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Relational and Liberal Feminism: The Ethic of Care, Fetal Personhood and Autonomy

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No loss is greater than losing one's child. To the joyfully expectant mother or father-to-be, the promise of that child begins at conception. When an expectant parent loses the expectation of the wanted child through a wrongfully, preternaturally terminated pregnancy, he or she mourns the lost promise of that child. Recognizing this lost expectancy, the Supreme Court of Appeals of West
Virginia, in *Farley v. Sartin*, uniformly declared a non-viable fetus to be a "person" under the West Virginia wrongful death statute, to permit an anguished father to sue for the wrongful death of his wife and the fetus she carried.

Motivated by compassion for tort victims and a wish to deter tortious wrongdoers, the court sought to compensate for the lost child-to-be, and held the fetus to be a person prior to viability and birth. How can such an act of judicial compassion be regarded as anything but wonderful? Is not this an act of justice to be celebrated? Or, is the court's declaration of fetal personhood frightening because it challenges constitutionally protected assumptions about a woman's right to terminate a pregnancy? Is it then an act to be feared? I contend that the decision is both, wonderful and frightening.

Understanding its declaration of fetal personhood to be a radical judicial act, one rejected by most other states and contradicted by the United States Supreme Court's jurisprudence on women's reproductive autonomy and privacy, the court anticipated the attention attracted by its pronouncement that a fetus is a person under the West Virginia wrongful death statute. Anti-abortion activists heralded the decision as progress in the fight for fetal rights. Pro-choice advocates condemned

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3 Viability and nonviability are medical concepts based on whether or not a fetus is capable of living outside of the mother's uterus. *Thomas L. Stedman, Stedman's Medical Dictionary* 1714 (25th ed. 1990).

4 Stedman defines "fetus" as "[t]he unborn young of a viviparous animal after it has taken form in the uterus. In man, the product of conception from the end of the eighth week to the moment of conception." *Id.* at 573.

5 The West Virginia Code provides in pertinent part:

Whenever the death of a person shall be caused by wrongful act, ... and the act ... is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages ... then ... the person who ... would have been liable if death had not ensued, shall be liable ... notwithstanding the death of the person injured.


6 *Id.* at 524. Comments by the Supreme Court of Appeals of West Virginia in *Farley* reveal that the court foresaw the controversy. *Id.* Immediately after stating the issue, the Court warned, "[O]ur discussion and holding are limited to this issue only, and what we say in this opinion should not be considered as indicative of our views on other unrelated issues, especially those on abortion." *Id.*

7 *See* Frances A. McMorris, *Courts Are Giving New Rights to Fetuses*, WALL ST. J., Sept. 4, 1996, at B1. The reporter states that "abortion opponents have long argued that [viability] ... an arbitrary standard." *Id.* McMorris quotes Charlotte Snead, president of an anti-abortion organization, West Virginians For Life as saying, "Cases like these indicate the value that even the courts place on a
it as a retreat from women’s rights.\textsuperscript{8} Both sides believed, however, that Farley portends expanded fetal rights. The difference between the sides is that one welcomed the possibility and the other feared it. Foreseeing these oppositional reactions, the Court attempted to confine any potential legal effects of its decision.\textsuperscript{9}

To those who would look to Farley to justify expanding fetal rights in other areas of the law, the court made clear that it intended its decision to apply only to West Virginia’s wrongful death statute.\textsuperscript{10} The court drove this message home by repeating its admonition that its decision “neither affects nor interferes with the constitutional protection afforded a woman who chooses to have an abortion,”\textsuperscript{11} and that the decision to terminate a pregnancy is governed by the Fourteenth Amendment to the United States Constitution and cannot be abrogated by a state court decision on wrongful death.\textsuperscript{12} The court stated, “[t]o be clear, a wrongful death action will not lie against a woman who chooses to exercise her constitutional right to have an abortion.”\textsuperscript{13} In its summary, the court repeated itself, stating that “our decision is a limited one and is in no way intended to be contrary to the constitutional right of a woman to have an abortion.”\textsuperscript{14}

Do the court’s many protestations reveal not only its intent to confine its decision, but also its fear that it could not? I do not suggest duplicity on the court’s part; that it said one thing, while knowing the opposite to be true. I do suggest, however, that the court sensed that by declaring a fetus a person from the moment of conception for the purpose of wrongful death it was implicating the foundation of women’s reproductive autonomy and privacy.

