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Cover Page Footnote

I wish to thank Professor Tracy Higgins of Fordham Law School for guidance during the development of this Note.

NOTES

RETHINKING EMOTIONAL DISTRESS LAW: PRENATAL MALPRACTICE AND FEMINIST THEORY

*CAROLYN A. GOODZEIT**

> The woman's body, with its potential for gestating, bringing forth and nourishing new life, has been through the ages a field of contradictions: a space invested with power, and an acute vulnerability . . . .[1]

INTRODUCTION

To much of the legal community outside the circle of feminist discourse, feminist legal theory remains susceptible to misunderstanding and skepticism. Feminist terminology may contribute to this unfortunate situation.[2] As a result, many legal scholars, professionals and students have cautiously avoided association with this controversial theoretical framework.[3] Despite the antagonism that the term "feminist" tends to generate, feminist legal theory and methodology have slowly been finding their way into the structure and development of American law.[4] This translation of feminist theory into practice has not been limited to statutory changes and has gradually manifested itself in recent common law developments aimed at incorporating women's perspectives into the law.[5]

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* I wish to thank Professor Tracy Higgins of Fordham Law School for guidance during the development of this Note.

1. Adrienne Rich, Of Woman Born: Motherhood as Experience and Institution 102 (Tenth Anniversary ed. 1986) (1976).

2. Feminist legal discourse is notorious for such provocative terminology as hierarchy, dominance, patriarchy and oppression. *See infra* notes 8-9 and accompanying text.

3. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 3 (1988) [hereinafter *Primer*](lamenting the hostility feminists face and the consequent distancing of many career women from feminist policy and practice); Patricia A. Cain, *Feminist Legal Scholarship*, 77 Iowa L. Rev. 19, 19 (1991) (hypothesizing that the legal academy has remained skeptical about the value of feminist scholarship); *see also The Feminist Minority*, Wall St. J., Aug. 23, 1994, at A12 (citing a magazine Gallup poll finding that only one in three American women considers herself a feminist).

4. For example, the work of Andrea Dworkin and Catharine MacKinnon has been critical to the development of sexual harassment law and anti-pornography legislation. *See* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 Harv. Women's L.J. 1, 24-28 (1985) (proposing a model anti-pornography civil rights law); *see generally* Catharine A. MacKinnon, Only Words (1993) (discussing both pornography and sexual harassment in terms of their discrimination against women and their First Amendment protection).

5. *See infra* note 19 and accompanying text.

Part of the problem of institutionalizing feminist ideology is a general unawareness of what the basic feminist theories entail. At the most fundamental level, feminist legal theory is a critical analysis of the current legal system, its laws and procedures, that assesses the ways in which women's points of view and moral understandings have been excluded from the shaping and development of the law.[6] As such, a "feminist perspective considers the significance of ideas about gender in shaping institutions such as law, and the relevance of the often overlooked or ignored experiences of women as powerful sources of critical insight."[7] Thus, the central focus of feminist legal theory is analyzing the numerous ways, both subtle and obvious, that women's interests have been undermined within the law.

Aside from the analytical goals of feminist theory in understanding the how and why of women's subordination, feminist scholars have been even more challenged by the need to find practical methods of redefining the existing power structure.[8] Dissension among feminist scholars has heightened this challenge.[9] Despite conflicting visions of

6. Feminist legal theory is distinguished from other legal theories such as Critical Legal Studies because feminism takes gender as its central category of analysis. Deborah L. Rhode, *Feminist Critical Theories*, 42 Stan. L. Rev. 617, 617-18 (1990).

7. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J.L. & Feminism 41, 42 n.1 (1989) [hereinafter *Torts Course*].

8. The existing power structure is often referred to in feminist discourse as patriarchy, which Leslie Bender defines as the feminist term for "the ubiquitous phenomenon of male domination and hierarchy." *Primer*, *supra* note 3, at 5-6. All feminist theorists share the underlying goal of eradicating the socially and economically inferior position of women. Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, Review Essay, 82 Nw. U. L. Rev. 352, 353 (1988).

9. Although feminists agree that the structures and stereotypes that exist in current society oppress women, they intensely disagree over what the "feminine voice" truly constitutes. For example, Professor Catharine MacKinnon is the most vocal scholar from the "dominance" school which urges that women, because of their absolute history of dominance by men, have no authentic voice with which to articulate their needs. *See* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 39 (1987) (stating that "[w]omen think in relational terms because our existence is defined in relation to men . . . [and] when you are powerless, you don't just speak differently . . . you don't speak."). Consequently, a woman's perspective cannot be infused into law until the social structures that oppress women are neutralized. *See id.* at 40 (arguing that difference is a result of male dominance which has socially constructed a hierarchy of power in which women are subordinate to men). At the other end of the spectrum is the work of Carol Gilligan, who has produced psychological studies of male and female children which suggest that women do indeed have a different method of moral reasoning than do males, and thus women are essentially different from men. *See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 29 (1982). This understanding is often referred to as essentialism, authenticity or difference. Gilligan's work has become popularly accepted among feminists and is the backbone of the difference school of feminist thought. *See* Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 28 (1988) (characterizing cultural feminism as the "official text" of feminism).

The heated debate between MacKinnon and Gilligan over whether the feminine voice is innate or socially constructed is exemplified by this conversation the two scholars had in 1984:

how to confront patriarchy, however, feminist theory can be practically applied to the law. As Ruth Colker noted, "we cannot always reduce the tension between opposing feminist positions by searching for middle grounds; instead, we can reduce the tension by making difficult choices in particular historical circumstances but articulating, as we make these choices, that the opposing perspectives represent important values and that our choices must be constantly open to re-examination."[10]

The perspective embraced in this Note reflects in large part the claim of many feminists that women share a common set of female values and aspirations grounded both in their experiences as mothers and in their efforts to reclaim for women the "right to define what 'women' are and should be."[11] This view of feminism, often called relational or difference feminism,[12] can have direct implications for the development of tort law.[13] Because tort law encompasses value-based concepts such as duty, reasonableness and harm,[14] feminist scholars argue that tort law should be reconsidered and take into account women's points of view.[15] Specifically, by re-evaluating duty

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MacKinnon:	And I am trying to work out how to change [the current power structure], not just how to make people be more fully human within it.
Gilligan:	Your definition of power is his definition.
MacKinnon:	That is because the society *is* that way, it operates on his definition, and I am trying to change it.
Gilligan:	To have her definition come in?
MacKinnon:	That would be part of it, but more to have a definition that she would articulate that she cannot now, because his foot is on her throat.
Gilligan:	She's saying it.
MacKinnon:	I know, but she is articulating the feminine. And you are calling it hers. That's what I find infuriating.
Gilligan:	No, I am saying she is articulating a set of values which are very positive.
MacKinnon:	Right, and I am saying they are feminine. And calling them hers is infuriating to me because we have never had the power to develop what ours really would be.

Feminist Discourse, Moral Values, and the Law: A Conversation, 34 Buff. L. Rev. 11, 74-75 (1985).

10. Ruth Colker, *The Female Body and the Law: On Truth and Lies*, 99 Yale L.J. 1159, 1161 (1990) (reviewing Zillah Eisenstein, The Female Body and the Law (1988)).

11. Karen Offen, *Feminism and Sexual Difference in Historical Perspective*, *in* Theoretical Perspectives on Sexual Difference 13 (Deborah L. Rhode ed., 1990).

12. *See infra* notes 174-79 and accompanying text.

13. "Tort law cries out for feminist insights, methodologies, critiques, and reconstructions. Because tort law is mostly common law . . . it is flexible enough to respond quickly to feminism's critiques." Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575, 575 (1993) [hereinafter *Overview*].

14. *See Torts Course*, *supra* note 7, at 42.

15. The "woman's point of view" for purposes of this Note will stem from the work of relational feminists such as Carol Gilligan. *See infra* notes 174-79 and accompanying text. Relational feminists do not claim that this point of view is strictly asso-

and harm, a feminist perspective can be infused into tort law in a fashion that will give a "balanced legal consciousness informed by the perspective of both genders."[16]

Integrating feminist theory into tort law does not conclude with a reconsideration of traditional tort concepts. Tort law frequently involves issues, such as pregnancy, that are of central concern to women.[17] Therefore, when both traditional torts concepts and pregnancy coincide within a single tort, feminist legal theory can supply a vast array of critiques and suggestions for change. This collision is evident in a series of cases that involve recovery for negligent infliction of emotional distress for the stillbirth or injury of fetuses as a result of prenatal medical malpractice.

The prenatal malpractice/emotional distress cases are an important area of tort law for feminist reconsideration for a number of reasons. First, these cases demonstrate the difficulties the courts face in coping with the issue of pregnancy and the question of whether the fetus is a separate entity from its mother.[18] Second, this is one of the few common law areas where feminist theory has already had an impact.[19] Finally, the traditional analyses of negligent infliction of emotional distress have presented many obstacles to mothers who seek recovery for the emotional trauma resulting from the death or injury of their fetus.[20]

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ciated with biological gender. Rather, as Gilligan noted, "[t]he voice I describe is characterized not by gender but theme." Gilligan, *supra* note 9, at 2.

16. *Torts Course*, *supra* note 7, at 42.

17. A number of torts specifically implicate pregnancy. *See infra* part III.A.1.

18. *See infra* part II.

19. In particular, a New York trial court's decision in *Alberto v. Columbia Presbyterian Medical Center*, N.Y. L.J., Sept. 10, 1993, at 21 (Sup. Ct. New York County 1993) shows how feminist insight can influence how judges view the law. Justice Kristin Booth Glen's judgment addressed specific feminist concepts and concerns and relied on such noted feminist scholars as: Robin West, Wendy Williams, Herma Hill Kay, Isabel Marcus, Barbara Katz Rothman, Patricia Cooney, Linda Krieger, and Zillah Eisenstein. *See id.* at 22.

20. *See infra* part II. This Note focuses solely on the availability of recovery for *mothers* for emotional distress sustained from the stillbirth or serious injury of the fetus. The right of the fathers to recover, however, has also been a somewhat controversial issue for the courts. *Compare* Justus v. Atchison, 565 P.2d 122, 134-36 (Cal. 1977) (denying father's recovery for emotional shock even though father was present in the delivery room and witnessed the emergency procedures performed on the dying mother and fetus) *with* Austin v. Regents of the Univ. of Cal., 152 Cal. Rptr. 420, 422 (Ct. App. 1979) (allowing father to state a valid cause of action for emotional distress when the father alleged that he learned of the death of the fetus by his own observation and "that his shock and distress were occasioned by that sensory and contemporaneous realization of the death"); *compare also* Robbins v. Kass, 516 N.E.2d 1023, 1026 (Ill. Ct. App. 1987) (denying father recovery for emotional distress because he was never in any physical danger himself in witnessing the stillbirth of his child) *with* Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909, 919 (N.C. Ct. App. 1988) (finding that father's emotional distress was neither too remote nor unforeseeable for purposes of emotional distress recovery).

The basis for the confusion in these cases derives from three primary conceptual difficulties. First, tort law is replete with conflicting rules regarding the status of the fetus.[21] The ambiguity as to whether a fetus is a part of its mother or separate from her has resulted in tremendous contradiction among the courts.[22] Second, the tort principles behind negligent infliction of emotional distress were not designed to address prenatal malpractice. Rather, emotional distress doctrine developed at common law to meet specific circumstances, such as when fright induced mental trauma, or when a parent witnessed injury to his or her child.[23] Consequently, the prenatal malpractice cases do not fit comfortably within the established legal formulas. Finally, women have been unable to recover in many instances because of the restrictive nature of tort law itself. The concepts of duty and harm have been traditionally very limited,[24] and as a result, courts have been unwilling to afford recovery in these circumstances.

This Note serves a twofold purpose. First, it underscores the current difficulty in applying traditional tort law concepts to cases of negligent infliction of emotional distress where pregnancy is a principal factor. Second, it addresses the ways in which feminist legal theory should be applied to resolve the conceptual challenges the courts have faced in deciding these difficult cases. Part I of this Note provides an overview of negligent infliction of emotional distress doctrine and the traditional analytical frameworks courts use to assess these causes of action. Part II explores how these rules and frameworks have been applied to prenatal medical malpractice claims and highlights the conflicting results the courts have reached and the obstacles women face in seeking recovery. Part III offers a feminist critique of this area of the law and interprets the erratic results in these cases. Finally, this Note concludes that a new approach should be adopted in analyzing these cases to recognize the complexities of the maternal/fetal relationship and to redefine the existing concepts of duty and harm to reflect feminist ideals.

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21. *See* discussion *infra* part III.A.1.

22. *Compare, e.g.*, Vaccaro v. Squibb Corp., 418 N.E.2d 386, 386 (N.Y. 1980) (holding that harm caused to a fetus in utero by the defendant does not impose a duty on the doctor towards the mother) *with* Anisodon v. Superior Ct., 285 Cal. Rptr. 539, 546 (Ct. App. 1991) (holding that duty during prenatal care includes the mother). For a discussion of the difficulties pregnancy creates within the law, see generally Zillah Eisenstein, The Female Body and the Law 98 (1988) ("The pregnant body represents a dilemma for legal discourse.").

23. Martha Chamallas with Linda Kerber, *Women, Mothers and the Law of Fright: A History*, 88 Mich. L. Rev. 814, 814 (1990).

24. *See infra* part III.C.

I. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS: A CONCEPTUAL BACKDROP

Traditionally, negligence law only allowed compensation for physical and property damage.[25] Compensation for emotional harm was and continues to be much more limited for a number of policy reasons. For instance, emotional suffering is generally viewed as a temporary condition and can be easily feigned or imagined.[26] Courts also tend to perceive an unfairness in imposing heavy financial burdens for behavior causing physical consequences that are considered remote from the "wrongful" act.[27] Moreover, the specter of increased litigation affects the courts' willingness to allow recovery.[28] As a result, the avenues of recovery for emotional injuries are limited.

