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"WHO IS THE MOTHER TO MAKE THE JUDGMENT?": THE CONSTRUCTIONS OF WOMAN IN ENGLISH ABORTION LAW*

by

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1. *Introduction*

The title of this paper comes from the Parliamentary debates on the Medical Termination of Pregnancy Bill (later to become the 1967 Abortion Act). Kevin McNamara, M.P., speaking with respect to the decision to abort a handicapped foetus, poses the question "who is the mother to make the judgment?"[1]

The continuing refusal of the law to recognise the decision of whether or not to terminate a pregnancy as one fundamentally belonging to the pregnant woman, forms the focus of this paper. I will argue that the reason why it is so unthinkable to give women self-determination (in the real sense of allowing them the final word in a decision to abort) is because of the constructions of Woman upon which this law is predicated.[2]

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1 McNamara, H.C. Deb. Vol. 730, Col. 1129, 1966 (22 June).

2 The writing of Woman in this way, intends the same distinction that Teresa de Lauretis makes between women (real historical beings) and Woman who is "the *representation* of an essence inherent in all women (which has been seen as Nature, Mother Mystery ... Femininity et cetera)", i.e. Woman is seen as a socially (and here specifically legally) constructed rather than a biologically rooted entity. See T. de Lauretis,

This paper conceptualizes the legal subject as an internal construct of a given law, and as embodying certain characteristics. Law creates its own fiction of the subject that it seeks to regulate. Feminist texts have often discussed the construction of this subject as essentially male, existing either as a male universal legal subject (see for example Naffine),[3] or as a construct of one particular law (for example O'Donovan, Holtmaat).[4] Abortion legislation, however, is one of the instances where law can be seen to posit a female legal subject.

This paper sets out to "deconstruct" the 1967 Abortion Act to reveal the female legal subject created within it. It does not enter into the discussion of the morality of abortion, or the debate around the competing rights of foetus and woman. It will already be clear, no doubt, what my position within that debate would be. This paper also implicitly rejects the centrality normally granted to the foetus. It is often assumed that if we can accord the foetus one intrinsic ontological status (personhood or non-personhood) this in itself will provide a definitive solution to the problem of whether to allow abortion. Rather, I seek to recentre the notion of woman within discussions of abortion. She has been, in many accounts, the forgotten party.[5]

This paper concentrates on the debates leading to the introduction of the 1967 Act, as played out in Parliament. It is beyond the scope of this paper to explore the exact relationship between the

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Technologies of Gender (Bloomington: Indiana University Press, 1987), 9-10.

3 N. Naffine, *Law and the Sexes* (London: Unwin & Hyman, 1990).

4 K. O'Donovan, "Defences for Battered Women who Kill", *Journal of Law and Society* 18/2 (Summer 1991), 219-240. O'Donovan argues that the traditional defences to murder of provocation and self-defence have been constructed with regard to stereotypically male patterns of behaviour. R. Holtmaat, "The Power of Legal Concepts: The Development of a Feminist Theory of Law", *International Journal of the Sociology of Law* 17 (1989), 481-502. Holtmaat argues that the concept of employee supports the male model of paid labour, whilst excluding women who cannot or will not participate on the same footing as men.

5 For example Hugh Rossi's formulation of the Medical Termination of Pregnancy Bill is of one that deals with "the attitude of society to humanity itself; the attitude of man to man, and of man to life." Rossi, H.C. Deb. Vol. 747, Col.511, 1967 (2 June).

content of Parliamentary debates, and the final text of a debated statute. To say that the law is the product of debate within Parliament is obviously simplistic, not least because any new bill is presented in draft form before ever coming under discussion (the text of the Abortion Act derives in large part from David Steel's original draft of the Medical Terminination of Pregnancy Bill). Neither do I seek to deny the impact of extra-Parliamentary groups and in particular in this case, the medical profession on the formulation of statute. Rather, I content myself with a minimum assertion (that Parliamentary debates are in some way indicative of the predominant social discourses around the concept of Woman which form the context within which the Abortion Act was conceived) and a more ambitious suspicion (that the statements made by M.P.s in this context provide particularly important and powerful "telling instances" of this social and political discourse).[6]

This paper represents an attempt to draw out the way that the pregnant woman seeking abortion is constructed within these debates — to bring together dispersed comments of M.P.s to present a more unified account of the sort of general assumptions about the "type" of woman whom the legislation must address (what kind of woman would seek to terminate a pregnancy?). I then very briefly outline the way that the figure of the doctor was constructed within the debates, before examining how these constructions and the assumptions upon which they are predicated are reflected in the text of the Abortion Act itself.

Although the major thrust of this paper will be a criticism of the 1967 Act and the way that Woman is constructed within it, I will at least begin to draw some more general conclusions about feminist strategies with regard to the law.

