns Hagar, telling Abram that Hagar is in his hands (Genesis 16:6), and Hagar consequently runs away (Genesis 16:6), fleeing into the wilderness, where an angel of the Lord finds her. Hagar is not condemned for her actions, but is told to return and submit to her mistress. Both women only refer to the other woman by their respective positions. The relationship between the two women deteriorates; as exemplified by Genesis 21, where Sarah is concerned at seeing the son of Hagar (she cannot even say his name) playing with Isaac. Abraham was distressed with Sarah's request to cast Hagar and his son Ishmael out.

¹⁴ Bilhah in Genesis 29:29, 30:4 and 7, is called a maid (NRSV), i.e. a slave girl (Hebrew *shiphchah*) and in Genesis 30:3 is called a maid (NRSV), i.e. a slave woman (Hebrew '*amah*).

¹⁵ Zilpah in Genesis 29:24, 30:9, 10, 12, 18, is just referred to as maid (NRSV), i.e. slave girl (Hebrew *shiphchah*).

¹⁶ In Genesis 16:1, 2, 3, 5, 6, 8 and Genesis 25:12, Hagar is called a slave girl (NRSV; Hebrew *shiphchah*) in Genesis 21:10, 21:12-13, Hagar is called a slave woman (NRSV; Hebrew '*amah*) which can also mean concubine, which fits in with Hagar's later status as Abram's wife.

¹⁷ The same word in Hebrew ('*ishshah*) is used to describe Sarai, Hagar, Rachel, Bilhah and Zilpah as wives.

It was not only the Hebrew Scriptures that mention the use of concubines to relieve childlessness. The ancient law code of *Hammurabi*, paragraph 146, a Nuzi text dated to 1792-1750 BC, warned that a slave girl 'elevated' by her mistress could 'not claim equality with her mistress'.¹⁸ The wife was allowed to make the concubine's child her own child and if the concubine tried to become equal to the wife she became a slave again, but could not be sold to others.¹⁹

However, the biblical accounts involving Hagar, Zilpah and Bilhah should probably not be rendered as surrogacy, but as accounts of concubinage, slavery, polygamy and possible rape as indicated by Christine Overall who suggests the biblical 'surrogates' would have had sexual intercourse with their commissioning fathers, unlike most of today's surrogates.²⁰ Modern surrogates are not slaves compelled and coerced to participate in a marriage out of fear, with a lack of consent, little support or respect in a contemptuous jealousy-ridden relationship. Modern surrogates are usually free, independent women who consent to enter surrogacy, have support and counselling with the choice to be a genetic or gestational surrogate. Usually commissioning mothers do not already have four children like Leah, who was motivated by jealousy at her sister Rachel, but most use surrogacy as a last resort to overcome infertility.

Wider definitions and interpretations of pregnancy and mothering, with greater flexibility, creativity and dynamism are needed to reflect the pluralistic examples of the types, meanings and activities of mothering today. For example, within society, we already use various terms to denote the varied

¹⁸ Ephraim Avigdor Speiser, *Genesis: The Anchor Bible* (Garden City, NY: Doubleday, 1964), 117-18. See also David Winton Thomas (ed.), *Documents from Old Testament Times* (New York: Harper Torchbooks, 1958), 32.

¹⁹ Speiser, *Genesis*, 120. The code of *Hammurabi* paragraph 146 is seen as offering the closest parallel; as Genesis 16 is part of the tradition it cannot be tied to one particular text. I am grateful to Professor Mary Callaway for assistance on this.

²⁰ Christine Overall, *Human Reproduction: Principles, Practices, Policies* (Toronto: Oxford University Press, 1992), 120.

types of mothering in existence. We use the terms 'natural mother' to designate a woman who is genetically related to a child, 'foster mother' denotes a temporary mothering activity, 'adoptive mother' refers to a social mother, the term 'stepmother' signifies a social mother who is not genetically related to the child, and 'grandmother' relates to a senior mothering figure. We also use the term 'godmother' to indicate a woman who has been selected by the family to act as a spiritual guardian and sometimes as a standby mother if the natural mother dies for example. Titles are given to professionals involved in looking after children to denote very specifically their roles, functions, practices and relationship to the child: for example a wet nurse, a baby sitter, a nanny, an *au pair*, a nursery nurse, a child minder, a teacher, etc., who are usually granted the term *in loco parentis* to demonstrate their particular status. Such concepts can be used within surrogacy too, to denote the specific roles and functions of participants.

As outlined in chapter one, surrogacy involves a genetic or a gestational surrogate, and usually a commissioning couple. Questions can be asked as to who the 'real' mother is. Some regard the commissioning mother as the mother; Laura Purdy, for example, regards the nurturing woman as the mother.²¹ Others see the 'real' mother as the gestator,²² whether she is a gestational surrogate or a genetic surrogate. Others in a similar vein see the commissioning mother as the surrogate,²³ i.e. a secondary substitute mother, instead of seeing the surrogate mother as the surrogate. However, it should be noted that within this thesis, the term surrogate is used within its capacity to

²¹ Laura M. Purdy, 'Another Look at Contract Pregnancy', in *idem.* (ed.), *Reproducing Persons: Issues in Feminist Bioethics* (Ithaca, NY: Cornell University Press, 1996), 198-215, at 200.

²² Overall, *Human Reproduction*, 119. Hilde Lindemann Nelson and James Lindemann Nelson, 'Cutting Motherhood in Two: Some Suspicions Concerning Surrogacy', *Hypatia* 4 (1989), 85-94, at 86.

²³ Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988), 216.

denote a woman who gives birth to a child on behalf of someone else and therefore *ex hypothesi* the commissioning mother cannot be the surrogate.

The word 'surrogate' means 'substitute' and calling her a surrogate mother, implies that she is an alternative, non-'real' mother. Usually it is perceived that there is an either/or, i.e. that either something is 'real' and authentic or it is not. However, the child's 'real' mother could be one of many possible combinations; there is no need for a single meaning to be dominant. Motherhood can have a basis in biology, but motherhood does not have to be defined by biology alone. Genes, gestation and nurturance do not have to belong together as they would in traditional concepts of motherhood. It is possible to regard the genetic surrogate as a 'real' mother for providing the genes and a gestational surrogate as a 'real' mother for providing the gestational function and the commissioning mother as a 'real' mother for providing the nurturing role. A child therefore does not have to have just one 'real' mother, since the child could regard both women as her mother, as in adoption. After all, both the surrogate and the commissioning mother are 'real' women who can act as 'real' mothers in their varying roles. The surrogate can provide an authentic and 'real' mothering function to the foetus in her care, even if it is temporary, while she looks after and nurtures the foetus as she acts as a gestational mother for the commissioning couple. Just because she is not expected to provide social nurture and mother the child after birth, does not mean that she is to be regarded as a substitute, since she provides a 'real' temporary mothering function and activity for the foetus in her care.

However, the reasons given by the surrogates for the type of surrogacy they choose reflect their priorities regarding motherhood. Anthropologist Heléna Ragoné found that surrogates do not see the child as theirs, but as belonging to

the commissioning couple.²⁴ The typical surrogate decides her relationship to the child by separating the social and biological aspects of motherhood, preferring to call herself a surrogate and not a birth mother, in order to keep a distance from the child.²⁵

It is possible that the reason why surrogates do not regard themselves as mothers is due to the inadequacy of language to describe their role and function. Instead, wider definitions of mothering could be used to reflect the various roles taking place. A genetic surrogate could be renamed as a genetic-gestatory mother. A gestational surrogate could be called a non-genetic-gestatory mother. Commissioning mothers are the intentional mothers who, despite not undergoing pregnancy, want to be the socially nurturing mothers of the child. They can be genetic-nurturing mothers or non-genetic nurturing mothers. Research by Susan Golombok indicates that those, such as a commissioning couple, who go to extra lengths to have a child, for example by using AID or IVF, are very motivated parents, and their quality of parenting is often higher than comparable samples of those with children conceived by ordinary means.²⁶ An egg donor may regard herself as an anonymous genetic mother. New terms can be used; for example, one commissioning mother, whose biological sister was her genetic surrogate, used the word 'mattie' to combine the words mother and aunt to denote the 'kinship term' used by the child.²⁷

This section has shown some of the complexities surrounding the concept of motherhood. The following sections aim to demonstrate how secular feminists,

²⁴ Heléna Ragoné, *Surrogate Motherhood: Conception in the Heart* (Oxford: Westview Press, 1994), 126.

²⁵ *Ibid.*, 8, 39 and 75-7.

²⁶ Susan Golombok *et al.*, 'Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children', *Child Development* 66 (1995), 285-98.

²⁷ Ragoné, *Surrogate Motherhood*, 135.

religious feminists and Christianity have regarded motherhood. The secular feminists to be analysed are Caroline Whitbeck, Sara Ruddick and Barbara Katz Rothman. They have been selected as important and significant theorists who have written on motherhood, with varying emphases upon its biological, social and cultural aspects. However, the practical implications of their mothering models lack the complexity to accommodate surrogacy, and the models are therefore inadequate and oversimplified.

2.3 Caroline Whitbeck

2.3.1 Caroline Whitbeck's Biological Model of Mothering

Feminist philosopher Caroline Whitbeck places the focus very firmly upon the gestational and biological dimensions of mothering as her main emphasis. Only later, as a minor note, is she aware of criticisms that she has been over essentialist. In light of not wanting to appear essentialist, she also brings the social and cultural aspects of mothering out too. In order to shake off essentialist criticisms she is also open to suggestions that men can mother too,²⁸ but her main emphasis in mothering is that of biology and gestation (266).²⁹ Whitbeck focuses on the biological differences of women and their conscious biological experiences such as labour, childbirth, lactation, which affect how women relate to their babies compared to men's relationship with their babies. Whitbeck believes that the biological experience of motherhood is primarily significant, as women have had a nine-month investment in the child. She believes that women's uniquely physical bodily pregnancy experiences 'are likely to enhance those feelings, attitudes, and fantasies which induce people

²⁸ Caroline Whitbeck, 'Feminist Ontology: A Different Reality', in Carol C. Gould, (ed.), *Beyond Domination: New Perspectives in Women and Philosophy* (Totowa, NJ: Rowman and Allanheld, 1983), 64-88, at 74.

²⁹ Numbers in brackets refer to Caroline Whitbeck, 'The Maternal Instinct', *The Philosophical Forum* 6 (1974/1975), 265-73.

generally to care for their infants' (272). Such experiences are regarded as being 'the same cross-culturally' (271-2). Whitbeck is usually regarded as a maternal feminist of the feminine school of thought, which tends to focus upon the unique aspects of women in a positive light such as their different embodied experiences. Such a view differs from liberal feminists who tend to call for women to be equal to men and thus play down any differences between men and women as essentialist for leading to stereotypes for women's behaviour.

However, in order to qualify her main views, she admits that physical pregnancy experiences may not create a maternal instinct, since hormones may not result in maternal behaviour (271-2). Men are encouraged to mother too. She acknowledges that not all women choose to mother. Recognition is given that maternal behaviour can depend on experience, and parental affection can include feelings towards the child after the birth (268). She also admits the influence of socialisation in affecting the difference between men and women in the attachment to their children (266).

2.3.2 Critique of Caroline Whitbeck's Biological Mothering Model

Despite some good points regarding mothering, Whitbeck lacks a fully developed conceptual theory of motherhood. She believes that women's pregnancy experiences are the same cross-culturally. However, not all women will experience or will want to experience pregnancy in the same manner. Whitbeck's mothering focuses on the biological gestational aspects, but this seems to overlook the complexity and flexibility of maternal relations, which do not all come under the biological experiences of pregnancy. Whitbeck ignores the importance of genes as an aspect of the biological contribution to motherhood; therefore in a surrogacy custody clash, she might favour a

gestational mother over a genetic commissioning mother due to biological experiences of pregnancy. She comments that the pregnant mother has a greater investment due to the nine months involved (271-2). Lesbian mothers or adoptive mothers may feel as though their relationship with their child is lacking for not undergoing the biological experience of a pregnancy.

2.4 Sara Ruddick

2.4.1 Sara Ruddick's Nurturing Social Model of Mothering

The feminist philosopher Sara Ruddick limits mothering to a social practice based upon nurturing the child after birth. Ruddick outlines a care-based 'maternal thinking', centred on an attentive love, and the virtues of empathy, humility and cheerfulness, which evolve from meeting the demands of the child. Such demands from the child include, firstly, preservative love: to preserve the child's life, which she believes mothers find natural to protect and foster their child's growth.³⁰ Secondly, it involves growth, which helps the child grow emotionally and physically. And thirdly, it encompasses the social acceptability of the child, which is met by 'preservative love, nurturance and training' (17).³¹ She admits that '[m]any women and some men express maternal thinking in various kinds of working and caring with others'.³² Ruddick regards the maternal as 'a social category',³³ which can include men and adoptive or step mothers, who are not to be regarded as less qualified for not giving birth, since giving birth is not regarded as sufficient to do maternal

³⁰ Sara Ruddick, 'Maternal Thinking', in Trebilcot, *Mothering*, 213-30, at 216 and 218. See also Sara Ruddick, 'Preservative Love and Military Destruction: Some Reflections on Mothering and Peace', in Trebilcot, *Mothering*, 231-62, at 260 n. 12, she regards 'preservative love' as an activity caring for children, informed by interest in 'preservation, growth, and acceptability'.

³¹ Numbers in brackets refer to Sara Ruddick, *Maternal Thinking: Towards a Politics of Peace* (Boston, MA: Beacon Press, 1989).

³² Ruddick, 'Maternal Thinking', 225.

³³ *Ibid.*, 225.

work or to do it effectively. Ruddick acknowledges that some parts of maternal thinking come from the mother's biological make up and experience.³⁴ She downplays the significance of pregnancy and birth saying they are not 'much like mothering' (50). She does not think that women can apply maternal tasks directly to the foetus while pregnant, but only to the future baby, such as making clothes or buying a crib.

Ruddick would more than likely be classified as a social feminist for wanting to concentrate upon the social practice of mothering as an activity which comes from experiencing nurturing. She draws away from emphasising the biological aspects of mothering, to prevent women being expected to mother just by being women and having a female body. In order to include men as mothers, unlike Whitbeck, she downplays the significance of pregnancy and birth and focuses upon the social activity, which can lead to maternal thinking in other areas such as politics.

2.4.2 Critique of Sara Ruddick's Social Mothering Model

Ruddick's theory of motherhood and maternal thinking seems to demonstrate complexity, allowing for experience and interaction with children to influence her concept of motherhood. However, the practical implications and her conclusions are inconsistent with her theory of motherhood: four difficulties will be discussed.

Firstly, Ruddick, with her theory of maternal thinking, stresses mothering as a natural activity coming from meeting the ongoing practical needs of the child. However, the ability to perform some aspect of mothering does not have to come as the consequence of long-term maternal care, but can come instantly

³⁴ Ruddick, 'Preservative Love and Military Destruction', 235.

and intuitively from an innate drive or socialization or by being with a child and automatically being able to respond to their immediate needs. A childless person for example could demonstrate mothering qualities by playing a game like 'peek-a-boo' with a stranger's child they meet on public transport, possibly echoing the maternal care shown to them as a child.

Secondly, it could be suggested that Ruddick idealises mothers, because her expectations of them are too high, making her impractical and unrealistic. Margaret Simons believes Ruddick's 'moral virtues' suggest 'sentimentalized motherhood'.³⁵ Ruddick, for example encourages cheerfulness for mothers, despite life's conditions,³⁶ and expects that humility and cheerfulness will emerge from the practice of mothering.³⁷ However, for some women the sense of constantly feeling pressurised by extremely demanding children or the caring for a child with a terminal illness may militate against the developing of positive maternal attitudes. Ruddick admits: '[w]hat we are pleased to call "mother love" is intermixed with hate, sorrow, impatience, resentment and despair; thought-provoking ambivalence is a hallmark of mothering' (68).

Thirdly, it can be suggested that in order to detract from the biological emphasis of motherhood and claims of essentialism, she states that mothering begins after birth. She can be seen as being inconsistent for stating that mothering is not involved in pregnancy or birthing labour (50 and 197). Ruddick sees pregnancy, birth and lactation as 'different in kind from other maternal work' (48) and she distinguishes birth from mothering (193). Ruddick believes pregnant women can adopt a maternal attitude to a foetus and engage in projective maternal tasks, but such tasks are not seen as relating to the foetus but to the future child. However, Ruddick fails to realise that women while

³⁵ Margaret A. Simons, 'Motherhood, Feminism and Identity', *Women's Studies International Forum* 7 (1984), 349-59, at 353.

³⁶ Ruddick, 'Maternal Thinking', 218.

³⁷ *Ibid.*, 214 and 218.

pregnant can choose to socially mother their foetuses as a choice, for example, talking to the foetus, stroking her abdomen, playing it music. A pregnant woman could deliberately want to engage in the activities of Ruddick's maternal practice such as preserving the child's life by eating additional vitamins especially for the benefit of the foetus and not herself, protecting the foetus from harm, for example, by not drinking. She may want to help the child grow physically and emotionally by exercising, talking to it, playing it music, interacting with it – all of which could be regarded as direct mothering activities if done outside of the womb. After all, Ruddick describes a mother as someone who fulfils the child-care needs of preservation, growth and social acceptability (50-1). Therefore, a woman can actively mother a foetus while pregnant and a father could mother the foetus too as well as an adoptive mother or a commissioning mother. Otherwise, those who have had miscarriages would be expected not to feel maternal bereavement at the loss of the foetus. A woman who intends to have her child adopted, may feel disgruntled that Ruddick undervalues her contribution to the child's development by not regarding her caring activities for the foetus as her time of mothering in the child's life.

Fourthly, maternal thinking would seem to be inappropriate for the collaborative practice of surrogacy involving the surrogate and the commissioning couple. Surrogacy is usually a shared birth experience and practice with planning and involvement. A commissioning couple could sense that they are being denied the opportunity to feel as though they are procreating with their surrogate together as a whole unit. Ruddick suggests that the birth giver should be respected, as a mother is inclined to 'ask certain questions - those relevant to *her* aims [emphasis added] – rather than others' (24). Even though Ruddick does not refer directly to surrogacy, she could be interpreted as indicating that only the surrogate's interests matter and they are

to take priority over the commissioning couple. Her maternal practice model is based upon partiality of allowing 'a legitimate special concern for the children one has engendered'³⁸ which will have an impact upon how motherhood and possibly surrogacy is practiced. Even though Ruddick respects the individual wishes of a birth mother to hand the child over to an adoptive mother, care is needed to ensure that both the needs of the commissioning couple as the intentional and in some cases genetic parents should be consulted and included too, as well as the surrogate within a custody dispute. A gestational surrogate should also be allowed some acknowledgement, as one of the child's mothers even though she has not 'engendered' the child herself.

2.5 Barbara Katz Rothman

2.5.1 Barbara Katz Rothman's Gestational and Birth Model of Mothering

Radical feminist Barbara Katz Rothman believes that the act of gestation and birth determines the child's mother and not the child's genetic connection. All three secular feminists, Whitbeck, Ruddick and Rothman downplay the genetic dimension of motherhood favouring their own aspects instead of seeing genes as an equally significant part. Whitbeck ignored the importance of genes for motherhood focusing on the mother's biological experiences such as gestation and childbirth. Ruddick in *Maternal Thinking* does not refer to the word 'genes' and only uses the word genetic three times, twice to refer to the connection between a grandmother and their grandchild in context of the 'Abuelas', the grandmothers of the 'disappeared' children of Argentina.³⁹ Instead Ruddick focuses on the social practice of mothering as a nurturing model and not the genetic connection. Rothman also downplays the genetic dimension, possibly

³⁸ Ruddick, 'Preservative Love and Military Destruction', 239.

³⁹ Ruddick, *Maternal Thinking*, 54 and 228. The word 'genetic' is mentioned on p. 154, referring to women's genetic makeup.

because she is aware of adoptive parenting, having adopted children herself (4 and 7).⁴⁰ She values 'nurturance and caring relationships more than genetic ties' (22). It is possible that she wants to prevent motherhood being regarded like fatherhood as just a progenerative procedure (20-3). Rothman is similar to Whitbeck in emphasising the gestational and biological elements of mothering. However, like Ruddick, Rothman tends to focus more on the social aspects of mothering such as nurturing, whereas Whitbeck focused more on female biological features such as lactation, with the social dimensions added later.

Motherhood for Rothman is based upon nurturance, love, care and a social relationship, along with the 'intimate connections' with the baby, its movements during pregnancy and giving birth (20). The child automatically belongs to the birth mother (109), giving all gestational mothers parental custody rights and responsibilities of motherhood, regardless of the foetus's origin. She regards a genetic father who does not nurture as not being a father. However, she admits genes should be recognised and appreciated, though not as 'the determining connection' (22), since she regards parenthood as 'a social relationship, not a genetic connection' (82). She sees motherhood as a chosen activity, which can be shared with others, including men (10); as an experience, set of values, and a discipline; as work, as an activity and project learnt by practice; and as influencing life in the world. She admits children can have both a birth mother and a social mother (83).

Mothering is seen to include intimate care to create competent community members, involving feeding, tending and care as well as other 'social and psychological and physical tasks' (24). Motherhood for Rothman is a feeling of identity, capacity for empathy, as well as an experience of the body and mind. Pregnant women can establish nurturing and caring relationships to the foetus,

⁴⁰ Numbers in brackets refer to Barbara Katz Rothman, *Recreating Motherhood* (New Brunswick, NJ: Rutgers University Press, 2nd ed., 2000).

which can also be demonstrated by men to the foetus. Pregnancy therefore is a social and emotional relationship, not just physical. Mothers are not just the birth mother, since loving men and other women such as adoptive mothers, foster mothers and hired mothers can be engaged in the discipline and activities of motherhood, giving warmth, care, love and nurturance to children (169). She approves of relationships involving joint parenting where mothers without a spouse can act as a legal co-parent without having given birth. Rothman suggests those who have acted as child-care workers should be given visitation rights to the child because they have given 'prolonged personal care' (204). She admits that: '[o]pen adoption and egalitarian relationships in surrogacy face tremendous and very similar obstacles' 'placed by definitions of "family" which permit one and only one mother per child and obstacles of class that make cross-class "egalitarian" relationships profoundly challenging' (166).

In parenting she emphasises the social and interpersonal relations established between parents and children based on love, nurturing and care instead of ownership and the physical biological characteristics of genetic kinship within patriarchal families (169-70). Rothman believes her 'value system' places 'the woman, her experiences and her relationships, at the very heart of my understanding of all pregnancies'⁴¹ and consequently rejects mothering models based on genetic ownership or preconception intentional agreements. Rothman therefore believes, '[t]here is no such thing [as surrogacy] under this system' (202). She believes surrogates are regarded as substitutes, who devalue pregnancy and birth and diminish women (164 and 167).

2.5.2 Critique of Barbara Katz Rothman's Gestational Mothering Model

⁴¹ Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Ontario: Penguin Books Canada, 1st ed., 1989), 243.

Rothman defines motherhood as determined by gestation and birth, but downplays motherhood based on genetic connection. For Rothman biological motherhood is a relationship in which the mother engages in a social interaction with her foetus during the pregnancy. She admits that women can 'create bonds between the foetus' and others who ask to feel the baby's kicks (67).

With surrogacy she believes the surrogate is the 'obvious' mother, due to her biological experiences of pregnancy (167). She states:

[e]very woman bears her *own* baby. I believe that is true regardless of the source of the sperm, and regardless also of the source of the egg (171).

She adds: '[f]urther, *accepting a baby is a gift from its mother, regardless of the source of the egg and the sperm, is a form of adoption*' (168; italics original). The commissioning mother who despite having had a social and nurturing relationship with a developing foetus, all features which Rothman equates with motherhood, and despite being possibly genetically related and intentionally wanting to mother the child, is not considered to be a mother. Therefore, with surrogacy, she regards the commissioning couple as donors, with the surrogate as the mother, expecting her child (162 and 167).

Despite supporting open adoption and joint parenting and despite suggesting the adoption model can be applied to surrogacy, she is extremely reluctant to articulate the possible details; for example, she does not state that the commissioning mother or the surrogate could be regarded as a social mother, within a collaborative co-parenting model. This is despite her belief that in the best circumstances, the significance of the birth mother and the social mother can be acknowledged based on the sharing involved (46). In connection with adoption, she states: '[t]hat someone else is mother to her child does not erase

the birth mother as a mother: the motherhood of one woman does not cancel out the motherhood of the other' (83). Logically, Rothman could allow both the surrogate and the commissioning mother to be acknowledged at the same time, due to their genetic, birthing and nurturing relationships to the child regardless whether the surrogate keeps the child or not. Such an oversight on her part towards surrogacy reflects a failure to be logically consistent, since she is willing and happy to accept a social mother in the case of adoption but hesitant to do so in the case of surrogacy.

An alternative model would allow both mothers to play a role in the child's life, without custody battles and without the commissioning mother's maternal status being dependent upon the surrogate relinquishing the child over to her, especially when she already has a relationship to the child.

Rothman generally supports radical feminist values for society as including, 'a sense of organic wholeness, roundness, interconnectedness'.⁴² These values are echoed by Alison Jaggar, who indicates that radical feminists support values of:

emotional expressiveness, gentleness, sensitivity to the feelings of others, closeness to nature, flexibility rather than rigidity, a distrust of abstract principles, the acceptance of all bodily functions and an acknowledgement of their capacity to bring pleasure.⁴³

Despite the importance of such values in radical feminism, Rothman believes that within pregnancy women have, 'full rights of personal privacy, bodily autonomy, and individualist decision making in pregnancy'.⁴⁴ Such a perspective of Rothman's reflects more individualist liberal views than the interdependency of some radical feminists. Therefore, within Rothman's value

⁴² Rothman, *Recreating Motherhood*, (1989), 253.

⁴³ Alison M. Jaggar, *Feminist Politics and Human Nature* (Brighton, Sussex: The Harvester Press, 1983), 251.

⁴⁴ Rothman, *Recreating Motherhood*, (1989), 258.

system elements of radical feminism's interconnectedness, co-operation, wholeness and sensuality to the feelings of others exist alongside elements of liberal feminism including the full right of personal privacy and bodily autonomy. Usually the two sets of values co-exist, but within surrogacy an overemphasis upon liberal feminist values such as individual privacy could cause problems. A liberal approach to surrogacy could prevent a collaborative approach to surrogacy pregnancy management, embodiment and the bodily integrity of the surrogate, as well as custody solutions involving the surrogate and the commissioning couple instead of just the surrogate. Therefore, by taking the individualist approach that the surrogate is the child's only real mother she is denying the collaborative social approach suggested by her mothering model, which logically should at least acknowledge the commissioning mother as a social mother.

Therefore, despite seeing parenthood as a social relationship, the practical application and implications of her own model of motherhood falsely limits and oversimplifies the complexity of motherhood, by denying various aspects involved: for example, intention, genes and social care. By focusing upon gestation as her prime criterion of motherhood, she fails to consider that the qualities of nurturance and care within her value system can be demonstrated by surrogates towards their pregnancies, but on behalf of another. Also the commissioning mothers could demonstrate and continue the nurturance and care of the foetus/child during and after the birth. By regarding the surrogate as the child's only mother and by ignoring the importance of a genetic connection to those involved in the surrogacy arrangement, it denies the commissioning mother the opportunity to claim motherhood. She is critical of men who claim fatherhood by genetic connection alone, but she adopts another exclusive position for motherhood, but based on gestation. The conclusions she draws regarding surrogacy fail to allow for her social values of nurturance, love and

care to exist between the commissioning mother and the child and between the commissioning couple and the surrogate. Instead, according to negotiations, both the surrogate and the commissioning mother should be acknowledged as different types of mothers. The women can be acknowledged for their different gestational, genetic, and social mothering roles in the child's life, regardless of whether the surrogate keeps the child or not.

2.6 Evaluation of the Secular Feminists

2.6.1 Positive Points of the Secular Feminists

Despite criticisms of these secular feminists, some positive aspects of their views on mothering can be made. Whitbeck is right to bring out the unique experiences of mothering that women are able to offer. She focuses upon the biological experiences of mothering such as pregnancy, childbirth and lactation (266). The physical aspects of pregnancy are highlighted, which she believes are able to increase the feelings of care from a woman towards the child (266, 269 and 272).

Ruddick does well to bring in aspects of social care for a child into her mothering. She highlights the virtues and philosophy of mothering which from the practice of nurturing a child including preservative love and training (17). Such an attitude is able to focus upon the needs of the child to ensure that they flourish in their well-being.

Rothman is right to focus upon the importance of gestation and birth for women as mothers, and for their relationship to the child, which of course are important features of mothering (20). She is also right to focus upon aspects of love and care involved in nurturing a child. Love and care are important for

the child's well-being, which can be performed by others too (169). Unlike Ruddick, she acknowledges that women are able to be mothers while pregnant (155).

2.6.2 Where the Secular Feminists Agree with Each Other

Whitbeck and Ruddick admit that both men and women can mother. All three feminists agree on the importance of biology for motherhood, without emphasising the use of hormones by concentrating on gestation and the act of birth. They also highlight the importance of the social aspects of mothering, albeit usually after the birth. All of the feminists want to highlight women's unique experiences of mothering and acknowledge that the biological experiences of pregnancy for women can contribute to their mothering either during the pregnancy or later. They tend not to concentrate upon the importance of genes for mothering, possibly wanting to move away from the patriarchal connotations of owning a child due to genetic connection only. Unfortunately, they also agree on failing to allow motherhood to operate in a flexible, pluralistic and diverse system where different aspects of mothering can be acknowledged and work together with varying emphasis upon the diverse types such as a gestational mother, a genetic mother or a social mother such as in surrogacy.

2.6.3 Where the Secular Feminists Disagree with Each Other

There are also differences within these writings towards motherhood. Whitbeck focuses upon the biological experience of pregnant women for mothering, but tends to downplay the genetic aspects. In contrast, Ruddick focuses more upon the social aspects of mothering after birth and turns mothering into a pragmatic philosophy resulting from the practical nurturing

of a child. One of Ruddick's weaknesses is that she does not include the possibility of a pregnant woman being able to mother her own child, since she focuses upon mothering as the nurturance of a child once it is born. Her mothering view is also very child-centric, as mothers are expected to meet the needs of the child, however, the mother's needs matter too. She also focuses upon an idealisation of motherhood and tends to regard mothering as natural. The feminists unfortunately tend not to give a comprehensive view of surrogacy, and fail to take different cultural forms of motherhood into account. Rothman seems to contradict her logic regarding her acceptance of birth mothers and other mothers in adoption but not allowing the same for surrogacy (46).

2.6.4 Critique of the Secular Feminists

The concepts of motherhood in Whitbeck, Ruddick and Rothman lack a comprehensive and nuanced view of mothering. They fail to realise that mothering is a complex, pluralistic concept, made up of differing components including genetic contribution, gestation, social care while pregnant, and lactation and nurturance after birth. Often they ignore different aspects and experiences of mothering by focusing upon one aspect of mothering at the expense of another. Whitbeck focuses too much upon the gestational aspects of mothering and ignores the genes. Ruddick concentrates on the nurturing parts of mothering after birth and ignores the mothering done during pregnancy. Rothman highlights gestation and nurturance but again downplays a genetic connection.

Their understanding of motherhood lacks a dynamic interaction between the differing components of mothering, failing to see an equal worth between different types of mothering. They ignore the possibility of an interaction or

relational spectrum between mothers in order to give a wide pluralistic understanding of mothering. At times, their views of motherhood are romanticised and idealistic. The practical implications of their mothering models lack the complexity to accommodate surrogacy, and the models are therefore inadequate and oversimplified. Since they restrict their understanding of motherhood, it is not open to different types of motherhood working together within a relational framework. Therefore, they are unable to accommodate surrogacy as part of their understanding of mothering.

One of the problems of the secular feminists is that none of them takes a holistic approach towards mothering and each of them tends to be one sided. It could be an accident of the secular feminist scholars I happen to have chosen. However, it could be due to the way secular philosophy is based around winning arguments by making clear and direct points with one particular view, thus leading to a one-sided emphasis. Such an approach could be the reason why the secular feminists tend to be less rounded in their view on mothering, because they want to make an original point and belong to one school of thought, without being influenced by others in order to make their point stronger. Such a methodology could be due to modern philosophy's tendency to engage in dualistic rhetorical discussions where one side is expected to defeat the other to claim a victory.

Therefore for a practice such as surrogacy to work, an alternative framework is required which allows for the working together of a gestational, a genetic and a social mother with interdependence, mutuality and individualism. We need to ensure that a multidimensional view of motherhood is possible with various emphases upon the different aspects of mothering, which can on some occasions come together in one person and can, on others, be performed by different people in an interdependent framework.

2.7 Christian Feminists

2.7.1 How the Christian Feminists Differ from the Secular Feminists

Having explored three major secular feminists on motherhood and demonstrated the lack of a comprehensive view of mothering, our attention now turns to the work of two Christian feminists who have written on motherhood and the family. Unlike the secular feminists, the Christian feminists of Protestant Bonnie Miller-McLemore and Roman Catholic Rosemary Radford Ruether regard mothering as a complex and comprehensive concept, allowing for both a biological (gestation and genes) and social input. Their understanding of mothering is not limited to just one aspect of mothering such as gestation or social mothering after the birth. They recognise the roles both men and women can take in creating and nurturing a child. Both are keen to relate to women's mothering experiences and to ensure their well-being is respected as well as the child's, without insisting on compulsory self-sacrifice. They realise that mothering can occur in diverse and different ways in different women, without taking a universal model of the mothering role. They take a more realist view, instead of an idealised and romantic view. Motherhood for the Christian feminists is practiced in a framework involving mutuality, interdependence and justice within diverse and pluralistic relationships. They are more open to negotiation and dialogue towards a better understanding of motherhood. The varying roles of mothering are more likely to be acknowledged and treated equally, due to their egalitarian emphasis, instead of one aspect of mothering being seen as superior to another. The motherhood of both Miller-McLemore and Ruether will now be discussed along with their theological influences.

2.7.2 Theology and Mothering in Bonnie Miller-McLemore

Protestant theologian Bonnie Miller-McLemore criticises theology for ignoring mothers and their experiences. She considers the Christian ideal of mothers as self-sacrificing, which has been promoted by Church tradition and society, to be destructive for women and to misinterpret God's intention in creation and the promises of the gospel (20-3).⁴⁵ Likewise, she believes that mothers who engage in self-sacrifice for their children can endanger mothering since children do not benefit from it (162). She believes religion has told 'old lies about motherhood'⁴⁶ and even though feminist theologians use maternal imagery and language for God, she criticises them for neglecting families and motherhood, as they have not learnt about theology from this view.⁴⁷ She acknowledges that feminist theologians reject patriarchal families for the 'oppressive, unjust relations' and 'stereotypical gender roles', but admits that alternative family models or motherhood roles have tended to be ignored (85). Miller-McLemore believes that few theologians have considered the effects of mothering upon theology and calls for feminist theology to include mothers' discourse as part of its social context, method and content (94). She wants feminist theologians to define the 'ambiguities of good mothering' and to elaborate 'new constructive ideals and future possibilities'.⁴⁸

In order to ensure that the family and work are not divided by gender, Miller-McLemore develops a feminist maternal theology, which is based on maternal experience, knowledge and embodiment such as the pregnant body (20, 104 and 147). Her Protestant theological background leads her to seeing

⁴⁵ Numbers in brackets refer to Bonnie J. Miller-McLemore, *Also a Mother: Work and Family as Theological Dilemma* (Nashville, TN: Abingdon Press, 1994).

⁴⁶ Bonnie J. Miller-McLemore, 'Ideals and Realities of Motherhood: A Theological Perspective', in Julia E. Hanigsberg, and Sara Ruddick (eds.), *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Boston, MA: Beacon Press, 1999), 281-303, at 282.

⁴⁷ *Ibid.*, 287.

⁴⁸ *Ibid.*, 288.

motherhood as a vocation, with children as a gift and blessing of God (37). Miller-McLemore wants to reconnect mothering and the family. Philosophically, she sees the self and reality as connected instead of separate, while theologically she regards motherhood as 'social and relational' in a social context of supportive relationships.⁴⁹ Miller-McLemore acknowledges differences between idealism and realism in Christianity regarding the family.⁵⁰ She acknowledges that religious ideals can shape mothering, and believes alternative ideals in Christianity can shape culture and families into new directions. She wants to remove patriarchy from motherhood and create good institutions of 'family, marriage, partnership and motherhood' so that 'the good of mothers' and others are secured.⁵¹ Women's salvation is not regarded as dependent on motherhood (*cf.* 1 Timothy) but on divine grace (151). Churches are to reinterpret biblical passages and Church practice to prevent oppressive gender relationships or family relations, with more attention to justice and care (191). She calls for the values of caring labour to be for men and women (20).

Mutuality is a key concept for Miller-McLemore for her understanding of the family in Christianity. She uses the creation stories of Genesis 1-3 to show equality between men and women because women are created in God's image (139-41), which she uses to support her mutual and relational understanding of the family (141 and 186). Sexual difference is not to reflect inequality and subordination, but is part of the goodness of creation in Genesis 1:31 and is part of human beings' relationality (140). Women are regarded as equal to men, but different too (82). She is pleased that feminist theology highlights the self-worth of women created in God's image (104). Miller-McLemore also considers that mutuality is found in the Trinity with a 'relational godhead',

⁴⁹ *Ibid.*, 283.

⁵⁰ *Ibid.*, 295.

⁵¹ *Ibid.*, 299.

since God is three-in-one in wanting relationships with human beings.⁵² She believes that early Christian families supported mutuality. She considers that the household codes in the New Testament, which set out the rules of family relationships, should be reinterpreted in order to have mutuality in marriage. Mutuality is regarded as 'a transformative Christian ideal with potentially more dramatic consequences for families than sacrificial love'.⁵³

She sees church congregations today as helping to develop parental inclinations in broad circles of caring labour, alongside mutuality (189). Therefore, she wants to ensure that the Church is able to affirm parenting as 'an act of faith' and as a type of 'ministry of service' (189). She regards mutuality as an emotional, ethical and religious idea dealing with 'self-giving love and social justice'.⁵⁴ She realises that mutuality in parenting can be difficult. Miller-McLemore uses the concept of 'generativity' proposed by psychologist Erik Erikson, which is influenced by the Golden Rule and is seen as enhancing the mutuality of the self and the other (21 and 50). Generativity focuses upon a life cycle of interaction with others, where mutual acts between the self and the other enhance each other (50). She sees the theological concepts of grace, justice and love as part of human generativity (151) and sees generativity as involving all adults caring for children, which have been generated (49). Miller-McLemore links generativity theologically to 'creation, procreation, vocation, and redemption' (22).

Miller-McLemore wants to ensure that theology listens to a mother's thoughts, feelings and desires. She wants theology to understand nurturing, mutuality, the gift of life and the creation of personhood (40). Theology is to include

⁵² *Ibid.*, 297.

⁵³ *Ibid.*, 296.

⁵⁴ Bonnie J. Miller-McLemore, 'Family and Work: Can Anyone "Have it All"?', in Anne Carr, and Mary Stewart Van Leeuwen, (eds.), *Religion, Feminism, and the Family* (Louisville, KY: Westminster John Knox Press, 1996), 275-93, at 287.

mothers' experiences in relation to creation, procreation, vocation, salvation and redemption (22-3), in order to give theological reflection on human fulfilment (91-2). Therefore theology needs to speak with women's maternal experiences so women can evaluate birth, caring labour and childcare (105).

Miller-McLemore draws upon the maternal work of Ruddick and relates it to a theological understanding. Ruddick believes that by maternal practice, mothers gain 'a discipline of maternal thought' involving preservation, growth, and acceptability of their children (157). These help the mother to ensure that the mother actively caters for the child's physical and psychological needs,⁵⁵ therefore the child can grow physically, emotionally and intellectually so that the child is accepted by others and becomes an adult 'she can appreciate'.⁵⁶ Ruddick's maternal thought is considered to be similar to the theological concepts of creation and care, found in the Bible and tradition, which Ruddick does not suggest. Such religious virtues for Miller-McLemore include:

the priority of holding over acquiring; humility and a profound sense of one's limits; humor and resilient cheerfulness amid the realities of life; respect for persons; responsiveness to growth; and ultimately, the capacity for what Ruddick calls "attentive love" (157).

Ruddick calls this an exercise in 'keeping over acquiring, of conserving the fragile, of maintaining whatever is at hand and necessary to the child's life' (157-8), which Miller-McLemore sees as a divine love for creation, especially for the child (157-8).

Miller-McLemore regards the term 'mother' as referring to the 'physiological processes of conception and birth' (172) and regards pregnancy as a 'bio-

⁵⁵ Ruddick, 'Preservative Love and Military Destruction', 240.

⁵⁶ Ruddick, 'Maternal Thinking', 215.

cultural matrix' (132). She acknowledges that mothering includes women's biological processes of conception, gestation, birth and lactation, and realises that these unique female embodied experiences can reflect a particular perspective and lead to ways of knowing and thinking, (but without universalism) (135) since they can give women a 'heightened maternal investment' (143). However, she does not regard mothering as just biological destiny (48), since freedom plays a part (135). She regards biology as secondary (151): the mother's biological investment with the child should not prevent both men and women being involved in nurturing and caring childcare (144). Female biology is not seen as automatically leading to an effective nurturing mother (150).

Mothering is seen as complex and not as one universal essentialist form for all women (135-6). She also acknowledges caring labour as part of motherhood and believes that the values of caring labour are for men and women, which can include:

dressing, nursing, feeding, cleaning, wiping, brushing, guarding, protecting, reprimanding, teaching, watching, following, listening, mediating, responding, and anointing the head of a child (158).

She calls for mothers to support each other (20). Community responsibility from other relatives, neighbours, parents, friends and other adults is advocated to help women in their obligations to raise children (170). She regards the actions and thoughts of mothering as unique and suggests mothering can lead to ethical reasoning, including an awareness of self and other (158).

Miller-McLemore focuses on mutuality, self-respect, interdependence, shared responsibility and social justice (14) instead of destructive self-sacrifice for mothers and a romanticised portrayal of mothers (137). She favours the

experience of mothers over the demands of *agape* as self-sacrifice (104-5). She wants to ensure the well-being of all women and children. Therefore, she advocates a realist view of 'good enough' mothering (190). She favours 'egalitarian parenting' in diverse family forms.⁵⁷ Miller-McLemore wants a new motherhood, new fatherhood and new families. Men are encouraged to share parenting too with 'mutuality and partnership'⁵⁸ and to attain an attachment to their child (144). She wants to see liberation, justice and equality in the family with generativity, fulfilment and flourishing (105). Institutions are called to acknowledge the experience of complex motherhood and of diverse families to enhance the common good.⁵⁹ Miller-McLemore believes that surrogacy 'involves heavy burdens upon the woman and is less a substitution than a shared labor' (54). However, she does not discuss what those heavy burdens might be, how surrogacy can be a shared labour between two mothers - the surrogate and the commissioning mother - or how surrogacy could be performed relationally.

2.7.3 Mothering and Theology in Rosemary Radford Ruether

Roman Catholic theologian Rosemary Radford Ruether uses a modern Christian egalitarian theology, similar to Luther, which acknowledges women as originally created equally in God's image.⁶⁰ Woman's subjection is seen as God's punishment for her sin in the Fall, but has since been removed by Christ's redemption, giving women equality with men. Ruether supports a feminist anthropology by citing Galatians 3:28 ('in Christ there is neither male

⁵⁷ Miller-McLemore, 'Ideals and Realities of Motherhood', 288.

⁵⁸ Don S. Browning *et al.*, *From Culture Wars to Common Ground: Religion and the American Family Debate* (Louisville, KY: Westminster John Knox Press, 2000), 294.

⁵⁹ Miller-McLemore, 'Ideals and Realities of Motherhood', 293-4.

⁶⁰ Rosemary Radford Ruether, 'Christian Understandings of Human Nature and Gender', in Anne Carr and Mary Stewart Van Leeuwen (eds.), *Religion, Feminism, and the Family* (Louisville, KY: Westminster John Knox Press, 1996), 95-110, at 96, 99 and 103.

nor female') to show that women are equal with men in Christianity,⁶¹ but are different too.⁶²

In light of her theology, Ruether re-evaluates the Christian historical tradition on the family (225).⁶³ She challenges the oppressive cultural patriarchalism of early Christian families.⁶⁴ She acknowledges that early Christianity supports both singleness and marriage, and that the Bible contains various family forms (4). The natural family is subordinated to a 'new eschatological family', (25) reflecting Christ's words that '[w]hoever does the will of God is my brother and sister and mother' (Mark 3:35). She describes the first Christians 'as a "fictive kin group" awaiting eschatological transformation' (13). It is suggested this is similar to non-blood relatives, such as godparents by baptism, who become part of a 'family-like' caring community with a network of mutual support (13 and 231 n. 3). The new family in Christ caused divisions between parents and children and between other natural kin, who were to take a lesser role within a redeemed eschatological and spiritual community. After all, as she points out, Paul indicates that we are adopted by God (28-30).

Ruether proposes an alternative 'ecofeminist' ethic, with eco-justice, which allows equality and fairness between men and women at work and in the home. She considers her ecofeminist ethic to have theological and biblical roots and to articulate 'the full and equivalent humanity of women in partnership with men' (207-8). Her ecofeminist ethic therefore discards gender hierarchy along with gender differences of male rationality or autonomy and female intuitions and altruism, as distorting 'the full humanness' of both male and

⁶¹ *Ibid.*, 95.

⁶² *Ibid.*, 106.

⁶³ Numbers in brackets refer to Rosemary Radford Ruether, *Christianity and the Making of the Modern Family* (London: SCM Press, 2001).

⁶⁴ Rosemary Radford Ruether, 'Church and Family 1: Church and Family in the Scriptures and Early Christianity', *New Blackfriars* 65 (1984), 4-14, at 13.

female (208), and therefore calls for 'rationality and intuition, autonomy, and relationality' to transform each other and for male egoism to be influenced by altruism.⁶⁵ She calls for men and women as human beings to equally engage in family nurturing and work with 'harmony and balance' (229). She wants to ensure that both men and women, as legal and biological parents, along with the whole community are responsible for childcare, and not just women, unless it is their choice.⁶⁶ Men are to collaborate with women over parenting decisions (221). Ruether believes that male and female cultural roles are 'rooted in culture and history rather than in a relatively fixed "nature"'.⁶⁷ Ruether says that due to the time involved in female gestation and nursing, biological fathers have to put more effort into providing physical care for their children.⁶⁸ Families through the life cycle are to have 'mutuality in self-giving and receiving' (208) between men and women with 'interdependent flourishing' between each other and not at each other's expense (208). She advocates a mutuality that allows declaration of 'different ways of being' and allows for 'variety and particularity'.⁶⁹ Therefore, she rejects liberal individualism with autonomous isolated selves, outside of relationships. Men and women are encouraged to be relational and individuals within 'an interactive process'.⁷⁰ Ruether allows a limited use of self-sacrifice, for men and women, believing each partner will equally give up something or limit the self for the well-being of the other without women sacrificing the most. She does not consider such an arrangement to be 'fixed and finalized' (208) but to be constantly reformed within processes of 'growth and change' (208).

⁶⁵ Ruether, 'Christian Understandings of Human Nature and Gender', 106.

⁶⁶ Rosemary Radford Ruether, *New Woman/New Earth: Sexist Ideologies and Human Liberation* (New York: Seabury Press, 1975), 207-11.

⁶⁷ Browning *et al.*, *From Culture Wars to Common Ground*, 175.

⁶⁸ Rosemary Radford Ruether, *Sexism and God-Talk: Towards a Feminist Theology* (London: SCM Press, 1983), 177.

⁶⁹ *Ibid.*, 20.

⁷⁰ Ruether, 'Christian Understandings of Human Nature and Gender', 108.

Consequently, she considers family structures to be diverse, complex and different, believing there is no 'one' normative family form (181), but that families can be made up of both kin and non-kin, i.e. both biological and social parents (4 and 181). Often families are not just households but kin networks with a 'web of relationships' (183). Under Ruether, the 'monolithic' nuclear family is replaced by a postmodern family view with a diverse variety of partnerships (210-11) and pluralist family formations (12). Ruether says: 'we need to reimagine a dynamic interrelation of creation and new creation, of the reproducing and renewing of life' (229). She supports diverse family forms, such as single households, gay couples, adopting families by former marriage or artificial insemination, single parents, nuclear families, extended families, step-families, cohabiting partnerships of two, and flatmates. Women for Ruether can be full time housewives with breadwinning husbands if this has been chosen and enhances both of their talents, as well as allowing for full-time househusbands (212).

Ruether uses her theology to 'reimagine' the family as sacramental, and 'as a redemptive form of covenanted community, engaged in processes of mutual love and service' (12). She supports the church being able to use covenants and covenant ceremonies to bless holy unions, to support diverse family forms at different stages in life (11-12). One such covenant ceremony she advocates is a child's baptism or naming ceremony where couples and godparents would pledge their faithfulness to parenting the child, whether the relationship stays together or not (215-16). She wants those who intend to create and raise children to be committed to giving them 'a permanent, life-long relationship' to ensure their well-being (220-1). Religion is seen as being able to encourage families to be 'mutual, sustaining, and life-affirming', adding to a flourishing life (212-13). Marriage is regarded as a 'mutual covenant' allowing for interdependence and individualism of spouses, allowing for new families in a

society incorporating interrelation of individualism and community.⁷¹ The church is called to support the spirituality and ethics of relationships as 'sacramental bonding and redemptive promise' (214). Sacraments are seen to reflect 'renewed grace in nature' and creation is regarded as a sacrament (75). In order to clarify theological issues, she wants to separate the state's legal role in family contracts from the church's role of blessing covenants; therefore, churches would not become legally involved in family arrangements. She distinguishes the sacramental from the legal and covenants from contracts, thus allowing for legal homosexual civil partnerships (213-14). The church as a redemptive community is to re-imagine the family as sacramental and as a 'liberated community of chosen kin' (229). She supports the church being able to use covenants to bless holy unions, to support diverse family forms at different stages in life (11-12).

2.7.4 Advantages of the Christian Feminists

Unlike the secular feminists, the Christian feminists allow for an open maternal relationship with diversity for differing maternal roles. Miller-McLemore allows theology to listen to the voices, experiences, feelings of mothers. She encourages the well-being of mothers as a 'theological and creative dilemma' (15) and looks at issues which many others share (24). She does not want to romanticise, idealise or demonise motherhood for women (23 and 137) and takes a realistic view of motherhood, admitting that it can be disordered and messy (136). Miller-McLemore does not over emphasise self-sacrifice, but focuses on justice, self-respect, mutuality and interdependence (14). She argues for justice in egalitarian families. She has a more complex view of mothering as involving conception, pregnancy, birth, lactation and aftercare (132 and 149-50). Women's biological experiences of pregnancy, birth and lactation may

⁷¹ *Ibid.*, 108.

contribute to 'particular ways of perceiving and thinking' (135). However, she does not see biology as destiny (48), but as secondary (151). Men and others can have emotional care for the child too (144 and 174). She does not take universal essentialist view to mothering as being the same for all women (135-6).

Ruether takes a comprehensive view of mothering, seeing it as an activity for women, men and the whole community.⁷² She acknowledges pluralistic, complex and diverse family formations and sees equality, but also difference, between men and women (207 and 212). She wants mutual and interdependent relationships within families so that all parties flourish (208 and 212-3).

In contrast to the secular feminists, the Christian feminists are more rounded and take a holistic view towards what being a mother involves. The Christian feminists are bringing out the relational dimensions of the Christian theology of the trinity. Miller-McLemore takes a 'holistic' and 'antidualistic' view of the

flesh and spirit as inseparable is a particular reading of experience or nature and institution or culture shared by feminist readings of Jewish and Christian traditions.⁷³

Both have a more complex view of mothering, focusing upon mutuality, interdependence and flourishing in egalitarian families. Dialogue and negotiation allow for differing types of mothering relationships. Christianity tends to encourage equality and flourishing within an openness of dialogue with an emphasis upon communication by prayer and acknowledgement of being created in God's image with an emphasis on all being the same within Christ.

⁷² Ruether, *New Woman/New Earth*, 207-11.

⁷³ Miller-McLemore, 'Ideals and Realities of Motherhood', 300.

2.7.5 Critique of Bonnie Miller-McLemore and Rosemary Radford Ruether

However, the Christian feminists are not without their difficulties. McLemore admits to three problems herself. Firstly, even though she has used recent research, she regrets not talking to enough 'poor women, racial-minority mothers, single mothers, or to mothers of older children' (24). She believes white middle-class women like herself can learn from other women in different 'racial and economic groups', especially from their difficulties (32). Since she stresses mutuality, more could have been made of learning from all mothers, including fathers as well as white women, the poor or the middle-classes. Secondly, she admits to clashes between the private vocation of maternal desires of 'creation, nurturing and sustenance' (31) with childcare and domestic life alongside her public vocation as a professor and her hopes for justice and equality in a world hostile to children (30-1). Finally, she admits that discussion of mutuality by feminist theologians 'has sometimes been sloppy',⁷⁴ due to mutuality assuming a relationship between equal adults. Acknowledgement is made that within practices like parenting, teaching and counselling, 'equal relationships are rare' and mutuality can be difficult in unequal relationships.⁷⁵ However, Miller-McLemore could have spoken more about a solution to this problem.

At least six other issues can be raised regarding Miller-McLemore's views towards mothering. Firstly, she admits self-sacrifice can be a part of a relationship between a parent and child, and self-sacrifice should aim at mutuality, without being an ideal. She believes self-sacrifice comes with the promise of a heavenly reward or a return (164). However, not all self-sacrifice is ideal and self-sacrifice should not be conducted with the hope of self-gain.

⁷⁴ *Ibid.*, 296.

⁷⁵ *Ibid.*, 296.

Miller-McLemore believes that '[m]ost children do not need or benefit from the kind of unconditional self-sacrificial love that Christianity often esteems as the ideal'.⁷⁶ However, some self-sacrifice might be done as a purely altruistic or supererogatory act to benefit the other only and not the self. Not all self-sacrifice will result in mutuality, as the person receiving the self-sacrifice may be unable to reciprocate or engage in symmetrical equal relations. A concept of relationality instead of mutuality might be more accurate to describe the ontology between self and other and will be explored in chapter five in the context of dealing with clashes in surrogacy custody cases.

Secondly, at times, Miller-McLemore fails to expand her ideas with enough detail and dismisses further discussion. She states: 'a reconstructed religion alone and Christianity in particular will not give answers to the complex contemporary quandaries about mothering'.⁷⁷ More thought could have been given to this issue, to deal with problems such as custody clashes between mothers and fathers, the legal standing of lesbian social mothers, or possible difficulties between a surrogate mother and a commissioning mother if the surrogate wants to keep the child. Part of her problem could be that she focuses upon mutuality and may have realised that mutuality as a concept is unable to deal with the complexity of mothering. Instead, a concept such as relationality with a wider ontology between self and other could have been more useful. Relationalism and the contrast with mutuality will be discussed in chapter five.

