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FETAL PROTECTION LAWS AND THE "PERSONHOOD" PROBLEM: TOWARD A RELATIONAL THEORY OF FETAL LIFE AND REPRODUCTIVE RESPONSIBILITY

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Fetal Protection Laws (FPLs) are laws that define and provide punishments for any number of crimes, including homicide, committed "against a fetus."[1] Previous literature has suggested that FPLs need to be explicit about who the intended target of this legislation is.[2] Specifically, comments concerned about the use of FPLs against pregnant women in relation to their own pregnancies suggested that states include language in their FPLs that make it clear that the law ought not be applied to women for harm to their own fetuses. Indeed, some states like California have taken measures to curtail the application of FPLs to protect women from prosecution for the injury or death of their own fetus.[3] However, in recent years, despite these explicit constraints, cases have emerged in California that do just this: prosecute women for harm to their own fetus.[4] So why, if

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[1] *See infra* Part II.

[2] *See, e.g.*, Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 783 (2014); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438 (1991).

[3] *See, e.g.*, CAL. PENAL CODE § 187(b) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

[4] People v. Perez, No. F077851, 2019 WL 1349709 at *2 (Cal. Ct. App. Mar. 26, 2019); [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker at 1, 5–6, Becker v. Super. Ct. of Kings Cnty., No. F081341 (Cal. Ct. App. Aug. 7, 2020).

states are clearly exempting pregnant women from prosecution for their own injured fetuses, are such prosecutions still being undertaken?

This Comment suggests that the problem lies in the fetal personhood theory now underlying these FPLs. FPLs not only provide protective rights to fetuses, but in doing so, define the fetus as a legal person. Under this framework, it becomes impossible not to prosecute the mother for harm because she and the fetus are separate legal persons with separate legal rights and protections. However, there is an alternative.

Drawing from feminist care theory and distributive justice, this Comment proposes that rather than consider the fetus and the mother as separate legal entities, the fetus and the mother should be seen as one fetal-maternal entity with rights flowing through the mother. This Comment refers to this theory as the Fetal Maternal Identity Theory (FMIT). Rather than seeing the mother and fetus as independent entities, FMIT correctly recognizes the unique relationality between the fetus and its mother and reconceives of rights as incumbent upon this relationship. Because the fetus is necessarily dependent upon the mother, all of its rights, like its identity and very existence, are afforded to it through and in relation to its mother.

This theory solves several problems. First, it helps to define the problem facing states that seek not to prosecute women for harm to their fetuses but find it impossible to do so. Second, it provides the foundation for a new theory of relationality that better appreciates the complex condition of pregnancy and protects women from harm and unjust prosecution. Ultimately, beyond its function, FMIT better apprehends the conditions of pregnancy and provides a well-grounded framework for redistributing responsibility.

INTRODUCTION

Personhood is a foundational element of the American legal system.[5] To be imbued with rights or encumbered with duties, an entity must first be identified as a "legal person."[6] To this end, much legal and philosophical work has gone into making sense of exactly what a "legal person" is.[7] One significant question in this debate relates to the legal status of non-human persons. Animals are afforded some degree of legal rights, but are they persons? Since *Santa Clara County v. Southern Pacific Railroad Co.*[8] there have been serious questions about the legal personhood of corporations.[9] But

[5] *See, e.g.*, U.S. CONST. amend. XIV, § 1. For example, notice the distinction made between protections afforded to "person" and "citizen": "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

[6] *See* Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928).

[7] For a sampling of contemporary legal and philosophical work on the issue of "legal personhood," see, for example, KIM ATKINS, NARRATIVE IDENTITY AND MORAL IDENTITY: A PRACTICAL PERSPECTIVE (2008); LYNN RUDDER BAKER, PERSONS AND BODIES: A CONSTITUTION VIEW (2000); THE MORAL STATUS OF PERSONS: PERSPECTIVES ON BIOETHICS (Gerhold K. Becker ed., 2000); DAVID DEGRAZIA, HUMAN IDENTITY AND BIOETHICS (2005); THE OXFORD HANDBOOK OF THE SELF (Shaun Gallagher ed., 2011); VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD (2019).

[8] 118 U.S. 394, 404 (1886).

[9] For a catalogue of historical and legal debates concerning corporate personhood and the formation of corporate persons, see, for example, Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 785 (2013) (cataloguing the debate over corporate personhood, offering a functionalist analysis of existing literature on the question of corporate personhood, and concluding by offering a historical evaluation of the corporate form specifically related to how and why corporations have formed corporate personas).

one status in question—that is the subject of some of the most intense debate—is the legal status of fetuses. Are fetuses legal persons? Do fetuses have rights?

Some states have chosen to answer this question explicitly by granting fetuses rights through Fetal Protection Laws (FPLs).[10] These laws variously grant fetuses rights,[11] define fetuses as persons,[12] and provide extra protections to pregnant women unavailable to non-pregnant persons.[13] Beyond merely granting fetuses legal rights, FPLs have other secondary consequences on the rights of the women.[14] General Fetal Protection Laws (GFPLs)[15] have, by granting fetuses separate rights, placed women in an adversarial relationship with their fetus.[16] This has meant, in some cases, that women have been held criminally responsible for injury or death caused to their own fetuses.[17]

Some FPLs already have exemptions that are meant to preclude women from prosecution of harm to their own fetuses.[18] However, even for laws that explicitly state that they should not be used to the detriment of pregnant women, such as California's FPLs,[19] recent cases have been brought against

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[10] *See infra* Part II.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Goodwin recounts that "[s]tates and their lawmakers invoke a range of chilling arguments to support the establishment of fetal rights and impose limits on women's reproductive rights." Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 L. & ETHICS HUM. RTS. 189, 194 (2017). One such argument is that if the fetus is a person, its life must be protected at all costs. *Id.* at 194, 197–98. The value of that human life supersedes the burden placed on a woman to bear that life, even if she were the victim of incest or rape. *Id.* at 197–98; *see also* Lawrence J. Nelson, Brian P. Buggy & Carol J. Weil, *Forced Medical Treatment of Pregnant Women: Compelling Each to Live As Seems Good to the Rest,* 37 HASTINGS L.J. 703, 704 (1986); *Can a Corpse Give Birth?*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-exclusion-law.html [https://perma.cc/NR39-KY37].

[15] *See infra* Part II.

[16] Goodwin, *supra* note 14, at 208; Joyce E. McConnell, *Relational and Liberal Feminism: The "Ethic of Care," Fetal Personhood and Autonomy*, 99 W. VA. L. REV. 291, 307 (1996); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1333 (1990).

[17] *See, e.g.*, People v. Perez, No. F077851, 2019 WL 1349709 at *2 (Cal. Ct. App. Mar. 26, 2019); [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker, *supra* note 4, at 1, 5–6; Victoria Browne, *The Politics of Miscarriage*, 2.03 RADICAL PHIL. 61, 61–62 (2018).

[18] *See, e.g.*, CAL. PENAL CODE § 187(b) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

[19] *Id.*

women for harm caused to their own fetuses.[20] The emergence of these new cases in states that have enacted specific language protecting pregnant women is of great importance and immediate concern. How is it that states that have explicitly attempted to alleviate the dangers caused by FPLs are still using FPLs to target and punish pregnant women for harm to their fetuses? This Comment proposes that the impossibility of overcoming the personhood problem in FPLs is the reason that even the best-intentioned states cannot avoid unjustly prosecuting women for their own pregnancies. FPLs that attach rights to fetuses as separate persons create the inescapable problem of legally protecting those persons against harm with retributive justice.[21] Once an entity is afforded independent rights and defined as a person, it becomes nearly impossible for the state not to punish those who harm it, through whatever means and regardless of their relationship. Language that specifies the identity and rights of the fetus might help. But in reality, exempting women from this sort of prosecution is not beyond what state laws largely already provide in their own language.

A. THEORETICAL INTERVENTION: RELATIONSHIPS, RIGHTS, AND RESPONSIBILITIES

One way out of this quagmire would be to declare fetuses to be non-human and non-persons. However, this engages the state in ethical and existential questions that are not only inappropriate, but in which the state has no expertise.[22] Another way of approaching this problem is by circumventing the "human" and "person" discussion and engaging instead in a conversation about relationships and responsibilities. This Comment does just that.

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[20] *E.g.*, People v. Perez, No. F077851, 2019 WL 1349709 at *2 (Cal. Ct. App. Mar. 26, 2019); [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker, *supra* note 4, at 1, 5–6. In both cases, the women were charged with "feticide" by "harming" their fetus due to drug use during pregnancy. These diagnoses are contentious on their own as the cause of death of a fetus is often unclear. But moreover, charging women for "harm" caused to their own fetuses through the use of illicit substances flies in the face of FPLs' purposes and fails to protect women from serious illnesses and from the law.

[21] Retributive justice is a theory of punishment that holds that, when an individual is convicted of having committed a crime, justice is best served by imposing suffering on the individual proportional to the harm they caused. In essence, the suffering of the offender is the main object of retributive punishment, as opposed to rehabilitation or simple detainment. ANTHONY DUFF & STUART P. GREEN, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 1, 433–61 (2011)

[22] Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 321 (2017); Steven L. Skahn, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U. L. REV. 487, 523 (1980).

Feminist theories of identity have long purported that women exist in a network of relationships rather than as atomistic, autonomous individuals.[23] The fetal-maternal relationship, they suggest, is the epitome of this sort of relational identity because of its uniquely necessary, rather than discretionary, relationality.[24] By drawing from feminist theories of identity, this Comment suggests a theory of identity that circumvents the personhood question and instead focuses on the provision of rights as part of a relational system.

