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**RE-CONCEIVING HARM AND VALUE:  
FEMINISM AND NEW ZEALAND  
ABORTION LAW**

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**ABSTRACT****1 INTRODUCTION**

This paper argues from a feminist legal theory point of view that our current abortion law inadequately deals with women's own experiences. There is no recognition of the harms and values which, in this context, are unique to women and of which liberal legal theory takes no account. In pregnancy, women experience connection as either valuable intimacy or self-identity destroying invasion. Abortion law should protect women from this harm and recognise their morality as equally as significant as liberal harms and values. The paper deconstructs the images and assumptions implied in current law which prevent the recognition of women's perspectives on abortion. It argues that women are in the best psychological and physical position to be making abortion decisions and that their moral framework of empathy and responsibility is more appropriate than the unhelpful and often damaging methods of rights, abstraction and so-called objectivity.

*The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13,900 words.*

## I INTRODUCTION

Feminist legal theories are trying to inform the law with new ways of thinking which the law previously silenced. Feminist ideas are particularly appropriate for informing medical law for two reasons. First, many medical issues relate specifically to women. The law which describes those issues should fit with women's experience of them. Second, medicine is a discipline involving vulnerability and caring relationships. Feminist values are therefore particularly applicable to debate about medical law.

A critique of existing abortion law is an example which may be particularly relevant for women. The law at present does not recognise women's experiences of pregnancy because the existing liberal legal theory base is inadequate for a true conception of what abortion law involves. This paper will involve establishing as viable a feminist account of an alternative framework of values and harms. The law's ability to give weight to women's own experience of pregnancy has been further hindered by a set of assumptions and images which it holds. These need to be deconstructed in order to make the way open for a new morality.

Ways will be suggested how women can best be protected from the harms which can happen to them. Protection cannot be had in the same way liberal values are ensured. The current abortion decision-making framework is not adequate and is based upon questionable liberal assumptions. We need to show how women can be responsible for moral questions. Their position in the debate and their moral solution-creating techniques mean women are in fact the best decision-makers available. The unpacking of unjustified images and the adoption of women's experience as a source of moral values paves the way for such a conclusion.

This paper will not be trying to construct a grand theory. It will try to show that by abandoning attempts to remain compatible with the current legal theory's construction of the debate, we can inform the law in ways which will make it more relevant and useful in its application to women's lives. This must be the ultimate goal rather than a search for some elusive universal truth.

## II VALUE, HARM AND THEORY

### A *Claiming Women's Own Definition of Harm*

In the area of abortion law, women are trying to get protection from an injury which they suffer. The primary problem is that the law is based on a conception of being human which is not women's experience of being human, and which cannot recognise that pregnancy may be harmful.<sup>1</sup>

If the law has been defined largely by men, and if its definitions, which we presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?

Because "[e]quality has come to mean a right to be treated like the white man when you can show you *are* like him"<sup>2</sup> women have tried to describe their harm in terms which correspond to the harms the law *does* recognise. What protection women do have in abortion legislation is from what a liberal human being would experience as harm, which the law takes as its framework.

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1 L M Finley "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 *Notre Dame L Rev* 886, 892.

2 C A MacKinnon *Feminism Unmodified: Discourse on Life and Law* (Harvard University Press, Massachusetts, 1987), 63.

"[S]erious danger ... to the life, or to the physical or mental health, of the woman or girl"<sup>3</sup> are harms based on annihilation, which the liberal human being fears.<sup>4</sup> Other times women have framed the debate in terms of a right to privacy<sup>5</sup> or a right to choose. Both of these rights are derived from a general right to autonomy — which our law perceives to be of supreme value to people. This tactic has met with limited success in that the law *has* recognised what it is familiar with. However, making women's harm fit within the law's conception of harm has not been entirely satisfactory. Source?

First, the law's protection of women has been limited to those harms which could be something like those liberal human beings could experience. There is no protection for harms which women uniquely experience. Secondly,<sup>6</sup>

because legal language is assumed to be legitimate for all, because it understands itself as being aperspectived, it does not even comprehend that there might be fit or translation problems ... [women are] not seen ... as ... trying to explain as best [they] could within the alien terms of the law, but as ... befuddled, contradictory [people] whose account could not be credited at all.

Women's arguments are being undermined by the tactic of trying to fit them into an existing framework which will not take them properly. Feminist debate becomes less credible because of these "translation problems" and so devalues the claims behind the debate.

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3 Section 187A Crimes Act 1961.

4 See below text accompanying n 8.

5 This argument is more familiar in the United States following *Roe v Wade* 410 US 113 (1973).

6 Above n 1, 904.

Third, and perhaps most important,<sup>7</sup>

[w]hen the design of a legal wrong does not fit the wrong as it happens to you, ... that law can undermine your social and political as well as legal legitimacy in saying what happened was an injury at all — even to yourself.

Evident  
Because women's experiences are not recognised as valid by the law, and through that by society, women have come to question their own judgments and to lose confidence in themselves. If the law does not value what women value and ignores their perspectives, then how can women continue to find their own perspectives valuable themselves?

Increasingly, the alternative to women being devalued by non-recognition is coming clear. Instead of distrusting themselves, women are starting to question whether the law really is neutral and whole given that it ignores their perspectives. It is therefore important to establish a new theory base for abortion law — one with its origins in the state of being which women, who are most affected by it, experience.

First it is necessary to unpack the basis of current legal theory in order to determine why the law is unable to take account of women's experiences of pregnancy and abortion. Liberal theory assumes that human beings are separate, rational, freely-contracting individuals. "Reason" is the only mode of decision-making and the individual is presumed to know and act in his<sup>8</sup> own interests. As a result, this human being, and therefore the legal system, most values autonomy and perceives as harm the threat of annihilation at the hands

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7 Above n 2, 105.

8 The use of "his" is deliberate as this view of human beings is a distinctly male one.



of other individuals pursuing *their* own goals. Recent developments in legal theory have suggested that the human being longs for the connection which his love of autonomy precludes him from achieving naturally.<sup>9</sup> However, this does not change legal theory's important assumption:<sup>10</sup>

the claim that human beings are distinct individuals first and form relationships later.

Because this conception of what it is to be human is the root of law, it cannot adequately deal with women, who do not fit the mould, nor pregnancy which is outside liberal theory's experience. Women are fundamentally *connected* to others both physically and emotionally.<sup>11</sup>

That sense of connection in turn entails a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's.

Women are not necessarily motivated by self-interest and even form their *own* preferences in reference to their social relationships.<sup>12</sup> Autonomy as a value is therefore largely irrelevant for women's experience of life. A claim that women do not fit liberal legalism's vision of human beings is not to claim that women are lesser human beings. If women do not have those characteristics,

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9 This is Critical Legal Studies' contribution.

10 A P Harris "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan L Rev 581, 603.

11 R West "Jurisprudence and Gender" (1988) 55 Univ Chicago L Rev 1, 15.

12 D L Rhode "Feminist Critical Theories" (1990) 42 Stan L Rev 617, 629.

that makes them different only. It is only by the law's privileging of individual autonomy-type characteristics that women are devalued.<sup>13</sup>

Why should the autonomy of a self unaffected by others be the goal of human life? Why not promote altruism, responsibility and interconnection as the primary aspirations?

If the liberal framework cannot cope with the values of women, then it is fundamentally inadequate for pregnancy. The basis of law is the concept of separate individuals, where during a pregnancy the "individuals" are not separate — not even physically. The mother-foetus relationship is prior to any idea of them being separate individuals. Liberal values like autonomy, premised as they are on separation,<sup>14</sup> can have little place in pregnancy, nor in laws about abortion.

### ***B Pregnancy As Connection***

The law, following its liberal theoretical base conceptualises pregnancy as two individuals in some kind of hierarchical relationship. Liberalism cannot conceive of an association which exists before a decision by an individual to "contract" with another to further her/his own ends. It therefore cannot deal with a woman's association with her foetus in the abortion context because, according to liberal theory, a woman must have somehow *chosen* to be part of that association. Abortion is therefore seen as annihilating the other in order

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13 L M Finley "Choice and Freedom: Elusive Issues in the Search for Gender Justice" (1987) 96 Yale LJ 914, 943.

14 Above n 11, 6. "Our separation entails our freedom which in turn entails our right to establish and pursue our own concept of value, independent of the concept of value pursued or favoured by others."

to break the association. The law cannot countenance that because its role is to enforce individuals' bargains with each other.

Even to speak of the pre-birth period as one of mother-child 'interdependence' does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us.<sup>15</sup>

Liberal legalism's characterisation of pregnancy is as two individuals of whom one happens to be separate but encapsulated in the other's womb. This conception<sup>16</sup>

ignores altogether the reality that pregnancy is a process of a woman's body, not something which simply happens *inside* a woman's uterus like a pacemaker working inside a woman's heart.

Not only is a woman's continuing creation necessary for the process of the foetus' development, but the closest inter-relationship changes the woman also.<sup>17</sup>

So profound are the alterations that occur in the process of pregnancy that a woman may find herself to be, in some senses, a 'different person' at the end of the pregnancy from the one she was at its start.

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15 M Ashe "Law — Language of Maternity: Discourse Holding Nature in Contempt" (1988) 22 New Engl L Rev 521, 551.