Thirdly, Miller-McLemore gives contrasting views on the significance of biology and gestation for generative activities such as parenthood (48), without considering the ethical implications and significance of her views. She admits that neither anatomy (48) nor biology is destiny and that biology plays a

⁷⁶ Miller-McLemore, *Also a Mother*, 162.

⁷⁷ *Ibid.*, 301.

secondary and relative role (151). Even so, she suggests that anatomy cannot be ignored since it enriches human horizons; likewise, biology is seen as shaping the meaning of generativity. However, she believes we cannot own children and does not want biology to determine the ownership of children⁷⁸ or to determine modes of generativity. After all, a biological connection to a child can play a major role in deciding custody in disputes.

Fourthly, instead of using gender to create division in families, Miller-McLemore develops a Christian maternal feminist theology based on maternal experience and knowledge (20) as 'body-mediated' (147). She believes that gestation as a 'biological inclination' gives women a 'heightened maternal investment', meaning an emotional equity between mother and fathers is only cautiously attainable (143). Attachment for women is seen as given, but attained by men who have to make more efforts to care for others. Even though she wants to support mothers and prevent essentialism, she is in danger of possibly excluding men and non-gestational mothers. She ignores the evidence that not all women automatically bond to their children and the research which indicates that bonding is emotional and not biological. Women differ greatly regarding how they bond to their children in pregnancy and even in different pregnancies. Some men may find her comments patronising, since they will have a deep emotional attachment to a child who is genetically biologically related to them while the child is being gestated. Non-genetically related social parents can have deep emotional attachment too, meaning they will not have to work at such an attachment as she suggests. Men have a different type of biological attachment, similar to arguments for kin altruism with their parental investment based upon their genes. However, she admits,

⁷⁸ Bonnie J. Miller-McLemore, 'Produce or Perish: Generativity and New Reproductive Technologies', *Journal of the American Academy of Religion* 59 (1991), 39-69, at 56.

a mother's physiological investments in her offspring should never be used to deny the attainability of an emotional and cognitive equity between women and men in the care of offspring (144).

Fifthly, Miller-McLemore possibly overlooks the importance of fathers and male ways of fathering, in favour of egalitarian parenting. She believes caring for a child involves 'egalitarian parenting'⁷⁹ in order not to stereotype men or women. However, both particular mothering skills and fathering skills can be acknowledged without essentialism or an amalgamation into an androgynous parenting role. Male experience is important as fathers and should not be dismissed as part of patriarchy. Miller-McLemore calls for theology to listen to mothers to understand nurture and mutuality, in order to speak with a mother's voice. However, for a mutual relationship theology needs to speak and listen to the voices of mothers, fathers and children too.

Finally, even though Miller-McLemore supports mothers and encourages men to care for children, a couple of her remarks could offend some mothers for indicating that mothering is an inferior practice and role. Calls are made for men to take part in day-care centres so that 'children do not grow up thinking that only women are demoted to these apparently less valued, less profitable tasks'.⁸⁰ She also wants others to learn to care for children because she regards this as 'far too important to be left to mothers alone'.⁸¹

One of the areas Ruether could have spent more time discussing in her 2001 book *Christianity and the Making of the Modern Family* is that of the new reproductive technologies and how the relationships involved between donors and recipients may be organised. She calls for a 'permanent, lifelong

⁷⁹ Miller-McLemore, 'Ideals and Realities of Motherhood', 288.

⁸⁰ Miller-McLemore, *Also a Mother*, 193.

⁸¹ *Ibid.*, 172.

relationship' between those who intend to create and those who raise the child (220-1). However, she does not take into consideration infertile couples using anonymous gamete donation. In such cases a relationship between the donors and their recipients may be impossible. Even if the donors are known, a life-long relationship may not be desired. Some Christians like Scott Rae reject her acknowledgment of lesbian couples using sperm donation as a third party to create a family, whereas others may criticise her for not going far enough to support changes in the law to protect legally the non-biologically related lesbian mother.

Even though Ruether mentions the need for pluralistic families, she could have explored surrogacy in greater depth. She briefly mentions that surrogacy 'shifts the relationships between the social and the biological parent' (220). However, she does not explore how surrogacy could work or the possibility of a relationship between the surrogate and the commissioning couple, or between the surrogate and the child. Nor does she suggest how the Church could be involved with a special baptism for the child with the surrogate and the commissioning mother making vows for the child. She does not explicitly explore the possibility of the social and the biological relationship working together, instead of being 'shifted'. After all, the possibility is there with her mutual and pluralistic eco-feminism. Needless to say, no author can write on every issue.

As part of her support for postmodern pluralistic families, she seems to allow for various family formations, including co-habiting couples and homosexual relationships (210-11 and 213). Some Christians may find such arrangements too 'liberal' for not reflecting Christian tradition or for being against some biblical passages.

As a Roman Catholic, she re-imagines the family as a redemptive sacramental covenanted community (12). Some Protestants may have problems accepting her creative covenantal relationships as sacramental, especially for non-Christians or mixed marriages, due to not wanting them to be automatic vehicles of grace or redemption, because of our fallen natures. However, she uses the term 'sacramental' to mean a channel of grace, and not 'sacrament', making it seem less controversial. Other Christians may find problems with her emphasis upon covenant and its tendency to insist on permanent obligation and duty. She suggests that couples pledge to parent a child for life even if their relationship disintegrates (220-1). However, such a relationship may not be in the child's interests if the parent is or becomes a violent alcoholic. Some Christians may oppose her temporary covenantal-vows for young people in non-permanent relationships (219) as not reflecting God's steadfast love. Some Christians could have concerns about fornication and the watering down of commitment by agreeing to temporary covenants for young people before marriage.

2.8 Theologian Don Browning

2.8.1 Don Browning

A third theologian is the Protestant, Don Browning, who was a prominent writer on theology and the family. In two of his major works *From Culture Wars to Common Ground*⁸² and *Equality and the Family*,⁸³ he restructures the Christian family using 'critical familism'. Critical familism is a new flexible family ideal, with three key points referred to as the 'committed, intact, equal-regard, public-private family' (406). However, it is not to be considered as 'the'

⁸² Browning *et al.*, *From Culture Wars to Common Ground*.

⁸³ Numbers in brackets refer to Don S. Browning, *Equality and the Family: A Fundamental, Practical Theology of Children, Mothers, and Fathers in Modern Society* (Grand Rapids, MI: Eerdmans, 2007).

Christian family.⁸⁴ Firstly 'committed intact' relates to married parents raising their own children from nature, adoption or the new reproductive technologies.⁸⁵ Secondly, 'equal-regard' refers to marriage with 'mutual respect, affection, practical assistance, and justice', which 'values and aids the self and other with equal seriousness'.⁸⁶ Thirdly, 'public-private' means that both husband and wife participate equally and have responsibilities in the public world of work and the private world of childcare.⁸⁷ Presumably, the spouses therefore must have such responsibilities to their children which can involve a free choice to enter the public world of work. Browning sees the family as postmodern, meaning that divisions between work and home, and working husband and domestic mother are not idealised (58-9). Critical familism and their supporting theological themes will now be discussed.

The theological basis of his critical familism is a hermeneutical practical theology, which includes descriptive theology (describing the present situation), historical theology (looking at past traditions),⁸⁸ systematic theology (the ideals of faith), moral theology (critical reflection) and strategic-practical theology (seeing what can be done to the problem) (35-6). He reconstructs Catholic natural law family theory (120), by revising a natural law model with a flexible Catholic natural law (used in a Protestant way) (103), which does not tie natural law to a final end (330). As part of his pragmatic theology of the family, Browning uses kin altruism and social science evidence to support the 'committed, intact' families of his critical familism (344 and 406).

The first point of critical familism refers to 'committed, intact' families (406). He cites social science evidence suggesting that children raised by their

⁸⁴ Browning *et al.*, *From Culture Wars to Common Ground*, 7.

⁸⁵ *Ibid.*, 2.

⁸⁶ *Ibid.*, 2.

⁸⁷ *Ibid.*, 1-2 and 170.

⁸⁸ *Ibid.*, 337-8.

married natural parents do better at school, have more stable jobs, stable marriages and engage in less criminal activity than children in families with a single parent or step-parents (344). He wants these more effective family forms to be encouraged in law and politics, supported by Christian covenant and sacrament (262). He urges churches to put the good of children first, by realising that not all pluralistic family formations raise children equally (57). Therefore, churches are to promote egalitarian intact families with a married mother-father and their children. Browning supports Emil Brunner who regards parents as responsible for the child's existence and as bound together in a 'trinity of being' of human existence in a one-flesh union of mother, father and child (341).

His ideas of a committed intact family of a married couple raising their natural children are supported by kin altruism. Kin altruism allows 'preferential treatment' to genetic natural children because the children have 50% of each parent's genes.⁸⁹ Kin altruism is seen as part of God's intended natural creation and is considered natural for parents to care for their children. Browning acknowledges that biology can influence, but not 'completely determine, the form and dynamics of families', since biology is directed by 'imagination and practical reason'.⁹⁰ Thomas Aquinas believed in 'special obligations' to our own kin and that parental obligations are for men and women (89). He regarded the natural children of parents as God's gifts; made in God's image, who are loved for reflecting God's goodness (122). Browning suggests parents have natural inclinations towards their children and are deeply attached to them. Biological attachment can make people 'good and nurturing parents' (343).

⁸⁹ *Ibid.*, 35, 71 and 277.

⁹⁰ *Ibid.*, 5.

However, quality parenting is rated higher than biological relatedness.⁹¹ Kin altruism is 'not an ultimate good' to 'trump all other goods', since other types of child-rearing cannot be ignored (354). Indeed, 'intactness' in families is not to 'trump all other values'.⁹² Churches are to acknowledge family plurality and be concerned 'for the welfare and dignity of all families' (406-7). Browning regards the 'postmodern family' as pluralistic but with more 'divorce, non-marital births, and cohabitation' (84). Due to family break-up, he accepts the need for adoption (359). Adults are called to show benevolence to all children because God loves them and his goodness is within them (122). Adoptive children can flourish, due to the screening and motivated parenting of their adoptive parents, despite not knowing their biological parents (355).

The second point of his critical familism is 'equal-regard' marriages, which involve a mutual covenant, ensuring spouses treat each other as ends and not just means (316). It features egalitarian families with gender equality and equal relations between spouses,⁹³ while acknowledging each other's differences (307-8). Browning's love as equal-regard or mutuality, is influenced by Louis Janssens', so the needs of others are taken as seriously as our own, allowing for teleology within a deontological moral logic (280). Therefore premoral goods can be hierarchically ranked while maintaining a wider deontological ethic (280). Human beings are made in God's image (Genesis 1:27) and share God's goodness, thus giving them equality, dignity and respect.⁹⁴ In order to deal with the ideals and the reality of human life, he wants equal-regard to occur within a context of 'sin, grace, forgiveness, and redemption' (98). Love as

⁹¹ *Ibid.*, 56.

⁹² *Ibid.*, 6.

⁹³ *Ibid.*, 37-8.

⁹⁴ *Ibid.*, 281. Elaine Storkey indicates that persons are defined relationally within Christian theology which make us communal and not individualistic as we are created in God's image and are in relationship with him, see Elaine Storkey, and Margaret Hebblethwaite, *Conversations on Christian Feminism: Speaking Heart to Heart* (London: Fount, 1999), 206.

equal-regard is also influenced by Kant's categorical imperative (351-2), which treats human beings as ends and not just means.

Love as equal-regard is regarded as 'an intersubjective and dialogical concept', which takes feelings into consideration.⁹⁵ It is not achieved unilaterally, but together by communication, listening, understanding and empathizing the needs and desires of others, supporting each other and living out the mutual agreements. Marriage is also seen as a '*covenant of intersubjective dialogue*'.⁹⁶ Families are formed by 'biological, psychological, historical, and religiocultural negotiation',⁹⁷ involving spouses, families, community, tradition, children and God.⁹⁸ Self-sacrifice (self-giving) is part of, but 'subordinate to', love as equal-regard,⁹⁹ and occurs in rhythms, so equality and mutuality are later restored over the whole life-cycle (192-3). Browning wants intact families reconstructed, without 'patriarchy, abuse, inequality and exploitation'.¹⁰⁰

The third and final point of his 'critical familism' involves the equal-regard and public-private family, where both parents have responsibilities to raise their children (281). He uses Genesis 1:28 to show that in life men and women have equal authority over reproduction and economics. However, he acknowledges that male-female asymmetries exist regarding parental investments in procreation and child raising (325). He believes:

[t]here is little doubt that pregnancy, lactation, a mother's parental certainty, and other physiological changes give most women a head start over men in parental investment.¹⁰¹

⁹⁵ Browning *et al.*, *From Culture Wars to Common Ground*, 275.

⁹⁶ *Ibid.*, 276.

⁹⁷ *Ibid.*, 288.

⁹⁸ *Ibid.*, 289.

⁹⁹ *Ibid.*, 154.

¹⁰⁰ *Ibid.*, 6.

¹⁰¹ *Ibid.*, 180.

Browning admits that women have often raised children since they can give them nourishment (294-5). He suggests that 'vulnerable' mothers at childbirth and the child's infancy should be given preferential rights and support by culture and law in custody matters, due to such asymmetries, unless the mother is incapable or unfit (325-6). He suggests critical familism differs to gynocentric legal feminism which elevates a mother's status before the law and government (323). However, he admits that after the birth, the mother may have a 'slightly grander role to play' but fathers are also to be involved in this 'mutual recognition' for the child and for himself,¹⁰² as birth signifies parenthood for both mother and father.¹⁰³

Browning wants fathers to care for infants to avoid asymmetrical parenting between spouses.¹⁰⁴ Therefore, the biological investment of a mother to her child is not to prevent an equal emotional and behavioural involvement in childcare for men and women. Browning believes that fathers have less investment than mothers have at the start of reproduction and slowly consider the child as theirs and learn to take responsibility later (294). Browning sees families as subordinated to the common good, be it God's kingdom or 'civil society'.¹⁰⁵ Browning draws on Pope Leo XIII, who believed human beings have rights and responsibilities to the 'fruits of their bodily labor and the issue of their procreative activity', as a law of nature (337). He suggests that equal-regard means that families are to 'respect and support the inclinations of other families'¹⁰⁶ to look after their own children. The welfare of a family is not to negatively affect other families' welfare. All families are to support 'the justice

¹⁰² *Ibid.*, 297.

¹⁰³ *Ibid.*, 292.

¹⁰⁴ *Ibid.*, 307.

¹⁰⁵ *Ibid.*, 271.

¹⁰⁶ *Ibid.*, 303-4.

and welfare of all families *as* families and not just the welfare of individuals in abstraction from family ties'.¹⁰⁷

As seen above, Browning offers a theologically influenced case for effective but flexible and diverse families, within a context of marriage, informed by dialogue and negotiation. He gives equal respect to men and women, for both to be involved in childcare. The biological investment of women towards their children is acknowledged, but without excluding men, who also have a genetic investment in their children based upon the theories of kin altruism. The quality of parenting is seen as more important than parental biological relatedness. He envisions a covenantal aspect to families with justice, well-being, communication, mutuality and duties to children.

The implications of Browning for families could possibly mean that after dialogue and negotiation, a surrogacy could go ahead between a married commissioning couple having fertility difficulties and a surrogate. With the need for communication, well-being and respect for each other, any possible disputes would be solved with consideration for the child as well as those involved, possibly allowing for different types of mothering to be acknowledged. In a private email from Professor Browning regarding surrogacy, he commented that he was 'not very firm' in his opinion. He tends to accept gestational surrogacy 'if used by a married couple who contribute egg and sperm'. He believes this because:

children have the right to be born into a society that *intentionally* maximizes it [*sic*] chances of being raised by it [*sic*] own biological mother and father. Accidents occur and this will not always happen. But to *intentionally plan for it not to happen* probably disrespects children's rights (the international legal question) and the biblical one-flesh union which, in many interpretations, includes the child in the one-flesh union (the

¹⁰⁷ *Ibid.*, 304.

theological view). So, gestational surrogacy, yes, but I am not sure it should go beyond that.¹⁰⁸

2.8.2 Critique of Don Browning

However, Browning's equal-regard family is not without its difficulties and seven problems will now be highlighted.

Firstly, Browning regards his love as equal-regard to be covenantal, but fails to stipulate its use, theological significance, ethical usage or implications. Covenant is a comprehensive term, which can be applied to many relationships and situations with varying degrees of permanency, obligation and responsibility. More attention could have been given to explain the significance and relationship between natural law and covenant for marriage, especially for the infertile and how they may overcome their infertility, since he acknowledges that family formation includes 'natural tendencies' according to 'God's intentions for creation'.¹⁰⁹

Secondly, Browning supports using new reproductive technologies which 'enhance covenanted marriage' (365), but fails to articulate which techniques he supports and why. The issues of infertility and its possible solutions seem to be overlooked. He also assumes that those using the techniques are doing so within 'a new individualistic culture of "procreative liberty"' (359). Browning fails to focus upon differing Christian attitudes to the use of the techniques or how they can be used positively to enhance the family, without acting from purely individualistic motives. He tends to reject genetic surrogacy; however, this could be less invasive and more successful than gestational surrogacy,

¹⁰⁸ Private email received from Don Browning, 6 April 2009.

¹⁰⁹ Browning *et al.*, *From Culture Wars to Common Ground*, 287.

which may not be available for some commissioning mothers if they cannot produce their own ova.

Thirdly, disquiet can be raised over Browning's understanding of mutuality and love as equal-regard concerning the true motives behind the action of self-giving and self-sacrifice. He sees self-sacrifice as a 'transitional ethic' with a non-permanent role (280) existing before relations are restored to mutuality. Self-sacrifice or self-giving is regarded as subordinated to love as equal-regard¹¹⁰ and seems to be needed because of 'broken and unequal relations' (280). He suggests that Christianity regards sacrifice as 'symmetrical' for spouses.¹¹¹ However, Browning does admit that self-giving is part of Christian love and can occur without 'immediate return' (98 and 189).¹¹²

Even so, self-sacrifice should not always be seen as inferior or subordinate to equal-regard. Sometimes the needs of the other may lead to self-sacrifice as a supererogatory act or as an act of pure altruism. Self-sacrifice might be temporary or ongoing and may not result in mutuality. The person engaging in the self-sacrifice may not be aiming at mutuality, but purely the needs and the good of the other. A loving self-sacrifice is done for the other's good, but sometimes mutuality can occur too. Browning needs to take into consideration that not all unequal relations are due to sin and injustice, since unbalanced relationships are not necessarily unethical. A spouse may be disabled and unable to reciprocate or participate in equal and mutual relationships within the marriage.

¹¹⁰ *Ibid.*, 154.

¹¹¹ *Ibid.*, 160.

¹¹² *Ibid.*, 290.

Fourthly, Browning calls for ‘psychological and ethical sophistication’¹¹³ concerning the ‘cooperative interaction of interdependent and individuated’ family members.¹¹⁴ In his ethic of equal-regard he suggests giving ‘equal weight’ to self-regard and to other-regard,¹¹⁵ echoing Janssens and Christine Gudorf who want to *balance* self-fulfilment with self-giving love (127). The individual is not regarded as ‘solely autonomous but a being-in-relation’.¹¹⁶ He wants the other’s selfhood to be regarded as your selfhood.¹¹⁷ He advocates a symmetrical and mutual ontology between self and other.¹¹⁸ However, ethical sophistication could mean that self-fulfilment and self-giving love cannot always be balanced with equal weight. Self-regard and regard for the other may not always be possible at the same time. An alternative relational ontology which allows for various asymmetrical emphases upon the self and the other is required. We cannot always have equality or symmetry, due to the specific needs of a particular person, for example a disabled child. A healthy person will not necessarily regard the selfhood of a sick relative to be the same as their own selfhood. Caring for another’s needs may not always lead to self-fulfilment as sometimes priority may have to be given exclusively to the self or to the other without mutuality or reciprocity according to need.

Fifthly, Browning supports kin altruism, which gives ‘preferential treatment’ to biologically related parents.¹¹⁹ However, Browning needs to take into consideration the role social parents play in a child’s life, for if a clash occurs between a surrogate gestating a donor embryo and a commissioning couple wanting to keep the child, under Browning’s logic the anonymous genetic gamete donors would be the parents and more likely to want the child.

¹¹³ *Ibid.*, 180.

¹¹⁴ *Ibid.*, 180.

¹¹⁵ *Ibid.*, 126.

¹¹⁶ *Ibid.*, 213.

¹¹⁷ *Ibid.*, 282.

¹¹⁸ *Ibid.*, 189.

¹¹⁹ *Ibid.*, 71.

Protestant theologian Ted Peters is critical of Browning's emphasis on kin altruism as he sees it as perpetuating the importance of genes. Peters believes Jesus did not advocate preferential treatment towards your biological kin, but suggests Jesus supported 'social kin'.¹²⁰

Sixthly, another area of concern is Browning's ethic of equal-regard and its practical implementation regarding 'the reordering of gender relations' between mothers and fathers (100). He believes there are asymmetrical investments between mothers and fathers in procreation, with men having less investment so they have to learn to take responsibility for the child. He wants his ethic of equal-regard, culture and the law to give preferential rights, support and extra protection for vulnerable mothers at childbirth and during the child's early years in custody cases (294, 325-6). However, his comments that men have less investment in their children could be seen as patronising to fathers, since their investment is not 'less', just different to that of women. However, Browning could be seen as making a social scientific point, reflecting a general truth that men do not take a strong interest in their children or have such an investment in their children as women do. Both fathers and mothers can have an emotional and genetic involvement in a child, and the gestational involvement of a mother may not increase her bonding to the child.

Finally, Browning's equal-regard and critical familism means all relationships are to aim at mutuality, including parents and infants during feeding and cleaning times (eye-to-eye contact is considered mutual interaction).¹²¹ Children are seen as having a 'significant' reciprocal role in family life and are regarded as peers to their parents, otherwise mutuality is inadequate.¹²² However, it is difficult to see how a child can have a mutual and equal

¹²⁰ Ted Peters, *For the Love of Children: Genetic Technology and the Future of the Family* (Louisville, KY: Westminster John Knox Press, 1996), 21.

¹²¹ Browning *et al.*, *From Culture Wars to Common Ground*, 98 and 295-8.

¹²² *Ibid.*, 178-9.

relationship with its adult parents. Browning admits that mutuality may not be achieved until the child is an adult, but this is still expected as part of an equal-regard family. It is difficult to see how families can maintain a balanced and mutual equal relationship between all members, since the needs of one member may have to come first at whatever stage in a person's life-cycle due to the needs of that person, such as a severely handicapped child. Browning admits that reciprocity when children are young is not perfect¹²³ and will involve 'extreme effort' and brief periods of self-sacrifice.¹²⁴ He admits that parents will not give equal decision-making powers to infants (401).

From Browning we can appreciate that the Christian family is flexible but occurring within a context of a married couple. He has a revisionist approach to natural law, without insisting on a final end. He prioritises the quality of parenting over biological relatedness and regards the postmodern family as pluralistic. Browning was influenced by Janssens' mutuality and the needs of the self and the other with a hierarchical ranking. He highlights human beings made in the image of God which means they are to be treated as ends and not just a means. His methodology is a dialogical which encourages negotiation. However, as seen above there are problems with his approach including an over emphasis upon mutuality.

2.9 Christian Writing On Motherhood

Having looked at three modern-day theologians' views concerning motherhood and the family, attention now focuses upon how mothering has been presented in Christianity as in the Bible, Church History and by other theologians. These sources help to further establish the complexity of motherhood found in Christianity in light of the theologians discussed above.

¹²³ *Ibid.*, 295.

¹²⁴ *Ibid.*, 297.

Attention will focus upon Christian themes of motherhood, namely creation, conception, gestation, birth, lactation and nurturing. This complex view of mothering is found in the Bible, with differing mothering images for God, with various roles for mothers in the Bible. Also the Church, Mary and priests are seen as mothers too. This section will go through such examples of mothering to show its comprehensive and complex depiction in Christianity.

2.9.1 Motherhood in General in Christianity

Christians often regard the Bible as the primary source of Christian authority (*norma normans*) and tradition as secondary (*norma normata*), but they can both be used to show the different types and complexity of motherhood in Christianity. Despite Alan Lewis suggesting that calling God 'mother' would be 'illegitimate and cause hurt',¹²⁵ it is possible to find many examples of God being referred to as a mother. In the Bible, God as a mother tends to focus upon God as a creator, as a birthing mother and as a nurturing mother. These types of motherhood will be explored later. Some of the early Church fathers also regarded God as mother. For example, Clement of Alexandria commented in 215 AD that:

God is love, and for love of us has become woman. The ineffable being of the Father has out of compassion with us become mother.¹²⁶

Julian of Norwich declared of God:

¹²⁵ Alan E. Lewis (ed.), *The Motherhood of God* (Edinburgh: St Andrew Press, 1984), 65-6 cited in Ursula King, 'The Divine as Mother', in Anne Carr and Elisabeth Schüssler Fiorenza (eds.), 'Motherhood: Experience, Institution, Theology', *Concilium* 206 (1989), 128-37, at 128.

¹²⁶ King, 'The Divine as Mother', in Carr and Fiorenza, 'Motherhood', 128.

[t]hat fair lovely word “mother” is so sweet and so kind in itself that it cannot truly be said of anyone or to anyone except of him and to him who is the true Mother of life and of all things.¹²⁷

Robin Jensen indicates that the Church itself is called ‘the Mother of all Christians’ which was later applied to Mary, the mother of Jesus.¹²⁸ Paulinus of Nola (353/4-431) also referred to the ‘Mother Church’.¹²⁹

Modern-day theologians such as Christian feminist Margaret Hebblethwaite have used the simile ‘God as mother’¹³⁰ and called God ‘she’, leading some feminists to think she was stereotyping women as mothers.¹³¹ Hebblethwaite accepts Mary as our mother, but also regards God as ‘the fundamental mother and root of all motherhood’.¹³² She indicates that the Church of Scotland report, *The Motherhood of God*¹³³ accepted the use of God is like a mother as a religious simile, but if the word ‘like’ is not used it becomes a deeper and more profound religious metaphor, which can be done with father but not mother.¹³⁴ She believes the ‘extraordinary quality’ of maternal love comes from God who is a mother.¹³⁵ She points out that at first it was thought that the male sperm created life, with women only nurturing, which meant God as the father was seen as the creator, however she now wants theology to reflect biological changes of the discovery of the female egg.¹³⁶ It is not just feminist theologians who regard God as mother, but Paul Tillich regards the ‘ground of being’ or

¹²⁷ Julian of Norwich, *Showings*, chapter 60, cited in Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 30.

¹²⁸ Robin M. Jensen, ‘*Mater Ecclesia and Fons Aeterna: The Church and Her Womb in Ancient Christian Tradition*’, in Amy-Jill Levine (ed.), *A Feminist Companion to Patristic Literature* (London: T. and T. Clark International, 2008), 137-55, at 138.

¹²⁹ Paulinus of Nola, *Ep.* 32.5 cited in *ibid.*, 148-9.

¹³⁰ Margaret Hebblethwaite, *Motherhood and God* (London: Geoffrey Chapman, 1984).

¹³¹ Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 6 and 27.

¹³² *Ibid.*, 30.

¹³³ Lewis, *The Motherhood of God*.

¹³⁴ Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 30.

¹³⁵ *Ibid.*, 31.

¹³⁶ *Ibid.*, 30-2.

God's divinity as mother-love which gives life. He refers to 'the mother-quality of giving birth, carrying, and embracing'.¹³⁷ Traditionally, God as mother has tended not to be used in Christian discourse, though the use of analogy and also metaphor is popular with some Christian feminists and others.

2.9.2 Motherhood as Creation and Conception

Motherhood in Christianity is linked to creation and conception. In the Bible God is regarded as the creator of life, as seen in Deuteronomy 32:18 ('[y]ou were unmindful of the Rock that begot you; you forgot the God who gave you birth'). God as a creator can be interpreted as the instigator of life (a commissioning mother in surrogacy could be regarded as creatively instigating the surrogacy). Psalm 139:13-16 sees God as involved in creating a human being in the mother's womb, and also in Jeremiah 1:5 ('[b]efore I formed you in the womb I knew you, before you were born I consecrated you; I appointed you a prophet to the nations'). See also Job 10:9-12, 31:15, Psalm 119:73 and Ecclesiastes 11:5. God is seen as being involved in the creation of human beings from conception in the Old Testament, for example, 'births to Sarah (Genesis 17:15-22; 21:1-7), Leah and Rachel (Genesis 30:1-24), Ruth (Ruth 4:13-17), and Hannah (1 Samuel 1:19-20); in the New Testament' with Mary and Elizabeth (Luke 1:24-35, 39-44).¹³⁸ These passages help to show the complexity of motherhood, in this case demonstrating an active creativity.

¹³⁷ Paul Tillich, *Systematic Theology*, vol. III (Chicago, IL: University of Chicago Press, 1963), 293-4.

¹³⁸ Andreas J. Köstenberger, *God, Marriage, and Family: Rebuilding the Biblical Foundations* (Wheaton, IL: Crossway Books, 2004), 130.

The Church is also seen as a conceiving mother since in the fourth century, Ambrose of Milan, saw the Church as a mother who conceives by the Holy Spirit.¹³⁹

2.9.3 Motherhood as Gestational

Gestation as part of motherhood is also highlighted in Christianity. Jeanette Rodríguez considers Mary to be 'the compassionate Mother of the people', who loves with a 'womblike' love which reflects 'God's compassion'.¹⁴⁰ Similarly, Jensen suggests that the Church's 'fecundity' comes from the Holy Spirit descending 'upon her watery womb (the font)'.¹⁴¹ The Church can be seen as performing a gestational mothering role - being a 'vessel' and 'giving birth from her womb' - which leads to salvation, 'protection and sustenance'.¹⁴²

The Church could possibly be depicted as a gestational surrogate mother. Theodore of Mopsuestia believed that the bishop at baptism is involved in

asking God to let the grace of the Holy Spirit come upon the water and make it capable of begetting this awesome birth, making it a womb for sacramental birth.¹⁴³

Theodore believed that just as in a human birth a mother's womb receives a seed, so in baptism, the womb (i.e. the font) also receives a seed from God. Jensen suggests that Theodore of Mopsuestia believed that the font is like a womb having a fertilised embryo implanted into it.¹⁴⁴ It could be possible that Augustine supported something similar to what we now regard as genetic

¹³⁹ Ambrose, *Exp. Luc. 2.7*, cited in Jensen, 'Mater Ecclesia and Fons Aeterna', 145.

¹⁴⁰ Anne M. Clifford, *Introducing Feminist Theology* (Maryknoll, NY: Orbis Books, 2001), 198.

¹⁴¹ Jensen, 'Mater Ecclesia and Fons Aeterna', 152.

¹⁴² *Ibid.*, 145-6.

¹⁴³ *Ibid.*, 147. Theodore, *Bapt. Hom. 3.9*, in trans. Edward Yarnold, S.J., *The Awe-Inspiring Rites of Initiation* (Collegeville, MN: Liturgical Press, 2nd ed., 1994), 185, see also 3.2-5.

¹⁴⁴ Jensen, 'Mater Ecclesia and Fons Aeterna', 147.

surrogacy. Augustine in his treatise *On Baptism, Against the Donatists*¹⁴⁵ acknowledges that different wombs give birth to children, but in order for children such as Ishmael who are born to slave women to receive their promised inheritance, they are to be joined to the true wives of their father, like Sarah. Augustine did not want such children to be considered children of an adulterous union.¹⁴⁶

2.9.4 Motherhood as Giving Birth

Christianity also focuses upon the act of giving birth as part of motherhood. In the Bible, God is depicted as a mother who gives birth in Exodus 19:4 ('I bore you [Israel] on eagles' wings and brought you to myself') and in Job 38:29 ('[f]rom whose womb did the ice come forth, and who has given birth to the hoarfrost of heaven?'). Isaiah also has examples such as Isaiah 42:14 ('I will cry out like a woman in labour, I will gasp and pant'), Isaiah 46:3 (where Yahweh describes Israel as a people 'who have been borne by me from your birth, carried from the womb'), and Isaiah 66:9 ('[s]hall I open the womb and not deliver? Says the Lord; shall I, the one who delivers, shut the womb?')

Such imagery is not just found in the Bible. The Eleventh Council of Toledo (675), in discussing the Trinity, suggested that the Son is begotten and born from the Father's womb.¹⁴⁷ The Church was frequently seen as a mother giving birth. Jensen, for example, comments that from the second to the fifth century liturgical evidence exists of baptism as rebirth from the mother's womb. She believes the Church was regarded as a mother, with a font as a womb, which reflected feminine maternal and sexual imagery.¹⁴⁸ Jensen suggests Augustine

¹⁴⁵ Augustine, *On Baptism, Against the Donatists* 4.17, cited in Jensen, 'Mater Ecclesia and Fons Aeterna', 143-4.

¹⁴⁶ Jensen, 'Mater Ecclesia and Fons Aeterna', 143-4.

¹⁴⁷ Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 33-4.

¹⁴⁸ Jensen, 'Mater Ecclesia and Fons Aeterna', 138.

often referred to 'the maternal Church with a font for a womb'¹⁴⁹ and Ambrose regarded the Church as 'fertile in childbirth'.¹⁵⁰ Jensen indicates that the baptismal birthing metaphors were popular 'in the West in the late fourth and early fifth centuries', for example Zeno of Verona (ca.370) regarded the newly baptised as infants coming from 'the one womb' who gathered as 'nurslings'.¹⁵¹ Jensen suggests that some ancient fonts were designed to signify a mother's womb by having a round shape.¹⁵²

Theologian Jeanne Stevenson-Moessner regards parents as biological and social as their parent-child relationship reflects God's womb-love.¹⁵³ She believes that God loves as womb-love [*rechem*] and reflects God's mercy and compassion in the Old Testament. Womb-love shows God as a mother with 'continual and constant' compassion, nurture and love for his children.¹⁵⁴ She points out that Phyllis Trible utilised the 'metaphor of God as a birthing mother' by linking the Hebrew word womb (*rechem*) with the Hebrew word merciful or compassionate (*raham*).¹⁵⁵ *Rahum* is used just for God as creator and not the creatures.¹⁵⁶

2.9.5 Motherhood as Involving Lactation and Nurturance

Lactation and nurturance in motherhood are also highlighted in Christianity. The Church has been regarded as a lactating mother; Irenaeus, implies that those outside the Church are lost and are not 'nourished into life by the

¹⁴⁹ *Ibid.*, 144.

¹⁵⁰ Ambrose, *On Virginity*, 1.6.31, cited in *ibid.*, 145-6.

¹⁵¹ *Ibid.*, 148.

¹⁵² *Ibid.*, 152-3.

¹⁵³ Jeanne Stevenson-Moessner, *The Spirit of Adoption: At Home in God's Family* (Louisville, KY: Westminster John Knox Press, 2003), 1.

¹⁵⁴ *Ibid.*, 19.

¹⁵⁵ *Ibid.*, 90. However, 'God as a mother' is usually a simile and 'God is a mother' is usually metaphorical.

¹⁵⁶ *Ibid.*, 90.

mother's breasts'.¹⁵⁷ Jensen points out that the first Eucharist included candidates having a drink of sweet milk which represents the mother nourishing her children (cf. Hebrews 5:12). The Church has also been seen as a nurturing mother; Irenaeus described the Church as enlivening and nourishing the faithful.¹⁵⁸

God is also portrayed as a nurturing mother in the Bible in Deuteronomy 32:11-12 ('[a]s an eagle stirs up its nest, and hovers over its young the Lord alone guided him'). The Psalms also support this view of God, with Psalm 8:4 showing that God cares for human beings; Psalm 17:8 depicting God as a mother bird; Psalm 131:2 ('I have calmed and quieted my soul, like a weaned child with its mother'). Isaiah also has examples including Isaiah 49:15 ('[c]an a woman forget her nursing child, or show no compassion for the child of her womb? Even these may forget, yet I will not forget you'), and Isaiah 66:13 ('[a]s a mother comforts her child, so will I comfort you').

Theologians also regard God as a nurturing mother. The Jewish writer Emmanuel Levinas suggests that in Numbers 11 God becomes like a mother for Moses, helping him with the people who seem impossible to deal with.¹⁵⁹ Theologian Marie-Theres Wacker regards Hosea 11 as showing God involved in 'maternal activities of tending and nourishing', with 'maternal caring and feelings of the heart'.¹⁶⁰ Wacker believes Hosea regards God as an 'adoptive parent', because God did not give birth to Israel but rather called him from Egypt.¹⁶¹ Christian feminist Elaine Storkey believes the Trinity includes God as

¹⁵⁷ Irenaeus, *Against Heresies (Haer)*, 3.24.1 and the Church's 'nourishing bosom' in 5.20.2, cited in Jensen, *Mater Ecclesia and Fons Aeterna*, 139.

¹⁵⁸ *Ibid.*, 140.

¹⁵⁹ Lisa Guenther, "'Like a Maternal Body': Emmanuel Levinas and the Motherhood of Moses", *Hypatia* 21 (2006), 119-36, at 119-20 and 125.

¹⁶⁰ Marie-Theres Wacker, 'God as Mother? On the Meaning of a Biblical God-symbol for Feminist Theology', in Carr and Fiorenza 'Motherhood', 103-11, at 107.

¹⁶¹ *Ibid.*, 107-8.

Father, which incorporates God as a nurturing mother,¹⁶² thus including motherhood as part of God's being. Storkey suggests that mothers' experiences are close to God's heart 'and the heart of God is the love, the compassion, the self-giving and sacrificial vulnerability that we know as mothers'.¹⁶³ She proposes that God shows 'attention, concern, motherly compassion, protectiveness, care, nurture and so on' and says that '[we] can call God "Daddy" (or "Mummy")'.¹⁶⁴ Storkey disapproves of a cosmic mother due to its link to 'goddess'.¹⁶⁵ Stevenson-Moessner mentions God is a 'midwife' (Psalm 22:9-11), a 'mother bear' (Hosea 13:8) and a 'mother hen' (Matthew 23:37).¹⁶⁶

It is not just God who is depicted as nurturing, but other women as mothers in the Bible too. Andreas Köstenberger indicates that in the Old Testament, mothers nurtured their children by naming them,¹⁶⁷ by defending their daughter's virginity at marriage, by giving them wisdom in instruction,¹⁶⁸ by 'instructing' and 'caring for' her children.¹⁶⁹ For example, Proverbs 31 suggests that mother's responsibilities towards her children include providing food, clothing and shelter. At birth, mothers would cut the umbilical cord, wash the child and put it into a cloth (*cf.* Ezekiel 16:3-4). The mother would look after and educate the child at home during its first ten years and they would usually instruct their daughters to become future wives and mothers.¹⁷⁰ Levinas in *Otherwise than Being* regards Moses as a mother who is able to bear the stranger whom he has 'neither conceived nor given birth to' (Numbers 11:12) in his

¹⁶² Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 34.

¹⁶³ *Ibid.*, 31.

¹⁶⁴ *Ibid.*, 38.

¹⁶⁵ *Ibid.*, 157.

¹⁶⁶ Stevenson-Moessner, *The Spirit of Adoption*, 90.

¹⁶⁷ Köstenberger, *God, Marriage, and Family*, 97. See Genesis 29:32, 30:6, 35:18, Judges 13:24, 1 Samuel 1:20, 4:20-1 and Isaiah 7:14.

¹⁶⁸ Köstenberger, *God, Marriage, and Family*, 97. See Proverbs 1:8 and 6:20.

¹⁶⁹ *Ibid.*, 336.

¹⁷⁰ *Ibid.*, 98.

arms and at his breast 'as the wet-nurse bears the nursling'.¹⁷¹ Therefore, Lisa Guenther believes that for Levinas, ethical responsibility is like a maternal body hosting another, bearing the other, and taking on responsibility for the other, like Moses in Numbers 11:12 who takes 'responsibility for another'.¹⁷² Köstenberger suggests that the New Testament regards women as having a 'God-given calling as mothers', (citing Titus 2:4-5).¹⁷³ He suggests that Paul regarded childbirth and mothering, i.e. the nurturing of children and home management, as 'primary roles' for women (1 Timothy 2:15 and 5:14).¹⁷⁴ He believes the New Testament encourages parents to raise children 'in the nurture and admonition of the Lord' (Ephesians 6:4).¹⁷⁵

It is not only Mary and the Church who are considered to be mothers, but priests too, as Margaret Hebblethwaite mentions that St Bernard regarded the priest as a mother.¹⁷⁶ Christianity therefore, throughout its various parts such as the Bible, the Church and its theological writings, depicts the complexity of motherhood as involving various elements such as creation, conception, gestation, birth, lactation and nurturance.

2.10 Motherhood as Multidimensional

In light of the discussion in the chapter, it can hopefully be seen that motherhood can be made up of many varying components including genetic, gestational, birth, lactation and social nurturance. Such features of motherhood have been seen in Christianity in portrayals of God as a mother in the Bible and the Church as a mother and in the writing of theologians too. A framework is

¹⁷¹ Guenther, 'Like a Maternal Body', 120.

¹⁷² *Ibid.*, 119-20.

¹⁷³ Köstenberger, *God, Marriage, and Family*, 273.

¹⁷⁴ *Ibid.*, 120.

¹⁷⁵ *Ibid.*, 273.

¹⁷⁶ Storkey and Hebblethwaite, *Conversations on Christian Feminism*, 111.

needed which allows for the various types of mothering to come together – even if performed by different people. This framework will incorporate a range of emphases upon the different types of mothering, according to the needs and wishes of those involved. The theological framework of allowing dialogue and negotiation could for example provide a platform for the surrogate and the commissioning mother to both be acknowledged as mothers. Such a framework could have a relational understanding, so that varying degrees of involvement could be allowed to exist between participants. It may be that the relationships involved are unidirectional with the child seeing just one mother, the commissioning mother. Alternatively, there could be a symmetrical, equal-regard and mutual relationship between the surrogate and the commissioning mother. The relational framework though, unlike Browning's is not insistent upon mutuality and equal-regard. Relationalism allows for a spectrum of involvement between the surrogate and the commissioning mother, which would allow the surrogate to have various lengths of visitation access. Therefore, a relational framework needs to be comprehensive and flexible enough to allow for the many dimensions of motherhood of the secular and Christian feminists, but to be acknowledged in varying ways according to the wishes of those involved, which will include the needs of the child too. Chapter five will explore in more depth the relational framework for surrogacy.

2.11 Conclusion

The overall aim of this chapter has not been to develop a totally new theory of motherhood or of surrogacy. Instead, its objective has been to demonstrate the complexity of the concept of motherhood and the inadequacies, oversimplification and inconsistencies of the mothering models for surrogacy as espoused by Whitbeck, Ruddick and Rothman, due to the type of

relationships involved in surrogacy and its contextual nature. Neither pregnancy nor motherhood is a completely universal experience, since women's experience and bodily occurrences are varied and it is difficult to give one definition or universal account of surrogacy or motherhood.

After setting out the complexity of motherhood and the successes and failings of the secular feminists, attention turned to the portrayal of motherhood in the writings of three modern day theologians. Here the theologians presented a more nuanced view of motherhood, which allowed for the various aspects of motherhood to be realised. By using theological insights from the Bible and Christian Tradition, the theologians were able to suggest a comprehensive view of motherhood within a mutual framework, allowing for diverse family formations. The work of the theologians seeing motherhood as involving diverse roles was echoed and supported by biblical imagery of God as mother and by the Church as mother too. Even though the theologians' accounts were not without their difficulties, they provided a more comprehensive background to develop further a relational framework, which will allow for varying emphasis upon the different types of motherhood in surrogacy.

A relational theme will be explored more fully in the following chapters. The next chapter, chapter three, will explore the issues of commodification, exploitation and coercion in paid surrogacy. Chapter four will focus upon accusations of baby selling in surrogacy in order to highlight the ongoing need for a new relational framework for the practice. The final chapter five will question the suitability of a contractarian framework and an adoption model for surrogacy and instead, offer an alternative relational framework.

CHAPTER THREE COMMODIFICATION, EXPLOITATION, AND COERCION IN SURROGATE MOTHERHOOD

3.1 Introduction

As previously indicated, the aim of this thesis is to suggest that a relational ethical framework can be used as a basis for surrogacy. A relational framework provides a basis for thinking through the relationship between the surrogate, the commissioning couple and the child. As seen in chapter two, motherhood can be considered multidimensional and a relational approach could possibly accommodate the complexity of motherhood in surrogacy. However, before attending to that directly, this chapter considers some standard ethical objections to paid surrogacy, including commodification, exploitation and coercion, and how they impact upon the child, the surrogate, and the commissioning couple. Critics of paid surrogacy include Phyllis Chesler, who regards it as immoral to treat human beings as a commodity,¹ and George Annas, who considers paid surrogacy to be 'the exploitation of women and infertile couples, and the dehumanization of babies'.² Other concerns include paid surrogates being treated as objects, as mere means to an end, losing their dignity and being degraded. This chapter lays the foundation for chapter four which assesses whether surrogacy involves baby selling. These two chapters do not aim fully to defend surrogacy commercialisation as good practice, but to investigate and analyse the criticisms of it. It is suggested that the association of money with surrogacy does not necessarily lead to typical capitalistic rhetoric simply because it is a commercial practice. It is proposed that paying surrogates can be appropriate in some cases, giving women

¹ Phyllis Chesler, *Sacred Bond: The Legacy of Baby M* (London: Virago, 1990), 111-12.

² George J. Annas, 'The Baby Broker Boom', *The Hastings Center Report* 16 (1986), 30-1, at 31.

economic empowerment within a context of a caring surrogacy relationship, but there is a need for caution and regulation to prevent possible problems such as commodification, exploitation and coercion.

Attention now focuses upon the image of God and human dignity along with their implications.

3.2 The Image of God (the *Imago Dei*) and Human Dignity

In order to understand the basis of possible commodification, exploitation and coercion in surrogacy, we need to think theologically by analysing the image of God. The most common theological grounding of human dignity as the basis for opposition to commodification lies in the biblical notion of the image of God. According to Genesis 1:26-7, human beings are created in God's image (*tselem*) and likeness (*d'muth*), giving them dignity and importance so they are not mere instruments. Human beings are commanded to rule the earth in Genesis 1:28 and 2:15, reflecting their dignity as rulers.³ The Fathers regarded the *imago Dei* as connected with reason, physical nature (Tertullian)⁴ and a status given by God (Origen).⁵ Therefore human beings have 'universal and inviolable' rights and duties according to Vatican II.⁶ Peter Bristow believes man's rationality also gives him dignity and an elevated position in the world.⁷ The *imago Dei* was distinguished from the likeness of God which is linked to

³ Stephen Riley, 'Observing the Breach: Dignity and the Limits of Political Theology', *Law Critique* 19 (2008), 115-38, at 118-19.

⁴ David J. Atkinson, and David H. Field, *The New Dictionary of Christian Ethics and Pastoral Theology* (Leicester: IVP, 1995), 477.

⁵ Origen, *De Principiis*, III.iv.1, cited in Alister E. McGrath (ed.), *The Christian Theology Reader* (Oxford: Blackwell, 1995), 214.

⁶ Cited in Peter Bristow, *The Moral Dignity of Man: Catholic Moral Teaching on Family and Medical Ethics* (Dublin: Four Courts Press, 1993), 19.

⁷ *Ibid.*, 22.

original righteousness,⁸ God's eternity (Tertullian)⁹ and human imitation of God (Origen).¹⁰ However, the Reformers, unlike Roman Catholicism, regarded both image and likeness as the same.¹¹

The *imago Dei* is also connected to Christology, since Christians regard Christ as God incarnate, his perfect humanity reflecting his perfect divinity. Colossians 1:15-16 describes Christ as 'the image of the invisible God, the firstborn of all creation', and all things as created in him. Through Christ, Christians become new persons and have their sins purified since Jesus reflects God's being (Hebrews 1:3), therefore the new self of Christians is created according to God's likeness (Ephesians 4:24).

Another view of dignity is a relational view. Roman Catholic theologian Louis Janssens highlights dignity as a basis for how we treat others in our relationships. Human beings cannot be treated as objects towards our goals, but are to be respected as persons with their dignity promoted. Janssens considers human beings as subjects who cannot be treated as mere means or exploited.¹² He regarded actions as morally good if they serve human dignity, if they benefit the whole person in their relationships with the world, with others socially and with God.¹³

We now turn to the *imago Dei* as presented by Helmut Thielicke and Paul Ramsey; two prominent Christian ethicists of the twentieth century, who

⁸ Atkinson and Field, *The New Dictionary of Christian Ethics and Pastoral Theology*, 477.

⁹ Tertullian, *De Baptism*, 5 cited in McGrath, *The Christian Theology Reader*, 214.

¹⁰ Origen, *De Principiis*, III.iv.1.

¹¹ Atkinson and Field, *The New Dictionary of Christian Ethics and Pastoral Theology*, 477.

¹² Louis Janssens, 'Artificial Insemination: Ethical Considerations', *Louvain Studies* 8 (1980), 3-29, at 5.

¹³ *Ibid.*, 13.

tended to take a biblical and theological view, whereas others, like Janssens, took a more philosophical approach.

3.2.1 The *Imago Dei* According to Helmut Thielicke¹⁴

Human beings are made in God's image and likeness. This gives us self worth, which affects how others treat us and how we treat others. Theologian Helmut Thielicke regarded human beings as having infinite worth based upon an 'alien dignity', coming from God (45). Only in Christ do we find the *imago Dei* fulfilled, which we as human beings can partake in and thus have a relationship with God, reflecting God's glory and *agape* love (46). Karen Lebacqz notes that some criticise alien dignity for being external to us and not intrinsically part of us, making God distant and omnipotent compared to human beings. Human beings only reflect the *imago Dei* which comes from God's glory (47). But, Lebacqz argues, God partakes and shares our human suffering and is not remote (48).

Five parts to alien dignity exist. Firstly, alien dignity protects people, giving them worth. Human dignity is 'alien' because it is given to human beings as part of their creation from God's love (48). Human dignity is not earned or lost, is non-transferable and inalienable (49). Therefore human beings may not be valued instrumentally or used as a mere means; people have worth even if they lose their functional capacities. Human beings cannot be possessed fully by another, nor are the different parts of a person to be separated out by

¹⁴ The page references in brackets in section 3.2.1 refer to Karen Lebacqz, 'Alien Dignity: The Legacy of Helmut Thielicke for Bioethics', in Allen Verhey (ed.), *Religion and Medical Ethics: Looking Back, Looking Forward* (Grand Rapids, MI: Eerdmans, 1996), 44-60.

objectifying them since human beings are wholes with an 'indivisible totality' (50-1).

Secondly, alien dignity equalises people. Human worth comes from God, making us equal, despite differences. Human life has immeasurable value, so we cannot compare people's dignity. Alien dignity is an expression of God's love, giving people a unique and incomparable value (51-2). Thirdly, alien dignity requires a personal response. Thieliicke regards alien dignity as an 'I-Thou' relationship involving personal responsibilities (54). *Agape* involves responding to the alien dignity of others, and dignity becomes a personal response involving responsibility for others' needs (54). Fourthly, alien dignity requires a structural response. Thieliicke was reluctant to see care institutionalised, rationalised or routinized, preferring personal responsibility. He favoured people receiving *agape* or charity over claiming welfare as a right (55-7). Thieliicke believed rights and claims lead people into hostile and opposing relationships, preferring instead a partnership as the basis of Christian action. In contemporary politics the language of partnership is used as an alternative to the language of entitlement. Fifthly, alien dignity is regarded as relational, occurring in our relationship with God and others. God gives us dignity by loving us; others acknowledge our dignity by acting from *agape* towards us (57).

From Thieliicke we can learn that alien dignity means that God regards people as subjects and they are not to be degraded by being used as mere objects. Others cannot be regarded as 'passive recipient[s] of our actions' or just valued for their usefulness (56). Alien dignity prevents owning people, objectification, oppression, instrumentalisation and imposing our aims upon them. People

have dignity and are to be treated equally while acknowledging their differences.

3.2.2 The *Imago Dei* in Paul Ramsey's *Basic Christian Ethics*¹⁵

Paul Ramsey regards man's creation in God's image as a basic principle of Christian morality (249). Ramsey outlines two theories of the *imago Dei* and human nature, the substantial form and a relational form. Firstly the substantial form believes there is an inner capacity of the mind within human nature which distinguishes us from animals. This inner capacity is linked to God's image and is connected to the Stoic idea of a divine spark being inside everyone. Aristotle regarded man as having reason and rationality, reflecting God's image (250-1). However, Ramsey criticised the substantial form of the *imago Dei* for equating human nature with the divine (254).

Instead, Ramsey prefers a second relational view for understanding the *imago Dei* and human nature. He uses an analogy of a mirror reflecting an object's image. The *imago Dei* is not connected with something within us, such as reason or culture and history, but occurs by being in a 'responsive relationship to God' (254), reflecting God's will and actions. The *imago Dei* is reflected in human beings due to their position before God (255). Jesus allows us to be changed into God's glory and likeness (2 Corinthians 4:6 and 3:18), therefore the *imago Dei* is not defined by human nature but is found in Christ's love, humility and obedience, reflecting God's glory (259).

¹⁵ Pages numbers in section 3.2.2 refer to Paul Ramsey, *Basic Christian Ethics* (Louisville, KY: Westminster John Knox Press, 1950).

Ramsey's relational view of the *imago Dei* does have some positive parts, but his view of human nature also has some negative aspects too. He regards human beings as subservient, who become 'nothing through the act of worship' to quote Kierkegaard (257). Human rationality is considered 'rebellious' unless obeying God (264). For Ramsey, a human being standing in the *imago Dei* is 'least concerned about his own value' (354). In the relationship of the *imago Dei*, individual rights are overlooked: '[w]hen man ceases to reflect the image of God and begins simply to reflect upon himself and his own rights, he is no longer *in* the image of God' (354).

However, many believe human beings in Christ are glorified, having a restored relationship with God. God loves us as we are and we can grow spiritually with God. Our self-interest, wants, needs and rights matter without resorting to selfishness or egotism. In Christ, Christians are forgiven, restored and can fulfil their God-given plan and potential, which personally enhances them. Human beings are not robots, without free will, but can live life in fullness. It could be argued that Christians should not have to imitate Christ's self-sacrificial obedience which leads to the loss of the self on the cross, but they should live in the power of the resurrection allowing for self-growth and development, since Christ's sacrificial redemption was a one-off act done for all.

It is important to be aware of the way a major theologian such as Ramsey has understood a relational view of the *imago Dei*. However, his view of relationalism has its weaknesses. I believe Ramsey has a negative view of self-interest, since he favours *agape* and self-sacrifice as the basis for human obedience to God. An alternative relational understanding of the *imago Dei* incorporates a more positive understanding of self-interest and acknowledges

the importance of the other which will be explored in chapter four. An alternative view of relationalism and its significance for surrogacy is developed in chapter five.