Rights should be afforded to individuals in relation to one another. Because fetuses have a necessary and constitutive relationship with the women that bear them, fetuses should only be afforded rights through the rights afforded to women, not as an independent entity.[25] A fetus is necessarily reliant on a woman for sustenance and existence. In essence, this means that, for legal purposes, the fetus is identical to the woman.[26] But because the woman is not in relationship with the fetus or dependent upon it in the same way as the fetus is her, the woman is not identical to her fetus.[27] Thus, this theory would conceive of the fetus and its mother as a new maternal-fetal person that bears rights through reference to the woman exclusively.

In this sense, a fetus cannot claim independent rights because it does not function independently, only at the support and discretion of the woman who bears it. Rights essentially "flow through" the woman to her fetus, and fetuses are only afforded protection to the extent that the woman is protected because of this unique relationship of necessary dependence.[28]

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[23] CAROL GILLIGAN, IN A DIFFERENT VOICE 1, 24–64 (1982); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 1, 65–69 (1984); GRACE CLEMENT, CARE, AUTONOMY AND JUSTICE: FEMINISM AND THE ETHIC OF CARE 1, 22–35 (1996).

[24] IRIS MARION YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 163 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988); Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women,* 81 IND. L.J. 667, 705 (2006).

[25] This construction of rights mirrors the thinking found in Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 48–49 (1971). In this piece, Jarvis Thomson outlines the "Famous Violinist Problem" explaining the fundamental and incomparable relationship that fetuses have with the women who bear them. *Id.* Because of this relationship, the fetus does not have a separate claim to rights but is subject to the will of the person supporting them and supplying them with life. *Id.*

[26] KURKI, *supra* note 7, at 147–48.

[27] *Id.*

[28] *See* sources cited *supra* note 27.

In this system, then, responsibility, like rights, would be distributed through a network of relations.[29] Rather than holding a woman exclusively responsible for the care of the fetus, and implicitly herself, this theory of relational identity and responsibility would insist that tertiary actors in relation to the woman be held responsible for ensuring her health and safety in a network of care.[30]

Such a system would solve a number of problems. Women and their fetuses would no longer be antagonists because the fetus would not be a cognizable separate legal entity that could claim rights separately from and potentially against its mother. Women could not be held liable for harm caused to their fetuses because, on one hand, the fetus being identical to the mother would be merely caring for or harming herself by caring for or harming her fetus, and on the other, with responsibility made diffuse, there would now exist a network of individuals and systems in relationship who would be responsible for caring for the woman and, by extension, her fetus.

Ultimately, this Comment does two things: it proposes a novel, alternative theory to current fetal personhood theories that is based on relationships rather than autonomous rights, and it applies this new theory to contemporary problems in the policing of pregnancy to demonstrate how a novel theory of personhood would better apprehend the reality of pregnancy and protect pregnant women.

B. ARGUMENT AND STRUCTURE

This Comment begins by grounding the discussion of fetal personhood theory in historical context. Part II moves from the history of fetal personhood to a new theory of identity grounded in relationality. First, this Comment argues that problems caused by attaching rights to fetal persons might be avoided by circumventing the personhood question entirely, focusing instead on relationships. Second, this Comment extends this theory of relationality to explore the imposition of responsibilities as well as the provision of rights. Part III then applies this new relational theory to persistent problems in the policing of pregnancy and explains how this revised version of relational identity and responsibility will solve problems caused by the fetal personhood movement and FPLs. Part IV follows by addressing possible critiques of this theory of relational identity and responsibility.

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[29] Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 22–23 (1996).

[30] *Id.* at 23.

I. THE HISTORY OF PERSONHOOD AND FETAL RIGHTS

The question of life arises most frequently in legislation in cases involving the destruction of a fetus.[31] At early common law, the fetus was not considered alive for somewhere between several days to several months after conception.[32] Even then, a fetus was not considered a human being and the killing of a fetus was not homicide unless the fetus had been "born alive"[33] and established an "independent circulation."[34] Indeed, the court in *Dietrich v. Inhabitants of Northampton* maintained that to consider a fetus as "on the same footing as . . . an existing person" would be illogical because no "quasi *independent* life" could be maintained by a fetus.[35] Ultimately, the consensus was fairly universal that only *independent* life could be recognized by law.[36] More recently, however, both federal and state legislation have recognized and provided legal protections for the fetus. The federal Unborn Victim of Violence Act (UVVA) of 2004 recognizes an embryo or fetus in utero as a legal victim and defines an unborn child as a child in utero, or a "member of the species homo sapiens, at any stage of development, who is carried in the womb."[37]

Following the example of the UVVA, some states passed "Fetal Protection Laws" (FPLs) that added separate causes of action for harmed fetuses, enhanced penalties for harm done to pregnant women, and/or defined

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[31] *See, e.g.*, Carol A. Tauer, *Personhood and Human Embryos and Fetuses*, 10 J. MED. & PHIL. 253, 253 (1985); Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 90 (2000); John Janez Miklavcic & Paul Flaman, *Personhood Status of the Human Zygote, Embryo, Fetus*, 84 LINACRE Q. 130, 130 (2017).

[32] Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 412, 420 (1968).

[33] 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.1(c) (3d ed. 2020); Stanley B. Atkinson, *Life, Birth and Live-Birth*, 17 HARV. L. REV. 589, 589 (1904); Jackson v. Commonwealth, 96 S.W.2d 1014, 1015 (Ky. 1936).

[34] State v. Winthrop, 43 Iowa 519, 520 (1876).

[35] Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 16 (1884) (emphasis added). This case was later abrogated by *Angelini v. OMD Corp.*, 575 N.E.2d 41 (Mass. 1991), which involved injured automobile passengers, and a passenger's child who was nonviable fetus at time of accident who sued driver and restaurants that allegedly served driver alcoholic beverages. *Id.* at 41–42. The court held that, among other things, a child who was conceived before his or her parents suffered nonfatal injuries caused by negligence of defendant and was subsequently born alive was not precluded from recovering for loss of parental consortium. *Id.* at 43–44.

[36] Schroedel, Fiber & Snyder, *supra* note 31, at 90; Miklavcic & Flaman, *supra* note 32, at 130.

[37] 18 U.S.C. § 1841.

a fetus as a human life from the earliest stages of development.[38] The great majority of these provisions apply back to the beginnings of the pregnancy by stating that they cover an unborn child at "any stage of development"[39] or from "fertilization"[40] or "conception."[41] Several other statutes cover only an "unborn quick child,"[42] while only a few refer to a "fetus"[43] or "unborn child"[44] without further definition. In general, though, among these laws there is little daylight between the terms "human" and "fetus." Currently, at least thirty-seven states have fetal homicide laws: Alabama*,[45] Alaska*,[46]

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[38] *See State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. STATE LEGISLATURES (May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx [https://perma.cc/6YSM-22NX].

[39] ALA. CODE § 13A-6-1 (Westlaw through 2021 Reg. Sess.); ALASKA STAT. § 11.81.900 (West, Westlaw through 2021 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 13-1102 (Westlaw through 2021 1st Spec. Sess.); GA. CODE ANN. § 16-5-80 (West, Westlaw through 2021 Reg. Sess.); IND. CODE §§ 35-41-1-1, 35-41-1-3, 35-41-1-4 (West 2021); MD. CODE ANN., CRIM. LAW § 2-103 (West, Westlaw through 2021 1st Spec. Sess.)); NEB. REV. STAT. § 28-389 (LEXIS through 2021 1st Spec. Sess.); N.C. GEN. STAT. § 14-23.1 (LEXIS through Sess. Law 2021-162); S.C. CODE ANN. § 16-3-1083 (Westlaw through 2021 Act No. 116); UTAH CODE ANN. § 76-5-201 (West, Westlaw through 2021 2nd Spec. Sess.)).

[40] KAN. STAT. ANN. § 21-5419 (Westlaw through 2021 Reg. Sess); LA. STAT. ANN. § 14:2 (Westlaw through 2021 Reg. Sess.); OHIO REV. CODE ANN. § 2903.09 (West, Westlaw through File 70 of 134th Gen. Assemb.); 18 PA. CONS. STAT. § 3203 (Westlaw through 2021 Reg. Sess., Act 100); TEX. PENAL CODE ANN. § 1.07 (West, Westlaw through 2021 Legis. Sess.); W. VA. CODE § 61-2-30 (Westlaw through 2021 1st Sess.).

[41] ARK. CODE ANN. § 5-1-102 (West, Westlaw through 2021 Reg. Sess.); KY. REV. STAT. ANN. § 507A.010 (West, Westlaw through 2021 Reg. Sess.); MINN. STAT. ANN. § 609.266 (Westlaw through 2021 1st Spec. Sess.); MISS. CODE ANN. § 97-3-37 (West, Westlaw through 2021 Reg. Sess.); N.D. CENT. CODE § 12.1-17.1-01 (LEXIS through 2021 Spec. Sess.); OKLA. STAT. tit. 21, § 691 (Westlaw through 2021 1st Reg. Sess.).

[42] MICH. COMP. LAWS § 750.322 (Westlaw through 2021 Pub. L. No. 168); NEV. REV. STAT. § 200.210 (Westlaw through Ch. 2 of 33rd Spec. Sess. (2021)); 11 R.I. GEN. LAWS ANN. § 23-5 (LEXIS through Ch. 424 of 2021 Sess.); WASH. REV. CODE ANN. § 9A.32.060 (West, Westlaw through 2021 Reg. Sess.); WIS. STAT. § 940.04 (LEXIS through Act 118 of 2021–22 Legis. Sess.). The R.I. provision goes on to define a "quick child" as an unborn with a heartbeat, brain waves, and development to the point as to be capable of survival.

[43] CAL. PENAL CODE § 187 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.); VA. CODE ANN. § 18.2-32.2 (LEXIS through 2021 Legis. Sess.); IDAHO CODE ANN. §§ 18-4001, 18-4006, 18-4016 (West, Westlaw through 2021 1st Reg. Sess.) Regarding the California law, in *People v. Davis*, 872 P.2d 591, 602 (Cal. 1994), the court concluded that viability was not necessary and that seven to eight weeks of development would suffice.