2. *The Constructions of Woman Employed in Parliament*

From my reading of the Parliamentary debates which preceded the passing of the Abortion Act of 1967, two major constructions of the "type" of woman who would want an abortion emerge. Both accounts

6 P. Fitzpatrick, "Racism and the Innocence of Law", in P. Fitzpatrick and A. Hunt, eds., *Critical Legal Studies* (Oxford: Blackwell, 1987), 119-132, at 120.

reflect this Woman as marginal and deviant, standing against a wider norm of women who do not need/desire abortion. These constructions reflect strategies used by the proponents and opponents of increasing access to abortion, and on a broader level, reflect images of women that were/are predominant in other social discourses. Both typifications are extreme — they are predicated partially on stereotypes, and partially on real and concrete examples which continually recur within the debates as leitmotivs to become generalized as representing the reality of the woman who seeks abortion.

The structure adopted within this section is to identify two major constructions of Woman used within the debates, which may be broadly (though not always consistently) identified with the reformer/opponent split. Thus, I would argue, whilst the reformers represent the woman who would seek to terminate a pregnancy as an emotionally weak, unstable (even suicidal) victim of her desperate social circumstances, the conservatives view her as a selfish, irrational child.[7] Such a schema is inevitably a simplification and imposes a unity and coherence which is doubtless lacking, but nonetheless it is useful in understanding and highlighting the kinds of constructions used in the debates.

(a) *Woman as a Minor*

This construction is typically adopted by opponents of abortion (although normally in their accounts the central place would be ceded to the foetus). It represents Woman as a minor in terms of immaturity or underdevelopment with regard to matters of responsi bility, morality, and even to her very femininity or "womanliness".

7 In view of Carol Smart's recent assertion that it is important to analyse how the female legal subject is constituted in classed and raced as well as gendered terms, it would perhaps be productive to view this distinction as one of class — i.e. the poor working class woman fits the model of the unstable and desperate "multi-child mother" who will have to resort to the back streets should legal relief be denied her; the rich, educated middle class (working) woman is open to charge of selfishness for choosing to have a career rather than raise a child. See C. Smart, "Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the 19th Century", in C. Smart, ed., *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (London and New York: Routledge, 1992), 7-32.

Her decision to abort is trivialised and denied rational grounding, being perceived as mere selfishness: she will abort, "according to her wishes or whims,"[8] for example, in order to avoid the inconvenience of having to postpone a holiday. She is immoral for being sexually active for reasons other than procreation; she is irresponsible for not having used contraception, and now for refusing to pay the price for her carelessness; she is unnatural and "unwomanly" because she rejects the natural outcome of sexual intercourse for women: maternity. There is a hint that one day she will come to realise the error of her ways and want children, yet maybe will be unable to have them as a result of the abortion.[9]

Jill Knight plays heavily on the idea of the woman as selfish and irresponsible. She reveals an image of women seeking abortion as selfish, treating "[b]abies ... like bad teeth to be jerked out just because they cause suffering ... simply because it may be inconvenient for a year or so to its mother."[10] She later adds that "[a] mother might want an abortion so that a planned holiday is not postponed or other arrangements interfered with."[11] The ability of the Woman to make a serious decision regarding abortion is trivialised. It is not expected that the Woman will make a careful decision considering all parties, but rather (like a child) she will make a snap decision for her own convenience.

The task of the law is thus perceived essentially as one of responsibilisation: if the Woman seeks to evade the consequences of her carelessness, the law should stand as a barrier. It is often stated that allowing women to take the easy way out encourages them to be irresponsible: "People must be helped to be responsible, not encouraged to be irresponsible ... Does anyone think that the problem of the 15-year-old mother can be solved by taking the easy way out? ... here is the case of a perfectly healthy baby being sacrificed for the mothers convenience ... For goodness sake, let us bring up our daughters with love and care enough not to get pregnant and not let them degenerate into free-for-alls with the sleazy comfort of knowing,

8 Mahon, H.C. Deb. Vol 750, Col. 1356, 1967 (13 July).

9 See for example the comments of Knight, H.C. Deb. Vol. 749, Col. 932, 1967 (29 June); Glover, H.C. Deb. Vol. 749, Col. 971, 1967 (29 June).

10 Knight, H.C. Deb. Vol. 732, Col. 1100, 1966 (22 July).

11 Knight, H.C. Deb. Vol. 749, Col. 926, 1967 (29 June).

'She can always go and have it out.'"[12]

By forcing her to continue with the pregnancy then, the law will seek to ensure that the pregnant woman will be more responsible in the future. As one M.P. comments with regard to whether abortion should be allowed to a fifteen year old girl: "one needs to think twice before one removes all the consequences of folly from people."[13]

The Woman who seeks abortion is also seen as morally immature, and hence undeserving of help. Simon Mahon asks who is to be given priority in terms of treatment: is it the "feckless girl who has an unwanted pregnancy from time to time" or the "decent married woman who is awaiting investigation or treatment for sterility?"[14] The use of this rhetorical trick of opposing the "girl" to the "decent married woman," serves to emphasise that the girl is not only feckless but is also indecent and unworthy of respect.