There are three basic categories of negligent infliction of emotional distress. First, under the direct victim framework, a plaintiff may recover for emotional distress if she has suffered a direct physical harm from the defendant's negligent act which leads to emotional distress.[29] Second, under bystander analysis, a plaintiff may recover if she is a witness to an injury to a family member that causes her to suffer her own emotional distress.[30] Finally, under a duty framework, a plaintiff may recover if the defendant has breached a direct duty that is the proximate cause of the plaintiff's emotional distress.[31] To state a cause of action in any of these cases, however, many states require that the plaintiff prove some physical manifestations of the distress to ensure that the emotional injuries are genuine.[32] Because of the diffi-

25. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 54, at 359-60 (5th ed. 1984) [hereinafter Prosser & Keeton].

26. *See id.* § 54, at 360-61.

27. *See id.*

28. *Id.* This is also known as the classic floodgate argument.

29. Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 Wash. L. Rev. 1, 7 (1992). The requirement of physical impact has been virtually extinguished, and today, even the mildest form of impact can be sufficient to trigger a cause of action. *Id.* at 8; *see also* Prosser & Keeton, *supra* note 25, § 54, at 363-64 (listing some absurd situations where courts have found "impact").

30. Davies, *supra* note 29, at 7-8.

31. Jacqueline M. Mega, *Negligent Infliction of Emotional Distress: Confusion in New York and a Proposed Standard*, 56 Brook. L. Rev. 379, 381 (1990). The classic example of this form of negligent infliction of emotional distress appears in *Battalla v. New York*, 176 N.E.2d 729 (N.Y. 1961), in which a ski-lift attendant negligently failed to secure the safety bar and plaintiff subsequently suffered severe emotional trauma. *Id.* at 729.

32. *See, e.g.*, Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983) (adopting the physical manifestations requirement in order for bystanders to recover for emotional distress); Robbins v. Kass, 516 N.E.2d 1023, 1027 (Ill. App. Ct. 1987) (stating that this requirement indicates a desire to permit compensation only in severe emotional distress cases); Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909, 916 (N.C. Ct. App. 1988) (citation omitted) (commenting that absent any physical impact, plaintiff must prove some resulting physical injury from the emotional distress).

culty of distinguishing mental from physical injuries, others merely require that the distress be sufficiently severe to ensure genuineness.[33]

Courts that require physical manifestations of the distress only recognize several exceptions to this requirement. First, the physical trauma rule does not adhere in cases that involve negligently delivered messages erroneously informing the plaintiff that a loved one has died.[34] In addition, plaintiffs need not plead physical harm if a defendant has negligently handled the remains of a loved one (the "corpse" cases).[35] Recently, the New York courts have also allowed recovery without showing physical manifestations of distress when the negligent advice of a defendant leads a plaintiff to violate her deep-seated beliefs and undergo an abortion.[36] In these three circumstances, the courts eliminated the physical manifestation requirement because of the unique guarantee that the emotional harm was real.[37]

Physical manifestations of emotional distress are also required under many bystander frameworks. Generally, courts employ one of three basic bystander analyses. Traditionally, bystanders to another's injury had to prove that they suffered some sort of physical impact in addition to physical injuries resulting from the distress.[38] This rule, however, has been discarded in most jurisdictions.[39] Although independent injury will still afford relief in the courts, a number of other states also allow recovery if plaintiffs can satisfy the "zone of danger" test for their emotional distress.[40] This test allows a bystander to recover when: (1) the defendant's negligence creates an unreasonable risk of bodily harm to the plaintiff; (2) the defendant's conduct was a substantial factor in causing the plaintiff's injuries; (3) that resulted from the contemporaneous observance of death or physical injury; (4) to a member of the plaintiff's immediate family; (5) in the plaintiff's

33. *See* Prosser & Keeton, *supra* note 25, § 54, at 364-65 n.57-9. Hawaii, California and several other states allow recovery for emotional distress without regard to any physical manifestations of the trauma. *Id.*

34. Mega, *supra* note 31, at 383. A popular example of this form of the tort appears in Johnson v. New York, 334 N.E.2d 590 (N.Y. 1975), in which a hospital erroneously informed the plaintiff-daughter that her mother had died. *Id.* at 590.

35. *See* Mega, *supra* note 31, at 383; *see also* Prosser & Keeton, *supra*, note 25, § 54, at 362; *see, e.g.*, Lando v. New York, 351 N.E.2d 426, 427 (N.Y. 1976) (allowing recovery when defendants did not recover the body of plaintiff's daughter for eleven days).

36. Martinez v. Long Island Jewish Hillside Medical Ctr., 512 N.E.2d 538, 539 (N.Y. 1987). *See infra* notes 131-34 and accompanying text.

37. Prosser & Keeton, *supra* note 25, § 54, at 362.

38. Prosser & Keeton, *supra* note 25, § 54, at 362; Blanche Wilkinson, Note, *Bystander Emotional Distress Claims in Medical Malpractice Actions*, 15 Am. J. Trial Advoc. 605, 608 (1992).

39. This rule only persists in Delaware, Georgia, Idaho, Indiana, Kentucky, Oklahoma and Oregon. Wilkinson, *supra* note 38, at 608 n.19.

40. *See* Prosser & Keeton, *supra* note 25, § 54, at 365.

presence.[41] The majority of jurisdictions, however, follow California's *Dillon* rule.[42] Under *Dillon*, the plaintiff (1) must be in close proximity to accident; (2) must suffer a direct emotional impact from the contemporaneous observance of the accident; and (3) must be closely related to the victim.[43] Recently, this rule has been modified to stress the foreseeability of emotional harm as a determining factor.[44]

Several jurisdictions have eliminated the physical manifestation requirement for bystanders.[45] If plaintiffs are not required to allege physical consequences of their distress, they must at least prove that they suffered severe emotional distress. Typically, the severity is assessed in terms of the intensity and duration of the distress.[46] Some jurisdictions have formulated specific tests to determine the extent of the emotional harm. New Jersey, for example, applies a three factor test: (1) the frequency of the distress; (2) the length or intensity of the distress; and (3) the interference caused by the distress in everyday life.[47]

When these forms and analyses of negligent infliction of emotional distress are applied in the context of prenatal malpractice, they become convoluted and unworkable. The case law demonstrates that as applied to a physician's negligence causing the severe injury or death of the fetus, neither bystander, direct victim nor duty analysis provide a sound and legitimate avenue of recovery for mothers for their resulting emotional distress.

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41. Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983); Bovsun v. Sanperi, 461 N.E.2d 843, 847 (N.Y. 1984). In Illinois, a plaintiff seeking damages for negligent infliction of emotional distress must allege not only that she was in a zone of physical danger and reasonably feared for her safety but also that she suffered physical manifestations of her emotional distress. Hunt v. Chettri, 510 N.E.2d 1324, 1327 (Ill. App. 1987). This rule is also followed in North Carolina. *See* Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909, 916 (N.C. Ct. App. 1988) (holding that absent some impact, a plaintiff must show some physical injuries resulting from her distress).

42. *See* Dillon v. Legg, 441 P.2d 912 (Cal. 1968). States adhering to the *Dillon* rule include: Alaska, Hawaii, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Pennsylvania, Washington, and Wyoming. Wilkinson, *supra* note 38, at 614 n.66.

43. Wilkinson, *supra* note 38, at 614-15.

44. *See* Thing v. La Chusa, 771 P.2d 814, 829-30 (Cal. 1989).

45. Maine and New Jersey do not require physical manifestations of emotional distress in order for bystanders to recover. Prosser & Keeton, *supra* note 25, § 54, at 365 n.60.

46. *See* Restatement (Second) of Torts § 46 (1965).

47. Buckley v. Trenton Saving Fund Soc'y, 544 A.2d 857, 864-65 (N.J. 1988); *see also* Andreasen v. Gomes, 504 N.W.2d 539, 542 (Neb. 1993) (stating that "[t]o be actionable, the emotional distress must have been so severe that no reasonable person could have been expected to endure it").

II. Prenatal Malpractice and Emotional Distress: Inconsistency and Confusion in the Courts

When a doctor's negligence physically injures only the fetus, and leaves the mother with severe emotional scars, the courts have been unable to fit this unique form of emotional harm into either bystander, direct victim or duty frameworks. As a result, many courts have used a complicated array of tortured logic and legal fictions, and have offered sharp criticisms of other courts' analyses.[48] While one court may assess the cause of action under the bystander theory, another may resort to direct duty analysis. Others may opt to treat the mother and fetus as one, so that the mother is the direct victim of the negligent conduct. In some cases, the court may not select the framework at all and instead rely on the plaintiff's pleadings.[49] Consequently, the case law manifests an inconsistent pattern of adjudication, in which courts waver between treating the mother as a bystander, the direct victim of the harm, or an object of duty.

A. *Mother as Bystander*

Although none of the three prevailing emotional distress formulas have provided uniform and positive results for mothers, many courts across the country have analyzed cases of prenatal malpractice under a bystander framework. Courts applying this analysis have depended largely on the assumption that two entities are involved in the equation.[50] Accordingly, mothers must prove such factors as their observance of the injury to the fetus, their risk of serious bodily injury or their own independent physical injuries, despite the fact that the procedure that caused the harm was performed through contact with her body.

1. The "Contemporaneous Observance" Pitfall

Both the *Dillon* and zone of danger tests require that the plaintiff "contemporaneously observe" the death or injury of a family member

48. *See, e.g.*, Sceusa v. Mastor, 525 N.Y.S.2d 101, 103 (4th Dep't 1988) (criticizing the use of bystander analyses in prenatal malpractice contexts because bystander analysis was created as a fiction "in order to bring the plaintiffs within the tort-feasor's ambit of duty/foreseeability . . . [and this] fiction is unnecessary . . . where defendants doctor and hospital clearly had a duty to both the mother and the unborn infants and the risk of injury as a result of defendants' negligence was foreseeable").

49. *See, e.g.*, Anisodon v. Superior Court, 285 Cal. Rptr. 539, 541 (Ct. App. 1991) (mother bases her action for emotional distress on her status as the physician's patient for her pregnancy and delivery); Hurlbut v. Sonora Comm. Hosp., 254 Cal. Rptr. 840, 843 (Ct. App. 1989) (parents base their emotional distress claims solely on the "bystander" theory and did not contend that they were direct victims of the breach of duty.).

50. *See, e.g.*, Khan v. Hip Hosp., 487 N.Y.S.2d 700, 706 (Sup. Ct. Queens County 1985) ("The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life.") (citing Kelly v. Gregory, 125 N.Y.S.2d 696 (3d Dep't 1953))).

to state a prima facie cause of action.[51] In the context of prenatal malpractice, however, the ramifications of the negligence may not become apparent until after the child is born.[52] For example, if the doctor negligently performs a procedure and directly harms the fetus, the mother may not become aware that the injury has occurred until the fetus is born and the harm is observable. Likewise, if a doctor negligently fails to perform certain tests or procedures that could have prevented harm to the fetus, the harm may become apparent at a much later time than when the negligent omission took place. In both situations, the nexus between the negligent act or omission and the mother's realization of it are remote. As a result, from jurisdiction to jurisdiction, the courts have disagreed on how to interpret the observance factor in a way that accurately reflects the realities of prenatal care and childbirth.

Whether or not a mother is deemed to have "contemporaneously observed" the death or injury to the fetus may hinge solely on the specific facts of the case. Under the zone of danger test, for instance, the New York Court of Appeals in *Tebbutt v. Virostek*[53] denied a mother emotional distress recovery for the stillbirth of her fetus after her physician negligently performed an amniocentesis. Because she did not become aware of the injury to the fetus until weeks later when she gave birth,[54] the court found that she had not observed the injury to the fetus and denied recovery.[55] The temporal nexus between the injury and the mother's realization of it was critical to this decision.

In contrast to *Tebbutt*, a New York trial court found only months earlier in *Khan v. Hip Hospital*[56] that under certain circumstances, a mother could "contemporaneously observe" the injury or death of the fetus.[57] In *Khan*, the plaintiff mother was awake and conscious and subject to a reasonable fear of immediate personal injury during a prolonged delivery, in which the physician failed to perform a timely cesarean.[58] After being anesthetized, the mother regained conscious-

51. *See supra* notes 41-43 and accompanying text.

52. For example, in Tebbutt v. Virostek, 483 N.E.2d 1142 (N.Y. 1985), a mother was negligently administered an amniocentesis which later led to the stillbirth of the baby. *Id.* at 1143.

53. *Id.*

54. *See id.* at 1143.

55. *Id.* Thus, because she failed to satisfy the zone of danger observance requirement, she had to prove that she had sufficient independent physical injuries to warrant recovery. The court then found that her "pain, severe disappointment, anxiety, despondency, bitterness and suffering" were not sufficient physical injuries to maintain a cause of action for negligent infliction of emotional distress. *Id.*

For a discussion of what constitutes sufficient independent physical injury to maintain a cause of action for emotional distress, see *infra* part II.A.3.

56. 487 N.Y.S.2d 700 (Sup. Ct. Queens County 1985).

57. *Id.* at 706.