[44] 720 ILL. COMP. STAT. 5/9-1.2, -2.1, -3.2 (Westlaw through P.A. 102-178 of 2021 Reg. Sess.); KAN. STAT. ANN. § 21-5419 (Westlaw through 2021 Reg. Sess.); LA. STAT. ANN. § 14:2 (Westlaw through 2021 Reg. Sess.); MISS. CODE ANN. § 97-3-37 (LEXIS through 2021 Reg. Sess.); MO. REV. STAT. § 1.205 (LEXIS through 2021 1st Extraordinary Sess.).

[45] ALA. CODE § 13A-6-1 (Westlaw through 2021 Reg. Sess.).

[46] ALASKA STAT. ANN. §§ 11.41.150, 11.81.250, 12.55.035, 12.55.125 (West, Westlaw through 2021 1st Reg. Sess.).

Arizona*,[47] Arkansas*,[48] California,[49] Florida*,[50] Georgia*,[51] Idaho*,[52] Illinois*,[53] Indiana*,[54] Kansas*,[55] Kentucky*,[56] Louisiana*,[57] Maryland,[58] Massachusetts,[59] Michigan*,[60] Minnesota*,[61] Mississippi*,[62] Missouri*,[63] Montana,[64] Nebraska*,[65] Nevada,[66] New Hampshire,[67] North Carolina*,[68] North Dakota*,[69] Ohio*,[70] Oklahoma*,[71] Pennsylvania*,[72] South

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[47] ARIZ. REV. STAT. ANN. §§ 13-1102–1105, 13-701, 13-704, 13-705, 13-751 (Westlaw through 2021 1st Spec. Sess.).

[48] ARK. CODE ANN. §§ 5-1-102(13), 5-10-101–05 (West, Westlaw through 2021 Reg. Sess.).

[49] CAL. PENAL CODE § 187(a) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

[50] FLA. STAT. ANN. § 775.021(5) (West, Westlaw through 2021 1st Reg. Sess.).

[51] GA. CODE ANN. §§ 16-5-80, 40-6-393.1, 52-7-12.3 (West, Westlaw through 2021 Reg. Sess.).

[52] IDAHO CODE ANN. §§ 18-4001, -4006, -4016 (West, Westlaw through 2021 1st Reg. Sess.).

[53] 720 ILL. COMP. STAT. 5/9-1.2, 9-2.1, 9-3.2 (Westlaw through 2021 Reg. Sess.); 720 ILL. COMP. STAT. 5/12-3.1, 12-3.2, 12-4.4 (Westlaw through 2021 Reg. Sess.); 730 ILL. COMP. STAT. § 5/3-6-3 (Westlaw through 2021 Reg. Sess.); 740 ILL. COMP. STAT. 180/2 (Westlaw through 2021 Reg. Sess.).

[54] IND. CODE § 35-50-2-16 (Westlaw through 2021 1st Reg. Sess.).

[55] KAN. STAT. ANN. §§ 21-5401 to 5406, 21-5413, 21-5419 (Westlaw through 2021 Reg. Sess.).

[56] KY. REV. STAT. ANN. §§ 439.3401, 507A.010 (West, Westlaw through 2021 Reg. Sess.).

[57] LA. STAT. ANN. §§ 14:2(7), 2(11), 32.5–32.8 (Westlaw through 2021 Reg. Sess.).

[58] MD. CODE ANN., CRIM. LAW § 2-103 (West, Westlaw through 2021 1st Spec. Sess.).

[59] MASS. GEN LAWS ANN. ch. 90, § 24G (Westlaw through Ch. 14 of 2022 2d Ann. Sess.).

[60] MICH. COMP. LAWS §§ 750.322, .323, .90a (Westlaw through 2021 Pub. L. No. 168).

[61] MINN. STAT. ANN. §§ 609.205, .21, .266 (Westlaw through 2021 1st Spec. Sess.).

[62] MISS. CODE ANN. §§ 11-7-13, 97-3-19, 97-3-37 (LEXIS through 2021 Reg. Sess.).

[63] MO. REV. STAT. § 1.205.2 (LEXIS through 2021 1st Extraordinary Sess.).

[64] MONT. CODE ANN. §§ 45-5-102, 45-5-116 (Westlaw through 2021 Sess.).

[65] NEB. REV. STAT. §§ 28-388–97, 60-6,198 (LEXIS through 2021 1st Spec. Sess.).

[66] NEV. REV. STAT. § 200.210 (Westlaw through Ch. 2 of 33rd Spec. Sess. (2021)).

[67] N.H. REV. STAT. ANN. § 630:1 (Westlaw through 2021 Reg. Sess.).

[68] N.C. GEN. STAT. § 14-45.1 (LEXIS through Sess. Law 2021-162).

[69] N.D. CENT. CODE § 12.1-17.1-01 (LEXIS through 2021 Spec. Sess.).

[70] OHIO REV. CODE ANN. § 2903.01 (West, Westlaw through File 70 of 134th Gen. Assemb.).

[71] OKLA. STAT. tit. 20, § 644 (Westlaw through 2021 1st Reg. Sess.); OKLA. STAT. tit. 21, § 691 (Westlaw through 2021 1st Reg. Sess).

[72] 18 PA. STAT. AND CONS. STAT. ANN. §§ 106, 2601 (West, Westlaw through 2022 Reg. Sess. Act 13); 18 PA. STAT. AND CONS. STAT. ANN. § 1102 (West, Westlaw through 2022 Reg. Sess. Act 13).

Carolina*,[73] South Dakota*,[74] Tennessee*,[75] Texas*,[76] Utah*,[77] Virginia,[78] Washington,[79] West Virginia*,[80] and Wisconsin*,[81] at least twenty-nine of which have fetal homicide laws that apply to the earliest stages of pregnancy.[82] In some states these take the form of General Fetal Protection Laws (GFPLs) that provide separate causes of action for a harmed fetus.[83] In others including Colorado,[84] Connecticut,[85] Delaware,[86] Iowa,[87] Maine,[88] New Mexico,[89] Oregon,[90] and Wyoming[91] these laws take the form of "penalty-enhancement for crimes against pregnant women" and what this Comment will refer to as Punishment Enhancement Laws (PEL).[92]

II. FETAL-MATERNAL IDENTITY AND DISTRIBUTIVE JUSTICE: RELATIONAL THEORIES OF IDENTITY AND CARE

Pregnancy is fundamentally a relational state. The relationship between fetus and its mother is necessarily dependent. Therefore, rather than applying, as prior theories of fetal personhood have, theories of individual, atomistic personhood[93] to fetuses, Part A of this section proposes

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[73] S.C. CODE ANN. §§ 16-3-1083, -20(C)(a) (Westlaw through 2021 Act No. 116).

[74] S.D. CODIFIED LAWS §§ 22-16-1.1, -4 (Westlaw through 2022 Reg. Sess.); S.D. CODIFIED LAWS § 16-41 (Westlaw through 2021 1st Spec. Sess.).

[75] TENN. CODE ANN. § 39-13-107, 13-214 (LEXIS through 2021 3rd Extraordinary Sess.).

[76] TEX. PENAL CODE ANN. § 1.07 (West, Westlaw through 2021 Legis. Sess).

[77] UTAH CODE ANN. § 76-5-201 (West, Westlaw through 2021 2nd Spec. Sess.).

[78] VA. CODE ANN. §§ 18.2-32.2 (LEXIS through 2021 Legis. Sess.).

[79] WASH. REV. CODE ANN. § 9A.32.060 (West, Westlaw through 2021 Reg. Sess.).

[80] W. VA. CODE § 61-2-30 (Westlaw through 2021 1st Sess.).

[81] WIS. STAT. § 940.04(2) (LEXIS through Act 118 of 2021–22 Legis. Sess.).

[82] As indicated by *. *See* "Summary of Statutes and Case Laws," *supra* note 40.

[83] *Id.*

[84] COLO. REV. STAT. §§ 18-1.3-401(13)(a), 1.3-501(6), 1.3-1201 (LEXIS through 2021 Reg. Sess.).

[85] CONN. GEN. STAT. §§ 53a-924-59a, 924-59c, 924-60b, 942-60c, 924-61a (LEXIS through 2021 Reg. Sess.).

[86] DEL. CODE ANN. tit. 11, § 11-5-605, 5-606 (LEXIS through 83 Del. Laws, c. 266)

[87] IOWA CODE § 707.8 (LEXIS through 2021 Reg. Sess.).

[88] ME. REV. STAT. tit. 17-A, § 208-C (LEXIS through 2021 Legis. Sess.).

[89] N.M. STAT. ANN. § 30-3-7 (1996 through 1st Sess. 50th Legis.).

[90] OR. REV. STAT. §§ 163.155, 163.160, 163.185 (LEXIS through 81st Legis. Assemb.).

[91] WYO. STAT. ANN. § 6-2-502 (LEXIS through 2021 Gen & Spec. Sess.).

[92] *See State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, *supra* note 38.

[93] Feminist literature has long regarded the notion of autonomy with suspicion because it disconnects individuals who are inherently interdependent from one another. This idea of

reconceiving of the fetal "person" as a fundamentally relational entity, dependent upon its mother for both identity and rights. Part B of this section will take these concepts and construct a new theory grounded in relationality called the Fetal-Maternal Identity Theory (FMIT).[94] This theory proposes that the relational fetal-maternal person would be granted the rights to be protected against harm rather than any individual identity of the fetus. This part applies FMIT to solve problems of justice caused by FPLs and will conclude by analyzing the broader implications of adopting a relational theory of fetal identity. This Comment argues that relational identity theory will draw attention to the fact that the woman too is in relation to those around her. Thus, responsibility for her and her fetus's health lie not only on her shoulders, but of those around her with whom she is in relation.

