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Abortion, Pregnancy Loss, & Subjective Fetal Personhood

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ABSTRACT. *Longstanding dogma dictates that recognizing pregnancy loss threatens abortion rights—acknowledging that miscarriage and stillbirth involve a loss, the theory goes, creates a slippery slope to fetal personhood. For decades, anti-abortion advocates have capitalized on this tension and weaponized the grief that can accompany pregnancy loss in their efforts to legislate personhood and end abortion rights. In response, abortion rights advocates have at times fought legislative efforts to support those experiencing pregnancy loss, and more recently, remained silent, alienating those who suffer a miscarriage or stillbirth.*

This Article is the first to argue that this perceived tension can be reconciled through the concept of subjective and relational fetal value. The Article derives this concept of subjective fetal personhood from pregnancy loss research, which demonstrates that a pregnant person's attachment to their fetus is based on myriad individualized factors. Importantly, attachment in pregnancy is neither fixed nor biological and therefore does not support the antiabortion concept of personhood-at-conception. We suggest that tort law offers a way forward: a model of recognizing subjective, relational fetal value that does not collapse into personhood-at-conception. Thus, abortion rights advocates can recognize and support those experiencing pregnancy loss without ceding ground on abortion rights.

*Most importantly, this Article proposes that recognition of pregnancy loss within abortion narratives will better position the abortion rights movement for a post-*Roe *world in which abortion and pregnancy loss are inexorably intertwined. Without legal abortion access, women will turn to self-management. But because complications from self-managed abortion are indistinguishable from miscarriage, investigation and criminalization of pregnancy loss will dramatically increase as a mechanism of enforcing abortion laws. Furthermore, restrictions on abortion also create offshoot consequences that harm the treatment of pregnancy loss. Appreciating how connected these two experiences are will help to normalize and de-stigmatize all pregnancy endings that do not result in a live birth—abortion, stillbirth, and miscarriage. Finally, we argue that an abortion rights narrative that acknowledges subjective fetal value is less alienating and reflects nuanced views on the meaning of pregnancy.*

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INTRODUCTION

In the summer of 2020, celebrity Chrissy Teigen excitedly announced that she was pregnant with her third child,[2] who she later named Jack.[3] Unfortunately, she was diagnosed with a partial placental abruption, and after months of intervention, she shared the news on social media that Jack had died.[4] Teigen posted raw photos of her agony at the sadness of Jack's simultaneous birth and death, including a photo of her sobbing receiving an epidural and another holding Jack's body wrapped in a blanket.[5]

Teigen and her husband, John Legend, are noted supporters of abortion rights. After Jack's death, Planned Parenthood tweeted condolences to Teigen: "We're so sorry to hear that Chrissy Teigen and John Legend lost their son, and we admire them for sharing their story." Backlash was swift, accusing both Teigen[6] and Planned Parenthood[7] of hypocrisy, questioning how one could believe abortion involves only a "clump of cells," yet grieve a pregnancy loss.

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[2] The terminology used to describe the subject of pregnancy is fraught for many reasons. First, medical terminology includes different labels depending on the length of pregnancy. What starts as a zygote immediately after conception becomes an embryo two weeks later and a fetus around week nine. Thus, there is no one medical term to describe a pregnancy at all stages of development. "Fetus" has come to take on this general meaning in public dialogue, but it might imply the pregnancy is further along than it really is, as most abortions and miscarriages happen in the embryonic stage. Second, as we explain in great depth in this paper, many people carrying wanted pregnancies, especially after pregnancy loss, chafe at the use of medical terminology to describe what they consider their "baby" or "child." Indeed, "fetus" is typically used in the abortion movement specifically because it is less likely to personify the fetus. There are no easy answers, and we don't attempt to resolve the impossible conflict. Instead, we use a variety of terms depending on the context. Given that one of the main goals of this paper is to break down longstanding divides, we think this sensitivity to context and flexibility of language is important.