58. The plaintiffs alleged in particular that the defendants were guilty of malpractice in "failing to properly anticipate a footling breech delivery and provide competent physicians to deal with an emergency created at the time of birth." *Id.* at 701.

ness and immediately became aware that the fetus was stillborn, only a short time after its actual occurrence.[59] Moreover, Mrs. Khan's first request was to see her baby, at which time she was taken in a wheelchair to the hospital's morgue.[60] In reaching its decision, the court found that "contemporaneousness should not require that plaintiff witness the impact."[61] Accordingly, when the injury occurred during the delivery of the infant, and not weeks earlier, the temporal nexus was met. The court held, therefore, that if the evidence substantiated her claims, the mother could recover under the zone of danger test.[62]

Parallel conflicts arise under the *Dillon* observance requirement. Although the *Dillon* test is often regarded as the most liberal of the bystander frameworks,[63] courts interpreting the observance requirement have been reluctant to expand it to cover situations where the mother did not become aware of the injury until some time after the injury. For example, in *Hurlbut v. Sonora Community Hospital*,[64] the California Court of Appeals found that *Dillon* did not afford recovery to a mother for emotional suffering caused by the birth of her infant with brain damage, unless she suffered her own independent injury.[65] The court reasoned that the mother could not have contemporaneously observed the injury to the fetus because she was unconscious during delivery.[66] Consequently, the court found that *Dillon* did not allow recovery when parents do not become aware of the negligence until after the fact,[67] even though the negligent conduct occurred during the delivery process.[68]

Other courts have addressed the observance requirement by simply redefining the contemporaneity factor in factual situations involving prenatal care and the delivery of infants. For example, in *Phillips v.*

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 707. The *Khan* court based this holding on the observance analysis enunciated in Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982), discussed *infra* notes 73-76 and accompanying text.
63. *See* Prosser & Keeton, *supra* note 25, § 54, at 366 (stating that the restrictive zone of danger test has been discarded in some jurisdictions in favor of the progressive "bystander proximity" doctrine).
64. 254 Cal. Rptr. 840 (Ct. App. 1989).
65. *Id.* at 844.
66. *See id.* at 844-45.
67. *Id.* at 843-44. In most cases of prenatal malpractice, the parents do not become aware of the injury to the fetus until well after the negligent procedure has taken place. Therefore, confining *Dillon* to actual observance of the negligent act severely limits a mother or father's ability to recover for the emotional trauma caused by the resulting injury to the infant. *But see* Sesma v. Cueto, 181 Cal. Rptr. 12, 15 (Ct. App. 1982) (finding that a mother's perception of and concern over the neglect she was experiencing from medical personnel in the labor room could constitute contemporaneous observance and afford recovery for emotional distress).
68. The parents had brought suit against the hospital for damages resulting from the physician's failure to perform a timely cesarean section, which caused brain damage in the infant. 254 Cal. Rptr. at 841.

Cooper OB/GYN Associates,[69] the court applying New Jersey law[70] found that in the context of childbirth and pregnancy, the heightened observance requirement of immediately witnessing the accident did not apply.[71] The district court relied on an earlier New Jersey decision which found that "the experience of pregnancy and child birth itself constitutes the immediacy and presence of the claimant in the face of inflicted personal injury or death of a loved one."[72]

The Fifth Circuit reached a similar interpretation in *Haught v. Maceluch*[73] and construed *Dillon* to allow a mother to recover for her emotional distress by finding that she had contemporaneously observed the injury to her fetus. The "contemporaneous" requirement under *Dillon* was considered to include the mother's "experiential perception" of the entire accident, not just the moment of injury.[74] The court also found that regardless of whether the mother actually witnessed the injury to the fetus, the factor of observance should not determine the outcome.[75] Instead, the clear foreseeability of the mother's distress in the context of childbirth overrode the weakness of any one factor.[76]

As a consequence of these decisions, to satisfy the "contemporaneous observance" factor of bystander theory, mothers must allege and

69. 811 F. Supp. 1018 (D.N.J. 1992). In *Phillips*, the plaintiff's son suffered head bruises and chest contusions during delivery as a result of the physician's alleged malpractice which caused permanent damage to the infant's left shoulder, left arm, and left hand. *Id.* at 1019. The plaintiffs, the infant's mother and father, presented evidence that the father was present in the delivery room with his wife during the childbirth and that they both witnessed the injuries to the infant contemporaneously with his birth. *Id.* at 1020.

70. New Jersey follows a similar test to *Dillon* and requires a plaintiff to prove (1) the death or serious physical injury of another caused by the defendant's negligence; (2) a marital or intimate familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress. Portee v. Jaffe, 417 A.2d 521, 528 (N.J. 1980).

71. *Phillips*, 811 F. Supp. at 1023.

72. *Id.* (quoting Giardina v. Bennett, 545 A.2d 139, 142-43 (N.J. 1988)). The *Phillips* court also noted that the temporal nexus between the observance of the injury and the emotional distress that was required in order to recover for bystander emotional distress differed in the context of negligent medical diagnosis versus negligent medical treatment. In Frame v. Kothari, 560 A.2d 675 (N.J. 1989), the New Jersey Supreme Court imposed a heightened standard for satisfying the observance requirement in cases of medical misdiagnosis. The *Frame* court ruled that because of the unique circumstances of medical misdiagnosis in which parents do not perceive the consequences of the negligence until after the fact, a temporal nexus was required between the misdiagnosis and the injury, as well as the contemporaneous observation of the injury by the family member. *Id.* at 678-79. This heightened requirement should not be imposed where negligent prenatal and childbirth procedures leads directly and imminently to the injury of the fetus. *See Phillips*, 811 F. Supp. at 1023.

73. 681 F.2d 291 (5th Cir. 1982). In *Haught*, the physician's negligence and absence during the mother's difficult delivery caused the infant to suffer permanent brain damage. *Id.* at 294-95.

74. *Id.* at 300 (quoting Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App. 1978)).

75. *Id.*

76. *Id.*

prove that the injury to the fetus was caused during delivery and that she was conscious and aware of the injuries. The observance requirement, therefore, can be a substantial obstacle to mothers seeking emotional distress recovery. These inconsistencies are not restricted to interpreting the observance requirement, and also appear when courts have assessed other elements of bystander recovery.

2. The Zone of Danger Requirement

In zone of danger jurisdictions, a mother must also prove that she was in immediate physical danger from the defendant's negligence.[77] In the context of prenatal care, this element is not satisfied merely because the conduct that caused the injury to the fetus occurred through contact with the mother's body.[78] For instance, *Tebbutt* found that the negligent performance of an amniocentesis did not draw a mother into the zone of danger.[79]

Other courts have analyzed the zone of danger more broadly. In *Brown v. Green*,[80] for example, when a defendant physician's negligence caused the premature birth and subsequent death of the plaintiff's pre-viable twins, the court allowed the mother to recover.[81] The court reasoned that the miscarriage of a fetus that has not reached viability is considered physical injury to the mother that puts her in the zone of danger.[82] Regardless of this expansive view, the zone of danger continues to be an obstacle to mothers seeking recovery when they do not allege independent physical injury.[83]

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77. *See* Seef v. Sutkus, 562 N.E.2d 606, 609 (Ill. App. Ct. 1990) (holding that plaintiffs must suffer a reasonable fear for their own safety, not simply fear for the safety of a third person); Guialdo v. Allen, 567 N.Y.S.2d 255, 256 (1st Dep't 1991) (finding that the law is established that a plaintiff may not recover for injury resulting from witnessing the unintentional infliction of harm to another unless the negligence of the defendant also created an unreasonable risk of bodily harm to the plaintiff and the emotional disturbance experienced was "serious and verifiable"); Khan v. Hip Hosp., 487 N.Y.S.2d 700, 705 (Sup. Ct. Queens County 1985) ("According to [the] Bovsun-Vaillancourt analysis, the plaintiff mother need not prove 'independent physical injuries' but may recover for emotional and psychic harm as a result of the stillborn birth if she is found to have been within the 'zone of danger' and subject to a reasonable fear of immediate personal injury.").

78. *See* Seef v. Sutkus, 562 N.E.2d 606, 609 (App. Ct. 1990) (stating that "[p]arents of an unborn child are not *ipso facto* in the zone of danger for negligence involving that child").

79. *See supra* note 53-55 and accompanying text.

80. 781 F. Supp. 36 (D.D.C. 1991).

81. *See id.* at 39.

82. *Id.* The court did not fully explain this point, so it remains unclear if the court considered the mother the direct victim of the conduct or if she was still a bystander even though the fetus was not viable. Because the court did use a bystander analysis, however, it seems to have implicitly regarded the mother as a third party.

83. *See, e.g.*, Seef v. Sutkus, 562 N.E.2d 606, 609 (Ill. App. Ct. 1990) (finding that mother who perceived changes in the responses of her fetus while waiting to undergo cesarean section was not within the zone of danger).

3. The Independent Injury Factor

When a court finds that a plaintiff has not observed the injury to a third person or was not in the zone of danger, it then requires the plaintiff to prove that she suffered her own independent injury.[84] These injuries must be completely distinct from the pain and suffering associated with the childbirth process or the injury to the fetus.[85] This rule is grounded in policy considerations to keep tort concepts manageable and limited.[86]

Independent injury is generally a question of fact for the courts, requiring case-by-case determinations.[87] For example, courts have disagreed on whether a cesarean section constitutes an injury sufficient to meet this requirement. In *Alberto v. Columbia Presbyterian*

84. If the mother is not in the zone of danger, however, she may not recover for emotional harm as a result of a stillbirth absent physical injuries to the mother distinct from the injuries to the fetus. Scott v. Capital Area Community Health Plan, 594 N.Y.S.2d 370, 371 (3d Dep't 1993); Bubendey v. Winthrop Univ. Hosp., 543 N.Y.S.2d 146, 147 (2d Dep't 1989); Burgess v. Miller, 508 N.Y.S.2d 204, 205 (2d Dep't 1986); Gastwirth v. Rosenberg, 499 N.Y.S.2d 95, 97 (2d Dep't 1986).

The same rule also prevails in North Carolina. In *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, the North Carolina Court of Appeals found that a mother must show some impact if she was not in the zone of danger. 365 S.E.2d 909, 916 (N.C. Ct. App. 1988). Given the physical connection between mother and fetus, however, the court found that a physical impact or injury to the fetus is an injury or impact to the mother. *Id.* at 917.

The independent injury requirement also attaches if the *Dillon* factors are not met. *See supra* note 65 and accompanying text.

85. *See* Wittrock v. Maimonides Medical Ctr., 501 N.Y.S.2d 684, 685 (2d Dep't 1986) (finding that plaintiff's labor pains were not actionable independent injuries because they were incident to the childbirth process); Farago v. Shulman, 480 N.Y.S.2d 758, 759 (2d Dep't 1984) (finding that plaintiff's episiotomy was merely another aspect of the childbirth procedure and not an independent injury and did not cause the stillbirth of plaintiff's infant); McLean v. Lilling, 529 N.Y.S.2d 975, 976 (Sup. Ct. Kings County 1988) (finding that in order for mother of stillborn child to successfully plead an "independent physical injury, the injuries must be other than those attendant to childbirth and must be a *cause* of the stillbirth").

86. Sceusa v. Mastor, 525 N.Y.S.2d 101, 102 (4th Dep't 1988).

87. Courts have found no independent injury to the mother in the following cases: Scott v. Capital Area Community Health Plan, 594 N.Y.S.2d 370, 371 (3d Dep't 1993) (finding that plaintiff's rapid heartbeat, nausea, shortness of breath and chest pains were a result of the fetal distress and thus were not independent injuries); Guialdo v. Allen, 567 N.Y.S.2d 255, 256 (1st Dep't 1991) (finding that plaintiff's lower abdominal cramping during last six weeks of pregnancy was not independent of childbirth process); Hayes v. Record, 551 N.Y.S.2d 668, 669 (3d Dep't 1990) (stating that plaintiff's "anxiety attacks" do not meet the independent injury requirement "even under the most liberal pleading standards"); Keselman v. Kingsboro Medical Group, 548 N.Y.S.2d 287, 288 (2d Dep't 1989) (finding that mother's moderate vaginal bleeding was a common phenomenon during childbirth and not an independent injury); Bauch v. Verrilli, 536 N.Y.S.2d 240, 242 (3d Dep't 1989) (holding that an episiotomy does not constitute physical injury unless it is also alleged to be the cause of the infant's death). *But see* Stiles v. Sen, 544 N.Y.S.2d 259, 261 (4th Dep't 1989) (holding that whether a torn cervix or vaginal tear is an independent injury is an issue of fact for the trial court).

Medical Center,[88] the court found that a cesarean section was a physical injury to the mother which placed her in the zone of danger.[89] The *Alberto* court suggested that if Mrs. Alberto had delivered vaginally, she could not have recovered because she would have no independent injury.[90] Other courts, however, have found that cesarean sections are routine delivery procedures and do not constitute independent injuries for the purposes of negligent infliction of emotional distress recovery.[91]

Courts have also found independent physical injury where the mother was conscious during a long and painful delivery,[92] where the mother suffered for hours while waiting for the doctor to perform a cesarean section,[93] and where the mother was seeking an abortion.[94] To survive summary judgment, therefore, it is imperative for a plaintiff to plead some form of physical injury.[95] The injury claimed, however,

88. N.Y. L.J., Sept. 10, 1993, at 21 (Sup. Ct. N.Y. County 1993). This case involved the defendant physician's negligent amniocentesis, which resulted in an emergency cesarean section. A week after the surgery, the infant died. *See id.*

89. *Id.*; *see also* Zinn v. Long Island Jewish Medical Ctr., 476 N.Y.S.2d 8, 9 (2d Dep't 1984) (affirming denial of defendant's motion for summary judgment because plaintiff, who underwent an emergency cesarean section in which the fetus died, alleged "physical injuries").

90. *Alberto*, N.Y. L.J., Sept. 10, 1993, at 22.