A. PREGNANCY, RELATIONALITY, AND CARE

Much of the discussion of legal personhood revolves around "justice" theory concerning individual rights and duties.[95] However, feminist scholars have pointed out that often, justice discourse relies on concepts of rights and autonomy that do not fully account for all experiences, particularly the experiences of pregnant women.[96] Traditional justice-based ethics is

autonomy is, according to these scholars, a characteristic of "masculinist" thinking and ideals. That is, that theories of ethics and law based on assumptions about autonomy as an ideal presuppose the concept of a self-sufficient individual, operating in a vacuum, unaffected by social relationships. Atomistic conceptions of individuals eschew relational and emotional thinking and, according to feminist scholars, strip individuals of their relations and emotions to achieve an "abstract reasoner" liberated from the distortions of feelings and connection. Recently, some feminists have sought to reintegrate autonomy into feminist theory and ethics while still avoiding the pitfalls of atomistic thinking. These scholars use the term "relational autonomy" to refer to feminist reconceptualization of autonomy which are contrasted to notions of autonomy that presuppose atomistic conceptions of the self. *See e.g.*, sources cited *supra* note 23.

[94] *See infra* Part II.B.

[95] In basic terms, justice theory holds that each individual has an equal right to basic liberties, and that they should have equal access to opportunities as other individuals of similar ability. *See*, *e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 79 (Harvard Univ. Press 1971); Ruth Anna Putnam, *Why Not a Feminist Theory of Justice*, *in* MARTHA C. NUSSBAUM & JONATHAN GLOVER, WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 298 (1995); sources cited *supra* note 7.

[96] It should be noted that I will be following the literature in this regard and speaking of pregnant bodies as "female" bodies. However, this is an oversimplification and a gloss that, while convenient and common, ignores the experience of other non-female pregnant persons, especially trans-men, in troubling ways. This Comment certainly does not solve this issue and more work should and must be done to develop a feminist theory of relationality and reproduction that accounts for more than only cis-women. However, despite the acute need for such a theory, this paper will not undertake this project and use the terms available in the discipline as they exist.

exemplified in a tendency to use gender-neutral language in addressing issues that nonetheless affect men and women differently, such as those involving family and reproductive decisions.[97] Therefore, for many feminist ethicists, justice is an inadequate framework to attend to many social issues, especially those that predominantly affect women.[98] With that in mind, this Section will refocus the discussion of personhood away from rights and duties and toward relationships.

Feminist identity theorists have argued that there is a distinctively feminine way of engaging with the world that is substantially different than our present frameworks for understanding rights, responsibilities, and identity.[99] Feminist ethicists suggest an alternative framework for thinking through social, legal, and ethical problems that would be grounded in care.[100] Traditionally, justice frameworks have tended to rely on and reinforce gender differences that contribute to social, legal, and economic disparities, whereas care ethics would demand the elimination of social and economic disparities that arise from gender differences.[101] Moreover, while justice models tend to view individuals atomistically, care models emphasize their relatedness to

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[97] Janice Moulton, *The Myth of the Neutral 'Man'*, *in* MARY VETTERLING-BRAGGIN, SEXIST LANGUAGE: A MODERN PHILOSOPHICAL ANALYSIS 100, 105 (1981); Adele Mercier, *A Perverse Case of the Contingent A Pariori: On the Logic of Emasculating Language (A Reply to Dawkins and Dummett)*, 23 PHIL. TOPICS 2, 221, 230 (1995).

[98] *See, e.g.*, GILLIGAN, *supra* note 23, at 24–64; NODDINGS, *supra* note 23, at 65–69

[99] PETA BOWDEN, CARING: GENDER-SENSITIVE ETHICS 1, 21–60 (1997); DIEMUT ELISABET BUBECK, CARE, GENDER, AND JUSTICE 1, 159–71, 189–242 (1995).

[100] Care ethics is a normative, feminist ethical theory that holds that moral action centers on interpersonal relationships and centers care or benevolence as a virtue. *See, e.g.*, GILLIGAN, *supra* note 23, at 24–64; NODDINGS, *supra* note 23, at 65–69; BOWDEN, *supra* note 99, at 21–60; BUBECK, *supra* note 99, at 189–242. Care ethics has its roots in feminist circles of political, legal, and medical ethics reasoning. While this Comment deals primarily with the implications of approaching questions of identity and responsibility related to pregnancy from a legal standpoint, many of the authors referenced in this Comment will be from disciplines outside of the law, especially from medical ethics. Because pregnancy is undoubtedly both a social and a biological phenomenon, it makes sense to take an interdisciplinary approach to analyzing the legal and ethical dimensions of responsibility and identity in relation to pregnancy.

[101] Some scholars such as Anna Putnam, Martha Nussbaum, and Jonathan Glover, among others, have attempted to "rehabilitate" justice-based reasoning traditions to move toward a "feminist theory of justice" that draws on the work of John Rawls' A THEORY OF JUSTICE to develop a universalist version of justice that can account for a multiplicity of experiences in ways that accommodate different identities while also providing a normative framework for universal justice. RAWLS, *supra* note 95, at 79; Putnam, *supra* note 95, at 298. I find these attempts to be unconvincing and choose rather to engage with explicitly relational-feminist theoretical approaches to move beyond "justice talk" such as MARY BRIODY MAHOWALD, WOMEN AND CHILDREN IN HEALTH CARE: AN UNEQUAL MAJORITY 217–27 (1993); BOWDEN, *supra* note 99, at 21–60; BUBECK, *supra* note 99, at 159–71, 189–242.

one another through ties of blood, commitment, and affection.[102] Such theorists draw on a long tradition of reconsidering the demands of justice based on contextual features rather than as a universal principle.[103] If a concept of equality is not blind to individual differences and context, and if it extends beyond isolated selves to relationships among individuals, it can be amenable to both egalitarian feminism and care-based models of moral reasoning.[104]

One of the main differences between the experiences of men and women that warrants the use of a care-based model of reasoning is the experience of pregnancy.[105] Pregnancy is one experience that is necessarily relational. As Robin West has observed, "[w]omen are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly 'connected' to another human life when pregnant."[106] Pregnancy is a unique experience insofar as one party is necessarily dependent upon the other for their existence and preservation. The pregnant woman's act of sustaining a fetus is an essentially physical, rather than rational, act.[107] And the relationship is not only relational but constitutive. If the mother chooses to terminate her relationship with the fetus, it is not just the relationship that ends, but so too does the existence of one of the parties.

Additionally, the relationship between the mother and her fetus has a form of interiority that is quite different from other relationships.[108] The fetus's movements are entirely within the woman. She is the only person with access to these moments and the only one who can bear such constant and intimate witness to the life within her.[109] Even when others gain access to experience the movement of the fetus, it is under its mother's direction.[110]

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[102] GILLIGAN, *supra* note 23, at 26–64; NODDINGS, *supra* note 23, at 1, 65–69; MEDICINE AND THE ETHICS OF CARE 1–6 (Diana Fritz Cates & Paul Lauritzen eds., 2001).

[103] SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE 13–58 (1992). This usage is also consistent with Michael Walzer's notion of "complex equality." MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–31 (1983); *see also* ZILLAH R. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY 17, 191 (1984) (outlining the notion of "sexual egalitarianism").

[104] West, *supra* note 24, at 2; Tuerkheimer, *supra* note 24, at 705.

[105] West, *supra* note 24, at 1 (quoting Naomi Scheman, *Individualism and the Objects of Psychology*, *in* DISCOVERING REALITY 255, 237 (Sandra Harding & Merrill B. Hintikka eds., 1983)).

[106] *Id.* at 21.

[107] *Id.* at 8 (quoting Bruce A. Ackerman, Social Justice in the Liberal State 3 (1980)).

[108] Tuerkheimer, *supra* note 24, at 705.

[109] YOUNG, *supra* note 24, at 163.

[110] *Id.* at 163–64.

This level of investment between two parties is fundamentally unique and fundamentally relational. Therefore, it makes sense to apply a system of moral reasoning to questions of reproduction and pregnancy that holds relationality as a fundamental premise.[111]

B. FETAL-MATERNAL IDENTITY THEORY

Starting from the perspective that the relationship between the fetus and the woman is fundamentally unique and unlike any other human relationship, this Comment offers an alternative legal theory of fetal legal identity. Specifically, the relationship theory, which this Comment calls the "Fetal-Maternal Identity Theory" (FMIT).[112] FMIT proposes that, for legal purposes, because of the necessary dependence of the fetus upon the woman, the fetus is identical to the woman. A fetus, under this formulation, is viewed as an entity that exists wholly in relation to its mother. Because the fetus is necessarily reliant on the woman and not the other way around, the legal identity of the fetus can be subsumed within the legal identity of the mother.[113] It can make no legal claims independent of the mother because its fundamental existence is reliant on and at the pleasure of the woman.[114] Because the fetus cannot exist without the woman who is carrying it, the fetus is subsumed within the woman's identity in the same way that an organ or limb of the woman's body would be.

One way to further illuminate this theory is by exploring it functionally in relation to legal rights against harm. While an individual could be charged with assault for harming a woman's arm or charged with murder by destroying her brain (and thereby causing death), the individual is not charged with a separate crime or an elevated sentence for the injury of an appendage or destruction of the organ in addition to the injury or death of the woman. The harm is identified with the woman as a whole person because, without the woman, the arm or brain would cease to have functional meaning. Similarly, a fetus would be treated as legally identical to its mother. A woman could be harmed by violence done to her that affects her gestating fetus or could be killed, resulting in the death of her fetus. But, under FMIT, the

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[111] SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 13–28, 127–41 (1989); Minow & Shanley, *supra* note 29, at 23.

