

# Ethics of Care and the Public Good of Abortion

Jonathan Herring\*

## Abstract

This article makes the case for seeing abortion as a public good. It does so using an ethics of care analysis. At the heart of the argument is that ethics of care requires us to promote relationships which are marked by care and mutual flourishing and to terminate relationships which are not so marked. Applying this in the context of pregnancy it is argued that the law should protect and promote wanted pregnancies as profoundly caring relationships, but that law must offer a termination of unwanted pregnancies. By providing abortion the law can end a non-caring relationship and free women to enter other caring relationships. I argue that this approach chimes with the reasons women typically give for seeking termination (to free them to undertake other caring responsibilities). It also provides a reason why unwanted termination of pregnancy, for example by miscarriage or criminal acts, can be recognised as serious wrongs, without challenging a liberal abortion law.

**Keywords:** Abortion, Ethics of Care, Pregnancy, Caring Relationships,

## *1. Introduction*

This article will seek to apply ethics of care to make the case for the public good of abortion. While ethics of care is thought by some to be antithetical to abortion rights, this article will argue the opposite. The promotion of caring relationships requires both the support and

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\*Jonathan Herring, Professor Law, University of Oxford.

sustenance of care; but also the termination of relationships which are not nurturing or marked by care. This is especially important if people are hindered by non-caring relationships from entering caring ones. I argue in this article that, seen in this way, abortion is an important aspect of promoting caring relationships within society.

This article will start by very briefly summarising the key aspects of an ethic of care. It will then summarise the way that ethics of care has been used by some commentators to oppose abortion rights. It will, thereafter, set out an alternative vision of how ethics of care can be used as the basis for the promotion of abortion rights. It will conclude by summarising how an ethics of care approach can provide more useful tools for promoting the public good of abortion, than the more traditional rights analysis.

## 2. *Ethics of Care*

There is now significant and rich literature on ethics of care.<sup>1</sup> At its heart is the claim that caring should be the most highly valued activity in society. A key role of the state and the law is to ensure that the basic needs of its citizens are met. And caring is essential to that. Therefore, the law and state must promote and protect caring relationships. In reality, caring is often invisible in public policy, law and even ethical discourse. Re-orientating social and legal interventions around ethics of care would have profound ramifications that extend far beyond domestic life, impacting political thought, international relations and core conceptions of legal rights and responsibilities.<sup>2</sup>

As the focus of this article is on its application to abortion, only a very brief overview of ethics of care can be offered here. Joan Tronto summarizes ethics of care in this way:

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<sup>1</sup> Leading works on ethics of care include: Carol Gilligan, 'Moral Orientation and Moral Development' in Eva Feder Kittay and Diane Meyers (eds), *Women and Moral Theory* (Rowman and Littlefield, 1987); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993); Selma Sevenhuijsen, *Citizenship and the Ethics of Care* (Routledge, 1998); Virginia Held, *The Ethics of Care* (OUP, 2006); Jonathan Herring, *Caring and the Law* (Hart, 2013); Rosie Harding, Ruth Fletcher and Chris Beasley (eds), *Revaluing Care in Theory, Law and Policy* (Routledge, 2016); Rosie Harding, *Duties to Care* (CUP, 2017).

<sup>2</sup> Held, *The Ethics of Care* (n 1); Daniel Engster, *The Heart of Justice: Care Ethics and Political Theory* (OUP, 2007).

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*...a set of moral sensibilities, issues and practices that arise from taking seriously the fact that care is a central aspect of human existence...a species activity that includes everything that we do to maintain, continue and repair our 'world' so that we can live in it as well as possible. That world includes our bodies, ourselves and our environment, all of which we seek to interweave in a complex, life-sustaining web.*<sup>3</sup>

Clearly, the concept of care is at the heart of the approach. Yet the concept of care is somewhat vague. With some justification, ethics of care has been criticized as lacking a concrete definition of care. In my book, *Caring and the Law*,<sup>4</sup> I have suggested that care is, in its nature, not subject to a precise definition. What is caring depends on the relationship between the parties, their personalities, and preferences. It is, therefore, not amenable to an objective definition. I argue that the best approach, in contrast to those seeking a definition, is to provide hallmarks of care, and suggest the following four:

- Meeting needs
- Respect
- Responsibility
- Rationality.<sup>5</sup>

These concepts are unpacked in that book and I will not discuss them further here.

### *A. Care is Part of Being Human*

We all have needs, and caring for others in meeting these needs, and having our needs met by the care of others, is a universal experience. Wendy Holloway argues that 'care is the psychological equivalent to our need to breathe unpolluted air'.<sup>6</sup> There will be few, if any, stages during anyone's life when they are not in caring relationships. As Eva Feder Kittay et al put it:

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<sup>3</sup> Tronto (n 1) 12.

<sup>4</sup> Herring, *Caring and the Law* (n 1).

<sup>5</sup> *ibid.* For an alternative analysis see Tronto (n 1) 127-34.

<sup>6</sup> Wendy Holloway, 'Introducing the Capacity to Care' in Wendy Holloway (ed), *The Capacity to Care: Gender and Ethical Subjectivity* (Routledge, 2006).