16 D Greschner "Abortion and Democracy for Women: A Critique of *Tremblay v Daigle*" (1990) 35 McGill LJ 633, 650.

17 Above n 15, 550.

Women appear to experience the profound alteration which the connection of pregnancy involves in two fundamentally different ways. Some women experience the connection as creative and empowering, and as irrevocably enriching their lives. They experience pregnancy as valuable intimacy and the source of their women-centred values. Pregnancy, to them, is of "knowledge and vision, of strength ... of experiential extremities of great seriousness".<sup>18</sup> However this is only one experience of the connection.<sup>19</sup>

If a pregnancy is wanted, many women may feel an ecstatic connected wholeness with the wonder of their growing body. The developing fetus is not just part of her; it is her and part of a seamless web. Whatever is done to or for it, is done *to* her, not just through her. If the pregnancy is unwanted, conflict with an opposed autonomous rights holder still does not encapsulate what many women feel. The feelings may be of terrifying ... invasion by and surrender of self to the pregnancy — not of a fight against a separate being. After terminating an unwanted pregnancy, a woman does not feel as though she has vanquished an enemy, but as if she has been given herself back. Overwhelming relief, a sense of something restored — but sometimes a sense of part of herself lost as well.

It is this capacity for women to experience pregnancy as inherently harmful which the liberal vision of human nature cannot comprehend.

The law cannot comprehend women's harm because it is a harm which women uniquely experience. It is their potential for connection which lays them open to the invasion which destroys their individuation. It is this harm, and not any

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18 Above n 15, 545.

19 Above n 1, 900-901.

liberal, annihilation-type conception of it, which women seek to protect themselves from through abortion. It is:<sup>20</sup>

that pregnancy is a dangerous, psychically consuming, existentially intrusive, and physically invasive assault upon the body which in turn leads to a dangerous, consuming, intrusive, invasive assault on the mother's self-identity — that best captures women's own sense of the injury and danger of pregnancy, whether or not it captures the law's sense of what an unwanted pregnancy involves, or why women should have the right to terminate it.

Women describe this very real harm in similar ways:<sup>21</sup>

I was sick in my heart ... It was as if I had been told my body had been invaded with cancer. It seemed that very wrong.

They describe the feelings after abortion as:<sup>22</sup>

getting my body, myself back

or:<sup>23</sup>

[i]t helped me learn that I am a person.

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20 Above n 11, 30.

21 Above n 11, 32 quoting the Amicus Brief for the National Abortion Rights Action League in the *Thornburgh v American College of Obstetricians and Gynaecologists* 476 US 747 (1986), 28.

22 Interview with Julie Crosland, counsellor at Parkview Abortion Clinic, Wellington.

23 Above n 21, 29.

The effect of pregnancy is not a competition of two selves over their competing ends, it is not a matter of exercising autonomy and having it thwarted by another, instead it involves<sup>24</sup>

selfhood changed in a way that is irrevocable, unrecoverable.

It is part of women's nature that connection is prior to the individual and that therefore identity and connection are inseparable. Pregnancy as the ultimate in connection overwhelms the identity. The foetus invades the woman and physically occupies her and in doing so, takes her over and destroys her sense of self. When a foetus intrudes on a woman she does not lose her autonomy powers, she loses something on a more basic level — herself, for herself.

These voices of women appear to give opposite and incompatible accounts of pregnancy — as both valuable and harmful. But this contradiction is not a logical one. Women have the capacity for either or both experiences of pregnancy — both accounts resonate with truth because women are complex and contradictory and have more than one reaction to phenomena.<sup>25</sup>

The potentiality for physical connection with others that uniquely characterizes women's lives has within it the seeds of *both* intimacy and invasion, and therefore women rightly value the former while we dread and fear the latter.

Laying yourself open to the connection which can bring the valuable intimacy necessarily entails being vulnerable to an invasion which could destroy your individuation. Exactly how women would feel about pregnancy without

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24 A Dworkin *Intercourse* (The Free Press, New York, 1987), 122.

25 Above n 11, 53.

society's current attitudes and structures is unclear. The conception of the contradiction might change if women no longer had to fear the extremes of invasion. However, it also seems clear that there are intrinsic consequences for a woman being "defined by how she is made"<sup>26</sup> and<sup>27</sup>

being made for ... penetration, entry, occupation.

Defining the contradiction as experiential and not logical implies that there is an essential nature — connection — which is women's. Essentialism is a trap which can be very harmful in that, by defining women by how they are different from men, "men have remained the unstated standard of analysis".<sup>28</sup> Further, by defining what is the essence of women's experience, the voices of women who experiencing things differently, or whose lives are also defined by race, class and other things are silenced.

Experiences are not just the occurrences which happen to an individual but are also the interpretations of them given by society which affect the way the individual reacts or interprets them for his/herself. With experience in its wider context:<sup>29</sup>

many women experience society in ways significantly different from the ways that men experience society ... certain real *or* potential experiences can be described as constituting the basis for a feminist development of the concept of 'gendered life'. These experiences lead many women to develop a perspective qualitatively different from what is reflected in

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26 Above n 24, 123.

27 Above n 24, 123.

28 Above n 12, 618.

29 M L Fineman "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship" (1990) 42 Fla L Rev 25, 37.

dominant legal ideology. This is *not* to assert that all women think alike or have identical experiences.

While not trying to establish the definitive "woman's" experience of pregnancy, it is important to show that women think about pregnancy in ways different from the way our law perceives women think about pregnancy. The law is based on a legal theory orientated to men's experiences and since men do not experience pregnancy, the law should reflect the experiences of those who do. By describing the perspectives women develop the way is opened to different perspectives and decision-making methods which may help better resolve law in general, and especially the aspects which determine women's lives so fundamentally as abortion. Women should not be excluded by differences among them.

### *C Creating A New Theory Base*

Women's conceptions of harm and value do not fit into liberal legal theory's conceptions of harm and value. Without a new theory-base, the law is inadequate to protect women against harm. It is important to show the differences between feminist theory and legal theory in order to illustrate exactly where the law is inadequate or needs modifying. Legal theory has an almost opposite vision of human beings from feminist theory.<sup>30</sup>

The human being, according to legal theory, values autonomy and fears annihilation, while at the same time he subjectively dreads the alienation that his love of autonomy entails. Women, according to feminist theory, value intimacy and fear separation, while at the same time longing for the

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30 Above n 11, 40.



individuation which our fear of separation precludes and dreading the invasion which our love of intimacy entails.

Liberal theory's domination of our law's base excludes women's experience of being human from informing the law.

What then are the differences between the values and harms of these alternative theory-bases? The connection which the legal theory's human being craves<sup>31</sup> differs from the connection which is part of women's lives. For the "human being" recognition by others is rewarded and empowering but it is *because* he is autonomous and separate that he desires it. He achieves connection by forming relationships with other individuals, where for women connection is prior to the self. Connection is not something done for its benefits; it is a part of women's nature and identity.

Annihilation is the greatest fear of the liberal human being and it is the primary function of the law to protect individuals from annihilating conflict with each other. Invasion, which women greatly fear is not a threat from another, competing individual but of being occupied and overcome from within. The fear of invasion which women experience is not a fear of annihilation, nor can it be protected against by protecting against annihilation.<sup>32</sup>

I do not fear having my 'ends' frustrated [by the conflicting ends of the other]; I fear having my ends 'displaced' before I even formulate them. I fear that I will be refused the right to be an 'I' who fears. I fear that my ends will not be my own ... I fear I will never feel the freedom, or have the space, to become an ends-making creature.

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31 Above n 9.

32 Above n 11, 42.

Powerlessness — in the sense of "self-naming"<sup>33</sup> power rather than the liberal "power over" — and confusion are destructive of individuation. Women experience harm when invasion causes this powerlessness, when they are unable to express an identity. This happens when the connection is not creative but when it means the woman is possessed. This internal destruction of self-naming power is what women fear.

Autonomy and individuation, though very different values, are in some sense interrelated.<sup>34</sup>

Autonomy is something which is natural to men's existential state and which the state might protect. Individuation, by contrast, is the material pre-condition to autonomy. Individuation is what you need to be before you can even begin to think about what you need to be free.

Autonomy symbolises the individualism ethic at the heart of liberal legal theory.<sup>35</sup> To achieve and maintain it, the individual needs a protected sphere in which to assert his autonomy. Isolated independence is fundamental to fully exercising autonomy. Only then can the individual choose for himself when and how to step outside the sphere to bargain with others for his ends. Autonomy does not gel with women's connected natures. Yet women are not<sup>36</sup>

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33 Above n 15, 545.

34 Above n 11, 42.

35 J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 Yale J of L and Feminism 7, 10. Nedelsky wants to "reclaim" autonomy from its "liberal incarnation" (p 7) and redefine it to retain its value for women while fitting it with their natures. This project appears to be confusing and it seems better to leave autonomy to its individualist definition and create a new term for that which women value instead — individuation.

36 Above n 35, 8.

prepared to abandon freedom as a value, nor, therefore can any of us completely abandon the notion of a human capacity for making one's own life and self.

The value of individuation is an ability to know one's own self without undervaluing the importance of connection and intimacy with others in forming decisions and ends. Being fundamentally connected, women can never be the isolated, independent being constituted by autonomy. Yet a sense of self is so important that women profoundly fear the invasion that prevents it. An individuated self can still be connected to others and therefore not autonomous, but if *possessed* by others, then individuation is lost.