[3] To read a full account of Teigen's experience, see her Medium post. Chrissy Teigen, *Hi.*, Medium (Oct. 27, 2020), https://chrissyteigen.medium.com/hi-2e45e6faf764.

[4] As of last check, Teigen has 13.5 million followers on Twitter and 35 million on Instagram.

[5] Chrissy Teigen (@chrissyteigen), INSTAGRAM, https://www.instagram.com/p/CFyWQLWpJ3u/ (last visited Jan. 2., 2022).

[6] As one example, a GOP congressional candidate tweeted: "Hoping that Chrissy Teigen and John Legend will reevaluate their thoughts on abortion after their heartbreaking experience. It's not a clump of cells. It's either a baby or it's not." Elizabeth Gulino, *Yes, You Can Be Pro-Choice & Still Grieve A Miscarriage*, REFINERY29 (Oct. 5, 2020), https://www.refinery29.com/en-us/2020/10/10067213/chrissy-teigen-pro-choice-miscarriage. Worse were the commenters who said she deserved this loss because of her abortion rights advocacy: "Probably karma from all those kids you sacrificed. Mothers [sic] babies that didn't get a chance at life. Whose last moments were filled with terror and cries out for protection. You know the truth. Reap what you sew lady. You will answer to god…." Laura Bradley, *QAnon and Pro-Lifers Hit a New Low Mocking Chrissy Teigen's Miscarriage*, DAILY BEAST (Oct. 1, 2020), https://www.refinery29.com/en-us/2020/10/10067213/chrissy-teigen-pro-choice-miscarriage.

[7] @ThomasCoutouzis, Twitter (Oct. 2, 2010), https://twitter.com?ThomasCoutouzis/status/1312004745138237440 ("Is this a parody account? You are admitting that you are murderers. You say you believe that children in the womb are a clump of cells until birth, but you shared your condolences for the loss of their son. 1. You admit that it is a person. 2. You admit that this causes grief.")

Our nation's ever present abortion debate often erases pregnancy loss, defined as miscarriage before 20 weeks of pregnancy and stillbirth thereafter. Both abortion rights and antiabortion advocates presume that pregnancies either end in abortion or the birth of a healthy baby. In SB8, Texas legislators partly justified banning abortion after a detectable "fetal heartbeat" because it is "a key medical predictor that an unborn child will reach live birth."[8] Abortion rights advocates, on the other hand, stress that without abortion, people "will be forced into parenthood."[9]

Millions of Americans, however, know that this is a false dichotomy. The risk of miscarriage is now considered as high as 25%, dropping as pregnancy progresses, but still at least 10% after a confirmed "heartbeat" at 6 weeks of pregnancy.[10] Stillbirth occurs in about 1 in 160 pregnancies.[11] Women of color and poor women are disproportionately likely to experience both stillbirth and miscarriage.[12] These risks translate to millions of miscarriages and at least 24,000 stillbirths a year in the United States.[13] Pregnancy loss silently repudiates both sides of the abortion debate: "a denial of life and choice at the same time."[14]

The only time pregnancy loss appears in the abortion debate is when it has been weaponized as evidence of fetal personhood. For decades, antiabortion advocates have argued that life begins at conception and that a fetus is a person, rendering abortion illegal.[15] As further support for personhood, antiabortion advocates have sought to treat fetuses the same as living children in multiple legal contexts, including legal claims and rights related to pregnancy loss.[16] On the other hand, abortion rights advocates have feared that any legal recognition of pregnancy loss would cause a slippery slope to fetal personhood (exactly as antiabortion advocates hope).[17] As a result, the reproductive rights movement has at times fought against legislative measures related to pregnancy loss and often ignores the subject as much as possible in the public narrative.[18]