Recognizing and honoring relational loss and establishing and maintaining women’s reproductive autonomy were two prongs of a philosophical debate entered into by the Farley court. This debate, about whether the law’s embrace of the

\textsuperscript{8} Id. Ms. McMorril also interviews Kathryn Kolbert, vice president of the abortion-rights group, the Center for Reproductive Law and Policy, who states that “‘recognition of the [nonviable] fetus as an individual person is a back-door way to undermine the rights guaranteed by Roe vs. Wade.’” Id.

\textsuperscript{9} Farley, 466 S.E.2d at 534-35.

\textsuperscript{10} Id.

\textsuperscript{11} Id. at 534 (citing Roe v. Wade, 410 U.S. 113 (1973)).

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} Farley, 466 S.E.2d at 535.
primacy of relational concerns can be reconciled with individual privacy and autonomy, is the subject of an ongoing dialogue in feminist jurisprudence between cultural and liberal feminists.

To explain the difference between the two for introductory purposes, I offer accurate, albeit simplified, descriptions. Cultural feminists, also referred to as relational feminists and the term I use from this point on, begin with the premise that traditional liberal theory is based on a male standard as the universal experience of the world, one of separation and independent individuality. This, they contend, ignores women's different experience of life, which is one of connection, and interdependent relationships. Liberal feminists acknowledge the absence of women's perspectives and experiences in shaping traditional liberal theory. They argue, however, that once liberal theory incorporates and responds to women's concerns, its basic liberal principles of individual autonomy and privacy will advance women's equality.

In this Article I turn to these two branches of feminist jurisprudence to demonstrate why the court's attempt to confine Farley with declarations of limited application was insufficient in the face of such fundamental philosophical questions. Section II places Farley in historical perspective, describing how wrongful death actions for the loss of children have evolved. Section III introduces relational and liberal feminism and relies on Professor Linda McClain's work in which she analyzes the implications of relational feminism for women's reproductive autonomy. Section IV uses Farley as an example of a possible result of relational feminism's ethic of care when reproductive autonomy protections are not incorporated. To illustrate the result, Section IV charts the tendency of declarations of fetal personhood in wrongful death actions to be used to create civil and criminal liability for maternal conduct during pregnancy that jeopardizes fetal health. Section V argues that the attempt of the Supreme Court of Appeals of West Virginia to limit the effects of Farley was insufficient because the court does not anticipate and explicitly reject the degree to which it opens the door to creating an adversarial relationship between the mother and the fetus. Finally, this Section closes with the observation that to confine effectively its decision, the Supreme Court of Appeals of West Virginia had to state more than that a woman's Constitutional rights were untouched by its decision, but that her autonomy interests as a moral decision maker were left intact.

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II. EVOLVING DEFINITIONS OF "PERSON" FOR WRONGFUL DEATH

A. Purpose of Wrongful Death Actions

At common law one could recover from a tortious wrongdoer if he or she caused injury, but not if his or her wrongful conduct resulted in death. Thus, one could not recover for the death of a family member. In these situations families had no remedy and wrongdoers were not held accountable. Recognizing the absurdity of this result, that one could recover for injury but not for death, legislative bodies began to permit wrongful death actions with the passage of the Fatal Accidents Act of 1846 by the English Parliament. In this early developmental period, some American courts expressed moral repulsion at placing economic value on something as sacred as human life. Although for many this uneasiness remains, every state now has a wrongful death statute, the purpose of which is to compensate those who have a legitimate claim to the decedent’s succor. Wrongful death statutes protect “relational interest[s].”

All wrongful death statutes are similar. The two areas of greatest similarity are the beneficiaries and the damages permitted. Typical beneficiaries include spouses and children. Damages are primarily based on pecuniary loss to the beneficiary and most jurisdictions do not permit damages based solely on grief. Despite this, most jurisdictions find a way to value the lost society and comfort by placing pecuniary value on relational loss.

B. Wrongful Death Actions for the Death of a Living Child

According to Professor Zelinger, a sociologist, with damages for wrongful

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18 KEETON ET AL., supra note 15, § 127. This Act came to be known as Lord Campbell’s Act and wrongful death statutes are referred to as Lord Campbell statutes. Id.

19 See, e.g., Hyatt v. Adams, 16 Mich. 180 (1867). The court stated “[t]o the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting.” Id.


21 KEETON ET AL., supra note 15, § 127.

22 Id.
death based on pecuniary loss, damages valuations for the loss of a child in the
nineteenth century were relatively straightforward. Then, children played an
important productive role in the family whether through their work on the farm or
business or in wage labor outside the home. However, when children ceased to be
viewed as productive members of the family, around the same time that education
became both universally available and compulsory and child labor was prohibited,
the legal evaluation of the child’s work fell. Professor Zelizer marks this point at
which the “sacralization of childhood” became widespread and was no longer
limited to the upper classes who had no need to regard their children as
economically productive.