To the question:<sup>37</sup>

can an occupied people — physically occupied inside, internally invaded — be free; can those with a metaphysically compromised privacy have self-determination; can those without a biologically based physical integrity have self-respect?

The answer is predominantly no. Like the conditions for autonomy the law already protects, it needs also to protect some conditions for the self-respect of individuation like: "dignity, efficacy, competence, and comprehension"<sup>38</sup> and some degree of security from oppressive power and invasion. These ingredients for individuation, which women value as liberal beings value autonomy, justify and require the law's intervention for abortion.

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37 Above n 24, 124.

38 Above n 35, 28.

Describing how autonomy and individuation, annihilation and invasion relate to abortion is best done through the "moral analogy" of self-defence. Self-defence involves protecting against an ultimate form of annihilation. Similarly, foetal invasion is an ultimate form of invasion, an ultimate destruction of the sense of self. For women, invasion is morally as powerful a harm as annihilation is for the liberal human being. Therefore the harm a foetus causes to a woman is as morally significant as the harm the 'other' of self-defence causes to the liberal human being.<sup>39</sup>

Often the decision involves the conflict between her desire to protect her own life by not carrying a pregnancy to term and her desire to bring a life into the world. I contend that the abortion decision represents a decision to terminate a pregnancy, not to terminate a life — that the termination of fetal life should be considered an unfortunate consequence of a woman's decision to value her own life.

So, terminating the life of the other in the self-defence scenario is considered an unfortunate but justifiable consequence of the decision to value his own life higher and protect himself from harm.

Abortion is not analogous to self-defence. Self-defence applies to protecting oneself against a relatively equal, aggressing other individual. During an unwanted pregnancy the "other" is a vulnerable, dependent, unequal, non-aggressor. The foetus is not even an individual 'other' but is inseparable from the victim. For self-defence, the protection of the self involved in abortion is patently unjustified. Yet self-defence is the moral equivalent to abortion because women can be equally vulnerable to this source of harm as the liberal

39 R Colker "Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom" (1989) 77 Calif L Rev 1011, 1055.

being of self-defence law is to his. It is the nature of women's harm which crucially distinguishes them. We need to show that women's harm in pregnancy is *not* related to annihilation because that would undermine the equivalency of self-defence. Women's harm has nothing to do with annihilation; it is invasion and the threat to that *can* come from a vulnerable, dependent "other". It is only by recognising women's different great harm, and that it can come from a source which liberals are not used to harm coming from, that the moral need for women to be protected from that fundamental harm can be shown.

The effect of the equivalency of self-defence is to demonstrate how the threat of invasion justifies the law's intervention to protect women through abortion. Self-defence even justifies protection against another who is also a person. In abortion, the foetus is not a person and is fundamentally connected with the woman. A law which recognises the significance of women's moral values and women's harm would need also to protect women through abortion laws, and would give women a role in that protection.

Giving women such a role would be giving due recognition to the strength of the ethic of care in women's moral structure. The power would not be conceived as "power over" in the hierarchical sense which liberal theory understands relationships. Women conceptualise power as "power to" create, think and envisage best all-round solutions.

The moral state of liberal humans is such that in a competitive environment of equal individuals they develop an ethic of rights and autonomy.<sup>40</sup>

To control the threat of those who would dominate you or gain at your expense, you must strive to gain power over them.

This ethic means legal theory envisages the individual will naturally aggress towards a vulnerable other and gain power to achieve their own ends. Women are in a state of inequality with many of the most important 'others' they encounter and this leads, feminist theory shows, to women developing a moral structure based on the ethic of care and responsibility. Care and nurturing is so strong a moral base for women that it remains dominant for them and "exists *in spite of* patriarchy's contempt for and under-valuation of these values".<sup>41</sup>

The ethic of care should not be underestimated as a motivating force for women in relation to their pregnancies. It is one of women's highest moral values along with the need for a sense of self. Our present law tends to disregard women's moral focus and<sup>42</sup>

treats the connection between the mother and the fetus as creating the potential for self-dealing on the mother's part and therefore discounts her view.

The law is justifying its intention on the basis of a liberal conception of what a human being would do. The liberal human being might react by striking out-against the demanding vulnerable other, rather than by empathising, so the law denies women control. When the "origins of aggression [are] in the failure of

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41 Above n 11, 50.

42 L Rethinking (M)otherhood: Feminist Theory and State Regulation of Abortion" (1990) 103 Harv L Rev 1325, 1339.

connection"<sup>43</sup> it is clear women's moral force is being ignored. Women achieve connection and extend care and responsibility in reaction to it.

The law disregards women's ethic of care value in other ways, too. By criminalising abortion, the law appears to be trying to make women value foetal life more. Women deeply value foetal life. Much of their moral instinct is directed to feeling very protective<sup>44</sup> and women who have had abortions feel great sadness.<sup>45</sup>

These women may value fetal life but also hold other values which lead them to choose abortion.

A decision to abort does not reflect her lack of incentive to care for the foetus; instead it is her lack of control over the conditions which would allow her to protect it. Punishing women to make them respect foetuses is of no use. Women's own moral standards involve great responsibility and empathy for the foetus. Other circumstances and values, such as individuation, just overwhelm that need to care. There seems no reason therefore to fear that by introducing women's morality and ethics to our law we will become "a society that is callous toward life"<sup>46</sup> as the law's current refusal to do implies.

Our law appears to ignore women's entire moral framework and in an area of law which so involves women and is so central to their lives as abortion is, this

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43 C Gilligan *In a Different Voice — Psychological Theory and Women's Development* (Harvard University Press, Massachusetts, 1982), 173.

44 According to Julie Crosland, above n 22, many women she counsels are feeling so protective they wrap their arms around their bellies as if by doing so it could be possible for them to continue to nurture and care for their foetus.

45 Above n 39, 1058. Women often mark anniversaries such as when the baby might have been born, and grieve for it.

46 Above n 39, 1058.

is unjustified. There is a need to incorporate into the theory-base the values and harms women develop through their experience of connection. The law needs to recognise that deciding to avoid harm through abortion may make women come closer to autonomy (by giving them the opportunity to attain the precursor, individuation) but that decision cannot be an exercise of autonomy itself. Instead the law must recognise women experience significant harms which do not come within the existing theory's framework. The morality of women does provide viable alternative standards through which moral judgments can be made.

#### *D Recognition of Harm*

Unlike threats to autonomy, which our law currently recognises as harmful, threats to individuation must, almost by definition, be subjective. Autonomy involves the exercise of one's own judgement through action. Outside constraint on the freedom of that individual action usually can be seen objectively. Annihilation involves destruction or harm to the individual by the outside action of others. Our legal system is used to identifying this destruction of self from its external manifestations.

Invasion, on the other hand, involves not harm to the self, but to the *sense* of self. The vulnerability of self-identity cannot really be judged from the outside. Individuation is defined as a subjective experience of forming an idea of "self". Deciding when harm of this sort is happening would be a subjective decision.

Defining women's experience of harm as subjective does not involve a wholesale free-for-all on harm. A mere claim that harm exists does not justify any or all protection from it. Although the harm itself is subjective, recognition of it *as harm* is objectively done. This is why feminists tell the stories of their



experience — in order to convince society that women experience a harm which should be respected and which they should be protected against. It is this arguing for a recognition that harm exists which is the first task.

At present, New Zealand law in no way recognises the real harm pregnancy causes to women. Under the Crimes Act 1961, section 187A makes abortion<sup>47</sup> unlawful unless, among other exceptions, there is a belief that continuing the pregnancy:

would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health, of the woman or girl ...

This section not only does not allow loss of self as a ground for abortion but expressly abandons women to this greatest form of harm by refusing to allow protection against the "normal" dangers of childbirth.

*Depends -  
or means  
of mental  
health*

The procedure for obtaining abortion is very medically, and especially obstetrically and gynaecologically, based.<sup>48</sup> This medical procedure draws the focus far away from issues such as individuation. There is no place for consideration of the moral significance of pregnancy on a woman's identity.

It is clear that our law does not recognise women's experiences of pregnancy. For such recognition to become possible, we must deconstruct some of the

47 "[P]rocure the miscarriage of any woman" is the terminology used in the Crimes Act but I will continue to use the terms "abortion" and "abortion law" as these are more familiar. These are also defined in the Contraception, Sterilisation and Abortion Act 1977, s 2.

48 See especially ss 30(4)(a) and 32 and the rest of the Contraception, Sterilisation and Abortion Act 1977.

assumptions and images which do lie behind our law and which prevent women's arguments from being respected.

### III DECONSTRUCTING THE LIMITING IMAGES

#### A *Intervention And Control*

The most basic and fundamental assumption underlying abortion law is:<sup>49</sup>

the fact that women's fertility (or lack of it) has traditionally been seen as something [in] which others have a legitimate voice, has served to suggest that the issue is not a question of women's rights and freedoms, but is rather one on which the morals or moral discourse of others have a legitimate bearing.

Why does society feel it can intervene in women's decisions about their pregnancies? The basis must be that it is a way in which to control women and dictate much of their lives. Compare abortion with the state's traditional reluctance to intervene in what has been seen as the private, family sphere.

People remain unprotected from domestic violence and other dangers because the state sees the family as generally outside its potential for intervention. Yet, in the sphere of abortion, regulation is widespread.