*People do not spring up from the soil like mushrooms. People produce people. People need to be cared for and nurtured throughout their lives by other people, at some times more urgently and more completely than at other times.*<sup>7</sup>

Not only is care essential, it should be accepted as a moral good. Care should be treasured and valued as a good part of life. Care is the outworking of that most core moral value: love. It involves achieving a primary good: meeting the needs of others.<sup>8</sup>

### *B. Emotions are Ethically Significant*

The law has traditionally been rather sceptical of emotions. It has preferred the idea of law to be governed by rationale and rule following, rather than turning on the whims of emotions. Emotions cannot be assessed by empirical evidence, and cannot be trusted. As a result, emotions are largely ignored, or even treated with suspicion. The love which is involved in caring, and the grief, disappointment, frustration, anger and despair, which are all part of life, find no place.<sup>8</sup> An ethics of care approach, by contrast, regards emotions as offering important moral insights. For care work, values such as trust, empathy, compassion and sensitivity are key. If legal interventions are to promote caring relationships, then taking emotions seriously is essential. Law which ignores or undermines emotional values will be ineffective in seeking to promote care.

### *C. Intermingled Interests*

Ethics of care is based on the belief that people are relational. People understand themselves in terms of their relationships. Their well-being is deeply tied up with the well-being of others. If good things happen to

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<sup>7</sup> Eva Feder Kittay, Bruce Jennings and Angela Wassuna, 'Dependency, Difference and the Global Ethic of Longterm Care' (2005) 13 *Journal of Political Philosophy* 433, 436.

<sup>8</sup> Jonathan Herring, 'Compassion, Ethic of Care and Legal rights' (2017) 13 *International Journal of Law in Context* 158.

those they are in a positive relationship with, then that is good for them.<sup>9</sup>

An ethic of care, therefore, takes a particular view of the nature of the self, one that is constructed through, and finds its meanings in relation to others.<sup>10</sup> Supporters of ethics of care do not need to entirely reject the notion of an individual self, but simply recognise that its identity and nature can only be appreciated in relation to others. In relationships of care and dependency, interests become intermingled. We do not break down into ‘me’ and ‘you’. As Virginia Held puts it:

*Care should not be understood as self-sacrifice. Egoism versus altruism is the wrong way to interpret the issues. Yes, the interests of care giver and care receiver will sometimes conflict, but for the most part we do not pit our own interests against those of others in this context. We want what will be good for both or all of us together. We want our children and others we care for to do well along with ourselves, and for the relations between us to be good ones. If we are the recipients of care we want our care givers to do well along with us.*<sup>11</sup>

#### *D. The Importance of Responsibilities*

Ethics of care emphasise the importance of responsibilities within caring relationships.<sup>12</sup> Indeed, many ethics of care supporters suggest that responsibilities should be the primary ethical tool, with rights playing a subordinate role. The classic liberal perspective is that one is ‘born free’ and that any responsibilities one takes must be, in some sense, voluntarily assumed. However, for an ethics of care approach, with its starting point being that people are relational, the supposition is that there will be responsibilities for others. We are born into relationships which carry responsibilities with them. So, the central legal or ethical

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<sup>9</sup> Jocelyn Downie and Jennifer Llewellyn, *Being Relational* (UBC Press, 2011).

<sup>10</sup> Charles Foster and Jonathan Herring, *Identify, Personhood and the Law* (Springer, 2017).

<sup>11</sup> Virginia Held, ‘Care and Human Rights’ in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP, 2015).

<sup>12</sup> Stephanie Collins, *The Core of Care Ethics* (Palgrave, 2015).

question on a given issue should not be ‘do I have a right to do X?’, the question should be ‘what is my proper obligation within the context of this relationship?’<sup>13</sup> Under this vision, rights primarily exist to enable people to carry out their responsibilities.<sup>14</sup> The role of the law should primarily be to encourage and enable people to fulfil their responsibilities to each other, rather than to enforce their rights.

### *E. The Importance of Non-Abstraction*

One of the key aspects of ethics of care is that an ethical analysis must start with the context and concrete reality of particular situations, involving individuals, their relationships and characteristics. It rejects the approach of many mainstream ethical approaches, which seek to develop general rules which apply across all cases. Ethics of care argues that what might work for one group of people in one situation, will not work in another. What will be caring, will depend on the particular individuals and their obligations. What will meet one person’s needs, cannot be generalized.

### *F. Gender and an Ethic of Care*

Carol Gilligan is the leading pioneer of ethics of care thinking. In her 1980s writing she developed her approach as a response to the writing of Lawrence Kohlberg, who had argued that universalized and principled thinking was the highest and most sophisticated moral analysis. Kohlberg found that a higher percentage of boys in his samples scored higher than girls. Gilligan’s response to this was that the girls were speaking in a ‘different voice’, an ethic of care; as opposed to the ethic of justice. Although she has sometimes been interpreted as suggesting that the ethic of care reflects a feminine voice, it seems that her writing does not support the view that women are more likely to adopt it than men. Certainly, nowadays, few writings on ethics of care would support such a claim.

Nevertheless, the ethic has attracted considerable support among feminists, although it has supporters who do not explicitly adopt a

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<sup>13</sup> Held, *The Ethics of Care* (n 1).