The Parliamentary debates often reflect an implicit assumption that it is wrong for women to make a distinction between sex and procreation, they should not indulge in sex, if pregnancy is not desired. William Deedes makes these sentiments clear in expressing his concern that: "science and its little pill will enable so-called civilised countries to treat sex more and more as a sport and less and less as a sacrament in love," a divine instrument of procreation.[15] Perhaps the single most telling quotation in this instance is that of David Steel himself, defending a clause which was included in the original wording of the Bill but dropped after debate in Parliament (for reasons that will be discussed later, see section 4(b) below). The clause sought to allow abortion to "a pregnant woman being a defective or becoming pregnant while under the age of 16 or becoming pregnant as a result of rape." He states: "Most honourable Members would agree *that to have a woman continue with a pregnancy which she did not wish to conceive*, or in respect of which she was incapable of expressing her wish to conceive, *is a practice which we deplore*, but the difficulty is to find an acceptable wording which will enable termination to be carried out following sexual offences of this kind but which does not allow an open gate for the pretence of sexual

12 Knight, H.C. Deb. Vol. 732, Col. 1101, 1102-3, 1966 (22 July).

13 Maude, H.C. Deb. Vol. 732, Col. 1121, 1966 (22 July).

14 Mahon, H.C. Deb. Vol. 749, Col. 1046, 1967 (29 June).

15 Deedes, H.C. Deb. Vol. 732, Col. 1092, 1966 (22 July).

offences."[16]

What is startling here is Steel's correlation of "a pregnancy which she did not wish to conceive" with conception following rape. Steel fails to imagine that the vast majority of requests for abortion will be for pregnancies that the woman did not wish to conceive[17] — thus in using this as an argument to justify abortion in cases of rape, he implicitly equates consensual intercourse with desired conception. Wanting sex equals wanting pregnancy and motherhood.

The woman who rejects maternity is seen to reject the very essence of Womanhood. Kevin McNamara provides a strong account of Woman's maternal instinct: "How can a womans capacity to be a mother be measured before she has a child? Fecklessness, a bad background, being a bad manager, these are nothing to do with love, that unidentifiable bond, no matter how strange or difficult the circumstances, which links a mother to her child and makes her cherish it."[18]

This implicit assumption of Woman as mother is further reflected in the consideration of her as having existing responsibilities to children and family, (and an apparent inability to see her outside of this role). Jill Knight informs us that: "if it comes to a choice between the mothers life or the baby's, the mother is very much more important," this is not however, because the woman is more important in her own right, but rather because "[s]he has ties and responsibilities to her husband and other children."[19]

(b) *Woman as a Victim*

The second construction strongly present in the Parliamentary debates is that of Woman as victim. This construction is typically that of the reforming forces, where the Woman and her social situation enjoy a far more central place. Advantage was taken of public sympathy for the situation of women at this time, given the highly restricted access to abortion. Newspapers and books had reported

16 Steel, H.C. Deb. Vol. 730, Col. 1075, 1966 (22 June) — my emphasis.

17 Although, of course, it is possible that a woman might wish to conceive, and subsequently change her mind.

18 McNamara, H.C. Deb. Vol. 732, Col. 1129, 1966 (22 July).

19 Knight, H.C. Deb. Vol. 732, Col. 1104, 1966 (22 July).

horror stories of back-street and self-induced abortions, and as David Steel noted in the debates, in the years preceding the introduction of the Abortion Act, an average of thirty women per year were dying at the hands of criminal abortionists.[20]

The Woman of this construction is not "only on the fringe, but literally, physically inadequate."[21] She is portrayed as distraught, out of her mind with the worry of pregnancy (possibly because she is young and unmarried, but normally because she already has too many children). She is desperate, and should the doctor not be able to help her, who knows what she will stop at (suicide is often discussed).[22] Her husband is either absent or an alcoholic, her housing situation is intolerable. She is at the end of her tether simply trying to hold the whole situation together. As Madeleine Simms, of the Abortion Law Reform Association (ALRA), later wrote: "It was chiefly for the worn out mother of many children with an ill or illiterate or feckless or brutal or drunken or otherwise inadequate husband that we were fighting."[23]

The following letter to Lord Silkin (referred to in the debates) provides a good example of the "type" of Woman envisaged by the reformist forces: "Dear Lord Silkin, I am married to a complete drunk who is out of work more than he is in. I have four children and now at 40 I am pregnant again; I was just beginning to get on my feet, and get some of the things we needed. I've been working for the last three years, and cannot bear the thought of that terrible struggle to make ends meet again. I've tried all other methods that I've been told about; without success, so as a last resort I appeal to you — please help me if you possibly can."[24]

Lord Silkin himself comments, in presenting the Bill for its second reading that: "the vast majority of women who are concerned with this are not, as I might have expected originally, single women, but married women, of an age approaching forty or more, with a number of children, who have become pregnant again, very

20 Steel, H.C. Deb. Vol. 750, Col. 1350, 1967 (13 July).

21 V. Greenwood and J. Young, *Abortion in Demand* (London: Pluto, 1976), 76.

22 See, for example, Strange, H.L. Deb. Vol. 274, Col. 1235, 1966 (23 May).

23 *Supra* n.21, at 81.