[112] The reason that the term "fetal" proceeds the term "maternal" is not to suggest the priority of the fetus over the mother, but rather to prioritize the term "fetus" in relation to the term "identity." Said another way, the order of the words is meant to suggest that the fetus shares its identity with its mother, not the other way around. The fetus is identical to the woman; the woman is not identical to the fetus.

[113] KURKI, *supra* note 7, at 147–48.

[114] *Id*.

crimes would be attached to the mother, not to the fetus. Rather than, as some states do, charging an individual with two counts of manslaughter for the death of the fetus and the death of its mother, FMIT would charge only one count for the death of the mother.[115] Like any other part of the woman's body, the fetus, because of its necessary relationship to and reliance on the woman, would be able to bear reference for harm caused to the woman. But the fetus would not be afforded separate or additional rights.

This theory would have the further effect of avoiding the current problem of prosecuting women for their own pregnancies.[116] Under FMIT, women could not be prosecuted for the harm to their own fetus because harm caused to the fetus is ultimately harm to the mother. Though the mother may have engaged in behavior that harmed the fetus, the focus under FMIT would be on the harm the behavior caused to the woman. Women whose fetuses died as a result of illicit drug use or self-harming behaviors could be treated for the harm caused to themselves and receive social and psychological support. But they would not face the threat of prosecution that they do under the current system.[117] This could have the beneficial effect of encouraging more women to seek help for self-harming behaviors as they would no longer have to fear retribution for harm done to their own fetus.

Moreover, the FMIT approach would accurately acknowledge that harm caused to a fetus is just as much a failure to prevent harm to a woman. This not only demonstrates that harming a fetus requires acting upon the mother, but also centers the woman's experience of harm and takes seriously the physical and emotional suffering the woman could experience related to fetal harm or death.

Ultimately, under FMIT, a woman could not be prosecuted for behaviors that she engaged in solely on the grounds that they harmed the fetus. There have been numerous cases where women have been prosecuted for violence done to their fetuses either by physical harm,[118] attempted

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[115] *See infra* Part II.

[116] *See infra* Section IV.A.1.

[117] *Id*.

[118] *See*, *e.g.*, Farah Stockman, *Alabamians Defend Arrest of Woman Whose Fetus Died in Shooting*, N.Y. TIMES (June 30, 2019), https://www.nytimes.com/2019/06/30/us/alabama-woman-marshae-jones.html [https://perma.cc/MQS6-FBGB].

suicide,[119] and drug use,[120] all of which have been based on the theory that the fetus is a separate entity from the mother. However, if the mother and fetus were considered one singular maternal-fetal person, this harm would be reconceived of as self-harm and would not warrant prosecution but rather some form of care such as counselling or rehabilitative intervention. To institute such a system of care and rehabilitation, the state would have to move away from atomistic conceptions of justice and toward a relational system of redistributed responsibility.[121]

C. RECONSIDERING AND REDISTRIBUTING RESPONSIBILITY

Along with traditional, atomistic concepts of justice, the recent medicalization of pregnancy has reallocated the responsibility for fetal health to the pregnant individual herself.[122] Pregnancy has not always been considered a medical condition.[123] Indeed, for much of history, pregnancy has been considered a social enterprise rather than a medical one. Doctors were not often present during child birth unless there was an emergency.[124] There was little in the way of prenatal care.[125] And fertility and contraceptive matters were not considered to be under the purview of physicians but rather family members, midwives, and other community caregivers.[126] The medicalization of pregnancy has brought with it many benefits, from decreased maternal mortality rates to better family planning practices and fewer unwanted pregnancies.[127] However, one negative side effect of the medicalization of pregnancy has been the individualization of

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[119] *See*, *e.g.*, Julie Rovner, *Woman Who Tried to Commit Suicide While Pregnant Gets Bail*, NPR (May 18, 2012, 4:16 PM), https://www.npr.org/sections/health-shots/2012/05/18/153026015/bail-granted-for-indiana-woman-charged-in-attempted-feticide [https://perma.cc/9QVM-2XD4].

[120] *See*, *e.g.*, *Take Action to Free Chelsea Becker*, NAT'L ADVOCATES FOR PREGNANT WOMEN (June 17, 2020), https://www.nationaladvocatesforpregnantwomen.org/take-action-to-free-chelsea-becker/ [https://perma.cc/P7MB-8RMQ]; People v. Perez, No. F077851, 2019 WL 1349709, at *2 (Cal. Ct. App. Mar. 26, 2019).

[121] GILLIGAN, *supra* note 23, at 1, 24–64; NODDINGS, *supra* note 23, at 65–69; MEDICINE AND THE ETHICS OF CARE, *supra* note 102, at 1–6.

[122] Chris Shilling, *Culture, the "Sick Role" and the Consumption of Health*, 53 BRIT. J. SOC. 621, 630 (2002).

[123] *See e.g.*, JUDITH WALZER LEAVITT, BROUGHT TO BED: CHILDBEARING IN AMERICA 1750–1950 36–64 (30th aniv. ed., Oxford Univ. Press 1986); CHARLOTTE G. BORST, CATCHING BABIES: THE PROFESSIONALIZATION OF CHILDBIRTH 1870–1920 1–13 (1995).

[124] LEAVITT, *supra* note 123, at 36–64.

[125] *Id.* at 87–116.

[126] *Id.* at 13–68.

[127] William F. McCool & Sara A. Simerone, *Birth in the United States: An Overview of Trends Past and Present*, 37 NURSING CLINICS N. AM. 735, 744–46 (2002).

responsibility.[128] Where once entire communities that included any number of individuals, such as the pregnant woman's family, friends, neighbors, and midwives, were involved in the pregnancy process, the medicalization of pregnancy has localized the focus of health responsibility on the mother exclusively.[129]

While FPLs take women to be solely responsible for the health and safety of their fetus, there are, in fact, multiple intersecting parties that play a role in the creation of the fetus and support of the woman. By focusing on the woman as solely responsible, FPLs fail to appreciate the relational aspects of pregnancy that suggest a more diffuse locus for responsibility.[130]

While classic biomedical ethicists Beauchamp and Childress largely focus on justice as a matter between neutral individuals,[131] feminist theory adds another layer. Feminist medical ethics intervenes by contextualizing medical decision-making within a larger web of social concerns particular to a system embedded with hostility toward women.[132] This framework offers a conception of persons and their relationships that stresses what Susan M. Wolf has referred to as "nesting rights in a community of caring."[133] This restructured account of justice sees the system as not simply innocently and unintentionally neglectful of women, but as actively hostile to them.[134] As such, in addition to theories of law and jurisprudence, systems of power must be addressed as well. In this account, justice must be understood within the context of systemic oppression. Thus, such an understanding would call into

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[128] CATHERINE MILLS, FUTURES OF REPRODUCTION 1, 6 (2011).

[129] BORST, *supra* note 123, at 117–31.

[130] GILLIGAN, *supra* note 23, at 1, 24–64; NODDINGS, *supra* note 23, at 65–69; MEDICINE AND THE ETHICS OF CARE, *supra* note 102, at 1–6.

[131] TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 99–142 (8th ed. 2019). Beauchamp and Childress are influential biomedical ethicists responsible for the prevailing theory of medical ethics called principlism. This theory of ethics has four main components: autonomy, beneficence, non-maleficence, and justice, which a medical practitioner making ethical decisions are supposed to weigh and balance against each other to come to an ethical solution. Principlism is the main mode of ethical reasoning taught to medical students. This mode of ethical reasoning has dominated the ethical field since its inception in 1979 through to its most recent edition published in 2019. In essence, principlism as the primary mode of medical reasoning does not seem to be going away anytime soon.

[132] SUSAN WOLF, FEMINISM & BIOETHICS: BEYOND REPRODUCTION 67–95 (1996).

[133] Susan Wolf, *Ethics Committees and Due Process: Nesting Rights in a Community of Caring*, 50 MD. L. REV. 798, 798–858 (1996).

[134] *Id.*

question the very structure in which goods are produced, assigned value, and distributed.[135]

To solve this, this Comment proposes a framework of distributive responsibility associated with feminist care ethics and theories of relational identity. This means shifting focus from the woman as solely responsible for fetal health and instead positioning the woman within a web of concern that would involve not only the pregnant woman, her fetus, and her partner, but also medical, economic, and housing systems, social supports, and laws and law makers that in some way engage with and shape the experience of pregnancy.[136] In relational systems of identity, such as FMIT, individuals are defined in relation to one another. This vision of relational identity, when extended to theories of responsibility, suggests that rights and responsibilities should similarly be conceptualized as relational rather than individual.[137] It is not merely the individual's responsibility to care for their own safety and health, but a social responsibility of an interconnected network of relevant concerned parties to care for one another.[138] An individual only has rights and responsibilities in relation to others and thus the conditions of possibility for their behavior are constituted by these relations as well.[139] In the context of pregnancy, a theory of relational-distributive justice would shift the focus of responsibility away from the pregnant woman exclusively and redistribute it among a larger network of social connections.[140]

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[135] RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 52–72 (Catriona Mackenzie & Natalie Stoljar eds., 2000); SUSAN SHERWIN, THE POLITICS OF WOMEN'S HEALTH: EXPLORING AGENCY AND AUTONOMY 19–48 (1998); WOLF, *supra* note 132, at 67–95; MARY BRIODY MAHOWALD, WOMEN AND CHILDREN IN HEALTH CARE: AN UNEQUAL MAJORITY 24–42 (1993).

[136] SHERWIN, *supra* note 135, at 48–64; RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF, *supra* note 135, at 52–72.