<sup>14</sup> Herring, ‘Compassion’ (n 8) 158.

feminist approach.<sup>15</sup> Its support among feminists can, in part, be explained by the fact that women undertake a significantly greater proportion of care work in contrast with men, and the political, social and ethical neglect of this work results in disadvantages for women.

### *3. The Abortion Debate*

We turn now to the issue of abortion. The ethical literature on the issue is extensive, but is commonly divided into three sets of debates.<sup>16</sup> First, there are sophisticated arguments over the nature of personhood and whether the foetus is a person; second, whether claims of autonomy and bodily integrity of the woman trump the claims, if any, of the foetus; and third, whether gender equality arguments strengthen the arguments for rights to abortion. What do ethics of care add to this? It must be admitted that, at first sight, it might be thought that ethics of care would be opposed to abortion, and indeed, this is a line some ethics of care writers have taken. I will set out their views, before explaining why, in fact, ethics of care should apply in a different direction: recognizing the good of abortion.

### *4. The Anti-Abortion Ethic of Care Arguments*

It is unsurprising, at least from a pro-choice perspective, that an ethics of care approach has been relatively neglected in the debates over abortion. It is not immediately clear that an ethic of care would, in fact, support abortion rights at all.<sup>17</sup> Indeed, the language of care and support for dependents might, if anything, play into the hands of anti-abortion advocacy.<sup>18</sup> I will be arguing that, in fact, an ethic of care can add rich analysis to the literature, and in particular, strengthen the case

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<sup>15</sup> Michael Slote, *The Ethics of Care and Empathy* (Routledge, 2007).

<sup>16</sup> Kate Greasley, *Arguing About Abortion* (CUP, 2017).

<sup>17</sup> Jackie Davies, 'Analogy and Narrative: Caring about the Forgone and Repressed' (2001) OSA Conference Archive 22.

<sup>18</sup> Pamela S Katlan and Daniel R Ortiz, 'In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda' (1993) 87 *Northwestern University Law Review* 858, 870-90.

for abortion as a public good. Before developing that argument, I will look at some of the arguments that have been made about abortion, using ethics of care to deny abortion rights.

Celia Wolf-Devine has been one of the most prominent writers to use ethics of care to oppose abortion rights.<sup>19</sup> She describes abortion as a ‘masculine response to the problems posed by unwanted pregnancy.’ She argues that the ‘feminine voice’, promoted by ethics of care, should generate a strong presumption against the use of abortion. She points to the emphasis in ethics of care on responsibilities to care for others; our interconnectedness and importance to preserve relationships; as opposed to abortion rights. She claims, with justification that the language used to promote abortion is typically in terms of the ‘masculine’ values of autonomy and bodily integrity. Such rights are normally challenged by ethics of care. She writes: ‘Abortion is a separation—a severing of a life-preserving connection between the woman and the foetus. It thus fails to respect the interconnectedness of all life. Nor does it respect the natural cycles of nature.’<sup>20</sup>

It is true that many of the strongest defences of abortion rights are put in terms of the right to choose, the right to bodily integrity and the right to self-defence. These arguments are well made, and it is not the aim of the chapter to reject these. Forcing a woman to go through an unwanted pregnancy can properly be seen as a ‘non-consensual invasion, appropriation and use of her physical body’<sup>21</sup> and she should be entitled to defend herself against that.<sup>22</sup> But Wolf-Devine is correct that such powerful justifications for abortion rights, sit a little uncomfortably with the language of care and relationality promoted by ethics of care. Indeed, Robin West has challenged ethics of care precisely on the basis that it could undermine abortion rights.<sup>23</sup> She goes on to make a more general critique of ethics of care, arguing:

*The ethic of care, from a liberal perspective, emphasizes and then valorizes precisely the interrelationships, the*

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<sup>19</sup> Celia Wolf-Devine, ‘Abortion and the “Feminine Voice”’ (1989) 3 Public Affairs Quarterly 81.

<sup>20</sup> *ibid* 84,

<sup>21</sup> Robin West, ‘Liberalism and Abortion’ (1999) 87 Georgetown Law Journal 2117, 2117.

<sup>22</sup> Eileen McDonagh, *Breaking The Abortion Deadlock: From Choice To Consent* (OUP, 1996)

<sup>23</sup> West, ‘Liberalism and Abortion’ (n 21) 2117.

*dependency, the lack of agency, the identification with care and nurturance, the relegation to the private sphere, and in short the sex and gender linked differences that have been used, when an excuse was needed, to justify the two-century-long project of continuing the subordination of women even in a liberal society that should seemingly be committed to ending it.*<sup>24</sup>

This is not the place to defend an ethic of care against that challenge, although shortly I will explain why I do not think it follows that ethics of care opposes abortion rights. Indeed, Robin West in her article goes on to call on liberalism to incorporate ethics of care and to build ways of thinking that combines ethics of care analysis and liberalism.<sup>25</sup>

## ***5. Developing an Ethics of Care Based Approach***

I now move on to make the positive case in favour of using ethics of care to promote abortion as a public good. I will argue that it offers a more convincing case than the standard right to choose and bodily integrity arguments.

### ***A. Pregnancy as Interconnection***

As argued earlier, abortion is typically presented as a clash between the rights of the woman and the rights of the foetus. Ethics of care offers us a way to by-pass that approach and understand pregnancy as a relationship. It rejects the standard individualised approach to the issue.