24 *Ibid.* at 80.

often unexpectedly, and who for one reason or another find themselves unable to cope with an additional child at that age ... [T]he kind of person that I really want to cater for [is] the prospective mother who really is unable to cope with having a child, or another child, whether she has too many already or whether, for physical or other reasons she cannot cope."[25]

The same kind of image is also drawn in the House of Commons, where one M.P. speaks of "the mothers with large families and the burdens of large families very often with low incomes."[26] Another M.P. describes the illegal abortions he knows of: "I have represented abortionists, both medical and lay. I have, therefore, met the 30s. abortion with Higginson's syringe and a soapy solution undertaken in a kitchen by a grey-faced woman on a *distracted multi-child mother, often the wife of a drunken husband.* I have also come across the more expensive back- bedroom abortion by the hasty medical man whose patient returns to a distant town, *there to lie in terror and blood and without medical attention.*"[27]

Even Bernard Braine, a vocal opponent of the Bill accepts the image of the Woman presented by the reformers: "The hope of the sponsors of the Bill is to change the law that many abortions which take place at the moment illegally either in the back streets or, *self-induced by some poor unfortunate woman, driven to desperation* — shall be brought into the framework of legality."[28]

The Woman is portrayed as someone who is not completely in control of her actions, who will be driven to madness if relief is denied to her. David Owen states that: "[s]uch a woman is in total misery, and could be precipitated into a depression deep and lasting. What happens to that woman when she gets depressed? She is incapable of looking after those children so she retires into a shell of herself and loses all feeling, all her drive and affection."[29] A more extreme example is given by Lena Jeger, who speaks of the case of an "honest young woman" with five children, recently deserted by her husband, who was refused an abortion because "she did not seem

25 Silkin, H.L. Deb. Vol. 274, Col. 578, 579, 1966 (10 May).

26 Dunwoody, H.C. Deb. Vol. 732, Col. 1096, 1966 (22 July).

27 Lyons, H.C. Deb. Vol. 732, Col. 1089, 1966 (22 July) — my emphasis.

28 Braine, H.C. Deb. Vol. 747, Col. 496, 1967 (2 June) — my emphasis.

29 Owen, H.C. Deb. Vol. 732, Col. 1115, 1966 (22 July).

quite depressed enough." The woman was forced to continue the pregnancy, and her depression following the birth of her sixth baby was so extreme, that she killed the baby by throwing it on the floor. The woman was now in Holloway prison, the children in care.[30] Lord Strange notes that "nearly every woman in this condition [of unwanted pregnancy] would be in a state bordering on suicide."[31]

The woman's irrationality is sometimes conceptually linked to her pregnant condition, as David Owen states, for example: "[t]he reproductive cycle of women is intimately linked with her psyche."[32] This plays on notions of women as dominated by their biology, as existing through their ovaries.[33] This image of the desperate woman is emphasized by contrasting it with the cool, impassive figure of the doctor (see section 3 below).

The idea that maternity is the female norm is exploited rather than challenged by the reformists. Madeleine Simms argued that it was precisely the woman with a fully developed "maternal instinct" who might require an abortion, pointing out however that most women wished to have not more than two or three children, and they were appalled if they found they were having more children than they believed they could adequately care for. Should they accidentally become pregnant, she argued, they would then seek an abortion because of their feelings of responsibility to their husband and family, and because of their maternal instinct towards their existing children."[34] In the House of Lords, Joan Vickers sums up sentiments which are often expressed or implicit in statements of other M.P.s when she notes that: "I think that most women desire motherhood. It is natural for a woman to want to have a child ... It is only in extreme cases that a woman wants to terminate her pregnancy."[35]

In defending the need for a social clause (to allow abortion where the woman's social circumstances are deemed inadequate) within

30 Jeger, H.C. Deb. Vol. 749, Col. 977-8, 1967 (29 June).

31 Strange, H.L. Deb. Vol. 277, Col. 1235, 1966 (23 October).

32 Owen, H.C. Deb. Vol. 732, Col. 1113, 1966 (22 July).

33 The phrase belongs to Victor Jozé (1985) cited in T. Laqueur, *Making Sex: Body and Gender From the Greeks to Freud* (Cambridge, Massachussetts and London: Harvard University Press, 1990), 149.

34 *Supra* n.21, at 81.