Many other forces may have contributed to this emergence of the sacred
child. Historians, demographers and economists all contribute theoretically to
understanding these forces. Transforming children from producers to resource
consumers led to a desire for a reduction in family size, although this was not always
accomplished. Infant mortality dropped with the increase in the medical
knowledge of birth, disease and infant nutrition, thereby reducing the need to have
so many children. Methods of birth control became available. Ultimately, most
parents expected to have smaller families and as a result came to view each child as

23 See Viviana A. Zelizer, Pricing the Priceless Child: The Changing Social Value of
Children (1985). Much of this section is based on an excellent socio-historical study of the economic
valuation of children from the mid-eighteenth century to the present. Chapter 5 of the book, entitled
From Wrongful Death to Wrongful Birth: The Changing Legal Evaluation of Children, traces the
monetary value placed on the death of a child in wrongful death suits. Id. at 138-68.

24 Id. at 139-40, 142-46.

25 Id. at 146-51.

26 Id. at 151.

27 Zelizer, supra note 22, at 7-15. Professor Zelizer is a sociologist and discusses theories from other
disciplines to illustrate the gap left by the lack of a complete sociological work. Id. She completed
her research and book to fill this gap. Id.

28 Id. at 8.

29 Id. at 10.

30 Several full length books on the history of birth control and movements promoting or banning it
support the proposition that birth control knowledge became more widespread after the start of the
twentieth century. See Linda Gordon, Woman’s Body, Woman’s Right: Birth Control in
America (rev. ed. 1990); James Reed, From Private Vice to Public Virtue: The Birth Control
Movement and American Society Since 1830 (1978); Rosalind Petchesky, Abortion and
precious and irreplaceable.31

C. The Fetus as Potential Child

Along with this transformation of the economic value of a child from producer to object of love is the transformation of wrongful death actions from children to nonviable fetuses.32 In 1884, Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, held that a fetus was united with the woman who carried it and therefore no separate right of action existed for the unborn fetus.33 Justice Holmes’ pronouncement of the mother and fetus as a single entity went unchallenged until 1946, when the United States District Court in the District of Columbia held that when a fetus was born alive, but died from injuries suffered in utero, its parents had an action for wrongful death.34 The Court reasoned that once born alive, the fetus was not part of the woman, but was a separate “person” with standing. By 1967, every state permitted recovery for prenatal injuries to fetuses, if they were born alive.35 In 1969 a federal district court held that West Virginia’s wrongful death statute’s definition of “person” included a viable unborn fetus.36

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31 ZELIZER, supra note 22, at 11. That a high rate of infant mortality could also contribute to a sentimental view of infants as precious is also possible. Professor Zelizer cites an article by historian John Demos. See John Demos, Infancy and Childhood in Plymouth Colony, in THE AMERICAN FAMILY 157-65 (Gordon, ed., 1978). Demos’ research reveals a highly sentimentalized view of infants, which he attributes to an extremely high infant mortality rate. Id.

32 Another development that may play a role is the expansion of tort liability. This topic is beyond the scope of this Article. Articles on whether, how and why tort liability has expanded are too numerous to cite here. However, whether enough is known about the tort litigation system to determine whether there is a crisis is the subject of an exhaustive article by Michael J. Saks, which summarizes both the sources of the public perception of the crisis as well as the empirical data on the subject. See Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?, 140 U. PA. L. REV. 1147 (1992).

33 Dietrich v. Northampton, 138 Mass. 14 (1884). Justice Holmes used the phrase, “child en ventre sa mere” to describe the unborn fetus. Id. This phrase is also used by the Supreme Court of Appeals West Virginia in Farley v. Sartin. 466 S.E.2d at 534. The Supreme Court of Illinois agreed that “an unborn child was but a part of the mother, and had no existence or being which could be the subject-matter of injury distinct from the mother, and that an injury to it was but an injury to the mother.” Allaire v. St. Luke’s Hosp., 56 N.E. 638 (Ill. 1900).


Two years later, the Supreme Court of Appeals of West Virginia adopted this position.  

To understand how the concept of a "person" on whose behalf one can bring a wrongful death suit continues to broaden, it helps to construct a continuum. Such a continuum is based on three variables and how they combine to result in death. One variable is the stage of human development as measured by the viability or nonviability of the fetus. A second variable is the point of time during the pregnancy at which the injury occurs. The third and final variable is whether the injured fetus is born alive. With these variables in mind, the continuum begins with the traditional legal concept of "person" or personhood, a person born alive and fatally injured after birth.  