Martha Nussbaum explains why she believes the individual should be the basic unit for political thought:

*It means, first of all, that liberalism responds sharply to the basic fact that each person has a course from birth to*

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<sup>24</sup> Wolf-Devine (n 19) 37.

<sup>25</sup> West, 'Liberalism and Abortion' (n 21) 2117.

*death that is not precisely the same as that of any other person; that each person is one and not more than one, that each feels pain in his or her own body, that the food given to A does not arrive in the stomach of B.*<sup>26</sup>

Whatever one thinks of this argument generally, it is immediately clear that what she is saying is not true of the foetus. The pain of the mother affects the foetus, and the food given to the mother can arrive in the stomach of the foetus. The biological reality is that pregnancy is a relationship of profound interconnection.<sup>27</sup> There are, I suggest, three interlocking aspects to this.

### 1. Biological Interconnection

As a matter of biology, the pregnant woman and the foetus cannot be neatly divided into two people. There is no clear point at which foetal tissue ends and the woman's tissue begins. They share fluids and space. The health and well-being of the woman profoundly affect the foetus, and vice versa.<sup>28</sup> As Iris Marion Young puts it:

*[p]regnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body.*<sup>29</sup>

The interconnection between the two shows that the standard individualised approach is particularly inappropriate in relation to pregnancy.

Likewise, Margaret Anne Little emphasises the significance of the inter-corporality involved in pregnancy:

*To be pregnant is to be **inhabited**. It is to be **occupied**. It is to be in a state of physical **intimacy** of a particularly*

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<sup>26</sup> Martha Nussbaum, *Sex and Social Justice* (OUP, 1999) 62.

<sup>27</sup> Jonathan Herring, 'The Loneliness of Status: The Legal and Moral Significance of Birth' in Fatemeh Ebtehaj et al (eds), *Birth Rights and Rites* (Hart, 2011).

<sup>28</sup> See Jonathan Herring and P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34, for a discussion of the biology.

<sup>29</sup> Iris Marion Young, *On Female Body Experience* (OUP, 2005) 49.

*thorough-going nature. The fetus intrudes on the body massively; whatever medical risks one faces or avoids, the brute fact remains that the fetus shifts and alters the very physical boundaries of the woman's self. To mandate continuation of gestation is, quite simply, to force continuation of such occupation.*<sup>30</sup>

Conceiving of the foetus on its own terms fails to capture the fact that it is integrated into the woman. The traditional presentation is some kind of fairy tale image that the woman provides a cosy sitting room for the foetus to live in, awaiting birth. But the woman is not simply a 'foetal container'.<sup>31</sup> Barbara Katz Rothman writes:

*the reigning medical model of pregnancy, as an essentially parasitic and vaguely pathological relationship, [which] encourages the physician to view the fetus and mother as two separate patients, and to see pregnancy as inherently a conflict of interests between the two. Where the fetus is highly valued, the effect is to reduce the woman to what current obstetrical language calls the 'maternal environment'.*<sup>32</sup>

The reality is that all interaction and dealings with the foetus must be mediated through, and with, the woman. Pregnancy is utterly relational.

## 2. Psychological interconnection

The interconnection is not simply a biological one, but also a psychological one. Jane Mair writes that the notion of the maternal/foetal conflict which dominates the traditional approach 'is a violent image which disrupts the coexistence of mother and foetus. It is an emotive phrase which suggests unmotherly feelings and a grotesque

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<sup>30</sup> Margaret Little, 'Abortion, Intimacy and the Duty to Gestate' (1999) 2 *Ethical Theory and Moral Practice* 295.

<sup>31</sup> George Annas, 'Pregnant Women as Fetal Containers' (1986) 16 *Hastings Centre Report* 13, 14.

<sup>32</sup> Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Rutgers University Press, 1989) 89.

perception of the struggling foetus'.<sup>33</sup> This conflict model reflects what Anne Morris has called 'an ignorance of what it means to be pregnant'.<sup>34</sup> As she argues, 'the issues involved are much more complex than the easy label of maternal/foetal conflict suggests ... instead of seeking to resolve maternal/foetal conflicts by defining more clearly the individual legal rights of the pregnant woman and the foetus, should we not question the construction of these so-called conflicts?'<sup>35</sup> We need instead, as Barbara Katz Rothman suggests an acknowledgement that '[m]otherhood is an experience of interpersonal connection. The isolated, atomistic individual is an absurdity when one is pregnant: one is two, two are one.'<sup>36</sup>

The experience of pregnancy profoundly impacts on the body and identity of the woman. As Anne Elvey explains:

*. . . the pregnant body . . . calls into question these assumptions of separateness and sameness. When I am pregnant, 'my' body is both 'I' and 'not I', mine and not mine. The boundaries of the body shift as the pregnant body creates its own expanding space. While the skin stretches the boundary between the body and its outside is continually renegotiated, until in birth the inside enters the outside. The pregnant body is, moreover, two or more under the influence of a third, the placenta, through the agency of which self and other are interconnected.*<sup>37</sup>

The deep mutuality approach is much better captured by an ethics of care approach, which acknowledges the relational nature of pregnancy.