[137] For a sampling of feminist scholars who suggest relational theories of responsibility, see generally SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY (1991); VIRGINIA HELD, RIGHTS AND GOODS: JUSTIFYING SOCIAL ACTION (1994); MOIRA GATENS, FEMINISM AND PHILOSOPHY: PERSPECTIVES ON DIFFERENCE AND EQUALITY (1991); ROSEMARY TONG, FEMININE AND FEMINIST ETHICS (1993).

[138] *See* sources cited *supra* note 137.

[139] RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF, *supra* note 135, at 52–72.

[140] *See, e.g.*, Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654, 658 (2012).

III. FETAL-MATERNAL IDENTITY SOLVING PROBLEMS IN PRACTICE

A. MATERNAL-FETAL ANTAGONISM, POLICING PREGNANCY, AND PROBLEMS IN MATERNAL-FETAL HARM

One consequence of viewing women and their fetuses as legally distinct entities is that women and their fetuses are placed in an adversarial relationship to one another. If the health or behavior of a woman threatens the health or life of her fetus, she could be held responsible. In many states with FPLs a woman can be criminally charged for harming her fetus, creating an antagonistic relationship between the woman and her fetus by making them competitors for rights that are necessarily connected.[141] And while not all politicians advocate for the punishment of women if they fail to comport to certain behavioral standards, increasingly many do—as codified in FPLs.[142] Recent examples of women who have been prosecuted for harm to their own fetuses under FPLs include the cases of Chelsea Becker, Adora Perez, and Kelli Leever-Driskel.[143] These cases involve pregnant women prosecuted under FPLs that were not intended to punish them, and serve as examples of how broken FPLs are and how FMIT might intervene to solve these problems.

In September 2019, Chelsea Becker, pregnant and alone at a friend's house, thought her water had broken.[144] But when she saw that she was covered in blood, she knew that something had gone wrong.[145] She was immediately taken to the hospital by ambulance and about three hours later,

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[141] *See e.g.*, ABBY SCHNELLER, PENALIZING PREGNANCY: A FEMINIST LEGAL STUDIES ANALYSIS OF PURVI PATEL'S CRIMINALIZATION 3, 24 (2018); McConnell, *supra* note 16, at 307; *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, *supra* note 16, at 1333.

[142] *See, e.g.*, State v. McKnight, 576 S.E.2d 168, 173–75 (S.C. 2003) (reaffirming a conviction of homicide by child abuse for the mother's use of crack cocaine during her pregnancy); *see also* Shuai v. State, 966 N.E.2d 619, 630–32 (Ind. Ct. App. 2012) (finding that a pregnant woman can be charged with murder after attempting suicide); Patel v. State, 60 N.E.3d 1041, 1050–56 (Ind. Ct. App. 2016) (finding that a pregnant woman who attempts an abortion can be charged with neglect of a dependent for failing to provide medical care).

[143] *See, e.g.*, [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker *supra* note 4, at 5–6; People v. Perez, No. F077851, 2019 WL 1349709, at *2 (Cal. Ct. App. Mar. 26, 2019).

[144] [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker, *supra* note 4, at 1.

[145] Dorian Geiger, *California Mom Charged with Murder After Stillborn Baby Found with Meth in its System*, OXYGEN (Nov. 7, 2019, 4:12 PM), https://www.oxygen.com/crime-news/chelsea-becker-charged-with-murder-baby-had-meth-in-system [https://perma.cc/YQ8M-2EY8].

she delivered a stillborn baby boy.[146] Chelsea was devastated for the loss of her son, who had already been named Zachariah.[147] Nearly two months later, on November 6, 2019, Chelsea Becker was arrested and charged with murder under California Penal Code § 187.[148] Chelsea is still in prison now, with her bail set at $2 million.[149] Chelsea's sentence follows another prosecution in the same county that established a precedent in the area for prosecuting mothers for the miscarriage of their unborn babies.[150]

On December 30, 2017, Adora Perez suffered a stillbirth.[151] Alleging that Ms. Perez's drug use during pregnancy caused the stillbirth, the Kings County, California District Attorney charged Ms. Perez with murder under § 187.[152] Perez is now serving eleven years in state prison for a crime she never intended to commit.[153]

Similarly, in Indiana, Kelli Leever-Driskel was arrested and formally charged with "feticide" and involuntary manslaughter in connection with the death of her son at birth.[154] According to court documents, "a roommate told police he was awakened [one night] by [Kelli] crying as she delivered what appeared to be a full-term baby boy in the bathroom."[155] "The roommate said the infant didn't appear to be breathing and he called 911 . . . ."[156] After her

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146 Alex Wigglesworth, *Addicts with Stillborn Babies Are Being Charged with Murder in California*, L.A. TIMES (Nov. 26, 2019, 2:44 PM), https://www.latimes.com/california/story/2019-11-26/chelsea-becker-adora-perez-murder-charge-stillbirth.

147 *Id.*

148 *Id.*; CAL. PENAL CODE § 187 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

149 Alex Wigglesworth, *With a Woman in Prison for Stillbirth, California's Murder Law Is Tested*, L.A. TIMES (Dec. 16, 2020, 6:00 AM), https://www.latimes.com/california/story/2020-12-16/adora-perez-appeal-stillborn-murder-charge.

150 Shawn Steiner, *NAPW Statement: The Fight to Free Chelsea Becker Continues: How the San Francisco Chronicle, Associated Press, New York Post, and Other Media Outlets Got It Wrong*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Dec. 27, 2020), https://www.nationaladvocatesforpregnantwomen.org/napw-statement-the-fight-to-free-chelsea-becker-continues-how-the-san-francisco-chronicle-ap-and-other-media-outlets-got-it-wrong/ [https://perma.cc/2AJK-MQWK].

151 Wigglesworth, *supra* note 149.

152 CAL. PENAL CODE § 187(a) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.) defines murder as the unlawful killing of a human being or a fetus with malice aforethought. *See also* People v. Perez, No. F077851, 2019 WL 1349709, at *2 (Cal. Ct. App. Mar. 26, 2019).

153 Wigglesworth, *supra* note 149.

154 Ken de la Bastide, *Mother Charged with Feticide, Involuntary Manslaughter in Death of Newborn*, HERALD BULL. (Feb. 14, 2018), https://www.heraldbulletin.com/news/mother-charged-with-feticide-involuntary-manslaughter-in-death-of-newborn/article_3c3ac49c-11b9-11e8-89f7-4f9d30ae5021.html [https://perma.cc/3KGD-29A4].

155 *Id.*

156 *Id.*

visit to the hospital, Kelli was arrested for feticide by drug use.[157] However, it is not clear that drugs actually caused the rupturing of the placenta that occurred, as this can be a cause of premature birth in pregnant women for any variety of non-drug related reasons.[158] Nonetheless, Kelli was prosecuted for an involuntary crime for which she could have faced up to twenty-and-a-half years in prison.[159] The case has since been dropped, but the possibility of prosecuting women for their miscarriages still remains.[160]

In all three cases, the relevant FPLs had not been intended to be used against women for harm caused to their own fetuses. The California statute explicitly provides that no person "who commits an act that results in the death of a fetus" can be guilty of murder where "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus" and legislative history demonstrates lawmakers' intent to exempt mothers from prosecution for their own acts that result in fetal death.[161] Indiana law similarly states that their FPL was not intended for use against women for harm caused to their own fetuses, but nevertheless, states have continued to charge, prosecute, and imprison women on precisely these grounds.[162]

The justification for prosecuting these women is entirely based on the conceptualization of the fetus as a separate legal entity with separate legal rights. In all of these cases, women were charged with crimes that resulted in harm to a fetus as an independent entity.[163] Indeed, "[t]he characterization of maternal substance abuse as criminal directly reflects the model of the maternal-fetal relationship as one of *conflicting, autonomous bearers of*

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[157] *See id.*

[158] *See* Haley Bull, *Anderson Mother's Feticide Case Dropped*, FOX 59 (Feb. 15, 2018), https://fox59.com/news/anderson-mother-no-longer-accused-of-murder-now-facing-feticide-involuntary-manslaughter-charges-in-newborns-death/ [https://perma.cc/FZ7M-SG2Y].

[159] Bastide, *supra* note 154.

[160] Bull, *supra* note 158.

[161] In 1970, the legislature amended Section 187 to broaden the scope of the statute by adding feticide to the definition of murder. This amendment was in direct response to the California Supreme Court's decision in *Keeler v. Superior Court*, 470 P.2d 617, 619, 624 (Cal. 1970), in which the court held that "the unlawful killing of a human being" did not encompass a fetus. The legislature acted to protect pregnant women by criminalizing the intentional conduct of third parties that result in fetal death. Critically, the legislature's addition of fetal murder to Section 187 expressly carves out conduct undertaken by the pregnant person herself: Cal. Penal Code § 187 (b)(1) and Cal. Penal Code § 187 (b)(2) narrowly exclude abortions, and Cal. Penal Code § 187(b)(3) broadly excludes the conduct of a pregnant woman which results in the death of her fetus.

[162] IND. CODE § 35-50-2-16(a)(1) (2018).

[163] People v. Perez, No. F077851, 2019 WL 1349709 at *2 (Cal. Ct. App. Mar. 26, 2019); [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker *supra* note 4, at 6.

rights."[164] The prosecution of women for miscarrying makes clear the adversarial relationship between the rights afforded to a fetus and the rights of the mother. Affording a fetus separate rights compels the woman to act on her fetus's behalf, constrains her behavior, and makes her responsible for the health, safety, and well-being of another entity in the way that no other individual has the duty to care or rescue.[165]

FMIT would solve this issue and redistribute care and responsibility to better address the issue of maternal-fetal harm through violence and drug use. FMIT would reinterpret these cases as issues of self-harm rather than fetal harm because the woman and her fetus are legally identical entities. Had the women harmed themselves in the commission of these actions, they would not have been charged with a crime against themselves—assault against the self through the use of substances has never been a crime. This approach both prevents the mother from being criminally charged for what would now constitute self-harm and more accurately apprehends the real suffering experienced by the woman due to her addiction. Under a relational approach to identity, the harm done by using drugs while pregnant "does not make the woman's addiction more criminal. Rather, it highlights the severity of her disease."[166] The harm would, under FMIT, be reconsidered as self-harm which would not require legal retribution but instead support and rehabilitation to overcome.