49 S A M McLean "Women, Rights and Reproduction" in S A M McLean (ed) *Legal Issues in Human Reproduction* (Dartmouth Publishing Co Ltd, Aldershot, 1990), 213, 228.

The answer appears to be the relative power relationships involved. Non-intervention in the family generally maintains and condones a patriarchal dominance. Women are in a position of powerlessness.<sup>50</sup>

In contrast, women's physical position in pregnancy allows them to control this stage of the reproductive process. State intervention is necessary, therefore, to shift the balance of power away from women.

A patriarchal family structure controls women's lives. Similarly, control of reproduction controls not only the opportunities available to women which family and pregnancy constrain, but also women's very identities. State prohibition of abortion ensures women cannot protect themselves from the invasion which harms their individuation. Abortion regulation restricts both women's range of opportunities in life, and their ability ever to take advantage of those opportunities.

#### **B Society's Institution "Motherhood"**

The assumption that society can legitimately intervene in pregnancy de-emphasises the woman who is pregnant and instead creates the institution of motherhood. Society's image of motherhood plays a predominant part in preventing it recognising women's experience of pregnancy as invasion. The ideal of 'motherhood' and abortion to prevent harm to the mother are incompatible.

First, motherhood is seen as fundamentally natural. Being so much a part of nature, the image can contain no uniquely human perspective on pregnancy.

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50 Above n 42, 1337.

Perceiving pregnancy as just a part of animal/natural life precludes the deep psychological and emotional impact women experience. With child-bearing deeply rooted in the biological, women must establish its emotional significance before they can go on to claim some of the emotional effects as harmful.

The image of pregnancy as natural poses a hurdle to this second stage — proving harm. Natural is associated with goodness. Pregnancy is therefore a good experience. Despite women's stories that they experience pregnancy as harm, the image of motherhood as naturally good persists.

The idea of mystic nature isolates motherhood from the rest of a woman's decisions about her life. Motherhood is an institution with preconceived ideas as to its place in society and how women should behave when pregnant. Institutionalising motherhood places it in the realm of a social construct with the rules defined by society and not by the individual women. It is the institution which precludes abortion on the grounds of threat to individuation.<sup>51</sup>

To destroy the institution is not to abolish motherhood. It is to release the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination, and conscious intelligence, as any other difficult, but freely chosen, work.

Motherhood, the institution, is perceived as something for society, not as a creative life-choice for the women involved. This, in turn, leads to the conception of the mother as a container for the child within. The mother-as-container image holds no place for the inter-relation and fundamental

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51 *A Rich On Lies, Secrets and Silence* (Norton Press, New York, 1979), 272.

connectedness which women experience as pregnancy. This in turn means the effect of the relationship on the woman is minimal. A glass is not altered in its identity by having water in it — and similarly, women in this image of motherhood, cannot be fundamentally altered by having a foetus in their womb. If they are not fundamentally affected by pregnancy then it cannot be the serious harm to protect against which women claim.

Motherhood as something for society requires that women be self-sacrificing. This assumption can be very damaging for a feminist argument in favour of abortion. To counteract it, the image of the 'mother' is broken down and placed in an ordinary context. In this ordinary context, a woman becomes a "good samaritan". The prohibition on abortion makes it compulsory for her to make a significant physical and intimate sacrifice which would not be required of anyone else. There is no duty on the passer-by to leap into a river to save a drowning stranger. Yet our abortion regime, by<sup>52</sup>

forcing women with unwanted pregnancies to bear children causes the women great harm and suffering, calls upon them to endure physical and mental torment in a way we do not ask of any Good Samaritan, and chains them to serve other human wishes ...

Why  
The analogy between rescuing the drowning stranger and rescuing the foetus is a little flawed but it does draw attention to the assumption implicit in our law that women should be self-sacrificing. A pregnant woman is different from the passing stranger in that she is, in effect, already in the water with her hands on the drowning person. However, this does not destroy the argument. If the "samaritan" in question had happened already to be swimming in the river and

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52 L N Henderson "Legality and Empathy" (1987) 85 Mich L Rev 1574, 1628.

had by chance come into contact with the drowning stranger, the law would impose no duty to rescue the stranger. It would patently be unfair to prohibit the "rescuer" from being helped out of the water if the rescue were seriously danger. Other than conceiving motherhood as uniquely involving such demands, there is no reason why, women in the analogous situation should be forced to subject themselves to genuine danger in order to complete the 'rescue' of the foetus.

The second difference between the drowning stranger situation and the woman who is pregnant may appear to justify the distinction. The relationship of the Good Samaritan to the person in the river is one of strangers. In the pregnancy situation there is a relationship sufficient for the law to impose some duties. Parents may have a duty not to stand and watch their children drown. However such duties will be limited by balancing them with the risks and danger involved in performing the duty. If the parent would have to make too great a sacrifice for the child, it would not be required of them.

Section 187A appears to involve just such a balancing operation. If there is a "serious danger ... to the life, or to the physical or mental health, of the woman or girl" then she may be helped out of the water — she has no "duty to rescue".<sup>53</sup> Again, the legislation fails to recognise the serious danger to the woman's self-identification as a harm to be involved in the balancing process. Those serious effects are ignored in favour of a duty to continue to rescue.

But even more fundamentally, the appearance of the usual duty-danger balancing is misleading. The section specifically removes the 'ordinary danger' of pregnancy from the balancing test. By unpacking what is involved in a

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53 B Bennett "Pregnant Women and the Duty to Rescue: A Feminist Response to the Fetal Rights Debate" (1991) 9 Law in Context 70, 70.

pregnancy, this exclusion is patently unjustified. Even dealing with only annihilation-type harm which the law recognises in all other situations, a woman's sacrifice for her child in pregnancy is much more than would be compulsorily required of any other person. By incorporating the accepted "motherhood" image into our abortion law, women as real people and not institutions have duties imposed on them which no one else in society would have imposed on them. Removing the duty from the shadow of the motherhood institution we can see what the duty in fact means in comparable situations. For example:<sup>54</sup>

[o]ne must ask whether the argument that mothers must make their bodies available to their children means ... that the state will require of parent whose fatally ill child needs a liver transplant that he or she donate a lobe to keep the child alive.

Even a normal pregnancy involves a bodily sacrifice that it would seem wrong to impose in any other context. When to this is added the individuation sacrifice which women may also be forced to make, by the prohibition of abortion, then the duties assumed by the labelling of women as "mothers" becomes clear.

It is not merely that it is compulsory for women to take on these duties to others but the assumption that women who are pregnant must subordinate themselves to others' interests. The fact that motherhood is not conceived as a choice of women, for themselves, to create and bring a life into the world but that women who become pregnant are performing this role for others leads in turn to the imposition of the duty to continue to be pregnant for others. If the

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54 A L Allen "Tribe's Judicious Feminism" (1991) 44 Stan L Rev 179, 197.

benefit is for others, then they can require that they get that benefit. If creating life is a decision for women then they could control when they choose to assume the duties. Instead, once a woman becomes pregnant she is governed in her reactions and conduct by the rules of the institution. Her own feelings and decisions are irrelevant, she is presumed to comply with the model.<sup>55</sup>

'Mother' and 'child' evoke an image of caring and need for protection, respectively; only a mother who is evil would kill her child, and she is unworthy of empathy.

A 'mother' must be selfish and ignorant to desire abortion because that is not what 'mothers' do. It is legitimate to refuse to value the judgment of a 'mother' whose judgment contravenes the image because the image is normal and good. Not only, as the 'drowning stranger' argument shows, is the image not good nor the way women can experience motherhood, but refusing to value the decision of a 'mother' also means a fundamental lack of respect for *women's* judgment. Unpacking "motherhood" reveals expectations found nowhere else and shows that by squashing women into roles as mothers, women are denied the status of independent and moral decision-makers as *women*, as people.

Women make significant decisions in their lives. Pregnancy is one of the most determinative factors of women's lives and it should therefore be subject to their decision-making.<sup>56</sup>

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55 Above n 52, 1621.

56 Above n 2, 94.



Why should women not make life or death decisions?

The answer is that women should be recognised as being able to make such decisions. It is only by casting women as 'mothers' who must conform to the dictates of the institution and therefore whose decisions have no status within that framework, that women's capacity for judgment is able to be ignored.

Unpacking the institution is important because it is on that basis that women are denied the status of decision-making people. Therefore by showing that the image is not a 'true' one — that it does not conform to actual experience — and that behind its facade we are forcing women to subordinate themselves for others in ways our law does not find justified in any other circumstances, the way is open for valuing women and their judgments.

### *C Guilt And Rape — Let The Punishment Fit The Crime*

Another assumption implicit in our law which must be deconstructed before the law could legitimate abortion is that pregnant women are somehow guilty. Part of this is that a woman who wishes to have an abortion contravenes the motherhood image and is therefore "evil". Even if she perceives pregnancy is harmful, she may justifiably be forced to suffer that harm, because of her guilt.