3.2.3 The Implications of Being Made in the *Imago Dei*

Since human beings are created by God in his image, all humans have worth and value. Jerome Wernow suggests that being created in the *imago Dei* means that human beings are equal,¹⁶ that the *imago Dei* has moral content and is linked to choosing to be righteous and holy including universal moral norms. Lactantius in his *Divine Institutes* says that human beings who are in God's image are to give their dues to God and give love, justice and protect them, instead of harming others.¹⁷ Dónal O'Mathúna regards being in the *imago Dei* as encouraging people to ensure that their attitudes and actions reflect and give glory to God by taking responsibility for the 'ethical impact of their actions'.¹⁸ James Childress regards human beings as 'God's representatives' in his kingdom, who are to rule like God and 'should not be exploitative'.¹⁹

Different theologians have taken alternative views towards the practical implications of the *imago Dei*. John Wilkinson regards human beings as having 'a status and dignity' for being made in God's image which limits the 'nature and extent' of experimentation to prevent them being demeaned or

¹⁶ Jerome R. Wernow, 'Saying the Unsaid: Quality of Life Criteria in a Sanctity of Life Position', in John F. Kilner *et al.* (ed.), *Bioethics and the Future of Medicine: A Christian Appraisal* (Carlisle, Cumbria: Paternoster, 1995), 93-111, at 102.

¹⁷ McGrath, *The Christian Theology Reader*, 215-6.

¹⁸ Dónal P. O' Mathúna, 'The Bible and Abortion: What of the "Image of God?"', in Kilner *et al.*, *Bioethics and the Future of Medicine*, 199-211, at 204.

¹⁹ John Macquarrie and James Childress (eds.), *A New Dictionary of Christian Ethics* (London: SCM Press, 1986), 293.

humiliated.²⁰ Ted Peters believes human beings in the *imago Dei* are ‘co-creators’ and should use our ‘scientific and technological creativity’ to serve others with beneficence and neighbour love.²¹ For surrogacy, the *imago Dei* could mean all the participants treat each other with dignity, care and respect, allowing for valid and autonomous decisions during the pregnancy while being aware of each other’s needs. Dignity takes people’s interests, welfare and human flourishing into consideration, so they are treated as ends and not objectified. Writing about children being sold in commercial surrogacy, Scott Rae adheres to the view that people have inherent worth, dignity and value. Having the *imago Dei* therefore means their value cannot be considered in monetary, market-based terms. Human beings cannot be sold, as human dignity would be violated.²² Christian writer Judith Bellow Khazoum regards surrogacy as an ‘inherently wrong’, ‘degrading and unnatural’.²³ The Church of England document *Personal Origins* suggests surrogacy undermines the dignity of women to bear children they do not intend to mother, especially if paid.²⁴

We have seen that the Bible regards human beings as made in God’s image; giving them intrinsic dignity. Also, Janssens’ philosophical discussion of human dignity attempts to do justice to the fundamental theological insight.

²⁰ John Wilkinson, *Christian Ethics in Health Care: A Source Book for Christian Doctors, Nurses and Other Health Care Professionals* (Edinburgh: The Handsel Press, 1988), 366-7. References to Wilkinson in the rest of the chapter do not relate to John Wilkinson, but to Stephen Wilkinson, see n. 26.

²¹ Ted Peters, *Playing God? Genetic Determinism and Human Freedom* (London: Routledge, 1997), 161.

²² Scott B. Rae, ‘Pregnancy for Profit? Legal and Moral Perspectives on Commercial Surrogate Motherhood’, in Kilner *et al.*, *Bioethics and the Future of Medicine*, 227-37, at 233.

²³ Judith L. Bellow Khazoum, ‘The Ethics of Surrogate Motherhood’, *Dialog* 28 (1989), 191-7, at 197.

²⁴ The Board for Social Responsibility of the General Synod of the Church of England, *Personal Origins* (London: Church House, 2nd ed., 1996), 59.

Generally Catholics have focused on dignity and Protestants on the image of God. Dignity is important for both Christian theological and philosophical reasons and the grounds for rejecting any commodification, objectification, exploitation or coercion of human beings. Attention now turns to whether the child, surrogate and commissioning couple are affected by commodification, exploitation and coercion in paid surrogacy. By looking at these areas, alternative views to those expressed by Khazoum and *Personal Origins* above are explored.

3.3 The Child in Paid Surrogacy

3.3.1 Introduction

The first participant to consider is the child. Some believe paid surrogacy is immoral for treating children as commodified products.²⁵ Section 3.3 focuses upon child commodification in nine subsections: defining commodification (3.3.2), how payment affects the child (3.3.3), child objectification (3.3.4), children treated as mere means to an end (3.3.5), children as fungible (3.3.6), the domino theory that all surrogacy children are commodified (3.3.7), psychological harm to children born of surrogacy (3.3.8), and harm to the surrogate's own child[ren] (3.3.9). The final section (3.3.10) calls for research. Each section starts with objections, followed by counter arguments which I tend to favour, which suggest that paid surrogacy does not have to involve child commodification.

3.3.2 Definition of Commodification

²⁵ *The Brazier Report* believed a child would be commodified see Department of Health and Social Security, *Surrogacy (The Brazier Report)* (London: HMSO, 1998), (i) paragraph four.

To assess whether child commodification occurs in surrogacy, we need to be clear about the terminology used. Commodification in a 'broad sense' refers to all things traded, usually involving monetary exchanges within a market.²⁶ Stephen Wilkinson distinguishes between two types of commodification.²⁷ Firstly, non-moral or descriptive commodification involves the buying and selling of commodities and is socially acceptable.²⁸ Secondly, normative commodification can be an adverse ethical concept and is a type of objectification and wrongfully involves treating something as a mere object, which should not be regarded in that way.²⁹ Treating a person as a commodity includes having a commodifying attitude towards them.³⁰ If a person is treated wrongly as a mere means to achieve another's goals,³¹ then their dignity, their subjectivity, personhood and intrinsic value are ignored by disrespectful treatment.³² Objectification is also called 'wrongful use exploitation' (see section 3.5.5).³³

Normative commodification can also involve wrongful fungibility, where we wrongly treat someone as fungible (i.e. interchangeable), by regarding them as an object.³⁴ Wrongful fungibility goes against Kant's argument that people have rational wills, dignity and equal worth over mere price, by not giving

²⁶ Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (London: Routledge, 2003), 46 and 48. References to Wilkinson in the rest of the chapter are to Stephen Wilkinson.

²⁷ *Ibid.*, 45.

²⁸ *Ibid.*, 44.

²⁹ *Ibid.*, 27 and 44-45.

³⁰ *Ibid.*, 46.

³¹ *Ibid.*, 55.

³² *Ibid.*, 36.

³³ *Ibid.*, 27.

³⁴ *Ibid.*, 46-8.

people dignity and seeing them in monetary terms.³⁵ Kant wanted to respect people as ends-in-themselves, so they are separated from and are above market prices.³⁶ Kant articulates a core insight or truth given to us in the Christian tradition: the notion of the end in itself, though not fully capturing everything said in the image of God, does capture a core insight. It is a violation of the intrinsic dignity of human beings to be bought and sold as commodities, since turning them into mere products cheapens their existence.

Sometimes people can be interchangeable without losing their dignity or respect, as long as they are not treated as a mere means to an end. A person may not be bothered which bus driver they have as long as they do the job competently. It is acceptable though to treat commodities such as cocoa beans as fungible, since they are replaceable inanimate objects. Wilkinson suggests that if money is not involved it is a matter not of commodification but of fungibilisation, or objectification, where something is treated as a commodity without monetary involvement.³⁷

3.3.3 Claim One: Effect of Payment in Surrogacy upon the Child

The first claim of commodification upon the child in surrogacy is that wealthy commissioning couples could demand specific eugenic characteristics in the children they are paying for. In genetic surrogacy, they could pay more to select a surrogate with particular genetic traits such as high IQ, eye, hair and

³⁵ *Ibid.*, 46. Kant says: 'In the realm of ends everything either has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has dignity', see Immanuel Kant, *Foundations of the Metaphysics of Morals* trans. Lewis White Beck (Indianapolis, IN: Bobbs-Merrill, 1959), 51.

³⁶ Kant, *Foundations of the Metaphysics of Morals*, 47 and 51-2.

³⁷ Wilkinson, *Bodies for Sale*, 46-8.

skin colour or in gestational surrogacy they could screen and implant the embryos which match their criteria, such as a particular sex. Commodification could lead to disabled embryos being considered as imperfect merchandise and rejected. Societal eugenic pressure could increase quality control over procreation for perfect children. Children could become degraded and lose their dignity. Children born without selection may be bullied by peers as 'cheap' if purchased at a lower price compared to their 'dearer' friends. Children's personhood and human flourishing could be wronged if regarded in market terms.³⁸ Successful selection could lead parents to feeling happy with their 'product' and treat the child well.

However, regulated surrogacy does not have to include selecting foetus' attributes, but for some, such selection could prevent sex-linked genetic conditions. Clinics are expected to assess the child's welfare, which would probably prevent screening gametes for social reasons. Preventing couples from paying more if a child has particular features would reduce commodification. Most commissioning couples in surrogacy just want to have a child they are 'genetically related to'.³⁹ Alice, aged 13, born of gestational surrogacy, commented that no one at school had teased her about surrogacy, until one pupil accused her of being abnormal and called her the teacher's pet for being a 'test-tube kid'.⁴⁰ However, she thought it was 'stupid' as he did not understand why her birth was different and that IVF is common and does not involve a test-tube.⁴¹ She regarded him as 'just another bully who bullied

³⁸ Margaret Jane Radin, 'Market-Inalienability', *Harvard Law Review* 100 (1987), 1849-937, at 1927-8.

³⁹ Debra Satz, 'Markets in Women's Reproductive Labor', *Philosophy and Public Affairs* 21 (1992), 107-31, at 119.

⁴⁰ M. Kirkman, and A. Kirkman, 'Sister-to-Sister Gestational "Surrogacy" 13 Years On: A Narrative of Parenthood', *Journal of Reproductive and Infant Psychology* 20 (2002), 135-47, at 145.

⁴¹ *Ibid.*, 145.

everyone' and she considered it less embarrassing to be conceived in a Petri dish than by parental sex.⁴² As a child, she might have been embarrassed at the thought of her parents having sexual intercourse, but that does not mean it is embarrassing to be conceived that way. In her evidence of life as a surrogate child, no mention of commodification was made.⁴³

3.3.4 Claim Two: The Child is an Object

The second concern regarding paid surrogacy upon the child is that payment could turn children into commercial products, alienable pieces of property to be bargained over and disposed of at the surrogate's will. A commissioning couple may believe they have bought the child's parental and custody rights from the surrogate and can treat it as they like. Children may develop a harmful commodified attitude towards themselves from how their parents treat them. Children could feel pressured to live up to their buyers' expectations for being an expensive product. Commodification could devalue all children, 'treating them like products or pets for our own pleasure'.⁴⁴ Mia Kellmer-Pringle criticises attitudes regarding children as consumer durables to complete a family.⁴⁵ Participants in unpaid surrogacy could also demonstrate an objectified attitude by treating the child as a disposable object. A commissioning father from Michigan, who only wanted a girl, accepted the female baby when his surrogate gave birth to a boy and a girl, but the boy was placed in foster care, until the surrogate and her husband won custody of both

⁴² *Ibid.*, 145.

⁴³ *Ibid.*, 142-5.

⁴⁴ George J. Annas, 'Death Without Dignity for Commercial Surrogacy: The Case of Baby M', *The Hastings Center Report* 18 (1988), 21-4, at 22.

⁴⁵ Mia Kellmer-Pringle, *The Needs of Children* (London: Hutchinson, 1977), 69-70, cited in Michael Freeman, 'Is Surrogacy Exploitative?', in Shelia McLean (ed.), *Legal Issues in Human Reproduction* (London: Gower, 1989), 164-84, at 175.

children.⁴⁶ One boyfriend of a surrogate regarded the baby as ‘absolutely nothing’ and they were:

in it for the money: it’s a business. That’s the way we look at it.⁴⁷

Usually commercial transactions occur within an open market, with profit motives, allowing anyone with money to buy. Business dealings usually involve advertisements, bulk purchases, special offers, cost cutting activities, sale targets and stockpiles waiting for customers. However, paid surrogacy does not have to operate as a commercial practice with typical market rhetoric. Firstly, commercial surrogacy agencies cannot legally operate in the UK, surrogates cannot advertise their services and they select their commissioning couple. Secondly, many commercial marketing techniques are not found in surrogacy. Surrogates carrying twins do not offer bulk purchase discounts, or offer a sale reduction for January births, disabled children are not reduced as damaged goods, surrogates do not stockpile babies at home waiting for buyers. Thirdly, most surrogates do not see surrogacy as a business transaction, thus reducing the likelihood of their regarding the child as a commodity.⁴⁸ Practicing surrogacy with a set fee and not as a commercial practice reduces commodification, since twins would not cost more, as all surrogacy would cost the same. Surrogacy does not involve an ‘unfettered’ commercial baby market since surrogates do not bear a child in order to auction it to the highest

⁴⁶ Janna C. Merrick, ‘Selling Reproductive Rights: Policy Issues in Surrogate Motherhood’, *Politics and the Life Sciences* 8 (1990), 161-72, at 165.

⁴⁷ *The New York Times Magazine* 29 March 1987, 33, cited in Lenore Kuo, ‘The Morality of Surrogate Parenting’, *The Southern Journal of Philosophy* 27 (1989), 361-80, at 361.

⁴⁸ Heléna Ragoné, *Surrogate Motherhood: Conception in the Heart* (Oxford: Westview Press, 1994), 123-4, see also 121, which has similar views from a commissioning couple.

bidder.⁴⁹ Therefore, monetary involvement in paid surrogacy may not be detrimental to children.

3.3.5 Claim Three: The Child is Used as a Mere Means to an End

The third fear of the effect of payment upon children in surrogacy is that they will no longer evoke unconditional maternal love, obligation, duty or responsibility. Pregnancy becomes a job, deliberately creating a child without the intention to raise it. Children become merely a means for surrogates' financial gain - to satisfy their own ends instead of fulfilling children's needs. Children could suffer negligence if surrogates take an instrumental attitude to pregnancy and distance and alienate themselves from the child. The surrogates could treat the child disrespectfully with indignity; possibly putting its life at risk by smoking heavily or drinking excessively because it is not hers. The surrogate may not care about the child's welfare; preferring to have a commissioning couple who pay the most, instead of the one most likely to provide a loving home.

However, surrogates usually love children and want others to experience the joys of parenting. Surrogates have usually completed their families and gestate or procreate and gestate an additional child, which they regard as belonging to the commissioning couple for them to love. Screening could prevent selection of participants with purely commodifying attitudes. Surrogates do not abandon the child but help to create or gestate a child for a commissioning couple to become parents. Most surrogates are concerned for the child's welfare and carefully select which commissioning couple to work with. Some women will not choose to be surrogates unless they can choose which

⁴⁹ Wilkinson, *Bodies for Sale*, 147-8.

commissioning couples to associate with.⁵⁰ Most surrogacy children are told of their surrogate mother's identity and many surrogates continue to play a part in the child's life after birth.

The infertile do not approach families to sell their existing children, nor do they pressurise women who have conceived a baby with their husband to relinquish it. The commissioning couple have usually gone to great lengths to have a child due to infertility or difficult circumstances such as a hysterectomy from uterine cancer. They are usually keen to love and parent this particular wanted child born of surrogacy. Most commissioning couples long for a child, thus reducing the probability of them harming or treating the child as a mere product. This is demonstrated in a couple of studies by Susan Golombok. In the first study, 42 families with children aged one, conceived through surrogacy, were compared to 51 families with children from egg donation and 80 families with children conceived naturally. It was found that the surrogacy families had higher levels of psychological well-being and adaptation to parenting compared to the parents of naturally conceived children.⁵¹ Towards their children, the commissioning couples demonstrated higher levels of warmth, attachment, acceptance and enjoyment of parenting with lower parenting stress levels and depression than parents of naturally conceived children.⁵² In the second study, 37 surrogacy families with children aged two were compared to 48 egg donation families and 68 families with children

⁵⁰ Private conversation with a surrogate at The University of Westminster, GEDR Egg Donation Conference, 8 February 2003, who had presumably spoken with other surrogates. I telephoned COTS, (Childlessness Overcome Through Surrogacy, one of the major surrogacy agencies in the UK) in August 2012 who confirmed that all surrogates select which commissioning couples they would like to meet from information about them. The surrogate's details are then passed on to the commissioning couples, who decide if they would like to speak to her and then meet her.

⁵¹ Susan Golombok *et al.*, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life', *Developmental Psychology* 40 (2004), 400-11.

⁵² *Ibid.*, 404-8.

conceived naturally.⁵³ It was suggested that the commissioning couples were motivated, committed parents who had positive relationships with a higher quality of parenting with their children than the parents of naturally conceived children.⁵⁴ At the age of two, surrogate children had lower levels of aggression than naturally conceived children.⁵⁵

Leonard Fleck indicates that the child's existence can be regarded as 'an act of love' and not profit-making, since the child is an end in itself and not a means to an end.⁵⁶ Commissioning mother Rona Walker disliked American surrogacy involving large payments, believing that it did not serve the child's interests. She thought that surrogacy does not have to be 'exploitative, or encouraging women to sell themselves'.⁵⁷ Ninety percent of American surrogates considered payment to be a 'decisive, but not the sole, motive'⁵⁸ to becoming a surrogate, as they also wanted to be happy being pregnant, display altruism, and overcome guilt connected to earlier abortions.⁵⁹ Even though surrogacy could be a positive experience for the surrogate wanting to overcome an abortion, the surrogate will hopefully have been screened to come to terms with her guilt and that she will not regret handing the child over. Surrogacy does not have to be conducted negatively, but ethically with regulation, which will be discussed later.

⁵³ Susan Golombok *et al.*, 'Surrogacy Families: Parental Functioning, Parent-child Relationships and Children's Psychological Development at Age 2', *Journal of Child Psychology and Psychiatry* 47 (2006), 213-22, at 213.

⁵⁴ *Ibid.*, 219.

⁵⁵ *Ibid.*, 217.

⁵⁶ Leonard M. Fleck, 'Surrogate Motherhood: Is it Morally Equivalent to Selling Babies?', *Logos: Philosophical Issues in Christian Perspective* 9 (1988), 135-45, at 143.

⁵⁷ Rona Walker, *Love Child: Our Surrogate Baby* (London: Bloomsbury, 1990), 178.

⁵⁸ Miroslav Prokopijević, 'Surrogate Motherhood', *Journal of Applied Philosophy* 7 (1990), 169-81, at 175.

⁵⁹ *Ibid.*, 175.

3.3.6 Claim Four: The Child is Treated as Fungible

A fourth concern regarding payment upon the child is that commissioning couples could regard their existing children as fungible and use paid surrogacy to upgrade and replace them. J. Robert Prichard believes people will buy a newborn child to 'trade up' and 'trade in' unsatisfactory children.⁶⁰ Even though Prichard referred to paid adoption, his ideas could be applied to paid surrogacy. Surrogacy could be used to buy a new child from a surrogate with a high IQ to replace an existing child with lower intelligence.

However, most commissioning couples do not treat the child as a commodity as they initiated its existence, intend to parent it and are often genetically related. The surrogate assists in the procreation of an additional wanted child for others to parent. The commissioning couple's motivation of wanting to parent a child helps to bring the specific surrogate child into existence. The child should not suffer because the commissioning couple plan to provide for its needs and treat it with dignity.

Once a child is born from a surrogacy arrangement, laws exist to protect it, and parents are expected to give unconditional love with their parental duties. John Robertson indicates that commissioning couples cannot:

buy the right to treat the child...as a commodity or property. Child abuse and neglect laws still apply, with criminal and civil sanctions available for mistreatment.⁶¹

⁶⁰ J. Robert S. Prichard, 'A Market for Babies?', *University of Toronto Law Journal* 34 (1984), 341-57, at 349.

⁶¹ John A. Robertson, 'Surrogate Mothers: Not So Novel After All', *The Hastings Center Report* 13 (1983), 28-34, at 33.

Commissioning couples cannot sell the child on a 'whim',⁶² nor can the commissioning father 'destroy, transfer or abandon the child'.⁶³

The intrinsic worth of children is beyond money and money cannot be a fair exchange for a child, as it is inappropriate to put a value on a child's life. Child commodification in surrogacy can be lessened since most participants do not believe payment reflects the child's or surrogate's worth, since children and women are intrinsically priceless. Some paid surrogates regard the child as a gift to the commissioning couple and associate surrogacy with kinship, human relations, and not money.⁶⁴ One surrogate stated: '[y]ou can't put a price on a baby's life'.⁶⁵ Richard Epstein suggests that surrogacy may not turn children into commodities because commodities are consumed and fungible, whereas children are unique and irreplaceable.⁶⁶ Consequently, participants in paid surrogacy may treat the child as precious and sacred with intrinsic worth, despite payment.

3.3.7 Claim Five: The Domino Theory – All Children are Commodified

A fifth concern regarding children in paid surrogacy is that payment could lead to a 'domino effect'. Here all children are regarded as commodified products and they rate their dignity and self-worth according to parental payments. This could be understood in Hobbesian terms, according to which

⁶² Michael J. Meyer, 'The Idea of Selling in Surrogate Motherhood', *Public Affairs Quarterly* 4 (1990), 175-88, at 180-1.

⁶³ Satz, 'Markets in Women's Reproductive Labor', 120.

⁶⁴ Ragoné, *Surrogate Motherhood*, 59.

⁶⁵ Heléna Ragoné, 'The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism', in Rachel Cook *et al.* (eds.), *Surrogate Motherhood: International Perspectives* (Oxford: Hart, 2003), 209-26, at 214.

⁶⁶ See Richard A. Epstein, 'Surrogacy: The Case for Full Contractual Enforcement', *Virginia Law Review* 81 (1995), 2305-41, at 2326-38, in Denise E. Lascarides, 'A Plea for the Enforceability of Gestational Surrogacy Contracts', *Hofstra Law Review* 25 (1997), 1221-59, at 1237.

'[t]he *value*, or WORTH of man, is as of all other things, his price'.⁶⁷ Margaret Radin wants to ban market-led surrogacy to prevent child commodification.⁶⁸ She approves unpaid surrogacy which occurs without: sale, 'supply or demand pricing...advertising and marketing, stockpiling' or commodification of participants.⁶⁹ Radin regards unpaid surrogacy as aiding human flourishing, but believes it cannot operate alongside paid surrogacy, as a market framework would 'drive out' the nonmarket version.⁷⁰ She assumes the domino theory develops by turning payment for one, into commodification of all: 'once the fact of market value enters our discourse, it must be present in, and dominate, *every* [emphasis added] transaction'.⁷¹ Therefore commodification of some surrogate children leads a domino effect of all being commodified.⁷² Radin fears non-surrogate children will measure their capital worth, parents will compare their children's prices, human flourishing and personhood will suffer by creating 'class, race and gender divisions'.⁷³

Heather Widdows is concerned over the 'negative cumulative social effects' of the NRTs (new reproductive technologies)⁷⁴ and possible objectification of all children when parents select their children's physical attributes, such as sex, race, eye colour, IQ, unless done for medical reasons in order to have a healthy child.⁷⁵ She fears the selection and resulting commodification would not

⁶⁷ Thomas Hobbes, *Leviathan* (Oxford: Oxford World's Classics, Oxford University Press, 1996), chapter 10, paragraph 16.

⁶⁸ Radin, 'Market-Inalienability', 1935-6.

⁶⁹ *Ibid.*, 1855.

⁷⁰ *Ibid.*, 1923 and 1933-7.

⁷¹ Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, MA: Harvard University Press, 1996), 101.

⁷² Radin, 'Market-Inalienability', 1933.

⁷³ *Ibid.*, 1926-7.

⁷⁴ Heather Widdows, 'Persons and Their Parts: New Reproductive Technologies and Risks of Commodification', *Health Care Analysis* 17 (2009), 36-46, at 38.

⁷⁵ *Ibid.*, 38-9 and 45.

acknowledge a person's 'ethical significance' or 'equal moral status',⁷⁶ leading to parental disappointment regarding their children if expectations are unmet.⁷⁷ As body parts are connected to persons, then the commodification of body parts may lead to commodification of persons.⁷⁸

However, I believe Radin's and Widdows' claims are possibly exaggerated and speculative and do not reflect surrogacy practice. To suggest that all transactions are commodified if payment is involved, that children will feel their only value is monetary, and that women's features are commodified for all women, is to overstate the case without conclusive evidence. Radin admits the effects of the domino theory are 'remote', that fathers do not attach a monetary value to their genes, therefore children born from paid surrogacy do not have to be seen as fully commodified, thus lessening the domino effect.⁷⁹ Radin confesses that women's reproduction does not appear 'as commodified as their sexuality' and she does not know if this is due to them being commodification-resistant or if it develops later.⁸⁰ However, she thinks that the effects of the domino effect are serious enough to stop paid surrogacy.⁸¹ Widdows admits the question whether the NRTs change expectations towards children and all children is 'under-theorised and under-researched'.⁸² She accepts that some believe that if parents select their child's body parts and attributes it does not commodify people.⁸³ However, universalised commodification of all children in society from the effects of paid IVF has not occurred and far more people choose IVF than surrogacy, which has only about

⁷⁶ *Ibid.*, 40-1.

⁷⁷ *Ibid.*, 39-40.

⁷⁸ *Ibid.*, 41.

⁷⁹ Radin, 'Market-Inalienability', 1933.

⁸⁰ *Ibid.*, 1933.

⁸¹ Radin, *Contested Commodities*, 145.

⁸² Widdows, 'Persons and Their Parts', 38.

⁸³ *Ibid.*, 41.

40 to 50 births a year in the UK. Radin also ignores the surrogacy context, since for many surrogates, their actions aid their human flourishing; she regards theories supporting context as possibly harming people.⁸⁴ Therefore, she may be reluctant to support cases where surrogates spend the money received on their education as not really aiding their human flourishing, despite surrogates enjoying surrogacy and furthering their careers through additional education.

3.3.8 Claim Six: Children Born of Surrogacy are Psychologically Harmed

A sixth concern regarding payment upon the child in paid surrogacy is that a child born from surrogacy could suffer psychological harm. Such harm could include low self-esteem, rejection and insecurity, knowing that their natural mother was paid to deliberately conceive them and sell them to the commissioning couple. The child could feel commodified and resent its gestational mother for abandoning it instead of loving it. Children may suffer if surrogacy is used as an alternative to adoption, circumventing stringent checks upon the commissioning couple, allowing some to become parents who would have been rejected due to health or social factors. Michelle Moody-Adams warns that a child born from surrogacy could later lose self-respect, respect and trust for others, and might fear being sold if unsatisfactory.⁸⁵

However, I believe that if the context of paid surrogacy is explained to the children then fears of resale are alleviated, seeing their conception as wanted and longed for. One study found that 42 commissioning couples with a one-year-old born through surrogacy all told their family and friends about

⁸⁴ Radin, *Contested Commodities*, 62.

⁸⁵ Michelle M. Moody-Adams, 'On Surrogacy: Morality, Markets, and Motherhood', *Public Affairs Quarterly* 5 (1991), 175-90, at 183.

surrogacy and planned to tell the child.⁸⁶ Alice, the 13-year-old born from gestational surrogacy, commented that her relationship with her gestational surrogate was as aunt and niece 'just the way it should be'.⁸⁷ She comments that some people told her she would think she had been given away, but she knows is not true and knows the children of her surrogate are her cousins and not her siblings.⁸⁸ Alice, when aged 7 or 8, told her social mother that she was not her mother and that she could not boss her about, adding that she was 'a terrible mother' and she should not have had her and her infertility was for a 'good reason'.⁸⁹ Her mother was not upset by it because she was confident in her role as her mother and took it as the words of a child, angry for being told off.⁹⁰ Commissioning mother Linda Nelson received twins from surrogacy and at seven years of age, one of them wrote about her surrogate:

[i]t was a good job we had Kim as your friend, mummy. Otherwise you wouldn't have us.⁹¹

The gestational surrogate keeps in contact with the twins she incubated,⁹² who are 'well-adjusted', 'outward going and happy'⁹³ and understand the surrogacy arrangement.⁹⁴

⁸⁶ Fiona MacCallum *et al.*, 'Surrogacy: The Experience of Commissioning Couples', *Human Reproduction* 18 (2003), 1334-42, at 1334.

⁸⁷ Kirkman and Kirkman, 'Sister-to-Sister Gestational "Surrogacy" 13 Years On', 144.

⁸⁸ *Ibid.*, 144.

⁸⁹ *Ibid.*, 141.

⁹⁰ *Ibid.*, 141.

⁹¹ Linda Nelson, 'Truth and the Surrogate Child', in Eric Blyth *et al.* (eds.), *Truth and the Child 10 Years On: Information Exchange in Donor Assisted Conception* (Birmingham: BASW, 1998), 53-6, at 54.

⁹² *Ibid.*, 54.

⁹³ *Ibid.*, 54.

⁹⁴ *Ibid.*, 55.

The child could have enhanced self-esteem and be delighted at the lengths her social parents went to achieve her existence, allowing her to trust others and love the surrogate who undertook risks for her birth, realising she was 'compensated rather than exploited'.⁹⁵ The present lack of research on commercial surrogacy and the child means generalised statements as found in the *Brazier Report* paragraph 5:21 which implied that children born from surrogacy would not want to know they were born from high payments paid to surrogates, this needs clarification by future research to assess children's reactions to surrogacy.

3.3.9 Claim Seven: The Surrogate's Own Children are Psychologically Harmed

Seventhly, there are concerns that the surrogates' own children could suffer psychologically in surrogacy, by not trusting their parents, feeling insecure or anxious out of fear that they will be relinquished if they misbehave. Children of genetic surrogates have expressed fears of being sold like their half-sibling and have suffered loss at being deprived of a sibling.⁹⁶ Janna Merrick refers to works by surrogates Elizabeth Kane⁹⁷ and Amy Overvold⁹⁸ suggesting the surrogate's own children experience 'embarrassment' from peers finding out about the arrangement and experience 'confusion' when their sibling is relinquished to a stranger.⁹⁹ Children are expected to suffer from low self-

⁹⁵ Eric Blyth and Claire Potter, 'Paying for it? Surrogacy, Market Forces and Assisted Conception', in Cook *et al.* (eds.), *Surrogate Motherhood*, 227-42, at 235.

⁹⁶ Kay Longcope, 'Surrogacy: Two Professionals on Each Side of the Issue Give Their Arguments for Prohibition and Regulation', *Boston Globe*, 23 March 1987, 18-19 and Iver Peterson, 'Surrogate Mothers Vent Feelings of Doubt and Joy', *New York Times*, 2 March 1987, B1 and B4.

⁹⁷ Elizabeth Kane, *Birth Mother* (New York: Harcourt Brace Jovanovich, 1988).

⁹⁸ A. Z. Overvold, *Surrogate Parenting* (New York: Pharos, 1988).

⁹⁹ Merrick, 'Selling Reproductive Rights', 167.

esteem because of the changed attitude towards pregnancy and maternal duty induced by surrogacy.

However, caution needs to be exercised as no long-term studies have been conducted into this area and some concerns are only predictions. There is one study which has looked at how the surrogate's children perceived surrogacy. Of 34 surrogates who had given birth to a surrogate child a year previously, virtually all (32) already had children of their own and all told them of the arrangement, with 29 of the 32 explaining it fully.¹⁰⁰ Eighty one percent of the surrogates' own children were positive about surrogacy during pregnancy, 88% were positive at the handover, and 88% were positive one year on. None of the children were negative about surrogacy during the pregnancy, at the handover or one year on. Sixteen percent were neutral or ambivalent about surrogacy during the pregnancy, 9% were like this at the handover and 12% had the same attitude one year on.¹⁰¹ No 'major problems' about surrogacy were expressed from the surrogates' children.¹⁰²

Lori Andrews believes the fears of surrogates' children that they will be relinquished can be eased by telling them from the start that the child belongs to the commissioning couple and is 'not part of their own family'.¹⁰³ Commissioning mother Margaret Kirkman used her sister Linda as a gestational surrogate to gestate her own egg, but with donor sperm. Linda ensured her children did not fear being given away by telling them of the

¹⁰⁰ Vasanti Jadva *et al.*, 'Surrogacy: The Experiences of Surrogate Mothers', *Human Reproduction* 18 (2003), 2196-204, at 2197 and 2202.

¹⁰¹ *Ibid.*, 2202-3.

¹⁰² *Ibid.*, 2203.

¹⁰³ Lori B. Andrews, 'Surrogate Motherhood: The Challenge for Feminists', in Larry Gostin, (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington and Indianapolis, IN: Indiana University Press, 1988), 167-82, at 177.

arrangement. They accepted 'without question' that the baby was their cousin and not their sibling and were 'slightly disdainful of others who could not understand' what was clear to them.¹⁰⁴ Michael Freeman admits that children 'can be remarkably resilient'.¹⁰⁵ It is possible they could appreciate their mother's love of children and family life which motivated her to become a surrogate, allowing the infertile couple to have a family. Heléna Ragoné found that many surrogates choose to spend their payment upon their children and husbands as compensation for surrogacy's inconvenience,¹⁰⁶ demonstrating the care surrogates have towards their own children. All the surrogates in Olga van den Akker's study told their own children that the surrogate baby was going to be part of the commissioning couple's family and not their sibling.¹⁰⁷ Most surrogates thought they would continue contact with the family so their own children could see the child, as this was perceived to make it easier for them to understand events.¹⁰⁸

3.3.10 Lack of Research

As a general point, more empirical research needs to be conducted into the occurrence of child commodification in surrogacy due to lack of research. The executive summary of the *Brazier Report* admitted to the lack of research concerning the 'incidence, nature and outcomes of surrogacy arrangements' including the child's welfare.¹⁰⁹ Eric Blyth, a surrogacy researcher, has

¹⁰⁴ Linda Kirkman, 'Still Not Maternal: Giving Birth to My Niece (10 Years On)', in Robert Jansen, and David Mortimer (eds.), *Towards Reproductive Certainty: Fertility and Genetics Beyond 1999* (Carnforth, Lancs.: Parthenon, 1999), 116-19, at 116-17.

¹⁰⁵ Freeman, 'Is Surrogacy Exploitative?', 177.

¹⁰⁶ Ragoné, *Surrogate Motherhood*, 58.

¹⁰⁷ Olga B. A. van den Akker, 'Psychosocial Aspects of Surrogate Motherhood', *Human Reproduction Update* 13 (2007), 53-62, at 57.

¹⁰⁸ *Ibid.*, 57.

¹⁰⁹ *The Brazier Report*, (i).

confessed to being 'speculative' concerning children's possible positive attitudes towards payment in surrogacy due to the lack of research.¹¹⁰ Some scholars make claims, but frequently these are merely assertions that certain attitudes or outcomes will prevail in surrogacy, appealing to a series of slippery slope arguments despite the lack of evidence. However, from my reading, I am unaware of any empirical evidence of child commodification in surrogacy and no evidence of insecurity amongst children born of surrogacy. It is possible that the research has been done and that I am unaware of it, or that no research has been done in this area and that commodification (or a lack of it) is waiting to be found, even so far there is no indication of child commodification for example. It is important to remember that absence of evidence regarding commodification is not the same of evidence of an absence of commodification. Caution needs to be exercised looking at the practices of contraception and abortion in order to see if commodification has developed and whether this can also be applied to surrogacy. After all, the use of contraception and abortion are different types of practices to surrogacy, which is a far more personal relationship. There is a need for future long-term research to assess the psychological impact of paid surrogacy upon the child (including whether surrogate children suffer from lowered self-esteem and whether commissioning couples treat their children as commodities), as well as how society regards and treats these children. However, until evidence-based empirical research is conducted, caution needs to exist over any statements in this area. An appendix at the end of the thesis suggests some areas for research.

3.4 Commodification of the Surrogate in Paid Surrogacy

¹¹⁰ Blyth and Potter, 'Paying for it?', 235.

3.4.1 Introduction

The last section explored possible child commodification in paid surrogacy. The rest of the chapter explores the effects of commodification, exploitation, coercion upon the surrogate and upon the commissioning couple. Firstly we consider commodification of the surrogate, using a range of similar themes including objectification, degradation and being used as a mere means to an end. Once again each section starts off with the negative views followed by my more positive rejoinders.

3.4.2 Claim One: The Surrogate is Treated as an Object

The first concern is that surrogates could be commodified by being regarded as a mere replaceable womb. She may be treated 'disrespectfully and inconsiderately' by being used as 'a mere object'.¹¹¹ Teresa Iglesias uses the term 'rent-a-womb' to reflect the idea of surrogates becoming property.¹¹² In Philip Parker's study one surrogate reported that she was 'only an incubator'.¹¹³ Ragoné reported a commissioning husband who regarded his gestational surrogate as an 'oven' and not as the mother.¹¹⁴

Certainly we should accept that paid surrogacy could potentially turn pregnancy into a commodified market-led transaction where surrogates with less marketable attributes are paid less. Elizabeth Anderson calls surrogacy an 'industry' for allowing commissioning couples to select the surrogate's

¹¹¹ Rosemarie Tong, *Feminine and Feminist Ethics* (Belmont, CA: Wadsworth, 1993), 21.

¹¹² Teresa Iglesias *IVF and Justice: Moral, Social and Legal Issues Related to Human In Vitro Fertilisation* (London: The Linacre Centre, 1990), 70-1.

¹¹³ Philip J. Parker, 'Motivation of Surrogate Mothers: Initial Findings', *American Journal of Psychiatry* 140 (1983), 117-18, at 118.

¹¹⁴ Ragoné, 'The Gift of Life', 218.

attributes including her height, intelligence and race.¹¹⁵ In September 1988 an advertisement was placed in *USA Today* next to car advertisements for a surrogate with blue or green eyes, 5'2" to 5'8" to be paid \$10,000 plus expenses.¹¹⁶ Radin assumes paid surrogacy has a 'domino effect', meaning all aspects of women's attributes are commodified.¹¹⁷ All women therefore are in danger of harm from commodification since some women's attributes might be worth more. Subsequently, all pregnant women and not just surrogates will want paying. Radin favours unpaid surrogacy to prevent the surrogate's attributes becoming fungible objects and commodities.¹¹⁸

However, paid surrogacy should not excuse commissioning couples or society to regard surrogates as a commodified product or a mere foetal carrier without dignity. People use many parts of their bodies for financial gain - e.g. foot painters their feet, perfumers their noses and sword swallows their throats - while being respected by others. The above advertisement for a surrogate occurred in the USA, but in the UK it is illegal to advertise for a surrogate or a commissioning couple, which prevents requests for specific attributes; I have found no evidence of British commissioning couples selecting surrogate attributes. Indeed, outside of surrogacy people often favour certain characteristics when selecting sexual partners but this does not mean they are treated as commodities. The commissioning couple may feel they are respecting the surrogate's humanity by offering her money as a reward for her actions and believe they are treating her as a slave if they do not pay her. Some

¹¹⁵ Elizabeth S. Anderson, 'Is Women's Labor a Commodity?', *Philosophy and Public Affairs* 19 (1990), 71-92, at 76.

¹¹⁶ *USA Today*, (September 1988), cited in Merrick, 'Selling Reproductive Rights', 166.

¹¹⁷ Radin, 'Market-Inalienability', 1933.

¹¹⁸ *Ibid.*, 1935.

surrogates may regard payment in surrogacy as reflecting their reproductive freedom and economic empowerment.

3.4.3 Claim Two: The Surrogate is Degraded in Paid Surrogacy

Secondly, commissioning couples could commodify and harm surrogates by degrading them. A surrogate's rights, autonomy and emotional needs could be compromised, violated or denied in order to fulfil their demands. The surrogate could have her bodily integrity and inalienable right to the child ignored. Some commissioning couples may want to prevent the surrogate from smoking to protect the baby or feel they have a claim right to associate with the child. The surrogate could feel obliged within an unequal bargaining situation to have an abortion or a caesarean section against her will if the child has been tested positive for a condition such as Down's syndrome for example. Issues such as these are important; the law is able to protect surrogates and what is legal may properly be influenced by what can go wrong, such as a commissioning couple trying to force an abortion. Unfortunately, there is not the space to discuss this issue here in depth, though it will be briefly mentioned in the conclusion to the thesis.

However, commissioning couples (whether paying or non-paying) have a responsibility to respect the surrogate's personhood and intrinsic worth. They may acknowledge her autonomous decision-making capacities, by caring for her emotional well-being and providing enough information for her to give informed, valid consent. A surrogate could be treated well with her rights and privacy respected, so she can maintain her bodily integrity and self-respect while treated as an end. Commissioning couples hoping to become parents after a long wait are more likely to treat her with gratitude for her actions.

They are unlikely to treat her just as a living womb possibly out of fear of upsetting her so she does not keep the baby. The commissioning couple do not have an absolute claim right or control over the woman's body because of payment. They cannot insist on the service being completed, or control the surrogate's behaviour, since they do not own her as a piece of property or as a reproductive slave without autonomy. Therefore, surrogates cannot be subjected to detrimental or degrading treatment. A relational framework could ensure both are treated as ends by respecting their needs, regardless of whether money is exchanged or not.

3.4.4 Claim Three: The Woman is Used as a Mere Means to an End

Thirdly, the commissioning couple could treat the surrogate as a mere means to their end of wanting a child because they have paid her. One commissioning couple regarded surrogacy as a business operation. They treated their surrogate with contempt, not wanting to meet her, know of her physical discomfort or her problems in explaining surrogacy to her own child.¹¹⁹ Such an attitude could lead to fungibilisation, since being used as a mere means neglects a person's individual qualities, treating them as 'expendable, replaceable' by anyone performing similar activities.¹²⁰ Surrogacy could enforce societal expectations of women as just child breeders or reproductive carriers. Mary Warnock considers it 'intrinsically immoral' for surrogates to be used as a means to another's end.¹²¹

¹¹⁹ Overvold, *Surrogate Parenting*, in Merrick, 'Selling Reproductive Rights', 166.

¹²⁰ Thomas E. Hill, Jr., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca, NY: Cornell University Press, 1992), 42-3.

¹²¹ Mary Warnock, 'The Artificial Family', in Michael Lockwood (ed.), *Moral Dilemmas in Modern Medicine* (Oxford: Oxford University Press, 1985), 138-54, at 144.

Kant in his second formulation of the Categorical Imperative wanted every human being to be treated as an end and not 'simply as a means'.¹²² Treating someone as a mere means to an end is unethical for disrespecting their human dignity, however treating someone as a means to an end can be done with respect and the person's consent. There is a difference between treating the surrogate as a mere means to an end with no concern for her interests or humanity and treating her as a means to an end by giving her money for services rendered, respecting her rationality, her welfare and emotions. Most commissioning couples treat their surrogates with respect and dignity.¹²³ The chances of the surrogate being used as a mere means to an end are reduced because none of the commissioning couples in one surrogacy study for example had used surrogacy for convenience, as all had problems trying to conceive.¹²⁴ One surrogate regarded surrogacy as a 'woman-to-woman' relationship, an ongoing and inter-related arrangement and not a 'business arrangement'.¹²⁵

The last three subsections have explored whether surrogates are commodified in paid surrogacy. Firstly section 3.4.2 rejected the idea that surrogacy treats surrogates as mere objects. Secondly, section 3.4.3 dismissed the view that surrogates are degraded. Thirdly section 3.4.4 proposed that surrogates are not a mere means to an end. The next section, 3.5, analyses the effect of exploitation upon the surrogate in paid surrogacy. It will analyse different

¹²² Immanuel Kant, *Groundwork of the Metaphysic of Morals* trans. H. J. Paton (London: Routledge, 1991), 96 and 91.

¹²³ Private conversation with Dr Heléna Ragoné, anthropologist, Boston University, at the Society of Reproductive and Infant Psychology Conference, Birmingham University, 2000.

¹²⁴ MacCallum *et al.*, 'Surrogacy', 1340.

¹²⁵ Eric Blyth, "'I Wanted to be Interesting. I Wanted to be Able to Say 'I've Done Something Interesting with My Life'": Interviews with Surrogate Mothers in Britain', *Journal of Reproductive and Infant Psychology* 12 (1994), 189-98, at 193-4.

types of exploitation, consent in exploitation, exploitation of women and the need for regulations.

3.5 Exploitation and the Surrogate in Paid Surrogacy

3.5.1 A Definition of Exploitation

The last section outlined commodification as broadly relating to everything which is traded for money. It is immoral if people are treated as objects, as mere means to an end, with indignity, with disrespect and regarded as replaceable. Commodification is linked to exploitation because objectification is also called wrongful use exploitation when money is involved. Exploitation is generally a legitimate offer which could involve harm if a person does not receive the monetary worth for a good or service. Wilkinson distinguishes between non-moral and moral forms of exploitation.¹²⁶ If exploitation is used in a non-moral or ‘innocent’ sense,¹²⁷ the use is regarded as acceptable.¹²⁸ For example a person ‘exploits’ their talent to become a professional concert pianist. By contrast, exploitation used in a moral sense has negative connotations, since the exploitee is often harmed, for example a worker earning low remuneration for long hours during a shortage of jobs. Wilkinson, influenced by philosopher John Harris, identifies two types of ‘moral’ exploitation: firstly, ‘disparity of value’ exploitation and, secondly, ‘wrongful use’ exploitation.¹²⁹

¹²⁶ Wilkinson, *Bodies for Sale*, 10.

¹²⁷ *Ibid.*, 11.

¹²⁸ *Ibid.*, 22-3.

¹²⁹ *Ibid.*, 13-14 and 34.

Firstly, disparity of value exploitation involves an exchange with a disparity in the value of the goods or services, e.g. being underpaid or overcharged.¹³⁰ It is wrong because the exploitee is used unfairly in a 'bad deal'¹³¹ and Allen Wood believes exploitation occurs in all market transactions involving participants 'in unequal bargaining positions'.¹³² Jeffery Reiman regards exploitation as involving unpaid labour.¹³³ However, Alan Wertheimer suggests a case is not exploitation if B makes a gift to A and volunteers his labour,¹³⁴ as a voluntary and altruistic transfer of disproportionate value to A.

Secondly, wrongful use exploitation (without monetary involvement) is called instrumentalisation, a type of objectification, where the exploiter wrongs the exploitee by using them as a mere means or a mere fungible object. Wilkinson says: 'A exploits B...if A treats B merely as a tool for, or as means of, achieving A's goals'.¹³⁵ If money is involved then wrongful use exploitation is called commodification, as commodification is instrumentalisation but with money.¹³⁶ Wilkinson regards exploitation as referring only to disparity of value exploitation,¹³⁷ preferring to regard wrongful use exploitation as instrumentalisation.

Wertheimer distinguishes between non-consensual and consensual exploitation.¹³⁸ Non-consensual exploitation involves invalid consent and fails to protect the vulnerable. Consensual exploitation is entered into voluntarily,

¹³⁰ *Ibid.*, 14.

¹³¹ *Ibid.*, 25 and 34.

¹³² Allen W. Wood, 'Exploitation', *Social Philosophy and Policy* 12 (1995), 136-58, at 156.

¹³³ *Ibid.*, 147 citing Jeffrey Reiman, 'Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen', *Philosophy and Public Affairs* 16 (1987), 3-41.

¹³⁴ Alan Wertheimer, *Exploitation* (Princeton, NJ: Princeton University Press, 1996), 25.

¹³⁵ Wilkinson, *Bodies for Sale*, 33.

¹³⁶ *Ibid.*, 47-8.

¹³⁷ *Ibid.*, 24.

¹³⁸ Wertheimer, *Exploitation*, 205.

allowing both the exploiter and the exploitee to benefit.¹³⁹ Exploitation therefore can be mutually advantageous and represent a win-win situation for both exploiter and exploited, even though it is still a bad deal for the exploited. Wertheimer warns that A's action can still be exploitative even if B has given voluntary and informed consent, since B could suffer a wrongful loss according to a 'fairness' baseline even in a consensual mutually advantageous transaction and B may resent A's exploitation.¹⁴⁰ An unemployed teacher may agree to work as a cover supervisor even though it is less money, but is still more than unemployment benefit.

It is important to look at the exploiter's motivation and see if they are trying to advance their own interests at the expense of the exploitee's interests by avoiding justice for the exploitee and by avoiding acting in a virtuous, honest and honourable manner. More emphasis should be placed upon the interaction between the exploiter and the exploitee so neither side is deceived, but both can benefit without harm and while maintaining the virtue and character of each other with integrity, openness, trust, care and justice.

Exploitation should not be confused with coercion. Exploitation often involves a legal offer which can be turned down, whereas coercion usually involves a threat which will worsen the person's situation if refused and is often performed under duress. A's proposal can be exploitative *and* coercive,¹⁴¹ e.g. a surrogate benefits herself at the expense of her commissioning couple by threatening to abort the baby if they do not pay her. A's proposal can be coercive and non-exploitative,¹⁴² e.g. a commissioning couple coerces a

¹³⁹ *Ibid.*, 12.

¹⁴⁰ *Ibid.*, 205 and 251-2.

¹⁴¹ Alan Wertheimer, *Coercion* (Princeton, NJ: Princeton University Press, 1987), 225-6.

¹⁴² *Ibid.*, 225-6.

surrogate to do something that is in the surrogate's interest but does not benefit the couple such as getting her to exercise. Wertheimer believes A's proposal can be 'exploitative and non-coercive',¹⁴³ e.g. a surrogate charges a commissioning couple a very high price.

Exploitation in surrogacy can take many forms including 'disparity of value' where surrogates receive a lower rate or commissioning couples are overcharged (3.5.2). Non-moral exploitation involves surrogates exploiting their fertility and ease of giving birth (3.5.3). Exploitation can be connected with consent (3.5.4) and be classed as wrongful use or commodification (3.5.5). These points will now be critically explored with the problem or issue stated, followed by possible solutions.

3.5.2 Exploitation for Not Enough Pay – 'Disparity of Value'

Surrogacy could be exploitative and unfair to the surrogate, if she does not receive enough money. A surrogate could be exploited by a surrogacy agency, refusing to give her a fair share, despite high fees charged to the commissioning couple, due to wanting large profits.¹⁴⁴ In Britain 69% of surrogates receive under £5,000 and 3% earn over £10,000.¹⁴⁵ In America, surrogates receive only a quarter (\$0 to \$12,000) of the total fees paid by the commissioning couple, with other fees covering legal, medical, psychological and insurance services.¹⁴⁶ Surrogacy pay is low if calculated hourly and is

¹⁴³ *Ibid.*, 225-6.

¹⁴⁴ The Office of Technology Assessment in 1988 claimed that every \$4 paid by the commissioning couple only \$1 goes to the surrogate, see Office of Technology Assessment, U.S. Congress, *Infertility: Medical and Social Choices* (Washington D.C.: Government Printing Office, 1988) 276, cited in Merrick, 'Selling Reproductive Rights', 163.

¹⁴⁵ *The Brazier Report*, 5.5-5.6.

¹⁴⁶ Ragoné, *Surrogate Motherhood*, 34.

below the minimum wage, especially as surrogates provide a twenty-four hour service with high risks involved. Surrogates may feel exploited compared to other professionals in surrogacy. Doctors are still paid if IVF treatments fail, but surrogates may receive nothing if a miscarriage or stillbirth occurs. Some may feel increasing the money given in surrogacy could make it more coercive and difficult to resist, compromising the voluntariness of the surrogate's decision.

However, offering a surrogate a minimum wage could prevent exploitation from low pay; ensuring women are offered fair compensation for their time, effort and gestational service. Until 30th September 2011, the minimum wage in Britain is £5.93 per hour for an adult over 21, which when applied to surrogacy is £35,864.64, for 24 hours a day for nine months. Such a figure is high in comparison to the average British surrogacy fee of £5,000. Alternatively, a surrogate paid £5.93 for 37 and a half hours per week, would receive £8,005.50. However, surrogates paid a minimum wage may subsequently class it as a mere job. Screening surrogates could discover if they are motivated solely by money without care for the child or the commissioning couple. Surrogates could work while pregnant. Accusations of baby selling and exploitation could be lessened if surrogates receive payment for stillbirths or miscarriages if not her deliberate fault.

3.5.3 Mutually Beneficial Exploitation

Another type of exploitation is called non-moral or innocent exploitation. Even though I disagree with exploitation, surrogacy here could be classed as mutually beneficial exploitation, performed without harm. A surrogate could exploit her fertility and ability to gestate a baby. It can be questioned whether

such an arrangement should be considered 'exploitative', as it could be a consensual, voluntary and rational decision, reflectively entered into with informed and valid consent. The surrogate and the commissioning couple could both benefit without worsening their situation within a mutually reciprocal agreement. The surrogate could become better off by escaping poverty and other poorly paid jobs, and it could improve her situation giving her more choice and enhancing her freedom without making her worse off if she does not do it. The payment could reflect the gratitude, kindness, beneficence, benevolence, generosity and commissioning couple's respect towards her. The money could be regarded as reciprocal payment and a reward for the gift they have received within a co-operative and interpersonal framework. The commissioning couple may hold the surrogate in high esteem and regard the money given to her as a generous gift, demonstrating their gratefulness, appreciation and thankfulness. They may regard the payment as reflecting their virtuous character. The commissioning couple may feel an obligation towards her and believe that until they have paid the surrogate, they are in a debt of gratitude to her. After all, as David Heyd indicates, Thomas Aquinas suggested 'a supererogatory gift deserves a slightly larger gift in return'.¹⁴⁷ Such reciprocal giving will benefit the surrogate and the commissioning couple in a mutually advantageous win-win situation, since altruism is all too often expected of women and usually moral agents are not expected to benefit from a moral action. However, Wertheimer warns that mutually exploitative arrangements could still be unfair and exploit the surrogate despite providing a net benefit. But if she receives fair compensation then she is not exploited.¹⁴⁸

¹⁴⁷ David Heyd, *Supererogation: Its Status in Ethical Theory* (Cambridge: Cambridge University Press, 1982), 38 n. 2.

¹⁴⁸ Wertheimer, *Exploitation*, 107-8.

3.5.4 Consent

In order to assess whether surrogacy is exploitative we need to consider the issue of consent which is linked to exploitation. Wertheimer regards a defect in consent as a condition of exploitation because it comes from the view that exploitation must be harmful.¹⁴⁹ The *Brazier Report* considered some surrogates as not giving valid consent.¹⁵⁰ It believed 'payments create a danger that women will give a less than free and fully informed consent to act as a surrogate',¹⁵¹ and women should not become 'professional surrogates'.¹⁵² Such invalid consent could be a sign of exploitation. The surrogate's invalid consent could be due to her incompetence, inexperience,¹⁵³ involuntary, and defective consent. Some women may be exploited by not having enough information or time to reflect to make a fully voluntary choice or they may underestimate their bonding to the child due to 'cognitive and emotional limitations' and learn to regret their decision.¹⁵⁴ Money and coercion could compromise the voluntariness of the surrogate's choice and offering more money to prevent exploitation could worsen the situation, making the consent unfree. Surrogates may feel exploited even after giving voluntary and informed consent, due to low pay.