Next on the continuum, are fetuses that are injured in utero while viable, are born alive, but subsequently die from the prenatal injuries. Following this are injured nonviable fetuses that are born alive, but later die from the injuries suffered in the womb. Next come viable fetuses fatally injured while in utero and never born alive. At the endpoint are fetuses fatally injured while nonviable and not born alive. Four jurisdictions occupy this endpoint, including West Virginia as a result of the Supreme Court of Appeals of West Virginia's Farley decision.  

This trend of expanding the definition of person in wrongful death actions has not occurred in isolation from other legal, cultural, medical and technological trends. First, if one accepts that tort liability has grown since the turn of the century, expanding liability for wrongful death is of a piece. Second, the debate about fetal personhood is a significant subject of public discourse. Third, medicine and technology to support fetuses born prematurely challenge assumptions about viability. Fourth, following Professor Zelizer's theory of increased sentimentalizing of children leading to increased recognition of wrongful death actions, the next logical step is to recognize the potential child in permitting wrongful death actions for the fetus. There may be others, but these are the ones most evident in legal discourse.

39 Prior to Farley, Georgia and Missouri permitted a nonviable fetus to be the subject of a wrongful death action. In Shirley v. Bacon, the Court of Appeals of Georgia announced that a "quick" fetus, one that had reached a stage of development at which the mother could feel its in-utero movements, was a person for wrongful death purposes. 267 S.E.2d 809 (Ga. 1980). The Supreme Court of Missouri held that the definition of person included a nonviable fetus for wrongful death. See Connor v. Monkm Co., 898 S.W.2d 89 (Mo. 1995). Shortly after Farley, South Dakota adopted a definition of person that includes a nonviable fetus. See Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996).
III. RELATIONAL AND LIBERAL FEMINISM

Declaring a nonviable fetus to be a "person" for wrongful death purposes implicates issues of women's reproductive autonomy. These issues are engaged by relational and liberal feminists. Placing Farley in the context of the debate between relational and liberal feminists sheds necessary light on the decision's significance. This context begins with a brief history of the evolution of these feminist theories. With second-wave feminism in the early 1970's, feminists began to develop a new jurisprudence to provide theoretical models for analyzing the role law plays in maintaining gender hierarchy.\(^\text{40}\) Using the plural "models" here is intentional because there is not a single, monolithic feminism, nor is there a single feminist jurisprudence.\(^\text{41}\) The first jurisprudence was one drawn primarily from traditional liberalism.\(^\text{42}\) Through this theoretical lense, women called for equality, but at the same time offered a critique of traditional liberalism as being constructed by men and being modeled upon man and maleness.\(^\text{43}\) Not wanting to have men and maleness define the standard for women, feminist scholars began to construct theories placing women at the center of inquiry and using women's perspectives to inform their work.\(^\text{44}\)

Scholars debate the number and significance of the theories that emerged during this active period in theory construction. There is, however, general agreement that there are "three . . . schools of modern feminist jurisprudence: liberal feminism, cultural feminism and radical feminism."\(^\text{45}\) Most significantly, for purposes of this article is the apparent tension between relational feminism and


\(^{41}\) Id. at 129.

\(^{42}\) Id.

\(^{43}\) Id. at 130-31.

\(^{44}\) MINDA, supra note 39, at 130. Professor Minda states that "feminists sought to develop a distinctive feminist jurisprudence "built upon feminist insights into women's true nature, rather than upon masculine insights into 'human nature.'" Id. (citing Catherine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635 (1983)).

\(^{45}\) Id. at 134 (emphasis added) (citing Linda J. Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute, 25 TULSA L.J. 775, 780 (1990). Professor Minda adopts her terms and departs from terms he used in his earlier work. Id.; see Gary Minda, Jurisprudential Movements of the 1980s, 50 OHIO ST. L. J. 599, 626 (1989).
liberal feminism. Professor Linda C. McClain analyzes relational feminism’s critique of liberalism and I base my portrayal of these tensions on her work. To understand the debate on reproductive autonomy between liberal and relational feminists one must have a basic understanding of the two schools and the primary differences between them.

A. Liberal Feminism

Liberal feminism draws its basic premises from traditional liberalism, but criticizes liberalism for constructing its view of humanity from that of men and for men only. Rather than rejecting the basic premises of liberalism, however, liberal feminism adds women and women’s perspective to liberalism. I do not mean that liberal feminism is simply an “add women and stir” recipe, however. It is an amalgam of adoption and modification of fundamental liberal premises.