There is a further image which a pregnant women violates and for which, our law implies, she should suffer the consequences. Section 187A(1)(c) of the Crimes Act expressly provides that one of the considerations of the medical determination of an abortion's lawfulness is where the pregnancy is the result

of sexual violation.<sup>57</sup> Case law expresses the same sentiments. Woodhouse J in *R v Woolnough*<sup>58</sup> mentioned that "a condition of forced pregnancy, the result of rape"<sup>59</sup> might be a special circumstance as regards the "lawful limits"<sup>60</sup> of abortion. If the law expressly provides that women who were raped need not be forced to continue their pregnancies, then it also implies that women who voluntarily had sex *ought* to be forced to continue their pregnancies, no matter what harm they might suffer.

The image assumed by the law is that "women" ought to abstain from sex. The focus of the law is not on whether the *pregnancy* was voluntary or unwanted, but on the voluntariness of the *sexual conduct*. A woman who voluntarily had sex but involuntarily became pregnant violates the image and should suffer the consequences. A rape victim, whose pregnancy is similarly involuntary, did not violate the image and does not therefore assume the label of guilt. Violating the law's images and acquiring a label of guilt has serious flow-on effects for women's whole status in abortion. These are made clear in a question from a judge during the course of argument of the landmark US case *Roe v Wade*<sup>61</sup>. During discussion of which life (the woman's or the foetus') the state should protect, he asked:<sup>62</sup>

Well, which would you choose? Would you choose to kill the *innocent* one or what?

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57 Rape was not made an express ground for an abortion because of the difficulties of proof and coordination of this section with the requirements of a criminal conviction for sexual violation. Royal Commission of Inquiry Contraception Sterilisation and Abortion in New Zealand (Government Printer, Wellington, 1977), 212-214.

58 *R v Woolnough* [1977] 2 NZLR 508.

59 Above n 58, 521.

60 Above n 58, 521.

61 410 US 113 (1973).

62 Quoted in above n 52, 1628.

Because women's argument for abortion is so seriously undermined by the images which attach blame to them, we should deconstruct the contradictions of the images. If women are guilty because they "got pregnant" then the assumption is that women should abstain from sex (as the rape consideration implies), or generally should use contraception. The image that women abstain from sex ignores<sup>63</sup>

the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality.

Abstaining from sex requires that women control sex when feminism shows that not women, but *men* control sex in our society.<sup>64</sup>

Following from this, the alternative justification for blame — that the woman ought to have used contraception — shows itself as equally unreasonable. Use of contraception means planning the possibility of intercourse — yet women are not supposed to initiate sex. Not only do men tend to control sexual intercourse but more:<sup>65</sup>

women feel compelled to preserve the appearance — which, acted upon, becomes the reality — of male direction of sexual expression.

The effect of these contradictory images is that women are blamed for having sex, or not controlling it and so violating *that* image, when the only way to avoid doing so is to violate the image that women should not control intercourse.

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63 Above n 2, 96.

64 Above n 2, 94.

65 Above n 2, 96.

All these images, from what "motherhood" entails to the guilt of being pregnant, structure the abortion debate in such a way that women's arguments must be devalued. These images need to be eradicated in order that the debate can be restructured and looked at from a woman's point of view. The way the debate is framed can have considerable consequences for its outcome. For example:<sup>66</sup>

[One] means to reduce abortion would be for the state to outlaw the act of impregnating women who do not wish to become pregnant.

#### IV DECISION-PROCESSES

##### A *Rights And Conflict*

Both the legislation<sup>67</sup> and the reasoning of the court judgments interpreting abortion law frame the abortion issue in terms of conflicting rights. For feminism, rights are an inadequate process to deal with abortion. The current rights categories do not protect women's values in the way they do men's. Even further though, rights are an inappropriate moral framework because they are based in the liberal vision of the human being — which is foreign to women and especially wrong for the situation during pregnancy.

In content, rights<sup>68</sup>

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66 Above n 16, 640; quoting F Olsen "Unravelling Compromise" (1989) 103 Harv L Rev 105, 730.

67 Eg. the conflict in the Crimes Act 1961 between ss 182, 182A and 187A; and in the long title of the Contraception, Sterilisation and Abortion Act 1977.

68 Above n 12, 633.

remain restricted to those that a predominantly white upper middle class male judiciary has been prepared to regard as fundamental.

Rights particularly tend to privilege what a liberal human being would value and protect from what would harm him. Nowhere is there a right to individuation, or even more basically protection of a minimum quality of life standard, which women could invoke for themselves. Because in law state interference is delineated by rights, when the content of rights is without weight for women, it is very hard to show the limits or valid types of intervention.

The available rights categories in which women are forced to frame their issues immediately disadvantage their claims. Between a right to social convenience or privacy and a right to life there are inherent weightings. This is made most clear in the often made assumption<sup>69</sup> that if the foetus is a person then no woman could have a claim to abortion. The only reason that this could be so is if the foetus' rights must necessarily override the woman's — so that the normal balancing tests involved in rights assessments would be redundant. Women's claims are currently confined to 'rights' which have a much lower priority than any rights a foetus might have.

There are further ways that the debate is intrinsically structured to devalue the arguments of women. For example, in *R v Woolnough*<sup>70</sup> the issue was framed as:<sup>71</sup>

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69 Eg. in the landmark *Roe v Wade* case 410 US 113 (1973), 156-157: "If [the] suggestion of personhood is established the appellant's case, of course, collapses".

70 Above n 58.

71 Above n 58, 517.

What is a justification ... for a departure from the purpose of the section in protecting a potential life.

In effect, in formulating the right this way the reason for restricting the right is incorporated into the very definition of the right itself. The right incorporates some right of the woman to kill the "potential life", which means "the fundamental nature of that liberty inevitably vanishes".<sup>72</sup>

The rights framework also has inherent consequences for women in that it helps to preserve some of the images which restrict recognition of their harm. The ability of the law to focus on foetal rights and even to prefer them implies the particular vision of women which they are trying to deconstruct. Foetal rights implies that subordinating women to the pregnancy is justified. Framing the issue of abortion in this way can often exclude women entirely from the debate. Women are irrelevant to this conception of morality, for example:<sup>73</sup>

the fundamental ethical issue in abortion — at what point, and in what circumstances, does a fetus become a person — and at what point does that person have rights to an existence.

In fact, rights are inappropriate not just in their current definitions and use but as a method of moral decision-making at all. Rights assume the autonomy of the bearer of them and isolate him/her as an individual. This assumption is not only not true of fundamentally connected women, but it is glaringly untrue in pregnancy.

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72 Above n 54, 185.

73 J K Mason and R A McCall Smith *Law and Medical Ethics* (2 ed) (Butterworths and Co Ltd, London, 1987), 75.

[W]ithin the material/fetal relationship, even the minimal degree of bodily autonomy requisite for a fetal rights claim is lacking.<sup>74</sup>

Not only does a rights framework impose individual autonomy on the parties, it also sets them up in opposition to each other. A conflict approach to decision making is the typical liberal response, yet<sup>75</sup>

[t]here appears to be no justification, biological or logical, for the construction of a debate that places mother and fetus in an oppositional relationship when they are very clearly linked.

Although conflict may be the standard framework for liberal decision making, it can do nothing constructive when it tries to divide and pit against each other two elements of something so mutually interconnected as pregnancy. "Conflict talk"<sup>76</sup> is based on the liberal assumption that competition between individuals is the normal situation for achieving goals. Liberalism's conflict approach, then, fails<sup>77</sup>

to recognize that many meaningful and important interactions are motivated by particular concerns, commitments, and loyalties and are based on ideals of co-operation, trust, and interdependence.

The resolution of issues where the relationships involved clearly involve cooperation and connection rather than conflict, should reflect those values

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74 Above n 53, 86.

75 Above n 53, 86.

76 Above n 1, 902.

77 K Jackson "And Justice For All? Human Nature and the Feminist Critique of Liberalism" in J O'Barr (ed) *Women and New Academy* (University of Wisconsin Press, USA, 1989), 122, 127.

too. Legal dispute resolution, following the conflict model generally requires win/lose situations because:<sup>78</sup>

something must either be one way, or another. It cannot be a complicated mix of factors and still be legally digestible.

This fact that<sup>79</sup>

rights discourse cannot resolve social conflict but can only restate it in somewhat abstract, conclusory form

is the basis of feminist critique of rights decision processes. Rights simplify complex relationships by abstracting — complexities which give content to women's morality and can lead to value judgments and solutions. Rights base themselves on formal equality and "fairness" where morality for women is rooted in equity and "the recognition of differences in need".<sup>80</sup>

When the focus is on rights, it is just as possible to claim fetal rights as it is to claim maternal rights. The debate appears to be a ping-pong match with both sides claiming the primacy of rights on their side. This ping-pong match is founded on a maternal/fetal conflict. As the characteristics of personhood are increasingly attributed to the fetus, so the characteristics of personhood belonging to the mother are correspondingly devalued.<sup>81</sup>

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78 Above n 1, 902.

79 Above n 12, 633.

80 Above n 43, 164.

81 Above n 53, 85.



The artificial construction of conflict and abstract rights cover the fact that the resolution of a rights conflict is not inherent in the rights at all. The framing of the rights and the weighting of them are dictated by background assumptions which are not apparent on the face of the debate. For women the appropriate decision framework is that:<sup>82</sup>

right[s] ... are weighed not in the abstract, in terms of their logical priority, but in the particular, in terms of the actual consequences that the violation of these rights will have in the lives of the people involved.