¹⁴⁹ *Ibid.*, 249.

¹⁵⁰ *The Brazier Report*, 6.2.

¹⁵¹ *Ibid.*, (i) paragraph four.

¹⁵² *Ibid.*, 5.17.

¹⁵³ Wilkinson, *Bodies for Sale*, 76-7.

¹⁵⁴ Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation', *Philosophy and Public Affairs* 21 (1992), 211-39, at 214 and 227-9.

However, exploitation is considered not to occur if 'exploitees' enter the relationship voluntarily.¹⁵⁵ Wertheimer does not think exploitees voluntarily consent to actions which are detrimental to their interests.¹⁵⁶ Wood suggests exploitees are willing to be exploited due to no worse alternatives.¹⁵⁷ This could mean that the exploitees have chosen to be exploited as giving them a slightly better alternative to their present situation. Therefore Wood, unlike Wilkinson, does not regard defective consent part of defining exploitation.¹⁵⁸

The surrogate could give valid consent with clear, accurate and relevant information, so she understands what is being asked of her and the possible risks and consequences involved. Therefore the risk of harm from non-consensual exploitation is lowered. Even so, surrogates should not have to consent to a bad deal. Section 3.8 explores the need for clear regulations. Wertheimer believes people can consent to something without experiencing it, but to prevent miscalculation in surrogacy he suggests surrogates should have already given birth and have experienced bonding or receive 'careful psychological screening'.¹⁵⁹

3.5.5 Wrongful Use Exploitation (Instrumentalisation or Commodification)

In section 3.5.2 above we looked at the first type of moral exploitation called disparity of value exploitation, where a person is exploited for not receiving an appropriate amount. We now consider the second type of moral exploitation called wrongful use exploitation which involves instrumentalisation and no

¹⁵⁵ *Ibid.*, 224.

¹⁵⁶ Wertheimer, *Exploitation*, 249.

¹⁵⁷ Wilkinson, *Bodies for Sale*, 79.

¹⁵⁸ *Ibid.*, 79.

¹⁵⁹ Wertheimer, 'Two Questions About Surrogacy and Exploitation', 228.

pay. Here people are regarded as 'fungible',¹⁶⁰ usually for the exploiter's benefit. The exploiter substantially harms the exploitee by ignoring their interests and welfare, making them worse off.¹⁶¹ Wrongful use exploitation involving payment is known as commodification¹⁶² (see section 3.3 and 3.4). Therefore, both poor and wealthier surrogates could be exploited due to being degraded or used as a mere means to an end from their paying or non-paying commissioning couple. Surrogate Kim Cotton found that surrogacy within families was more problematic than using unknown surrogates, as families rarely gave their known surrogates expenses, making them feel used and unfulfilled.¹⁶³

However, participants may not feel exploited and may want to avoid exploitation. Friends or family members should not feel compelled to be unpaid, especially as some could prefer to be paid to reflect their self-interest as a rational choice. One surrogate for example felt that her payment represented a commitment by her commissioning couple.¹⁶⁴ A paid surrogate could have a commissioning couple who respect her human flourishing by respecting her autonomy and rights. Some commissioning couples rejected 'closed' surrogacy programmes as exploiting surrogates. These programmes offered no interaction between surrogates and commissioning couples during the pregnancy, until the child's adoption at the end and gave no psychological support or counselling to surrogates.¹⁶⁵

¹⁶⁰ Wilkinson, *Bodies for Sale*, 47.

¹⁶¹ *Ibid.*, 42.

¹⁶² *Ibid.*, 47-8.

¹⁶³ Kim Cotton, 'Surrogacy Should Pay', *British Medical Journal* 320 (2000), 928-9, at 928.

¹⁶⁴ Kirsty Stevens with Emma Dally, *Surrogate Mother: One Woman's Story* (London: Century, 1985), 27.

¹⁶⁵ Ragoné, *Surrogate Motherhood*, 18.

Attention now turns to two main claims made by those who view surrogacy as exploitation, namely that poor women and women as a class are exploited, and that both paid and unpaid surrogacy are exploitative. Once again negative positions will be given first followed by my more positive understanding of the situation. The section helps to lay the foundations for whether both paid and unpaid surrogacy can co-exist (which will be explored in chapter four).

3.5.6 Claim One: Poor Women and Women as a Class are Exploited in Surrogacy

Another concern of paid surrogacy is that richer commissioning couples could take unfair advantage and exploit the situation of poor and uneducated surrogates, leading to the exploitation of women generally in society. Poverty may compromise the surrogate's consent, making surrogacy non-consensual exploitation. The commissioning couple could deliberately exploit the surrogate's ignorance by not telling her she can keep the child if she changes her mind. Andrea Dworkin believes that society allows the sale of women's reproduction to ensure women's survival.¹⁶⁶ Gena Corea suggests women's exploitation is linked to women's economic status; earning less than men and for being discriminated against at work.¹⁶⁷ In Australia in the early 1980s, about half of the inquiries about surrogacy came from women who were divorced, single, widowed, and wives with terminally ill husbands.¹⁶⁸ John Stehura, President of the Bionetics Foundation believed that the surrogacy 'industry' should go to poorer parts of the USA, where \$5,000 would be

¹⁶⁶ Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females* (London: The Women's Press, 1983), cited in Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (London: The Women's Press, 1988), 228.

¹⁶⁷ Corea, *The Mother Machine*, 228.

¹⁶⁸ Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood: Brave New Families?* (Westport, CT: Praeger 1994), 58.

acceptable (which was half the going rate).¹⁶⁹ Stehura also suggested \$1,000, a tenth of the surrogacy fee, could be paid to third world women.¹⁷⁰

However, I suggest it is not the surrogate's fault that the commissioning couple are infertile and it is not the couple's fault that the surrogate may be underprivileged. The commissioning couple do not insist upon financially poor women coming forward, since the practice is open to richer middle-class women too. The involvement of a poor woman does not necessarily make a practice intrinsically exploitative. Ragoné discovered surrogates usually have lower education levels and belong to a lower socio-economic class compared to the commissioning mothers. However, surrogates are not bothered by this and did not feel exploited but made an informed choice, seeing it not as a job but as a calling or vocation, knowing it was right for them.¹⁷¹ The skilful poor are often employed by richer others within a private home setting without exploitation, such as babysitters, child minders or nannies.

The surrogate's payment could be treated as a fee for a professional and skilful gestational service similar to other professionals such as doctors and lawyers. The money could reflect her dignity as a woman, her liberty and autonomy. Rae, an opponent of paid surrogacy, admits that statistics on 600 surrogacy cases indicate that potential for exploitation on a wide scale has not materialised, even though he believes the potential for exploitation and abuse exists.¹⁷² Most women who become surrogates are not desperately poor, with

¹⁶⁹ Corea, *The Mother Machine*, 214. The Bionetics Foundation closed in 1989, see <http://bionetics.tripod.com> assessed 15 September 2011.

¹⁷⁰ Rita Arditti, 'The Surrogacy Business', *Social Policy* 18 (1987), 42-6, at 45.

¹⁷¹ Olga B. A. van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy', *Journal of Reproductive and Infant Psychology* 21 (2003), 145-61, at 146, referring to Ragoné, *Surrogate Motherhood*, 56.

¹⁷² Rae, *The Ethics of Commercial Surrogate Motherhood*, 57.

the majority of them earning about \$25,000 a year.¹⁷³ The average surrogate attended college for two years, is married and has 'all the children she and her husband want', having completed her family.¹⁷⁴ Andrews indicates most surrogates do not do it for basic needs such as food or health care: for example Mary Beth Whitehead paid for the education of her children, Kim Cotton redecorated her home, and another wanted a car. Some surrogacy agencies reject women below some income levels to avoid accusations of exploitation.¹⁷⁵ However, it could be suggested that it is discriminatory to prevent poorer women from becoming surrogates, especially if they have given valid consent and have thought deeply about the practice, see also section 3.6.2 below which discusses the 'double bind'.

Paid surrogacy could allow some women to enter the public arena and receive money alongside a possible redistribution of economic power by taking them out of the unpaid private sphere. They are 'free agents' who make a 'deliberate and informed choice' to become surrogates and could benefit financially and emotionally by increasing their self-worth by helping others.¹⁷⁶ Surrogates often personally benefit from the money received, by spending it on their education.¹⁷⁷

3.5.7 Claim Two: Paid Surrogacy and Unpaid Surrogacy are Exploitative

¹⁷³ *Ibid.*, 57 n. 103.

¹⁷⁴ H. M. Malm, 'Commodification or Compensation: A Reply to Ketchum', *Hypatia* 4 (1989), 128-35, at 134, citing Itabari Njeri 'Surrogate Motherhood: A Practice That's Still Undergoing Birth Pangs', *Los Angeles Times*, 22 March 1987. Some Christians may reject the phrase 'completed their family' believing God may give more children later.

¹⁷⁵ Andrews, 'Surrogate Motherhood', 174.

¹⁷⁶ Ken Daniels and Karyn Taylor, 'Surrogacy: The Private Troubles and Public Issues', *Community Mental Health in New Zealand* 6 (1991), 28-50, at 39.

¹⁷⁷ Private conversation with Dr van der Akker Birmingham University (September 2000).

Surrogacy includes concerns that women are exploited for being paid, but are also exploited if the pay is low or if they are unpaid. Both points of view represent different theoretical perspectives within feminism which will now be explored.

3.5.7 (i) Do Women Become Victims if Paid?

The first group of feminists to be explored is radical feminists and their view towards payment. Radical feminists prefer unpaid surrogacy, believing that paid surrogates are exploited and are victims of men's demands for a genetic child. Mary Shanley suggests paid surrogacy occurs within structures of institutional sexism with domination and subordination between men and women. She fears that women's self-esteem could come from being pregnant and that men might buy control over women's reproduction with a resulting objectification and commodification of pregnancy.¹⁷⁸ Some regard surrogacy as exploitative for involving 'economic duress' because women feel they have to become surrogates or hand the child over for money, thus making their choice unfree and socially conditioned, instead of being a voluntary and informed choice.¹⁷⁹ The offer could be 'exploitatively high', which could include 'psychological compulsion', making it difficult to 'resist the offer',¹⁸⁰ with the result that the pay could affect the woman's consent and judgement.¹⁸¹ Consequently women may alienate their relationship to the child by denying any emotional relationship to it. Women who believe they choose to become surrogates could act under a false consciousness by denying the economic

¹⁷⁸ Mary Lyndon Shanley, "'Surrogate Mothering' and Women's Freedom: A Critique of Contracts for Human Reproduction', *Signs* 18 (1993), 618-39, at 628-9.

¹⁷⁹ John Lawrence Hill, 'Exploitation', *Cornell Law Review* 79 (1994), 631-99, at 638-40 and 643.

¹⁸⁰ *Ibid.*, 633.

¹⁸¹ Wertheimer, *Exploitation*, 108.

pressure they are under, as they may not choose to be surrogates if they were wealthier.

However, Wertheimer suggests that reducing exploitation in surrogacy by paying the surrogate more is not advocated in society, as unpaid surrogacy is seen as '*less* exploitative than paid surrogacy'.¹⁸² Increased pay is not suggested since it may make the surrogates feel they were doing a sordid activity and it is seen as immoral for procreative labour to be commodified.¹⁸³ 'Social norms' could deem it 'inappropriate' for a surrogate to ask for more money.¹⁸⁴ Indeed, by ensuring they receive fair compensation surrogates could prevent exploitation by disparity of value from low pay.

3.5.7 (ii) Does Not Paying Women Reinforce Stereotypes?

In contrast to the radical feminists above who believe paid surrogacy is exploitative and surrogacy should be unpaid, liberal and socialist feminists usually believe unpaid surrogates are exploited and discriminated against. Presently in Britain all surrogates should be unpaid, receiving expenses only. Unpaid surrogacy could be regarded as perpetuating female inequality and altruistic expectations, thus fulfilling women's stereotypical role as selfless, self-sacrificing, caregivers for others, unable to financially benefit. Anderson regards surrogacy as taking advantage of non-autonomous 'self-effacing "altruism"' which women gain from social conditioning.¹⁸⁵ Shanley suggests the State, by banning paid surrogacy, could treat the reproductive service like women's domestic labour 'as unpaid, noneconomic acts of love and nurturing

¹⁸² *Ibid.*, 101.

¹⁸³ *Ibid.*, 102.

¹⁸⁴ Wertheimer, 'Two Questions About Surrogacy and Exploitation', 231.

¹⁸⁵ Anderson, 'Is Women's Labor a Commodity?', 91.

rather than as work and real economic contributions to family life'.¹⁸⁶ Preventing paid surrogacy, for Shanley, denies women 'the full and effective proprietorship of [their] bod[ies]'.¹⁸⁷

Some want unpaid surrogacy banned. They believe not having unpaid surrogacy would not compromise the surrogate's autonomy. Surrogates are considered not to acquire altruistic motives autonomously.¹⁸⁸ Some women may be unaware that they have been socially conditioned to become a surrogate, from family, friends, work colleagues or society as a whole expecting women to bear babies. Therefore, women offering to become a surrogate could be given counselling to explore societal pressure to bear a child.

Having unpaid surrogacy only could make some surrogates resentful, feeling that it is unjust for the commissioning couple to benefit, and preferring payment for their service, time and risks involved. A psychiatrist in Michigan found 90% of women screened to become surrogates wanted payment.¹⁸⁹ Alan Ryan believes if you make a free gift to someone you are not exploited, but suggests 'the exploited are forced to accept less than they are entitled'.¹⁹⁰ If a person voluntarily assumes a risk and is unpaid or does not receive a benefit then according to Wertheimer the person is exploited,¹⁹¹ especially if they did

¹⁸⁶ Shanley, "'Surrogate Mothering" and Women's Freedom', 623.

¹⁸⁷ *Ibid.*, 623.

¹⁸⁸ Wertheimer, *Exploitation*, 117.

¹⁸⁹ Elizabeth Bettenhausen, 'Hagar Revisited: Surrogacy, Alienation and Motherhood', *Christianity and Crisis* 47 (1987), 157-9, at 158.

¹⁹⁰ Alan Ryan, 'Exploitation, Justice, and the Rational Man', in J. Gay Tulip Meeks (ed.), *Thoughtful Economic Man: Essays on Rationality, Moral Rules and Benevolence* (Cambridge: Cambridge University Press, 1991), 29-49, at 44 cited in Wertheimer, *Exploitation*, 249.

¹⁹¹ *Ibid.*, 85-6.

not intend to make a gift of their services since they might want to gain.¹⁹² Even Rae, who is opposed to paid surrogacy, admits the demands of surrogacy are 'too burdensome to be supplied altruistically'.¹⁹³ Socialist feminists may support paid surrogacy as compensation for providing a gestational service, as payment for labour traditionally unpaid, along with 'all birthing...housework and family maintenance' to be paid, which is seen as exploitative for being unpaid.¹⁹⁴ Payment could ensure women are not taken for granted and a woman's altruism is not exploited unfairly. An American surrogacy agency allows surrogates to name their own fee as they often unaware that they can be paid.¹⁹⁵ An infertility clinic suggested unpaid surrogacy can succeed, but some commissioning mothers were unable to find surrogates and were denied treatment.¹⁹⁶ The Californian court case *Johnson v. Calvert*,¹⁹⁷ indicated that despite the commissioning couple being richer than surrogates, surrogacy does not exploit poor women, since economic need does not exploit people into low paid jobs.

Liberal feminists emphasise women making an autonomous choice to become a paid surrogate with informed and valid consent. Surrogates can choose how to use her body to achieve her interests and those of the commissioning couple. Radin acknowledges some feminists believe 'power in the market is power,

¹⁹² *Ibid.*, 86.

¹⁹³ Rae, *The Ethics of Commercial Surrogate Motherhood*, 48.

¹⁹⁴ Jane Ollenburger and John Hamlin, "'All Birthing Should be Paid Labor": A Marxist Analysis of the Commodification of Motherhood', in Herbert Richardson (ed.), *On The Problem of Surrogate Parenthood: Analyzing the Baby M Case* (Lewiston, NY: Edwin Mullen Press, 1987), 57-68, at 66.

¹⁹⁵ Ragoné, *Surrogate Motherhood*, 29.

¹⁹⁶ Peter R. Brinsden *et al.*, 'Treatment by *In Vitro* Fertilisation with Surrogacy: Experience of One British Centre', *British Medical Journal* 320 (2000), 924-8, at 926-7.

¹⁹⁷ *Johnson v. Calvert*, 851 P2d 776, 785 (Cal. 1993).

and power is liberating'.¹⁹⁸ Sharyn Roach Anleu indicates monetary involvement does not have to be exploitative by definition as we often pay for services.¹⁹⁹

3.5.7 (iii) Reasons for Unpaid Surrogates

So far we have seen that radical feminists want only unpaid surrogacy, out of fears that men in paid surrogacy exploit poor surrogates. We saw above that liberal and socialist feminists regard unpaid surrogacy as exploitative for fulfilling societal stereotypes of women. However, I prefer both paid and unpaid surrogacy to operate together and suggest that it is paternalistic to deny women the opportunity to be an unpaid surrogate if they want as they may not regard it as undignified. By allowing both paid and unpaid surrogacy to operate then those who want to do it unpaid will make it their genuine choice, instead of being expected not to receive a fee by societal pressure or by the law.

Brenda Baker indicates that some do not want unpaid surrogacy to occur as it endorses stereotypes of women as giving and self-sacrificing. However, Baker criticises this view as restricting women's behaviour.²⁰⁰ She wants women to be made aware of 'gender-specific roles and gender stereotyping' but not to limit or proscribe their roles and choices.²⁰¹

As long as the surrogates give informed consent based upon detailed knowledge and are aware of possible dangers of coercion and oppression,

¹⁹⁸ Radin, *Contested Commodities*, 149.

¹⁹⁹ Sharyn L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy', *Acta Sociologica* 33 (1990), 63-74, at 71.

²⁰⁰ Brenda M. Baker, 'A Case for Permitting Altruistic Surrogacy', *Hypatia* 11 (1996), 34-48, at 43.

²⁰¹ *Ibid.*, 43.

surrogacy for some women will affirm values important to them and aid their human flourishing. There may be psychological and physical risks to the surrogate but all pregnancy involves risks and the surrogate needs to be fully informed of possible dangers. Therefore, if all participants are aware of the dangers of exploitation in surrogacy, it could be possible for both paid and unpaid surrogacy to operate together, which will be explored in chapter four.

3.5.7 (iv) Paid and Unpaid Surrogacy Can Operate Together

The next chapter will investigate if payment involves a reduction in altruism and whether paid and unpaid surrogacy can co-exist. It will be suggested that a paid or an unpaid surrogate could have virtuous motives and care for her commissioning couple and the child too.

Section 3.5 has explored possible surrogate exploitation in paid surrogacy. It suggested that interactions include justice, care and virtue to prevent exploitation and deception (3.5.1). Disparity of value exploitation could be reduced by giving surrogates a minimum wage, screening their motives and giving them a fee if a miscarriage or still birth occurs (3.5.2). It asked whether a non-moral exploitation of surrogates 'exploiting' their fertility is really exploitation, as they make a voluntary choice with valid consent to become surrogates, are not harmed and benefit from their actions (3.5.3). Clear information and regulations are needed to alert surrogates to possible problems and to prevent non-consensual exploitation where surrogates give invalid consent (3.5.4). Paid or unpaid surrogates should not be treated as an object or degraded (3.5.5). Paid surrogates are not always desperately poor and commissioning couples are open to richer women becoming their surrogate (3.5.6). It was tentatively suggested that both paid and unpaid surrogacy can

co-exist (which will be explored in the next chapter), unlike the radical feminists who only want unpaid surrogacy to prevent exploitation by men of poor women or liberal and social feminists who only want paid surrogacy to prevent self-sacrifice (3.5.7).

Another major area of concern with paid surrogacy is whether the surrogate and the commissioning couple are coerced. The following section (3.6) explores coercion in three subsections with 'A' as the coercer and 'B' as the coerced. Firstly, coercion is defined (3.6.1); secondly the 'double bind' is investigated (3.6.2); thirdly whether surrogates are coerced by their family and friends to enter surrogacy (3.6.3); and fourthly the issue of whether surrogates are coerced to hand the child over is explored (3.6.4)

3.6 The Surrogate and Coercion

3.6.1 The Definition of Coercion

The last section explored exploitation. Exploitation is a legal offer which can be turned down. However, coercion is a threat of harm which would make the person worse off if unperformed, often leading to an action done under duress. For example, a car driver could be coerced at gun point to drive a gang of thieves away from a robbery. However, if B needs money and not knowing this, A offers them money for sexual favours, and if B would be worse off if they said no, then this is not usually regarded as coercion. The person making the offer A, is making an illegal offer as paying for sexual favours is illegal, and A's offer could be regarded as exploitation not coercion. With coercion it is a deliberate attempt to cause harm by active or ommissive harm and is considered a threat and not an offer.

Wertheimer defines two types of coercion.²⁰² The first is non-moral, value-free and descriptive. The second is a normative moral judgement,²⁰³ usually with negative moral connotations²⁰⁴ and is linked to the wrongful use of people, violation of autonomy and invalid consent.²⁰⁵ Attention in this section will focus upon coercion as a normative moral judgement. Wilkinson regards coercion as a proposal where A threatens B with harm relative to a normative baseline, unless B does what A wants.²⁰⁶ He believes the coercer is usually responsible for the coercee's situation and distinguishes between active and omissive coercion. Active coercion threatens harm if the coerced refuses to do the action. Omissive coercion involves a threat of omissive harm, when the coercer has a duty to do something for the coerced, but threatens not to do it unless the coerced does what he wants. Therefore, A could have a duty to alleviate the situation of B even if they did not cause that situation.²⁰⁷ If a lifeboat rescuer refuses to rescue a dog at sea unless the owner pays them a high fee, then it is a coercive offer and is a threat, as rescuers normally do it for free and have an obligation and expectation to rescue the dog. A vet does not coerce if she offers to heal your dog if you pay her as she is not a rescuer but a professional. Wertheimer indicates that threats coerce, limit freedom, involve involuntarily responses and are usually not turned down. By contrast, offers do not coerce, but enhance freedom, involve voluntarily acceptance, and can be turned down. A's proposal may include both a threat and an offer (what Michael Taylor calls a 'thoffer'), e.g. marry me or I will kidnap you. Wertheimer indicates a 'thoffer' can be a threat, since if

²⁰² Wertheimer, *Coercion*, xi, see Wilkinson, *Bodies for Sale*, 85-6.

²⁰³ *Ibid.*, 85-6.

²⁰⁴ *Ibid.*, 82.

²⁰⁵ *Ibid.*, 2.

²⁰⁶ *Ibid.*, 97.

²⁰⁷ *Ibid.*, 127-8.

B rejects A's proposal 'B will be worse off than in the relevant baseline position'.²⁰⁸ Wilkinson does not think coercion always has to be wrong, 'all things considered'; it may sometimes be justified, such as to save a life.²⁰⁹

Attention will now focus on whether paid surrogacy is a coercive 'double bind' offer, whether families or friends of the surrogate coerce her to enter surrogacy and whether the commissioning couples use coercion to make surrogates hand the child over. Once again the negative points will be placed first, followed by a more positive counter argument, which I tend to favour.

3.6.2 The Double Bind

Radin believes surrogacy could be problematic for creating a 'double bind' for women. Paid surrogacy could empower and liberate poor, uneducated women from poverty, overcome powerlessness and oppression, but with a lower standard of human flourishing.²¹⁰ However, allowing paid surrogacy could oppress, disempower and degrade poor, 'ignorant women', as their reproduction, features and genes are seen as fungible in order to perpetuate a male's genes,²¹¹ thus reinforcing class and gender oppression,²¹² leading to inferior human flourishing.²¹³ But not allowing paid surrogacy could appear 'harmful or disempowering to [the] poor'.²¹⁴ Denying poor women the opportunity to sell something could harm their personhood,²¹⁵ and keep 'them

²⁰⁸ Wertheimer, *Coercion*, 204. Wilkinson, *Bodies for Sale*, 90.

²⁰⁹ Wilkinson, *Bodies for Sale*, 87-9.

²¹⁰ Radin, 'Market-Inalienability', 1915-16 and 1930.

²¹¹ *Ibid.*, 1930.

²¹² *Ibid.*, 1916.

²¹³ *Ibid.*, 1930.

²¹⁴ *Ibid.*, 1911 n. 226.

²¹⁵ *Ibid.*, 1910-11.

out of the economic mainstream',²¹⁶ which could be a burden, but maybe for the best.²¹⁷ Therefore the possibility of a double bind is created.²¹⁸

It is possible that poor people may be unfree to decline an enormous offer, especially if there are no alternatives. However, they could still give valid consent to surrogacy by deliberating carefully, using rational reflection.²¹⁹ Society could ensure there are alternatives to paid surrogacy, to prevent poor women feeling coerced to become surrogates against their will. A woman could then decide for herself if she is coerced and she may not feel coerced. Surrogate Kirsty Stevens rejected an offer from an American commissioning couple which included £60,000, paying off her mortgage along with travel, medical and legal expenses. She thought they were trying to rush the decision by making an offer you cannot refuse.²²⁰ Instead, she wanted a relationship with her couple,²²¹ preferring surrogacy to be done from trust and friendship and not as a contract.²²² A surrogate may believe she is using her free will to act in an empowered manner because she enjoys pregnancy and wants to give another a child. She has to consider the advantages of furthering her interests with the money received against possible negative effects of handing the child over, compared to the lost opportunity cost of not participating on her welfare, such as not escaping poverty or improving her career prospects.

It may be that only agents and not a situation of poverty can coerce by threatening harm relative to a person's normative baseline, but the threat of

²¹⁶ *Ibid.*, 1916.

²¹⁷ *Ibid.*, 1915.

²¹⁸ *Ibid.*, 1911 n. 226.

²¹⁹ Wilkinson, *Bodies for Sale*, 119-20.

²²⁰ Stevens with Dally, *Surrogate Mother*, 15.

²²¹ *Ibid.*, 21.

²²² *Ibid.*, 32-3.

poverty could be used to coerce another into doing what the coercer wants.²²³ A commissioning couple could ommissively coerce a poor woman into surrogacy if they are responsible for her poverty and if they refuse to fulfil their obligation to help her, unless she becomes a surrogate and hands a child over to them. However, most commissioning couples do not create the surrogate's poverty, unless possibly known well to her and, by making her an offer, they are rescuing her from a situation of poverty and are not coercing her.²²⁴ A commissioning couple may 'have no special obligation to help potential surrogates without demanding anything in return'.²²⁵ Surrogates needing money are not necessarily being coerced, because if they refuse the offer they are 'not deprived of anything'.²²⁶ The offer from the commissioning couple is a proposal to make her better off with regard to her baseline and is not a threat and is therefore uncoercive.

Commercial surrogacy is seen to involve hidden class exploitation, as those who can afford it are usually middle-class, rich and powerful whereas surrogates are poor working-class housewives without power or qualifications. In the Baby M case, the commissioning couple, the Sterns, had professional degrees and a family income of over \$90,000. However the surrogate, Mary Beth Whitehead, had dropped out of school²²⁷ and had a family income of \$28, 000, but her home was in repossession. William Winslade reported that 40% of altruistic surrogates were on welfare or unemployed.²²⁸ Class

²²³ Wilkinson, *Bodies for Sale*, 127.

²²⁴ *Ibid.*, 128.

²²⁵ Wertheimer, 'Two Questions About Surrogacy and Exploitation', 226.

²²⁶ John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, NJ: Princeton University Press, 1994), 141.

²²⁷ H. E. Baber, 'For the Legitimacy of Surrogacy Contracts', in Richardson (ed.), *On The Problem of Surrogate Parenthood*, 31-40, at 37-8.

²²⁸ William J. Winslade, 'Surrogate Mothers: Private Right or Public Wrong?', *Journal of Medical Ethics* 7 (1981), 153-4, at 153-4.

differences could lead to unequal bargaining and power between the participants. However, Joan Einwohner notes that the surrogate and her spouse are often 'in their twenties' and the commissioning couple 'in their thirties'; the surrogate's income is similar to other families in their twenties and therefore they are not needy.²²⁹

3.6.3 Are Women Coerced by Their Family and Friends to Become Surrogates?

A woman, against her better judgement, could be coerced into surrogacy not by money, but by demands from her family, friends, work colleagues to become an unpaid surrogate. J. Harvey suggests that related donors are under 'heavy psychological and emotional pressure'.²³⁰ For example, Alejandra Munoz was an illegal Mexican immigrant brought into the USA. She was told by her family she would be impregnated with an embryo, which would be washed out and implanted into her cousin, but she later discovered she would have to carry it.

However, not all unpaid surrogates are coerced, since many family members make a genuine offer to become a surrogate or they are nervously asked to become one. In a 2003 study, Fiona MacCallum *et al.*, found 'little evidence' that known surrogates who were a family member or a friend were coerced from the commissioning couple, since 'in over three-quarters of cases, the suggestion had come from the surrogate mother herself'.²³¹ However,

²²⁹ Lori B. Andrews, 'Control and Compensation: Laws Governing Extracorporeal Generative Materials', *Journal of Medical Philosophy* 14 (1989), 541-60, at 551, referring to Joan Einwohner, Testimony, *Hearing in re Surrogate Parenting: Hearing on New York S.B. 1429*, before Senators Goodhue, Dunne, Misters Balboni, Abramson, and Amgott (10 April 1987), 108.

²³⁰ J. Harvey, 'Paying Organ Donors', *Journal of Medical Ethics* 16 (1990), 117-19, at 118.

²³¹ MacCallum *et al.*, 'Surrogacy', 1341.

awareness of possible coercion, instrumentalisation and exploitation could prevent it.

3.6.4 Are Surrogates Coerced to Hand the Child Over?

Concerns are often raised in surrogacy that surrogates are coerced. The money offered and the need for money could coerce a surrogate, compromising her autonomy and behaviour before, during and after the pregnancy. The commissioning couple may believe paying the surrogate allows them to control her, leading to a coercive relationship with an imbalance of power. If a surrogate wanted to keep the child and as the commissioning couple are legally not entitled to it, they could coerce her, by threatening to make her situation worse if she does not relinquish the child to them. Both paid and unpaid surrogates may face pressure from counsellors and the surrogacy agency to relinquish the child to the commissioning couple.

However, most surrogates hand the child over voluntarily and do not feel coerced by the money to relinquish the child. Counsellors usually remind surrogates that they can keep the child and any money received. The couple could try and persuade someone to become a surrogate with reasons other than money, such as appealing to someone to give them the gift of life so they can found a family. Most will be pleased that after a long search, their hope of having a child could come true. Consequently, they are more likely to treat the surrogate well by respecting her rights, freedom and autonomy. It is not in the commissioning couple's interests to coerce a woman into surrogacy, since coercion can be used as an excuse to prevent completion of an act thus compromising her obligation and responsibility. Commissioning mother Maggie spent every day with her sister who was her gestational surrogate and

they ‘both found it distressing’ to find in the press and the radio that the sister had been coerced into surrogacy and a ‘defective’ baby would be rejected.²³² If a surrogate wanted to keep the child, she is unlikely to allow a coercing commissioning couple visitation, nor are the authorities likely to allow the couple to adopt the child. Commissioning couples are probably worried that if they mistreat the surrogate she will harm the child or not give it to them; therefore most will want a caring and harmonious relationship to ensure they receive their child. Many couples will want an ongoing relationship with the surrogate after the birth and will want to acknowledge her role by ensuring the child meets her later.

The way most British surrogacy relationships operate reduces coercion. Firstly, most women wanting to become surrogates approach a surrogacy agency directly, since advertising for a surrogate is banned. Surrogates using the surrogacy agency COTS are given a two-hour counselling session to assess their motives. Secondly, commissioning couples do not make direct offers to specific surrogates, but send their details for the potential surrogate to select them. Thirdly, the surrogate selects which commissioning couple to associate with, thus reducing claims that a commissioning couple coerce specific women to work for them. Fourthly, commissioning couples do not entice women with already existing children to sell them for a profit, thus reducing claims that surrogacy involves child trafficking. Fifthly, since the surrogate decides to become a surrogate herself, the commissioning couple cannot be accused of preventing her from following alternatives or restricting her freedom. Sixthly, since most commissioning couples do not know their surrogates prior to being selected by them, it is not possible for them to be responsible for her background situation and therefore do not cause her poverty. Most

²³² Kirkman and Kirkman, ‘Sister-to-Sister Gestational “Surrogacy” 13 Years On’, 138.

commissioning couples do not threaten to make the surrogate's situation worse if she does not do it.

Section 3.6 has explored the issue of coercion and the surrogate in paid surrogacy in three subsections: coercion was defined (3.6.1); the double bind was investigated (3.6.2); whether surrogates are coerced to enter surrogacy was analysed (3.6.3); and the issue of coercion to hand the child over was explored (3.6.4). The next section, 3.7, deals with the effect of paid surrogacy upon the commissioning couple. The commissioning couple could be coerced by a surrogate threatening to abort or keep the child. They could be exploited by a demand for high fees by the medical profession. However, the commissioning couple could try to coerce relatives to become a surrogate for free and they could possibly exploit their surrogate by not paying her enough.

3.7 The Effect of Paid Surrogacy upon the Commissioning Couple

It is not just the child and the surrogate who may experience problems in surrogacy, but the commissioning couple too. A surrogate could coerce her commissioning couple by threatening to abort the baby or keep it if they do not give her more money. One surrogate tried to coerce her commissioning couple into handing more money over, to ensure adoption.²³³ Another surrogate used blackmail to coerce her commissioning couple into giving her additional money for drugs, by threatening to reveal that the commissioning mother had had a sex-change operation which could have jeopardised the child's adoption.²³⁴

²³³ Noel P. Keane and Dennis L. Breo, *The Surrogate Mother* (New York: Everest House, 1981), 109-10.

²³⁴ *Ibid.*, 198-209 and 237.

A commissioning couple could feel coerced by their families and society to become parents. A family might threaten a childless married couple with losing their inheritance if they do not produce a grandchild for them. The couple may feel coercion from their peers, fearing that if they do not have children they will miss out on having a social life evolving around children.

Theoretically, if money is not offered to surrogates there is a danger that the commissioning couple may be tempted to coerce relatives or friends to do it for free, especially if the couple were turned down for adoption. However, no evidence has been found to suggest that this has happened. One way to ensure poorer commissioning couples are not denied access to surrogacy in order to procreate, would be to offer financial assistance. Otherwise, only rich infertile couples will be able to afford to pay a surrogate in secret or go to a country such as the USA where paid surrogacy is legal in some states such as California. Alternatively, surrogates who are willing to be unpaid could possibly be matched with couples unable to pay the full amount.

Wood assumes it will be the surrogate in a position of vulnerability²³⁵ and fails to acknowledge the commissioning couple's vulnerabilities and anxiety; they have to trust the surrogate to gestate and deliver the child, fearing she may abort it or keep it. They may regard surrogacy as a supererogatory act, meaning the surrogate is not under an obligation to hand the child over, that she could pull out at any time and maintain full claim rights to the child and do so at their expense, ignoring their needs to associate with the child. The surrogate may exercise considerable power over her commissioning couple and emotionally exploit them by taking unfair advantage of their vulnerability

²³⁵ Wood, 'Exploitation', 146.

of being infertile and their desperation for a child in order to benefit herself. An unequal bargaining relationship could develop with the surrogate holding the commissioning couple to ransom by charging extortionate fees or demanding more money. The surrogate could treat the arrangement as a business transaction in order to make profit with no regard for the commissioning couple. The surrogate usually sets her fees and she selects which couple she works with. The surrogate could decide to work with those willing to pay more, or give the child to the highest bidder. One commissioning mother admitted: '[i]f you are desperate for a child you will do almost anything'.²³⁶ She acknowledged that once the payment has been made a surrogate could change her mind or lie about the pregnancy and commissioning couples could feel they are at the surrogate's mercy. She also said: 'I would have felt exploited handing out a large sum of money for a child simply because I couldn't have one naturally'.²³⁷

Some poor commissioning couples may feel they are being exploited and harmed by the medical profession with the high fees they have to pay when receiving infertility treatment. Some commissioning couples entering surrogacy could be poor and find it difficult to pay a surrogate, especially as surrogacy is not available on the NHS in the UK. Some working-class couples in the United States, for example, were prepared to mortgage their home in order to try and find the \$10,000 fee for their surrogates.²³⁸ Surrogacy could become a status symbol with only the wealthy able to pay for an experienced

²³⁶ Amanda Ward and Nina Ahmad, 'I Paid for My Baby But Big Money Deals Not On', *The Sun*, 15 October 1998, 6.

²³⁷ *Ibid.*, 6. The response of the commissioning mother that she 'would have felt exploited' could be regarded as an abuse of language regarding exploitation. However, it could be suggested that her response demonstrates 'disparity of value' one of the definitions of exploitation, as she is concerned at being over charged for something.

²³⁸ Keane and Breo, *The Surrogate Mother*, 54-5.

surrogate. Poorer commissioning couples may find they have little to spend on the baby after paying the surrogate.

Some commissioning couples are wealthier than the surrogates, but this is often due to being infertile, childless and older than their surrogates who are younger and have raised families. One commissioning couple admitted they had managed to save money by being childless.²³⁹ However, commissioning couple John and Lorelei were a driver and a dispatcher, and their \$2,000 cheque for their surrogate cleared out their savings.²⁴⁰ In a 2003 study of commissioning couples' reaction to surrogacy, including its cost, by MacCallum *et al.*, 66% felt no financial strain, 27% felt some strain and cut down on expenses to afford treatment, and 7% had a financial burden with requiring loans or borrowing money to pay for gestational surrogacy.²⁴¹ It may be suggested that if commissioning couples are experiencing financial difficulties choosing to become parents, then it should not be a choice they are allowed to make. However, such an approach could be seen as discriminating against the poor and their ability to found a family. In Israel, for example commissioning couples receive financial State help and it could be argued that if the UK government allows paid for IVF treatments then this could possibly include surrogacy payments too. A set fee could quell the fears of the *Brazier Report* (5.21) that the surrogate will make 'increased financial demands' upon the commissioning couple. There is the possible risk that if only unpaid surrogates are used then a shortage of surrogates could occur, jeopardising the reproductive opportunities of the infertile.

²³⁹ Lori B. Andrews, 'Feminism Revisited: Fallacies and Policies in the Surrogacy Debate', *Logos: Philosophical Issues in Christian Perspective* 9 (1988), 81-96, at 84.

²⁴⁰ Keane and Breo, *The Surrogate Mother*, 167-8.

²⁴¹ MacCallum *et al.*, 'Surrogacy', 1337.

3.8 The Need for Research, Regulation and Guidelines

So far in this chapter we have focused upon the possibility of commodification, exploitation and coercion for surrogacy participants. More empirical research is needed in this area and the appendix to the thesis outlines some areas for further research. Clear regulation and guidelines could reduce the risk of commodification, exploitation, and coercion in surrogacy along with the following seven practical measures.

Firstly, a code of practice could set out fair terms and conditions to ensure no one harms or degrades the other by treating them as a mere means to an end. Both parties should be sensitive to each other's rights, needs and welfare. Secondly, compulsory counselling with independent counsellors could ensure participants are given time to reflect if they wish to enter the practice or not and if they want to hand the child over, so they are made aware of possible dangers of coercion, harm and risk. Despite claiming to be more surrogate-centred, Ragoné found evidence suggesting the commissioning couples' feelings dominate in some American agencies.²⁴² If agencies and counsellors were paid for by the State and not by the commissioning couples' fees, it could lessen possible bias and coercion to make the surrogate relinquish the child.

Thirdly, clear information should be provided to all participants, so they are aware of what they are being asked to do, as well as pregnancy management issues such as abortion, smoking, caesarean section, place of birth and child relinquishment, so consent is autonomous, informed and valid. Fourthly, careful psychological and medical screening of participants could ensure

²⁴² Ragoné, *Surrogate Motherhood*, 20.

surrogates in desperate financial need do not hide possibly detrimental medical conditions which could be passed on to the child in order to receive payment. Screening of genetic disorders including HIV, hepatitis B and C and sexually transmitted diseases could occur including assessment to ensure the surrogate's and commissioning couple's motives are not solely financial. Fifthly, independent mediation and legal services could intervene between the surrogate and the couple if difficulties arise over the child's custody, possibly finding a foster family for the child if rejected at birth.

Sixthly, a set fee in paid surrogacy could prevent a commercial market-led practice operating so attributes of surrogates are not commodified. A set fee could prevent surrogates coercing their commissioning couples for more money by threatening to keep the child if they do not receive additional payments. In order for a set fee to operate, English law would need to be changed to allow surrogates to be paid, other than reasonable expenses, since at the moment commissioning couples risk not being able to adopt the child if payment has occurred. If a set fee were used then the minimum wage could operate to ensure a fair amount was paid along with taxes. Finally, a relational approach to the arrangement, the pregnancy and custody could reduce exploitation to ensure justice for all participants within a framework of careful negotiation.

3.9 Conclusion

Further empirical research is needed to find out if exploitation, harm, commodification and coercion occur before, during and after surrogacy to the surrogate, the commissioning couple, and the child born of surrogacy both in the short and the long term. Research needs to focus on the decision-making

processes of a woman entering into surrogacy to assess if her consent to the practice is constrained by the short-term prospect of earning money, or if she considers possible long-term adverse psychological effects connected with relinquishment. Some surrogates may feel they are acting rationally or on impulse. We need to ask if surrogacy is of benefit and if it is fair to the surrogate.

However, one of the arguments of this thesis is that surrogacy can sometimes be a justified practice - for example in the case of the infertile wife who has had a hysterectomy due to cancer, but has functioning ovaries; or the fertile wife who has had repeated miscarriages. Paid surrogacy could operate without negative influences such as child commodification and it could occur in a more positive way with society doing all it can to stop commodification, exploitation and coercion. Commodification, for example is more of an attitude than an inevitable consequence of monetary involvement in surrogacy. An unpaid surrogate or commissioning couple could regard the child or surrogate as an object, as a mere means to an end with contempt, alienation and no dignity or respect for their emotions. Equally a paying commissioning couple could respect the surrogate's dignity, intrinsic worth and personhood by respecting her autonomy, decision making, rights, bodily integrity and embodiment. Most surrogates and commissioning couples will treat the child with respect as the context differs from a black market attempt to sell an existing child to the highest bidder. A set fee, instead of a commercialised market system, could operate to prevent commodification. Paid surrogacy should not reflect the child's or surrogate's personal value, dignity or worth but her service. Surrogacy could be a mutual benefit, aiding the human flourishing of all participants. Measures must be taken to prevent exploitation in surrogacy, so it is practiced in an honest and open way with integrity, virtue and dignity.

Risks could be reduced by a code of practice with safeguards and guidelines before, during and after the event. Independent counselling, mediation, legal advice and a cooling off period could help to ensure the surrogate gives her valid and informed consent to enter surrogacy or to relinquish the child, thus preventing possible duress from a coercive imbalance of power between her and the commissioning couple. Participants could be provided with clear, accurate and relevant information so they are aware of what to expect, aware of the legal situation and possible problems of coercion, exploitation and commodification. Screening may uncover medical problems, which could be passed on to the child, which the surrogate was hiding to be accepted and receive the money. The surrogate should be made aware of her motivations for entering surrogacy, to prevent those solely doing it for money, as well as an awareness of alternative economic options so she can decide for herself if she is being coerced and if her choice is voluntary or involuntary. Counsellors should look out for potential commodification in the commissioning couple's motives. Advertising for particular attributes of a surrogate could be banned. Commissioning couples could be prevented from selecting the genes of the embryo the surrogate will carry in order to stop particular physical characteristics being selected in the child to be born. Guidelines, regulation and a code of practice with clear laws could help prevent surrogacy being a commodified and market-led practice. Exploitation could be prevented by ensuring surrogates are of a certain age, have had time to give informed and valid consent, have the opportunity to back out before insemination, etc. A protocol could ensure commissioning couples know how to treat their surrogates with respect and dignity to prevent them being regarded as an object.

All participants in surrogacy have moral duties and obligations to each other which can be explored within a relational framework set out in chapter five. The next chapter will explore whether surrogacy involves baby selling or not.

**CHAPTER FOUR SELF-INTEREST, ALTRUISM AND BABY SELLING IN
PAID AND UNPAID SURROGACY**

4.1 Introduction

So far analysis has included six reports featuring surrogacy, exploration of motherhood as multidimensional and suggestions that paid surrogacy does not necessarily result in commodification, exploitation and coercion. The aim of this chapter is to argue that the co-existence of paid and unpaid surrogacy can be ethically positive, with the motives of self-interest and other regard co-existing. Self-interest can be regarded positively instead of negatively. In section 4.2 the relationship between the self and other is explored in St Augustine and St Thomas Aquinas with an emphasis upon self-love and ordered love. The concepts of altruism, *agape*, mutuality and relationalism are discussed in section 4.3 as a basis for relational altruism which allows for a variety of emphases upon the self and the other. The discussion provides a foundation for the view that unpaid and paid surrogacy (but non-commercial without marketisation) can co-exist.

Various authorities have equated commercial surrogacy to baby-selling. Questions will be raised regarding the objects of payment in commercial surrogacy, e.g. whether parental rights and custody are bought and sold. Discussion in section 4.4 focuses upon the suggestions and possible implications of the *Brazier Report*¹ that expenses alone should be provided for a surrogate. Section 4.5 concentrates upon whether the commissioning father buys his parental and custody rights. Consideration will also be given to whether surrogacy is or is not a gestational service in section 4.6, with reference

¹ Department of Health and Social Security, *Surrogacy (The Brazier Report)* (London: HMSO, 1998).

to the distinction between gestational and genetic surrogacy along with claim rights, property rights and intention to mother.

The practical issues surrounding payment are examined by looking at surrogates' motives (4.6.3) and by considering a parallel debate regarding the blood donation system in section 4.7. It will be proposed that problems of paid blood donation can be met by careful screening and regulation. The philosophical underpinnings of the practical nature of the debate surrounding blood donation are assessed with the work of Richard Titmuss and Peter Singer, both of whom assume that a social practice has to be based upon either concern for self or a concern for others and that the two motives cannot co-exist. Their work will be criticised for suggesting self-interest drives out altruism. Kenneth Arrow's contribution to this debate is also evaluated. Section 4.7.3 refers to Charles Handy who has investigated voluntary organisations where unpaid volunteers work alongside paid professionals.

The final section 4.8 indicates surrogates should not be expected to become purely altruistic alone nor should altruism be paternalistically denied. Not all altruistic acts are a result of oppression, as suggested by some feminists, since some altruism is carefully chosen by the altruist and such behaviour need not fulfil feminine stereotypes of women.

4.2 The Self and Other in St Augustine and St Aquinas

In order to provide support for both paid and unpaid surrogacy, self-interest as self-love will be analysed according to the theologians St Augustine and St Aquinas. By showing self-interest positively, it supports the idea that a surrogate who seeks her own interest by wanting payment is not selfish, as long as money is not her sole motive. The surrogate can have self-interest and

altruistic concern for the commissioning couple. But self-interest should not be regarded as good only because it is compatible with or redeemed by an altruistic concern for the other; it can be good in itself to look after the self. It must be pointed out that technically Augustine and Aquinas do not use the phrase 'the self' in their writings, since the term did not exist. I could have used the term agent to refer to the self in their writings but have decided to retain 'self' due to its use by modern readers.

Self-interest deals with the interests of the self and can be subjective and objective, aiding a person's flourishing. Attitudes towards self-interest have often been negative; for example, sociobiologists consider it to be genetically programmed selfishness. Self-interest has been seen as operating within a rationalistic framework, which excludes concern for others in order to maximise self-benefit - being willing or pretending to co-operate with others for self-gain only. Some branches of economics use the term '*homo economicus*' to suggest that agents are only interested in their own financial gain. Self-interest should not be equated with selfishness, since self-interest includes a built-in positive concern for the self, whereas selfishness tends not to. However, not all self-interest requires excessive self-concern and detrimental action to the other. Some actions could be self-interested while having altruistic motivations. Even so, some actions could be altruistic but have selfish and ulterior motives.

4.2.1 St Augustine of Hippo

Oliver O'Donovan begins his book *The Problem of Self-Love in St Augustine*² by admitting that the notion of self-love is confusing and even contradictory within Augustine's writings. For Augustine, self-love can have 'positive,

² The references in section 4.2.1 relate to Oliver O'Donovan, *The Problem of Self-Love in St. Augustine* (New Haven, CT; London: Yale University Press, 1980).

negative, and neutral' meanings (2). Firstly, a negative understanding of self-love is found in *De Doctrina Christiana*, as a 'rebellious self-love which refused to accept subordination to God' (97-8). Wrong self-love is connected with 'sin and rebellion against God' (137). It involves pride, where a person glorifies themselves and satisfies themselves without God, leading to sin.³

Secondly, Augustine in the 14th book of *De Trinitate*, sets out the neutral understanding of self-love, which considers it natural and universal to love yourself, because no one can hate himself. This natural self-love is linked to self-protection and is part of human rational nature, since passages in the *De Trinitate* regard self-love as part of self-consciousness, self-understanding and self-awareness. Indeed self-interest is perceived to be a Christian duty (157-8). Augustine in the *Soliloquia* states it is wrong to love the neighbour more than yourself and Augustine implies that love has self-interested elements within it. Augustine is seen as opposing self-sacrifice, since we are to love ourselves no less than our neighbours (143), but O'Donovan indicates that self-sacrifice is possible in Christianity.

Thirdly, loving yourself for Augustine is a positive love which is co-extensive with the love of God and any differing self-love is self-hate. Positive self-love finds its only true expression in loving God completely, since for Augustine moral obligation comes from obligation to God and to fulfil yourself. In *De Doctrina Christiana*, Augustine regards perfect self-love as being one with the love of God. However, the activity of loving yourself and loving God are not the same. Only by perfect self-love and explicit perfect love of God can loving yourself and God be the same. It is a benevolent, rational and cosmic love to love yourself since you are promoting your 'true welfare in God' (137).

³ Kelly Rogers (ed.), *Self-Interest: An Anthology of Philosophical Perspectives* (New York: Routledge, 1997), 48.

Christians are called to love their neighbour as themselves, for the sake of loving God. Loving your neighbour as yourself is modelled on perfect self-love which is expressed in love for God. Attention now turns to Aquinas who, like Augustine, also believed in three types of self-love: negative, neutral and positive.

4.2.2 St Thomas Aquinas

St Thomas Aquinas distinguished between the theological virtues of faith, hope and charity and the cardinal virtues of prudence, temperance, fortitude and justice. Aquinas regarded the theological virtues as superior to the cardinal ones.⁴ The theological virtue of charity - i.e. love - is the prime virtue which takes priority and directs all the other virtues. Charity is not acquired or natural but infused within us by God. For Aquinas, charity is part of a 'fellowship of eternal happiness'⁵ and includes three parts: God, human beings and the human body. Charity leads to love of self and love of neighbour and is seen as being rooted in a human being's rational soul. It is guided by reason, but it is also beyond reason and beyond nature too.⁶

Like Augustine, Aquinas believed in three types of self-love: a negative self-love, a neutral self-love and a positive self-love.⁷ Firstly, negative self-love deals with wanting worldly goods, and is called 'inordinate love of self',⁸ and causes desires such as pride, leading to sin, disharmony and turning away from God. Secondly, neutral self-love takes two forms 'natural' and 'from choice'.⁹ Neutral self-love with a natural form involves naturally seeking our

⁴ Thomas Aquinas, *Summa Theologiae: English and Latin* (60 volumes) (Cambridge: Cambridge University Press, 2006), (ST) I-II, 62, 2; II-II, 23, 6.

⁵ Rogers, *Self-Interest*, 70.

⁶ Aquinas, *ST*, II-II, 24, 2 co.

⁷ Rogers, *Self-Interest*, 50.

⁸ *Ibid.*, 50.

⁹ *Ibid.*, 50.

own good and perfection. Neutral self-love can also come 'from choice', since we wish good for the self and reason wants a rational choice which benefits us. If you accidentally fail to want the good, you are considered to become a self-hater. A person may desire something and not realise it is evil or they may want the nonessential compared to those which are essential for the self. Thirdly, positive self-love involves the self directing themselves towards God, in seeking our perfection we desire God.¹⁰ Loving God directs a person towards God and makes their life harmonious. Aquinas' view of self-interest deals with the afterlife and with a human being's relationship to God instead of the relationship to himself, but a degree of self-love is allowed as 'natural and necessary'.¹¹

Aquinas accepts a love of self as obligatory. Aquinas's positive self-love is considered 'superior to love of neighbour'.¹² But he acknowledges that our true self-love is not individualistic, as we are 'social animals'¹³ who naturally desire to love others as part of our 'common humanity' and 'shared goods'.¹⁴ Self-perfection in charity involves loving and caring for your neighbour with proportion and moderation. Others are not to be used as instruments for our self-perfection, but we give alms, for example, due to our love of God, therefore we love others '*for their own sake*'.¹⁵ If we fail to love the other, we fail to love the self correctly. Love of neighbour can take priority over love of strangers. However, prudence with charity does not mean 'unmitigated altruism'¹⁶ for

¹⁰ Aquinas, *ST*, I, 6, 1 ad. 2.

¹¹ Rogers, *Self-Interest*, 51.

¹² Aquinas, *ST*, II-II, 25, 12; 26, 4 see Douglas J. Den Uyl, *The Virtue of Prudence* (New York: Peter Lang, 1991), 96.

¹³ Stephen J. Pope, 'Expressive Individualism and True Self-Love: A Thomistic Perspective', *The Journal of Religion* 71 (1991), 384-99, at 390.

¹⁴ *Ibid.*, 390, see also 392-3.

¹⁵ Douglas J. Den Uyl, 'The Right to Welfare and the Virtue of Charity', in Ellen Frankel Paul *et al.* (eds.), *Altruism* (Cambridge: The University of Cambridge, 1993), 192-224, at 207 n. 27.

¹⁶ Uyl, *The Virtue of Prudence*, 96.

Aquinas, but it does mean more emphasis upon loving others.¹⁷ Aquinas allows us to love one neighbour more than another, with varying degrees of affection, whereas Augustine believed Christian love requires we have the same love for everyone.¹⁸ For Aquinas we are allowed to love our family more than strangers.

The self therefore in both Augustine and Aquinas has positive connotations, but both raise concerns about how the self is to relate to others. The relationship between the self and the other is explored in the concept of charity or '*caritas ordinata*', which refers to an ordered love where the self is to be taken into consideration in relationship. This is explored below in sections 4.2.3 and 4.2.4.