Furthermore, a relational and redistributive approach to justice would better address the problems of maternal drug use and self-harm. In essence, such an approach would appreciate that "the solution to the problem of fetal addiction is not further to deny women's reproductive autonomy through regulation, but to create the conditions necessary for women to choose a healthy pregnancy."[167] At present, FPLs actually discourage women from getting healthcare or seeking treatment for drug addiction during their pregnancy for fear of being prosecuted for fetal abuse or feticide.[168] Women are receiving inadequate maternal healthcare and no addiction recovery support during pregnancy because of the existing policies enshrined in

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[164] *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, *supra* note 16, at 1342 (emphasis added).

[165] *See generally* Belinda Bennett, *Pregnant Women and the Duty to Rescue: A Feminist Response to the Fetal Rights Debate*, 9 L. CONTEXT 70, 83–86 (1991); A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1273 (1983).

[166] *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, *supra* note 16, at 1342 (emphasis added).

[167] *Id*.

[168] Goodwin, *supra* note 2, at 830–33.

FPLs.[169] Under FMIT, women would no longer need to fear prosecution for drug use during pregnancy and could seek out maternal healthcare and get help with their addiction. At a basic level, promoting maternal health would require revision of our current theory of fetal identity and the implementation of new policies designed to provide prenatal care for women generally, to meet the particular needs of pregnant addicts. Moreover, a relational and redistributive approach to justice would center pregnant women within a network of care in order to redistribute responsibility, provide better support, and expand the conditions of possibility allowing for healing and a healthier pregnancy.

B. PROBLEMS SOLVED BY REDISTRIBUTING RESPONSIBILITY

FPLs function within and perpetuate an existing system of unjust discrimination against and oppression of women.[170] As such, a model which accounts for the injustices perpetrated on an individual level can only go so far. Instead, any successful intervention must reconsider the source of the problem: it is not individual women behaving badly that is the central cause for concern.[171] Instead, systemic stereotypes about women's inherent duty to care, the policing of pregnancy, and inadequate social support structures are significant issues which, if addressed, would mitigate most if not all of the foundational problems that lead to prosecutions under FPLs in the first place.

After refocusing the locus of concern, the unjust exclusive focus on women must be addressed. First, as significant contributors to pregnancy, men must be brought into the fold and held responsible for sexual practices as well.[172] This means not only providing education about and access to contraception for women but also for men.[173] Next, at a systems level, issues of distributive injustice must be addressed so that individuals have equal access to adequate sexual education, affordable contraceptives, reproductive healthcare, and structural support. And finally, all of this must be done under the umbrella of feminist biomedical ethics theory acknowledging that the

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[169] *Id*.; Diya Uberoi & Maria de Bruyn, *Human Rights Versus Legal Control Over Women's Reproductive Self-Determination*, 15 HEALTH & HUMAN RTS. J. 1, 13 (2013); Vanessa Vecchiarello, Note, *The Criminalization of Pregnancy and Its Effects on Maternal Health: Understanding State Interventions*, 47 FORDHAM URBAN L.J. 1051, 1055 (2020).

[170] *See, e.g.*, SCHNELLER, *supra* note 141, at 24; McConnell, *supra* note 16, at 307; *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, *supra* note 16, at 1333.

[171] Vecchiarello, *supra* note 169, at 1080.

[172] Judith Bruce, *Reproductive Choice: The Responsibilities of Men and Women*, 2 REPROD. HEALTH MATTERS 68, 70 (1994).

[173] *Id*.

current formulation of FPLs function within the context of an oppressive system and serve to perpetuate oppression.

1. Social Assumptions about Care and Maternal Responsibility

The most logical place to begin this analysis is with a discussion of stereotypes about female care and responsibility. Related to, and perhaps in part as a result of, the uniquely female capacity to become pregnant and engage in one of the most fundamentally "relational relationships," the female social experience has become marked, not just by the unique biological capacity to care, but imbued with social presumptions about the naturalness of female caregiving.[174] The social presumption that women will altruistically care for those around them is borne out in a number of observable ways. Women still bear the brunt of responsibility for unpaid childcare in the United States and globally.[175] Women generally are responsible for maintaining connections with extended families, which means that when parents and in-laws eventually need care, it is generally women who facilitate and take on the majority of this care.[176] Women visit the doctor more frequently than men for preventative care, meaning that, on the whole, women are healthier than their male partners for longer, which results in women bearing the brunt of at-home medical care later in their lives.[177] These social presumptions are reflexive and reinforcing in that as women are conditioned to be social caregivers, they perform these social functions, which reinforces the myth of the naturalness of female care and propagates the myth further.[178] This myth can be seen in the compelled care that results from the codification and implementation of FPLs.[179]

While compelled maternal care tracks and reinforces social presumptions and patterns, it nonetheless ignores the lived experiences of

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[174] WOLF, *supra* note 132, at 67–95.

[175] Sarah Jane Glynn, *An Unequal Division of Labor*, CTR. FOR AM. PROGRESS (May 18, 2018), https://www.americanprogress.org/article/unequal-division-labor/#:~:text=When%20workers%20experience%20role%20overload,day%20to%20get%20everything%20done. [https://perma.cc/XK25-9F46]; EMMA SAMMAN, ELIZABETH PRESLER-MARSHALL, NICOLA JONES, TANVI BHATKAL, CLAIRE MELAMED, MARIA STAVROPOULOU & JOHN WALLACE, OVERSEES DEV. INST., WOMEN'S WORK: MOTHERS, CHILDREN, AND THE GLOBAL CHILDCARE CRISIS 1, 46 (2016), https://cdn.odi.org/media/documents/10333.pdf [https://perma.cc/YU2C-J9PU].

[176] SAMMAN, PRESLER-MARSHALL, JONES, BHATKAL, MELAMED, STAVROPOULOU & WALLACE, *supra* note 175, at 46; LYNDA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011 2 tbl.1 (2013).

[177] WOLF, *supra* note 132, at 67–95.

[178] *Id.*

[179] *Id*.

women who are induced to care for their fetus and punished for failure to do so. Pregnancy takes a serious physical and emotional toll on women that is largely overlooked by insisting that caring is the natural disposition of a woman and presuming the naturalness of female altruism.[180]

To illustrate this point, there is no discernable pattern among states that institute FPLs of any increase in funding for such social support services as healthcare, prenatal services, women's health services, childcare, affordable housing, food, and education, among others, that would support a woman in her experience of pregnancy and potential experience as a parent.[181] Instead, the law treats the woman as autonomous and all powerful caregiver in that it presumes that she will naturally and altruistically care for the fetus while she is pregnant as a matter of course. After pregnancy, however, it treats her as a self-reliant, independent individual that is afforded no additional support.[182] Ironically, by treating the woman as an atomistic individual, the law actually decreases rather than increases female autonomy. The universe of possibilities is substantially narrowed for women when social conditions presume that they will naturally and altruistically care for not only those around them but also the fetuses they bear.[183] Without providing the pregnant woman with social support in her uniquely relational condition and instead making her uniquely responsible for the health and safety of her fetus, the conditions for thriving are substantially narrowed for her.[184]

At bottom, this problem arises because the fetus is considered a separate individual from the woman but one who is still entitled to the woman's care. By holding the woman responsible for the wellbeing of the fetus as an independent agent, the law illustrates that it is willing to apply relational thinking to the rights of the fetus but not the woman.[185] The woman stands on her own as solely responsible for the health and safety of the fetus as the fetus stands in necessary relationship with the woman.[186]

2. Relational Responsibility for Health and Safety

To solve these problems the first step is to reconsider the maternal-fetal bond through FMIT and recenter the locus of care from the fetus to the woman. This enables a wider network of care givers and no longer implicates

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[180] *Id*.

[181] NAT'L ACADS. OF SCIS., ENG'G, AND MED., BIRTH SETTINGS IN AMERICA: OUTCOMES, QUALITY, ACCESS, AND CHOICE 45–85 (2020).

[182] WOLF, *supra* note 132, at 67–95.

[183] *Id*.

[184] YOUNG, *supra* note 24, at 17–18, 25.

[185] WOLF, *supra* note 132, at 67–95.

[186] *Id*.

the woman individually as care provider. When the fetus is considered a separate entity, it is easy to see why intuitively it falls on the woman alone to care for the fetus: the woman has exclusive access to the fetus physically and psychologically in ways that no one else does, and has control over what the fetus ingests and is exposed to at the near exclusion of any other person.[187] However, when the fetus is reconsidered as essentially identical to the woman because of its necessary dependence upon her, the woman becomes the focus of care and more individuals have the capacity to relate to and care for her. Now, in relation to the fetal-maternal person, care and responsibility can be redistributed among more participants, including notably, the father.

Men, who contribute significantly to pregnancy,[188] can now be included in the network of caregivers, even before the fetus exists. Bearing responsibility for the woman and, more abstractly, their part in reproduction, men alongside women become responsible for making sensible decisions about reproduction, including preventing unplanned or unwanted pregnancies.[189] Men, in this system, must be responsible for their part in reproduction by becoming educated on and engaging in safe sexual practices.[190] The sexual partners become entangled in a network of mutual care bound by their responsibility for one another to avoid risk and harm caused by a potential pregnancy.