91. Sceusa v. Mastor, 525 N.Y.S.2d 101, 103 (4th Dep't 1988) (finding that plaintiff's cesarean section did not fall within the realm of physical injury); McLean v. Lilling, 529 N.Y.S.2d 975, 977 (Sup. Ct. Kings County 1988) (finding that "the caesarean itself was another aspect of the childbirth procedure and thus cannot serve as the basis for recovery"). On the subject of cesarean sections in the context of medical malpractice, see generally Hilary E. Berkman, *A Discussion of Medical Malpractice and Cesarean Section*, 70 Or. L. Rev. 629, 649-50 (1991) (arguing that a decrease in the number of cesareans performed will allow women to have greater control over their bodies and will force physicians to focus on the woman's needs in each particular case).

92. *See, e.g.*, Khan v. Hip Hosp., 487 N.Y.S.2d 700, 704 (Sup. Ct. Queens County 1985) (finding that delayed and prolonged delivery was not merely an incidental aspect of the childbirth process). *But see* Bubendey v. Winthrop Univ. Hosp., 543 N.Y.S.2d 146, 147 (2d Dep't 1989) (finding that labor pains for many hours are neither independent of those naturally associated with the childbirth process itself nor the cause of the injury to the fetus); Prado v. Catholic Medical Ctr., 536 N.Y.S.2d 474, 475 (2d Dep't 1988) (finding that plaintiff's claim of "prolonged pain cannot be actionable since it was not permanent and since it could be considered as pain naturally associated with the childbirth process itself").

93. McLean v. Lilling, 529 N.Y.S.2d 975, 977 (Sup. Ct. Kings County 1988).

94. In Ferrara v. Bernstein, 582 N.Y.S.2d 673 (1st Dep't 1992), for example, the New York Appellate Division found independent physical injuries in the abortion context. *Id.* at 676-77. In *Ferrara*, plaintiff's abortion was incomplete and several weeks later, after suffering through severe cramping, she was admitted to the hospital where she miscarried a four and one-half inch fetus into a toilet. *Id.* at 674-75. The court distinguished the abortion context from injuries arising from a stillbirth, noting that while the physical pains she suffered might be naturally associated with childbirth, they were not naturally associated with the abortion procedure for which she had contracted. *Id.* at 676.

95. *See, e.g.*, Friedman v. Meyer, 454 N.Y.S.2d 909, 910 (2d Dep't 1982) (holding that plaintiff cannot recover without showing independent physical injuries).

must be independent and not incidental to the childbirth process and unrelated to the stillbirth or fetal injury.[96]

4. The Severity of the Distress

Another element which may preclude emotional distress recovery is the seriousness of the distress itself. Although a particular jurisdiction may or may not require the trauma to take a physical form,[97] mothers have the additional task of proving severe emotional distress.

In zone of danger jurisdictions, the physical manifestations rule requires that the mother show that her mental distress has resulted in physical symptoms.[98] For example, crying, sleeplessness, increased migraine headaches and becoming upset upon the sight of other pregnant women does not rise to this standard.[99] Seeking medical attention, however, may be a step towards documenting physical manifestations.[100]

In *Dillon* jurisdictions, the absence of the zone of danger requirement seems to facilitate recovery. Because courts do not have to focus on whether the parents were themselves at risk, they are free to assess the core issue: the severity of the emotional distress and whether it should be compensated. This severity may be assessed by looking at the facts and circumstances of the underlying injury. In the context of childbirth and pregnancy, some courts deem these special circumstances to ensure the genuineness of the emotional distress.[101] Others have stricter requirements.[102]

5. The Bystander Morass

The case law demonstrates the difficulties in applying bystander frameworks to the prenatal malpractice context. Whether the court is employing the *Dillon* test, with its requirement of contemporaneous observance, or invoking the zone of danger test and searching for independent physical injury, neither analysis comprehends pregnancy in a manner that accounts for the emotional and *physical* connection between mother and fetus.[103] Furthermore, using a bystander analysis is

96. *See supra* note 84 and accompanying text.
97. *See supra* notes 32-33 and accompanying text.
98. *See* Rickey v. Chicago Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983).
99. *See* Robbins v. Kass, 516 N.E.2d 1023, 1027 (Ill. Ct. App. 1987).
100. *See id.*
101. *See, e.g.*, Phillips v. Cooper OB/GYN Assocs., 811 F. Supp. 1018, 1025 (D.N.J. 1993) (holding that "the parents' experience of observing the injury of their child during childbirth as a result of medical negligence is one that gives rise to genuine claims of psychic injury").
102. *See* Andreasen v. Gomes, 504 N.W.2d 539, 542 (Neb. 1993) (stating that "[m]ere crying, mourning and headaches" is not sufficient emotional distress to warrant recovery).
103. In one extreme case, a court imposed a further burden on the mother to recover under the zone of danger test. In McBride v. Brookdale Hosp. Medical Ctr.,

erroneous because it applies to situations where two individuals are involved, and during pregnancy, the law is clear that only one individual exists.[104] In light of this analysis, many courts have analyzed the prenatal malpractice cases by treating the fetus and mother as a single entity, thus designating the mother as the direct victim of the malpractice and injury.

B. *The Mother as Direct Victim*

Several jurisdictions have discarded bystander analysis and allowed mothers to assert causes of action for emotional distress arising from the stillbirth of their infants as part of their direct malpractice claims.[105] These decisions reflect in part a recognition that bystander analysis is inappropriate in these situations.[106]

Courts have chosen to employ the direct victim approach for various reasons. Some courts opt for this analysis because they recognize the physical connection between mother and fetus.[107] Others have

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498 N.Y.S.2d 256 (Sup. Ct. Kings County 1986), the court held that being within the zone of danger standing alone does not create liability:

> To hold that the zone-of-danger rule applies would be to determine that a fetus is a "member of the immediate family." [But] as far as tort law is concerned, a fetus has no "life" until birth. It follows that someone who was never alive could not be considered a member of the family and could not be within the zone of danger.

Id. at 262. *But see* Kahn v. Hip Hosp., 487 N.Y.S.2d 700, 706 (Sup. Ct. Queens County 1985) (finding that for purposes of the zone of danger test, a stillborn fetus is a member of the immediate family).

104. *See, e.g.*, Roe v. Wade, 410 U.S. 133, 158 (1973) (holding that a fetus is not a person for purposes of the Fourteenth Amendment).

105. Currently decisions in California, Florida, New Jersey, New York, Texas and Virginia have reflected this approach. *See* Johnson v. Superior Court, 177 Cal. Rptr. 63, 65 (Ct. App. 1981); Singleton v. Ranz, 534 So. 2d 847, 847-48 (Fla. Dist. Ct. App. 1988); Gendek v. Poblete, 636 A.2d 113, 117 (N.J. App. Div. 1993); Johnson v. Verrilli, 511 N.Y.S.2d 1008, 1010 (Sup. Ct. Duchess County 1987); Sepulveda v. Krishnan, 839 S.W.2d 132, 136 (Tex. Ct. App. 1992); and Modaber v. Kelley, 348 S.E.2d 233, 236 (Va. 1986).

106. In Johnson v. Superior Court, 177 Cal. Rptr. 63, 65 (Ct. App. 1981), the California Court of Appeals remarked that medically caused stillbirth did not fit in the *Dillon* mold. *Id.* at 65. As the court went on to note, "[t]he solution to the problem lies not in contorting *Dillon* to cover a situation which it was not designed to fit, but in recognizing that the emotional distress arising from the sensory impact of the death of the child is compensable as part of the mother's cause of action for malpractice to herself." *Id. See also* Hunt v. Chettri, 510 N.E.2d 1324, 1327 (Ill. Ct. App. 1987) (remarking that cases involving stillbirth as a result of medical malpractice do not fall into the zone-of-physical-danger rule as contemplated by the court, but failing to offer an alternative framework); Sceusa v. Mastor, 525 N.Y.S.2d 101, 103 (4th Dep't 1988) (criticizing application of the zone of danger rule in cases seeking damages for emotional distress resulting from the stillbirth of an infant).

107. *See, e.g.*, Sesma v. Cueto, 181 Cal. Rptr. 12, 15 n.2 (Ct. App. 1982) (finding it unreasonable to label a woman a bystander as to any injury suffered by her fetus, considering the intimate and psychic connection between them); Johnson v. Superior Court, 177 Cal. Rptr. 63, 65 (Ct. App. 1981) (recognizing that a mother forms a close relationship with her fetus during pregnancy so that the emotional trauma from its

elected this approach as a practical matter because fetuses are not considered persons under the state's wrongful death statute.[108]

The direct victim approach is the most realistic in the sense that it recognizes the physical connection between mother and fetus. The mother's claim is therefore a primary claim on her behalf and in recognition of her injuries, as opposed to a derivative injury on behalf of the fetus.[109]

Regardless of the appeal of this approach and its practical ease in application, wide acceptance of it may not be forthcoming given the moral and theoretical difficulties of treating fetal tissue like any other part of a woman's physiology.[110] In addition, treating the fetal tissue as simply another part of the woman's body may unrealistically undervalue women's claims of emotional distress.[111] Like bystander recovery, therefore, direct victim analysis suffers from theoretical weaknesses regarding the status of the fetus. Moreover, courts that use direct victim logic are directly contradicting courts that use bystander analyses in how they treat the fetus. In an attempt to overcome these problems, therefore, a number of courts have tried to

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stillbirth is foreseeable harm to the mother); Gendek v. Poblete, 636 A.2d 113, 117 (N.J. App. Div. 1993) (stating that the basis for the direct victim rule is the "essential identity of mother and fetus" such that the commission of malpractice on one was the commission of malpractice on the other); Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909, 917 (N.C. Ct. App. 1988) (stating that "[a]s the fetus is normally attached to the mother's uterine wall, [the court fails] to see how a physical impact or injury to the fetus would not normally be an injury or impact to the mother").

108. *See, e.g.*, Singleton v. Ranz, 534 So. 2d 847, 847-48 (Fla. Dist. Ct. App. 1988) ("The Florida Supreme Court has held that, in legal contemplation, an unborn fetus is not a person for the wrongful death of whom a tortfeasor is liable to its survivors for damages under [Florida's wrongful death statute], therefore it is living tissue of the body of the mother for the negligent or intentional tortious injury to which the mother has a legal cause of action the same as she has for a wrongful injury to any other part of her body.") (citations omitted); Johnson v. Verrilli, 511 N.Y.S.2d 1008, 1010 (Sup. Ct. Duchess County 1987) (finding that because the fetus is not a person to whom a cause of action accrues, it must be regarded as part of the mother's body); Sepulveda v. Krishnan, 839 S.W.2d 132, 136 (Tx. Ct. App. 1992) (treating the mother as the direct victim because Texas law does not treat the fetus as a separate entity); Modaber v. Kelley, 348 S.E.2d 233, 236 (Va. 1986) (affirming the trial court's determination that the mother sustained a direct injury because an unborn child is not a "person" within the meaning of Virginia's wrongful death statute). This rationale was also asserted by Judge Kaye of the New York Court of Appeals in her dissent in Tebbutt v. Virostek, 483 N.E.2d 1142 (N.Y. 1985): "Where the law declares that a stillborn child is not a person who can bring suit, then it must follow in the eyes of the law that any injury here was done to the mother." *Id.* at 1149 (Kaye, J., dissenting). For more detailed discussion of *Tebbutt*, see *supra* notes 53-55 and accompanying text.

109. *See* Gendek v. Poblete, 636 A.2d 113, 117 (N.J. App. Div. 1993) (commenting on the direct victim analysis employed in Carey v. Lovett, 622 A.2d 1279 (N.J. 1993)).

110. *See, e.g.*, Alberto v. Columbia Presbyterian Hosp., N.Y. L.J., Sept. 10, 1993, at 22 (Sup. Ct. N.Y. County 1993) (discarding the notion that the mother is the sole victim of the negligence because of the fetus' "potentiality of life").

111. *See infra* part III.C.1.

assess these claims in terms of the physician's duty to the mother and fetus.

C. *Duty to the Mother*

A final approach to the prenatal malpractice cases is to assess the cause of action for emotional distress in terms of breach of duty.[112] Much like the direct victim approach, courts favor a duty analysis because bystander frameworks do not accurately reflect the reality of prenatal care.[113] Duty analysis, however, suffers from the same difficult determinations of whether one or two entities are implicated in the recovery equation. This problem arises in duty analysis because a court must determine to whom the harm is foreseeable,[114] and thus implicitly determine whether or not it considers the fetus an independent entity. If the court does determine that the duty was owed to the fetus, the mother must comply with bystander requirements in order to recover.

In cases of emotional distress arising from the death or injury of a fetus, courts have rarely assessed the standard of care owed to the mother and fetus. Rather, they have focused solely on whether the physician owes a duty of care at all to the mother when it harms the fetus within her. The question for the courts, therefore, has been primarily to whom the duty runs.

If the physician's duty only runs to the individual to whom the negligent conduct is directed, it seems on the surface that there is a bright line distinction between mother and child. In the context of pregnancy, however, this line is not so clearly drawn. On the contrary, it is often extremely ambiguous as to whom the conduct was directed during pregnancy. Consequently, assessing to whom the duty flows may depend merely on the judge's interpretation of the negligent act, or how the judge characterizes fetal life at the time of the injury. This point is highlighted by contrasting duty analysis for emotional distress claims arising in two recurring fact patterns that involve pregnancy. First, in the context of prenatal care, where the mother is anticipating the birth of the child, courts have struggled with the question of to whom the duty flows. Second, in the context of abortion, where the mother wishes to terminate the pregnancy, duty is focused solely towards the mother.

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112. *See supra* note 31 and accompanying text.