4.2.3 Augustine and Ordered Love

The concept of charity involves the notion of '*caritas ordinata*' (or *dilectio ordinata*) – 'ordered love'. St Ambrose 'taught that *caritas ordinata* required a man to love God first, then his parents, then his children, then those of his own household and finally strangers'.¹⁹

Augustine regarded *caritas* as the only right kind of love,²⁰ which is also infused into people's hearts by grace. Love has a natural order, where all objects of love are placed in a hierarchy dependent upon how close they are to God. *Caritas* is 'God's love given to the self',²¹ allowing the self to love God and

¹⁷ *Ibid.*, 96.

¹⁸ Stephen J. Pope, 'The Order of Love and Recent Catholic Ethics: A Constructive Proposal', *Theological Studies* 52 (1991), 255-88, at 262.

¹⁹ Brian Tierney, 'The Decretists and the "Deserving Poor"', *Comparative Studies in Society and History* 1 (1959), 360-73, at 363-4.

²⁰ Anders Nygren, *Agape and Eros* (London: SPCK, 1957), 484.

²¹ Darlene Fozard Weaver, *Self Love and Christian Ethics* (Cambridge: Cambridge University Press, 2002), 4.

others.²² Human beings are to love God before themselves, because God is higher. Loving your neighbour is to love another as you love yourself and direct them to God. By loving God we can love the self rightly, as we find satisfaction in the highest good. Right self-love finds its *bonum* in God and is part of any human beings best interest. Augustine believed that loving God and our neighbour orders other love, for example self-love occurs because we are called to love our neighbour as our self.²³ *Caritas Ordinata* deals with a proper self-love which is ordered to the self. Love of neighbour and self-love are connected because we are to love our neighbour as we love our self, as this is a human being's natural inclination. Augustine comments: 'charity seeks not her own, means that she puts the common good before her own private interests'.²⁴ In comparison, false or inordinate self-love is the basis of all evil and is called 'unordered love' i.e. '*cupiditas*' or '*dilectio inordinate*', which wants satisfaction in something which is not God and in things which are temporal, transient and worldly.²⁵

4.2.4 Aquinas and Ordered Love

For Aquinas, charity is a friendship with God, inspired by grace, with God as its main object, not the self or the neighbour, meaning the self is loved not for itself, but for the sake of God. As part of charity, a person loves God as the principle of good and has right self-love by being involved with this good.²⁶ Aquinas and Augustine believe that true happiness for the self, '*beatitudo*', is in God, because proper self-love loves the self 'in God',²⁷ as the highest good,

²² *Ibid.*, 4.

²³ Oliver O'Donovan, *Resurrection and Moral Order: An Outline for Evangelical Ethics* (Leicester: Apollos, 2nd ed., 1994), 239.

²⁴ Augustine, *Epist.* CCXXI.PL 33 and 963, cited by Thomas Aquinas in Rogers, *Self-Interest*, 72 n. 130.

²⁵ Nygren, *Agape and Eros*, 709-10.

²⁶ Aquinas, *ST*, II-II, 26, 4.

²⁷ Pope, 'Expressive Individualism and True Self-Love', 387.

whereas improper self-love loves God instrumentally 'for the self'.²⁸ God's love for us is the exemplary form of charity and our charity becomes perfect if we copy God's. We belong to God and love out of charity and therefore we love our self and others due to our love for God. Charity is part of self-perfection but 'is not a *means* to self-perfection',²⁹ since a person is not charitable in order to gain self-perfection, but charity reflects a person's self-perfection.³⁰

Aquinas believes we are naturally ordered by God in charity, to love God, ourselves and the common good. In question 26 of the *Secunda Secundae* of *Summa Theologiae*, Aquinas points out that 'order' deals with that coming 'before' and that coming 'after'.³¹ Aquinas' '*ordo caritatis*' is similar to Augustine's view where we love God first, then the self, then the neighbour and then our own bodies.³² Charity distinguishes between ordered and disordered family ties, which is not for the good and involves hating the family.³³ For Aquinas, self-love can follow or ignore right reason, self-love can be ordered or disordered towards the good, or self-love can be expressed 'properly or improperly'.³⁴ Improper self-love is self-hatred, and is disordered for not loving yourself according to your natural rational nature, by not wanting the good or not doing that which perfects reason, whereas charity allows self-love.³⁵ Both Augustine and Aquinas have a moral psychology where people are motivated by the love of the good and Aquinas has a teleological understanding of self-interest.

²⁸ *Ibid.*, 387.

²⁹ Uyl, 'The Right to Welfare and the Virtue of Charity', 204.

³⁰ *Ibid.*, 204-5.

³¹ Aquinas, *ST*, II-II, 26, 1.

³² Augustine, *On Christian Doctrine* trans. J. F. Shaw in Robert Maynard Hutchins (ed.), *Great Books of the Western World: The Confessions, The City of God and On Christian Doctrine*, (volume 18 of 54), (Chicago, IL: Encyclopaedia Britannica, 1952), Book 1, chapter 22, (21) and chapter 23, (22).

³³ Aquinas, *ST*, II-II, 26, 7, ad. 1.

³⁴ Pope, 'Expressive Individualism and True Self-Love', 387.

³⁵ Aquinas, *ST*, II-II, 25, 4, ad. 3 and *ST*, II-II, 26, 4.22.

4.3 Altruism, Thomas Nagel, Agape, Mutuality and Relational Altruism

As seen above, both Augustine and Aquinas support self-love or self-interest. Both want us avoid negative self destruction, both acknowledge that self-love is natural where we want to protect and perfect ourselves, and both want us to love God, ourselves and our neighbours. We now turn to the concept of altruism as developed by Auguste Comte in light of Thomas Hobbes. This will be followed by the insights of self-interest and altruism by modern day neo-Kantian Thomas Nagel. After Nagel we turn to a section on *agape* as presented by the theologian Anders Nygren, and the effects of his favouring the other over the self in *agape* will be considered. Three other areas including mutuality, a relational alternative and relational altruism will also be presented.

4.3.1 The Term Altruism

The word 'altruism' is derived from *alter*, Latin for 'other' and was coined in the eighteenth century by the founding figure of sociology, Auguste Comte. It was developed as a principle to guide action for the interests of others, in order to subvert the philosophy of egoism as self-interest³⁶ which had been developed by Thomas Hobbes. Comte wanted to understand how people, motivated by selfish thought on the Hobbesian model, could be motivated by sympathy for the other in line with Hume's non-selfish model for the other. Basic moral psychology came to be rewritten in the seventeenth and eighteenth centuries by the dominant categories of egoism and altruism as opposed to the theological concept of charity. However, Comte with a different reading of pre-modern history stated: '[i]n a word, Biocracy and Sociocracy will be alike

³⁶ Paul *et al.*, *Altruism*, vii.

pervaded by Altruism; whereas during the long period of theological and military training Egoism predominated'.³⁷ Comte wanted to develop 'common interests and goals' alongside 'social harmony'.³⁸

However, Comte's altruism risks regarding self-interest as inferior to the needs of others. On this view, others' needs take priority,³⁹ since morality is linked to altruism and fails to include any sense of the good of the self. Comte may have been concerned that some people, ostensibly acting for others, had ulterior motives because they were really acting for their own interests alone. Altruism is predicated on a moral psychology which is not the one of traditional theology. Egoism believes people act for their own self-interest only, but this is not what Augustine says.

Colin Grant suggests: '[a]ltruism is a modern concept, but its roots lie in the Christian understanding of love as *agape*, the self-giving love that is seen to be characteristic of God and in which human beings are called to participate'.⁴⁰ However, altruism and *agape* can be contrasted to ordered love, which differs from altruism and *agape* because it allows for ordered relationships between the self and the other as well as God. It needs to be borne in mind that Aquinas, for example, did not use the terms *agape* or altruism, with altruism developed by Comte as a secular term for concern for the other. Religion does not have to be seen as 'the material principle of altruism' which Grant advocates,⁴¹ since religious ethics does not have to be equated with *agape* and altruism does not have to be regarded as pure altruism only.

³⁷ Auguste Comte, *System of Positive Polity*, vol. 1 (New York: Burt Franklin, 1875), 500.

³⁸ Colin Grant, *Altruism and Christian Ethics* (Cambridge: Cambridge University Press, 2001), 74.

³⁹ Ellen Frankel Paul *et al.* (eds.), *Self-Interest*, (Cambridge: The University of Cambridge, 1997), vii.

⁴⁰ Grant, *Altruism and Christian Ethics*, xvii.

⁴¹ *Ibid.*, xix.

Part of the problem of altruism has been a movement away from an inclusion of God in the loving of self and other towards a secular understanding of love as self-interest or as love for others with altruism.⁴² Aquinas believed the end of human beings is God, and people are to aim toward this good. In contrast modern ethics tends to focus upon following duties towards others with rules or a maximization of a social utility, so self-interest became restrained in favour of a social moral principle, thus reducing duties to the self. Without God or teleology, altruism (the moral primacy of the other) becomes the main focus, for example Hobbes regarded others to be the object of charity, which becomes social co-operation instead of self-perfection.⁴³ It is possible that less emphasis was placed upon God due to some of the theological and political changes leading to increased diversity in the practice of religion. In the burgeoning industrial age, more emphasis was placed upon economic maximisation.

Emphasis within ethics became focused upon the other as our neighbour instead of God.⁴⁴ Consequently (and problematically) self-love has been assimilated into love for the other, so self-love becomes subordinate and involves self-abnegation and fails to include reference to God. Nygren indicates that Max Scheler believed that modern altruism is separate from Christian love because altruism does not have a 'religious basis', saying:

He [Comte] fails to observe that 'love' in the Christian sense is understood as a *species of act*, which is of a spiritual nature, and by its very nature is directed primarily to the spiritual person (of God and of men); that consequently the reference to the other is by no means characteristic of its *essence* and that just for this reason Christianity knows, and must know, a 'self-love' that is different in kind from all 'egoism'!⁴⁵

⁴² Weaver, *Self Love and Christian Ethics*, 44.

⁴³ Uyl, 'The Right to Welfare and the Virtue of Charity', 205 and 208-9.

⁴⁴ Weaver, *Self Love and Christian Ethics*, 44-5.

⁴⁵ Max Scheler, *Vom Umsturz der Werte*, vol. 1 (Leipzig: *Der Neue Geist*, 1919), 166, cited in Nygren, *Agape and Eros*, 95-6 n. 1.

Self-interest is often perceived to be outside morality, which is defined exclusively in terms of the other, leading self-interest to clash with altruistic moral motives concerning the other. The traditional meaning of altruism, as pure altruism, involves denial of the agent's own interests or pleasure from altruism, for such interests are considered to be ulterior motives, with priority given to the other's needs only. A positive co-existence of the motives of self and other in altruism is not thought possible because of an expectation that self-concern would detract from and harm the others involved and also because concern for the other is supposed to be antagonistic and detrimental to your own self-interest.⁴⁶ The self is expected to be motivated by concerns and benefits for itself only, as demonstrated in the rationalistic utility-maximising theories, since even when acting for others, the self is supposed to do so for its own gain alone. The theologian Colin Grant is typical of those who regard the co-existence of self-interested and altruistic motives as incompatible:

Altruism and self-interest do not relate by direct contrast. The attraction of a relation of complementarity, in recognizing a role for each on a common spectrum, is suspect precisely because of its neatness. The clash and commonality of altruism and self-interest suggest that the most productive way of envisioning the ongoing relation between them is in terms of conflict.⁴⁷

In order to overcome egoism, the ethics of pure altruism subordinated self-interest to the needs of others. However, we need to ensure that ethics can include the mixed motives of concern for the other as well as for the self, with a variety of emphasis upon the self and the other. Such an approach would reflect the ordered love of the theologians which allows relationships with the self, the other and God.

⁴⁶ This idea is demonstrated by psychologists: 'focusing on one's own needs and development cannot help but lead away from other-directed concern' (Michael A. Wallach and Lise Wallach, *Psychology's Sanction for Selfishness: The Error of Egoism in Theory and Therapy* [San Francisco, CA: W. H. Freeman, 1983], 261).

⁴⁷ Grant, *Altruism and Christian Ethics*, 76.

4.3.2 Thomas Nagel⁴⁸

In contrast to the theologians Augustine and Aquinas, Thomas Nagel is a modern neo-Kantian and rationalistic philosopher. Nagel's *The Possibility of Altruism* was published in 1970 and, according to Alan Thomas, focuses upon 'the idea of reasons for action'.⁴⁹ Thomas suggests *The View from Nowhere*⁵⁰ extends the discussion of ethics 'into political theory'.⁵¹

Altruism, for Nagel, is 'not abject self-sacrifice, but merely a willingness to act in consideration of the interests of other persons, without the need of ulterior motives' (79). He believes altruism includes behaviour motivated by the belief that someone will benefit or avoid harm. The self-interested needs and good of the other are regarded as rational reasons for an agent to be altruistic to them and such reasons are independent of our emotions (81-4). He acknowledges some altruistic acts may be performed with some 'inconvenience' to the agent or be of 'no benefit' to them (79).

Altruism therefore is not based upon 'desires', but 'practical reason' (15). Nagel implies that if a person acts from sympathy, they act from the emotion instead of the altruistic reason, which could mean they act only due to having the emotion and not due to the other's situation.⁵² Nagel regards emotionally motivated altruism as egoistically motivated,⁵³ and argues against egoism. Egoism regards agents as acting upon reasons and motivations based on their

⁴⁸ References in brackets below refer to Thomas Nagel, *The Possibility of Altruism* (Princeton, NJ: Princeton University Press, 1970).

⁴⁹ Alan Thomas, *Thomas Nagel* (Stocksfield: Acumen, 2009), viii.

⁵⁰ Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986).

⁵¹ Thomas, *Thomas Nagel*, viii.

⁵² Lawrence A. Blum, *Friendship, Altruism and Morality* (London: Routledge and Kegan Paul, 1980), 122.

⁵³ Neera Kapur Badhwar, 'Altruism Versus Self-Interest: Sometimes a False Dichotomy', in Paul *et al.*, *Altruism*, 90-117, at 92 n. 5.

own 'interests and desires' (84) only; it therefore lacks 'direct concern for others' (84-5). Nagel rejects Kant's claim that all interests are reducible to self-interest but, 'like Kant, he excludes all egotistic interests from moral motivation'.⁵⁴ Even so, if I was ill I would rather be visited by a compassionate friend than a carer performing a duty as part of their job.

In order to understand Nagel, it is important to be aware of how he uses the terms subjective and objective, which he considers to reflect a tension in human nature. Nagel sees subjective and objective as 'predicates of understanding'⁵⁵ and they apply to reasons, knowledge and understanding, but not to the aims of the understanding or knowledge.⁵⁶ Thomas believes that the term 'subjective' is fairly stable in Nagel's work and refers to a particular person's 'pre-reflective, personal commitments',⁵⁷ ('whether theoretical or practical').⁵⁸ 'Pre-reflective' is not regarded as 'unreflective', but refers to those commitments which have not been critically analysed yet.⁵⁹ A subjective reason has its content fulfilled by referring to a particular agent.⁶⁰ Nagel describes objectivity as:

a method of understanding. It is beliefs and attitudes that are objective in the primary sense.⁶¹

Objective reason is seen as a reason for everyone⁶² and is linked to impersonal detachment.⁶³ A person attempts to look at themselves from the outside, as if by a neutral third person and not from their own perspective. However, he

⁵⁴ *Ibid.*, 91 n. 2.

⁵⁵ Thomas, *Thomas Nagel*, 26.

⁵⁶ *Ibid.*, 26, 30 and 169.

⁵⁷ *Ibid.*, 11.

⁵⁸ *Ibid.*, 6.

⁵⁹ *Ibid.*, 11.

⁶⁰ *Ibid.*, 129.

⁶¹ Nagel, *The View from Nowhere*, 4.

⁶² Thomas, *Thomas Nagel*, 129.

⁶³ Nagel, *The View from Nowhere*, 9.

rejects 'a false objectification' where objectification is applied, but the reality is better understood with less detachment such as perspective,⁶⁴ thus reducing distortion, but he allows for our own experiences, reflecting an influence of phenomenology.⁶⁵

In *The Possibility of Altruism* Nagel adopts a 'Cartesian' model of objectification which replaces 'subjective representation' by an objective one.⁶⁶ Subjective reasons have to be supported by objective reasons to be tolerated.⁶⁷ In *The Possibility of Altruism* Nagel wanted moral agents to act for objective reasons and he used objective principles to support subjective principles (96-7). In the *View from Nowhere*, he uses a 'Hegelian' model of objectification which allows for 'subjective representation' to 'be placed in a wider,...context',⁶⁸ which allows for differing subjective representations, as agent-relative reasons. Therefore, the subjective and objective - as agent-neutral reasons - can work together without the objective replacing the subjective,⁶⁹ as objectivity cannot completely provide a view of the world.⁷⁰

Nagel wants altruism to be based upon objective values and reasons, as opposed to subjective ones. He encourages moral agents to put themselves into the place of the other and take an objective interest in the needs, actions and desires of the other, who is considered to be like the agent. Altruistic agents acting for the other are to consider themselves as 'merely one individual among many' (1) and as an impersonal other, making altruism impartial. Objective reasons are seen to prevent self-centredness, whereas subjective reasons do not. He wants subjective principles to be formed universally and

⁶⁴ *Ibid.*, 4.

⁶⁵ Thomas, *Thomas Nagel*, 5 and 235.

⁶⁶ *Ibid.*, 12.

⁶⁷ *Ibid.*, 135 and 167.

⁶⁸ *Ibid.*, 12-13.

⁶⁹ *Ibid.*, 12-13 and 135.

⁷⁰ Nagel, *The View From Nowhere*, 5.

impersonally so they can apply to everyone, including the self. There can be an objective reason to ensure others will survive, which is not dependent upon the interests of the agent doing the action but are based on objectivity (127-8).

In a postscript to *The Possibility of Altruism*, Nagel pointed out that he had argued 'only objective reasons are acceptable', with subjective reasons being acceptable if derived from objective reasons (vii). However, he has revised this view. Nagel now believes that objective reasons can correspond to subjective ones. He wants to ensure personal and impersonal standpoints are linked motivationally. He does not think the personal has to be subordinated to the impersonal. He believes subjective reasons can give an 'independent influence' in life as well as acknowledging objective reasons, as personal standpoints can still have power alongside the impersonal and these reasons can explain 'the possibility of altruism' (vii-viii). Not all subjective reasons are objective since they may be subjective for a particular agent without being a reason for others. In his later book, *The View from Nowhere*, he admits the objective view may not replace the subjective view, but both the objective and subjective view could co-exist. Reflection is needed to decide how to balance between impersonal and personal reasons and what can 'be demanded of rational individuals'.⁷¹

At times, Nagel seems to link the altruistic motive of the moral agent with the self-interest of the other saying:

Altruistic reasons are parasitic upon self-interested ones; the circumstances in the lives of others which altruism requires us to consider are circumstances which those others already have reason to consider from a self-interested point of view. Therefore the form of altruistic reasons will depend both on the form of self-interested ones, and on the procedure for constructing the altruistic analogue of a given self-interested reason (16).

⁷¹ *Ibid.*, 203.

However, it could be argued that such reasons are the self-interests of the other and not of the agent. He admits the agent can look after their own interests as there are some ends and objects you can pursue better for yourself than you can for others. Sometimes individuals may have to pay more attention to their own problems and the needs of their family than those of humanity (133). Individuals can favour their interest if the agent-relative reason 'exceeds' the agent-neutral reason.⁷² The claims of others may have to compete with personal reasons in deciding what to do.⁷³

But Nagel downplays the part self-interest can play in altruistic behaviour. In a footnote, he brushes aside the possibility of 'the relative weight to be assigned to the interests of oneself and others' (79). He reduces the correlation between self-interest and altruism, claiming that '[a] defence of altruism in terms of self-interest is therefore unlikely to be successful' (79), since appeal to self-interest and sentiments to account for altruism are 'superfluous' (80). He acknowledges self-interest can be a motivation for altruism (80), but this tends to be an internal reason and is seen as not being rational, because it is often dependent upon feelings. Altruism, for Nagel, is dependent on impersonal objective reasons as motives for action. Therefore, Nagel proposes that '[a]ny objective principle which demands self-reliance, self-defence, or self-improvement will not be altruistic' (97). It seems as though Nagel regards all human beings as the same, following a rational Kantian universalisation, and fails to consider how individuals's specific needs differ. He fails to see a dialogue or interaction between the self and the other. If we adopt an impersonalist morality, based upon impartiality and universality, which focuses upon generic human beings with the same agent-neutral and objective

⁷² *Ibid.*, 175.

⁷³ *Ibid.*, 175-6.

values, then allowing for the partial, specific self-interest, experience and inclination of agents can be difficult.

4.3.3 Agape with Anders Nygren and Gene Outka

Christian interpretations of altruism are often defined in relation to *agape*. *Agape* is regarded as love for the other, i.e. love for our neighbour according to the Protestant theologian Anders Nygren. Nygren is explored in this section, even though he is criticised for his interpretation of *agape*. Nygren regarded *agape* as love for our neighbour, which has a Christian basis in the love of God. He considered it as 'disastrous' that the 'general love of humanity', found in love of neighbour, has lost its religious identity by being equated with altruism as 'fellow-feeling'.⁷⁴ He acknowledged that notions such as altruism and sympathy bore 'similarities' to Christian love of neighbour, but he suggested they had differing spiritual bases, and are unconnected to Christian love.⁷⁵

For Nygren, self-love is connected to Eros,⁷⁶ which is a type of selfish self-interest and self-seeking. This is regarded as sinful by *agape* for wanting its own.⁷⁷ He refused to link self-love with *agape*, seeing self-love as perverting human will, and regarded it as an 'error' to read self-love into the gospels.⁷⁸ He saw self-love as the basic human moral problem to be overcome by other-regarding and self-sacrificing *agape* as *the* Christian love. *Agape* as love for the neighbour is seen to 'exclude' and 'overcome' self-love.⁷⁹ Self-love is seen as 'alien' to New Testament commands to love.⁸⁰ 2 Corinthians 5:14f. is cited, that

⁷⁴ Nygren, *Agape and Eros*, 95.

⁷⁵ *Ibid.*, 95.

⁷⁶ *Ibid.*, 209-10 and 216.

⁷⁷ *Ibid.*, xiii.

⁷⁸ *Ibid.*, 101 and 130.

⁷⁹ *Ibid.*, 101.

⁸⁰ *Ibid.*, 100.

human beings under Christ's *agape* do not live to themselves but to Jesus, since according to Romans 15:1-3 we are not to please ourselves but our neighbour.

Instead, *agape* is seen as coming from God and is 'the criterion and the source of all that can be called Christian love'.⁸¹ *Agape*, as God's love gives order to the world. Nygren believed *agape* is surrender to God where the agent becomes God's slave so only God's will is done.⁸² He believes *agape* derived its meaning from 'fellowship with God'.⁸³ He regards *agape* as '*spontaneous and unmotivated, uncalculating, unlimited and unconditional*'.⁸⁴ Nygren states:

Christian love moves in two directions, towards God and towards its neighbour; and in self-love it finds its chief adversary, which must be fought and conquered. It is self-love that alienates man from God, preventing him from sincerely giving himself up to God, and it is self-love that shuts up a man's heart against his neighbour.⁸⁵

However, Nygren's view of *agape* is too negative and can be criticised for its expectations of self-abnegation and self-sacrifice, where the self is lost due to there being no obligation to the self. Love does not have to be seen as self-sacrificial *agape* only; and an alternative exists in love as charity, as we have seen above in Augustine and Aquinas.

In contrast with Nygren, theologian Gene Outka understands *agape* as a universal, impartial and rational love including the self, reducing the emphasis upon the other.⁸⁶ Outka shows that altruism is usually regarded as a moral obligation promoting others and not the agent's interests, whereas ethical

⁸¹ *Ibid.*, 218. Darlene Fozard Weaver agrees stating: 'Anders Nygren regards self love as entirely pernicious. He differentiates self-interested, erotic love from other-regarding, *agapic* love, correlating *agape* with neighbor love and eros with self love', see Weaver, *Self Love and Christian Ethics*, 48.

⁸² Nygren, *Agape and Eros*, viii-ix.

⁸³ *Ibid.*, 67.

⁸⁴ *Ibid.*, 91.

⁸⁵ *Ibid.*, 217.

⁸⁶ Gene Outka, *Agape: An Ethical Analysis* (New Haven, CT: Yale University Press, 1972).

neutralism or universalism aims at all who are affected by the actions of the agent. He prefers *agape* to involve social cooperativeness with a movement from self-sacrifice to harmony. However, he suggests a mutual *agape* in personal and social relations where a communication and sharing exists between people or groups in an exchange. People for Outka are 'reciprocally connected' within groups and society with a 'struggle' for harmony.⁸⁷ He favours mutuality with *agape* as 'equal regard'. He sees as equal regard as having advantages over co-operativeness for *agape*, such as an emphasis upon egalitarianism.⁸⁸ Self-love is acknowledged as part of mutual love and is unavoidable and is part of a person's integrity. He sees self-love as a basic, natural self-regarding act for all human beings. For Outka a person who loves their neighbour is able to love themselves too.⁸⁹

Even so, Outka has been criticised for being too individualistic and failing to connect the self to others and ignoring 'personal identity, narrative, tradition, and community'.⁹⁰ Equal regard is criticised for being 'rule-based' with an 'impersonal universalism' and overlooking the psychological aspects of *agape*, including 'empathy and affections' relating to the special relationships of family and friends.⁹¹

Instead, an alternative needs to be offered. There is a need for more emphasis upon *caritas ordinata* as an ordered self-love, reflecting God's love for us. Self-sacrifice or self-abnegation should not be the only expected duty within Christianity, and altruism, especially pure altruism, is not the only possible ethical relationship. *Caritas ordinata* allows us to love the self and to love the other too while loving God, whereas altruism tends to favour love of the other

⁸⁷ *Ibid.*, 177.

⁸⁸ *Ibid.*, 285.

⁸⁹ *Ibid.*, 288.

⁹⁰ Stephen J. Pope, 'Love in Contemporary Christian Ethics', *The Journal of Religious Ethics* 23 (1995), 167-97, at 169.

⁹¹ *Ibid.*, 169.

over love of the self, with self-interest too often being equated with selfishness or egoism. However, an alternative view of altruism needs to be offered, which draws upon *caritas ordinata* to a certain extent. However - as we shall see - the alternative view of altruism, as relational altruism, differs from the organic view involving mutuality which is set out in the next subsection. It is important to have a variety of emphases upon the self and the other, without insisting upon a mutuality of the self and the other, since there are times when the self has to be independent and the other has to be independent or a certain degree of self-sacrifice is required.

4.3.4 Mutuality

As seen above, *agape* for Nygren is impartial, self-sacrificial action for another, without self-regard. An alternative is an organic view of the relationship between the self and the other, which is based upon mutuality and consensus. Mutuality favours egalitarianism, by valuing the self and other and allowing them to positively care and respect each other, often with a balanced equilibrium. Some feminists such as Beverly Wildung Harrison⁹² and Judith Plaskow⁹³ favour mutuality over *agape*, believing it includes the self and the other without emphasising self-sacrifice. Feminists are often concerned that women are expected to be subservient in society and instead encourage them to stand up for their welfare and human flourishing by acknowledging their dignity by caring for and respecting themselves.⁹⁴ Valerie Saiving Goldstein believed women are pressurised to 'devote themselves' to others which can

⁹² Beverley Wildung Harrison, 'The Power of Anger in the Work of Love: Christian Ethics for Women and Other Strangers', in Judith Plaskow and Carol P. Christ (eds.), *Weaving the Visions: New Patterns in Feminist Spirituality* (New York: Harper Collins, 1989), 214-25.

⁹³ Judith Plaskow, *Sex, Sin and Grace: Women's Experience and the Theologies of Reinhold Niebuhr and Paul Tillich* (Washington, DC: University Press of America, 1980).

⁹⁴ Grant, *Altruism and Christian Ethics*, 159.

prevent her self-development.⁹⁵ Instead of self-sacrifice, collegial altruism is often advocated, where the self and the other are able to mutually benefit with exchange or reciprocity. On this view, the welfare of the self and the other is sought; not just that of the other.⁹⁶ Feminists like Plaskow tend to concentrate upon love as *caritas* with an inclusion of *eros*, with 'a balance or equilibrium' of self-regard and other-regard with mutuality and equal regard.⁹⁷ Louis Janssens also advocates *caritas* with love as equal regard; on his view we can love the other and the self in mutuality without self-abnegation.⁹⁸

However, a weakness of mutuality is that it demands an equal relationship of the self and the other. It expects both parties to benefit within a transaction, by both giving and receiving. Altruism within the mutual organic perspective is seen as expected, unavoidable and natural, with the self and the other mutually helping each other to develop. Action for one is perceived as action for the other. Mutualists tend not to allow the self to engage in pure, supererogatory altruism because such sacrifice would be considered negative for the self. Feminists often disapprove of pure or sacrificial altruism as detrimental to women and incompatible with mutuality. However, mutuality may not be responsive enough to deal with the actual and specific needs of the self or the other. At times self-sacrifice which cannot be reciprocated may be required, for example a sister may donate a kidney to her ill sister, who cannot reciprocate. Even so, it is imperative that women do not feel pressured to be altruistic and alternatives exist to prevent expected altruism from women, with women made aware of cultural stereotypes that lead some into altruism. Relationalism as an alternative to mutually is explored below in section 4.3.5.

⁹⁵ Valerie Saiving Goldstein, 'The Human Situation: A Feminine View', *The Journal of Religion* 40 (1960), 100-12, at 110.

⁹⁶ Grant, *Altruism and Christian Ethics*, 221-2.

⁹⁷ Don S. Browning, 'Altruism and Christian Love', *Zygon* 27 (1992), 421-36, at 427.

⁹⁸ Louis Janssens, 'Norms and Priorities in a Love Ethics', *Louvain Studies* 6 (1977), 207-38, at 216-30.

4.3.5 An Alternative Relational Framework

The moral domain does not have to be defined exclusively in terms of concern for the other, with an objectively rational and universal framework, nor does it always have to follow mutuality. An alternative relational framework could be flexible, sensitive and responsive to the needs of the self and other with a pluralistic ontology. It would allow for varying degrees of emphasis upon the self and other with pluralistic moral motives and actions, so both the self and other can be acknowledged together or separately, thus giving an ordered love, without insisting the needs of one party always take preference. Such flexible responsiveness will not always be mutually egalitarian with an equally balanced relationship. Sometimes a compromise may be inappropriate, and an imbalance may be required, with more emphasis upon the other or more emphasis upon the self which may involve excess or some sacrifice to satisfy the needs of the self or the other. Occasionally, it is possible to see your needs as less important and the other's needs as weighing more. For example, an agent might act as a carer, giving her all to a person, but at other times having a respite and care for herself. Aquinas was too constrained to suggest charity requires we are to love ourselves more than our neighbour.⁹⁹ It could be suggested that the 'constraint' on Aquinas is the teaching of Jesus. However, Jesus wants us to love our neighbour as we love ourselves, not to love the self more than the neighbour as suggested by Aquinas. However, self-abnegation, selfishness or altruism will not be obligatory. A relational framework, without exclusively insisting upon one type of arrangement, will allow for a variety of acts such as self-interest, pure altruism, supererogatory self-sacrifice and egalitarian mutuality with a proportional balance, dependent upon the needs of participants.

⁹⁹ Aquinas, *ST*, II, 26, 4.

Even though the self has to be responsive to the needs of the other, a relational ontology allows for the separate self and appropriate self-concern, so that the self is not totally absorbed or lost by the other. We can give to charity and have care for others, but keep some money for ourselves to care for the self, while being motivated to care for others. Therefore, the other needs to consider the self and possibly restrict what they are asking the self to do for them, by being responsive to their needs and considering justice. Both self and the other could be in dialogue with each other; listening to each others' needs and priorities instead of assuming what they want by your own interpretation, since the self cannot always know what the other needs. Many factors will determine which type of relationalism with the other is followed, depending upon the needs and priorities of participants and their circumstances. Even though it can be difficult to articulate what the needs of people are at the outset as people differ and their needs differ, **within philosophy** the concepts of needs are often discussed. Basic human needs can be universal and objective and usually, as a minimum, include oxygen, water, food, clothes, medicine and shelter which contribute to a person's welfare, well-being and flourishing, leading to harm if they are not met.¹⁰⁰

Relationalism is not a new ethical theory for everything; sometimes a relationship may have to be severed, since not all relationships can be maintained. But a relational framework will encourage co-operation in order to reach a solution with ongoing collaborative interaction, discourse and negotiation. It will respond to on-going experiences with flexibility, dynamism and sometimes compromise by taking an interpersonal and contextual approach to the needs of participants. The framework will allow for interdependence as well as separate individuals with particular and personal

¹⁰⁰ Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford: Oxford University Press, 1995), 610.

others, allowing for partiality instead of impartial impersonal others. Relationalism involves people whose interests may differ and therefore it may involve tensions within a relationship. As relationalism is flexible, there are many different ways in which it can try to resolve these differences. Sometimes, the discourse the participants are involved in, allows them to see the importance of each other's priorities and their importance, which could lead to compromises and concessions. Sometimes people might have to agree to disagree. At times, the relationship may have to end completely. Alternatively, the relationship between the two people will run alongside each other concurrently, but separately, such as a couple both going to a cinema complex, but watching separate films. Allowance will be made for feelings such as compassion, sympathy and empathy as well as reason. The rights of individuals need to be respected along with their freedom, autonomy, well-being, dignity and human flourishing, but with justice and care working together.

My relational framework is objective in form but not in content, since I am rejecting an objective set of rules. It is not traditionally objective in Nagel's sense, since I reject the idea of an impersonal generalised other. However, I am not totally subjectivist or relativist; allowing for the individual does not necessarily mean relativistic allowance of anything. My three main principles held in the construction of the framework are objective, general and universal: Firstly, you ought to be concerned with the needs of other people (this obligation does not depend on whether you want to be concerned with them). Secondly, you ought to be concerned for your own needs. Thirdly, you ought to be willing to negotiate the fulfilment of both. The relational framework allows for negotiation to fulfil the three objective principles to allow for people's individual needs and the needs of others in a particular way. Therefore, I have a meta-objectivity of standards, allowing for freedom,

flexibility and reason from the individual by combining objectivity and subjectivity. The next section explores how a relational framework can be applied to altruism.

4.3.6 Relational Altruism

Relationalism as described above can be applied to altruism. Relational altruism tries to be more responsive to the specific needs and welfare of participants by allowing for some subjectivity, instead of making such needs fit to the requirements of predetermined reason. Unlike Nagel's impersonal and universal, generalised altruistic agent, who acts on impartial rational terms and sees him or herself as just one person among many,¹⁰¹ the relational altruist looks out for their own needs and the specific interests of the particular other. The ends of altruistic action will be personally derived by dialogue instead of being impersonally imposed, since the objectively determined ends of traditional altruism may not be responsive enough, applicable to or suitable to meet the needs of participants.

My relational altruism differs to pure altruism, for my relational altruism allows for self-interest and concern for the other. My relational framework is flexible to allow for acts of pure altruism done just for the other, but it is not just restricted to this. The relational framework also allows for relational altruism, with various degrees of emphasis upon the self and the other, and not just all for the other, as with pure altruism. The relational approach to altruism is premised upon the belief that motives of self-interest and altruism can co-exist in various ways. Relational altruism produces a spectrum of altruistic actions without detriment to participants, which sometimes includes mutuality. We can reject the idea that only one motive of concern for the other

¹⁰¹ Nagel, *The Possibility of Altruism*, 123-4.

must be at work in altruistic action. The motives can be filtered through in many ways by a structure of understanding, based on an intuitive level and psychological level about how reason and motives co-exist. Relational altruism allows an agent to choose pure altruism or to coincide self-care with care for the other's welfare, unlike traditional altruism where the self is often expected to be subordinated to the other with less moral significance. Relational altruism, unlike mutuality, does not insist upon a proportionate and equal relationship between the self and other with no pure altruism, since relational altruism does not paternistically restrict pure altruism as inappropriate. Sometimes others will not be able to respond in a mutual way to the self who is acting altruistically towards them, such as a person in a persistent vegetative state. Paid acts which care for the self as well as the other will be able to operate alongside pure unpaid altruistic acts.

The other has a responsibility to the altruistic agent to consider their needs and dignity while they are altruistic towards them, thus preventing unnecessary harm or self-sacrifice. This may mean the other performs an action for themselves, instead of expecting another to do it for them. The altruistic agent has a responsibility to themselves to ensure they are not exploited or coerced into action, thus respecting their own interests. Self-interest can be an ethical motive for altruism since an agent can act altruistically for another while caring for themselves, and self-interest does not have to cause harm to the other or threaten moral motivation or moral action. After all, the other may have given permission or approve of the altruist's self-interested behaviour.

Altruistic concern for the other can include concern for the self, without detriment to the other. The truly loving person has to take care of themselves, since to drive oneself to depression and suicide by overdoing altruism to the extent of self-neglect is morally unacceptable. By loving ourselves, we can love

and act for others by being aware of our common interests as human beings with dignity as well as our distinct and specific needs. We can look after our interests, for example feeding ourselves, because we love ourselves and not simply as a secondary duty performed in order to look after others, as suggested by Protestant theologian Paul Ramsey.¹⁰² Self-interested motivated actions will not be regarded as egotistical since the actions will not be detrimental to the other. However, an act would be condemned as egotistical if the situation called for concern for the other and the self failed to acknowledge this, by insisting upon their own actions to the detriment of the other. Self-interest can include responding to the needs of others, but some altruistic acts will involve no self-interest. Self-interest cannot always take precedence, as it would be inappropriate for a moral agent to prioritise the trivial needs of the self over the greater needs of another. Both the self and the other have responsibilities to themselves and each other; both should be treated with dignity by respecting their interests and needs.

Having looked at the issue of self-interest and altruism, we will now turn to the issue of surrogacy and the 1998 *Brazier Report*, which investigated payment in surrogacy. The *Brazier Report* believed unpaid surrogacy is preferable to paid surrogacy since paid surrogacy is equated with baby selling. However, if the self-interest of the surrogate is to be taken into consideration as an ethical dimension and if self-interest can operate alongside altruistic motives of concern for the other, paying a surrogate could be regarded as a way for the commissioning couple to show their gratitude to the surrogate for her activities, and respond to her needs. A surrogate may regard payment as a way for her to benefit from the arrangement along with her family, while having concern for the needs of the commissioning couple and the child at the

¹⁰² Paul Ramsey, *Basic Christian Ethics* (Louisville, KY: Westminster John Knox Press, 1950), 163.

same time. As a result of this discussion we will refute concerns that paying surrogates involves baby selling.

4.4 Attitudes to Paying Surrogates in Surrogate Motherhood

4.4.1 The Brazier Report and Allowable Expenses

To prevent accusations of baby selling, the *Brazier Report* recommended new statutory provisions to define and limit specific lawful payments to surrogates. These were to be restricted to expenses only for designated purposes, even though no limit was set. It regarded allowable expenses to include:

[m]aternity clothing, healthy food, domestic help, counselling fees, legal fees, life and disability insurance, travel to and from hospital/clinic, telephone and postal expenses, overnight accommodation, child care to attend hospital/clinic, medical expenses, ovulation and pregnancy tests, insemination and IVF costs, medicines and vitamins.¹⁰³

Loss of actual earnings, but not potential earnings could also be taken into consideration.¹⁰⁴ The surrogate could claim therefore for the payment of services provided by others involved - e.g. the counsellor who counsels her, the lawyer who advises her, and the medic who cares for her. Yet, she is unable to claim any expenses for her time, and her service of gestation, and the use of her body, which she gives as her contribution to the arrangement.

However, surrogates may prefer to receive a fee instead of expenses. An expenses-only policy could deny surrogates 'control and autonomy' over how they spend the money they receive.¹⁰⁵ The *Brazier Report* suggested that all

¹⁰³ *The Brazier Report*, 5.25-5.26.

¹⁰⁴ *Ibid.*, 5.25-5.26.

¹⁰⁵ Sharyn L. Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy', *Acta Sociologica* 33 (1990), 63-74, at 70.

monies given to the surrogate be directed to specific costs, which could be interpreted as over burdensome. The surrogate may express her autonomy more with a fee. For example, a commissioning couple may be willing to pay taxi fares for a surrogate. The surrogate may prefer to take the bus and spend the additional money on her existing children. Under the expenses system the surrogate only receives money upon presenting receipts, which could reduce her autonomy and restrict how she spends the money. The surrogate therefore could be denied money which her commissioning couple may be willing to give. If an expenses system is not ideal, the issue whether paid surrogacy is baby selling will now be explored.

4.4.2 Surrogacy Should Not Be Considered To Include Baby Selling

Many official international governmental investigations into surrogacy have regarded commercial surrogacy as the selling and the buying of a child. The *Warnock Report* suggested: 'for all practical purposes, the child will have been bought for money'.¹⁰⁶ The Australian Waller Committee in 1984 believed allowing payments in surrogacy would reintroduce the condemned practice of buying and selling children.¹⁰⁷

Much of the argumentation around the surrogate's payment involves the assumption that selling and buying children is immoral, that surrogacy involves selling and buying children, and that, therefore, paid surrogacy is immoral. Children are deemed as invaluable and therefore inappropriate to buy, outside the operation of markets and beyond the reach of money. Michael Walzer calls these 'blocked exchanges', which include preventing the sale of

¹⁰⁶ Department of Health and Social Security, *Report of the Committee of Enquiry into Human Fertilisation and Embryology (The Warnock Report)* (London: HMSO, 1984), 8.11.

¹⁰⁷ Anleu, 'Reinforcing Gender Norms', 66.

human beings, etc.¹⁰⁸ The individual and the collective worth of human beings is superior to being bought and sold, which processes violate their intrinsic human dignity and turn them into mere products. When a commissioning couple pay their surrogate a fee, it is assumed they are engaging in a business transaction involving the sale and purchase of a child.

In order to avoid accusations of market rhetoric Margaret Radin suggests banning paid surrogacy. Therefore it could operate without sale, 'supply or demand pricing' or 'advertising and marketing, stockpiling' or commodification of participants.¹⁰⁹ Radin believes unpaid surrogacy aids human flourishing, but cannot operate alongside paid surrogacy, expecting the market framework to 'drive out' the unpaid version. She maintains a 'domino theory' that if some sales are allowed then an 'exclusive market' for it exists.¹¹⁰ Even those children who were not 'purchased' from surrogates will 'realize that they have a definite commercial value, and that this is all their value amounts to'.¹¹¹

Many scholars believe financial remunerations in surrogacy are not for the gestational service provided by the surrogate, but for her to terminate, transfer and sell her parental and custodial rights and responsibilities to her own child and for the commissioning couple to buy her parental rights and custody to rear her child. Scott Rae believes payment in surrogacy involves 'the surrender of custody'¹¹² and 'purchasing the parental rights to the child'.¹¹³ A genetic

¹⁰⁸ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 100-3.

¹⁰⁹ Margaret Jane Radin, 'Market-Inalienability', *Harvard Law Review* 100 (1987), 1849-937, at 1855.

¹¹⁰ Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, MA: Harvard University Press, 1996), 99.

¹¹¹ *Ibid.*, 100.

¹¹² Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood: Brave New Families?* (Westport, CT: Praeger 1994), 32.

¹¹³ *Ibid.*, 35.

surrogate in particular is regarded as the child's biological and true mother because she has used her own egg and is thus considered to be selling her own child. Marvin Glass believes the payment in surrogacy is 'in part property rights over the child'¹¹⁴ and 'property is control over a person'.¹¹⁵ The child is regarded as an alienable piece of property to be disposed at the will of the surrogate. Even so, it can be argued surrogacy does not always involve baby selling, as seen in the next section.

4.4.3 Surrogacy Does Not Invariably Involve Baby Selling

Radin's refusal of paid surrogacy ignores the context surrogacy operates in. Radin identifies regulated markets as 'incomplete commodification', since regulation 'expresses and fosters an important nonmarket aspect of the interactions between persons who buy and sell things'.¹¹⁶ She admits that '[t]hings that are incompletely commodified do not fully exhibit the typical indicia of traditional property and contract'.¹¹⁷ Radin even hints at a relational justice approach with incomplete commodification (even though she does not see it in this way), when she says: 'justice in such an alternative theory [incomplete commodification]...depends upon the appropriate relation between persons and things, and between the persons and other people'.¹¹⁸

Unlike the relational approach that will be developed in chapter five of this thesis, Radin sees incomplete commodification as a 'regime'.¹¹⁹ She admits such a regime could be applicable to surrogacy because of the need for consideration for the commissioning father's genetic link to the baby and

¹¹⁴ Marvin Glass, 'Reproduction for Money: Marxist Feminism and Surrogate Motherhood', *Nature, Society and Thought* 7 (1994), 281-97, at 294.

¹¹⁵ *Ibid.*, 293.

¹¹⁶ Radin, *Contested Commodities*, 116.

¹¹⁷ *Ibid.*, 20.

¹¹⁸ *Ibid.*, 112.

¹¹⁹ *Ibid.*, 147.

without requiring compulsory and specific contractarian performance, if a surrogate changed her mind. However, Radin rejects incomplete commodification because she believes paying for surrogacy commodifies women's attributes as 'fungible baby-makers',¹²⁰ leads to a domino effect of all women suffering by becoming commodified, disempowers poor women, and sells babies. Chapter three clarified problems with commodification and this chapter challenges the view that surrogacy involves baby selling.

Anthropologist Heléna Ragoné conducted research into surrogacy centres in the United States of America.¹²¹ This indicated that most surrogates do not see the arrangement in terms of a contract or a business transaction,¹²² which is reflected in surrogates' motives for becoming surrogates. This correlates to Lori Andrews' suggestion that:

[s]urrogacy is distinguishable from baby-selling since the resulting child is never in a state of insecurity. From the moment of birth, he or she is under the care of the biological father and his wife, who cannot sell the child.¹²³

The child would not exist if it were not for the arrangement. The resulting child is not sold or auctioned off to any willing stranger offering a higher price, there is no reservation price which if not reached would cancel the process. The issue of rights is a key point in the issue of baby selling which is explored below. As seen above, it is often thought that the surrogate sells her parental and custody rights to the commissioning couple.

¹²⁰ Radin, 'Market-Inalienability', 1935.

¹²¹ Heléna Ragoné, *Surrogate Motherhood: Conception in the Heart* (Oxford: Westview Press, 1994).

¹²² Most American surrogates preferred having an open relationship, allowing them a close 'sisterhood' relationship with the commissioning mother see *ibid.*, 123.

¹²³ Lori B. Andrews, 'Surrogate Motherhood: The Challenge for Feminists', in Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Bloomington and Indianapolis, IN: Indiana University Press, 1988), 167-82, at 176.

4.4.4 The Issue Whether Rights Language is Appropriate for Surrogacy

The main debate regarding the selling of babies in surrogacy is focused upon the selling and buying of the surrogate's parental and custody rights. If the accusation of selling rights can be deflected then accusations of selling babies are reduced. Contractarian and rights-based language – along with the legal stance towards surrogacy in England – are problematic when discussing the ethics of surrogacy. Some women may want to alienate their parental and custody rights due to reasons of autonomy. However, it is preferable to reject rights and contract language as inappropriate for surrogacy, with emphasis upon a relational alternative as proposed in chapter five.

Rights language tends to be static, focused upon the individual and their needs, instead of a shared, dynamic, ongoing, negotiated and reflective response to problems caused by emotions or changed circumstances. Alan Gewirth believes: 'the agent's right-claim, precisely because is based on his own agency-needs, is logically prior to and independent of a community or social rules, except in a certain minimal sense'.¹²⁴ Gewirth wants human rights to take priority over every other moral consideration.¹²⁵ Such a belief puts rights before responsiveness to people's needs and circumstances.

Moral philosophers often suggest that having a moral right means you are 'morally entitled to something'.¹²⁶ H. L. A. Hart perceived rights as involving 'a moral justification for limiting the freedom of another person and for determining how he should act'.¹²⁷ Traditional rights language insists that

¹²⁴ Alan Gewirth, 'Rights and Virtues', *The Review of Metaphysics* 38 (1985), 739-62, at 746.

¹²⁵ *Ibid.*, 749.

¹²⁶ Joseph L. Allen, 'A Theological Approach to Moral Rights', *Journal of Religious Ethics* 2 (1974), 119-41, at 120.

¹²⁷ H. L. A. Hart, 'Are There any Natural Rights?', in Jeremy Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), 77-90, at 83.

rights are something you already have until you waive them. Present surrogacy law regards the surrogate as the birth mother with automatic child parental rights. A paid surrogate is regarded as being paid to waive, lose and transfer her parental and custody rights to the commissioning couple, thus selling her child. There is little opportunity for custody negotiation based upon the emotions or genetic relationship of the commissioning couple if she wants to keep the child. Another problem with a contractarian-rights framework is that a surrogate, who signs a contract, relinquishes her alienable rights to the child and is expected to honour the contract even if she changes her mind.

However, not all surrogates want to gain parental or custody rights. It could be seen as an essentialist and paternalistic view of motherhood, for society to insist women must automatically have these rights, whether she wants to or not. Some women may want to decide for themselves if they want to opt in and acquire the custody right and then assert them, so the custody right is not there until she has chosen it and selected it. If the surrogate decides not to opt into acquiring, having and asserting the custody right to the child then she cannot be accused of selling them because she has not acquired them in the first place. The payments to the surrogates would be for a gestational service and for their time and effort involved. If the surrogate asserts her parental right to be listed as the child's natural mother on the child's birth certificate, if the child is told of her existence and has a relationship with her, then she is not selling her parental right, but retains it.

Many surrogates value parenthood and their mothering role. Most surrogates receiving money benefit their families and see it as payment for a service. Research conducted by Ragoné shows that women who become genetic surrogates do so because they place a higher value on social motherhood and the role the commissioning mother plays; giving lesser importance to the role

of their own genes in the child's make-up.¹²⁸ Even though a genetic surrogate is linked genetically to the child, she may not regard herself as the child's mother, because she values social motherhood over genetic and gestational motherhood, thus reducing the possibility that she is selling the child.

It will be proposed in chapter five that an alternative, relational approach is more suitable for surrogacy, as opposed to a rights based, market-focused and contractarian framework. J. L. Mackie represents a traditional advocate of a rights-based morality, which favours rights instead of a relational approach. He states: '[i]f one individual is sacrificed for advantages accruing to others, what is deplorable is the ill-treatment of this individual, the invasion of his rights, rather than the relational matter of the unfairness of his treatment in comparison with others'.¹²⁹ The relational approach incorporates consideration of the needs of both self and other, and not just one to the detriment of another. The approach will have a co-operative stance and obviates rights-based imbalances, since the needs of each other will to be taken into consideration.

If a genetic surrogate, for example, was having doubts as to whether to hand the child over, a relational approach would consider her bonding and emotions, and visitation or shared custody could be an option. At the moment, the law can deny the commissioning couple parental and custody rights to the child. Rights language would assert that a genetic surrogate has full rights over the child, being able to put it up for adoption by anyone, whereas a relational approach would be more open to dynamic interactive dialogue to cater for changes in the situation and be responsive to negotiation, needs and emotional desires. A relational approach would respond to the needs of the

¹²⁸ Ragoné, *Surrogate Motherhood*, 74.

¹²⁹ J. L. Mackie, 'Can there be a Right-Based Moral Theory?', in Waldron, *Theories of Rights*, 168-181, at 174.

commissioning couple and allow them to be acknowledged as the child's genetic parents and to play a part in the child's life.

However, if a genetic surrogate changes her mind and wants to keep the child, she can opt into and then assert her custody right to the child and in such a case I would argue she should not be paid, since she will have gestated and plans to nurture her own child. She may be entitled to receive some maintenance and expenses from the commissioning father if she is very poor. It is similar to a painter who is given a commission to paint a picture for someone, who then decides she wants to keep it; she will have to return the fee paid at the beginning for her services. The surrogate could be accused of selling the child if the commissioning couple offered her more money to hand the child over to them, so they could have sole custody to the child (as opposed to joint custody), possibly making her relinquish custody for money. Women are not traditionally paid for gestating their own children when they raise them for themselves in society. If a surrogate keeps the child, the surrogate has in effect gestated her own child and is no longer a surrogate; therefore she should not necessarily and automatically be paid, since surrogates could be interpreted as being paid for gestating others' children and not their own. Another key aspect of the baby selling debate concerns the commissioning father, who could be regarded as buying his right to the child, which is explored below in 4.5.

4.5 The Issue of Whether the Commissioning Father Buys His Parental and Custody Rights

Opponents of surrogacy accuse the commissioning father of buying fatherhood and his parental rights when he offers money to a surrogate for her to conceive a child with his sperm. If it were not for the payment of money, the genetic

relationship the man has to the embryo would not come to fruition in a social relationship, therefore the commissioning father is envisaged as paying to become a father. Even when the surrogate inseminates herself with donor sperm (i.e. sperm from a man other than the commissioning father, who will not be the genetic father), the commissioning father is regarded as paying for the right for the surrogate to hand the child over to him. He is seen as buying custodial rights, so he can assume fatherly responsibilities to the child. If the commissioning father is the child's natural genetic father, Rae believes, 'the contracting father' buys parental rights to the child even if he is biologically related.¹³⁰ The commissioning father, to have full and permanent access to the child, additionally has to pay the surrogate's husband to relinquish his rights.

It is the inadequacies of English Law which lead to the supposition that a commissioning father is deemed to be buying his parental right when he pays a surrogate. English Law treats the commissioning father, who uses a married surrogate, as if he were an anonymous donor, when he does not want to be considered in this manner. The commissioning father, if he is genetically related to the child, should not have to buy his parental status to be acknowledged as the child's father, since he is the child's genetic father.¹³¹ His position as the child's father is a result of the surrogate gestating his genetic sperm or embryo.

For the surrogate's husband not to be considered the child's father he has to formally opt out of being regarded as the child's father, instead of him not having the opportunity to be so regarded in the first place. Most surrogates' husbands do not want to be considered the child's father. The present law means the surrogate's husband would be legally responsible for the social and

¹³⁰ Rae, *The Ethics of Commercial Surrogate Motherhood*, 42.

¹³¹ The Kentucky Court declared that paid surrogacy is not baby selling because 'the natural father cannot buy back what is already his', see *ibid.*, 30.

financial maintenance of the child if the commissioning father rejected the child. Nonetheless, there have been no reported cases of a commissioning father paying the husband of the surrogate in order to be regarded as the child's father.

If the genetic surrogate keeps the child, then the commissioning father should not have to pay the surrogate for the right to be regarded as the child's father. This is because the surrogate is the mother of the child, she is keeping the child and if she were to charge the commissioning father she would be charging to hire the baby out. The commissioning father is usually related to the child and because the surrogate has gestated and kept the child she cannot be paid for providing a gestational service for another. However, a surrogate should be entitled to some payment; being able to claim maintenance payments from the father for the upkeep of the child during gestation. The law needs to be changed to allow a commissioning father visitation and custody access as the child's genetic father, even if the surrogate keeps the child. However, there is a need for a balance between justice and the accessibility of the commissioning father to his own child and the family stability of the child in the family of the surrogate who may raise it.