Should pregnancy occur, either planned or unplanned, the man is still implicated in the care network. Now with the woman and fetus considered legally identical, the man has more concrete ways of caring for the maternal-fetal person than he would have in caring for the fetus as a separate entity. Under FMIT, the man is responsible for caring for this new maternal-fetal person, created, in part, through his behavior, by providing psychological, physical, and economic support, or at least by abstaining from behaviors that would cause the person harm. The responsibilities to the woman have changed because the relationship has changed. Because the man has, through his own action, transformed the relationship with the woman through the creation of a fetus, his relationship with the woman has taken on a new meaning and thus new responsibilities. While the man would not have been

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[187] *See* West, *supra* note 24, at 2–3; Tuerkheimer, *supra* note 24, at 705–06.

[188] Pregnancy certainly occurs in non-heterosexual relationships with different dynamics. However, legal theories of autonomy and justice are largely "masculinist" in their conceptions of relationality and autonomy. Therefore, focusing on male-female heterosexual relationships helps to draw out the problems that emerge in a masculinist structure where men are seen as wholly separate from the pregnancy experience and women are seen as naturally altruistic caregivers of a fetus that is both wholly dependent on her but also somehow fully independent.

[189] Bruce, *supra* note 172, at 70.

[190] *See id*.

able to directly provide care to a fetus that was an entity internal to but separate from its mother, the man can and should directly provide care for the maternal-fetal person with whom he has created a new, responsibility-producing relationship.

3. Distributive Justice, Revising Systems and Providing Support

Similarly, while society at large would not have been able to directly care for the fetus were it considered a separate entity shut off from the world by virtue of inhabiting its mother, FMIT would refocus attention to the mother and allow the larger society to care for her directly. While an individual man becomes responsible for the care of an individual woman by virtue of the changed relationship through the creation of the fetus and imposition of new responsibilities, society, inversely, becomes responsible for the care of the fetus through an already existing responsibility to the woman. Social contracts that bound society to caring for the woman now bind society to caring for the new maternal-fetal person and providing for her new needs and protecting her in her newly heightened state of vulnerability. This means that society, once responsible for providing access to adequate individual healthcare to the woman, is now responsible for providing adequate maternal-fetal healthcare. Similarly, society is now responsible for the provision of food, economic security, and protection from violence and discrimination for the maternal-fetal person. The fact that society imperfectly provides these supports now is not an indictment of relational responsibility or FMIT, but rather simply illustrates the state's failing to provide adequate care to its citizens at present. Imperfect performance of a duty does not abdicate responsibility. Indeed, this merely suggests that rather than spending resources on punishing women for harming their fetuses in a system that considers the two to be separate entities, the state would be better served by and in better service of its duties by reallocating those resources toward better provision of basic needs to maternal-fetal persons and all citizens more generally.

IV. RESPONDING TO POSSIBLE CRITIQUES

Despite the problems that applying care ethics, responsibility reallocation, and revised identity theory to the issues caused by FPLs would solve, there remain some unanswered questions, room for skepticism, and areas of concern or critique. This Part attempts to answer those questions, allay some skepticism, and preempt possible critiques thoroughly and succinctly.

A. DEFINING HUMAN LIFE

One may argue that by defining the fetus and the woman as identical in relation to the mother, the theory still engages the state in inappropriate determinations of when human life begins.

However, an important distinction should be made: FMIT is a theory not about defining life but about defining rights. There is a difference between "personhood" and rights bearing.[191] Being human does not automatically convey all rights—children, non-citizens, and individuals deemed "mentally incompetent" do not bear the same rights.[192] The difference between rights-bearing humans and limited-rights-bearing humans does not depend on a difference in status as human but some other status—citizenship, age, capacity, etc.[193] Similarly, the conveyance of rights does not imply humanity—animals, environment, companies etc.[194] It is a mistake to personify all entities that receive certain rights. This does not mean that a fetus is not human, simply that the law is agnostic on the matter and that, substantively, it does not matter for the provision of rights.

B. INCREASING HARM AND PREVENTING INTERVENTION

Supporters of FPLs and the retributive prosecution of pregnant women for harm to their own fetuses might worry that the elimination of FPLs that allow for the prosecution of women who use drugs or alcohol during pregnancy would increase harm and leave no mechanism for intervention.

However, the elimination of FPLs that demand prosecution of women who use drugs or alcohol during pregnancy does not mean that no intervention is possible, but merely shifts the form of intervention and intervening body. Modes of intervention would shift from retribution to rehabilitation and protection and the intervening system would shift from law enforcement to public health organizations. So, if, for instance, a woman harmed her fetus in an attempted suicide by ingestion of a poisonous substance, intervention would still be warranted, but justified on different grounds and aimed at different outcomes.[195]

C. THREAT TO ABORTION RIGHTS?

One critique of relational theories of maternity might be the concern that under FMIT, abortion would now constitute "harm to the self" requiring

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191 *See, e.g.*, sources cited *supra* note 7.

192 KURKI, *supra* note 7, at 1, 99, 147–148.

193 *See id*.

194 *Id*.

195 Vecchiarello, *supra* note 169, at 1068, 1074–76.

protective intervention effectively limiting or eliminating abortion rights. However, as alluded to above, considering the fetus as identical to the mother does not imply that the mother is identical to the fetus. The fetus is necessarily dependent upon the woman—the woman is not necessarily dependent upon the fetus. The existence of the fetus is at the discretion of the mother—the existence of the woman is not at the discretion of the fetus.

Additionally, abortion would not be considered "harm" to the woman. Childbirth, in fact, is much more dangerous than abortion.[196] Pregnancy carries with it inherent physical and psychological dangers that abortion does not.[197] For instance, a woman is fourteen times more likely to die from carrying a pregnancy to term than from getting an abortion.[198] Moreover, harms that could incidentally be caused from an abortion can be easily mitigated through simple medical intervention.[199] In fact, the termination of a pregnancy could be considered risk-mitigating, like similar elective procedures such as prophylactic hysterectomies or mastectomies.

D. ONE LESS PROTECTION

One final, and perhaps the strongest critique among the ones listed here, is the concern that because the law already fails to protect women from violence—especially women of color—eliminating FPL just strips an additional form of protection. However, as demonstrated above, FPLs do not actually function as protection for women[200] and in fact systemically disadvantage women of color to a greater extent than white women.[201] And history demonstrates that pregnancy does not actually afford extra protection and in fact leads to the violent violation of basic rights, especially among women of color.[202]

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[196] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortions and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 217 (2012) (noting that "[l]egal abortion is much safer than childbirth," because "[p]regnancies ending in abortion are substantially shorter" and "[m]any dangerous pregnancy complications . . . manifest themselves in late pregnancy").

[197] *Id*.

[198] *Id*.

[199] *Id*. at 217–18.

[200] Vecchiarello, *supra* note 169, at 1080.

[201] *See generally, e.g.*, Roberts, *supra* note 2 (recording and analyzing the systemic abuse of Black women's bodies by the American medical system, which has "bonded women's fertility to government programs" that endangered the lives of countless Black women, their children, and deprived them of reproductive autonomy).

[202] *See, e.g.*, *id.* at 1438.

CONCLUSION

Debates over fetal personhood have been dominated by three major viewpoints: that a fetus has the same rights as a live child; that a fetus has no rights; or that a fetus has increasing moral status with advancing gestation.[203] But each of these ways views the fetus, to some degree, as an independent entity with separate identity from its mother. In response, FPLs were passed to protect the rights of the fetal legal person.[204] However, these laws create an antagonistic relationship between the fetus and its mother under which a woman can be prosecuted for harm to her own fetus, causing unequal protection for pregnant versus non-pregnant persons. Similarly, because of social presumptions about gender and care and the separateness of the fetus and its internal unreachability by other individuals, the pregnant woman has been encumbered with exclusive responsibility to care for and prevent harm to her fetus.

To solve these problems, this Comment has proposed a new approach to fetal identity that relies on relationships rather than autonomy to locate rights and responsibilities. Under FMIT, the fetus and its mother are legally identical because of the necessary dependence of the fetus on its mother. This means not only that a mother cannot be prosecuted for harming the fetus, as it is not a separate, rights bearing entity, but also that now more individuals have the capacity and responsibility to care for the maternal-fetal person. By focusing on the relationship between the fetus and its mother and redistributing responsibility, this theory takes seriously the uniqueness of the fetal-maternal relationship, acknowledges the inherent risks and vulnerabilities associated with pregnancy, and involves more individuals in a network of responsibility to care for the vulnerable life. This theory prevents harm, better appreciates the relationships and vulnerabilities created by pregnancy, and effectively redistributes responsibility to provide more and better care.

However, work on FPLs cannot end here. Even if the law were to adopt a new theoretical grounding for fetal identity and rights like FMIT, there are still structural inadequacies that would prevent women from getting the healthcare necessary to preserve both their and their fetuses' health. Redistributing maternal responsibility would require the state to invest in healthcare in ways that it has declined to do. Reproductive healthcare access is woefully inadequate in the United States. Not to mention the serious inadequacies in access to healthy food, safe housing, social services,

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[203] D. Isaacs, *Moral Status of the Fetus? Fetal Rights or Maternal Autonomy*, 39 J. PAEDIATRIC CHILD HEALTH 58, 58–59 (2003).

[204] *See supra* Part II.

including protective services from abuse, drug counseling, and rehabilitation that women face. Rethinking the way that we conceive of fetuses is one step toward protecting women from unjust prosecution, but it is certainly not the last step. Perhaps rethinking our model of responsibility to focus more on relationships rather than the individual would be enough to provide incentives and motivation to restructure systems that are at present inadequate. It is at least an essential element to such work. But while rethinking systems of responsibility, relationality, and identity is an essential element of structural transformation, there is much more work to be done to really protect pregnant women during what is a particularly vulnerable time in their lives. To that end, this author cannot, at present, do more than look forward hopefully.