The most significant premises of traditional liberalism adopted by liberal feminists are familiar as they formed the basis for much of the legal reform wrought by second wave feminists in the 1970s and 1980s. As in liberalism generally, one of the fundamental premises is of equality; that all people should be treated equally under the law. This is the premise upon which the Equal Rights Amendment and women’s civil rights are based. A second fundamental premise is the individual

46 McClain, supra note 14, at 1174. In this article, Professor McClain “argue[s] that the feminist critique of liberalism as presenting an atomistic and unconnected conception of the person attacks a caricatured picture of liberalism.” Id. By separating liberal theory from feminist jurisprudence she first appears to ignore the “schools” of feminist theory, one of which is liberal feminist theory. She clarifies, however, that she is primarily describing cultural or relational feminism and juxtaposing that with liberal theory. Id. at 1174-75. In doing so she implies that liberal feminism is to be included in liberalism generally. Id.

47 See Craig v. Boren, 429 U.S. 190 (1976) (establishing an intermediate standard of equal protection review under the Fourteenth Amendment to determine whether a classification based on gender is unconstitutional); Stanton v. Stanton, 421 U.S. 7 (1975) (holding a state statute establishing different ages for a parent’s obligation to support sons and daughters to violate Fourteenth Amendment); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down a federal statute permitting military men to claim their wives as dependents, but requiring enlisted women to establish their husband’s dependency as contrary to Fourteenth Amendment); Reed v. Reed, 404 U.S. 71 (1971) (finding a state statute giving a preference to men to administer estates to be a violation of equal protection guarantees of the Fourteenth Amendment).

48 To amend the United States Constitution, requires ratification by two-thirds (38) of the states. Congress extended the deadline from 1979 to 1982, but the Equal Rights Amendment failed to gain the necessary two-thirds of the states by the second deadline. Prior to this attempt to amend the Constitution to clarify that gender discrimination in employment violated it, feminists were able to get Congress to include gender in the Civil Rights Act. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).
human right to autonomy. Rights to autonomy and its corollary, privacy, are the basis upon which the United States Supreme Court grounds its reproductive jurisprudence. Thus, traditional liberalism supports a legal system based on the separateness, the atomism, of individuals who compete with one another and need the law to protect them from the incursions of other individuals on their freedom to exercise their individual rights. Some liberal feminists modify the fundamental premises of liberalism by offering a different perspective from women's experience to redefine equality. They suggest that equality is not the same treatment, but different treatment that results in equality. This internal struggle in liberal feminism is often described as the sameness/difference debate. Liberal feminists who advocate a difference paradigm of equality, argue that treating women the same as men merely perpetuates the existing gender hierarchy.

B. Relational Feminism

Reacting to the primacy of the independent, unconnected rights bearer of liberalism and liberal feminism, other feminists developed relational or cultural feminism. In doing so, they rejected liberalism's premise that the law's role is to protect individual rights and therefore, to maintain conditions in which independent and unconnected human beings are protected against interdependency and connection where the latter might interfere with the former. Instead relational feminists premised their theory on a system of interdependence and mutual responsibility.

Relational feminism is rooted in Professor Carol Gilligan's work on the differences in moral development between girls and boys. She based her “different


50 McClain, supra note 14, at 1173.


54 Id.

55 See CAROL GILLIGAN, IN A DIFFERENT VOICE (1982). Carol Gilligan is a professor of education at Harvard University's Graduate School of Education.
voice” theory on her research investigating whether there are differences in moral development between boys and girls. Carol Gilligan was motivated by pioneering research on moral development conducted by Lawrence Kohlberg, a professor of moral psychology at Harvard, who used only boys as subjects. From this he had concluded that the correct course of moral development in humans culminates in recognizing the supremacy of individual rights as the model of justice. Professor Gilligan used both boys and girls in her study. Her work demonstrated that there are two distinct moral analytic processes. While she clarified that she did not intend to make gendered generalizations, she observed that the justice/individual rights mode is more often employed by boys and the justice/relational care by girls.

Her work challenged Kohlberg’s results of a singular correct moral process and suggested that his results were limited by the gender of his subjects.

Significantly for feminist legal theory, Gilligan’s work came along just when some feminists began to claim that women’s perspective was not that of the “atomistic” person upon which liberalism is based. Thus, Gilligan’s work, even though she was careful not to make generalizations based on gender, provided the necessary fuel to energize claims of women’s differences in epistemology and morality. This work came along at a critical moment in the development of relational feminism, as it supported claims that women see themselves as operating within a web of relationships, a web in which care for others is crucial.