Usually relationalism will operate within the legal framework of the society in which it is found, following legal guidelines. Relationalists will be encouraged to follow the law, but also to be virtuous and sensitive to each other's needs which could involve them going above and beyond the minimum standards set for morality by the law. Most obedient and responsible citizens will follow the law, but at times the law may be unethical and a person may use their conscience by engaging in peaceful and legal civil protest. They will be encouraged to be critical of the law and call for change if the law fails to meet the changing needs of people or if it fails to allow for human flourishing, well-

being and welfare, or does not protect the vulnerable. Ideally, a legal framework for relationalism could be flexible and responsible, while being compassionate and responsive to the needs, priorities and importance of people as partial beings and not as universalised generic humans.

It is possible that the commissioning father, even though not technically buying the right to be the child's father because he is the genetic father of the child, may be accused of buying the right to custody if the surrogate has opted into acquiring custody rights. A surrogate could feel pressured to hand the child over, because of demands by the commissioning father offering her money for him to gain exclusive custodial rights. In such a situation, the commissioning father could be accused of buying custody to his child because the surrogate had decided to opt into acquiring the chance to gain and then assert parental rights.

Heidi Malm, however, believes the commissioning father is not able to purchase the mother's custodial right from her, even when she admits the father must have the custody right to achieve exclusive custody of the child.¹³² Uma Narayan indicates that the fathers gain full parental rights to the child and are unable to resell it.¹³³ However, if the commissioning father offered the surrogate money after she had opted into acquiring parental rights, to try to get her to waive her opted into legal rights so he could raise the child exclusively, then he could be accused of trying to buy them from her and bribe her by coercion. Therefore, despite Malm's views, it is possible to highlight the potential coercive role money could play in a father trying to gain exclusive custody rights, as opposed to parental rights, from a surrogate not wanting to

¹³² Heidi Malm, 'Paid Surrogacy: Arguments and Responses', *Public Affairs Quarterly* 3 (1989), 57-66, at 62.

¹³³ Uma Narayan, 'The "Gift" of a Child: Commercial Surrogacy, Gift Surrogacy, and Motherhood', in Patricia Boling (ed.), *Expecting Trouble: Surrogacy, Fetal Abuse and New Reproductive Technologies*, (Boulder, CO: Westview Press, 1995), 177-99, at 185.

hand the child over. However, if the surrogate is able to retain her custody rights if she keeps the child the commissioning father should be able to have access and be acknowledged as the child's father on the birth certificate. If the surrogate does not opt into acquiring parental and custody rights then the surrogate cannot be accused of selling them and the commissioning father cannot be accused of buying them if she did not sell them in the first instance.

4.6 The Issue of Gestational Service

Another major concern in paid surrogacy is whether the surrogates are being paid for selling a baby or for providing a gestation service, which is connected to the question of what their motives are in surrogacy. This will now be discussed.

4.6.1 Is Paid Gestational Service Payment for the Baby Alone?

Opponents of paid surrogacy believe commissioning couples pay primarily for the child and only secondarily for the gestational service of the surrogate. If the couple were interested in the services of the surrogate alone and not the child, then if the surrogate had a miscarriage, stillbirth or she kept the child; she would be paid in full. However, most surrogates only receive their full fees if they hand full custody of the child over to the commissioning couple and receive nothing if they maintain custody of their child. The surrogate contract in the Baby M case signified that the surrogate Mrs Whitehead would receive no fee if she miscarried before the fifth month of the pregnancy, receive \$1,000 for a miscarriage or a stillbirth after the fifth month and \$10,000 for handing the child over to the commissioning couple shortly after the birth.¹³⁴

¹³⁴ George J. Annas, 'Baby M: Babies (and Justice) for Sale', *The Hastings Center Report* 17 (1987), 13-15, at 14.

The belief that the gestational surrogate becomes the mother is supported by the English 1985 Surrogacy Arrangements Act, which asserts that the surrogate, even if she is a gestational surrogate, gestating someone else's embryo, gains parental rights to a child.¹³⁵ The foetus being gestated by the surrogate is not a separate part of her, but becomes part of her identity as a mother, allowing her to keep the child as part of her bodily integrity and embodiment of the surrogate. The idea the surrogate is considered the mother supports the idea that she is paid to hand over her child. However, as discussed below some suggest surrogates provide a gestational service, which is not child selling.

4.6.2 Is Paid Gestational Service Payment for the Service Alone?

Gestational surrogacy usually occurs in the context of a surrogate providing a service of 'embryo sitting' the commissioning couple's embryo, on their behalf, as a paid gestator. The surrogate expresses a prior intention to hand the child over to them as the parents. Research by anthropologist Ragoné indicates that gestational surrogates have selected to become gestational rather than genetic surrogates, since they place a high value on their own and others' genetic motherhood. Therefore, they do not want to be considered the child's natural mother, nor do they want to be seen as giving away their own genetic child.¹³⁶ Accusations of selling the child can be lessened by the following five points.

Firstly, the embryo 'belongs' to the commissioning couple; because they initiated the arrangement, they intentionally want to be regarded as the child's social parents and they are the child's natural genetic parents and could be seen to have an entitlement to their child. It may sound inappropriate to

¹³⁵ Rae, *The Ethics of Commercial Surrogate Motherhood*, 35.

¹³⁶ Heléna Ragoné, 'The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism', in Rachel Cook *et al.* (eds.), *Surrogate Motherhood: International Perspectives* (Oxford: Hart, 2003), 209-26.

suggest the commissioning couple have a property right in the embryo and the gestational surrogate has no right to the child, but this is the fault of the traditional rights and contract language used. The commissioning couple do not want to relinquish their right as the child's parents due to the embryo being gestated by another. Presently, the commissioning couple in England have no automatic right of visitation or acknowledgement as the child's genetic parents if a married gestational surrogate decides to keep the child, because the gestational surrogate as the birth mother and her husband are the child's legal parents. Only if the surrogate consents are they allowed to be acknowledged as the child's parents by a Parental Order or by adoption.

Gestation should not allow the gestational surrogate to gain exclusive maternal legal rights to the commissioning couple's pre-existent embryo. Custody disputes in gestational surrogacy could possibly be solved with the interests of the commissioning couple taking priority since they initiated the arrangement. However, the bodily integrity, emotions, embodiment and personal dignity of the surrogate cannot be overlooked. The gestational surrogate may be able to have limited access to the child and be recognised on the child's birth certificate as the child's gestator. If the law were changed to allow the genetic commissioning parents to be acknowledged as the child's legal parents and the surrogate was listed as the child's gestator, then the legal roles would be clarified for the child's benefit. Such a solution would be an example of 'relational justice', since the needs of each party would be taken into consideration as well as the context of the arrangement.

In foster care, a professional relationship of trust between the carer, the child and the natural parents is expected. Foster carers could be accused of kidnap and abduction if they keep a child who was due to return to its birth parents. Similarly, teachers maintain a professional stance to the children in their care

and cannot simply take home the ones they have bonded to. Such an attitude could also prevail in gestational surrogacy as a matter of trust between the surrogate, the commissioning couple and their child.

Secondly, since gestational surrogates do not want to gain parental or custody rights, they cannot be accused of selling something which they do not regard as having in the first place. The commissioning couple pay for a service and not a child. The law creates the illusion of paid gestational surrogates selling 'her' parental and custody 'rights' instead of her gestational service. The law insists that a gestational surrogate automatically gains parental and custodial rights as the child's legal mother, even when she does not want them. Such socially constructed behaviour undermines the surrogate's autonomy and ignores the unique context of the surrogate providing gestatory services to give others their only chance of gestating their own embryo. On occasions a gestational surrogate has been extremely distressed at having to register as the child's birth mother on a birth certificate (instead of the genetic commissioning mother) and has been troubled by having to go through an adoption procedure to give the child to its genetic mother.¹³⁷ Legally, surrogates are responsible for the child if the commissioning couple reject it, even if she has not consented to this role. Accusations of gestational surrogates selling children, parental and custody rights could be reduced by changing the law. Instead of gaining these rights she could be acknowledged as a gestational service provider and not the child's only mother. Of course, child security is important, but so is the bodily integrity and empowerment of the surrogates who do not to be regarded as the child's exclusive mother for giving birth to it. In order to ensure the child's welfare, the surrogacy agency could have strategies in place, such as approved foster carers on standby, in case the commissioning couple or the surrogate do

¹³⁷ *Surrogate Babies*, directed by Veronica Reinhardt and Graham Maughan (BBC documentary, 2 February 2000).

not want the child. Agencies could ask commissioning couples to take out insurance to cover such costs.

Thirdly, a gestational surrogate could reasonably expect to earn higher compensation for her services of gestation in comparison to a genetic surrogate, without baby selling. A gestational surrogate undergoes invasive treatments including hormonal injections to prepare and synchronise the surrogate's womb for the implantation of the commissioning couple's embryo or embryos. Extra payment could be made for the inconvenience of additional hospital visits, for the psychological and physical stress of whether embryos will implant or not and for the extra time taken to ensure a pregnancy. The payment from the commissioning couple could be for potential risks to her health and for sickness, since some jobs do not pay their employees if they are ill. Some women, if they have been employed in a job for only a short time, may receive few maternity benefits.

Fourthly, transactions involving both people and money are often made without the money being considered a direct exchange for the person. Registered child minders, nursery nurses, foster carers, wet nurses and teachers are paid to look after others' children. Likewise a surrogate could be paid for the time, care and nurturing she gives another's foetus. Judy Callman indicates that the National Foster Care Association in 1996 wanted foster carers to be paid 'for their time, experience and skills'.¹³⁸

Finally, careful regulation and compulsory insurance could ensure that a surrogate who experiences a miscarriage or a stillbirth, through no deliberate fault of her own, could be awarded compensation for her services, time, and effort, as well as for her convalescence after the birth. Indeed, R. Jo Kornegay

¹³⁸ Judy Callman, 'Surrogacy - A Case for Normalization', *Human Reproduction* 14 (1999), 277-8, at 278.

believes offering Mrs Whitehead only 10 percent for a stillbirth and miscarriage was not enough and she should have been offered more.¹³⁹ Such payments could help to answer accusations of baby selling.

4.6.3 Motives of the Surrogate Mothers

An issue pertinent to the question of whether surrogacy involves baby selling is the motives of the surrogate. Self-interest has already been identified as an ethical motive, which can co-exist with altruism, i.e. concern for the other. Surrogacy has been identified as not necessarily involving baby selling. Following from this, the possibility of a co-existence of self-interest and altruism within paid surrogacy and the co-existence of unpaid surrogacy alongside paid surrogacy will be explored. Much of the medical and legal literature uses the term 'altruism' in an inappropriately defined manner; it uses the term 'altruistic surrogacy' to refer to situations where the surrogate is not paid, with little understanding of the philosophy of altruism. Since the word altruism is being used in this context as an evaluative term, I prefer not to use it. Therefore, I will be using the term 'unpaid' to describe a surrogate who acts as a surrogate without payment. It is important that unpaid surrogates are not being threatened to become a surrogate by pressure from family or friends or doing it out of fear, but are motivated by altruism for the commissioning couple and possibly out of self-interest too. At the moment, no specific research has been performed into comparing directly a paid surrogacy programme and an unpaid programme to analyse differences between the motives of participants.

Surrogacy research and biographies provide some details of surrogates' motives.¹⁴⁰ It is important to look at the precise language used, within the

¹³⁹ R. Jo Kornegay, 'Is Commercial Surrogacy Baby-Selling?', *Journal of Applied Philosophy* 7 (1990), 45-50, at 49.

evidence, to describe the surrogates' motives, in order to make a clear distinction whether money was the sole or the main motive of the surrogates. If money was the sole motive, this can be regarded as unfavourable since it adds to the commodification of the practice and reinforces surrogacy as purely baby selling.

However, most surrogates have mixed motives for wanting to become surrogates, combining altruism and gift giving with financial remuneration, whereas others have purely altruistic reasons and act without payment. Such a mixture of motives contradicts the belief that women only become surrogates due to financial incentives, as suggested in the *Brazier Report*.¹⁴¹ Ragoné shows most of the surrogates she interviewed did not have money as a sole motive. One surrogate commented: '[t]he money wasn't enough to be pregnant for nine months'.¹⁴² Another stated:

I'm not doing it for the money. Take the money: that wouldn't stop me. It wouldn't stop the majority.¹⁴³

Some surrogates phoned surrogacy agencies in the United States not knowing payment was available. Ragoné's surrogates admitted that money was initially an important consideration, but it was never a primary motivation, and its importance decreased over time as the pregnancy developed.¹⁴⁴ Research by psychologist Philip Parker shows 89% of women required a fee, but it was never a sole reason, i.e. 'never a totally sufficient reason for being a surrogate

¹⁴⁰ See: Maggie Kirkman and Linda Kirkman, *My Sister's Child: A Story of Full Surrogate Motherhood Between Two Sisters Using In Vitro Fertilisation* (Harmondsworth: Penguin Books, 1988), Lori B. Andrews, *Between Strangers: Surrogate Mothers, Expectant Fathers, and Brave New Babies* (New York: Harper and Row, 1989), Kim Cotton and Denise Winn, *Baby Cotton: For Love and Money* (London: Dorling Kindersley, 1985), Kirsty Stevens with Emma Dally, *Surrogate Mother: One Woman's Story* (London: Century, 1985) and Ragoné, *Surrogate Motherhood*.

¹⁴¹ *The Brazier Report*, 5:14.

¹⁴² Ragoné, *Surrogate Motherhood*, 57.

¹⁴³ *Ibid.*, 57.

¹⁴⁴ *Ibid.*, 57.

mother'.¹⁴⁵ Eric Blyth indicates 13 surrogates in his study 'claimed that money was not - and should not be - the *prime* motivating factor',¹⁴⁶ though he fails to explain what he means by 'prime' motive.

In Blyth's study, 3 out of 19 surrogates admitted 'financial motives' were the 'the *main* or *sole* reason'.¹⁴⁷ One woman stated that her motivation was 'financial embarrassment' and another woman regarded surrogacy as part of a way out of the poverty trap to fund higher education.¹⁴⁸ It is possible that the three women who admitted to financial need were more honest if this was truly their only motive. However, Blyth fails to state clearly whether he regarded these responses as sole or main reasons, since these women could have had other reasons too. For two of the other women, surrogacy was seen as a way of earning money alongside caring for young children.¹⁴⁹

Ragoné suggests that 'idealised' women are altruistic, and altruism precludes remuneration in surrogacy.¹⁵⁰ However, the financial motive is usually combined with other motives. Most surrogates want to benefit others, usually the commissioning couple. Sometimes the surrogates combine helping the commissioning couple with wanting to benefit their own children and families. Most surrogates felt sympathy for the infertile commissioning couple and want to make them happy by fulfilling their needs with the gift of life by providing

¹⁴⁵ Philip J. Parker, 'Motivation of Surrogate Mothers: Initial Findings', *American Journal of Psychiatry* 140 (1983), 117-18, at 118.

¹⁴⁶ Eric Blyth, "'I wanted to be Interesting. I Wanted to be Able to Say 'I've Done Something Interesting with my Life'": Interviews with Surrogate Mothers in Britain', *Journal of Reproductive and Infant Psychology* 12 (1994), 189-98, at 191.

¹⁴⁷ *Ibid.*, 191.

¹⁴⁸ *Ibid.*, 191.

¹⁴⁹ *Ibid.*, 191.

¹⁵⁰ Ragoné, *Surrogate Motherhood*, 60-1.

them with a much-wanted child.¹⁵¹ In Ragoné's study, most surrogates did not spend the money on themselves alone, but on their family as a reward.¹⁵²

However, just because the surrogates in Ragoné's study tended not to spend money from surrogacy on themselves does not mean they were not acting self-interestedly. Close analysis of the surrogacy research demonstrates surrogates combining wanting to benefit others with self-interest. While being surrogates for the commissioning couple the surrogates were at the same time able to act on values which were important to them and satisfy themselves. In fact, one paid surrogate specifically stated she had been a selfish person in the past but had wanted to do something for others.¹⁵³ Other self-interested reasons of the surrogates included, wanting to bear a child but not raise it,¹⁵⁴ pregnancy and birth as 'a source of comfort, an avenue of power'¹⁵⁵ and compensation for a past abortion or adoption.¹⁵⁶ Some surrogates wanted the experience of childbirth itself.¹⁵⁷ The surrogates saw giving birth as an occupation, a vocation and a skill and talent as a special quality that is socially valued and should be rewarded monetarily as it is something not all women can do. They value childbirth and see motherhood as important.¹⁵⁸ Surrogacy for such women is a way 'to express and to fulfill themselves'.¹⁵⁹ Being a surrogate gave them a sense of 'pride' 'self-worth' and 'confidence' in themselves.¹⁶⁰

¹⁵¹ *Ibid.*, 38, 40-1, 85 and 136. A surrogate who regarded children as important entered surrogacy to make a commissioning couple happy and not for money, see Rona Walker, *Love Child: Our Surrogate Baby* (London: Bloomsbury, 1990), 177.

¹⁵² Ragoné, *Surrogate Motherhood*, 58.

¹⁵³ This comment was made by Stephanie, the surrogate mother of Rona Walker in Walker, *Love Child*, 75.

¹⁵⁴ Ragoné, *Surrogate Motherhood*, 62.

¹⁵⁵ Andrews, *Between Strangers*, 69.

¹⁵⁶ Parker, 'Motivation of Surrogate Mothers', 118.

¹⁵⁷ For example Dawn wanted to be a surrogate to experience childbirth and make others happy and receive \$10, 000, in Noel P. Keane with Dennis L. Breo, *The Surrogate Mother* (New York: Everest House, 1981), 76.

¹⁵⁸ Ragoné, *Surrogate Motherhood*, 72.

¹⁵⁹ *Ibid.*, 55.

¹⁶⁰ *Ibid.*, 65.

In order to assess the debate as to whether payment deters altruism, I will explore the well-known research by Richard Titmuss into blood donation. Titmuss believed an exclusive unpaid system encourages altruism (4.7.1) – a view which has been challenged by Kenneth Arrow, but defended by Peter Singer (4.7.2). However in section 4.7.3 I will suggest altruism should be freely chosen alongside a paid alternative, instead of directly guided by society or peer group pressure. After all, it could be altruistic for an unpaid participant to acknowledge that another may need payment.

4.7 Self-Interest and Altruism in Blood Donation

4.7.1 The Consequences of Payment: Richard Titmuss and the Case for Altruism Only in Blood Donation

Richard Titmuss, in *The Gift Relationship: From Human Blood to Social Policy*, investigated American and British blood donation between 1965 and 1967. He believed paid blood donation involves lower blood supplies, poor quality, wastage,¹⁶¹ more expense,¹⁶² and a fourfold higher risk of contracting a disease from contaminated blood, when compared to the British system where all donors are unpaid. The poor and drug addicts donate more in paid systems, often hiding their addiction to receive payment.¹⁶³ In the United Kingdom, unpaid blood donors tend to be social class I, or II - not IV or V.¹⁶⁴ Titmuss feared that commercialisation deters altruistic givers, discourages fellow-

¹⁶¹ According to Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London: George Alden and Unwin, 1970), blood can be wasted due to medical, technical and administrative mistakes and 15%-30% of blood is wasted in the United States of America compared with 2% in the United Kingdom, 55-6.

¹⁶² Titmuss indicates that blood is 5-15 times administratively more expensive in the United States *ibid.*, 205.

¹⁶³ *Ibid.*, 105 and 76.

¹⁶⁴ *Ibid.*, 128.

feeling to help strangers and increases coercion. He rejected a combination of commercialisation and altruism, favouring a system of non-payment as encouraging 'fellowship' in society.¹⁶⁵

The 1965-1967 survey into blood donation in the United States of America revealed six types of donors. The percentages of each type of donor are given. The percentages in brackets refer to the same types of donors, but they participated in systems operated by commercial banks and pharmaceutical firms. The non-bracketed figures relate to the USA Government-run, paid blood donation programme.

1. The paid donor 29% (47%): Titmuss regarded this as impersonal and mechanical selling of blood at market price without being regarded as a gift.¹⁶⁶
2. The paid-induced voluntary donor 4% (3%): donors were induced to give by their trade unions, but were paid.
3. The responsibility fee donor 52% (39%): blood donations are given instead of payment for blood the donor received in the past. Family credit donors are included too, who donate to insure their family's blood needs for a year.¹⁶⁷
4. The captive voluntary donors 5% (4%): are expected to give blood by their institutions, including members of the defence force and prisoners who have their terms reduced by donating.
5. The fringe benefit voluntary donors 1% (0%): these have non-monetary fringe benefits such as paid leave, longer holidays, sports tickets, etc.
6. The voluntary community donor 9% (7%): these receive no monetary reward, but expenses only; donation is a free gift to strangers.

¹⁶⁵ *Ibid.*, 241-2.

¹⁶⁶ *Ibid.*, 75-6.

¹⁶⁷ *Ibid.*, 82 and 95.

At the time in Communist Russia, half the donors were unpaid but received other benefits such as time off work, extra holiday, free transport and 'higher priority for housing'.¹⁶⁸

In the British survey of unpaid blood donors questions were asked to try to determine their motives and influences for giving blood. However, Titmuss admits it was difficult to determine the respondents' main motives and influences due to the vague wording of the questionnaire:

1. Altruism (26.4%): a general desire to help people (possibly copied directly from the questionnaire).
2. Gratitude for good health (1.4%).
3. Reciprocity (9.8%): respondents believed blood donation should be a reciprocal process.
4. Replacement (0.8%): donors believed they replaced a family member who used to donate.
5. Awareness of a need for blood (6.4%).
6. Duty (3.5%): donation seen as an obligation to help others from religious duty (16.1%) or a duty to society (83.9%).
7. War effort (6.7%).
8. As members of the defence services (5%): blood donated to receive benefits, e.g. excused drill and from external pressure to donate.
9. Rare blood group (1.1%).
10. Obtain some benefit (1.8%): e.g. to find out their blood group, to receive a health check.
11. Personal appeal (13.2%): known individuals encouraged or requested donation.
12. General appeal for donors (18%).

¹⁶⁸ *Ibid.*, 177.

13. Miscellaneous (5%): reasons given include to get a cup of tea and to support their spouse.

14. More than one type of answer (0.9%).

In Table 1 below I have compared the motives in unpaid and paid blood donation. The comparison reveals that altruism is not the only motive in the unpaid system and even within commercially run systems in the United States (shown in the table in brackets) 7% of donors chose to receive no monetary reward, which was ignored by Titmuss. Interestingly, some of the unpaid donors, like the paid donors, were motivated by self-interest, some did not see their giving as a gift, some were induced to give and some gave blood to receive a benefit. Titmuss also failed to acknowledge inducement in the unpaid system. Participation in an unpaid system may not reflect altruistic motives, whereas a paid donor could also have altruistic motives for the other. Further research is needed, to see if the two cases Peter Singer cites of the number of people coming forward for donation falling once payment is offered would occur in surrogacy too.¹⁶⁹

Motives	UK Government-Run Unpaid Blood Donation Programme	USA Government-Run, Paid Blood Donation Programme (with commercially run programme statistics in brackets)
Benefit to self	Approx 10%	1% (0%)
Appeal to donor	31%	0% (0%)
Responsibility/duty	4%	52% (39%)

¹⁶⁹ Peter Singer ('Altruism and Commerce: A Defense of Titmuss against Arrow', *Philosophy and Public Affairs* 2 [1973], 312-20, at 315) comments '[i]n New York, the only city to have published sufficient figures to indicate a trend, voluntary community donations fell from 20 percent of total supplies in 1956 to 1% in 1966. The rise of commercial supplies has not been sufficient to compensate for the fall in unpaid donations', referring to Titmuss, *The Gift Relationship*, 96. Singer says that in Japan since donors are now paid, 98% of blood is paid for and the shortage of blood is worse than in the USA, Singer, 'Altruism and Commerce, 315.

Gratitude/duty	11%	0%	(0%)
Pure Altruism	26%	9%	(7%)
Induced	5%	9%	(7%)
Awareness of need	13%	0%	(0%)
Money	0%	29%	(47%)

Table 1: Comparison of the Motives Involved in Blood Donation Programmes.

Kenneth Arrow argues with Titmuss' findings, suggesting there is a lack of evidence that frequent blood giving by commercial blood donors damages health or that commercial blood supplies decrease altruism.¹⁷⁰ He believes blood is wasted in a commercial system, not because of payment, but because of a decentralised and unclear system. Arrow also comments on the redistribution of wealth in paid blood donation with the rich giving money to the poor. It is possible, for example, that if paid blood donation does encourage drug addicts to give blood, then perhaps they could be offered treatment instead of payment.

Titmuss suggests that payment reduces freedom, believing that 'private market systems in the United States and other countries...deprive men of their freedom to choose to give or not to give but by so doing escalate other coercive forces in the social system'.¹⁷¹ However, Titmuss failed to realise or chose to discount that if a society only allows for unpaid blood donation to exist without a paid alternative, then society is depriving people of their freedom to be paid. By offering only altruism, freedoms are limited instead of increased.

Improved efficiency, planning and control within a paid blood donation system could prevent wastage. A set fee could be paid to donors, but with flexibility to offer a higher fee to encourage donation by those with a rare blood

¹⁷⁰ Kenneth J. Arrow, 'Gifts and Exchanges', *Philosophy and Public Affairs* 1 (1972), 343-62.

¹⁷¹ Titmuss, *The Gift Relationship*, 239.

group or when general stock is low. Honesty should be a virtue for donors whether paid or unpaid. Sophisticated screening could detect hepatitis B and C, etc., and officials could wait for positive test results before paying donors, blacklisting those who do not match predetermined criteria. The paid system does not have to be 'mechanical, impersonal', as suggested by Titmuss,¹⁷² but could be personalised so paid donors know which hospital the blood is going to for example, allowing for fellow-feeling. Care needs to ensure that donors, whether paid or unpaid, are not coerced to participate; for example medical students should not be pressurised to donate blood as a course requirement.

4.7.2 Motives, Altruism and Money: Peter Singer

The philosopher Peter Singer tries to defend Titmuss against Arrow and supports unpaid blood donation only, instead of both paid and unpaid, despite admitting the evidence is 'inconclusive' whether paid systems discourage altruism.¹⁷³ However, he believes Titmuss provides a presumption of such a connection.¹⁷⁴ But Singer only quotes two examples to represent the 'overall picture' of the effect of paid blood donation upon unpaid supplies.¹⁷⁵ He believes a free system 'may strengthen feelings of community and mutual interdependence',¹⁷⁶ because altruism allows 'bonds' which can 'exist between strangers in a community'.¹⁷⁷ However, unpaid blood donation, unlike surrogacy, is an anonymous act and the donors never meet, preventing them from expressing their gratitude and appreciation to the donor, which could increase community cohesiveness. Pure altruism is motivated by concern for the other only, which is not representative of mutuality or interdependence.

¹⁷² *Ibid.*, 75.

¹⁷³ Singer, 'Altruism and Commerce', 314.

¹⁷⁴ *Ibid.*, 320.

¹⁷⁵ *Ibid.*, 315.

¹⁷⁶ *Ibid.*, 317.

¹⁷⁷ Peter Singer, 'Rights and the Market', in Tom L. Beauchamp and Norman E. Bowie (eds.), *Ethical Theory and Business* (Englewood Cliffs, NJ: Prentice-Hall, 1979), 72-85, at 78.

Singer suggests acting altruistically is hard if most people are egotistical, stating that he finds it 'easier to be genuinely altruistic' if altruism is 'expected' of him.¹⁷⁸ He cites evidence of people acting altruistically if they have witnessed others acting altruistically.¹⁷⁹ 'Titmuss's view', according to Singer, is: 'the opportunity for altruism promotes further altruism'.¹⁸⁰ Singer wants society to function based upon altruism, with people volunteering to be altruistic, instead of being motivated by money. He perceives unpaid blood donation as 'institutionalized generosity'.¹⁸¹ But if there is no choice or alternative to unpaid altruism, then the agent performs 'altruism by legal default'. However, an agent can have concern for the other and want her self-interest acknowledged by receiving payment or she may have pressing needs. An unpaid volunteer could have ulterior motives behind her acts and perform her service as a mere routine without genuine concern for the other. Unfortunately a volunteer may just want praise, without having concern for others, which could lead to other copy-cat insincere acts. A person may feel socially pressured to be altruistic to fit in: if being altruistic becomes the norm it may limit the sense of such acts being free as they are not performed by choice.

However both paid and unpaid workers in charity shops can work together, with both of them having concern for their customers. Singer admits that the 80% of British donors motivated by 'social responsibility' for others' needs, could still have acted without pay alongside a paid donation system.¹⁸² Singer assumes paid blood donation 'discourage[s] altruism', loosening social bonds and 'fellow-feeling',¹⁸³ whereas unpaid donation 'encourages altruism' unlike a

¹⁷⁸ Singer, 'Altruism and Commerce', 319.

¹⁷⁹ *Ibid.*, 319.

¹⁸⁰ *Ibid.*, 319.

¹⁸¹ Singer, 'Rights and the Market', 76.

¹⁸² Singer, 'Altruism and Commerce', 316.

¹⁸³ *Ibid.*, 314.

mixed paid and unpaid system.¹⁸⁴ However, virtuous motives can co-exist alongside payment; fellow-feeling could be demonstrated by the reciprocity, generosity and appreciation of the recipient to the donor by offering and giving them money. The recipient could be extremely grateful to the donor for their act and want to demonstrate their gratitude by rewarding them so the donors can pursue their own projects.

William Upton suggests that if committed blood donors were offered \$10 to donate they would be less likely to come forward.¹⁸⁵ Such blood donors may be purely altruistic and choose to do it freely, and would be offended to receive money regarding it as a slight on their character or motivation. However, research is needed to find out if this is true. If it were the case, to ensure unpaid altruists continue, it would be better for them not to be offered money and be kept separate from any paid schemes than to refuse to offer money to everyone. It would not be purely altruistic if an altruist insisted others were unpaid, since they would be paternalistically imposing their values upon others. Allowing payment therefore could be an altruistic act by thinking of the needs of the other who may need paying.

4.7.3 The Co-Existence of Altruism and Payment

The motives of altruism and self-interest can co-exist in a paid and unpaid system called a mixed economy combination or a modified price control model without detriment. Titmuss believed payment drives out altruism, since, on his view, the two motives cannot co-exist. Singer states, (referring to Titmuss): 'we must choose between the freedom of the marketplace and the freedom to

¹⁸⁴ *Ibid.*, 315, see also 317.

¹⁸⁵ William Edward Upton III, 'Altruism, Attribution and Intrinsic Motivation in the Recruitment of Blood Donors', *Dissertation Abstracts International* 34 (1973), 6260 B (at Cornell University, USA).

give altruistically'.¹⁸⁶ Self-concern is assumed to lead to a decline in service quality and concern for others is expected to detract from self-concern. However, in the United States of America, some blood is now freely given, (which was not the case when Titmuss' was writing). Pope Pius XII, in 1960, admitted 'that grave abuses could occur if a payment is demanded' for blood donation but thought it was 'going too far to declare immoral every acceptance or every demand of payment'.¹⁸⁷ He thought it 'commendable' for blood donors to refuse payment but thought it 'not necessarily a fault to accept it'.¹⁸⁸

Much can be learnt from the world of voluntary organisations where some people are unpaid volunteers and others are paid professionals. Management consultant Charles Handy¹⁸⁹ acknowledges that voluntary organisations can treat all workers equally despite differing roles (2-3). Voluntary organisations can involve co-operative team work (96-7 and 99) with a full-time paid professional core, paid part-time workers and unpaid flexible voluntary workers. He believes volunteers should be treated differently to the professional core, as their loyalty, commitment and needs vary. Handy wants organisations to focus upon worker's roles (117-19). Volunteers often want good, varied working conditions; fair treatment; to feel professional; and receive training and gain experience. Volunteers are not slaves and should have some control over their work. He criticises the abusive 'servant syndrome' where people become depressed after giving and serving too much, which does not help them or the other (7-8).

4.8 The Co-Existence of Unpaid and Paid Surrogacy

¹⁸⁶ Singer, 'Altruism and Commerce', 313.

¹⁸⁷ The Monks of Solesmes, *Papal Teachings* (selected and arranged): *The Human Body* (Boston, MA: The Daughters of Saint Paul, 1960), 381-2.

¹⁸⁸ *Ibid.*, 381-2.

¹⁸⁹ The following references relate to Charles Handy, *Understanding Voluntary Organizations: How to Make Them Function Effectively* (London: Pelican Books, 1988).

4.8.1 Unpaid Surrogacy

We now turn to address the possible co-existence of paid and unpaid surrogacy. When surrogacy is debated, it is usually proposed that either unpaid surrogacy or commercial surrogacy should be permitted with little or no compromise or co-operation between these two polar views. Various reasons are offered for such proposals. The 1998 *Brazier Report* believed altruistic (unpaid) surrogacy arrangements were 'less likely to break down',¹⁹⁰ but provided no consolidatory evidence. Unpaid surrogates are expected to be selfless with more virtuous motives than paid surrogates. As altruists, surrogates are not expected to benefit themselves. The assumption is that only unpaid surrogacy should exist as self-interest is wrong. However, it has already been suggested that self-interest does not have to be conducted in an unethical manner, or be based upon selfishness or egotism, with no regard for others.

Another reason why unpaid surrogacy alone is favoured is because self-interest, in the form of payment, is considered incompatible with altruism. However, altruism can be motivated by self-interest and concern for the other, allowing payment and altruism to co-exist without one affecting the other and without one being seen as ethically inferior. It must be remembered that, in section 4.7.1, it was demonstrated that in the commercial blood donation system operating in the United States of America, some altruistic acts still occurred.

¹⁹⁰ *The Brazier Report*, 5:21.

Unpaid surrogacy is expected not to include baby-selling or profit making,¹⁹¹ but payment does not necessarily have to be perceived as wrongful baby-selling with commercialisation or commodification of the child or surrogate. Therefore, because payment is not always intrinsically wrong, payment can exist alongside altruism.

Some feminists believe women's feminine nature is naturally altruistic, to nurture and care for others. Nel Noddings suggests that: '[t]he caring relation, in particular, requires *engrossment* and *motivational displacement* on the part of the one-caring and a form of *responsiveness* or *reciprocity* on the part of the cared-for'.¹⁹² However, the one being cared for may be unable to respond or reciprocate through ill health or mental incapacity. Daniel Putman points out that '[c]aring by an agent is an act in which the person cared about is validated as more important than other concerns the agent might have'.¹⁹³ Putman's comment reflects the self-subversive approach some care perspectives take and echoes Sarah Hoagland's criticism of caring as being 'unidirectional'.¹⁹⁴ Putman calls for caring to be linked with virtue theory to prevent a person becoming a 'one-dimensional person' by applying practical wisdom to care in order to allow for a full human life, so care operates alongside other virtues.¹⁹⁵

Only having unpaid surrogacy implies paid surrogacy cannot be ethically motivated nor involve concern for the other. Paid surrogacy could prevent stereotypes and provide opportunities to break away from cultural expectations that women who want to be surrogates must be purely altruistic,

¹⁹¹ Lenore Kuo, 'The Morality of Surrogate Mothering', *The Southern Journal of Philosophy* 27 (1989), 361-80, at 376.

¹⁹² Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley and Los Angeles, CA: University of California Press, 1984), 150.

¹⁹³ Daniel Putman, 'Relational Ethics and Virtue Theory', *Metaphilosophy* 22 (1991), 231-8, at 234 and 236.

¹⁹⁴ Sarah Lucia Hoagland, 'Some Concerns About Nel Noddings' Caring', *Hypatia* 5 (1990), 109-14, at 109.

¹⁹⁵ Putman, 'Relational Ethics and Virtue Theory', 236.

with no payment or self-interest and with no alternative offered, for to do so is to reduce the scope of surrogacy for those who want to be paid or need to be paid. However, it will be expected that all surrogates, regardless of whether they are paid or not, have deep concern for their commissioning couples. Surrogates can have virtuous motives and care for the commissioning couple and the child.

4.8.2 Why Some Reject Unpaid Surrogacy

The sections above answered those who support unpaid surrogacy only. As it is being proposed in this chapter that paid surrogacy can operate alongside unpaid surrogacy, attention will now turn to question those who reject altruism and unpaid surrogacy.

Unpaid surrogacy could be interpreted as fulfilling and perpetuating oppressive societal stereotypes of women, who are expected and under pressure to be self-sacrificing caregivers for others and are socially conditioned to be supererogatory and to benefit others first and not themselves as moral agents. Larry Blum believes altruistic qualities of 'weakness and dependency'¹⁹⁶ become distorted in women's relationships with others.¹⁹⁷

It is important that women be made aware of past societal expectations, stereotypes and inequalities which may continue to exert pressure on them (in the case of surrogacy, to be sacrificial and altruistic). Likewise, they must realise that after reflection they can choose to be unpaid or paid surrogates because they want to be without fear of acting out a stereotype. Women, therefore, should not be paternalistically prevented from acting altruistically.

¹⁹⁶ Larry Blum *et al.*, 'Altruism and Women's Oppression', *Philosophical Forum* 5 (1975), 222-47, at 223.

¹⁹⁷ *Ibid.*, 230.

For example, Catharine MacKinnon's states, '[w]omen value care because men have valued us according to the care we give them'.¹⁹⁸ Women should not be expected to be pure unpaid altruistic surrogates only; there needs to be a paid alternative. But at the same time, women should be able to choose to be caring and altruistic, because they assert and value such behaviour for themselves - not simply because men have given us permission to value it. Expected or pressured altruism can deter women's autonomy, but women can choose altruism too.

Altruistic acts are not necessarily examples of 'weakness or dependency'. Women need to be educated to prevent unconscious oppression taking place and men need to be educated to stop oppression too. Both have responsibility to ensure they treat each other with due care and respect. Women need to ensure they are not treated as victims, and that others, especially their partner or family, do not insist on them being altruistic. Janice Raymond suggests: surrogacy '...reinforces the gender inequality of women as a group'. She goes on to say:

[a]ltruistic reproductive exchanges leave intact the status of women as a breeder class. Women's bodies are still the raw material for other's needs, desires, and purposes.¹⁹⁹

However, altruism for some women will be a demonstration of their self-awareness, self-determination and freedom. Women who have made a choice to be altruistic should not be denied the opportunity to be altruistic, caring or self-sacrificial from a fear that others might regard them as oppressed, when in fact they have assessed the situation and decided that they want to do it. Not all women will choose to be surrogates, not all women will become unpaid

¹⁹⁸ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987), 39.

¹⁹⁹ Janice G. Raymond, 'Reproductive Gifts and Gift Giving: The Altruistic Woman', *The Hastings Center Report* 20 (1990), 7-11, at 11.

surrogates, and the actions of a few women cannot affect all women universally. It is up to women to assert themselves and ensure they are not oppressed by their commissioning couple and to stop others assigning the victim role upon them. Women are not usually raped to become surrogates and only women are physically capable of being surrogates. Care needs to be taken with respect to the attitudes of both parties in a surrogacy arrangement in order to ensure that altruism does not collapse into negative domination.

If paid surrogacy is allowed, then the woman who chooses to be an unpaid surrogate has made a conscious decision. By contrast, legally restricting surrogacy to non-payment by default denies women who may prefer to be paid this choice. But, socially engineered altruism or imposed altruism is not genuine altruism. Such 'altruists' may resent their actions, consciously or unconsciously. Clear guidance is needed to ensure that women make autonomous decisions and give informed consent by receiving clear, detailed information before they enter into an arrangement. However, issues remain regarding an appropriate framework to accommodate the needs and self-interests of both the surrogate and the commissioning couple, which will be discussed in the next chapter.

4.9 Conclusion

This chapter has concentrated upon giving a positive view of self-interest and criticising negative accusations by various authorities that paid surrogacy involves baby selling. An appraisal of the relationship between the self and the other was given in the work of Augustine, Aquinas and Nagel with criticism given of self-abnegation in *agape*. Attention focused upon an 'ordered love' which allows for emphasis upon the self and the other and is reflected in a relational framework with relational altruism. Such analysis lays the

foundation to explore paid and unpaid blood donation since self-interest does not necessarily drive out altruism, as implied by Titmuss and Singer. Consideration was given to the definitions involved in commercial surrogacy that a surrogate cannot be accused of 'selling' something if she retains it and cannot be accused of 'selling' something she did not opt into having it in the first place. Likewise, a commissioning father cannot 'buy' his parental rights when he is entitled to them as the genetic father. Payment could be for the time, risks and gestational service she provides, but not as a sign of her intrinsic worth. It was suggested expenses could paternalistically restrict a surrogate's autonomy. Recommendations were made that a surrogate should be able to be reimbursed for her services just as she can claim, as expenses, the services of others towards her, e.g. counselling and legal services. The use of rights language could be inappropriate for surrogacy, with emphasis instead upon the surrogate choosing to opt in, acquire, then assert rights of mothering if she so wished, instead of an automatic claim to motherhood, which occurs with traditional mothering by birth alone. In relation to accusations of the sale of parental rights, it was acknowledged that if a genetic surrogate bonded to the child in the pregnancy and was offered money to relinquish her custody of the child, then she could be accused of selling her custody rights to the father if he tried to buy sole custody of the child.

Paid surrogacy and unpaid surrogacy can operate side by side without harm and payment can involve a concern for the other as well as the self. Surrogates who accept payment are not necessarily selfish, since they have mixed motives to help themselves and others and are not just motivated by financial incentives alone. Freedom could be increased by allowing agents to choose between paid and unpaid surrogacy, especially with the two systems being kept separate from each other, so pure altruism can be chosen instead of altruism by default with governmental policy. At the moment all surrogates

are expected to act altruistically and be unpaid in the UK. However, not all women are naturally inclined to be altruistic. Some women do not want to be altruistic and they should not be pressurised into it by societal expectations. Similarly, it is paternalistic to suggest all women are oppressed every time they are spontaneously purely altruistic or act altruistically after a deliberate choice. A surrogate who asks for payment may have a high self-regard. Payment from the commissioning couple to the surrogate can be a reflection of their gratitude, gratefulness and appreciation for the surrogate as a person with self-worth and dignity and their desire to reciprocate to ensure they do not treat her as a means to an end. However, questions remain regarding a suitably flexible and dynamic model to incorporate and respond to the needs of the self and the other - and to deal with potential conflicts between them. These will be covered in the next chapter. It is worth noting at this stage that the model will not be based on contractarian lines, rational choice theory, or proportionalism, since not all relationships involve an equal balance between the self and the other.

**CHAPTER FIVE THE CONTRACT MODEL, THE ADOPTION MODEL
AND THE RELATIONAL MODEL FOR SURROGATE MOTHERHOOD**

5.1 Introduction

So far, the argument has proceeded in four chapters. Chapter one explored six reports on surrogacy and found that most of the fears they expressed have not materialised, such as convenience surrogacy. Chapter two suggested that motherhood is complex and multidimensional. Chapter three proposed that regulated paid surrogacy could prevent commercial surrogacy, thus reducing commodification, exploitation and coercion. Chapter four argued that paid surrogacy does not have to incorporate baby-selling and that paid and unpaid surrogacy can operate together. Paid surrogates can combine self-interest and altruistic motives in a relational framework.

This chapter explores the ethical application of three models - the contract model, the adoption model and a relational model - in order to manage surrogacy. Firstly, after defining contract (5.2.1), the four key elements of a legal contract are outlined: the offer, the acceptance, consideration (payment) and the intention to create legal relations (5.2.2). These key points are applied to surrogacy in a hypothetical surrogacy contract model (5.3) which is followed by its problems (5.4) and the reality of surrogacy contracts (5.5). In reality, surrogacy contracts are void and unenforceable for being a personal service contract and a domestic arrangement.

The adoption model, put forward predominantly by Protestant theologian Scott Rae, is discussed in sections (5.6) and (5.7), where its strengths and weakness are assessed. The role of the commissioning couple, the surrogate and child in the adoption model is discussed along with how the adoption

model supports gestation to determine motherhood. Analysis is made of how custody is solved using Rae's adoption model, followed by problems with the model.

The flexible alternative offered is a relational framework and four types of relationalism are presented (5.8). Relationalism is influenced by the personalism of Roman Catholic moral theologian Louis Janssens, who was influenced by other theologians and philosophers (5.9). The personalism of Janssens is explored in eight points (5.10). My own version of relationalism is discussed in five sections including the relational framework, the self, the self and the other, what my relationalism excludes and differences to Janssens, (5.11). My relationalism is applied to surrogacy, focusing upon custody disputes, recommendations, embodiment, payment and what is excluded (5.12). The chapter finishes discussing the best interests of the child, which are often used to settle custody disputes in surrogacy (5.13), followed by problems of relationalism (5.14) and, finally, the conclusion (5.15).

5.2 The Basics of Contract Law

The first model to be explored is the contractarian model, which is a key approach for the organisation of surrogacy arrangements. Scholars in favour of using and enforcing a surrogacy contract include: Marjorie Shultz,¹ Carmel Shalev,² Lori Andrews³ and John Hill.⁴ Andrews wants surrogacy contracts

¹ Marjorie Maguire Shultz, 'Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality', *Wisconsin Law Review* 2 (1990), 297-398, at 377-8.

² Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven, CT: Yale University Press, 1989), 103-4.

³ Lori B. Andrews, 'Surrogate Motherhood: Should the Adoption Model Apply?', *Children's Legal Rights Journal* 7 (1986), 13-20, at 19.

⁴ John Lawrence Hill, 'The Case for Enforcement of the Surrogate Contract', *Politics and the Life Sciences* 8 (1990), 147-60, at 148 and John Lawrence Hill, 'What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights', *New York University Law Review* 66 (1991), 353-420, at 415-16.

enforced, to ensure surrogates keep their promises to hand the child over to the commissioning couple at birth. In order to understand surrogacy contracts we need to consider the key components of legal contracts in general, by looking at the definition of a contract and the four main contractual concepts of offer, acceptance, consideration (payment) and intention to create legal relations. Understanding the basis of legal contracts enables us to apply them to surrogacy in order to make a hypothetical surrogacy contract. However, there are problems with a contract approach towards surrogacy. Contracts can be a set, rigid,⁵ legalistic agreements with many restrictions and controls upon the agents involved, ignoring their specific needs, personal values or changing circumstances during the contract. Contracts tend not to be flexible or dynamic enough to accommodate unexpected reactions during the contractual experience. Renegotiation of contracts is seen as unsuitable and the strict terms and conditions are usually maintained. However, in reality a contractarian approach to surrogacy is a myth in the UK: surrogacy contracts are considered void, since contracts are not usually applied to domestic arrangements and personal service contracts are not normally enforced. Very few places uphold a surrogacy contract – although California, for example, enforces gestational surrogacy contracts.

5.2.1 Definition of a Contract

Traditionally, English law lacks a 'formal definition' of contract (3).⁶ Legal scholar Sir Guenter Treitel defines contract as:

⁵ Jean Bethke Elshtain suggests that: '[c]ontract theory is a static view: it presents a picture of consenting, rational adults', ('Feminism, Family and Community', *Dissent* 29 [1982], 442-49, at 446).

⁶ The page numbers in brackets in section 5.2.1-5.2.2 refer to Ewan Mckendrick, *Contract Law: Text, Cases and Materials* (Oxford: Oxford University Press, 4th ed., 2010).

an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.⁷

A person has to have the capacity to enter into a contract, which usually excludes minors under 18, the mentally ill and the incapacitated such as the intoxicated. The basic principles of contract law include an offer being made and accepted, which is backed by consideration with an intention to create binding legal relations (4-5).

5.2.2 Four Key Parts to a Contract

In order to understand how a surrogacy contract is formulated and operates, we need to understand the four key parts to a contract. Traditionally the four main components of a contract are: the offer, the acceptance, consideration and intention to create legal relations. Once we have explored these four points we will be able to apply them to surrogacy in order to ascertain whether surrogacy contracts are legally valid or void and unenforceable.

(i) The Offer

An offeror makes an offer of a contract to the offeree and expresses an intention to be legally bound to them if they accept the terms. Offers end if cancelled, rejected, time has lapsed, if death occurs (44) or if the offer is 'subject to a condition which then fails'.⁸ Contracts may involve negotiation and are made by an exchange of promises or by conduct. Bilateral contracts involve an exchange of two promises for participants to perform their obligations. Unilateral contracts involve one party making a promise to another such as an

⁷ G. H. Treitel (ed. Edwin Peel), *The Law of Contract* (London: Sweet and Maxwell, 12th ed., 2007), 1.

⁸ Robert Duxbury, *Nutshells: Contract Law* (London: Sweet and Maxwell, 8th ed., 2009), 15.

offer of a reward (46). If a counteroffer is made the offeree becomes the offeror, with new or varied terms from the original offer (which ends the original offer).⁹ Once an offer is accepted the parties are in a binding contract (51). Therefore rights, liabilities and duties are based upon the time when the contract was made and if broken the victim can sue and be remedied by damages (52).

(ii) Acceptance of an Offer

An acceptance is:

an unconditional assent, communicated by the offeree to the offeror, to all terms of the offer, made with the intention of accepting. Whether an acceptance has in fact occurred is ascertained objectively from the behaviour of the parties, including any correspondence that has passed between them.¹⁰

An acceptance does not introduce 'any new terms'.¹¹ Courts usually concentrate on the objective intention behind accepting an offer and not the subjective intention (50). Valid acceptance must be expressed to the offeror (82); silence is not acceptance (104). In standard form contracts, if the offeror makes an offer using their form and the offeree accepts using their form, if the acceptance differs to the offer there is no contract, since offer and acceptance must match. Contracts are usually performed on the terms of the last counteroffer. Courts tend to allow such contracts to go ahead if performance has started.¹² 'Parol evidence' prevents adding or changing the contractual document (297).

⁹ *Ibid.*, 8.

¹⁰ *Ibid.*, 8.

¹¹ *Ibid.*, 8.

¹² Stefan Fafinski and Emily Finch, *Contract Law* (Harlow: Pearson Education, 2nd ed., 2010), 19.

(iii) Consideration

All contracts involve consideration which is usually financial (254), as contracts often involve commercial transactions. Unpaid contracts are not upheld because no money has been promised in exchange for something else (5). Consideration means that 'something [of value] must be given in return for a promise in order to render that promise enforceable' (5). Gifts are not enforceable, unless they are made in a deed (149). Consideration also has to be sufficient but does not have to be adequate and cannot be in the past (148). Estoppel gives 'legal effect to a promise that is unsupported by consideration' (217) therefore a person is prevented from breaking the promise (217). Estoppel is an alternative to consideration and makes a promise legally enforceable if 'there has been [a] detrimental reliance upon it' (246).

(iv) The Intention to Create Legal Relations

The intention to create legal relations usually occurs in commercial settings and does not usually occur in social and domestic relationships, thus preventing the creation of contracts (5 and 20), unless there is objective evidence to the contrary (280). Family agreements such as domestic and social agreements are considered to operate without an intention to create legal obligations (274) and therefore the agreement is not binding.¹³ English law takes an objective view towards intention (19). The law looks at contracts from the stance of a reasonable person who is the promisee and then from the position of the promisor (27). Legally it is assumed that parties intend to create legal relations when entering a commercial contract (274).

5.3 The Principles of a Hypothetical Legal Contract Applied to Surrogacy

¹³ Duxbury, *Nutshells* (2009), 21.

Proponents of a contractarian approach to surrogacy usually want to apply the principles of a legal contract to surrogacy practice. The basic idea is that a woman of sound mind, aged over 18, may make an offer to a commissioning couple to act as their surrogate, or a commissioning couple may make an offer to a woman to act as their surrogate. The surrogate would receive counselling as part of her independent advice and to prevent mistakes with the contract. A written contract would be negotiated and signed between the surrogate and the commissioning father, which would reflect that both parties have freely entered the contract, after giving informed consent, as their autonomous choice. Both parties would intentionally want the contract to create legal relations, which would be enforceable binding promises, making the commissioning couple legal parents of the child.

In order for the arrangement to be regarded as a contract, the commissioning couple would give financial consideration to the surrogate for providing a gestational service, as an unpaid arrangement would not be regarded as a contract. However, sometimes the consideration can be nominal. If the surrogate entered the contract under duress, undue influence, misrepresentation or a mistake then the contract could be voided. The surrogate would be expected to provide a duty of care to the foetus otherwise the commissioning couple could sue for negligence and claim damages on behalf of the child. However, if the surrogate suffered a miscarriage due to no fault of her own, this would be classed as a frustrating event and the commissioning couple may be able to reclaim some of their costs such as expenses of the surrogate. If the surrogate breaches the contract by having an abortion without permission of the commissioning couple or wants to keep the child, the couple could sue for breach of contract and seek damages to reclaim money they spent on the surrogate. The commissioning couple could sue the

surrogate for damages for mental suffering caused to them by her negligence. The contract would be upheld in the courts as in the interests of public policy for ensuring that the child goes to its intended parents. The contract would determine parenthood and not the biological status. The commissioning mother may try to be party to the contract through a collateral contract or by an amendment to The Contract (Rights of Third Parties) Act 1999, even though this currently only applies to business arrangements.

5.4 Problems of a Hypothetical Contractarian Model Applied to Surrogacy

Attention now turns to three problems with a hypothetical contractarian model for surrogacy.

5.4.1 Only One Side Can Win

Contractarianism is influenced by liberal atomism, which emphasises the rights of separate individuals. If these rights clash and a contract is breached, the relationship ends and damages are paid to the claimant, with a solution often in favour of one person only. For example, the positive right of the commissioning couple to procreate could clash with the surrogate's inalienable right to motherhood, with custody going to one side only. Contract ignores the surrogacy context of two mothers, thus preventing a co-operative dynamic solution with various emphases upon the self or the other.

5.4.2 The Use of Intention in Contract

The commissioning couple's intention to procreate and rear a child fixes their parenthood at conception and gives them a positive claim right and entitlement to custody of the child for initiating the surrogacy contract. On the contractual

model their intention trumps any bonding, genetic, gestational connection or emotional involvement on the part of the surrogate as the birth mother. However, the contractual model ignores the surrogate's changing intentions towards the foetus. The surrogate may have bonded to the child and may want to keep it despite her informed consent at the start of the contract. Likewise, the couple may decide during a surrogate's pregnancy that they no longer want to be parents, but the contractual model would insist that they are the child's parents. However, it may not be in the child's best interests to be brought up by people who no longer want it. In order to deal with the possible rare situation of no one wanting the child, perhaps surrogacy agencies could arrange to have foster carers on standby to look after the child or a couple willing to adopt in order to ensure child security. The commissioning couple may be required to take out insurance to pay for such additional costs if they do not take the child, in order to ensure the child's welfare.