### **B Abstraction**

That the use of rights leads to abstraction is one of feminism's main concerns with rights theory because abstraction is so fundamentally foreign to women's conception of morality. Male morals are designed to transcend life — to put humanity on a plane higher than nature.<sup>83</sup> Women feel more tied to nature through pregnancy and so their morality is more tied to life.

Abstraction as part of the decision-making process has significant consequences for women and their arguments. Liberal legalism's insistence on abstract process — especially through the use of rights — is an "insistence on ... formal equality [which] serves to perpetuate social *inequality*".<sup>84</sup> Formal equality hides the power relationships and people's characteristics which probably underlie the dispute. Not only are the outcomes of the decision process going to be prejudiced by failing to take account of the context of the decision, but possible solutions are also restricted. Abstracting the issue means denying the

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82 Above n 43, 95.

83 Above n 11, 24.

84 M Stubbs "Feminism and Legal Positivism" (1986) *Aust Jnl of L & Soc* 63, 70.

decision process access to the on-going relationships of the parties and cuts-off possible resolution based on the reasons behind each party's stance on the issue. Such a resolution may be better than an abstract, conflict-based, win/lose "solution".

Abstraction, for women means considering an issue in a way which makes them<sup>85</sup>

atomistic actors removed from the affiliations that give meaning to their lives and content to their choices.

Because the relationships and connections of women are so much a part of themselves, abstraction means denying parts of their identities. As a method of moral decision making, abstract thinking is both irrelevant and damaging to women.

Yet our abortion law very much reflects abstract thinking — even apart from its framing of the debate in terms of decontextual rights. In particular, protection of the foetus and its interests is often considered in abstract from the circumstances of the potential harm. The granting of rights to action for injury caused prior to birth, for example the Thalidomide cases, is often seen as extending to give the foetus' interests more weight.<sup>86</sup>

In *R v Henderson*<sup>87</sup>, it was clear that the abstract way crimes are constructed in our law severely complicates things. Because ss 182-187A of the Crimes Act abstract the foetus on what is done to it, unlike situations, with totally different

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85 Above n 12, 629.

86 Above n 49, 227.

87 *R v Henderson* [1990] 3 NZLR 174.

moral contexts, are forced to be treated alike. The court had to find that sections of the law overlapped to a large extent because abstraction meant the law does not distinguish between a woman needing an abortion and a third party, in that case the father of the child, punching and kicking a woman and intending to kill her unborn child. The judgment considered the rules relating to legitimate abortion to be relevant because the foetus and its condition were abstracted from any contextual differences. Because of the use of abstract moral reasoning, protection of the foetus against third parties which enhances a woman's own protection of her pregnancy can also potentially impact on her own ability to protect herself from invasion. Abstraction means that such protection from third parties is extended to also apply to the woman — who is not a third party. Although when women's harms are recognised, the situations are patently different, abstraction forces an artificial construction on the issue.

In fact, it is abstract reasoning which enables the law to focus on the foetus at all. The law abstracts the individuality, because liberal theory values and understands it, and ignores the connectedness of the foetus altogether. State control of women to protect this "individual" is only justified through an abstract moral process.

### *C Objectivity*

Abstraction is also used as a tool to maintain the illusion of objectivity about abortion decisions. Objectivity as a decision-process is questionable not only as to its value as a process at all, but also because many decisions masquerading as objective are really biased or subjective. "The objectification of law successfully disguises the fact that it is the product of fallible human beings"<sup>88</sup>

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88 M Thornton "Feminist Jurisprudence: Illusion or Reality?" (1986) 3 Aust Jnl of L & Soc 5, 7.

so it is therefore necessary to maintain the facade of objectivity. If the objective mask is dropped it becomes clear that what women have argued is true: that it is impossible to separate a decision-maker's personal or moral background from the content of his or her decisions. Revealing the bias behind objectivity is crucial for women because to make decisions assume the appearance of moral neutrality, means it is very difficult for women to argue that their experiences are excluded from consideration.

There are several situations in New Zealand abortion law which must be shown not to be objective as claimed in order that women's arguments can be heard.

First, we must deconstruct the courts' claim to be objective and not to be making politically-charged decisions. In *Woolnough*,<sup>89</sup> where the Court was deciding under what circumstances abortion was unlawful, Richmond P noted that:<sup>90</sup>

the function impliedly entrusted to the courts ... is not to say who is right and who is wrong as between the extreme views held by different sections of the community as regards their highly controversial subject. Rather the courts have to do their best to draw a line at a point where the procuring of a miscarriage ceases to be merely a matter of debate, from a religious, moral or ethical point of view, and becomes activity of a kind which warrants its designation as criminal.

How can a court not be making a moral decision when saying when a woman can and cannot have an abortion? By saying that it is drawing a line where there is no debate, the court is covering the fact that it is involved in part of

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89 Above n 58.

90 Above n 58, 517-518.

the structure that maintains images, by drawing such lines which do exclude women's own arguments and experience of pregnancy.

Similarly in *Wall v Livingston*<sup>91</sup>, the Court tried to maintain the objective nature of the law in a way which precludes any argument by women that it does not reflect their own values. Section 30(5) of the Contraception, Sterilisation and Abortion Act 1977 tries to exclude as decision-makers medical practitioners whose views might colour their decisions — especially those believing no abortion is justified, or that it is a private doctor-patient decision. The Court thought that the provision was:<sup>92</sup>

to ensure ... determinations [made] in a clinically detached way ... It is a provision designed to avoid determinations that may be influenced by bias or predetermination based on some strong subjective attitude in one direction or the other concerning the sensitive question of abortion.

In fact, the provision does not ensure the objective decision the judges thought it did. Rather, it requires that the decisions be biased by a specific type of "predetermin[ed] ... subjective attitude", that is that the 'rights' of the 'unborn child' can be inhibited only by serious health risks for the mother.

Section 187A of the Crimes Act distinguishes between pregnancies of more or less than 20 weeks gestation. This is an attempt, following English cases, to introduce some so-called objective standard of "viability of the foetus" as justification for restricting abortions even further after that date. Viability is a particularly dangerous standard because not only does it claim to be neutral, but it also brings with it the authority of being 'scientific'. Although in New

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91 *Wall v Livingston* [1982] 1 NZLR 734.

92 Above n 91, 738.

Zealand the standard is set at the moment at 20 weeks any alteration of the viability standard is a political not an objective decision because it impacts on the degree of control a woman has over her pregnancy. However, the whole idea of incorporating viability as a relevant standard is suspect.

Whether or not the foetus is viable depends not only on the foetus, but on its environment, and the efforts of the medical team.<sup>93</sup> A moral test which supposedly legitimately restricts women because it is objective cannot be contingent on the moral decisions of others at the time. Further, technology itself is not a neutral standard-setter.<sup>94</sup>

When we talk of technology, we are not only talking about a product or process ... but also about a whole set of ideas or values that go into the design, making and use of such a process.

Technology, therefore is not morally independent — we make decisions as to what to develop or use based on a whole set of moral assumptions, which must lie behind any test based on technology. Retaining technology as part of our moral standard also retains the medical profession as the deciders of that standard. This is a result of the assumption that technology is more the concern of those who understand it, even when it raises ethical issues. Others are marginalised in their input by their lack of knowledge of the technology involved in the ethical issue.

The incorporation of a 20 week viability distinction is even less maintainable when what it implies is unpacked. A woman has less opportunity to have an

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93 Above n 73, 78.

94 Above n 49, 219.

abortion if the foetus is outside the "objective" 20 week standard. This means that:<sup>95</sup>

[b]ecause medical science *could* preserve the fetus' life outside the womb, [the law] impose[s] on the pregnant woman the responsibility to preserve the fetus' life inside her womb ... A woman has the capability of bringing a fetus to term from the moment of conception; it does not make sense for her moral responsibility to increase because an outside agent acquires that capability but prefers not to exercise it.

Therefore, it should be openly recognised that restrictions like the distinction imposed in section 187A are political and not objective or neutral decisions. They are then open to criticism by women. It is time to drop the neutral facade — to<sup>96</sup> "give up ... objectivity and try for ... fairness". Decisions can then be made as to whose subjectivity is most appropriate for protecting the values and harms of any issue.

#### *D Women's Different Decision Process*

Women make moral decisions in a different framework from the abstract, conflict-orientated, rights-based technique liberal legal theory uses. Women's connection and recognition of their interdependence with others informs their decision-making process. The process involves empathy, responsibility and conciliation instead of rights and combative resolutions.<sup>97</sup> Women form moral

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95 Above n 39, 1056.

96 Above n 2, 9.

97 Above n 12, 631-632.

decisions in reference to others — including their own actions, so it is impossible<sup>98</sup> to equate all expressed preferences with self-defined interests.

Women use this different moral framework in the abortion context. As D Greschner put it:<sup>99</sup>

I have yet to read any description of a woman facing an unwanted pregnancy who used the cold calculus of competing rights as her method of decision-making.

Instead of an abstract prioritising of rights, women reconstruct the dilemma in a way that<sup>100</sup>

focuses on the dynamics of relationships and dissipates the tension between selfishness and responsibility through a new understanding of the interconnection of other and self ... the fact of interconnection informs the central, recurring recognition that ... the activity of care enhances both others and self.

Women's recognition of their connection with others means they do not try to solve the concerns of one but resolve the dilemma in a way that means responsibility and care for everyone, including themselves.