From this emerged a cultural or relational feminist scholarship represented

56 Id. at 2.
57 Id. at 18.
58 Id. at 20.
59 Id. at 2.
60 GILLIGAN, supra note 54, at 2.
61 Id.; see also Carol Gilligan, Epilogue to MAKING CONNECTIONS 314, 317-18 (Carol Gilligan et al. eds., 1990) (explaining that Gilligan does not accept the claims made by others about her work, that it proves essential differences between men and women).
62 GILLIGAN, supra note 54.
63 Other work arrived on the scene shortly after Gilligan’s, which supported the development of cultural or relational feminism. See, e.g., MARY F. BELENKY ET AL., WOMEN’S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND (1986).
64 The image of the web comes from Gilligan who refers to “a network of connection, a web of relationships.” GILLIGAN, supra note 54 at 32.
by the work of Professor Robin West. She argues for a new system of values for law and society, one based on love, connection, interdependence and care. She claims that these values are rooted in women’s experiences, both material and existential, particularly the experience of pregnancy, childbirth and mothering.

Professor McClain argues that cultural or relational feminists rejection of liberalism is based on a “caricature” of liberalism and “atomistic man.” She relies on two contemporary liberal theorists, John Rawls and Ronald Dworkin, to demonstrate that liberalism also recognizes the importance of interdependence, connection and care. The goal of her article is to focus attention on this false dichotomy between cultural and relational feminism and liberalism. However, at the end she demonstrates how a jurisprudence of an ethic of care alone would fail to protect women’s reproductive autonomy.

C. Relational Feminism v. Liberal Feminism and Fetal Personhood

Insight into the destabilizing potential of the Farley decision emerges from Professor McClain’s argument that a woman’s right to terminate her pregnancy is the test for the “translation of the relational approach and the ethic of care into substantive law.” One scholar, Professor Leslie Bender, commits her scholarship to envisioning how principles of relational feminism could alter substantive law.

65 McConnell, supra note 14, at 1183.


67 Id. at 1181 n.32.

68 Id. at 1184-86.

69 Id. at 1203-18.

70 McClain, supra note 14, at 1218-28.

71 Id. at 1242-63.

72 Id. at 1242.

73 Id. at 1229 (citing Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, Changing the Values in Tort Law, 25 TULSA L.J. 759 (1990)); see also Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic
Professor McClain uses Bender's pathbreaking attempts to make operational the “ethic of care” in law through a duty to rescue to explore the dangers it presents to women's reproductive autonomy.  

For additional support, McClain argues that Robin West's suggestion that abortion be viewed as an exercise of responsibility and Ruth Colker's view that it be seen as a decision of responsible connection with other members of society are both fraught with danger. The gist of the danger appears to be that principles of responsibility and care could be used, if not understood as a complex process of the responsible exercise of autonomous decision-making, to justify the imposition by law upon pregnant women that the only way to act responsibly, connectedly, through an expression of the ethic of care, would be to carry every pregnancy to term.

To avoid this risk, McClain suggests that the relational feminist’s definition of responsibility must be “synonymous with autonomy” and include “self-determination and the freedom to make a difficult decision about the course of one’s life” or it will “endanger women's reproductive freedom.” She agrees that relational feminism has been right to focus on “relationships, care, and interdependency” and acknowledges its contribution in bringing a balance of connectedness and responsibility for others to liberalism’s individualism and responsibility for self. Yet she advises that relational feminists are wrong to think that there is a “stark pick” between the two visions of justice: relationship and care or autonomy and individual rights. For support she turns to Rawls and Dworkin to demonstrate the poverty of a view of liberalism that does not see in it

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74 McClain, supra note 14, at 1229.

75 Id. at 1243 (citing Robin West, Taking Freedom Seriously, 104 HARV. L. REV. 43 (1990)).


77 Id. at 1244.

78 Id. at 1263.

79 McClain, supra note 14, at 1263.
"interdependency, connection, and responsibility." Ultimately, she advises that there must be a dialogue between relational feminism and liberalism and that those who adhere to an ethic of care and responsibility as a model of justice must "place a strong value on self-determination and rights."

IV. FARLEY, THE "ETHIC OF CARE," AND REPRODUCTIVE AUTONOMY

A. Farley and the "Ethic of Care"

McClain's perspective that relational feminism and its call for an "ethic of care" endangers reproductive rights if it fails to acknowledge the critical role of autonomy, sheds light on the response to Farley by those who advocate for women's reproductive rights. Farley provides an example of the "ethic of care" made operational in law. If the defining principles of the "ethic of care" are those of connection, interdependency and care, Farley embraces them. For the court in Farley made explicit its commitment to these values.