5.4.3 Informed Consent

With an impartial pre-birth contract, the decision to surrender the child is fixed in time, *a priori* at the start before experiencing the contract. Autonomous surrogates may give valid informed consent after receiving information to assess the physical and psychological risks involved such as bonding and possible distress at relinquishing the child. Legal, informed consent does not require experience of an action.¹⁴ Despite giving informed consent to enter the contract, a woman may not appreciate what is involved until she has experienced some of the requirements of the contract. Women may not experience surrogacy as they expect to when they sign the contract. A surrogate, despite having had pregnancies before, would not have been

¹⁴ Lori B. Andrews, 'Surrogate Motherhood: The Challenge for Feminists', *Law, Medicine and Health Care* 16 (1988), 72-80, at 74-5.

pregnant with this particular child before and may be unprepared for her reactions to it, which could include bonding.

5.5 The Reality of the Surrogacy Contract

However, the above account of a surrogacy contract is a hypothetical model only. In reality surrogacy contracts are legally void and, as completion of personal service contracts, unenforceable.

5.5.1 Surrogacy Contracts are Void

In Britain, a surrogacy contract is void at statute according to the 1985 Surrogacy Arrangements Act, making it unenforceable and invalid, with no legal standing. As such, surrogacy participants cannot sue for damages if contracts are breached or claim compensation for any 'money paid or property transferred',¹⁵ since the parties do not gain rights.¹⁶ Therefore, the surrogate can keep any money received from the commissioning couple. Likewise, the surrogate cannot claim for money she is owed by the commissioning couple. Usually, within a contract, 'money paid before the frustrating event is recoverable' as well as expenses.¹⁷ However, because a surrogacy contract is void, a miscarriage cannot be classified as a frustrating event and the commissioning couple are unable to claim damages. Damages for a void contract cannot be claimed; therefore a commissioning couple who lost a child due to the surrogate's negligence would also be unable to claim expenses or compensation.

¹⁵ Duxbury, *Nutshells* (2009), 129.

¹⁶ Robert Duxbury, *Nutshells: Contract Law* (London: Sweet and Maxwell, 4th ed., 1997), 74.

¹⁷ Duxbury, *Nutshells* (2009), 156.

5.5.2 Surrogacy Is a Domestic Arrangement with Personal Service and Cannot Be Upheld

Contracts are not normally applied to family or social relationships such as surrogacy because they are considered 'domestic arrangements'. The terms of a surrogacy contract, such as abortion waivers, behaviour modifications or custody rights, are unenforceable. The right to procreate is regarded as a negative right and not a positive right. The child's legal mother is the birth mother and if she is married, her husband is the father, if he accepts the insemination. A surrogate can legally change her mind and keep the child, but such cases often go to court, where custody is usually decided by the best interests of the child. Therefore, as we have seen, a surrogacy contract is a myth in the UK courts as it is not upheld, but decided by the interests of the child which are regarded as paramount.

Specific performance is a remedy for a breached contract ordering the defendant to perform contractual obligations (which can vary from the original contractual obligations) when damages are inadequate (930).¹⁸ Courts do not usually uphold the specific performance of a personal service contract (931) if the contract is breached,¹⁹ as performance would be regarded as 'involuntary servitude',²⁰ 'hardship' (934), 'slavery' (935) and 'inconvenience' (937). As a surrogacy arrangement is a personal service contract, it cannot be enforced as it may be too demanding or harmful for the surrogate to relinquish the child. Similarly, the surrogate cannot order the commissioning couple to take the child, leaving her to look after it as the legal mother or place it for adoption.

¹⁸ The page numbers in brackets in section 5.5.2 refer to McKendrick, *Contract Law*.

¹⁹ D. J. Ll. D., 'Contract for Personal Service', *The Modern Law Review* 1 (1937), 150-2, at 151.

²⁰ Clifton Perry, 'Surrogate Contracts: Contractual and Constitutional Conundrums in the Baby "M" Case', *Journal of Legal Medicine* 9 (1988), 105-22, at 112.

Consequently, five problems with a contractarian approach to surrogacy can be outlined. Firstly, since a contract requires consideration, unpaid surrogacy arrangements would not be contractual, but could be subject to estoppel doctrines. Secondly, proponents advocate the enforcement of surrogacy contracts. However this would force a surrogate to hand the child over to the commissioning couple against her will and not to see it again, even if she is genetically related to the child or has bonded to it. Thirdly, surrogates would be expected to abort the child on the commissioning couple's demand, undergo any medical tests they require and give birth in the place where they stipulate. Fourthly, surrogates would receive a reduced fee if a miscarriage or stillbirth occurred. Fifthly, all women could be expected to follow a standardised contract which would control her behaviour, her diet, her medication, her alcohol consumption and her attitude towards the child while pregnant. There could be clashes between the commissioning couple's demands and the bodily integrity or embodiment of the surrogate. The commissioning couple could use their position of power to impose behaviour which the surrogate does not want to follow. A surrogate might be banned from jogging while pregnant for example, even if she has jogged while pregnant previously without problems. Not all women are the same and it would be unrealistic for a commissioning couple to demand that a surrogate follows all their requirements set out in a contract, without negotiation, flexibility and without them considering her needs as an individual person. Finally as the commissioning couple are paying for the surrogacy, the pregnant surrogate could be open to biased counselling advice from the surrogacy agency - who are financed by the commissioning couple's fees - to do as they want.

Attention now turns to the second model to be applied to surrogacy, the adoption model.

5.6 Introduction to the Adoption Model

In contrast to a contractarian stance to surrogacy, an adoption model is now explored.²¹ Three adoption models will be briefly summarised: the 'tender years' model, the best interests of the child model, and a hybrid model presented by theologian Scott Rae which combines the two approaches. All of these models are used to try and solve custody disputes in surrogacy, if it is unclear who should parent the child. Firstly, the 'tender years' adoption model involves a court giving exclusive parental custody of the child to the surrogate, as the birth mother, unless she is an unfit mother. Rosemary Tong supports such a decision on the grounds of the surrogate's gestational, biological and psychological contribution, for having a parental relationship and for her commitment to bring the child to term.²² Martha Field likewise wants the surrogate 'to retain custody of her child without having to prove to a court that she would be a better parent than the biological father'.²³ In *Re P (Minors)*²⁴ a surrogate was granted custody of her five-month-old twins because the children were considered to have a bond with her, despite the intellectual and wealthier background of the commissioning couple. However, Frances Miller regards the 'tender years' model as 'gender-biased discrimination'²⁵ because it automatically favours the mother over the father.

²¹ Usually the contract and the adoption models towards surrogacy differ, but the Church of England document *Personal Origins*, views surrogacy as an adoption agreement and a contract (The Board for Social Responsibility of the General Synod of the Church of England, *Personal Origins* [London: Church House, 2nd ed., 1996], 53 and 59).

²² Rosemarie Tong, 'The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements', *Journal of Social Philosophy* 21 (1990), 40-56, at 43. See also Rosemarie Tong, 'Feminist Bioethics: Toward Developing a "Feminist" Answer to the Surrogate Motherhood Question', *Kennedy Institute of Ethics* 6 (1996), 37-52.

²³ Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Expanded Edition) (Cambridge, MA: Harvard University Press, 1990), vii, see also 87-8.

²⁴ In *Re P (Minors)* (Wardship: Surrogacy) [1987] 2 FLR 421.

²⁵ Frances H. Miller, 'Surrogate Fatherhood?', *Boston University Law Review* 70 (1990), 169-83 at 171 n. 10, see also 169.

Secondly, custody can follow an adoption model where only one set of parents become the custodial parents, based upon the best interests of the child. Most UK surrogacy cases today, in light of the Human Fertilisation and Embryology Act (2008), are solved with the interests of the child having ‘paramount consideration’. *Re L (a minor)*²⁶ involved a British commissioning couple, who paid an American surrogate more than reasonable expenses but were allowed to keep the child. The judge, Mr Justice Hedley, believed that the needs of the child come first and the child’s welfare is now the court’s ‘paramount consideration’, since the 2010 Parental Order regulations use a welfare test. He believed that in issuing a Parental Order, the child’s welfare takes priority over public policy considerations, unless public policy is being abused. As will be seen in sections 5.11 and 5.12, I prefer greater flexibility with a variety of arrangements which are not necessarily based only upon the best interests of the child, even though these are part of the decision process.

Another adoption model put forward by American theologian Scott Rae is a hybrid approach which allows the surrogate or the commissioning father to keep their parental rights. This is often accompanied by the presumption that the surrogate will be the main custodian, with visitation rights according to the best interests of the child (277).²⁷ Rae is reluctant to use the ‘tender years’ doctrine, where the surrogate has exclusive custody based on her time and bonding with the child as this ‘neglects’ the commissioning father’s ‘desire to have a child’ (273). Rae’s adoption model will be explored in detail due to him being a Christian moral theologian and will be set out in five sections. Firstly his views on contract surrogacy will be given (5.7.1), secondly his views towards the commissioning couple, the surrogate and the child will be provided (5.7.2), thirdly his attitude towards motherhood will be explored,

²⁶ *Re L (a minor)* [2010] EWHC 3146 (Fam).

²⁷ The page numbers in section 5.6-5.7.5 refer to Scott B. Rae, ‘Parental Rights and the Definition of Motherhood in Surrogate Motherhood’, *Southern California Review of Law and Women’s Studies* 3 (1994), 219-77.

with emphasis upon gestation (5.7.3), fourthly his suggestion for how custody cases should be solved using an adoption model will be presented (5.7.4), and fifthly problems with Rae's model in general will be put forward (5.7.5).

5.7 Scott Rae's Adoption Model of Surrogate Motherhood

5.7.1 Scott Rae's Criticism of the Contract Approach to Surrogacy

Rae is critical of enforcing a contractarian approach to surrogacy, as it only takes the commissioning couple into consideration as the intentional parents with rights to the child.²⁸ However he admits that the commissioning father, who is genetically related to the surrogate child, would be considered to have rights to associate with the child born of surrogacy (262). However, Rae considers it 'immoral' to enforce a surrogacy contract and make a surrogate give up her child²⁹ by relinquishing her parental rights.³⁰ He suggests that enforcing contracts against the will of the surrogate leads to 'pain and damage' (270). He applies family law with adoption law to all surrogacy cases instead of contract law while banning commercial surrogacy (276-7). Rae regards 'the right to privacy' as supporting altruistic (i.e. unpaid) surrogacy, but not paid surrogacy.³¹

5.7.2 The Commissioning Couple, the Surrogate and the Child

Rae believes the natural father has rights to procreate and associate with his child, but without insisting the child is handed over or that the surrogate gives up her parental rights or right to associate with the child for his exclusive

²⁸ Scott B. Rae, *The Ethics of Commercial Surrogate Motherhood: Brave New Families?* (Westport, CT: Praeger, 1994), 22.

²⁹ *Ibid.*, 126.

³⁰ *Ibid.*, 9.

³¹ *Ibid.*, 105.

custody (262-3). The commissioning couple only have 'exclusive parental rights when the surrogate voluntarily relinquishes her parental rights' (264). Rae regards procreative rights and parental rights as separate in surrogacy (264). He believes that the surrogate's husband should be able to 'rebut' paternity and that the courts would recognise the commissioning father as 'the legal father' (224).

Rae considers the surrogate to be the child's mother as she is the gestational birth mother and her maternal rights are not to be ended by the surrogate agreement being enforced, as long as she is a fit parent and has not abandoned the child.³² The surrogate, as the birth mother, has a fundamental right to associate with and 'develop a relationship with the child', to raise it and decide its upbringing (262). He does not think that surrogates surrender the right to associate with their child, but their parental rights to custody can be voluntarily waived (264 and 266). Rae does not want courts to terminate a surrogate's rights against her will or enforce surrogacy contracts, unless the surrogate abandons the child or is unfit (267). But even though the surrogate has the right to associate with the child, this does not give her 'exclusive custody' according to Rae (262). He believes that as the surrogate is the child's legal mother, 'voluntary adoption' is the only way courts can end her parental rights (270). After all, the surrogate could be a competent parent and the child being with her could be in the child's best interest (272-3).

Rae wants to ensure the child has a 'stable environment' (272) which is decided by the best interests of the child. Using the best interests of the child could mean the child going to the commissioning couple, but he does not think it is in the child's best interest to enforce a contract requiring the surrogate to

³² *Ibid.*, 108.

relinquish her parental rights before the child's birth.³³ He is aware of the parties' competing interests, but he has an 'overriding concern' for the best interests of the child (277). Rae warns that judges, who use the best interests of the child in order to make value judgements, could find it difficult to make choices. This is due to the scarcity of information about the parents' home; judges could also 'discriminate against the poor' or those with alternative lifestyles.³⁴ Children are not to be removed 'from the care and custody' of the legal parents unless there is a 'sufficient cause'.³⁵ He indicates that in the United States of America parents have a legal right of association and children also have a reciprocal right to establish a relationship with their parents (266).

5.7.3 The Support for Gestation as the Determinant of Motherhood

Rae acknowledges that motherhood in surrogacy can be defined by genes, intention and gestation (219). Genes can give the child 'unique characteristics and traits' and an identity, especially as adoptees often want to reunite with their genetic parents (228). The commissioning couple often regard themselves as parents of the child due to owning the genetic materials (230-1). However, Rae believes genes alone cannot determine parenthood, as sperm donors for example have no rights to the child (231) and in *Lehr v Robertson* the court deprived parental rights to an unmarried father who had not formed a relationship with his child (232-3). He regards the surrogate as the natural mother (221) regardless of her genetic connection (222), and because he believes parental rights need genes and a relationship with the child (233).

Rae does not want the commissioning couple's intent to parent to dominate

³³ *Ibid.*, 169.

³⁴ Rene R. Gilliam, 'When a Surrogate Mother Breaks a Promise: The Inappropriateness of the Traditional "Best Interests of the Child" Standard', *Memphis State University Law Review* 18 (1988), 514-39, at 514 and 530, cited in Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood', 274.

³⁵ Rae, *The Ethics of Commercial Surrogate Motherhood*, 108.

over 'the surrogate's psychological intention to parent' (249), which can start during the pregnancy or at birth (249-50). Rae refuses to put a mental conception of a child, who has not been conceived and does not objectively exist, before the physical gestating relationship of the surrogate with the child, who he believes is the only one the child has a relationship with (252-3). He believes a surrogate's changing intention, and her 'biological connection', and relationship to the child give her 'sole maternal rights' to associate with the child and to 'share custody' with the father, but without giving her 'exclusive parental rights' (256 and 258). Therefore, the surrogate is able keep her maternal rights and retain custody of the child after its birth, before its final adoption (242), since 'the law assumes that the child is hers' (245).

Rae favours gestation and childbirth as determining motherhood and maternal rights rather than genes, due to the biological contribution of the gestational mother to the child's physical, emotional, psychological and personality development, as well as her 'effort and time' (236-7, 261). Influenced by Barbara Katz Rothman believes gestation determines motherhood due to the bonding and the 'physical and emotional' relationship involved (242 and 244) and the 'intense, intimate relationship' between mother and child.³⁶ Rae believes a unique relationship is formed *in utero* between the gestator and the foetus and she 'experiences something very significant' which the genetic contributor does not (246). Rae believes the gestational mother is considered to have 'a greater maternal rights claim to the child than the genetic mother' (244). The commissioning mother is regarded as an 'egg donor' having an 'anticipated and potential' bond only (244). Rae questions 'why the genetic "parent" should be the mother' without giving birth (260), since he believes genes are 'not determinative of motherhood' and intent alone 'is not an adequate component of motherhood' (261).

³⁶ *Ibid.*, 92.

5.7.4 How Custody is to be Solved in Scott Rae's Adoption Model

Rae does not want the law to be changed to deal with the new reproductive technologies (257). Current adoption law is considered 'appropriate and fitting for surrogacy' (250), which Rae suggests will allow the surrogate a cooling off period of about fifteen days³⁷ after the child's birth in order to make up her mind about waiving custody (222). Consent to adoption will therefore occur after the birth and the child is to stay with the surrogate until the cooling off period is over (271). He admits that the application of adoption law to surrogacy could 'involve more risk' for the commissioning couple.³⁸

Rae wants surrogacy custody disputes to be solved on a 'case by case basis', with a 'dual standard' to decide primary custody (222 and 277). The best interest of the child is used at first to see if there are differences in the parties' abilities to provide a stable home, income or marriage, as one parent (or set of parents) may have more ability than the other, who may be unfit or have a less stable home (275-7). If the best interests of the child is not determinable and therefore determinative, then secondly, the strength of competing parental claims is weighed. This usually falls in favour of the surrogate, as the 'primary caretaker' to have primary custody (276-7), based upon 'biological contribution, gestation and the bonding' in the womb which have already given her maternal rights (275). Rae favours the best interests of the child approach over shared custody for infants, believing it gives them stability, thus putting the children's interests above the adults' rights to associate with their child (274-6). Allowing the surrogate to have custody is considered less disruptive for the child, even though it ignores the 'desire' of the

³⁷ The 15-day cooling off time is part of the law in Rhode Island (cited in *ibid.*, 160, see 167 n. 105). In the UK, the surrogate could keep the child up to 6 months before the commissioning couple can apply for a Parental Order.

³⁸ *Ibid.*, 97.

commissioning natural father 'to have a child' (273). He believes that men and women are not equal in their relationship to a newborn and he regards denying the 'biological differences penalizes women' who have more involvement with pregnancy and birth (275).

Once the court has decided primary custody then visitation rights are decided by a best interests standard, as in divorce (277). Rae regards it as harmful for children to move between parents who do not get on. Even though parents have a right to associate with their children, he wants the best interests of the child to take priority (276), even if it means one parent is unable to exercise their full parental rights (275). Rae does not think that parents are relinquishing their parental rights, only primary custody (277). However, in one study of traditional open adoption (i.e. not involving surrogates), two sets of adoptive parents ignored the child's conflicting attitudes towards them (instigated by the resentful birth mothers), believing the contact was 'advantageous' for the children, as the children felt attached to their adoptive family and to the birth family,³⁹ thus showing a greater resilience than Rae expects. Rae does not consider shared custody to be in the child's best interests, as newborns need 'a stable environment' (274). Even though shared custody appears to be 'fair to both parents', he believes it can be harmful to the child and suggests that society priorities 'the interests of children' over adult rights (274-5). However, Alfred Kadushin found that in adoptions of 150 older children, only 5% had problematic attachments.⁴⁰ Marsha Garrison suggests studies indicate that continued contact with the birth parents has a positive effect upon the child's 'well-being and emotional security', even if the contact is

³⁹ Carole Smith and Janette Logan, *After Adoption: Direct Contact and Relationships* (London: Routledge, 2004), 134-5.

⁴⁰ Alfred Kadushin, *Adopting Older Children* (New York: Columbia University Press, 1970), 160, cited in C. Alty and S. Cameron, 'Open Adoption – The Way Forward?', *International Journal of Sociology and Social Policy* 15 (1995), 40-58, at 52.

infrequent.⁴¹ Judith Wallerstein and Joan Kelly found that after a divorce, continued contact with the child by the biological parents aided the child's psychological adjustment.⁴² Shared parenting can have positive outcomes for children if parents are co-operative and flexible.⁴³

5.7.5 Problems with Scott Rae and the Adoption Model

Rae's presentation of the adoption model has problems, three of which we will now consider.

Firstly, Rae's adoption model focuses on solving disputes according to the 'best interests of the child' standard. However, this approach theoretically could mean that the child is taken away from all of the interested parties, if none of them satisfied the detailed criteria needed to fulfil the 'best interests of the child' standard. Therefore, in order for the best interests of the child to work, a contradiction occurs since the surrogate might have to give up the child to the commissioning couple (275-7). This would be enforcing the surrogacy contract, which Rae disapproves of,⁴⁴ thus removing her right to associate with the child - which he claims he wants her to be able to retain (262), in favour of the child's best interests (277). However, supporters of a 'best interests of the child' approach may argue that their approach does not enforce the surrogacy contract, but rather enforces the child's best interests which just happen to coincide with the surrogacy contract. There is also the possibility of the surrogate having access rights to the child if the commissioning couple have

⁴¹ Marsha Garrison, 'Why Terminate Parental Rights?', *Stanford Law Review* 35 (1983), 423-96, at 461 and 461-5.

⁴² Judith S. Wallerstein and Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1981).

⁴³ Belinda Fehlberg *et al.* 'Caring for Children after Parental Separation: Would Legislation for Shared Parenting Time Help Children?', *Family Policy Briefing* 7 (2011), Department of Social Policy and Social Work, Oxford University, 1-16, at 13.

⁴⁴ Rae, *The Ethics of Commercial Surrogate Motherhood*, 126.

sole custody. Even so, the access of a poorer, less educated surrogate compared to a richer, well educated commissioning couple could be greatly reduced.

Rae dislikes the contract approach because he does not want the commissioning couple to have exclusive custody rights (262),⁴⁵ but this very situation could result from with a best interests of the child approach if, as Rae believes, it is in the best interests of the child not to have shared child custody (274). The 'best interests of the child' approach tends to focus on the needs of the child alone and it could be deemed in their 'best interest' for the child not to have contact with the surrogate or for it to be considerably reduced. However, the child is not the only person who should be taken into consideration; the needs of the adults should also be considered. The best interests of the child will be explored further in section 5.13.

Secondly, Rae admits that genes contribute to a child's characteristics, identity and physical nature, allowing them to resemble their genetic donor. He also accepts that adopted children often want to connect with their genetic parents (228). He confesses that genes could give parental rights to the commissioning couple over a gestational surrogate because they do not want to act as a donor or relinquish having parental rights (230), since the gametes belong to the commissioning couple which determine parenthood (231). However, he does not want the commissioning couple to claim parenthood based upon their genes or intention (261). Rae believes parental rights are a 'combination of genetic contribution and a relationship with the child' (233). Another contradiction occurs since the intention and biological connection of the commissioning couple are ignored (261), but the changing intention of the surrogate to keep the child, and her gestation or genetic connection, are

⁴⁵ *Ibid.*, 109.

acknowledged (256 and 258). He does not distinguish between genetic surrogacy or gestational surrogacy, where a surrogate with a genetic and a gestational link could be regarded as having a closer link than to a non-genetically related commissioning mother. Even so, Rae wants a surrogate's relinquishment of parental rights to be 'irrevocable', thus preventing her from changing her mind and taking up her maternal rights again once she has handed the child over (271). Such an approach could be regarded as cruel. Usually though courts would allow a surrogate to seek custody of the child even if she had handed it over. However, an alternative solution, which is not readily available, would be to allow open adoption and access to the child with visitation for the non-custodial parent, or for joint adoption to ensure their parental rights are respected.

Thirdly, Rae acknowledges that surrogacy arrangements determined by adoption law instead of contract law could become more uncertain and risky for the commissioning couple who may not have their rights fully protected. However, he believes his solution 'offer[s] maximum protection of the rights of the adult[s]' (277) while respecting the best interests of the child, without them becoming commodities and without surrogates being forced to relinquish their parental rights (277).⁴⁶ He claims to want 'legislative consideration and debate' (276). However, Rae overlooks the multidimensional aspects of motherhood in surrogacy. Despite admitting that intention plays a part in surrogacy (219), he does not take account of the commissioning mother's intention to associate with her child, especially if she is biologically related or has psychologically bonded to the child by having a relationship with it. He defines motherhood by giving birth only. As seen in section 5.7.3, Rae, however, prioritises gestation and birth as creating a 'stronger connection' between the mother and the child, since the birth mother is the only mother the child is in relationship

⁴⁶ *Ibid.*, 49 and 109.

with.⁴⁷ Fathers are allowed to assert custody if they have a genetic connection and a relationship with the child, but he does not allow this privilege to the commissioning mother, who could also have a genetic connection and a relationship to the child in gestational surrogacy. Rae though wants to ensure that the child's best interests take priority in surrogacy (277).

It must be remembered that in a gestational surrogacy the commissioning mother is often genetically related to the child, thus biologically contributing to the child's physical and personality development, as Rae believes pregnant mothers do (236-7). Rae comments that the surrogate as the gestational mother gives more 'effort and time' than the genetic mother (236); however commissioning mothers also put 'effort and time' into having their eggs collected and donated through IVF. A commissioning mother could see an embryo and emotionally bond with it before it is implanted into the surrogate; after implantation she may talk to it while in the womb. After birth, the child could possibly recognise her voice. The commissioning mother planned for and initiated the child's conception and birth by involving the surrogate. She hands over the embryo with the expectation that it will be returned. The surrogate gestates the embryo on behalf of a woman who might be ill or disabled and unable to carry the embryo herself. In such a situation, the commissioning mother procreates and the surrogate gestates. The commissioning mother is not acting as an egg donor for the surrogate to become a mother, but turns to surrogacy as (often) the last possible alternative for her to become a mother.

It could be regarded as inappropriate for a surrogate to bond to a child while she provides a gestational service with *in loco parentis* status. A teacher or babysitter who cares for another woman's child would be accused of

⁴⁷ *Ibid.*, 99.

kidnapping if they bonded to a child in their care and took it home after work. If a commissioning mother is denied a right to associate with the child after its birth, this could be regarded as discriminatory against a disabled woman and sexist for not acknowledging her relationship to the child, when the father's role is acknowledged. My relational approach to surrogacy, outlined in section 5.12, tries to acknowledge both the commissioning mother and the surrogate as having a connection to the child, allowing both some involvement and acknowledgement to the child on their birth certificate and on a case-by-case basis. After all, Rae accepts that a social mother exists in adoption and fostering (219), but fails to acknowledge one in surrogacy. He believes that his dual standard of deciding custody by using the best interests of the child or a parental claim standard will 'offer maximum protection of the rights of the adult participants' (223). However he fails to take the commissioning mother's rights to associate with or have a legal status to the child into consideration. Rae claims he does not want the rights of one parent to associate with their child enforced at the expense of another's being unable to do so (262); however this is the effect of not allowing the commissioning mother to have a relationship to the child. My alternative relational approach towards surrogacy will now be presented, which allows for a more sophisticated relationship with varying emphases upon the self and the other.

5.8 Relationalism as an Alternative Proposal

As seen earlier, surrogacy contracts are void for being personal service contracts, whereas the adoption model decides custody using the best interests of the child or a 'tender years' policy. Both models have one final custody solution, with one legally recognised mother. Instead an alternative - relational and pluralistic - solution is advocated. This section briefly highlights secular relationalism, secular feminist relationalism, feminist theological relationalism

and theological relationalism. Later, attention is given to the theologian Louis Janssens' and my own relationalism.

A relational approach is found in secular relationalism, especially in psychology. The Stone Center at Wellesley College in America, highlights the self-in-relation with empathy, mutuality, compassion and care alongside the well-being of others.⁴⁸ Psychoanalyst Stephen Mitchell emphasises the creation of meaning from interactions with others.⁴⁹ Psychologist Lewis Aron regards relationalism as interpersonal, allowing for 'both/and rather than either/or'.⁵⁰ Relationalism involves co-operation, interaction and inter-subjectivity in a dialectical ongoing process with interdependency and individuality.⁵¹ Cohesive and differing selves can be accommodated in differing contexts,⁵² including symmetrical mutuality (with equality between the self and the other) and asymmetrical mutuality (with differing 'roles, functions and responsibilities' between the self and the other).⁵³ Similarity and difference can be acknowledged,⁵⁴ while allowing for analytical objectivity and subjectivity,⁵⁵ as 'meaning is negotiated'.⁵⁶

Secondly, feminist secular relationalists focus upon the importance of personal relations for morality and share many points with these secular psychologists. Virginia Held highlights a particular relationship, the mother-child, as a model

⁴⁸ Judith V. Jordan, 'Clarity in Connection: Empathic Knowing, Desire and Sexuality', *Work in Progress* No. 29 (Wellesley, MA: Stone Center Working Papers Series, 1987), 1-13, at 5.

⁴⁹ Stephen A. Mitchell, *Relational Concepts in Psychoanalysis: An Integration* (Cambridge, MA: Harvard University Press, 1988), 4-5 and 149.

⁵⁰ Lewis Aron, *A Meeting of Minds: Mutuality in Psychoanalysis* (Hillsdale, NJ: The Analytic Press, 1996), 63.

⁵¹ *Ibid.*, 63-4 and 67.

⁵² *Ibid.*, 74.

⁵³ *Ibid.*, 98.

⁵⁴ *Ibid.*, 150.

⁵⁵ *Ibid.*, 261.

⁵⁶ *Ibid.*, 263.

for moral relations,⁵⁷ whereas Lorraine Code uses friendship.⁵⁸ Alisa Carse and Hilde Lindemann Nelson accentuate 'respect, concern' and 'flourishing' for the self and the other;⁵⁹ Sally Gadow, the importance of engaging responsively with particular others,⁶⁰ and Randy Spreen Parker our dynamic 'embodied dialogue',⁶¹ allowing for an awareness of the needs, desires and values of the self and the other.⁶² Margaret Urban Walker explores the discursive '*expressive-collaborative* conception of ethics',⁶³ which flexibly allows for continual revision and 'improvisation'.⁶⁴

Thirdly, relationalism is found in the writing of some feminist theologians. Margaret Farley believes that concrete differing persons, their needs and relationships deserve respect as integral valuable beings, based on autonomy and relationality.⁶⁵ These specify the content of moral obligation, moral action and attitudes such as love and care to deal with the reality of relationships. However, some aspects of a person are not to be respected; for example, cruelty.⁶⁶ Other relational Christian feminists who highlight mutuality include Catherine Keller⁶⁷ and Beverly Wildung Harrison,⁶⁸ who tend to praise self-love

⁵⁷ Virginia Held, *Feminist Morality: Transforming Culture, Society and Politics* (Chicago, IL: The University of Chicago Press, 1993), 213-4.

⁵⁸ Lorraine Code, 'Second Persons', in Marsha Hanen and Kai Nielsen (eds.), *Science, Morality and Feminist Theory* (Calgary: The University of Calgary Press, 1987), 357-82, at 369.

⁵⁹ Alisa L. Carse and Hilde Lindemann Nelson, 'Rehabilitating Care', *Kennedy Institute of Ethics Journal* 6 (1996), 19-35, at 23.

⁶⁰ Sally Gadow, 'Aging as Death Rehearsal: The Oppressiveness of Reason', *The Journal of Clinical Ethics* 7 (1996), 35-40, at 39-40.

⁶¹ Randy Spreen Parker, 'Nurses' Stories: The Search for Relational Ethic of Care', *Advances in Nursing Science* 13 (1990), 31-40, at 37.

⁶² *Ibid.*, 37-9.

⁶³ Margaret Urban Walker, 'Feminism, Ethics, and the Question of Theory', *Hypatia* 7 (1992), 23-38, at 32.

⁶⁴ *Ibid.*, 33 and 28.

⁶⁵ Margaret A. Farley, 'A Feminist Version of Respect for Persons', in Charles E. Curran *et al.* (ed.), *Feminist Ethics and the Catholic Moral Tradition* (New York: Paulist Press, 1996), 164-83.

⁶⁶ *Ibid.*, 167.

⁶⁷ Catherine Keller, *From a Broken Web: Separation, Sexism and Self* (Boston, MA: Beacon Press, 1986), 40 and 179.

as a positive duty and criticise sacrificial *agape* by supporting eros and mutuality.⁶⁹

Fourthly, male relational theologians include H. Richard Niebuhr who regards persons as particular, social selves involved in 'responsive relations' to particular others and embedded in and responsive to space, time and language.⁷⁰ James Keenan regards human beings as relational who in general use justice for the common good, who use fidelity for specific relationships, and who uniquely use self-care for themselves.⁷¹ J. Kellenberger believes relational morality involves acting in accordance 'with our intimate personal relationships', our 'general relationships', and 'the person/person relationship'.⁷² He wants us to respect and treat people as persons with worth and not as mere means.⁷³

Relational approaches also exist in Anglicanism and Roman Catholic social teaching. In Anglicanism, for example, family life includes interaction with others for mutuality, support and communal services.⁷⁴ Individualism is considered to 'diminish' relationships and community, as human beings are persons-in-community.⁷⁵

⁶⁸ Beverly Wildung Harrison, 'The Power of Anger in the Work of Love: Christian Ethics for Women and Other Strangers', in Carol S. Robb (ed.), *Making the Connections: Essays in Feminist Social Ethics* (Boston, MA: Beacon Press, 1985), 3-21, at 17-20.

⁶⁹ Darlene Fozard Weaver, *Self Love and Christian Ethics* (Cambridge: Cambridge University Press, 2002), 47.

⁷⁰ H. Richard Niebuhr, *The Responsible Self: An Essay in Christian Moral Philosophy* (New York: Harper and Row, 1978), chapters 2 and 3, at 77 for 'responsive relations'.

⁷¹ James F. Keenan, 'Proposing Cardinal Virtues', *Theological Studies* 56 (1995), 709-29, at 723-8.

⁷² J. Kellenberger, *Relationship Morality* (Pennsylvania, PA: The Pennsylvania State University Press, 1995), 165.

⁷³ *Ibid.*, 44.

⁷⁴ The Board for Social Responsibility of the General Synod of the Church of England, *Something to Celebrate* (London: Church House, 1995), 16.

⁷⁵ *Ibid.*, 76.

The relational model I will focus on is that developed by Roman Catholic Louis Janssens. He has been chosen on account of his being a distinguished theologian, for his interest in artificial insemination, and the intellectual qualities of his analysis of personalism. Before looking at Janssens' personalism in section 5.10 we will briefly look at some of its underlying influences.

5.9 Influences upon Louis Janssens

Personalism's emphasis upon the experiential as a basis for morality developed from phenomenology and existentialism's focus upon experience and individuals.⁷⁶ Janssens was possibly influenced by Max Scheler, who criticised Kant for ignoring the uniqueness of each person and the human situation, leading to depersonalisation.⁷⁷ He was also influenced by the Jewish philosopher Martin Buber, whose work *I and Thou* distinguished I-it relations (business-like relations) from I-Thou relations (personal human relations). In the latter persons are held to exist in relationship with others and God by dialogue.⁷⁸ Janssens was also influenced by Thomas Aquinas⁷⁹ and the Roman Catholic document *Gaudium et Spes*.

5.10 The Personalism of Louis Janssens

Having briefly outlined the background to Janssens, we now investigate his personalism. Janssens believes morality is predominately concerned with

⁷⁶ Joseph A. Selling, 'Introduction', in *idem.* (ed.), *Personalist Morals: Essays in Honor of Professor Louis Janssens* (Leuven: Leuven University Press, 1988), 1-7, at 2.

⁷⁷ Stephen Frederick Schneck, *Person and Polis: Max Scheler's Personalism as Political Theory* (Albany, NY: State University of New York Press, 1987), 99-100.

⁷⁸ Paul Schotsmans, 'Responsible Involvement and Conscientious Freedom: A Relational Approach to the Medical (R)Evolution in Ethical Perspective', in Selling, *Personalist Morals*, 167-84, at 170-1.

⁷⁹ Dolores L. Christie, *Adequately Considered: An American Perspective on Louis Janssens' Personalist Morals* (Louvain: Peeters Press, 1990), 10.

'human relationships' and 'well-being'.⁸⁰ Personalist morality has the human person as its end, allowing for discussion of moral norms and ethical reflection.⁸¹ Personalism is a 'revisionist' approach, involving '*a posteriori*' and 'experiential' knowledge with a 'proportionalist' method.⁸²

Eight themes of Janssens' personalism will now be summarised before being presented. Firstly, Janssens' personalism avoids static laws; it is dynamic. Secondly, the human person adequately considered acknowledges that equal and unique, but embodied human beings are made in God's image, and engage in dialogue and social relations which allow progress. Thirdly, he develops three additional criteria for his personalist ethics, which allow for morally good acts, dynamic ethics and mutual relationships. Fourthly, personalism is a teleological ethic which focuses upon the agent's motives, moral actions and goodness. Fifthly, both subjective and objective criteria are highlighted, including collaboration. Sixthly, he uses a hierarchy of values to solve conflicts between values with priority given to moral goodness. Seventhly the application of his personalism to reproductive technology is given. Finally, objections to personalism are outlined.

Firstly, Janssens rejects a rational moral law derived from a static, predetermined natural law, which emphasises an impersonal morality⁸³ with pre-defined ends and 'purposes' people are 'expected' to perform.⁸⁴ He rejects the three concepts of physicalism (the moral laws in nature), an *a priori*

⁸⁰ Louis Janssens, 'Ontic Evil and Moral Evil', *Louvain Studies* 4 (1972), 115-56, at 139.

⁸¹ Selling, 'Introduction', 5 and Jan Jans, 'Some Remarks on the Work of Professor Emeritus Louis Janssens', in Selling, *Personalist Morals*, 319-28, at 322 which indicates some of the areas Janssens wrote on.

⁸² David F. Kelly, 'Individualism and Corporatism in a Personalist Ethic: An Analysis of Organ Transplants', 147-65, in Selling, *Personalist Morals*, at 147.

⁸³ Selling, 'Introduction', 1; Christie, *Adequately Considered*, 182.

⁸⁴ Joseph A. Selling, 'Evolution and Continuity in Conjugal Morality', in Selling, *Personalist Morals*, 243-64, at 254.

approach,⁸⁵ and deontology,⁸⁶ thus allowing for more creativity. Personalism downplays individualism and human rights to protect the common good,⁸⁷ but does not 'subordinat[e] the individual to a wider corporate whole'.⁸⁸

Secondly, the basis of Janssens personalist ethics is the eight-fold objective criteria called 'the human person adequately considered'. This takes priority over 'laws, rules, norms and prescriptions', in morality.⁸⁹ It is used to decide if an act is worthy of human beings and is morally good,⁹⁰ in a context of relationships and self-fulfilment. Firstly, 'the human person is a *subject*, not an object'⁹¹ with dignity, conscience, freedom, responsibility⁹² and acts with intention,⁹³ allowing for dynamism and plurality.⁹⁴ Therefore persons cannot be exploited or used as a mere means to an end.⁹⁵ Secondly, human beings are embodied, with a body and spirit, meaning we should take care of our health and bodily integrity and others'. Thirdly, personal bodies use material things; since the human being is 'a being-in-the world'.⁹⁶ Fourthly, human persons are open, relational and in dialogue with others.⁹⁷ Fifthly, persons are social and live in societal institutions which are to be respected, but these must be open to 'dynamic development' and support human dignity.⁹⁸ Sixthly, human persons are created in God's image and are called to reflect that image.⁹⁹ Personalism

⁸⁵ Kelly, *Individualism and Corporatism in a Personalist Ethic*, 147.

⁸⁶ Christie, *Adequately Considered*, 182.

⁸⁷ Kelly, *Individualism and Corporatism in a Personalist Ethic*, 150.

⁸⁸ *Ibid.*, 158.

⁸⁹ Selling, 'Introduction', 4.

⁹⁰ Louis Janssens, 'Artificial Insemination: Ethical Considerations', *Louvain Studies* 8 (1980), 3-29, at 14-15.

⁹¹ *Ibid.*, 5.

⁹² *Ibid.*, 5; see also Second Vatican Council, *Gaudium et Spes* (GS) (London: Catholic Truth Society, 1966), 16-17, 31 and 55.

⁹³ Louis Janssens, 'Personalist Morals', *Louvain Studies* 3 (1970), 5-16, at 7.

⁹⁴ *Ibid.*, 10.

⁹⁵ Janssens, 'Artificial Insemination', 5 and GS, 27.

⁹⁶ Janssens, 'Artificial Insemination', 6 and GS, 14 and 27.

⁹⁷ Janssens, 'Personalist Morals', 5.

⁹⁸ Janssens, 'Artificial Insemination', 8-9 and GS, 12 and 23-32.

⁹⁹ Christie, *Adequately Considered*, 39.

includes a duty to follow God's will, using 'conscience,...liberty and responsibility', which give dignity to moral subjects to 'determine moral obligation'.¹⁰⁰ Human beings are called to know God, worship and glorify him, with 'faith, hope and love'.¹⁰¹ We are to love God and our neighbour with 'authentic' and 'morally good disposition[s]' and actions.¹⁰² Janssens subordinates a person's temporal and material life to their spiritual life.¹⁰³ Seventhly, even though he acknowledges that people live in a present reality,¹⁰⁴ human persons are also historical beings.¹⁰⁵ The history of human beings allows for moral progress, since morality reacts to 'new economic, scientific and technical advancements'.¹⁰⁶ Finally, persons are all equal, 'shar[ing] in the same human nature', but have originality too,¹⁰⁷ since human beings are unique and diverse.¹⁰⁸

Thirdly, Janssens develops three additional criteria to his personalist ethic. Firstly, morally good acts benefit our relations to others, society, the world and God, while acknowledging 'the *whole* person'.¹⁰⁹ Secondly, he wants us 'to serve the promotion of the human person' with a 'dynamic ethics' and wisdom, by a love for the good and truth.¹¹⁰ Subjects are free, with an internal consciousness within, and able to transcend themselves. Human beings have self awareness and can develop their self-fulfilment by choices and intention.¹¹¹

¹⁰⁰ Jan Jans, 'Some Remarks on the Work of Professor Emeritus Louis Janssens', 325.

¹⁰¹ Janssens, 'Artificial Insemination', 9 and GS, 12, 34, 36 and 48.

¹⁰² Janssens, 'Artificial Insemination', 15.

¹⁰³ Christie, *Adequately Considered*, 35.

¹⁰⁴ Janssens, 'Personalist Morals', 5.

¹⁰⁵ Janssens, 'Artificial Insemination', 10.

¹⁰⁶ Christie, *Adequately Considered*, 57.

¹⁰⁷ Janssens, 'Artificial Insemination', 12 and GS, 29.

¹⁰⁸ Janssens, 'Personalist Morals', 13.

¹⁰⁹ Janssens, 'Artificial Insemination', 13.

¹¹⁰ *Ibid.*, 14.

¹¹¹ Christie, *Adequately Considered*, 55.

Thirdly, we live in faith, responding to God's will and fulfilling our humanity in a mutual relationship with God and other human beings.¹¹²

Fourthly, Janssens' moral action involved agents with good motives intending a particular end of an action. The end determines how their will selects the proportionate means, i.e. the action to achieve the good end.¹¹³ Personalism is teleological, since the consequence is part of the moral judgement along with the agent's purpose, intention and end which aim for the good.¹¹⁴ For Janssens, a person's conscience decides what is 'of value' and the content of moral norms¹¹⁵ which strive towards good and can be informed by objectivity.¹¹⁶ Moral goodness and badness refer to an agent's inner disposition or attitude, which determine the moral quality of the person. Morally right actions have a value or values in their consequences which respect the human person in dialogue with an objective reality.¹¹⁷

Fifthly, personalism supports universal valid moral norms reflecting human and Christian understandings. These reflect each person's 'unique situation' in their 'concrete acts' and their own lives.¹¹⁸ However, universal norms are regarded as limited, because originality allows for actions universal norms cannot express. Personalist morality is based on objective criteria found in God, the self and relationships, but it acknowledges a person's subjective choices towards self achievement.¹¹⁹ Collaboration is encouraged as part of the common good, with a 'dialectical relationship between the subjective and objective'.¹²⁰

¹¹² Janssens, 'Personalist Morals', 10.

¹¹³ Christie, *Adequately Considered*, 85, 134-6, 46-7 and 87.

¹¹⁴ *Ibid.*, 127-8.

¹¹⁵ *Ibid.*, 171.

¹¹⁶ *Ibid.*, 160, and Janssens, 'Ontic Evil and Moral Evil', 118-19.

¹¹⁷ Christie, *Adequately Considered*, 170-3.

¹¹⁸ *Ibid.*, 56.

¹¹⁹ *Ibid.*, 36 and 34.

¹²⁰ *Ibid.*, 159.

Sixthly, Janssens solves the conflict between values by measuring acts according to an objective rule of morality i.e. 'the human person adequately considered'.¹²¹ He develops a personalistic hierarchy of values,¹²² to decide between subordinate or clashing values. Priority is given firstly to higher values such as the 'moral goodness of the human person';¹²³ secondly to the urgency of the value; thirdly to the chance of the value being realised; fourthly to long term values over short term ones; fifthly to values protecting social life; and finally to prudence.¹²⁴ If disvalues are included in an action then a principle of proportionality is used to decide if an action promotes the person and their relationships.¹²⁵

Seventhly, Janssens uses personalism to examine what an intervention means for promoting the human beings involved and their relationships.¹²⁶ Acts are to fit a person who has been 'adequately considered', which includes their embodiment, relationality and openness to others, the world, social groups and God.¹²⁷ Janssens encourages creativity¹²⁸ in actions. He is open to AIH, AID and IVF to serve the needs of infertile married couples, but without the Church making 'premature judgments'.¹²⁹ He considers the well-being of participants and their relationships including the child, the family and society.¹³⁰ With IVF he questions the success rate and whether people are used as a mere means to

¹²¹ *Ibid.*, 175-6.

¹²² Louis Janssens, 'Norms and Priorities in a Love Ethics', *Louvain Studies* 6 (1977), 207-38, at 229-30.

¹²³ Christie, *Adequately Considered*, 175.

¹²⁴ *Ibid.*, 175-6.

¹²⁵ Louis Janssens, 'Personalism in Moral Theology', in Charles E. Curran (ed.), *Moral Theology: Challenges for the Future – Essays in Honor of Richard A. McCormick* (New York: Paulist Press, 1990), 94-107, at 96.

¹²⁶ Janssens, 'Artificial Insemination', 24.

¹²⁷ Kelly, 'Individualism and Corporatism in a Personalist Ethic', 159.

¹²⁸ Christie, *Adequately Considered*, 183.

¹²⁹ Janssens, 'Artificial Insemination', 11.

¹³⁰ *Ibid.*, 22-3.

an end.¹³¹ AID is allowed as a last resort, if the married husband is infertile, if both spouses approve and if they are competent to raise a child.¹³² It is not to be used by single women. Sperm donors are to consult with their spouses before donating as a service to others.¹³³ AID is not considered always immoral, as 'proportionate reason...balance[s] the positive and negative aspects'.¹³⁴ As far as I know Janssens has not written on surrogacy. However, I would imagine that he would support a limited surrogacy practice for married couples as a creative and dynamic community service to create a family instead of being restricted by a rigid natural law. As a personalist he would want to ensure all participants are treated well with their dignity respected and adequately considered.

Finally, Janssens says that J. B. Metz criticises personalism for 'concentrat[ing] on primary (I-Thou) relationships', but life has 'social, political and secondary relationships'.¹³⁵ Janssens wants personalism to include secondary relationships - including technology and scientific progress. On this view, personalism should be concerned with intentionality in all relationships and not just primary relationships.¹³⁶ Janssens' personalism would be criticised by traditional Roman Catholics for encouraging the breaking of the unitive and procreative aspects of marriage and the use of masturbation by supporting the use of AIH, AID and IVF. Another criticism is that personalism centralises the human person and not God. Janssens believes people are the norms, who are fulfilled by loving the supreme God.¹³⁷

5.11 Towards a New Account of a Relational Framework

¹³¹ *Ibid.*, 24.

¹³² *Ibid.*, 26.

¹³³ *Ibid.*, 27.

¹³⁴ *Ibid.*, 28.

¹³⁵ Janssens, 'Personalist Morals', 15.

¹³⁶ *Ibid.*, 15.

¹³⁷ *Ibid.*, 15-16.

Much can be learnt from Janssens' personalism. I agree with its dynamic and revisionist approach to natural law, allowing for freedom and creativity, including responsibility in relationship to the new reproductive technologies (NRTs). I approve of its constructivist methodology, which uses dialogue within social relationships and acknowledges human experiences. I acknowledge its theistic basis for giving humans dignity and for being made in God's image. I endorse the well-being of embodied human beings who have equality while being unique, thus preventing them being used as a mere means to an end. I support the importance of morally good acts, intention, motives, the end of an action, as well as the importance of both subjective and objective stances.

However, I want to propose an alternative relational framework which draws upon Janssens, but has differences, making it a revised personalist approach. My own relational approach will now be presented in five sections. Firstly, my relationalism involves a framework allowing for different emphases upon the self and the other. Secondly, it has a more sophisticated ontology of the self (and its relationship to the other). Thirdly, I explore the relationship between the self and the other. Fourthly, I outline what my relationalism excludes. Finally I present the respects in which my relationalism differs to Janssens' personalism. I advocate: a varied ontology, the possibility of returning to a pre-discourse self, the significance of emotion and reason, the acknowledgment of supererogatory acts and finally the importance of priorities in ongoing discourse which may not always reach a final end. Later my relationalism will be applied to surrogacy (5.12).

5.11.1 The Relational Framework

My relationalism is a moral framework which can be used for surrogacy. The relational framework takes a personalist approach, acknowledging the personhood, dignity, and intrinsic worth of human beings – both the self and the other. Relationalism allows for diverse personal relationships such as I-Thou relationships and public relationships with others, without insisting upon one type of relationship. The relationship does not dominate in itself, but the people in them and their priorities, thus allowing for separateness sometimes.

Relationalism allows for certain degrees of universality, reason, rationality and objective impartial principles to ensure general well-being for all, thus preventing agent relativity like discrimination or cannibalism. Discrimination is not ideal as it involves unfair treatment based on colour, sex or age for example to the detriment of others. Cannibalism is not recommended, as it goes against the sanctity of life and the dignity of human beings, who deserve respect. However, universality is limited; people are not impersonal generic human beings required to fit predetermined impartial requirements. A universal principle might be applied in a particular way, allowing for reasonable partiality since people differ.

A relational framework is premised upon a complex and creative relational process between the self and the other. It is a constructivist theory, encouraging moral agents to interact with ongoing interpersonal discourse to negotiate meaning, outcomes and solutions, to dynamically respond to their past, present and future needs. It encourages interdependence and collaboration in the construction of a narrative with consideration and understanding for each other. The process is ongoing as experience develops, allowing for interpretation, deconstruction and reconstruction. Initial agreements are open to revision and relationships can change and evolve. A

promise made in the beginning may have an obligation as its goal, but the obligation in time may become inappropriate.

I acknowledge a person's identity, values, emotions, actions and nature throughout time, including their past, present and future interests as having moral significance. People's inclinations and needs can change during the course of an action, and both should try to be accommodated. A promise made in the beginning may have obligation as its goal, but the obligation may not respond to the needs of participants as time progresses. Instead of seeing one's desires positioned eternally frozen in a neutral time scale, differences between the present, near future and long-term future need to be made and priorities questioned.

My relationalism - as an alternative pluralistic framework or spectrum - allows for a varied ontology, with varying degrees of emphasis upon the self and the other. We can have my view, your view, and a combined view - i.e. our view - which may or may not be a compromise. The balance, intensity and relationship of the three motives of self, other, and self and other can vary: e.g. it can have a higher, lower, or equal emphasis upon the self and the other or just the self or just the other. Some relationships will be mutual and balanced, with a proportionate mean of 50%/50% upon the self and the other. However, mutuality may be unwanted by the participants and could downplay altruism, supererogatory actions, *agape* and self-sacrifice.

Relationalism encourages a plurality of ethical views, actions and motives and not just one solution. Within a relational framework, different types of discourse ethics exist, leading to different ethical outcomes to accommodate differences between the self and the other. The type of relationship and the amount of emphasis between the self and the other differs according to the

importance and priority of the value of the act for participants. Value can be seen as existing prior to the relational context. The requirements and demands of the relationship vary according to many factors. Factors include: ongoing and new needs, interests, expectations, circumstances, responsibilities, intentions, embodiment, nature, feelings, relationships, goals, beliefs, experience, personal history and well-being of the self and other, etc. Reflection is also given to significance of the time before, during and after the experience. Relationalism tries to respond sensitively, flexibly and dynamically to these factors according to the context and the particular priorities, which can produce different conclusions of right and wrong. Fairness can be decided by discourse, with or without agreement, but aims to reject unfair positions. Relationalism is flexible and responsive to the specific needs and different interests of both women and men to prevent oppression, but allowances for gender difference must be ethical and appropriate.

5.11.2 The Self in Relationalism

Relationalism tries to ensure self-participation in the relationship. The well-being of the self matters, as ethics should not just be about the other. Therefore self-preservation can be sought. Self-love and self-respect allow the self to have self-worth and integrity, which help them and others to acknowledge and understand their unique, partial self and prioritise what is important to them such as their values, interests, needs, concerns and emotions.

My relationalism acknowledges that the self and its self-identity exist prior to entering a discourse with another. The self then chooses to become part of the relational interaction with the other and responds to the needs of the other, but without being lost or assimilated by the other. The self could choose to leave the relationship, since not all relationships can be maintained and they may try

to revert back to the historical self prior to the interaction. The self is an ongoing creation reshaping its identity, with the ability to decide how much to change. The self can decide how much they are influenced by the other and by the discourse. Self-identity is not totally dependent upon the relationships the self is in. The self, as a separate independent autonomous individual, can take a different stance to the other.

5.11.3 The Self and the Other in Relationalism

Relationalism is not just about the self; it accords importance to the relationship between the self and the other. Relationalism tries to solve issues relationally by taking the needs of both self and other into consideration together, but sometimes individuals need separation. Both need to treat each other with dignity by respecting each other's needs with sensitivity and emotional insight. Responsibility to the self and to the other can be combined in a relational framework. There may be times when it is acceptable to favour the self over others. The other may need to recognise the importance of the needs of the self and the priorities of values. The self, however, should not impose its own values, priorities, views and interests upon the other without discussion. Love of the self does not have to be the same as the love for the other, as suggested by Plato.¹³⁸

The self can be integrated in a relationship as a self-in-relation. The self and other become connected through discourse with each other, gaining a relational identity which can change as the discourse develops. Sometimes a joint perspective of the self and other is more appropriate with interdependence and amalgamation between the self and the other. People can act together in fellowship, allowing both to help each other. There can be a co-existence and

¹³⁸ David O. Brink, 'Self-Love and Altruism', *Social Philosophy and Policy* 14 (1997), 122-57, at 128.

mixture of moral motives, actions and view, which require an awareness of the context of the relationship. It encourages attention to the social and cultural context of the relationship between the self and other.

The self, other and the community can be responsive to each other. People can help each other to flourish and to achieve their own ends within the community, thus allowing the community to flourish too. Communal relations matter, as long as the self is not lost. The self can be influenced by the other and the other by the self, creating social relations, but the self can decide not to be influenced by these. Sometimes compromise or harmony may be impossible as there could be a conflict of loyalty which cannot be resolved one way or the other. Therefore, each person may have to be acknowledged as an independent and separate individual during disagreement and agreement sometimes.

5.11.4 What My Relationalism Excludes

We now consider five ways in which my relationalism differs from other ethical theories and views of the self and other: (1) it rejects the self of liberalism; (2) it is not completely communitarian; (3) impartial discourse is not compulsory; (4) impersonal justice is not mandatory; and (5) people are not disembodied.¹³⁹

Firstly, even though relationalism supports the opportunity for individualism, it does not support the liberal conception of the self as an atomistic rational maximiser (*homo economicus*). Here, the self only co-operates and enters into a relationship or contract with others for its own rational gain, thus treating others instrumentally. Hobbes believed people are egotistical and obey a

contract out of self-interest and only pretend to have a genuine concern for the other when they co-operate, thus hiding their selfishness.¹⁴⁰ Rational economic man is not to be seen as the ideal approach within a competitive market setting. Such individuals tend to act as isolated, independent and self-sufficient individuals in order to gain their own self-interest and goals. Agents want to do the minimum for the other in order to co-operate with them, but expect to get as much as possible out of the situation for the sake of utility maximisation.