35 Vickers, H.L. Deb. Vol. 276, Col. 1108, 1966 (22 July).

the Act, Roy Jenkins argued that without the presence of such a clause "many women who are far from anxious to escape the responsibilities of motherhood, but rather wish to discharge their existing ones more effectively, would be denied relief."[36] Edward Dunwoody argues, in similar vein, that in "many cases where we have over-large families the mother is so burdened down physically and emotionally with the continual bearing of children that it becomes quite impossible for her to fulfil *her real function, her worthwhile function as a mother*, of holding together the family unit, so that all too often the family breaks apart, and it is for this reason that we have all too many problem families in many parts of the country."[37]

It is also argued that women should be allowed to abort handicapped foetuses, because the woman who is forced to give birth to a handicapped child will seldom allow herself to become pregnant again.[38] This implicitly asserts that the role of the law must be to protect and entrench motherhood.

3. *The Construction of the Doctor within the Debates*

A very clear construction of the typical doctor also appears within the debates, in strong contrast to the figure of the Woman. The doctor is a male figure, always referred to as "he." Doctors are referred to as "medical men", "professional medical gentlemen" and "professional men." William Deedes notes that "the medical profession comprises a great diversity of men" and Jill Knight says that "the GP is a skilled man."[39] The doctor is perceived as the epitome of maturity, common sense,[40] responsibility and professionalism. He

36 Jenkins, H.C. Deb. Vol. 732, Col. 1144, 1966 (22 July).

37 Dunwoody, H.C. Deb. Vol. 732, Col. 1098, 1966 (22 July) — my emphasis.

38 Winstanley, H.C. Deb. Vol. 749, Col. 1059, 1967 (29 July).

39 Knight, H.C. Deb. Vol. 749, Col. 931, 1967 (29 June); Jenkin, H.C. Deb. Vol. 749, Col. 967, 1967 (29 June); Hobson, H.C. Deb. Vol. 747, Col. 531, 1967 (2 June); Hogg, H.C. Deb. Vol. 747, Col. 946, 1967 (2 June); Deedes, H.C. Deb. Vol. 732, Col. 1092, 1966 (22 July); Knight, H.C. Deb. Vol. 747, Col. 482, 1967 (2 June).

40 Steel, H.C. Deb. Vol. 747, Col. 463, 1967 (2 June).

is a "highly skilled and dedicated",[41] "sensitive, sympathetic"[42] member of a "high and proud profession",[43] which acts "with its own ethical and medical standards"[44] displaying "skill, judgment and knowledge."[45] Peter Mahon, M.P. reminds us that "it would be as well if we applauded the work of some of these men [gynaecologists] to keep our homes and families and country right."[46]

In presenting the Bill at its Second Reading, David Steel went so far to say that he felt that given mere contact with her doctor and the ability to discuss her pregnancy with him, the woman would "in some way be reassured and feel that she has been offered some guidance, and no abortion will take place at all."[47] David Owen echoes this sentiment later in the debates, noting that "[i]f we allow abortion to become lawful under certain conditions, a woman will go to her doctor and discuss with him the problems which arise ... he may well be able to offer that support which is necessary for her to continue to full term and successfully to have a child."[48]

4. *The Construction of Woman and its Effect in Law*

David Steel asserted that the Abortion Act (at the time the Medical Termination of Pregnancy Bill) is what a "reasonable man would regard as a reasonable statement of the law."[49] The Act is often depicted as a compromise between two competing sets of rights: the right to life of the foetus versus the right to choose (right of self-determination) of the woman. I would argue that this is a fictitious claim for if the law serves to protect and entrench any rights it is those of the doctor.[50] If the law has achieved any sort of compro-

41 Mahon, H.C. Deb. Vol. 750, Col. 1352, 1967 (13 July).
42 Raglan, H.L. Deb. Vol. 274, Col. 591, 1966 (10 May).
43 Lyons, H.C. Deb. Vol. 732, Col. 1090, 1966 (22 July).
44 Steel, H.C. Deb. Vol. 747, Col. 464, 1967 (2 June).
45 Hobson, H.C. Deb. Vol.747, Col. 531, 1967 (2 June).
46 Mahon, H.C. Deb. Vol. 747, Col. 501, 1967 (2 June).
47 Steel, H.C. Deb. Vol. 732, Col.1076, 1966 (22 July).
48 Owen, H.C. Deb. Vol. 732, Col. 1116, 1966 (22 July).
49 Steel, H.C. Deb. Vol. 750, Col. 1346, 1967 (13 July).
50 W. Fyfe, "Abortion Acts: 1803-1967", in S. Franklin, C. Lury and J. Stacey, eds., *Off-Centre: Feminism and Cultural Studies* (London:

mise it is between the competing constructions of Woman described above. In this section, I aim to show how law has incorporated the above constructions of Woman in working with certain assumptions about (a) women's maternal role and (b) the essential irresponsibility and (c) sexual immorality of the sort of Woman who would seek to terminate a pregnancy.