As a backdrop, the court pointed out that the fundamental purpose of wrongful death statutes is to deter tortious conduct and thereby "preserve and protect human life." It warned that when potential human life in the form of a nonviable fetus is fatally injured through another's tortious conduct, justice will be denied if the tortfeasor is not held responsible. Next describing the relational interests protected by its decision, the court commented that injustice would result if the wrongdoer is exempt from legal responsibility because of the "happenstance" that the "unborn child" is not yet viable. While none of these statements in isolation support the position that the opinion reflects an ethic of care, their cumulative effect is one of care and responsibility. There is other language from the court, however, that places the decision squarely within relational feminism. When the court commented on the loss of life, it is not a singular life, lived in isolated autonomy that the court recognized. Rather the court seized upon the loss to those interdependent with the fetus, in the web of connected lives. The court said that "[i]n the societal and parental loss is egregious," no matter whether the fetus is viable

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10 Id.

11 Id. at 1264.


13 Id. at 532.

14 Id. at 533.
Explicitly interpreting society’s fundamental values, the court stated that Farley stands for the shared value “that life—old, young, and prospective—should not be wrongfully taken away.”86 Just because this potential life had not yet reached the legally-recognized stage of fetal development of viability, this was no reason to deny its interconnectedness with its family.87 Recognizing the importance of the prospective relationship, the court advised that “[w]hen a family loses a potential member” the injury is not less than if “it loses an existing member.”88 It concluded that this “life . . . would have provided love and sustenance,” if it had not been cut short by the tortious conduct of the wrongdoer.89

Viewing these statements in light of the facts in Farley, that the surviving father and husband sues for the death of his pregnant wife and the fetus she carried, the court’s statements about “love and sustenance,” and “family” are markedly similar to the values advanced by relational feminists. For example, Robin West, among others, writes of the significant role that nurturance plays in life. She admits to the centrality of others in one’s life, pointing out that to think of a human as alone and separate is incorrect. Doubtless she would see the father’s grief at the loss of his potential child as an expression of connectedness not historically attributed to men, but one desired and promoted by many feminists.

B. Farley and Reproductive Autonomy

But perhaps this is the point at which one should heed the adage, “be careful what you wish for, you just might get it.” If what is being wished for is greater connectedness with their children and greater nurturing and responsibility for the care of children on the part of men, why cannot a man make a claim for wrongful death against the actions of a woman who carries his child? Why should his claims, based on interconnectedness and loss, be only against a tortious wrongdoer? Should he not be given at least equal rights in a woman’s decision to terminate the pregnancy of his and her potential child?

These are the questions left open by the “ethic of care” and the Farley case. This is the reason why it is both wonderful and frightening. For despite the

85 Id.

86 Id.

87 Farley, 466 S.E.2d at 534.

88 Id. at 534.

89 Id.
Supreme Court of Appeals of West Virginia’s admonitions that its decision should not be interpreted as implicating rights guaranteed by the United States Constitution or any state law, other than the wrongful death statute, the decision is not merely a legal precedent, but is also a philosophical catalyst. The court explicitly limited the precedential value of Farley in the context of a woman’s right to abortion. The court is silent, however, about its potential effects in other areas of state law. This raises the specter that Farley, as philosophical catalyst, could contribute to legislative and judicial incursions into women’s reproductive autonomy.90

C. Declaring Fetal Personhood Leads to Adversarial Relationship Between Mother and Fetus

Lest this sound like a cry of wolf, it is worth reviewing the trend in liability for fetal injury. Generally, there is a trend toward increased civil and criminal liability for injuries to fetuses. The trend began with suits by parents against tortious third-parties but progressed rapidly, however, to civil suits by children and their fathers against mothers91 and criminal prosecutions of mothers by the state.92 Both of these situations share a central premise, which is that a pregnant woman should literally pay for the harm done to her fetus, either through monetary damages or through criminal punishment.93

90 See Janet Gallagher, Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights, 10 HARV. WOMEN’S L.J. 9, 41 (1987) (observing that “even when judges attempt to carefully limit their holdings in fetal cases, their decisions become springboards for new, intrusive state actions against pregnant women”).

91 Most states have abrogated, at least partially, intra familial tort immunity. See KEETON ET AL., supra note 15, § 122. States abolished the immunity protecting spouses from liability when one acted tortiously toward the other first. Id. They later abolished parent/child immunity. Id. In Grodin v. Grodin, the Supreme Court of Michigan opened the door to maternal liability for prenatal injuries by holding that a mother would be liable for prenatal injuries if she had not acted reasonably under all the circumstances in taking a prescription drug that caused her child’s teeth to be brown. 301 N.W.2d 869 (Mich. 1981).