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<sup>33</sup> Jane Mair, 'Maternal / Foetal Conflict: Defined or Defused?' in Sheila McLean (ed), *Contemporary Issues in Law, Medicine, and Ethics* (Dartmouth Publishing, 1996) 79.

<sup>34</sup> Anne Morris, 'Once Upon a Time in a Hospital...the Cautionary Tale of *St George's NHS Trust v S., R. v Collins and Others ex parte S.* [1998] 3 All ER 673' (1999) 7 *Feminist Legal Studies* 79, 84.

<sup>35</sup> Mair (n 33) 93.

<sup>36</sup> Katz Rothman (n 32) 93.

<sup>37</sup> Anne Elvey, 'The Material Given: Bodies, Pregnant Bodies and Earth' (2003) 18 *Australian Feminist Studies* 199, 208.

### 3. Foetal Status

The standard approach seeks to determine the status of the foetus, and to determine the responsibilities that are owed by the woman to the foetus as a result. The relational ethics of care approach argues that, rather than asking what rights or responsibilities are owed to an individual in response to their status, we ask what the responsibilities and rights are owed in relation to a relationship.<sup>38</sup> The argument is that, in order to determine what are the legal rights and responsibilities between person A and B, we need to know what their relationship is. In brief, where a relationship is marked by care, I would advocate that the law should allocate rights and responsibilities to ensure that the relationship is upheld and maintained.<sup>39</sup> Where, however, that relationship is not marked by care, then it does not have moral value, and the law should enable the parties to find other caring relationships. The relational approach sees our obligations and rights emerging from our relationship, rather than our legal status. In order to determine the rights and responsibilities owed by person A to B, we learn little by finding the fact that B is a person. Whether B is A's child; A's parent; a stranger; A's doctor; etc., is far more telling and significant, than merely whether B is a person or not. Contractual claims can transform the responsibilities one person owes to another. Even tort law requires a duty of care emerging typically from the nature of the relationship, and carry duties of care depending on that relationship. Later in this article, I will develop what this means in terms of the law's regulation of abortion.

### *B. Summary on Interconnection*

An ethics of care approach can recognise the deeply interconnected and relational experience of pregnancy.<sup>40</sup> As Rothman puts it,

*A holistic view of pregnancy understands that pregnancy is a unique relational existential reality that simultaneously represents physiological, existential, and social duality and*

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<sup>38</sup> This argument is developed more fully in Foster and Herring (n 10).

<sup>39</sup> Herring, *Caring and the Law* (n 1) Chapter 2.

<sup>40</sup> Sarudzayi Matambanadzo, 'Reconstructing Pregnancy' (2016) 69 *Southern Methodist Law Review* 187.

*oneness. This view is consistent with both physiological and maternal understandings of pregnancy. It is reflective of both intended and unintended pregnancies. It is honest. And, it is woman-centred.*<sup>41</sup>

## ***6. Applying a Relational Approach to Termination of Pregnancies***

As should already be clear, the relational approach opens up the possibility for a very different weighting and understanding of wanted and unwanted pregnancies. Wanted pregnancies are caring, and therefore of the highest moral value. We need to protect them through the criminal law from unwanted termination, and to recognise the goodness of them. By contrast, unwanted pregnancies lack moral value as these involve coerced care, which may well impede other wanted caring relationships. As Bryon Stoyles puts it:

*Relational accounts of fetal value allow that pregnancies have whatever meaning and value they are given by the pregnant woman. Thus, relational accounts allow that pregnancy can have little or no positive value and also that pregnancy can have great value.*<sup>42</sup>

I will develop these two points.

### ***A. Coerced Relationships Are Not Caring***

I suggest that a relational ethics of care approach can be helpful when thinking about abortion.<sup>43</sup> The relational ethics of care approach would focus on the question of what obligations flow from the pregnancy, given that it is unwanted, and so will not be marked by the reciprocity and mutuality required for a relationship to be caring. Given that a

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<sup>41</sup> Katz Rothman (n 32) 89.

<sup>42</sup> Byron Stoyles, 'The Value of Pregnancy and the Meaning of Pregnancy Loss' (2015) 46 *Journal of Social Philosophy* 91.

<sup>43</sup> See for an extended discussion Camilla Pickles, *Pregnancy Law in South Africa* (Juta, 2017).

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parent is not obliged by the law to give organs, or to even suffer the prick of a needle to give some blood in order to save the life of their child, it is inconceivable that the law could require a woman to go through pregnancy and birth for a foetus in order to promote a caring relationship. The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the very goodness of a mutually respectful caring relationship. As Bertha Manninen argues, even if one accepts foetal personhood, there are major limits to the responsibilities that can be imposed on others:

*As much as we can feel for the life of patients in need of organ transplants, we cannot force otherwise healthy persons to donate non-vital organs to save the sick. This does not mean that the lives of these patients have no value; rather what it means is that no matter how valuable they are, this value cannot be used as grounds to infringe upon the rights of other persons. Similarly, we can argue that being prochoice need not entail a wanton disregard of fetal life, but, rather, an acknowledgment that, like all persons, pregnant women have a right to decide if they want to use their bodies to sustain another.*<sup>44</sup>

Hilde Lindemann similarly argues,

*Anti-abortion legislation holds pregnant women—who are innocent of any wrongdoing—to a punitive standard of specific performance, sentencing them against their will to the many kinds of hard work, physical discomfort, and outright danger that my daughter willingly undertook to bring her child into the world. No other class of people is held to this standard in peacetime. No woman should be held to it either.*<sup>45</sup>

It should not be forgotten that pregnancy carries serious health risks. As Eugenie Gatens-Robinson points out:

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<sup>44</sup> Bertha Manninen, 'The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life within Prochoice Advocacy' (2003) 28 *Hypatia* 664, 679.