(a) *An Assumption of Maternity as the Normal Role for Woman*

The assumption of maternity as the female norm is reflected both in terms of the very structure of the law and in specific provisions which allow abortion in cases where the continuance of a pregnancy would involve injury to the health of any existing children of the woman's family, and (less obviously) in case of foetal handicap.

The law regarding abortion functions in terms of a blanket ban (Offences Against the Person Act, 1861, s.58) which renders abortion illegal. The Abortion (Amendment) Act, 1967, offers a defence against this law where two doctors deem that the circumstances of the individual woman fall within certain general categories which are laid out within section 1 of the Act. The decision to abort is thus never seen as an intrinsically acceptable one, the possibility of which any woman could face at some time in her life. Rather, it is an option which may be justified only in certain cases by the individual circumstances (or inadequacies) of individual women, with the approval of two doctors. Conceptually then, abortion stands as the exception to the norm of maternity. No woman can reject motherhood: the only women who are allowed to terminate are those who can do so without rejecting maternity/familial norms per se i.e. those who have reasons to reject this one particular pregnancy without rejecting motherhood as their destiny in general (they are carrying the wrong sort of foetus, they have obligations to meet to existing children, their living conditions are at present inadequate for a child, this particular pregnancy was thrust upon them through rape or incest, and could thus be psychologically damaging).

Harper Collins Academic, 1991), 160-174, at 165; M. Berer, "Whatever Happened to a Woman's Right to Choose?", *Feminist Review* 29 (Spring 1988), 24-37; L. Clarke, "Abortion: a Rights Issue?", in R. Lee and D. Morgan, eds., *Birthrights: Law and Ethics at the Beginning of Life* (London and New York: Routledge; 1990), 155-170.

The woman's role as mother is again emphasised where s1(1)(a) of the Abortion Act allows abortion where the continuance of a pregnancy "would involve ... injury to the physical or mental health of ... any existing children of her family." The woman is allowed to reject pregnancy in order to fulfil her existing responsibility as a mother more effectively. Here again, she is seen to reject one particular pregnancy, rather than motherhood itself. Indeed, she may reject this particular pregnancy in order to be a better mother to those children already in her family.

Section 1(1)(b) of the Act provides that abortion can be allowed where "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." Whilst clearly displaying eugenicist considerations,[51] this clause can also be interpreted with regard to the status of the woman. It was justified in part on the grounds that to force a woman to carry an abnormal child to term will discourage her from future pregnancy,[52] and, as Dr Winstanley points out that "[i]n every case the duty of the medical practicioners should be, wherever possible to encourage aid and support the mother towards term with the pregnancy."[53] Given that the handicapped baby or child is not seen as being as desirable as a "normal" one (and does not feature in the romanticized family ideal),[54] the woman can reject this preg-

51 Much of the debate in Parliament revolves around the number of healthy foetuses which must be sacrificed in order to pick out damaged ones. This appears to give official sanction to the notion that the lives of the handicapped are of less value than the able-bodied. For example, Peter Mahon, M.P. for Preston South: "It is argued that if a mother has a particular disease in pregnancy ... there is a chance that her child will be deformed in some way. But *the real tragedy would be that a large number of perfectly normal unmaimed human lives are to be sacrificed for the sake of one who would be born with some physical deformity.* What kind of morality is that?" — H.C. Deb. Vol. 750, Col. 1358, 1967 (13 July). See also Galperin: "Surely it would be more reasonable to have the odd malformed child than to take the risk of killing a normal foetus." — H.C. Deb. Vol. 749, Col. 1065, 1967 (29 June). For a strong criticism by a disabled feminist of the provision of abortion in case of handicap, see J. Morris, "Abortion: Whose Right to Choose?", *Spare Rib* (October 1991), 16-18.

52 Winstanley, H.C. Deb. Vol. 749, Col. 1059, 1967 (29 June).

53 Winstanley, H.C. Deb. Vol. 749, Col. 1055, 1967 (29 June).

54 As Dr. Winstanley says of the woman who has a higher than normal

nancy without rejecting the whole institution of motherhood itself.

(b) *Female Irresponsibility*

The assertion that many laws assume women to be irresponsible or irrational is a recurrent one within feminist writing.[55] This construction of Woman is clearly reflected in the text of the 1967 Act. The Woman is seen as irresponsible in that she is deemed incapable of taking for herself this important decision of whether to terminate a pregnancy.

Section 1(1) of the Act provides that "[s]ubject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practicioner if two registered medical practicioners are of the opinion, formed in good faith ..." (the section goes on to lay out the necessary contraindications).