113. *See, e.g.*, Ferrara v. Bernstein, 582 N.Y.S.2d 673, 679 (1st Dep't 1992) (Murphy, J., concurring) (distinguishing cases where mother sues for emotional injuries sustained as a result of an incomplete abortion as cases of breach of direct duty and not bystander cases where mother fears for fetuses' injuries); Sceusa v. Mastor, 525 N.Y.S.2d 101, 103 (4th Dep't 1988) (stating that bystander analysis is a "fiction [that] is unnecessary and inappropriate in a case such as that before us where defendants doctor and hospital clearly had a duty to both the mother and the unborn infants and the risk of injury as a result of defendants' negligence was foreseeable").

114. *See* Prosser & Keeton, *supra* note 25, § 43, at 280.

1. Duty in the Context of Prenatal Care

Contrary to what may be generally assumed, courts have found that the doctor's care does not run to both mother and fetus during prenatal care. In most cases, courts impose duty on the defendant only when they can reasonably anticipate harm towards the plaintiff.[115] Hence, when a physician performs a procedure on a fetus during the course of prenatal care, such as an amniocentesis, the only foreseeable harm may be to the fetus, and not to the mother.[116] When the negligent procedure in turn causes injury or death to the fetus, the physician has only breached her duty to the unborn infant.[117]

This line of reasoning was invoked by the New York Court of Appeals in *Tebbutt v. Virostek*[118] when it rejected the plaintiff's argument that the defendant doctor had breached his duty to the mother.[119] The court based this decision on a prior New York ruling in *Vaccaro v. Squibb Corporation*,[120] which held that harm caused to a fetus in utero by the defendant, about which the mother does not learn until after the stillbirth, does not impose a duty on the defendant towards the mother.

In contrast to *Tebbutt*, courts in California have employed a more realistic notion of duty when a mother undergoes prenatal care. For instance, in *Anisodon v. Superior Court*,[121] the court found that duty during prenatal care runs the mother as well as the fetus, deeming them a family unit which received joint treatment.[122] Moreover, in *Burgess v. Superior Court*,[123] the California Supreme Court recognized that a duty does exists towards the mother because of the preexisting physician-patient relationship with the mother during childbirth, and because any treatment for the fetus can only be achieved with the mother's consent and impact to her body.[124] Even in this analysis, however, courts still distinguish mother and fetus, and assess

115. *Id.* § 54, at 359.

116. For example, see the *Tebbutt* decision discussed *supra* notes 53-55 and accompanying text.

117. *See* Scott v. Capital Area Community Health Plan, 594 N.Y.S.2d 370, 371 (3d Dep't 1993) (finding that no recovery can be allowed when the injuries alleged by the mother were caused by a breach of a claimed duty to the fetus) (citing Woods v. Lancet, 102 N.E.2d 691, 695 (N.Y. 1951) (holding that there is no recovery for prepartum injuries to a fetus unless the child is delivered alive))).

118. 483 N.E.2d 1142 (N.Y. 1985).

119. *Id.* at 1143.

120. *Id.* at 1143 (citing Vaccaro v. Squibb Corp., 418 N.E.2d 386 (N.Y. 1978)).

121. 285 Cal. Rptr. 539 (Ct. App. 1991).

122. *Id.* at 546.

123. 831 P.2d 1197 (Cal. 1992).

124. *Id.* at 1202-03.

whether or not the tort was directed towards the mother or the fetus.[125]

Other courts have grounded their duty analysis in contract theory. For example, in *Newton v. Kaiser Hospital*,[126] the California Court of Appeals found that the physician-patient relationship created a duty to both mother and father because the plaintiffs had contracted with the hospital to provide for the treatment and delivery of a healthy child.[127] Other courts have also used contract theory to recognize a cause of action for the mental anguish associated with the stillbirth of a fetus as a result of medical malpractice. In *Taylor v. Baptist Medical Center*,[128] the Alabama Supreme Court opined that upon evidence of an implied contract, the mother of a stillborn fetus may recover for emotional distress that resulted from the breach of the doctor's duty of care.

2. Duty in the Context of Abortion and Wrongful Birth

When the medical treatment a pregnant woman seeks is to obtain an abortion, and not to receive prenatal care, the issue of duty and to whom it flows is less controversial. In the abortion context, women assert emotional distress claims arising from three primary fact patterns: (1) when a physician negligently performs an abortion on a pregnant woman; (2) when a physician gives her false information that leads her to terminate the pregnancy; or (3) when a physician fails to give her necessary information to make the choice to terminate her pregnancy. Under these circumstances, courts invariably view the duty to run to the mother, and then focus on the scope of the physician's standard of care and whether it has been breached.

When the doctor negligently performs an incomplete abortion, and the surviving fetus later dies from injuries sustained as a result, the courts have allowed the mother to recover for her emotional distress. For example, in *Miller v. Johnson*,[129] the Virginia Supreme Court stated that "[u]nder traditional tort principles, it is clear that a physician who performs an abortion or sterilization procedure owes a legal duty to the patient. Where the patient can establish failure to perform the procedure with reasonable care and damages proximately resulting from breach of the duty, she is entitled to recover as in any other medical malpractice action."[130]

125. *See, e.g.*, Martin v. United States, 984 F.2d 1033, 1036 (9th Cir. 1993)(stating that California courts remain reluctant to find a duty and allow recovery for negligent infliction of emotional distress arising from injuries to fetuses as third parties).

126. 228 Cal. Rptr. 890 (Ct. App. 1986).

127. *Id.* at 894.

128. 400 So. 2d 369 (Ala. 1981).

129. 343 S.E.2d 301 (Va. 1986).

130. *Id.* at 304; *see also* Ferrara v. Bernstein, 582 N.Y.S.2d 673, 678 (1st Dep't 1992) (finding that defendant's failure to inform plaintiff that her abortion was unsuccessful

When a doctor gives incorrect information that leads a mother to abort her fetus, the courts have also allowed recovery for negligent infliction of emotional distress. For example, in *Martinez v. Long Island Jewish Hillside Medical Center*,[131] a pregnant woman was negligently advised by her physician that her baby would be born with birth defects and that she should abort the fetus.[132] The plaintiff acted on such advice, only to find out that the baby would have been born healthy.[133] The court found that the doctor's affirmative advice to the mother was the precipitating and proximate cause of her emotional distress, and that she could recover.[134] The tortious conduct in this case was regarded as the advice to undergo an abortion, which clearly was directed at the mother. Because the court did not consider the status of the fetus at all in this context, the court's interpretation disregards the fact that the initial negligence occurred when the doctor misdiagnosed the fetus' health, a procedure ostensibly performed on the fetus.

Lynch v. Bay Ridge Obstetrical and Gynecological Associates[135] solidified the removal of the fetus as a consideration in duty analysis in the context of abortion. In *Lynch*, the defendant had prescribed Provera to the plaintiff to induce menstruation, assuring her she was not pregnant.[136] The plaintiff later learned that she was pregnant, and that Provera was known to cause birth defects if ingested during pregnancy.[137] Fearing the effects of the Provera, the plaintiff and her husband opted to terminate the pregnancy, causing the mother to suffer

in time for her to undergo a second abortion stated a prima facie case of negligence for resulting emotional distress).

131. 512 N.E.2d 538 (N.Y. 1987).

132. *Id.* at 538.

133. *Id.*

134. *Id.* at 539. This case is particularly interesting for several reasons. First, the court allowed the recovery for negligent infliction of emotional distress regardless of the fact that the plaintiff-mother manifested no physical symptoms of her trauma. As Judge Titone suggested in his dissent, this holding thus creates a new form of emotional distress in addition to the "corpse" and "death message" cases already existing in tort doctrine. *See id.* (Titone, J., dissenting). Second, the injury to the fetus (its death) was not the event that the court found elicited the distress. Instead, the court found that Mrs. Martinez's distress resulted from her breaching her deep-seated religious conviction against abortion. *Id.* The injury to the fetus was regarded as an indirect, albeit intended, result of the breach. *Id.*

The courts have interpreted this new cause of action quite narrowly. In Lancellotti v. Howard, 547 N.Y.S.2d 654 (2d Dep't 1989), for example, the Appellate Division denied a woman recovery for her emotional distress arising because her physician erroneously informed her she was pregnant and continued to treat her as such for seven months. *Id.* at 655. The court found that unless the plaintiff showed some physical manifestations of her distress, she could not recover. *Id.* Recovery for purely emotional harm, therefore, is premised on a breach of duty owed directly to the plaintiff, which either endangered her physical safety or caused her to fear for her own safety. *Id.*

135. 532 N.E.2d 1239 (N.Y. 1988).

136. *Id.* at 1240.

137. *Id.*

severe mental anguish.[138] The court allowed the mother to recover for her emotional distress, even without a showing of physical manifestations, finding that her emotional injury arose from direct harms to herself in undergoing the abortion, not from the loss of the fetus.[139]

In other contexts involving abortion, however, the availability of emotional distress recovery is less certain. When a physician fails to give advice to the mother regarding certain risks inherent in her pregnancy, for example, the ability to recover for emotional harm is less likely. Courts have conflicted on whether the breach of a duty to inform a mother of the risks of her pregnancy will give rise to a cause of action for emotional distress. In *Richardson v. Rohrbaugh*,[140] the Missouri Court of Appeals denied parents recovery for emotional distress because of their doctor's failure to perform genetic testing on their first child, which later led them to conceive a second infant who was born with birth defects identical to the first.[141] The court reasoned that no duty of care arose towards the physician for the first pregnancy to prevent the birth of the second child because no physician-patient relationship existed at the time of the second pregnancy.[142] If the mother had pursued a claim against her physician during the prenatal care of the second infant, however, she might have been able to state a viable cause of action. For example, in *Karlsons v. Guerinot*,[143] the New York Appellate Division recognized a duty on the part of the physician to properly diagnose the condition of the fetus allowing the parents to make the decision whether to abort.[144]

Regardless of whether a court recognizes a duty flowing to both parents and child, however, recovery for emotional harm may be discarded for other reasons. In *Becker v. Schwartz*[145] for example, the New York Court of Appeals found that the calculation of damages for

138. *Id.*

139. *Id.* at 1241.

140. 857 S.W.2d 415 (Mo. Ct. App. 1993).

141. *Id.* at 419. The plaintiff mother gave birth to a severely retarded son who continued to receive neurological treatment from the defendant doctor. The doctor never advised the mother or father of any risks in conceiving a second retarded child, despite plaintiffs' consistent questions and concerns. Several years later, the mother conceived and gave birth to a daughter, suffering from the identical conditions as her brother. The plaintiffs then alleged that the doctor's negligence denied them the right to choose whether to conceive the daughter and resulted in her conception and their emotional trauma. *Id.* at 417.

142. *See id.* at 418.

143. 394 N.Y.S.2d 933 (4th Dep't 1977).

144. *Id.* at 936. In factual circumstances very similar to *Miller*, the mother had already given birth to one child with birth defects and once pregnant with the second child, was never advised of the risks of her pregnancy, nor offered an amniocentesis despite her age. *Id.* at 934. The second child was also born a mongoloid, at which time the parents sued the defendant doctor, alleging they would have terminated the pregnancy had the proper tests been done. *Id.* Unlike *Miller*, however, they asserted their claim against the obstetrician for the prenatal care of the second infant.

145. 386 N.E.2d 807 (N.Y. 1978).

emotional distress from the birth of a deformed infant was too speculative to assess, despite the existence of a duty to the parents.[146]

The net result of the confusion regarding duty is that mothers of stillborn or birth-defected infants are often precluded from obtaining compensation for their emotional suffering. In the context of prenatal care, courts have tended to distinguish to whom the duty of care is owed because of implicit determinations that the fetus is a separate life. In the context of abortion, however, analysis has focused primarily on the harm suffered by the mother that arises from the breach of duty. The explanation for this problem and for the difficulties the courts have faced lies in the inability of courts to effectively confront the pregnancy question. The solution rests in the insights of feminist legal theorists, who have proposed conceptual frameworks for rethinking pregnancy, duty and harm in the law.

III. Creating a Mother/Fetus Nexus: Feminist Legal Theory and Tort Law

To provide a sense of legitimacy and fairness to these cases, a framework should be created that considers the underlying restrictive policies of emotional distress recovery, yet also includes an understanding of pregnancy and tort law that incorporates a woman's perspective. In the past, the courts have failed to meet this challenge because of the conceptual difficulties they face over the pregnancy question, the unsuitable frameworks that exist within contemporary emotional distress doctrines and the limited concepts of harm and duty that persist in tort law.

A. *Overcoming the Pregnancy Dilemma in Tort Law*

Bystander, direct victim and duty analyses present difficulties to the courts primarily because of the ambiguous relationship between mother and fetus. Under the current frameworks, courts must make an assumption on how to treat the fetus, as either a part of the family, or as part of the mother. This all-or-nothing approach has created many of the difficulties in applying the law of emotional distress. Consequently, the first challenge to reforming emotional distress doctrine in the context of prenatal care lies with reassessing pregnancy and turning away from the tortured constructions courts have used in the past to characterize the relationship between mother and fetus.

146. *Id.* at 814. The court noted, however, that part of this decision rested on the fact that there were mitigating factors because the infant was in fact born alive and "parents may yet experience a love that even an abnormality cannot fully dampen." *Id.* The court declined to rule on whether recovery for emotional damages would be allowed if the fetus was stillborn as a result of malpractice.

1. Perspectives on Pregnancy in Prenatal Torts

The difficulty courts have faced in assessing the maternal/fetal relationship is not unique to emotional distress cases.[147] Tort law is replete with conflicting characterizations of the fetus and thus offers little guidance to focus any reform in emotional distress law. Although tort law purports to have resolved the question of whether a fetus is accorded a legal status separate from its mother,[148] a survey of the prenatal doctrines shows otherwise.