<sup>45</sup> Hilde Lindemann, ' "...But I Could Never Have One": The Abortion Intuition and Moral Luck' (2009) 21 *Hypatia* 41, 57.

*The adverse physical effects of pregnancy on a woman are serious and common, including hypertension, hemorrhage, diabetes and embolism. The risk of death to both woman and fetus among poor women likely to have pre-existing health problems such as untreated hypertension is quite real. The 25% of women who undergo caesarean sections have a significantly higher risk of adverse effects on health or even death than those who have vaginal delivery.*<sup>46</sup>

So, forcing a woman to remain pregnant, and to provide the deeply embodied work involved in pregnancy, cannot be justified in the name of care.

Finally, it is important to note the impact of wider societal factors influencing abortion. Poverty, social exclusion and poor health care provision can impact on what can be expected of someone in terms of caring. Importantly, domestic violence is commonly associated with an abortion decision.<sup>47</sup> Abortion is, therefore, required as a public good, because it is a way of responding to the inequalities within society, and the failure to offer adequate protection from violence.

In this section, therefore, it has been argued that abortion cannot be seen as a caring response to unwanted pregnancy, because it leads to coerced care, which is not caring. A caring society would never compel the degree of personal and bodily sacrifice called for in pregnancy. Indeed, it does not in any other context.

## *B. Abortion Enables Caring Relationships to Develop*

By contrast, providing abortion can be a means of promoting care. It is important to note that many accounts of women's abortions, explain what they did in terms of caring. Consider, for example, these comments from three women who had abortions, provided to the 'My Body, My Life' project:

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<sup>46</sup> Eugenie Gatens-Robinson, 'A Defense of Women's Choice' (1992) 30 *Southern Journal of Philosophy* 39, 66.

<sup>47</sup> Indira Gilbert and Vishanthie Sewpaul, 'Challenging Dominant Discourses on Abortion From a Radical Feminist Standpoint' (2015) 30 *Affilia* 83.

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*I was 22 when I found out I was pregnant. I had just qualified as a teacher but was yet to find my first teaching position. My partner had a decent job but he was recovering from a prolonged period of severe depression and while he lived with his elderly mother, I was caring for my grandmother who had been diagnosed with a degenerative illness. Although we were very much in love and hoped to have children one day, our finances and living arrangements meant we were not equipped to raise a child. We would want to give our children the very best possible start in life and, at that time, we didn't have the opportunity to do so.<sup>48</sup>*

*I had made my decision even before it had happened. I got pregnant at 23 and knew I could not have it. I wasn't ready to give the baby the life it deserved.<sup>49</sup>*

*I fell pregnant again shortly after my son turned a year old. I have a long term health condition that means pregnancy can be dangerous for both myself and foetus. I had to consider my son's welfare and was the risk of having another child worth making myself very unwell?<sup>50</sup>*

A review of reasons used in making abortion decisions found that the decision to terminate a pregnancy was often influenced by the desire to be a good parent to a child, when born.<sup>51</sup> The first of the accounts presented above referred to the caring responsibilities to her partner and parent. The decision to abort is influenced by women's responsibilities to other people and to themselves. Sherwin reports from her analysis of women's abortion reasons, that the explanations involve '...her feelings about her foetus, her relationship with her partner, other

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<sup>48</sup> 'Post 15' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-15/>> accessed 17 November 2017.

<sup>49</sup> 'Post 9' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-9/>> accessed 17 November 2017.

<sup>50</sup> 'Post 16' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-16/>> accessed 17 November 2017.

<sup>51</sup> Maggie Kirkman et al, 'Reasons Women give for Abortion: A Review of the Literature' (2009) 12 Archives of Women's Mental Health 365; Julia Hainsberg, 'Homologizing Pregnancy and Motherhood: A Consideration of Abortion' (1985) 94 Michigan Law Review 371.

children she may have, and her various obligations to herself and others – contextually defined considerations that reflect her commitments to the needs and interests of everyone concerned.<sup>52</sup>

When thinking about an ethic of care, it is important to remember that care of the self is an aspect of caring. This is brought out in Carol Gilligan’s initial work. She rejects a dichotomy between self-care and altruism, showing that effective care of others involves care of the self.<sup>53</sup> Carol Gilligan in her seminal book, *In a Different Voice: Women’s Conception of Self and Morality*<sup>54</sup> uses a study of twenty nine women who made abortion decisions to explore the concept of the ‘different voice’ captured by ethics of care. She explains that the standard presentation of abortion ethics, as a clash between the right to choose of the woman and the interests of the foetus, plays into the argument that abortion is about selfishness and not accepting responsibility. She argues that care is used in the abortion debate, but in a way that plays on assumptions about motherhood, and equates good care as only caring for others, and in particular children. But, as Gilligan argues, this proposes a very narrow understanding of care. She writes:

*To be a mother in the societal as well as the physical sense requires the assumption of parental responsibility for the care and protection of a child. However, in order to be able to care for another, one must first be able to care responsibly for oneself.*<sup>55</sup>

She explores how the decisions women in her sample were making involved conflicts ‘between wish and necessity’. She quotes one woman:

*What I want to do is to have the baby, but what I feel I should do, which is what I need to do, is have an abortion right now, because sometimes what you want isn’t right.*

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<sup>52</sup> Susan Sherwin, *No Longer Patient* (Temple University Press, 1992) 102. See also Jeannie Ludlow, ‘Sometimes, it’s a Child and a Choice: Toward an Embodied Abortion Praxis’ (2008) *National Women Studies Association Journal* 20, 26-50.