The Woman of the Abortion Act is clearly treated as someone who cannot take decisions for herself, rather responsibility is handed over to the reassuringly mature and responsible (male) figure of the doctor. The legislation assumes that the doctor is far better equipped to judge what is best for the woman, even though he may never have met her before, and have no real knowledge of, nor interest in, her concrete situation. This construction is perhaps an inevitable result of the constructions of Woman used within the debates. If Woman is distraught and irrational, then she is an unsuitable party to take such an important decision. Equally, if she is selfish and self-centred, intellectually and morally immature, portrayed as only considering her own needs, and giving no weight to other factors (such as the foetus) in her snap decisions, she is again incapable of taking such an important decision. She is thus in need of the normalising control of the doctor to impose either calm and rationality or morality and consideration of others.

The power of doctors in the field of abortion is very often justi-

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chance of giving birth to a handicapped baby: "this mother does not know whether she will get a baby which will make her very happy or one which will make her very sad." Winstanley, H.C. Deb. Vol. 749, Col. 1057, 1967 (29 June).

55 See for example S. Atkins and B. Hoggett, *Women and the Law* (Oxford: Blackwell, 1984).

fied by the argument that abortion is essentially a medical matter. However, the actual decision whether or not to abort is not normally one that requires expert medical advice. Further, the doctors' decision-making power is not contained within a narrow, limited medical field. In judging whether or not abortion could be detrimental to the mental or physical health of the pregnant woman or existing children of her family, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment,"[56] thus her whole lifestyle, home and relationships are opened up to his scrutiny, so that he may judge whether or not she is a deserving case for relief.

It is also worth mentioning the case of rape here, by way of explaining its absence in the English statute. Arguments for allowing abortion in the case of rape were dismissed for two main reasons. The first was that the woman would already be granted abortion under the law as it stood.[57] However a second reason which received much discussion, and stood as the final reason for not codifying the jurisprudential position within statute was that the woman cannot be trusted to tell the truth about whether she has been raped. One M.P. notes that: "[w]e also know that a great many charges of rape are made which are quite unfounded and which are made for quite different motives."[58] If verification by doctors had been possible, however, this would have provided grounds for rape to be included in the text of the Act: "if there were a way in which doctors could decide whether or not a lady had been raped, I would be content to allow the provision on rape to go in."[59]

56 Abortion Act, 1967, section 1(2),

57 I.e. under section 1(1)(a) of the Abortion Act, 1967. Continuance of the pregnancy would involve risk of injury to her mental health. Indeed, in practice, since R. v. *Bourne* [1938] 3 All E.R. 615, abortion had been permitted in cases of rape.

58 Wells, H.C. Deb. Vol. 732, Col. 1086, 1966 (22 July).

59 Hobson, H.C. Deb. Vol. 732, Col. 1138, 1966 (22 July).

(c) *Female Sexuality*

The Abortion Act contains a strong moral element, distinguishing as it does between categories of deserving and undeserving "victims" of unwanted pregnancy. The former are allowed abortions, the latter denied them. This distinction works in part with regard to whether or not intercourse was wanted (hence the issue of rape), and whether the woman has a legitimate reason for changing her mind post conception — i.e. she did want to get pregnant, but now wants to reject this particular pregnancy (because of handicap).

Although, unlike most other European statutes, the English Abortion Act does not explicitly foresee abortion for cases of pregnancy resulting from rape (for the reasons noted above), there were lengthy discussions of this matter in Parliament which are informative with regard to constructions of Woman's sexuality. There was practically unanimous agreement that women should be allowed abortion in case of rape, although the clause which allowed it within the statute was deleted for the reason that it "is already enshrined in the Bill as amended."[60]

I have argued that the provision with regard to handicap[61] is strongly influenced both by eugenic considerations, and the construction of Woman as mother. This clause also bears some relation to constructions of women's sexuality, as it serves to provide a "get-out clause" for good women who want to become pregnant (and thus do not commit the sin of making the fatal distinction between sex and procreation), but through no fault of their own happen to be carrying a foetus "of the wrong sort".

5. *Conclusion — Political Implications*

I have argued that the law creates its own fiction of the Woman it seeks to regulate through the partial legalization of abortion in the 1967 Act. The statute is predicated upon certain assumptions of maternity as the female norm, female irresponsibility and emotional instability; it also carries implicit assumptions about appropriate female sexual morality.

60 Knight, H.C. Deb. Vol. 742, Col. 322, 1967 (1 March).

61 Section 1(1)(b), Abortion Act, 1967.

What clues might this initially give us for how feminist strategies aimed at the law can be made more effective in the future? There are two points which I need initially to clarify. Firstly, legal reform need not be the inevitable focal point of every feminist campaign, indeed perhaps feminism has been too much seduced by what Smart has described as the "siren call of the law."[62] However, with regard to abortion, it is impossible to ignore the power exercised by and through the law or to bypass the necessity of engagement with law, even if this is just one focus of political activity amongst others. Secondly, I do not wish to dismiss or denigrate those political strategies which in 1966-7 succeeded in providing limited access to legal abortion. The partial legalization of abortion has undoubtedly made a very real difference to the concrete possibilities open to many women. However, it is important also to realise the limitations of the 1967 Act, and to assess how it may best be challenged in the future.