Part of the restructuring of the dilemma involves contextualising — recognising the practical impact on those around her of the actual consequences of her

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98 Above n 13, 933.

99 Above n 16, 653.

100 Above n 43, 74.



decision. This causes confusion when the liberal, abstract form of morality has been presented as objective and whole. Women say things like:

I am saying that abortion is morally wrong but the situation is right.<sup>101</sup>

You really don't know your black and whites until you really get into them and face being confronted with it.<sup>102</sup>

*Carole*  
Catherine Gilligan observed that women question why abstract morality did not fit with their own conception of morality and more, why liberal morality did not recognise their harms:<sup>103</sup>

she questions not only the justification for hurting others in the name of morality but also the 'rightness' of hurting herself.

Contextualising means that for women, an abortion decision is inherently violent *whichever* decision is made. Under a legal-liberal analysis, deciding in favour of whichever right is prior *is* the just solution. For women, all solutions hurt — compromise the ethic of care and therefore no solution can be truly just.

Since women not only have different experiences of value and harm but also different moral decision-processes, it seems appropriate that those decisions which affect women most and are experiences which men do not have at least, should be subject to women's decision-process. Decisions on abortion should be made within the complete moral framework of women.

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101 Above n 43, 86.

102 Above n 43, 87.

103 Above n 43, 87.

## V DECISION MAKING INTERESTS

### A *The Unique Advantages Of Women*

Women's moral decision-making process of empathy and context means women are particularly appropriate to control decisions as to their reproductive capacity. What makes women *uniquely* appropriate is their physically and emotionally connected position in relation to the foetus. Once the restricting images are deconstructed, there is no reason not to respect women's moral judgment. The law's implied and unjustified assumptions were the only real thing preventing abortion decisions being placed in the hands of the women who are in the best position to make them.

There is no reason to fear that women will make abortion decisions frivolously. It is only because the law does not yet recognise women's moral framework that such a concern could be raised. A woman's abortion decision is a decision between protecting herself from one of her greatest harms — foetal invasion, and promoting one of her greatest values — the nurturance and care of a vulnerable life. Such a choice cannot be taken lightly. That women often do use their creative and nurturing powers to have babies despite the threat it can pose to their self-identity shows there is little need for the liberal concern with aggressive reaction.<sup>104</sup> Abortion decisions should be recognised as having a place alongside all the other moral decisions women are trusted to make. Even more, pregnancy can have such a significant effect on women's lives that so fundamental a life decision should be left to the women affected by it most.

104 See above n 42 and accompanying text.

[T]he notion that women's 'connectedness' in motherhood contributes to a distinct moral vision reinforces the appropriateness of women's decision making during pregnancy.<sup>105</sup>

If the ultimate relationship of pregnancy creates a distinct moral outlook then that outlook ought at least to be applied to the relationship it derives from. Interconnection should justify women's control of pregnancy because it creates a unique perspective and understanding of the relationship.<sup>106</sup>

[T]he law should privilege, not penalize, the pregnant woman based on her physical and psychological connection with the developing foetus.

Connection should not be the justification, as it is now, for state intervention based on liberal ideas of power relationships. Also, the liberal preference for abstract reasoning should not be used to devalue women's potential for contribution. Although abstraction means that anyone can consider the 'rights' and decide their priority, context means that women must hold a unique ability to consider the pregnancy relationship. Since there is no real objective decision making possible, women's direct involvement gives them a valuable perspective which is important to deciding whose subjective decision making is best.

Women have the advantage of being able to tell when a pregnancy is the harmful invasion they need to be protected against. Since the test is a subjective feeling of threat to identity, women's feelings must be decisive.

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105 Above n 42, 1340.

106 Above n 42, 1340.

There is a truth about feelings. One can be right or wrong about them. Thus while they are subjective in the sense that only the person having the feeling can be 'authoritative' on whether she feels something, her true feelings are not simply whatever impression, or experience, or sensation she has at the moment ... there is in the end a right answer as to what she really feels.<sup>107</sup>

That "right answer" which largely will be determinative of what decision should be reached regarding abortion can be provided only by the woman involved. If the capacity for individuation "can develop only in the context of relations with others ... that nurture this capacity"<sup>108</sup> then women have the unique position to identify which relationships, and in particular whether the relationship with the foetus will promote or prevent individuation. Women, being the authority on the harm, should decide when protection from it is needed.

Liberal legal theory assumes that the content of individual preferences is irrelevant for organising social structures. Here, the content of women's preferences, for example that they extend through the ethic of care to the preferences of those around them, is particularly relevant to the abortion process and even makes women especially appropriate deciders. There is a potential problem that a claim for reproductive control based on women's role as caretakers will reinforce existing social restrictions.<sup>109</sup> But the claim is more than that. The claim is that women have a role as moral decision makers because their moral framework of interdependence and responsibility is at least as legitimate as a liberal framework of conflict and independence and may, in many circumstances be a more relevant approach. In the abortion situation

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107 Above n 35, 23.

108 Above n 35, 11.

109 Above n 42, 1339.

women should be presumed to be the best decision makers both because any other moral framework is less appropriate and because women are inherently involved in the issue.

### ***B The Voice Of The Foetus***

Should the impact on the interests of the foetus be represented in the making of the abortion decision? The hidden implications of such a claim need to be unpacked. First, though a critique of the foetal personhood and rights arguments needs to be made.

The background to the critique of the foetal rights argument is that the claim for personhood in the foetus emerged only after restriction of abortion could no longer be justified by reference to the proper role of women as mothers. Foetal rights became the new instrument for control of women.<sup>110</sup> The argument for foetal personhood in this context runs:<sup>111</sup>

either the foetus is seen as a person with full moral status or it is a thing like a chair or a table. Since it is not a chair, it must be a person.

Personhood is seen as something absolute and objectively defined and therefore it is justified to devalue women's own personhood on those grounds. In fact personhood is a political and moral decision, it is not something inherent. Therefore "rights" should be given in context. Women should be protected from the strong harms they suffer by conscious decision. Foetal interests can be given value in the light of this. If the interests are something

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110 Above n 16, 662.

111 Above n 16, 651.

True of women?

we are giving to an entity which is neither a 'person' of full moral status, nor a thing, we can decide the content of them and make our concern for others, especially women, the context for the allocation of those interests. Even the 'rights' of an entity with full personhood bend to those of other persons.

In fact the whole discussion of the personhood of the foetus begs the question of why the foetus and not the woman should be the state's legitimate concern. Even full personhood in foetuses<sup>112</sup>

does not prevent the state from infringing their liberties because of its strong interest in protecting the liberties of another group of persons.

Once the law recognises the moral significance of the harm women suffer which is not redressed by current legal theory, and once the unjustified assumptions behind that failure are deconstructed there is no reason why women should not be the starting point for any discussion. The law should prefer adult, full person women. The presumption should be that the law's role is to protect women from the strongest of harm.

Once the strength of women's claim on the law for protection is recognised, any displacement of the presumption should be fully acknowledged as a decision not to value women.

To talk about autonomy of the foetus, which is necessary to give the foetus rights, is nonsensical speech because foetal autonomy can exist only as part of a woman's freedom.<sup>113</sup>

112 Above n 39, 1057.

113 Above n 16, 652.

True of a  
baby in  
most  
cases

The law must realise that prioritising protection from harm is a political and moral decision and should not be done through biased images and incomplete theory. One abortion law is free from the restraints of liberal legal theory, full-personhood, grievously-harmed women can openly be favoured.

The claim that the foetus has interests which ought to be given a voice in the decision-process is based on liberal ideas ignoring the fundamental connection of pregnancy.

Even to say that a foetus is independent with its own voice [to be heard] is to accept one traditional, religious, medical viewpoint of women.

Moreover, the very best person to speak for the foetus is its mother, for the two are inseparable ... *speaking for the foetus of/within a woman is to speak for the woman* ... It is not the case that foetuses do not have a voice; it is simply that their voices — mother's voices — are ones that patriarchy does not want to hear.<sup>114</sup>

Who can better represent the foetus than the one who is intimately, psychologically and physically connected with it. Their relationship is one of a complex web of interconnected needs and empathy and in most senses of the word women and the foetuses can not have independent interests. Women's connection with the foetus gives them the authority and responsibility to speak.

### C *A Medical Decision*

Currently the medical profession is seen to have the dominant decision-making interest. The legislative scheme of the Contraception, Sterilisation and Abortion Act revolves around a medical determination of when abortion is

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114 Above n 16, 654.

needed or justified. In *Wall v Livingstone* on at least eight separate occasions<sup>115</sup>, the decision whether a woman should be able to abort is described and approved of as entirely a medical judgment. It is ironic that if the decision is so based on medical considerations the emphasis in the Act should be on obstetricians and gynaecologists<sup>116</sup> when the majority of abortions are based on *mental* health grounds. This raises the question of whether the decision really is a "medical assessment pure and simple"<sup>117</sup> at all.

The courts have impliedly acknowledged that there are factors other than medical ones even in the determination within the Contraception, Sterilisation and Abortion Act framework. The Court in *Wall v Livingstone* cited and approved a comment that "a great *social* responsibility is firmly placed by the law on the shoulders of the medical profession".<sup>118</sup>

The Court also implied there were more than medical interests in a doctor's decision in its discussion of the Act's treatment of the rights of the 'unborn child'. Nowhere in the Contraception, Sterilisation and Abortion Act is there express protection for the rights of the 'unborn child', despite it being mentioned in the long title as one of the Act's aims. The Court said that, instead "[t]he matter is handled indirectly".<sup>119</sup> The moral debate as to the weight given to<sup>120</sup>

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115 Above n 91: twice p 736, p 737, p 738, twice p 739, twice p 741.