Autonomy, which is traditionally favoured, should not always be the key main principle, as it places too much upon self-determination and self-sufficiency, leading to a self-dependent approach. Liberalism tends to ignore others and the significance of the community, encouraging people to make decisions on their own as a sign of their individual privacy. Self-interest and self-regard do matter, along with virtues such as honesty, but these should be contrasted with a competitive narcissism, egotism or selfishness, since reason and care need to operate alongside each other. Similarly, a property model with its exclusive rights of ownership and privacy, which prevent others from participation, is not ideal. Relationalism wants both the self and the other to be taken into consideration. It is important that the interaction between the self and the other is not based upon a predetermined agenda, unable to respond to the specific and differing needs of those involved. Relationalism therefore is not based upon an objectively universalised contractarian framework for all to follow.

Secondly, relationalism is not communitarianism, which is based predominantly upon social relations, social roles and social order as the self could be lost. It will not advocate that the moral claim of the other can be put

¹⁴⁰ Margaret Moore, 'Gauthier's Contractarian Morality', in David Boucher and Paul Kelly (eds.), *The Social Contract from Hobbes to Rawls* (London: Routledge, 1994), 211-25, at 214.

on the same level of the self by reason, as suggested by Colin Grant,¹⁴¹ as this fails to take the priorities and needs of the moral agents involved. The self and the other differ and the self and their particular needs and interests should not be regarded as the same as those of the other. In performing acts for the other, the self can be motivated by their own concerns for the other and by the needs of the other too; not just by the requirements of the other or reason. Relationalism agrees with the emphasis in communicative ethics where agents are regarded as a concrete self and not as mere 'juridical agents'.¹⁴² Unlike Kantian ethics therefore, relationalism is not dependent upon the administration of universalised moral laws by its moral agents, as this can fail to deal with the specific needs and contexts of particular agents. Relationalism also differs from an African view which favours a communal orientation towards interpersonal relationships as opposed to self-welfare. In African thought, the individual self is only acknowledged for being 'part of a social order', since '[w]hatever happens to the individual happens to the whole group and whatever happens to the whole group happens to the individual'.¹⁴³ In [m]y relationalism the bonds between the self and the other are not considered to be as 'inescapable', as suggested by Sharon Farmer.¹⁴⁴ Relationalism rejects the view that identity is only formed by interacting with others, as developed by Hegel, or that self-consciousness exists by being recognised by another's self-consciousness. Hegel believed self identity is determined by the other's views of me.¹⁴⁵ Marx and Hegel rejected individuals having 'a pre-social

¹⁴¹ Colin Grant, *Altruism and Christian Ethics* (Cambridge: Cambridge University Press, 2001), 115.

¹⁴² Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 60.

¹⁴³ Sandra Harding, 'The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory', in Eva Feder Kittay and Diana T. Meyers (eds.), *Women and Moral Theory* (Totowa, NJ: Rowman and Littlefield, 1987), 296-315, at 302 n. 22-3.

¹⁴⁴ Sharon A. Farmer, 'Introduction', in Paula M. Cooley *et al.* (eds.), *Embodied Love: Sensuality and Relationship as Feminist Values* (San Francisco, CA: Harper and Row, 1987), 1-13, at 12.

¹⁴⁵ Niels Thomassen *Communicative Ethics in Theory and Practice* (Basingstoke: Macmillan, 1992), 60 referring to the master and slave in Hegel's *The Phenomenology of Spirit* (1807).

existence' or self-identity being established before 'social interaction'.¹⁴⁶ Unlike discourse ethics, the self in relationalism is not wholly constructed by discourse or social relationships. Similarly, relationalism does not adopt a postmodernist view of the self which involves the death of the subject as seen in Foucault who deconstructed the self by the death of the author and dissolution of the subject.¹⁴⁷ There is a danger that self identity and a pre-discourse self can be lost with postmodernism, since the self is not seen as existing outside of the discourse.

My relationalism believes in a pre-existent self who is a separate individual, existing before entering the discourse with the other, which the self can try to revert back to. The self and self-identity exist prior to entering a discourse with another, but then becomes part of the interaction with the other. The self can contribute to the discourse, but the self may be able to decide sometimes how far they want to be influenced by the other and by the discourse. Instead of contributing to the discourse, the self may be able to decide sometimes to come out of the relationship completely or partially in certain contexts. Sometimes a relationship may be unsustainable, and the self may try to revert back to the historical self prior to the interaction. However, it needs to be acknowledged that in reality, the self may find it hard to detach itself from a particular embedded relationship, such as marriage or a parent-child relationship, as relationships can have a profound impact upon the self. Even if a person does physically leave a relationship they could still be psychologically affected by it.

¹⁴⁶ David Boucher and Paul Kelly, 'The Social Contract and its Critics: An Overview', in *idem. The Social Contract from Hobbes to Rawls*, 1-34, at 24.

¹⁴⁷ Foucault at first thought the modern self was over, but later focused on the ethics of the self. Derrida regards the self as 'indispensable', and claims not to destroy the subject but situate it, because both experience and discourse need a subject with emphasis upon the origins and functions of the subject. See Jung Park, *Contractarian Liberal Ethics and the Theory of Rational Choice* (New York: P. Lang, 1992), 219.

The self is involved in an ongoing creation reshaping their identity, but they can sometimes decide how much they want to change. The identity of the self is not totally dependent upon the relationship it is in, since the self can be part of a relationship without being totally integrated into it. Therefore, the self can be part of the relationship with the other, but may be able to separate from it too sometimes, as an independent autonomous individual, but without the atomistic individualism and disembodiment of the self in liberalism. The self and the other are two separate individuals and the self may have to take a different stance to those they are engaging with. The self therefore, does not just know itself by 'interactive relationships' as suggested by Christine Koggel.¹⁴⁸ I reject social constructivism if morality is regarded as a social construct only, with social institutions taking priority over the individual. I disagree with E. J. Bond who says: '[it] is not a matter of the world conforming to discourse, it is a matter of discourse conforming to the world'.¹⁴⁹

Self-identity is important as well as an inter-connected self. Even though the self has to be responsive to the needs of the other, it does not mean that the self should be lost or assimilated by the other's needs, by the community, by universalism or by mutuality, as they will need their privacy too, thus contrasting with communitarianism or social constructivism. In contrast to Mullett who said that feminist actions should be collective and not individualistic,¹⁵⁰ the needs of the self can stand independent of the needs of the other, the relationship with the other and of social interaction. There can be some independence to allow for a separate and autonomous self, but this will not be a requirement. Care will be made to ensure that the needs of the individual are acknowledged and that the self is not emptied of their particular

¹⁴⁸ Christine Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Oxford: Rowman and Littlefield, 1997), 128.

¹⁴⁹ E. J. Bond, *Reason and Value* (New York: Cambridge University Press, 1993), 152 n. 44.

¹⁵⁰ Shelia Mullett 'Shifting Moral Perspectives' in Rosemarie Tong, *Feminine and Feminist Ethics* (California, CA: Wadsworth Publishing, 1993), 165-169, at 166.

concerns. Moral solutions should be able to acknowledge the particularities of the self and the other.

In relationalism, the interaction between the self and the other is not based upon a prearranged static agenda or relations, unresponsive and unchanging to the specific and differing needs of those involved. Instead, of treating people impersonally as generic human beings who are all to be treated in the same manner, relationalism regards human beings as unique and special, allowing for specific partial treatment. Aristotle's good man therefore needs to be redefined from being someone who extends the *same* relationship he has towards himself to his friend.¹⁵¹ Relationalism tries to respond to the specific ongoing needs, interests and priorities of the self and other, but without making them fit predetermined requirements of reason. Relationalism differs from a predetermined, rationalistic and universal agenda based upon closed non-interactive and impartial existence between the self and other. A pre-existing agenda may not continue to cater for the needs or situation of those involved, therefore flexibility is needed to cater for new needs.

Relationalism therefore, differs to a communicative ethic which favours mutuality and reciprocity as the norm.¹⁵² Relationalism does not just offer mutuality or a proportionalist solution. Mutuality should not be performed just to satisfy requirements of a feminist care ethic for example or just to achieve a pre-existing agenda of an Aristotelian mean. These are options, but when we are dealing with specific people, we have to be aware of their needs and a mutual or a proportionate and balanced solution may not be adequate. Therefore relationalism is not just based upon universal principles which we all

¹⁵¹ Aristotle, *Nicomachean Ethics* 1166a30-b2 in Aristotle, *The Ethics of Aristotle: The Nicomachean Ethics* trans. J. A. K. Thomson (London: Penguin Books, revised ed., 1976), 294. These are sentiments echoed by Joseph Butler in sermon 11: 'Love of neighbour then has just the *same* [emphasis added] respect to, is no more distinct from self-love'. See Joseph Butler, *Fifteen Sermons Preached at the Rolls Chapel* (London: W. Botham, 1729), 215.

¹⁵² Benhabib, *Situating the Self*, 60.

have in common as suggested by Seyla Benhabib 'the communicative ethicist asks: what principles of action can we all recognize or agree to as being valid if we engage in practical discourse or a mutual search for justification?'¹⁵³ The equality of moral subjects cannot always be guaranteed because people differ. The self should not be absorbed by the community, by universalism or mutuality. However, it needs to be acknowledged that sometimes mutuality might be the best solution for the needs, interests and priorities of the self and the other. Relationalism involves a flexible framework which does not focus exclusively upon one ethical concept such as mutuality all the time, but takes the people involved into consideration.

Thirdly, even though relationalism supports discourse ethics, it does not support the modernist view Jürgen Habermas has towards discourse which expects the self to be emptied of its individuality. Habermas focuses upon rationality, consensus, deontology and a universal discourse ethic,¹⁵⁴ with an impartial judging process '... it establishes a procedure based on presuppositions and designed to guarantee the impartiality of the process of judging'.¹⁵⁵ Relationalism does not insist upon agreement or consensus which is favoured by Benhabib and Habermas, since relationalism acknowledges that we can agree to disagree and it allows for a plurality of views. Likewise, relationalism does not support a dualistic approach with false oppositions between the private or the public world. It is not the case of a person putting forward one view and someone else trying to defeat it with either one position or another. Sometimes disagreement may be the favoured option. At times, it may not be possible even for those involved in the discourse to 'reach an understanding'¹⁵⁶ as the relationship might have to end. People exist in

¹⁵³ Benhabib, *Situating the Self*, 28.

¹⁵⁴ Jürgen Habermas, *Moral Consciousness and Communicative Action* trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge: Polity Press, 1990), 120-2.

¹⁵⁵ *Ibid.*, 122.

¹⁵⁶ Benhabib, *Situating the Self*, 86.

personal relationships such as I-Thou relationships as well as more public relationships with others. The type of relationship, and its requirements and demands, will vary. However, the people and their priorities can take precedence over the relationship, thus allowing for separateness sometimes.

Relationalism is not an objectively universalised contract. It rejects a neutral, objective universalism as an all encompassing impersonal principle to guide all action. The interaction between the self and the other is not a static predetermined agenda aiming at a fixed end. Reasoning does not always have to be exclusively impartial, but can take the specific and differing needs of agents into consideration. Making individual allowances does not have to lead to relativism as thought by Hegel.¹⁵⁷ Instead, relationalism wants to focus on partiality instead of impartiality as a way to gain solutions. It does not focus upon fixed, unchanging criteria with static meaning or following a predetermined static role which aims at a fixed end.

Fourthly, justice is usually considered owed to others and is often impartially, universally and impersonally applied. Relationalism rejects impersonalism and impartiality within ethics by avoiding impersonal justice, rules or regulations with a gender neutrality or a generalised account of self and other as devoid of opinion. The emphasis in relationalism is not upon deontological, abstract principles which primarily emphasise rights or duty in a depersonalised ethic. People are not to be objectified, standardised or treated as indifferent within an anonymous relationship. People are not to be treated impartially as hypothetical, universalised generalised others, losing their identity in an indiscriminate impersonal relationship as in liberalism. It does not advocate a neutral, objective universalism as an all encompassing principle. Universality has its limits as people are not all impersonal generic humans

¹⁵⁷ Carol MacMillan, *Women, Reason and Nature: Some Philosophical Problems with Feminism* (Oxford: Blackwell Publishers, 1982), 19.

required to fit into predetermined impartial requirements and work towards a common interest. Relationalism does not ignore relationships, in order to have total rationality, equality or egalitarianism. It rejects Kantian universal obligation and a universal reasoning of a situation, since reasoning does not have to be impartial, but can take the needs of the agents into consideration. Therefore, the personal positions of participants in relationalism are known and not hidden, as in Rawls, behind a veil of ignorance. Self-interest is not dependent upon universal acceptance distanced and impersonal reasoned principles as the guiding factor to decide what to do.

Even though relationalism does not work with an 'objective rational' set of rules, it allows for some objectivity. Relationalism acknowledges that there can be shared common objective values which may be the same for everyone. Some universalism, objectivity, rationality and impartiality is needed for social justice to prevent harm to the common good by nepotism or favouritism, thus preventing a judge letting off a relative for murder, for example. A relational justice tries to respond to the particular needs and relationships of the self and other by discourse. Relationalism encourages interdependency between justice and care by providing various emphases upon justice and care. We can have caring which is just, also caring justice, as well as only justice or only care to respond to the needs of the self, the other and society.

Finally, a relational embodiment is not a universalised, impartial and objective disembodiment found in contracts, as bodies differ. It rejects liberalism, which tends to focus upon that which is abstract, universal and impartial by assuming that men and women are equal. Liberalism often expects women to be treated in the same manner as men and to do the same actions as men. However, women, even though they are similar to men, do differ and allowances need to be made for this. For example a female fire fighter should carry equipment

suitable to her body weight and not have to match those of the men in order to prevent exhaustion. Liberalism also tends to take a dualistic or an essentialist approach by seeing the mind and body as separate or disembodied. Relationalism discards a neoclassical view which is based upon a male viewpoint and male values, even though it claims to be androcentric. Relationalism therefore rejects a Cartesian dualism which regards our minds as separate to our bodies with a disembodied universal self based on reason. Such a view is not advocated, as the mind and the body both matter and interact with each other. As embodied persons, some allowances can be made for nature, biology and the body as considering factors along with rationality. We are linked to our sexed bodies, but without having to follow essentialism or biological determinism, as biology is not destiny. However, relationalism will not be based entirely upon an essentialistic feminine maternal ethic either or upon a social role model such as friendship, as espoused by Lorraine Code.¹⁵⁸ The danger with such models is that they lead to biological determinism, stereotypes or a sexist bias so that one sex is automatically privileged over another. Even so, as embodied persons, some allowances can be made for our natural biological bodies such as some inclinations and emotions. We can demonstrate bodily integrity by choosing whether to transcend or not our biological urges such as our natural involuntary bodily inclinations by using our mind, freedom, reason and emotions. We are not just material bodies, but emotional embodied souls within a social context and a constructive discourse, which can allow for our own interpretations of our nature and changes to our body. Reason and emotion can both be used to decide how to react towards the body. However, a universalised, impartial and objective embodiment is not suggested as people are unique and can take different views towards their bodies such as women do towards bonding in pregnancy, since not all women's bodies are the same. Even so, relationalism will allow for those who

¹⁵⁸ Lorraine Code, 'Second Persons', in Marsha Hanen and Kai Nielsen (eds.), *Science, Morality and Feminist Theory* (Calgary: The University of Calgary Press, 1987), 357-82.

want to follow a natural law stance but without insisting upon it all the time, since we need to allow for difference, deconstruction, particularity and personal qualities.

5.11.5 How My Relationalism Differs to Louis Janssens' Personalism

Janssens develops a personalist morality based upon people and their human flourishing. My relationalism adopts some of Janssens' personalist approach, but differs in five ways: firstly by its ontology; secondly by allowing for self-separation and permitting relationships to end; thirdly for including emotion; fourthly for having more sensitivity between the self and other; and finally theologically, in that I prefer an ongoing end within morality and not a final one without necessarily proportionate means.

Firstly, Janssens' ontology involves mutuality between the self and the other because God's love means 'our love of neighbour aspires to mutuality'.¹⁵⁹ Janssens' methodology involves 'a delicate balance between and among the various elements in the human relational system'.¹⁶⁰ However, mutual relationships usually are proportional; in other words, they are symmetrical with an equally balanced reciprocal relationship. My relationalism allows but does not require mutuality, since it may be inappropriate for the needs of the participants and lead to lost self-identity in cases where asymmetry may be required instead.

Secondly, Janssens regards human beings as relational and dynamic social beings who co-exist, co-operate and co-participate, since the individual and the social 'interdepend',¹⁶¹ and human beings never function alone.¹⁶² He

¹⁵⁹ Janssens, 'Norms and Priorities in a Love Ethic', 227.

¹⁶⁰ Christie, *Adequately Considered*, 59-60.

¹⁶¹ Kelly, 'Individualism and Corporatism in a Personalist Ethic', 148 and 160.

prioritises the common good over 'private welfare', 'personal perfection' and relations to others.¹⁶³ However, morality is not just derived from a social context, as individual interests, emotions and needs matter; these are not always defined by relationships with others. Sometimes the emphasis may be all upon the self, or all upon the other. Self-interests matter and should not always have to be sacrificed for the sake of a social relationship. What is best for one person may not involve others. My relationalism does not always prioritise the common good over agent welfare. Even though the self can be a social self by being in relation with others, and is part of the community, the self may need some separation for self-development or self-perfection. My relationalism acknowledges that relationships cannot always be maintained as the people involved take priority, not maintaining the relationship for the sake of it. Some relationships end due to harm, injustice or disagreements. Such a view contrasts with Kellenberger who regards relationship morality as including 'moral failure' when a relationship is violated.¹⁶⁴

Thirdly, Janssens does not focus upon emotional intuitionism and an intuitive insight. My relationalism encourages participants to analyse their and others' feelings, using reason and discourse to judge their appropriateness and priority which could lead to compromises and allowances. Reason can guide emotions, allowing for rationality in emotion and emotion in rationality; but within a social context, some feelings may be inappropriate.

Fourthly, Janssens calls for the self to want the perfection of the other.¹⁶⁵ However, just because A wants B's perfection, does not mean that A should try to perfect B, as trying to achieve it is a different matter. A may try to bring about the perfection of B in a way that suits A and not B. It could be too

¹⁶² Christie, *Adequately Considered*, 60.

¹⁶³ Louis Janssens, 'Time and Space in Morals', in Selling, *Personalist Morals*, 9-22, at 15.

¹⁶⁴ Kellenberger, *Relationship Morality*, 2.

¹⁶⁵ Christie, *Adequately Considered*, 60-1.

demanding for the self to perfect the other, leading to sacrifice of the self's basic needs. Altruism is possible but not compulsory, as it could become a supererogatory act involving too much sacrifice. The other should consider if their request for altruism is appropriate as it could be more caring to do it themselves. Likewise the self should consider whether its offer of altruism is truly wanted, but it might still be needed. Altruism can include self-care, since the well-being of the self and the other both matter.

Fifthly, as a Roman Catholic, Janssens uses Roman Catholic moral theology, particularly the notions of proportionalism¹⁶⁶ and conscience.¹⁶⁷ However, my relationalism is a constructive ethic involving an ongoing interaction between the self and the other. Unlike Janssens, it does not necessarily insist upon a final end or specific conclusion which one agent selects and works towards. Discourse allows changing solutions to meet the needs and interests of participants. My relational framework is not limited to a proportional response to deal with the specific concerns, needs and interests of particular people, as they could agree proportionalism is inappropriate. An imbalance or a disproportion between the means and the end could be required instead of a predetermined proportional approach. The means chosen are likely to involve negotiation as a process instead of a way to achieve a particular set end. But at other times, with different people, proportionalism could be appropriate. Care is needed in the formation and influence of conscience, so it does not become subjective or relative or lead to inappropriate actions caused by mental illness. Agents can reflect using a discourse with others.

5.12 My Relationalism Applied to Surrogate Motherhood

¹⁶⁶ *Ibid.*, 172.

¹⁶⁷ *Ibid.*, 171.

Having set out my relational view, it is now applied to surrogacy, focusing upon custody disputes, recommendations, embodiment, payment and what my relationalism towards surrogacy excludes.

5.12.1 My Relationalism Applied To Surrogacy Custody Disputes

Relationalism has a varied ontology. It encourages compassion towards the needs of the self and other to prevent harm. It respects the flourishing and dignity of each particular person, but their values, priorities, relationships, commitments and roles differ. Relational surrogacy custody solutions are diverse and negotiated case by case. Outcomes could be dynamic, co-operative and flexible, with ongoing interpersonal dialogue. It allows a variety of involvement between the surrogate and the commissioning couple, therefore accommodating different types of motherhood. The importance, significance and priority to be given to procreation, genes, intention, gestation, social relationship, emotions and bonding can be discussed before, during and after the pregnancy to accommodate the needs, interests and welfare of all participants. Custody does not always have to be based upon one aspect only. Solutions include one main parent and the other having access. Sometimes joint custody involves both sharing legal parenting and decision making with varying degrees of involvement. Sometimes just one party could have custody without visitation from the other. Rarely, all parties could be unfit, with no one having custody or visitation. Ideally a parent would have limited supervised access to the child with a mediator, to maintain contact.

Priority for custody would be given to childless commissioning couples, who use surrogacy as their last resort to procreate, instead of gestational surrogates who provide a gestational service and already have children. A gestational surrogate gestates a borrowed embryo procreated by another which is

implanted into her. She should not automatically gain exclusive parental rights over the commissioning couple, as they do not consider they have transferred ownership of the embryo to her. The commissioning couple will not want to relinquish their relationship to the foetus - which exists by intention, genetic connection, action towards the foetus, by feeling it move, talking to it, and buying things for it, etc. The physical and emotional relationship of the surrogate to the child is recognised, but within the social context of surrogacy as a collaborative reproductive act. Gestational surrogates can be acknowledged as the child's gestator upon the child's birth certificate and may be allowed to visit the child occasionally and be kept informed of the child, with full custody going to the commissioning couple. If the commissioning couple leave the surrogacy arrangement then perhaps they should be fined to cover the costs of the surrogate possibly placing the child for adoption. A genetic surrogate could have joint custody with the commissioning couple, based upon her genetic connection and emotional relationship to the child. The commissioning mother, as a social mother, could be recognised without having to adopt the child, so the surrogate is able to play a role in the child's life and if the commissioning couple divorced the commissioning mother would be able to visit.

5.12.2 Recommendations

Guidelines could include careful selection and screening of the surrogate and the commissioning couple, who get to know each other before the pregnancy to ensure both would be happy to be involved in the child's life. The husband of the surrogate should not be seen as the exclusive legal father as influenced by the AID laws. A new birth certificate could be issued, allowing the birth mother, the genetic mother and the social mother to be listed as well as the genetic and social father. Instead of the child automatically going to the birth

mother or to the commissioning couple in a surrogacy dispute, the state could look after the child by using a temporary foster carer, before deciding who is going to have main custody of the child to prevent presumption of the case and to decide custody fairly. Ongoing research is important to assess the ethical outcomes of surrogacy - such as the effect upon the child and how the child is progressing. Further recommendations are made in the main conclusion to the thesis.

5.12.3 A Relational Approach to Embodiment in Surrogacy

A relational approach to surrogacy acknowledges surrogacy occurs in a context of an interdependent relationship between the surrogate and the infertile commissioning couple. Discussions and negotiations need to occur regarding pregnancy management including abortion, medical testing, and custody before, during and after the relationship with independent counselling to prevent coercion. Each surrogacy arrangement is unique, with different but common guidelines, allowing for flexibility in light of ongoing changing experiences and emotions. It is reasonable to expect the surrogate to modify her behaviour, her privacy and bodily integrity during the pregnancy over concern for the child and the commissioning couple – for example her actions towards drinking or sport. However, the surrogate can expect some privacy rights and autonomy such as having an abortion if her life is at risk, but most major decisions need to be discussed and negotiated.

5.12.4 A Relational Approach to Payment in Surrogacy

Payment in a relational framework can represent a reciprocal gift of gratitude by the commissioning couple as a sign of their gratefulness to the surrogate for her services. The surrogate could accept payment from a commissioning

couple not just to further her own self-interest, but also to develop altruism in both of them. Brenda Baker regards unpaid surrogacy arrangements as expressing 'benevolence' and 'reciprocal personal interaction',¹⁶⁸ 'mutual understanding and generosity', an interpersonal relationship with 'mutual liking and sympathy',¹⁶⁹ in a 'mutually beneficial helping relationship'.¹⁷⁰ However, these values can be expressed in paid non-commercialised surrogacy too. Both paid and unpaid surrogacy should co-exist, but without the commissioning couple acting as consumers or the child as a commodified product. The commissioning couple are not to exploit or treat the surrogate as a mere means to an end.

5.12.5 What Relationalism Does Not Involve when Applied to Surrogacy

A relational approach towards surrogacy rejects the disembodied self of liberalism, which is regarded as alienating. Relationalism does not expect women to behave and react in the same way as neutralised and depersonalised participants as in liberalism. Nor is relationalism a universal, impersonal practice focusing upon exclusive ownership of the child as property. It does not insist upon one custody solution, rejecting the views of: firstly, gestational embodiment (as the surrogate gestates and does not procreate and the social context of surrogacy matters including the commissioning mother); secondly, contractual intention of the commissioning couple (as the changing emotions of the embodied surrogate matter); or thirdly the best interest of the child (as the basic needs and interests of the adults to associate with the child matter). These three models take an absolutist and inflexible stance towards custody, failing to accommodate the needs of the other and their changing views towards the child.

¹⁶⁸ Brenda M. Baker, 'A Case for Permitting Altruistic Surrogacy', *Hypatia* 11 (1996), 34-48, at 34.

¹⁶⁹ *Ibid.*, 41.

¹⁷⁰ *Ibid.*, 42.

5.13 The Best Interests of the Child

The 'best interests of the child' model is used by courts to solve surrogacy custody disputes by deciding primary custody and visitation. It takes the child's future into consideration, the ability of the parties to 'provide for the child', their 'physical, mental and emotional health' and characters.¹⁷¹ The criteria used can produce different results. Firstly, a court may prioritise the genetic relationship of the commissioning couple to the child, along with their intention to raise it and their bonding to the child, thus terminating the surrogate's parental rights in order to provide stability with one set of parents. Secondly, a court may prioritise the surrogate's close gestational relationship as the child's primary care taker and psychological parent, following a 'tender years' policy. However, the commissioning mother could lack a legal connection to the child, which may be detrimental if she and the commissioning father divorce. Thirdly, a court may award joint custody to the surrogate and the commissioning couple or one party could have primary custody and the other visitation rights of varying frequency. Fourthly, a court could decide that it is not in the best interests of the child to be raised by either the surrogate or the commissioning couple but rather a wealthier, better educated, healthier childless couple who wish to adopt a child.

A relational view towards surrogacy custody disputes would not necessarily use the best interests of the child *only*, as this may prevent someone having access to the child on the basis of education, finance, marital status or gestational connection. The needs and priorities of all participants would be considered, allowing for a variety of emphases upon the surrogate, the commissioning couple and the child, taking the significance of the relationships

¹⁷¹ Denise E. Lascarides, 'A Plea for the Enforceability of Gestational Surrogacy Contracts', *Hofstra Law Review* 25 (1997), 1221-59, at 1251.

into consideration. Ideally both the surrogate and the commissioning couple should have access to the child. The needs of the child are very important - and are to be protected - but the needs of the adults matter too and using a 'best' interest approach could ignore the basic needs of the adults. If one of the parties is considered unfit to have full custody, then instead of being denied visitation totally, they could be given restricted and supervised access to the child through a mediator to protect their parental rights, unless they are dangerous to the child. In cases of danger the parental relationship would be ended, on this relational view.

5.14 Problems of a Relational Framework

Having explored a relational response to the best interests of the child solution, possible problems of a relational framework are now considered. Participants may find the emphasis upon a variety of interdependent custody solutions difficult. The commissioning couple may be unwilling to share the child with the surrogate, valuing their privacy in wanting to create a nuclear family - especially if they have different class and religious backgrounds. Likewise, a surrogate may fear the commissioning couple will prevent her seeing the child. Visitation rights in surrogacy custody disputes may not be in a child's best interests if the parents are uncooperative.¹⁷² Ongoing research is needed to investigate the short and long-term effects of various custody solutions upon participants.

However, a relational approach with its open access allows the surrogate to see the child occasionally and for the child to meet her, thus allowing them to know a part of their identity and not to fantasise about her. Barbara Cohen reports a surrogate who found relinquishing the child 'the hardest thing' she

¹⁷² Tong, 'The Overdue Death of a Feminist Chameleon', 44.

had done and 'was the saddest goodbye'.¹⁷³ The child may suffer greatly if they find out accidentally that they were born of a genetic surrogacy arrangement and may want to meet their genetic parent(s) and feel isolated if they cannot.

Marcia Westkott is critical of relational theories which emphasise care, empathy and relationality over individual achievements and autonomy, which could mean an expectation that women care for men's requirements. She warns that relationalism could lead to 'subservience' and oppression for women.¹⁷⁴ However, the relationalism advocated here is not a unidirectional care ethic but one that can include mutuality and reciprocity with an individual self without atomism. It tries sensitively to accommodate as many of the needs and interests of participants as it can.

5.15 Conclusion

The needs of all participants in surrogacy matter, not just the surrogate and the child. Genetic fathers denied access to the child could 'suffer from feelings of regret and self-betrayal similar to those that surrogate mothers could feel'.¹⁷⁵ The difficulty with a contractarian approach is that it ignores the commissioning mother, the emotional experiences of the surrogate and the need of the child to know its biological gestator. If the contract fails, then the surrogate is often able to claim full legal custody in the United Kingdom. Under the adoption model, the commissioning mother may not be given the opportunity to have any legal recognition, as the surrogate is usually given parental rights alongside the commissioning father. A relational model of

¹⁷³ Barbara Cohen, 'Surrogate Mothers: Whose Baby Is It?', *American Journal of Law and Medicine* 10 (1984-1985), 243-85, at 261.

¹⁷⁴ Marcia Westkott, 'Female Relationality and the Idealized Self', *The American Journal of Psychoanalysis* 49 (1989), 239-50, at 248-9.

¹⁷⁵ Anonymous, 'Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers', *Harvard Law Review* 99 (1986), 1936-55, at 1953.

surrogate motherhood understands that surrogacy occurs in a complex social context and includes the hopes of the commissioning couple for a child, the possibly changing emotions of an embodied surrogate, and a child. As relationalism is an interactive interdependent model, it provides for a variety of pluralistic solutions based upon the importance of the priorities for those involved. A gestational surrogate who gestates another's embryo could therefore still be involved in the child's life but possibly to a lesser extent than a genetic commissioning mother who has the intention, genetic connection and a psychological relationship to the child. In distinction from the proceedings of the American gestational surrogacy case *Johnson v Calvert*, the gestational surrogate should not be ignored, but acknowledged as a gestational mother and allowed to play some role in the child's life, so the child can know her. A relational model of surrogacy - with its dialogue and interdependence - will offer the flexibility to deal with the multidimensional determination of motherhood by intention, and by the status of genes, gestation and a social relationship. It will also acknowledge that paid surrogacy can be a reciprocal act of generosity between those who want to give life and those who want to receive life.

CONCLUSION

The aim of this thesis has been to develop a relational framework for surrogate motherhood within the context of Christian ethics. As seen in chapter one, the Church has traditionally unanimously condemned surrogacy, whether paid or unpaid. Little distinction has been made between gestational surrogacy and genetic surrogacy. However, the thesis has tried to address some of the key ethical issues of paid surrogacy, namely motherhood, commodification, exploitation, coercion, baby selling and reduction of altruism. An alternative relational framework was suggested to the contractarian and adoption models, including the best interests of the child approach. Relationalism incorporates a spectrum to accommodate a sophisticated ontology, with varying emphases upon the needs of the self and the other. It does not always insist upon an objective proportionate mean or mutuality, but responds to the needs of the particular self and other by analysing the priority and importance of the act for them. With regards to paid surrogacy, acknowledgement was made that in custody disputes a best interests of the child solution tends to focus upon the needs of the child only. A relational approach aims to acknowledge the needs of all moral agents and by the use of discourse and negotiation to allow for a resolution involving all, possibly with various emphases upon the self and the other. Therefore, relationalism acknowledges the time and effort of a gestational surrogate, and regards payment as a way of acknowledging her dignity and self-worth, but without commercialisation, to avoid commodification, exploitation and coercion. The aim of this conclusion is to see how a relational approach towards surrogacy could work in practice. The appendix suggests areas for future research.

In an ideal world surrogacy would not exist. Every married couple who wanted to have children would be able to do so without difficulty. However,

many Christian couples may want to have children but experience infertility problems. A commissioning mother may have been born without a womb, possibly suffering repeated miscarriages, having a hysterectomy due to cancer, or be unable to produce eggs, etc. Some Christians will welcome gestational surrogacy as an opportunity for a Christian woman to demonstrate Christian service to her fellow Christians by becoming a surrogate. Gestational surrogacy, especially if using the embryo of the commissioning couple, could be regarded as enhancing their marriage by using their gametes, so the child is of their flesh, reflecting the unitive bond of the couple. Gestational surrogates would gestate the embryo of the married couple and therefore would not be procreating themselves. Some commissioning couples may be unable to use their own gametes to procreate an embryo and therefore may want to use a gestational surrogate to 'save' a 'spare embryo' from destruction, especially if they believe life starts at conception. In such a case, another couple undergoing IVF may have a 'spare embryo' from treatment which they are unable to implant into the wife and instead of destroying it may be willing to donate it to be used for gestational surrogacy.

Some Christians will have no problem with the deliberate creation of an embryo from donated gametes to be used in gestational surrogacy. The created embryo may use the egg of the commissioning wife with donor sperm or use a donated egg with the sperm of the commissioning father. Alternatively the embryo may be created using a donated sperm with a donated egg. It is important to think of the child born from donated gametes and for them to have as much information about the donor(s), so the donors are acknowledged and for them to have the opportunity to meet their genetic parent(s). A relational approach would tend to favour using both or one of the genetic gametes of the commissioning couple, as they are connected to the child as a natural parent would be. However, due to the risks of pregnancy for the

surrogate, perhaps a commissioning couple unable to use one of their own gametes should think about adopting a child instead of deliberately creating one who they are not related to. Even so, not all commissioning couples are suitable for adoption and the needs of a child up for adoption may not be met by an infertile commissioning couple. The needs of the child matter, the child could be disabled, have emotional needs, be older and therefore the commissioning couple may not be suitable to adopt such a child because they are unable to meet the particular needs of a child requiring adoption. A commissioning couple therefore may be unsuitable for adoption, but suitable for surrogacy and the infertile commissioning couple should have the opportunity to procreate. It is in the interests of the child for the commissioning couple to undergo a Criminal Record Bureau Check to prevent a paedophile (heterosexual or homosexual) from having a child.

Relationalism acknowledges the importance of wanting a child by the commissioning couple and the positive role the surrogate can play in the life of the child by being acknowledged as the child's gestator. In order for gestational surrogacy to be used to 'rescue' 'spare embryos' or involve the deliberate creation of the child by donated gametes, the Human Fertilisation Act 2008 and its 2010 Parental Orders Act will have to be changed to allow for commissioning couples with no genetic link to the child to be able to apply for a Parental Order. At the moment one of the commissioning couples has to be genetically related to the child to be able to apply for a genetic order. Such an approach would allow for consistency within surrogacy.

Traditionally those who apply to use a gestational surrogate tend to be infertile married couples. Many Christians will vary in their responses to who can use a surrogate, with many wanting to limit access to married infertile couples in order to mimic traditional procreation occurring between married couples in

Christianity. Some Christians therefore will not want surrogacy to be used by single people regardless of their age or medical circumstances. At the moment single people are unable to apply for a surrogacy Parental Order under the law in the UK. Traditionally Christianity has supported procreation within marriage only. Likewise, many Christians will not want unmarried couples requesting surrogacy, whereas more liberal Christians will approve surrogacy for unmarried couples as long as they are living in a stable and committed relationship as if they were married. Reflecting a possible traditional and natural law stance to surrogacy, some more traditional Christians will disapprove of surrogacy being used by couples who are unable to have children due to the age of the mother or if they already have children and do not want to undergo another pregnancy. However, others may take a more responsive approach and try to be caring towards the needs of the commissioning mother, acknowledging that she may through no fault of her own need a surrogate due to meeting her husband late in life. Such a commissioning mother may not want to risk childbirth especially if she has an underlying medical condition which could harm herself or the child if she underwent a pregnancy. However, many Christians would probably reject convenience surrogacy where a woman who is capable of giving birth chooses to use a surrogate because she does not wish to lose her figure. Even so, from the literature I have read, there have been no instances of convenience surrogacy in the UK. However, there could be extreme circumstances where a surrogate might be appropriate as long as she was treated well, such as a newly married athlete of a certain age wanting to prepare for her last Olympics instead of undergoing pregnancy. A relational approach would be very concerned at the way in which the surrogate is treated in surrogacy and therefore would tend not to support long-distance international arrangements, especially if the participants did not meet. Likewise, relational surrogacy would not support 'closed' surrogacy programmes where the surrogate and

the commissioning couple did not meet during the pregnancy, with the child handed over through an intermediary. Such 'closed' programmes go against the values of relationalism - including openness, discourse and negotiation.

In recent years, gestational surrogacy has started to become used by homosexuals as a way to have children. Some Christians will be opposed to surrogacy being used by gay men believing that it is unnatural, as two men are unable to procreate. This objection is often based upon opposition to homosexuality *per se*. Some may be concerned that women acting as surrogates for a homosexual commissioning couple are being used as a mere means to an end to provide the men with a 'toy' to pretend being a real family. They may be concerned that the children are being deliberately deprived of a mother. Such Christians are more likely to be conservative rather than liberal. Conservative Christians will interpret particular verses of the Bible such as Romans 1:26-7 as avoiding unnatural relations to condemn homosexuality. These Christians will not want to encourage homosexuality, not seeing it as part of God's ordained natural purpose for creation. Likewise, such Christians are opposed to the former Labour Government's rejection of exempting Christian adoption agencies from allowing homosexuals to adopt children.

Other more liberal Christians may take a more favourable stance towards homosexuality, using verses such as Galatians 3:28 which focus upon differences being lost in Christ. Liberal Christians tend to accept homosexual relationships as long as they are loving, stable and committed, believing that they can be a reflection of a person's faith and not a hindrance. Proponents tend to support gay civil ceremonies, calling for the Church to recognise gay marriage and the ordination of gay priests. They are likely to support the use of surrogacy as a creative and dynamic way to overcome prejudice and barriers so that gay men can become parents. Surrogacy in such a case would be seen

as creating life and an opportunity for a child to be socialised by two Christians, thus spreading the Kingdom of God. Using a willing surrogate to create a family for homosexual couples would be considered part of the rights of the homosexual community to procreate and found a family, arguing that such rights are supported by the United Nations Declaration on the Family. Supporters of homosexual families would agree with the research by Susan Golombok which found that children in such families received supportive parenting.¹ Indeed, the 2008 Human Fertilisation and Embryology Act does not now insist upon a father for a child in the creation of families from the new reproductive technologies, but calls for supportive parenting.

A relational approach to surrogacy will acknowledge the importance of Christians being able to make their own choices towards the use of gestational surrogacy for homosexuals. It will try to take a non-judgemental approach, acknowledging that some homosexuals - even though they live together - may choose not to engage in homosexual relations on the advice of their priest or church. Relationalism will also acknowledge the importance of the use of conscience in deciding whether to use a surrogate for the creation of families. Even though some Christians will condemn the practice, they should not hate or make life difficult for those who do decide to use it, but pray for, support and help them. If a surrogate did decide to act for a homosexual couple, then hopefully the couple would ensure that the surrogate was acknowledged in the child's life by being listed on the child's birth certificate, ensuring the child knew of its surrogate birth, and allowing the surrogate to visit, especially if she acted as a genetic surrogate. A relational surrogacy approach to homosexual surrogacy would disapprove of cases where the surrogate is unknown to the couple or to the child and if she was unable to be acknowledged in the child's

¹ Susan Golombok and Shirlene Badger, 'Children Raised in Mother-headed Families from Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood', *Human Reproduction* 25 (2010), 150-7, at 150 and 154-5.

life. Churches may in the future decide to create special liturgies for surrogacy, for heterosexual families and possibly even homosexual families, especially in the Christening of the child, possibly thanking God for the involvement of the surrogate as his handmaiden in creating new life. The surrogate could be acknowledged as a godparent or, if she did not want to be a godparent, prayers said for her thanking her for role as a gestator.

Relationalism towards gestational surrogacy therefore aims to ensure that the welfare and dignity of the participants are respected, while encouraging discourse and negotiation if problems occur. Using a relational framework will try to solve problems by taking the needs of each other into consideration, especially the priorities and importance of the act for them. A married couple undergoing a divorce, for example, who had previously undergone fertility treatment, may find that they had one frozen embryo left, which was due for destruction after meeting its storage limit. In order for the wife to experience her only chance of being a genetic mother she may need to use a gestational surrogate to give life to the embryo. In such a case, relationalism would encourage the positive procreative needs of the wife over the negative rights of the husband not to become a father if he changed his mind and did not want the child to be gestated. Relationalism would highlight the importance and priority of the act for the woman, especially if the husband is able to procreate again later.

Some women will prefer to be gestational surrogates over genetic surrogacy because they are not procreating and they are not handing over a child who is related to them. However, some women will prefer to be genetic surrogates, believing that the practice is safer and easier, regarding the social commissioning mother as the real mother. A gestational surrogate has to undergo medical treatment so that her fertility cycle is synchronised with that

of the commissioning mother. A relational approach to surrogacy prefers gestational surrogacy which uses the gametes of the commissioning couple so that the surrogate does not procreate and so that the child comes from their marital union. Alternatively, if gestational surrogacy using one of the gametes of the commissioning couple cannot be used then a 'spare embryo' is preferable or an embryo created using donated gametes. However, genetic surrogacy (when the surrogate contributes her own egg) does allow for the child and the commissioning couple to personally know who the birth mother is and for her to be acknowledged.

Gestational surrogacy using a deliberately created embryo from anonymous donors may be easier for the surrogate to distance herself from, as she is not genetically related to the child and could be easier for her to relinquish. Some may argue that the child could suffer not knowing its genetic heritage and be confused about having five parents. Even so, the commissioning couple could still provide a loving and caring home for the child, carefully explaining its origin at a later date. At least with gestational surrogacy, the surrogate does not have to face relinquishing a child which is genetically related to her or handing over a child which may have features similar to her own children.

A relational approach to surrogacy will regard genetic surrogacy as a supererogatory act to be performed if gestational surrogacy using the embryo of the commissioning couple or a spare embryo cannot be used. Even though genetic surrogacy allows a commissioning father to procreate, the act needs to be seen from the surrogate's perspective who may find it difficult to relinquish the child or if she experiences bonding to the child. More allowances can be made for the genetic surrogate to keep the child especially if she is genetically related to it, allowing for partial justice instead of the impartial justice of a contractarian approach which would insist that she hand the child over. A

relational approach would want to acknowledge the surrogate's emotions during the surrogacy, especially at the end when she is expected to hand the child over. Hopefully all participants will have discussed how to deal with potential custody problems regarding relinquishment before and during the arrangement. Using a relational framework would aim to acknowledge the significance and importance of the act for those involved. A gestational surrogate who already has children, and who has gestated the last remaining embryo of a commissioning couple to which they are genetically related, would probably be more likely to be expected to hand the child over, with limited visitation rights, as a reflection of her emotion or bonding to the child. However a genetic surrogate who had gestated an embryo which was made using her egg with the sperm of an anonymous donor would more than likely have greater access to the child. Even so, the emotions of the commissioning couple should not be overlooked, as they can bond to an embryo, especially by seeing the foetus during an ultra-sound. A relational approach towards custody disputes would not just be based upon the genetic connection, but the significance of the child for those involved, whether they have children or not, the degree and type of the emotional attachment, their suitability for parenting, as well as the needs of the child. Unlike a best interests of the child approach, custody will not just be based upon the child's *best* interests alone, but also upon the needs of the adults to be able to associate with their child.

A relational approach towards surrogacy would encourage negotiation and discourse before the arrangement was made. Therefore the surrogate and the commissioning couple could discuss issues - such as pregnancy management, screening for Down's syndrome, abortion, the behaviour of the surrogate during the pregnancy, how and where the birth will take place - all before starting the surrogacy. The surrogate should be able to have the final decision regarding the abortion of the child, especially if her life was at risk and she

should not be made to have an abortion against her will. A surrogate who was opposed to abortion should not work with a commissioning couple who expect an abortion if the child is severely disabled. The commissioning couple have a responsibility to the child and they cannot expect the surrogate to bring up the child if they reject it due to it being disabled. If the couple choose to place the child up for adoption once the child is born, then they could be fined in order to pay the costs the state has to find in order to ensure that the child is adopted successfully. Alternatively, all commissioning couples could be asked to pay insurance in addition to life insurance for the surrogate, which would be paid to the state if they decided to reject the child.

One possible solution to ensure that surrogacy ran smoothly would be for Britain to have a dedicated NHS phone line or centre which could deal with all surrogacy issues such as the psychological screening of surrogates and information giving, since some of the legal information provided by some of the surrogacy agencies has sometimes been inaccurate. Even though it is debatable whether the professionalization of surrogacy is needed by the setting up of a surrogacy trade union, care for the surrogates is very important. Women need to be able to receive independent counselling and legal advice so they can make informed decisions with valid consent before entering the practice. As surrogacy agencies are funded by commissioning couples and their counsellors are the same ones who advise the commissioning couple, there is a danger that the advice and counselling given to surrogates may not be impartial or responsive to their needs. It is important to have standards within surrogacy so that women pretending to act as surrogates cannot deceive commissioning couples for money and then just keep the child, which could even be the natural child of the surrogate and her husband. Having a national centre could advise professionals dealing with surrogacy such as lawyers, courts, social workers, nurses, midwives, doctors, hospital consultants, hospital

chaplains, birth registrars, priests, academics, etc. Such a centre may build up trust with those using surrogacy and engage in research regarding for example the psychological bonding in gestational surrogates compared to genetic surrogates.

The centre could ensure that a national data-base of information is built up regarding surrogacy case law, especially regarding international agreements and within Europe concerning the national identity of children born of surrogacy.² There is a need for the international community to develop a coherent surrogacy policy, to prevent reproductive tourism, where commissioning couples travel thousands of miles to find a surrogate. In May 2011 a child born to a surrogate in India with a German commissioning couple was unable to claim German citizenship, even though the commissioning couple were named as the parents on the child's birth certificate and despite German nationality being given if one of the parents is genetically related to the child. The difficulty lies in that German law regards the child's legal father to be the husband of the surrogate.³ A similar situation stands in the UK where the husband of the surrogate is the legal father of the child born of the surrogate, unless he states that he disapproves of his wife being a surrogate. The husband of the surrogate, through no decision of his own, is legally forced to take on responsibility for the child and be listed as the child's father on the birth certificate whether he wants to or not. Such an approach can be seen as unethical. Even though the surrogate's husband is married to the surrogate and she has given birth to the child, it needs to be remembered that it is a surrogacy arrangement. At the moment the surrogate's husband is

² Lawyer Natalie Gamble calls for legal clarity in 'Crossing Borders for Surrogacy: The Problems for Families and Policymakers', *BioNews* 609 http://www.bionews.org.uk/page_95089.asp?dinfo=hSpNi1N06LhoAfyRTYWFwxXX (assessed 1 June 2011).

³ N. Satkunarajah, 'Surrogate Child Denied German Passport', *BioNews* 606 http://www.bionews.org.uk/page_94158.asp?dinfo=hSpNi1N06LhoAfyRTYWFwxXX (assessed 10 May 2011).

automatically regarded as the child's father and he has to disapprove of his wife's actions in order not to be considered the father which is not very supportive of his wife. Most husbands of the surrogate probably do not want to be regarded as the child's father, especially as it denies the fatherhood of the commissioning father, who is often genetically related to the child. There needs to be a way in which the husband of the surrogate can distance himself from being the child's father, without having to disapprove of his wife's actions. The law could be changed so that he is no longer required to register as the child's father.

By having more detailed birth certificates, greater clarity could be achieved regarding the identity of those involved in surrogacy. The birth certificate of a child born through surrogacy could include the names of the gestator, the genetic mother, the genetic father, the social father and the social mother. In some cases the same person will fulfil each role, but such a detailed birth certificate would help the child to be able to trace those who played a part in the creation of their life and in their upbringing. Another possible function for a national surrogacy centre could be to ensure that payment in surrogacy does not become too excessive and to ensure that paid surrogacy occurs without commodification, exploitation or coercion.

Since surrogacy has not gone away, and in light of the recent legislative changes regarding the reproductive technologies, perhaps it is time the churches explored surrogacy again. Some Christians will disapprove of third parties donating their gametes, but others may approve of a gestational surrogate gestating the embryo of the commissioning couple, even though the conception of the embryo did not occur by sexual intercourse. Even so, some members of the Church of England in the document *Personal Origins* acknowledge that using donated gametes can be a good and can help to

strengthen the relational marriage bond by positively affirming the family by focusing upon the social context of love and care for the children, since artificial insemination by donor (AID) can help the lack of a natural good of the marriage (50-1)⁴ without adultery (57). *Personal Origins* calls for truthfulness about genetic origins (57). Gamete donation is seen as similar to adoption, since the parents are not genetically related and they 'accept the child voluntarily' (50). Therefore, AID is given approval, due to reflection on tradition, knowledge and experience, even though AID was previously rejected in 1948 by the Archbishop's Committee (4, 51 and 57). However, some Christians will be concerned at a genetic surrogate procreating and handing her genetic child over to the couple. If a relational model is used, instead of a contractarian model, then the needs of the surrogate, the commissioning couple and the child will be taken into consideration. Surrogacy can be operated in an open and honest manner, without involving sexual intercourse or the unnecessary destruction of embryos, but respecting their dignity, while providing opportunities for families to be created. After all, another Church of England document on the family published in 1995, *Something to Celebrate*, admits that there can be 'seeds for creative thought and practice able to move people towards patterns of nurture, co-operative and interdependence which are more life-enhancing and open to the spirit'.⁵ *Something to Celebrate* believes:

Family values are usually used to sum up all that is good, commendable and traditional about human relationships between people within the same family. However, a more helpful and more inclusive term would be 'relational' values because family values are essentially healthy relationship values, such as trust, fidelity, honesty, truthfulness, commitment, continuity, compassion, self-sacrifice, forbearance, kindness, generosity, sharing respect, understanding, loyalty, co-operation, solidarity.⁶

⁴ References refer to pages in The Board for Social Responsibility of the General Synod of the Church of England, *Personal Origins* (London: Church House, 2nd edition, 1996).

⁵ The Board for Social Responsibility of the General Synod of the Church of England, *Something to Celebrate* (London: Church House, 1995), 90.

⁶ *Ibid.*, 121.

Perhaps a relational approach to surrogacy could make surrogacy acceptable for some Christians and give hope to others of having a family.

APPENDIX 1:**SUGGESTED QUESTIONS FOR EMPIRICAL RESEARCH****The Practice**

- Are surrogates paid the same amount if there is a miscarriage, abortion or stillbirth?
- Are surrogates paid monthly, in a lump sum, or a set fee?
- How much and for what are surrogates paid?
- Is there any evidence of market practices in surrogacy, e.g. advertisements, bulk purchase, special offers or end of season sales?
- Do surrogacy payments change over the pregnancy?
- Is clear information given to the surrogate concerning screening, consent, legal advice, counselling, caesarean section, abortion, place of birth, birth method?
- Do any of the parties involved believe that there should be a set fee for the surrogate?
- For what are the surrogates and the commissioning couples screened?

The Surrogate

- Does money affect and compromise the consent, autonomy, freedom, bargaining power, rights, privacy, bodily integrity, empowerment and personhood of the surrogate in the arrangement? Are the surrogates under pressure to conform to the requirements of the commissioning couple due to money being paid?

- Do the surrogates consider the emotional side or just the money when they make their decisions?
- Do surrogates hide disease, smoking, drugs, alcohol, diet, exercise and self-care in order to be accepted for payment?
- Are surrogates with certain characteristics - e.g. a high IQ and beauty - paid more?
- Do the surrogates feel that they are selling their parental or custody rights or selling a child?
- Does the involvement of money change the surrogate's perception of motherhood or their attitude to their other children?
- Do the surrogates feel that their dignity and self-esteem is lowered before, during or after the event?
- Do the surrogates feel coerced, induced, exploited, alienated, used or commodified by their commissioning couple and their offer of money?
- Are there problems with expenses, for example reduced autonomy? Do expenses coerce?
- Do the surrogates perceive their actions as a service?
- How does money affect the motives of the surrogate and her attitude to the child?
- How do the surrogates react to the money paid and how do they explain the money to others?
- What is the societal reaction to the surrogate? For example, commodification of all women?
- What proportion of surrogates do not accept money for their services?

The Commissioning Couple

- Are any commissioning couples prevented from adopting the child due to having paid the surrogate?
- Do the commissioning fathers see it as buying parental rights or custody rights and do they see surrogacy as selling these?
- Why do the commissioning couple want to pay? Is it for reasons of reward, gratitude, reciprocity or mixed reciprocity?

The Commissioning Couple and the Surrogate

- Do the commissioning couple commodify the surrogate by asking for specific genetic and social traits, for example IQ, health and other characteristics? Would they be willing to pay more?
- Do commissioning couples expect to have rights over the surrogate's body?
- Do the commissioning couples treat the surrogate mother as a commodity i.e. as a mere means to an end, or with dignity? Do they respect her rights or are they eroded?
- Do the commissioning couples treat the surrogate mother with contempt, as an object (e.g. oven) and treat surrogacy as a business transaction? Is it demeaning and dehumanising?
- What is the power relation between the surrogate and the commissioning couple? Is it contract biased or relational? Do paying couples expect the surrogates to do as they say?
- Do commissioning couples not paying the surrogate give more of their time?
- Do the surrogates feel pressurised to hand the child over because they are paid?

The Child and the Surrogate and the Commissioning Couple

- Are some embryos considered more valuable than others? For example are certain characteristics paid more, are handicapped embryos less expensive? Are twins more expensive?
- Are the children treated without dignity or intrinsic worth - i.e. what is the attitude of the surrogate to the foetus?
- Is the child commodified by the surrogate and the commissioning couple - i.e. treated as a product? What is their attitude to it?

The Child

- Do the children have low self-esteem? Is there evidence that they have higher levels of insecurity?
- Are the children commodified by the process?
- Do the children of surrogates fear that they will be sold if they do not behave?
- Is there resentment at abandonment towards the surrogate and generally?
- What are they told by others about the surrogacy practice?

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