<sup>53</sup> Inge van Nistelrooij and Carlo Leget, ‘Against Dichotomies: On Mature Care and Self-Sacrifice in Care Ethics’ (2017) *34 Nursing Ethics* 694.

<sup>54</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (HUP, 1992).

<sup>55</sup> *ibid* 192.

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*Sometimes what is necessary comes before what you want, because it might not always lead to the right thing.*<sup>56</sup>

Gilligan goes on to explain:

*In separating the voice of the self from those of others, the woman asks if it is possible to be responsible to herself as well as to others and thus to reconcile the disparity between hurt and care. The exercise of such responsibility, however, requires a new kind of judgment whose first demand is for honesty. To be responsible, it is necessary first to acknowledge what it is that one is doing. The criterion for judgment thus shifts from 'goodness' to 'truth' as the morality of action comes to be assessed not on the basis of its appearance in the eyes of others, but in terms of the realities of its intention and consequence.*<sup>57</sup>

So, we have seen in this context, that abortion enables women to care: to meet the caring responsibilities they currently face; to meet their caring responsibilities to any child they ever do have; and to care for themselves. A society committed to an ethic of care must promote caring, and that means promoting the ready availability of abortion.

### *C. Ethics of Care and Legal Protection of Wanted Relationships*

An ethics of care approach provides a meaningful way to respond to all pregnancies. One of the difficulties with the standard presentation of pregnancy, involving a separation between the interests of the foetus and those of the woman, is that it fails to account for differences in wanted and unwanted pregnancies. There is a real difficulty here. Those who see the foetus as having personhood from conception are likely to oppose abortion rights; while those who see the foetus as having no personhood cannot capture the value and importance of the pregnancy relationship where it is wanted. However, for many, there is a world of difference between wanted and unwanted pregnancies, and

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<sup>56</sup> *ibid* 201.

<sup>57</sup> *ibid* 202.

we need a form of legal analysis which distinguishes between them. As Camilla Pickles argues:

*Female autonomy must also recognise women's vested interests in their unborn. Therefore, female autonomy must be understood as including the decision to continue with a pregnancy, as well as decisions on how to progress through pregnancy. This manifestation of autonomy must be protected in law in order for it to have any meaningful effect for women who want children. Consequently, the single-entity approach only speaks to one side of female autonomy and fails to assist those women who plan to continue with their pregnancies and to adequately protect such decisions.<sup>58</sup>*

The problem with the traditional understanding of the foetus is well captured by Hannah Roberts, a Lecturer in Law whose eight month pregnancy was terminated through a car accident. She writes:

*The current law's attempt to answer this riddle is a clumsy one. It characterises our daughter's death as one of my 'injuries', because she died in utero, and was not a legal 'person' with a separate existence from me at the time she died. Calling our loss an 'injury' fails to acknowledge the depth of sorrow involved in grieving a child.<sup>59</sup>*

Yet she goes on to express nervousness for saying her foetus was a person or a child, for fear that that would negatively impact on abortion rights. This is also captured by the writing of Victoria Browne, arguing that miscarriage is 'disenfranchised grief'. She acknowledges that there is a concern that

*if one were to acknowledge that there was something of value lost, something worth grieving in a miscarriage, one*

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<sup>58</sup> Camilla Pickles, 'Approaches to Pregnancy Under the Law: A Relational Response to the Current South African Position and Recent Academic Trends' (2015) *De Jure Law Review* 2, 16.

<sup>59</sup> Hannah Robert, 'Responding to unwanted termination: Why losing my daughter means I don't support Zoe's Law' (*The Conversation*, 18 November 2013) <<https://theconversation.com/why-losing-my-daughter-means-i-dont-support-zoes-law-19985>> accessed 11 November 2018.

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*would be conceding ground to antiabortion or 'pro-life' arguments.*<sup>60</sup>

An ethics of care approach provides a way around this dilemma. We can recognize that, in the case of a wanted pregnancy, there is a caring relationship which the state has a duty to support and protect. However, in the case of an unwanted relationship, the state has a duty to provide abortion to ensure there is no coerced relationship, which would be the antithesis of care. Further, by providing abortion, the state promotes caring relationships – the current caring relationships the woman has; the care for any child the woman later has; and care for herself. We can, on this understanding, have a law which offers a liberal approach to abortion, yet is able to provide powerful criminal sanctions against those who terminate a pregnancy without consent, and to acknowledge the serious loss in an unwanted miscarriage.