There are two basic classifications of prenatal injuries: (1) when a defendant inflicts a physical injury, through the body of the mother, upon an unborn child, and (2) when a defendant's tortious act or omission results in the birth of an unwanted child.[149] The first category of prenatal torts includes wrongful death[150] and maternal negligence.[151] The second group consists of causes of action for wrongful life,[152] wrongful birth,[153] wrongful conception,[154] wrongful diagnosis[155] and preconception torts.[156] Depending on the jurisdiction, the fetus in these cases may or may not be treated as a separate legal entity.

Wrongful death is the clearest example in the first category of prenatal torts of how courts have contradicted each other regarding the status of the fetus. For instance, some states require that the fetus first must be born alive before parents may recover for wrongful death.[157]

147. The fetus has been accorded legal status in equity, criminal law, property law and tort law. Prosser & Keeton, *supra* note 25, § 55, at 367-68. The fetus does not have a legal status in constitutional law. *See* Roe v. Wade, 410 U.S. 113, 158 (1973). *See also* Judith Kahn, Note, *Of Woman's First Disobedience: Forsaking A Duty of Care to her Fetus—Is This a Mother's Crime?*, 53 Brook. L. Rev. 807, 810 (1987) (showing that the status of the fetus is not treated uniformly in all areas of the law).

148. "[A] stillborn fetus has no *legally* protected status as far as the law of torts is concerned since such law does not recognize it as a human being." McBride v. Brookdale Hosp. Medical Ctr., 498 N.Y.S.2d 256, 260 (Sup. Ct. Kings County 1986).

149. Prosser & Keeton, *supra* note 25, § 55, at 367. For a summary of birth-related torts, see 3 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability and Litigation, § 31.01-31.16, at 85-119 (rev. ed. 1988).

150. Although there is no common law cause of action for wrongful death, all states have enacted wrongful death statutes which usually provide that the action can be maintained for "any wrongful act, neglect, or default" which causes death. Prosser & Keeton, *supra* note 25, § 127, at 945-46; *see infra* notes 157-61 and accompanying text.

151. *See infra* notes 162-64 and accompanying text.

152. *See infra* note 166 and accompanying text.

153. *See infra* note 167 and accompanying text.

154. Some courts allow plaintiffs to state a valid cause of action for wrongful conception when a parent has undergone an unsuccessful surgical birth control procedure and seeks damages for the expenses of rearing an unplanned child. Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978).

155. Wrongful diagnosis arises when parents seek damages for the birth of a child after a physician has failed to inform the parents of possible complications in time to terminate the pregnancy. *See id.* at 811.

156. *See infra* note 168 and accompanying text.

157. *See, e.g.*, Justus v. Atchison, 565 P.2d 122, 132 (Cal. 1977) (finding that the word "person" does not include the unborn under California's wrongful death stat-

The majority of states, however, have allowed parents to recover for wrongful death even when a fetus is miscarried or stillborn.[158] These jurisdictions are therefore implicitly finding that the fetus is a "person" within the meaning of those states' wrongful death statutes.[159] This presumption may be closely linked with the viability of the fetus at the time of the death.[160] The disagreement among courts whether a fetus is a person under the wrongful death statute may also directly conflict with other prenatal torts. In New York, for example, the courts treat the mother as a bystander to prenatal injuries, which implies the fetus is a separate entity, yet they do not allow parents to recover for the wrongful death of a fetus because it is not a person. Mothers are then precluded from recovering under either claim.[161]

The status of the fetus is also unclear in cases where the mother herself inflicts the physical injury on the fetus. Although infants have generally been precluded from asserting claims against their mothers for negligent infliction of prenatal injuries through drug or alcohol

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ute); Henderson v. North, 545 So. 2d 486, 488 (Fla. Dist. Ct. App. 1989) (stating that Florida does not recognize a cause of action for the wrongful death of a fetus); Modaber v. Kelley, 348 S.E.2d 233, 236 (Va. 1986) (stating that the law in Virginia is established that an unborn child is not a "person" within the meaning of the state wrongful death statute). For these states, the viability of the fetus at the time of injury is irrelevant. *See* Abdelaziz v. AMISUB of Florida, 515 So. 2d 269, 271 (Fla. Dist. Ct. App. 1987) (holding that the wrongful death of a fetus, regardless of viability, is not a cognizable cause of action).

158. Prosser & Keeton, *supra* note 25, § 55, at 370.

159. *See, e.g.*, Ferguson v. District of Columbia, 629 A.2d 15, 20 (D.C. 1993) (holding that a viable fetus is a person with a right of action in D.C.'s survival statute); *see also* Tebbutt v. Virostek, 483 N.E.2d 1142, 1148 (N.Y. 1985) (Jasen, J., dissenting) (listing 28 states that allowed wrongful death recovery for the death of a fetus as of 1985).

The problem with this determination is the explicit contradiction to *Roe v. Wade*'s holding that a fetus is not a person. *See* 410 U.S. 113, 158 (1973). Thus, "a seeming paradox exists: the law permits the imposition of liability for fetal death or injury negligently caused, but on the other hand, also permits immunity from liability for harm intentionally caused and maternally desired." David Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 Mo. L. Rev. 639, 641 (1980). This reason alone emphasizes the need to determine a consistent and desirable redefinition of the legal status of the fetus.

160. *See id.*; *see also* Brown v. Green, 781 F. Supp. 36, 39 (D.D.C. 1991) (holding that prior to viability, any injury to the fetus is an injury to the mother); Amadio v. Levin, 501 A.2d 1085, 1086-87 (Pa. 1985) (holding that wrongful death actions lie for fatal injuries received by fetuses while viable); DiDonato v. Wortman, 358 S.E.2d 489, 495 (N.C. 1987) (same). The viability question is less important to the courts than the live birth requirement, and courts have granted relief when the injury occurred before viability when the mother was only in the early weeks of pregnancy. Prosser & Keeton, *supra* note 25, § 55, at 368-69.

161. For example, in Tebbutt v. Virostek, 483 N.E.2d 1142 (N.Y. 1985), the court precluded parents of a stillborn infant from recovering under New York's wrongful death statute because the fetus was not a person, yet also denied recovery for emotional distress because the mother could not satisfy the bystander elements of the zone of danger test. As a result, the mother is rendered a "bystander to medical procedures performed upon her own body." *Id.* at 1148 (Jasen, J., dissenting).

abuse,[162] this rule does not require any determination as to the status of the fetus.[163] Rather, it is an outgrowth of social policy that prevents courts from imposing a uniform standard of prenatal health care on mothers of varying cultural backgrounds.[164]

The question of whether the fetus should be treated as a separate entity from its mother is unclear in the second classification of prenatal tort as well. This category includes claims asserted by both the fetus and the parents because the fetus is born alive. A severely injured infant has several causes of action against negligent physicians, including its own negligence claim.[165] In a limited number of jurisdictions, an infant may also sue for wrongful life.[166] The parents in these situations may sue for the wrongful birth of an unwanted child.[167]

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162. Michigan is the only state to allow a child to recover against its mother for negligent infliction of prenatal injuries on the basis of a "reasonable pregnant woman" standard. Kahn, *supra* note 147, at 827-28.

163. The most notable case on this issue is Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988), in which the court held that a woman's interest in privacy and bodily integrity and difficulty of establishing a "reasonable" prenatal care standard militated against recognizing a fetus' right to sue its mother. *Recent Cases*, 103 Harv. L. Rev. 806, 823 (1990). In addition, the fact that the fetus is physically part of its mother mandates that a state exercise even greater caution in attempting to set minimum standards of conduct, "lest it unduly infringe upon a pregnant woman's constitutional right to exercise autonomy over her person." Kahn, *supra* note 147, at 815.

164. *See Recent Cases*, *supra* note 163, at 825.

165. Prosser & Keeton, *supra* note 25, § 55, at 368.

166. This situation arises when the doctor has negligently performed an incomplete abortion or sterilization resulting in the birth of an infant with brain damage or some other deformity. Many jurisdictions do not recognize this cause of action on the rationale that life, even if impaired, does not constitute a cognizable injury relative to non-existence. *See* Lee & Lindahl, *supra* note 149, § 31.15, at 114; *see, e.g.*, Robak v. United States, 658 F.2d 471, 474 (7th Cir. 1981) (holding that an action for wrongful life does not exist in Alabama); Reed v. Campagnolo, 810 F. Supp. 167, 169 (D. Md. 1993) (stating that Maryland does not recognize a cause of action for wrongful life); Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) (stating that "whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians"). *But cf.* Gami v. Mullikan Med. Ctr., 22 Cal. Rptr. 2d 819, 827 (Ct. App. 1993) (following a California Supreme Court ruling that an impaired child may recover for wrongful life).

167. These causes of action arise under similar circumstances as wrongful life claims, but also include instances when a doctor fails to inform parents that their child has birth defects in time to terminate the pregnancy. The claim may also be cognizable if the infant is born healthy. *See* Prosser & Keeton, *supra* note 25, § 55, at 372. Historically, these causes of action did not exist because of conflicts with anti-abortion statutes. For example, in Robak v. United States, 658 F.2d 471 (7th Cir. 1981), a pregnant woman's physician failed to inform her that her rubella could cause brain damage in her fetus. Although abortion was illegal in Alabama in 1972 when the negligent conduct occurred, the court found that it could benefit from the Supreme Court's subsequent decision in *Roe v. Wade* in 1973, and granted the plaintiff recovery for wrongful birth. *Id.* at 473-75. Today, many jurisdictions recognize the right of parents to recover for wrongful birth, including Alabama, California, Florida, Idaho, Illinois, Louisiana, Maine, Michigan, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia and Wisconsin. *See* Reed v. Campagnolo, 810 F. Supp. 167, 171 n.7 (D. Md. 1993).

Currently, however, only a small number of courts have allowed an infant to bring a claim for torts committed on the mother before the child was conceived that resulted in some deformity or genetic defect.[168] In each of these scenarios, courts have disregarded whether the injury occurred either before or after viability, and have focused instead on the fact that the infant was born alive. The only requirement of the fetus, therefore, is that there be life before a cause of action accrues on its behalf.[169] This category of tort, therefore, adds little insight into how fetuses should be treated.

A survey of tort law thus suggests that whenever a fetus is brought into the equation for recovery, difficulties arise with how to characterize its potential for life.[170] Consequently, beyond the realm of negligent infliction of emotional distress, there is no precise answer in tort law as to how the maternal/fetal conflict should be resolved. Without guidance from the prenatal torts, then, it appears that the concept of pregnancy itself should be reconsidered within the law to provide a more uniform approach than the *ad hoc* analyses currently in use.

One seemingly practical solution to the conflict between prenatal tort and bystander characterizations of the fetus is to bind the status of the fetus in the emotional distress analysis to the status used in the underlying claim. For instance, if a doctor negligently performs an amniocentesis that results in the stillbirth of the fetus, for purposes of the plaintiff's wrongful death claim, the fetus is not a person.[171] Therefore, the fetus should not be considered a person in the plaintiff's emotional distress claims, such that the theoretical framework does not treat the mother as a bystander, and complicated determinations as to the zone of danger may be avoided. Likewise, if a scenario

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The general rationale for allowing such recovery is that this type of emotional harm, which extends to both parents, is a direct harm to the parents flowing from the defendant's breach of duty to the parents. Karlsons v. Guerinot, 394 N.Y.S.2d 933, 936 (4th Dep't 1977).

168. Prosser & Keeton, *supra* note 25, § 55, at 369. The policy reasons advanced for this rule are that such claims involve difficult problems of proof and proximate causation arising, for example, from the imposition of liability upon a chemical or drug for future generations of genetically mutated children. *Id.* This rule differs, however, when the mother ingests the drug *during* her pregnancy (post-conception) which results in birth-defects. In such cases, the infant may bring a cause of action against the chemical manufacturer. For example, between the 1950s and 1970s, many pregnant women were prescribed DES (diethylstilbestrol) to prevent miscarriages. The children who were exposed to DES *in utero* later developed serious reproductive tract injuries and cancer. *Overview*, *supra* note 13, at 587 n.52; *see, e.g.* Sindell v. Abbott Labs, 607 P.2d 924, 935 (Cal. 1980) (discussing a market share theory for allocating liability among the major manufacturers of DES).

169. *See* McBride v. Brookdale Hosp. Medical Ctr., 498 N.Y.S.2d 256, 259 (Sup. Ct. Kings County 1986).

170. *See* Kahn, *supra* note 147, at 825 (finding that in tort law, a fetus does acquire legal status, but this status only attaches if the fetus is born alive, or when the courts have found it necessary to confer entitlements upon the fetus for the protection of the life and health of the mother).

171. *See supra* notes 157-61 and accompanying text.

arises in the second category of prenatal torts, such as the birth of an unwanted child, the fetus has become a person, so the mother then must satisfy bystander requirements.[172]

This practical change alone, however, does not remedy the existing maternal/fetal conflict within the law. First, logistical changes such as this merely reshuffle existing concepts without infusing women's perspectives on the experience of pregnancy.[173] Second, courts still must make some type of determination regarding the status of the fetus, lending itself to philosophical conflicts. To effectively cope with the issue of pregnancy in prenatal malpractice, therefore, courts must reconceptualize pregnancy from a feminist perspective, that accounts for women's experiences during pregnancy and as mothers, rather than the courts' interpretations of fetal life.

2. A Feminist Redefinition of Pregnancy

How courts characterize pregnancy in future emotional distress cases should be informed by the experiences of women. The starting point for this analysis must begin with looking beyond the physiological aspects of the reproductive process, and must also focus on the emotional, social and cultural meanings of pregnancy and childbirth. Because pregnancy is a common experience shared by most women, understanding how it should be characterized should include women's perspectives. The first analytical step, therefore, is ascertaining what different feminists suggest pregnancy means.