116 Contraception, Sterilisation and Abortion Act ss 30(4)(a) and 32.

117 Above n 91, 739.

118 Above n 91, 739 quoting Lord Scarman in *R v Smith* [1973] 1 WLR 1510, 1512.

119 Above n 91, 737 approving the lower court description of the legislation's effect.

120 Above n 91, 737 (my emphasis).



the rights of the unborn child would be given the attention intended by Parliament *simply by being at the forefront of the medical determination* arranged to take place in terms of the statute.

If abortion is admitted as not really a medical judgment, what is the interest of the medical profession in the decision at all?

"The concept of autonomy certainly pervades the whole of medical practice".<sup>121</sup> Even the decision-processes are based in liberal modes because of the scientific research background of medicine. How then can the medical profession decide when women should have abortions? An autonomy ethic does not comprehend a longing for individuation, let alone recognise invasion as a harm to protect against. Liberal decision-making is unrelated to the moral framework necessary to deal with a fundamentally connected relationship. Therefore, even the wide definition of "health" given to the grounds for abortion does not change the fact that a male-ethic dominated profession will define it.

It seems to have been taken as sufficient justification that because the medical profession controls the *means* to the end, it should control access to the end itself. This assumption is unsafe because its implications are the vulnerability of women to grievous harm, which they cannot protect themselves against. The main source of this vulnerability is a variation on the public/private dichotomy which is so much a focus of feminist criticism.

The public face of abortion is in the legislative framework which appears very strict on its face. This reflects a common state practice to take a "high" moral

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121 Above n 73, 7.

stance regarding the "sanctity of life" and yet modify the harsh effects by allowing a somewhat more flexible interpretation in practice. This is the case with abortion in New Zealand where the private/practice stance is less rigid than the public.<sup>122</sup> This appears to be some solution, but is unacceptable.<sup>123</sup>

The liberal idea of the private — and privacy as an ideal has been formulated in liberal terms — holds that, so long as the public does not interfere, autonomous individuals interact freely and equally.

Women are immensely vulnerable to privately wielded power. They are hostage to the prevailing attitudes of the certifying doctors in their area at the time. They are also vulnerable to any change restricting the private practice because they cannot claim public protection. The law has made a public stance and inherently refuses to intervene in the private in the hope of protecting autonomy. There is no opening for a claim that women have no power in the private.

Within the current framework, there appears no reason why medical decision-making interests should be most important.<sup>124</sup> In fact, they can be harmful. Certainly if the law recognises the real framework of harm women suffer in pregnancy there is no reason why the medical profession should be able to veto or approve of a woman's need of protection.

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122 Julie Crosland (above n 22) indicated this was the case and that it is widely seen as a satisfactory solution to the state's dilemma.

123 Above n 2, 99.

124 Above n 22. Julie Crosland commented that the common attitude is that it is treating women like children to require them to get permission from someone in order that they might abort.

### *D The 'Father' Of The Child*

The traditional liberal response to the feminist argument for recognition of women's empathy and connection is "empathy for everyone".<sup>125</sup> That is, that the connection of the father means he has an equal interest in the abortion decision. This illustrates once again liberal legal theory's preference for abstract formal equality — which it tries to impose on unequal parties through a liberty balancing regime.<sup>126</sup>

The outcome depends on what factors are selected for emphasis and who is evaluating the relative strengths of the respective liberties. For example, if the decision maker is morally opposed to abortion, the father's interest in preventing an immoral act will be seen to outweigh any interest the woman has in doing that act. But if the evaluator thinks that a woman's right to control her reproductive capacity is vitally important to her self-realization, and that a man's biological role in producing a child is of less duration and physical consequence than a woman's role, then the woman's liberty interest will clearly "win". There is no neutral, objective way to calibrate and compare the relative weights of two liberty interests, nor is the result of any balancing effort outcome neutral. Sometimes, a balancing test can simply be an invitation for the perspective and preferences of the traditionally powerful to triumph once again.

Balancing the respective rights of mothers and fathers implies an equality that is not true in substance. Mothers and fathers are not in equal positions regarding the foetus, let along the pregnancy.<sup>127</sup>

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125 Above n 16, 657.

126 Above n 13, 931.

127 Above n 16, 664.

a man's contribution of sperm in the act of conception does not make him a father in the same way as the woman becomes a mother with her physical labour and nurturance of the fertilised egg from the moment of conception.

It is only by abstracting some autonomy interest that men and women can be treated the same. Why should contributing sperm make the foetus more the father's than the mother's who continues to expend physical and emotional effort in a continuing connection relationship?<sup>128</sup> The 'father' is more a "potential father".<sup>129</sup>

It should be recognised that imposing formal equality is not an outcome-neutral technique. Preferring the interests of women may restrict fathers in some way but it is more justified by the unique values and connection of the mother. It should be accepted that prioritising interests is a political decision whichever way it is done and it should be done on openly justified grounds, and not covertly.

Such a decision to prefer the decision making interests of the mother does not exclude the father's interests entirely. The father of the child is usually a large part of any woman's decision to have an abortion and often plays a direct role.<sup>130</sup> Even when he does not play a direct role women's decision processes are such that his views are a big part of a woman's formulation of the morality of her act. Responsibility and the ethic of care extend to mean that women's

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128 Compare the Status of Children Amendment Act 1987 which distinguishes between the donation of gametes which gives no parental rights and the automatic motherhood of the woman who is pregnant.

129 Above n 16, 664.

130 Above n 22. The father of the child often attends the counselling sessions and is incorporated into the process.

views of the morality of their actions depends on how it will hurt others. They form their own preferences in relation to those important to them.

### *E A Group Decision*

Similar considerations apply for the claim that all those connected with the decision, such as the wider family, have interests in the decision. The first, most basic problem is that in a group decision, private inequalities and power structures are reinforced by lack of intervention. Women who have the dominant interest, are usually the ones who are the vulnerable party in power hierarchies.

More fundamentally though, the idea of a group decision being necessary is sourced in the liberal construct of separate individuals pursuing their own self-interest. Women see responsibility as applying to everyone and extend the ethic of care to all their relationships. Legal theory does not recognise this because it constructs responsibility only as part of a power relationship of the responsible to the vulnerable. Women's "web like imagery of relationships"<sup>131</sup> means preferences are a complex mix of the needs of those around her.

Women's moral framework can pose a dilemma for her if, as often happens, the family are pressuring her to abort against her desire to nurture the foetus.<sup>132</sup>

Although the feminine identification of goodness with self-sacrifice clearly dictates the 'right' resolution of this dilemma, the stakes may be high for

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131 Above n 43, 173.

132 Above n 43, 80.

the woman herself, and in any event the sacrifice of the foetus compromises the altruism of an abortion motivated by concern for others.

However, there is no need for the imposition of some adjudicating tribunal decision on the situation. That reflects liberalism's mistakes that decision making would collapse into self-interest and conflict without the intervention of "objective justice".<sup>133</sup> There are not warring individuals separate from one another — nor is objectivity possible or helpful. Women's subjectivity must be the best option.

#### *F Counselling And Process*

Since women hold the most powerful interest in abortion decision making it should be their conclusion which is authoritative. We can trust them as moral decision makers with the most appropriate framework and the greatest information and connection with the issue. However, such a decision will be hard for women given that their choice will be between greatest harms and values and they will perceive it as inherently violent. Women find the web of counselling support helpful in resolving their own feelings and morality.<sup>134</sup> Therefore some counselling process for affirming women's decision processes will be helpful. Such a formal process will also mean that institutional health safety of abortion clinics can be regulated to women's benefit.

The counselling should not be equivalent to some kind of permission or approval of a woman's judgment.<sup>135</sup>

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133 Above n 77, 127.

134 Above n 22. Women often express how good they feel to know they are not alone in the way they feel. Counselling also provides the opportunity to resolve issues such as contraception, or even domestic violence.

135 Above n 42, 1341.

Absent clear evidence that the decision making process has failed, courts should not substitute their own judgment or that of a doctor for the woman's.

Disagreeing with a woman's decision should not be taken as "clear evidence" that the process has broken down. The safeguard should be for women's own protection to prevent undue outside interference. Any such process should recognise and value women, their harms and their moral framework.

## VI CONCLUSION

New Zealand's abortion law is not currently relevant to women's lives and experience. The theory-base of law must be modified to reflect some kind of freedom for making a self-identity and that there is no autonomous self, for women, in isolation from their relationships. We need a *contextual* law, relevant to women's moral framework and giving proper recognition to the significance of their harms.

The law should realise that there is no reason to displace women as the most appropriate decision makers. Women have the strongest interest in abortion decision both because of their connection and proximity and their unique moral judgment process. It is time for the law to revise its "blind willingness to sacrifice people to truth"<sup>136</sup> and to realise that the current framework of abortion law makes women hostage to their reproductive capacities — not only in their substantive lives but in their very identities. It is time that women stopped being hurt.

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136 Above n 43, 104.

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