### *7. Traditional Reasoning*

Having indicated some of the insights offered by ethics of care, it is worth highlighting some advantages of an ethics of care approach over the more standard pro-choice arguments.

First, as we have seen in the arguments above, the traditional analysis pits the rights of the woman to choice and bodily integrity with the right to life of the foetus. As we have seen, this ignores the interconnection in bodily and psychological terms between the woman and the foetus, which means that their interests must be regarded as intertwined, rather than in opposition.

Second, we have seen that the standard approach fails to provide an adequate response to both abortion and miscarriage. Either the status of the foetus is placed at a high level in which abortion rights are threatened, or the foetus is given few rights, which fails to recognise the significance of unwanted miscarriage. By focusing on the qualities and nature of the relationship, we can distinguish between wanted and unwanted pregnancies.

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<sup>60</sup> Victoria Browne, 'Feminist Philosophy and Prenatal Death: Relationality and the Ethics of Intimacy' (2016) 41 *Signs* 485.

Third, the presentation of abortion as a matter of choice or control tends to privatise the matter. As Petchesky explains, this 'lets men and society neatly off the hook'.<sup>61</sup> While the choice/control language creates a powerful liberty claim, it fails to make the case for positive rights to abortion. As Lisa Smyth notes:

*the emphasis on privacy prevents any consideration of the socio-political forces which produce both involuntary pregnancies and calls for abortion access, and constrain the 'choices' of different women in different contexts.*<sup>62</sup>

Fourth, the traditional language of choice does not capture the reality of abortion decision making. Catriona Mackenzie has written of the way that the academic discussions on abortion:

*have focused philosophical and moral reflection away from the contexts in which deliberations about abortion are usually made and away from the concerns and experiences which motivate those involved in the processes of deliberation. The result is that philosophical analyses of abortion often seem beside the point, if not completely irrelevant, to the lives of the countless women who daily not only have to make moral decisions about abortion but, more importantly, who often face serious risks to their lives in contexts where abortion is not a safe and readily accessible procedure.*<sup>63</sup>

The relational model acknowledges the emotional issues raised. Gillian Hadfield writes of those who focus on choice in the abortion decision:

*Who are these people who populate the economist's ... imaginatio[n], who calmly assess the alternatives available according to a stable set of internally consistent*

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<sup>61</sup> Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* (Verso, 1986) 7.

<sup>62</sup> Lisa Smyth, 'Feminism and Abortion Politics: Choice, Rights, and Reproductive Freedom' (2002) 25 *Women's Studies International Forum* 335.

<sup>63</sup> Catriona Mackenzie, 'Abortion and Embodiment' (1992) 70 *Australian Journal of Philosophy* 136, 142.

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*preferences and proceed to select the obvious choice, who apparently feel no passion or emotion, who do not worry about whether they are choosing well, who never feel trapped by their choices, and who never discover over time more about themselves and their understanding of their choices? Where is love, duty, fear, self-doubt, and power?*<sup>64</sup>

An ethics of care approach would also require the state to respond to an unwanted pregnancy in a caring way. As mentioned earlier, this approach rejects ethical assessments based on abstract principles, and requires a focus on the particular relationships, their history and their context. This means that decisions about pregnancy and parenthood must be placed in the real mucky world of relationships, where sometimes things go wrong and sometimes they go right. The world of family life, where being a parent is sometimes about survival, rather than about reaching the highest ideals of parenthood. Where weighing up nicely the competing moral interests makes no sense, when everything is going crazy, and control over life is a long lost fiction. Abortion decisions are complex and not reducible to straightforward analysis of my rights against the non-person. Or reducible to one of five grounds in a statute. That would be a parody on the complexity of women's abortion decisions.<sup>65</sup> The language promoted by an ethic of care requires careful listening and respect for each story, in each case, and rejects an abstracted response.

## ***8. Conclusion***

This article has sought to use ethics of care to make an argument for abortion as a public good. It has argued that, at the heart of ethics of care is the idea that we should seek to promote caring relationships. However, unwanted pregnancies are not marked by mutual care, and so lack moral value. The law has no interest in enabling these relationships to continue, and indeed cannot compel people to continue

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<sup>64</sup> Gillian Hadfield, 'An Expressive Theory of Contract' (1998) 146 University of Pennsylvania Law Review 1235.

<sup>65</sup> Robin West, 'Taking Freedom Seriously' (1990) 104 Harvard Law Review 43.

them when they involve the kind of bodily interference involved in pregnancy and childbirth. A coerced relationship is the opposite of a caring one. In no other context does the law compel one party to give up bodily integrity to save another, even to the slightest degree, let alone to the extent required in pregnancy. The law must enable unwanted pregnancies to be terminated, so that caring responsibilities may be fulfilled.

By contrast, the ethics of care approach means that we should have the highest moral regard for wanted pregnancies. These are caring relationships in a rich sense. Wanted pregnancies should be protected by legal rights and protections in employment, criminal, and welfare law.

But, above all, I have argued that ethics of care focus on relational values. The approach looks backwards to the past, and forward to the future, seeking to meet caring responsibilities to others and oneself, and thereby matches the reality of abortion decision making by women. An ethics of care approach gives us the ethical and practical tools to respond to abortion decisions, and recognises that a caring society will want to provide abortion as a public good.