Some feminist theorists have suggested that women and men tend to understand moral obligations differently, particularly in the context of relationships.[174] These theorists argue that women tend to privilege

172. *See, e.g.* Becker v. Schwartz, 386 N.E.2d 807, 808-09 (N.Y. 1978) (plaintiffs were never advised of the risk of Down's Syndrome to their infant and consequently sued for wrongful life and emotional distress).

173. *See infra* part III.A.2.

174. Relational feminism stems in large part from the psychological studies published by Professor Carol Gilligan which suggest that women subscribe to an ideal of care by which women see and respond to need, taking care of the world by sustaining "the web of connection." Gilligan, *supra* note 9, at 62. This ethic (termed the ethic of care) differs from male moral reasoning, which perceives individuals as standing alone, attached to a system of rules, rather than a system of relationships. *See id.* at 29. Because women are seen to respond to their relationships, feminist scholarship that relies on this argument is frequently called relational feminism. Although relational feminism has been termed the "official" feminist legal theory, see West, *supra* note 9, at 28, it has also been the focus of much criticism from other feminists. *See, e.g.*, Pamela S. Karlan and Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 Nw. U. L. Rev. 858, 860 (1993) (challenging the wide acceptance of relational feminism because it assumes the moral reasoning described by Gilligan is authentic, and not just a result of female oppression); *see also* Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 Law & Soc. Inquiry 373, 379 (1991) (stating that feminist insight does not reveal women's "essence, but the structure of power under which they live"); MacKinnon, *supra* note 9, at 34 (criticizing the difference standard because masculinity remains as the critical reference point).

relationships and their connection to others, while men value individual autonomy and separation.[175] Taking this relational perspective into account, pregnancy can be reconceptualized, focusing on the relationship between mother and fetus, not on the separation that will occur after birth.

Emphasis on the relationship between mother and fetus, many feminists urge, runs against the classic liberal legal tradition in which individuals are viewed in terms of their competing rights.[176] Under liberal legal theory, the prototype of male legal reasoning,[177] mother and fetus are pitted against each other, each striving to preserve their own rights.[178] The alternative approach, under a feminist jurisprudence, would be to break down the barriers between mother and fetus and assess the interests of both as connected to each other by their physical and emotional bonds.[179]

If mother and fetus are not autonomous individuals, the difficult question arises of how to properly characterize their relationship in a way that can effectively operate within the law to preserve women's bodily autonomy and at the same time recognize the unique relationship between mother and child during pregnancy. Courts assessing emotional distress claims have tended to focus solely on the physiological aspects of pregnancy such as viability[180] without regard to the

175. "Women are 'profoundly relational;' men are not. That, according to relational feminist theory . . . is the 'essential' difference between them." Karlan & Ortiz, *supra* note 174, at 858. The male conceptual framework is termed the ethic of justice, and is generally described in terms of separation, autonomy, individualism and independence. *See* Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. Cal. L. Rev. 1699, 1712-13 (1990) (offering a descriptive list of differences between the "ethic of care" and the "ethic of justice").

176. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 543 (1986).

177. "Liberalism has been viewed as inextricably masculine in its model of separate, atomistic, competing individuals establishing a legal system to pursue their own interests and to protect them from others' interference with their rights to do so." Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. Cal. L. Rev. 1171, 1173 (1992); *see also id.* at 1242 (defending liberalism by analogizing the ethic of care to the notion of duties arising out of personhood, such that both ethics are directed at recognizing the relationships that exist between individuals).

178. *Id.* at 1243. Under liberal and libertarian theories, emphasis on the basic rights of individuals has presented a number of moral dilemmas for women. Susan Moller Okin, Justice, Gender, and the Family 75 (1989). Because liberal legal theory has ignored the fact that the potential lives of fetuses are radically dependent upon the bodies of others, conflicts have arisen between the rights of mothers to control their bodies, particularly in the context of abortion, surrogate motherhood and maternal drug use. *See id.*

179. *See* Martha Minow, Making All the Difference 194 (1990) (criticizing the autonomous assumption of prevailing legal doctrine because it rests on an image of "independent man" rather than "interconnected woman").

180. *See supra* part II; *see also* Johnson v. Ruark Obstetrics and Gynecology Assocs., 365 S.E.2d 909, 917 (N.C. Ct. App. 1988) (finding that so long as mother and

social and emotional experiences that occur during pregnancy.[181] In this respect, the courts have ignored the fact that pregnancy has both biological *and* social implications.[182]

One way to confront this dilemma is the conceptualization proposed by Justice Glen in her decision in *Alberto v. Columbia Presbyterian Medical Center*.[183] Justice Glen suggests that rather than focusing on "the either/or of the pregnant woman or fetus as object of injury, the real focus should be on the pregnancy itself."[184] She characterizes the pregnancy as an "ongoing process," which includes changes in both the woman's body and the well-being of the fetus.[185] Moreover, because this is a process that a woman has chosen to go through, negligence that injures the pregnancy violates the expected outcome of the pregnancy.[186] Thus, the injury or death of a fetus is not a self-contained event, and causes physical and emotional injuries to the mother as well.

Justice Glen's new framework for understanding pregnancy has practical merits for the law and encompasses many prevailing feminist theories. In a practical sense, Justice Glen recognizes in her analysis that pregnancy must be characterized in a way that does not dismiss the unique character of the fetus as something more than body tissue, yet something less than an independent entity. In this sense, she recognizes the "potentiality of life" understanding of pregnancy.[187]

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fetus are physically connected, the fetus is not "another" person for purposes of precluding emotional distress recovery).

181. *But see* Johnson v. Superior Court, 177 Cal. Rptr. 63, 65 (Ct. App. 1981) (recognizing that the emotional relationship a mother develops with her child during pregnancy exists even while the child is still a fetus).

182. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 267 (1992). Professor Siegel also commented that:

> Social forces play a powerful part in shaping the process of reproduction. Social forces define the circumstances under which a woman conceives a child, including how voluntary her participation in intercourse may be. Social forces determine whether a woman has access to methods of preventing and terminating a pregnancy, and whether it is acceptable for her to use them. Social forces determine the quality of health care available to a woman during pregnancy, and they determine whether a pregnant woman will be able to support herself throughout the term of gestation, or instead will be forced to depend on others for support. Social relations determine who cares for a child once it is born, and what resources, rewards, and penalties attend the work of gestating and nurturing human life.

Id.

183. N.Y. L.J., Sept. 10, 1993, at 21 (Sup. Ct. N.Y. County 1993).

184. *Id.* at 22.

185. *Id.*

186. *Id.*

187. *See id.* Courts have attempted to define the "potentiality of life" by a two-factor test: (1) whether the fetus is viable, and (2) what is the purpose of declaring the fetus a person. Kahn, *supra* note 147, at 811.

Recognizing that the fetus is more than the mother's body tissue will help Justice Glen's conceptualization gain acceptance in the legal community. Most legal scholars and courts would agree that the mother and fetus are not completely separate entities from each other.[188] As Ronald Dworkin noted, "it is as wrong to say that the fetus is separate from [the mother] as to say that it is not."[189] Therefore, if the fetus is not a person, it is at least "a creature of moral consequence."[190] In this way, fetal tissue is something more than just body tissue of the mother that is damaged by prenatal malpractice. The fetus is thus concurrently the "potentiality of life" and the mother's tissue.[191]

This dual aspect of fetal tissue highlights the inappropriateness of existing legal analyses of emotional distress claims. First, the direct victim approach, which would negate any recognition of fetal life until birth, is unrealistic. Likewise, bystander analysis is inappropriate because it accords the fetus complete autonomy. Similarly, duty analysis, as it currently exists, also accords the fetus an independent status. Thus, adopting a framework that focuses on the pregnancy and connection, rather than the separation, necessarily rejects these approaches.

Difficulties arise, however, with creating a new conceptualization of pregnancy. First, the concurrent nature of fetal and maternal life suggests that pregnancy is an absolutely unique condition.[192] Creating "special" legal frameworks for women suggests that women are in need of accommodation. Any accommodation in turn bears the risk of perpetuating stereotypes of women as weak and marginal in comparison to men.[193] Recognizing this need, however, may be a way to

188. *See, e.g.*, Roe v. Wade 410 U.S. 113, 158 (1973) (holding that a fetus is not a "person" within the meaning of the Fourteenth Amendment).

189. Ronald Dworkin, Life's Dominion 53 (1993); *see also* Rich, *supra* note 1, at 64 (stating that the child a mother carries can neither be described as the mother or not the mother).

190. Dworkin, *supra* note 189, at 57.

191. *Alberto v. Columbia Presbyterian Medical Ctr.*, N.Y. L.J., Sept. 10, 1993, at 22 (Sup. Ct. N.Y. County 1993).

192. *See id.*; *see also* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 22-23(1985) (arguing that pregnancy is a unique condition, but other than the time in which a woman is exercising her reproduction capacity, women and men are equal). The conclusion that pregnancy is a truly unique condition elicits the ongoing equal treatment/special treatment debate. Feminists have clashed over the implications of treating women "differently" from men because of their reproductive capabilities which perpetuates stereotypes of women needing special assistance in the law. An adequate discussion of this topic would go beyond the reasonable scope of this paper. For further insight into the problem, see generally Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 326 (1984-85) (characterizing the debate as centering on whether pregnancy "naturally" makes women unequal and whether women require special legislative accommodation).

193. *See* discussion *supra* note 192.

make our "differences" positive and valuable, not marginal.[194] Second, a conceptualization of pregnancy that recognizes the value of a potential life must be reconciled with constitutional guarantees of the right to choose to have an abortion. Justice Glen attempts to confront this dilemma by arguing that pregnancy "belongs" to the woman, as a part of her body, in the sense that she owns it and may choose to terminate it.[195] Only when a mother has chosen to become a mother, and be subject to prenatal care, can she state a cause of action for emotional distress arising from the loss of the fetus, based on both her physical pain and her emotional loss.

Providing an alternative conceptualization of pregnancy such as Justice Glen's may also confront traditional cultural and legal understandings of fetal life. For example, the fetus has traditionally been accorded an independent status from its mother. From the nineteenth century, the fetus has been defined as life because of its capacity for growth, which was deemed to imbue it with its own "embryonic autonomy."[196] Not surprisingly, this view of fetal life did not reflect women's common understanding of pregnancy, but reflected arguments put forth by men. As Reva Siegel noted, "[t]he arguments doctors brought to bear against the practice of abortion defined life from the perspective of medical science."[197] In addition:

> [The early doctors] arguments against abortion emphasized that the fertilized egg had a physiological capacity for growth, and derived from this capacity for growth the embryo's status as an autonomous life form. Thus, in defending the claim that life begins at conception, physicians redefined the maternal/fetal relation, offering a physiological account of human development that treated women's role in reproduction as a matter of minor consequence-from the point of conception onwards.[198]

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194. As Martha Minow notes:

> "[D]ifference" depends on a relationship, a comparison between people with reference to a norm .... Changing the ways we classify, evaluate, reward, and punish may make the differences we had noticed less significant, irrelevant, or even a strength. The way things are is not the only way things could be. By aligning ourselves with the "different" person, for example, we could make difference mean something new; we could make *all* the difference.

Minow, *supra* note 179, at 377.

195. *See id.*; *see also* Kahn, *supra* note 147, at 824-825. ("Once pregnant with the intention not to abort, a woman's duty to herself to act on her own behalf is secondary if not totally subjugated to her duty to care for her fetus.").

196. Siegel, *supra* note 182, at 288. This understanding is exemplified by Barbara Katz Rothman's classic analogy: "The fetus in utero has become a metaphor for 'man' in space, floating free, attached only by the umbilical cord to the spaceship. But where is the mother in the metaphor? She has become an empty space." Barbara Katz Rothman, The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood 114 (1986).

197. Siegel, *supra* note 181, at 287.

198. *Id.* at 288.

This entrenched physiological account of pregnancy is reflected in the courts' analyses of emotional distress cases. Women's roles in the reproductive process, both in terms of their physical burdens and emotional attachments, are rarely the subject of the court's scrutiny.

Despite these obstacles to creating a new understanding of pregnancy, redefining the status of the fetus by focusing on the mother's pregnancy has practical merits for the law. By understanding that pregnancy is a dual process of both the fetus' growth and the mother's expectation, courts can shift their focus away from determining whether a fetus is or is not a person. The focus, rather than on the fetus and its rights, would be on the *pregnancy* as a condition of the mother. Moreover, courts have already implicitly recognized this expectational aspect of pregnancy. For example, the distinction courts have found between duty in the prenatal and the abortion contexts reflects this understanding.[199] Courts have acknowledged that they recognize the expectation that life will occur in the prenatal context by assessing duty in terms of mother and fetus. Similarly, courts have recognized that when there is no expectation that the fetus will become a life, such as in the abortion context, legal analysis focuses solely on the mother's rights. A fetus does not gain status, therefore, until we expect it to be born.

With this conceptualization of pregnancy in mind, however, a mother also faces the task of meeting the legal requirements of emotional distress recovery. In this way, courts can keep recovery within manageable bounds and avoid opening the floodgates of litigation. For instance, she must then show that her emotional injury is sufficient to warrant recovery and that the doctor owed her a duty of care.[200] This new understanding of pregnancy, however, will impact how courts analyze the mother's harm and the duty the doctor extends. A comprehensive critique of emotional distress in prenatal malpractice, therefore, must recognize that the problems associated with this specific area of the law also reflect the inability of the existing tort doctrines to cope with this particular situation.