I have argued that the law operates through constructing its own image of the legal subject which it seeks to regulate. The recognition that law operates in this way has certain implications for how we seek to address it. Notably, we have to take into account of this subject when constructing challenges to law. This has two implications. Firstly, it means that feminist challenges to law must be more aware of the way that they construct their subject. To take the example of the reformist strategies in 1966-7, to utilize the powerful image of the the "worn out mother of many children with an ill or illiterate or feckless or brutal or drunken or other wise inadequate husband"[63] may have immediate political purchase at the expense of bringing its own, serious long term limitations (reinforcement of the perceived need for normalizing medical control over women in this situation). Secondly, it means that the most successful short term strategies may be those which come closest to constructing the issue — and the legal subject —in the terms which are closest to the law's own, as this subject is most readily open to assimilation within the law.

Carol Smart has expressed this problem in the following terms:

62 C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 160.

63 Simms, *supra* n.21, at 81.

"Law hears what we have to say about women as long as we are prepared to occupy the same epistemological and ontological space as law. In other words as long as we translate the vast and differentiated array of women into the more easily knowable Woman we can gain a purchase. We may sometimes go even further and collude with the Woman that legal discourse has constituted. But we do this at the expense of silencing and alienating many actual women for whom we do not speak."[64]

The tension between Woman and women upon which Smart draws is one which has excited a great deal of attention in recent feminist writings. It starts from the recognition that feminism has often sought to create its own "essential woman" — a unitary, generic woman[65] which seeks to offer one definitive account of women's experience of the world, but only at the expense of ignoring the voices of many real, concrete women. However, it is important to draw a distinction between the way that feminism seeks within itself to theorize issues of women's oppression, and the way that it seeks to develop concrete strategies aimed at achieving particular reforms. Feminist theory has been correctly criticized for falsely universalizing from the experience of a relatively select group of women to present one generic Woman. Feminist engagement with specific laws, however, may have no alternative but to do just this (albeit in a much more self-conscious way).

In my view, the tension between Woman and women is always (and inevitably) present in feminist engagement with the law. This is not merely because the attraction of constructing a feminist truth of the essential woman in order to challenge law's powerful claim to reality is so tempting. Rather, if it is accepted that (criminal) law always works on the basis of constructing a legal subject (as I feel it does), then to mount any effective challenge to the law we have to construct a different subject: a feminist Woman to challenge the legal Woman. As Smart asserts, this will inevitably silence some women, but it will also give voice to others. The challenge for feminism is to work with an awareness of this tension in a pragmatic way.

64 C. Smart, "Analysing Law: the challenge of feminism and postmodernism", conference paper presented at the conference *Women's Studies in the European Community*, European Culture Centre at the European University Institute, Florence, January, 1991, 10.

65 E.V. Spelman, *Inessential Woman* (Boston: Beacon Press, 1988).

The reform that was achieved in 1967 can thus be evaluated in terms of a trade-off between Woman and women. In 1992, we are still in a position of having to make the same kind of trade off, but under somewhat different circumstances.[66] With regard to abortion law, the aim must be to construct one feminist Woman who can best serve the purposes of the array of concrete women who stand behind her. Given the circumstances, I would suggest the need to construct an image of the Woman as rational, self-determining, responsible and mature; as the person best placed to consider the needs of herself and the foetus, and to make the correct decision with regard of whether or not to abort. This should form the basis for demanding a model of law which leaves the decision of whether or not to abort to the individual woman and therefore leaves the maximum amount of space for women's diversity. The feminist Woman, then, will seek to leave maximum space to real and concrete women.

Some of the possible reforms which could ground themselves on this construction of Woman were suggested in the 1990 Parliamentary debates on abortion, conducted within the ambit of the Human Fertilization and Embryology Bill. The debates are interesting for the way that pro-choice advocates in the Commons combine traditional images of the Woman seeking abortion (as described above) with much more positive images. Teresa Gorman, for example, argues that in "supposedly a liberal society ... we should accord to the women ... the maturity and ability to make decisions about such matters for themselves."[67] Another MP asserts that the women of this country "are perfectly capable of exercising their consciences over what they do with their bodies."[68]

Once the Woman of abortion legislation is recognised as a creation (or artefact) of the law, then, she becomes the site of possible political struggle. The task facing feminism is to work within the tension between Woman and women to construct a meaning in the interests of women, that is, a meaning which will serve as a basis for empowering, rather that disempowering women.

66 I have in mind here changes in attitudes towards abortion and women's role in society, the ever increasing body of reproductive technologies, the development of RU486 etc.

67 Gorman, H.C. Deb. Vol. 171, Col. 233, 1990 (24 April).

68 Primarolo, H.C. Deb. Vol. 171, Col. 246, 1990 (24 April).