92 Criminal prosecutions against women for conduct injurious to their fetuses grew dramatically when state prosecutors responded to the crack epidemic among young women. For an excellent article on the causes of the crack epidemic and the punitive responses by the states against pregnant women, particularly women of color, see Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419 (1991).

93 Lisa C. Ikemoto, The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of the Law, 53 OHIO ST. L.J. 1205, 1261-85 (1992). Professor Ikemoto writes that the law regulates pregnancy through civil and criminal law. Id. This occurs primarily through “tort liability, criminal prosecution and findings of child neglect based on conduct during pregnancy.” Id. at 1261.
State prosecutors have attempted to transfer the expanded definition of the fetus for wrongful death purposes to support the criminal prosecutions of pregnant women for their conduct during pregnancy. Until recently, these attempts were unsuccessful. However, shortly after the Supreme Court of Appeals of West Virginia decided Farley, the South Carolina Supreme Court upheld the prosecution of a woman for her conduct during pregnancy, thereby accepting the prosecution's argument that fetal personhood should be adopted from the wrongful death statute.

The Whitner Court did exactly what was feared by opponents of the Farley decision. Whitner concerns criminal responsibility for child abuse and neglect of a viable fetus. The Supreme Court of South Carolina found it "absurd" to declare fetal personhood in the context of wrongful death statutes, but not in the context of child abuse. The next step on the continuum is to extend the definition of child to a non-viable fetus. As one dissenting judge advises, the court cannot logically draw a distinction between viable and nonviable fetuses. He supports his position by showing that the current Whitner distinction does not include the period of fetal development, nonviability, during which the greatest harm occurs from substance abuse. Thus, women who engage in harmful conduct when the fetus is most likely to be harmed will not be criminally liable, while those who engage in harmful conduct during the period of reduced vulnerability will be. Thus, the dissent predicts that the definition of "child" will be extended to include nonviable fetuses


95 Amici Brief, supra note 93, at 11-13.


97 Id.

98 Id. at *3.

99 Id. at *9 (Moore, J., dissenting). Justice Moore also concurs with the dissenting opinion of Chief Justice Finney. Id.

in South Carolina.101

V. CONCLUSION: DECLARING REPRODUCTIVE AUTONOMY

Professor Ronald Dworkin, a renowned legal moral philosopher, argues that we cannot begin to resolve the debate about abortion as long as we continue to discuss it in terms of fetal personhood.102 We must, he advises, admit that what is at issue is the moral sense of society that there is intrinsic value in human life and that decisions of life and death are decisions of moral responsibility that can remain only with the individual who is the moral decision maker. Dworkin's position reflects Professor McClain's concerns, that relational feminism incorporate autonomy principles from liberalism. By discussing the opportunity robbed by the tortious wrongdoer in Farley, the court communicated a Dworkin-like position that a tortious act interferes with another's moral decision making and violates society's intent to have individuals be autonomous moral decision makers.

The court, however, failed to communicate the same for autonomy. Its statements that Farley in no way affect a woman's Constitutional rights, do not go far enough. As is demonstrated by the South Carolina example so much more is at stake. What is at stake is a woman's interest in being able to operate as a moral decision maker attempting to balance what is best for her, the fetus, her relations and the societal value in potential human life. To protect this interest from incursion justified by the declaration of fetal personhood for the purposes of wrongful death, the Supreme Court of Appeals of West Virginia needed to state explicitly that its decision would not justify placing the mother and the fetus in an adversarial relationship. It could have done this by declaring that relational and autonomy interests are protected by not permitting tortious interference with the right of a woman to carry a fetus to term and by maintaining a woman's right under state law to make the decisions that she needs to make regarding her fetus without the threat of interference from the state or others.

The philosophical debate that rages on issues of life and death forces each of us to examine our own moral positions on these issues. It challenges us to consider what we will do when these issues confront us. Farley attempts to protect the right to make these decisions by not allowing a tortfeasor to rob us of the opportunity to make them. From this perspective, the decision is welcome and affirms both relational interests and autonomy. Unfortunately, however, it also opens the door to incursions on reproductive autonomy without sufficient precautions to stop the state and others from inserting themselves into the moral

101 Id.

decision making involved. What we can do now is hope that the court’s attempt to limit *Farley* will succeed and that West Virginia courts will not permit fetal personhood to transgress the boundary of wrongful death actions. The legislature, urged by the Supreme Court of Appeals of West Virginia in *Farley* to amend the wrongful death statute to clarify whether the statute includes fetal death, should accept the court’s challenge. For the legislature can clarify that the statute includes fetal death, but do it without expanding the definition of “person.” By doing this, West Virginia can distinguish itself as a state that values relational interests and protects fetal health without sacrificing maternal autonomy.

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