B. *Negligent Infliction of Emotional Distress: Redefining Old Rules*

In addition to the conceptual difficulties of defining pregnancy within the law, courts have also been faced with the problem of how to fit these types of cases into the existing legal frameworks for emotional distress. This task is made more difficult because the prevailing theoretical frameworks were not formulated to cope with these situations. Historically, there are two paradigm cases of emotionally-based physical injuries brought by female plaintiffs: the pregnant plaintiff who suffers a miscarriage or stillbirth as a result of being frightened,

199. *See supra* part II.C.
200. *See* discussion *supra* parts III.A.2 & III.C.

and the mother who undergoes nervous shock when she witnesses her child's injury or death.[201] These claims were classified in the law as emotional harms[202] and from that point the familiar frameworks of emotional distress recovery developed.

Somewhere amidst these paradigm cases, however, are the cases that involve prenatal malpractice. The fetal death and injury cases are not quite like the miscarriage cases because the latter are in the medical context.[203] Nor are they like the cases where the mother witnesses an injury to her child, because here the child has not yet been born. As a result, the prenatal malpractice cases create a new scenario that is assessed by tests and frameworks that were not designed for it. In addition to redefining pregnancy, therefore, courts must also alter existing conceptions of harm and duty in the special circumstances of prenatal malpractice.

C. *Feminism and Tort Law: A Reconsideration of Values*

Feminist scholars argue that the past development and current understanding of tort law are infused with notions of gender roles and stereotypes that reflect patriarchal norms.[204] Within the general scope of tort law, feminists have focused on specific concepts such as harm and duty as areas for feminist reform. In the narrower context of prenatal malpractice, courts must consider how to evaluate the unique form of emotional suffering that women suffer when their children are stillborn or birth defected, and how to reconsider the duty extended by the physician to account for the treatment received by both the mother and the fetus. At the same time, any changes in how we characterize these concepts must be balanced against the competing claims

201. Chamallas with Kerber, *supra* note 23, at 814.

202. *Id.*

203. The early fright-based miscarriage cases involved pregnant women who underwent some trauma that induced a stillbirth. *See, e.g.*, Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888) (pregnant plaintiff nearly hit by negligently operated train causes her to miscarry her fetus).

204. For example, intraspousal and intrafamilial tort immunities shrouded domestic violence against women and children from legal redress. These doctrines precluded women and children from asserting claims against abusive husbands and fathers because of historical beliefs that men owned and controlled their women and children. *See Primer*, *supra* note 3, at 6; *see generally* Carl Tobias, *Interspousal Tort Immunity in America*, 23 Ga. L. Rev. 359, 478 (1989) (arguing that the demise of interspousal tort immunity reflects changing social roles of women, but may not significantly improve their condition within the family). In addition, gender roles are exemplified by the classic tort principle of reasonableness. Reasonableness is premised currently on the "reasonable man standard" which is the care required of a reasonably prudent person under the same or similar circumstances. Feminists argue that this standard is not gender neutral as existing doctrine teaches us and no universal standard can apply to all people at all times. *Primer*, *supra* note 3, at 23 (stating that "[n]ot only does 'reasonable person' still mean 'reasonable man'- 'reason' and 'reasonableness' are gendered concepts").

of the medical profession to keep malpractice insurance premiums at a minimum.[205]

1. Understanding Harm

In contemporary tort doctrine, harm is valued in a hierarchical manner in which individual physical integrity and property are valued more highly than emotional security and human relational ties.[206] This privileging of pecuniary injuries over lasting emotional scars is closely related to valuations made in the law of damages.[207] Because tort law values damages based on the market economy, feminists argue that women's injuries are undervalued.[208] As a consequence, male norms set the values of damages, and thus women are undercompensated.[209]

This undervaluation of emotional harm reflects continued gender bias in the legal system.[210] The concept of injury and harm is skewed to reflect male conceptions of pain and suffering. For example, women's complaints of pain or injury were dismissed historically as emotional or hysterical, whereas male complaints of the same ailment were more likely to be treated as serious physical harm.[211] The dominant standard for determining "normal" emotional responses, therefore, are male.[212] As a result, women become stereotyped as emotional,[213] which detracts legitimacy from their emotional injuries, and they are accordingly undercompensated within tort law.

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205. The medical profession has also voiced extensive criticisms of the tort system because of the "tort crisis" in medical malpractice. From the doctor's perspective, flaws in tort law and its application by the courts have caused medical malpractice claims to inflate malpractice insurance premiums to intolerable levels. *See* F. Patrick Hubbard, *The Physician's Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform"*, 23 Ga. L. Rev. 295, 296 (1989). A common critique of malpractice law is that courts have made recovery much easier by changing the methods of proving malpractice through the use of expert testimony, by heightening the standard of care physician's must satisfy, and increasing the information requirements doctors must offer for informed consent. *See id.* at 310-11.

206. Chamallas with Kerber, *supra* note 23, at 814.

207. *Torts Course*, *supra* note 7, at 51.

208. *Id.* at 52; *see also* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L. Rev. 73, 104 (1994) (arguing that the use of race and gender data for the assessment of wrongful death damages constitutes unlawful state action for purposes of Fourteenth Amendment scrutiny).

209. *Primer*, *supra* note 3, at 6.

210. *See id.* at 6-7.

211. *Torts Course*, *supra* note 7, at 65.

212. *See* Chamallas with Kerber, *supra* note 23, at 832-33.

213. Professor Carl Tobias reviewed the Prosser, Wade, and Schwartz casebook for examples of gender bias and revealed that "nearly all the cases included in the notes introducing historical material on the independent cause of action for emotional distress involved females who appear gullible, stupid, or weak, thus reaffirming notions of women's inferiority." Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 Golden Gate U. L. Rev. 495, 505 (1988).

Professor Lucinda Finley highlighted this phenomenon in the context of *Payton v. Abbott Labs*,[214] a leading DES case.[215] Professor Finley notes that the case is usually invoked for the proposition that trivial emotional distress should not be compensated because it is not a serious enough injury and it is very easy for plaintiffs to feign distress.[216] From the woman's perspective, however, the injury appears different. Professor Finley urges us to consider the feelings of a woman whose reproductive system has been harmed in a way that she may not be able to have children, in a society in which women's sense of identity and role is tied to their ability to become mothers.[217] In this context, the emotional experiences start to look more like real injuries and less like frivolous emotional claims.[218]

By analogy, the emotional injury that women suffer from the loss or injury to the fetus within them may seem more genuine and less frivolous from the woman's perspective. Understanding and evaluating emotional harm in these circumstances must reflect the conceptualization of pregnancy as a process or condition.[219] When a fetus is stillborn or injured, the emotional harm the mother suffers stems not simply from the biological harm, but from the social and relational costs associated with that loss. Integrating feminist values in relationships and connection, therefore, will add value to these claims where it has been missing.

Embracing these goals for understanding emotional harm may confront practical critiques. For instance, although critics recognize that emotional distress can be extreme, they argue that large awards for this harm should be limited because of the vagueness of intangible damages, the unpredictability of the form and extent of emotional harm, and the fact that monetary awards for intangible losses do not really compensate the victim accurately.[220]

The inability to place a monetary value on such harm is a primary concern of the courts.[221] As one court noted, "calculation of damages for plaintiffs' emotional injuries remains too speculative to permit recovery notwithstanding the breach of a duty flowing from defendants themselves."[222] In circumstances of prenatal malpractice, however, this argument fails. First, mental suffering is no more difficult to estimate in financial terms, and is no less a real injury, than "physical"

214. 437 N.E.2d 171 (Mass. 1982).
215. DES cases are briefly described *supra* note 168.
216. *Torts Course*, *supra* note 7, at 68.
217. *Id.*
218. *Id.* Professor Finley also noted that women exposed to DES often suffer intense anxiety and anger or guilt in their relationships with their mothers and husbands that require professional counseling. *Id.*
219. *See supra* part III.A.2.
220. *See* Hubbard, *supra*, note 206, at 318.
221. *Id.* at 360.
222. Becker v. Schwartz, 386 N.E.2d 807, 814 (N.Y. 1978).

pain.[223] Second, it would be unjust to deny all relief to the injured party simply because the wrong is of a nature with uncertain damages.[224]

To give substance to the theoretical aspirations of understanding harm to women, women's emotional injury should be given a legal/market valuation that will mainstream the injury, thus making it seem less remote and more legitimate.[225] In particular, Professors Chamallas and Kerber urge the expansion of emotional recovery because it will allow relational interests in emotion and connection to be viewed as essential to one's integrity, on an equal level with physical and property security.[226] In addition, they argue that this expanded notion of physical harm to include the emotional will account for the physical and social experience of pregnancy.[227] Moreover, valuing emotional harm in these circumstances will not contravene existing policy rationales for limiting emotional recovery.[228] For instance, the mental trauma of losing a child, regardless of whether the death occurred the day before or the day after birth, is likely to be long-lasting and extremely severe. Furthermore, fetal death or injury cases do not suffer from the same suspicion of falsity and lack of genuineness that other situations may face.[229]

In assessing claims for negligent infliction of emotional distress in the context of prenatal malpractice, therefore, courts should recognize that the mother's emotional injury is real and is deserving of a market valuation. Furthermore, this harm must be measured in a way that accounts for the social and biological aspects of pregnancy. Thus, the interplay of how courts conceptualize pregnancy and how they value the harm that results when that pregnancy is injured is critical to reshaping emotional distress law. This interplay is also crucial to understanding the concept of the duty of care a physician extends to pregnant patients.

2. Duty Re-Evaluated

Redefining harm and pregnancy are not the only aspects to reconsider in searching to find equitable solutions for mothers. Courts must also concentrate on ways to reconceptualize the limited concept of duty in cases that involve pregnancy. Currently, courts have been overly cautious in imposing a duty on a defendant, and have only done so in a dichotomous way by recognizing duty towards either mother *or*

223. Prosser & Keeton, *supra* note 25, § 54, at 360 ("The law is not for the protection of the physically sound alone.").
224. *Becker*, 386 N.E.2d at 815 (Fuchsberg, J., dissenting).
225. *See* Chamallas with Kerber, *supra* note 23, at 862.
226. *Id.*
227. *Id.*
228. *See supra* notes 26-28 and accompanying text.
229. *See* Prosser & Keeton, *supra* note 25, § 54, at 361.

fetus.[230] By shifting the focus away from determining to whom the duty runs, courts can avoid this difficult analysis and redefine the standard of care itself.

In traditional legal doctrine, duty arises only in three limited ways: when the defendant assumes it; when the law imposes it; or when it arises from a relationship between the plaintiff and the defendant.[231] Currently, a duty may be defined as an obligation, to which the law will give recognition and effect, to conform to a certain standard of conduct toward another.[232] Seldom, however, do courts in emotional distress cases confront the content of the duty of care. Rather, they have directed their analyses at the mother and fetus, and to whom the duty is owed.

Feminist jurisprudence offers two ways to resolve this problem. First, understanding pregnancy as a condition of the mother that encompasses a "potential" life will refocus duty analysis away from determining where the duty runs. Instead of according the fetus an independent status from its mother, courts should treat the mother and fetus as a biological, emotional and social unit when they receive prenatal care. Second, courts can alter the content of the physician's duty as well, taking into account relational norms of responsibility and caring.

Feminist legal theorists suggest that the current standard of responsibility is a pretext for the male view of autonomy and individuality.[233] How we define legal responsibility, therefore, should include feminist understandings of responsibility and interconnectedness.[234] In feminist terms, duty should be redefined to incorporate a "standard of caring" or "standard of consideration of another's safety and interests."[235] This relational notion of duty, feminists argue, will serve to encourage and improve social relations, rather than enforcing our divisions, disparities of power and isolation.[236] On a practical level, this would be to acknowledge the doctor's duty of care to the mother and the fetus within her. In turn, this encourages doctors to appreciate the maternal/fetal connection.

The practical objection to this formulation is the expansion of liability in an era when tort reform and limitation is an important issue. To adopt a theory of "interconnectedness" when assessing duty, as critics assert, would "remove all limits on negligent infliction of emotional

230. *See* discussion *supra* part II.

231. *See* Martin v. United States, 984 F.2d 1033, 1036 (9th Cir. 1993) (citations omitted).

232. Prosser & Keeton, *supra* note 25, § 53, at 356.

233. *See Primer*, *supra* note 3, at 31-32.

234. *Overview*, *supra* note 13, at 583.

235. *Primer*, *supra* note 3, at 31.

236. *Id.*

distress and expose all negligence defendants to limitless liability."[237] In the specific context of pregnancy, however, this unwanted and limitless expansion is not present. Understanding the connection between mother and fetus and that the duty a doctor owes during prenatal care runs to *both* the mother and the child inside her is neither remote nor unpredictable. It recognizes not simply an emotional tie and concern for others, but a demonstrable biological condition. Thus policy arguments against redefining duty in the prenatal context are not persuasive.

CONCLUSION

The development of the law of negligent infliction of emotional distress is intrinsically tied to changing societal views of women's roles and the understanding of the fetus.[238] Because the law continues to understand pregnancy through a masculine perspective, which tends to separate the identities of mother and fetus, women's emotional injuries have been undervalued. Any improvement in this situation necessarily begins with reconceptualizing the maternal/fetal relationship. By focusing on the woman's pregnancy, rather than the fetus' status, courts may begin to reassess the extent and severity of emotional harm women suffer, and the duty their physician's owe them. Most importantly, implementing these conceptual changes will serve to bridge the gap between feminist theory and legal practice, allowing women to move closer towards equality through the "redistributive mechanism of tort liability."[239]

237. Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 Marq. L. Rev. 369, 393 (1992).

238. *See* Chamallas with Kerber, *supra* note 23, at 823.

239. *Id.* at 861.