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[8] TEX. STAT. 171.202(1) (2021).
[9] Jia Tolentino, *S.B.8 and the Texas Preview of a World Without Roe v. Wade*, NEW YORKER (Sept. 5, 2021), https://www.newyorker.com/news/news-desk/sb-8-and-the-texas-preview-of-a-world-without-roe-v-wade.
[10] Stephen Tong, et al., *Miscarriage risk for asymptomatic women after a normal first-trimester prenatal visit*, 111(3) J. OBSTET. GYNECOL. 710 (2008).
[11] *What is Stillbirth*, CDC, cdc.gov/ncbddd/stillbirth/facts.html (last accessed Jan. 2, 2022).
[12] *See* discussion *infra* Part II.A.
[13] Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1061 (2021) [hereinafter Lens, WASH. U.]
[14] LARA FREIDENFELDS, THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF MISCARRIAGE IN AMERICA 137 (2020).
[15] Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALBANY L. REV. 999, 1000 (1999).
[16] *See* discussion *infra* Part I.
[17] *Id.*
[18] *Id.*

Despite this framing of pregnancy loss threatening abortion rights, a surprising amount of overlap exists between the two.[19] The physical experience of abortion and pregnancy loss is remarkably similar, as is the stigma and silence surrounding both experiences. A foundational assumption exists that the two groups radically diverge in how they conceptualize the subject of their lost pregnancies—women who have abortions are indifferent or hostile to the fetus, while women who experience pregnancy loss are grieving parents. But these stereotypes are simplistic and often inaccurate.[20] Many abortion patients use the term "baby," want to see the products of conception or fetal tissue afterwards, feel grief in addition to relief, and worry about fetal pain.[21] And many women experiencing pregnancy loss, especially after an unintended pregnancy or an early pregnancy, feel relief.[22] Abortion narratives separate and essentialize these experiences, but average people have no trouble recognizing the nuanced realities of abortion and pregnancy loss—indeed, many have experienced both.[23]

Antiabortion advocates' weaponization of grief after pregnancy loss will likely only increase post-*Roe* as part of attempts to constitutionalize fetal personhood, making abortion illegal in all states. This Article fundamentally challenges the absolutist idea that any recognition of a pregnancy's value, and the emotional response to its loss, will bolster the movement to end all abortion rights. We do so by describing the factors relevant to whether and how people value their pregnancies, including the pregnancy's wantedness, the length of the pregnancy, the influence of technology, the incorporation of the fetus into social structures, like families, and the person's history of pregnancy loss.[24] When seen through this lens, it becomes clear that a pregnancy's value is not inherent, but subjective and relational. Tort law recognizes this reality: when asked to value the loss of a potential child after a tortiously caused pregnancy loss, courts look to the specific parent-child relationship lost and any subsequent emotional distress.[25] No inherent or objective value is ascribed to miscarriage or the stillborn baby in tort law; it is individualized to the pregnant person.

This subjective and relational understanding of fetal value is inconsistent with antiabortion personhood-at-conception model, which attributes identical value to all fetuses starting at conception.[26] We thus argue that instead of dismissing the value of the fetus entirely, the abortion rights messaging can recognize this subjective, relational value without ceding ground on abortion rights. We express no opinion of when life begins or of any objective definition of personhood. Our aim is instead to argue that it is

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[19] *See* discussion *infra* Part II.
[20] *See* discussion *infra* Part II.D.
[21] *Id.*
[22] *Id.*
[23] Margot Sanger-Katz, et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14. 2021).
[24] *See* discussion *infra* Part III.A.
[25] *See* discussion *infra* Part III.B.
[26] *See* discussion *infra* Part III.C.

possible to legally recognize a pregnant person's valuation of the fetus without collapsing into the antiabortion model of personhood-at-conception.

We also argue that modernizing abortion rights narratives to allow for greater recognition of the fetus has several advantages. First, it will set the abortion rights movement up to best protect pregnant people in a future where abortion and pregnancy loss are inexorably intertwined.[27] Self-managed abortion, which mimics the experience of pregnancy loss, is already on the rise and will become the primary method of abortion in states that continue to restrict legal abortion or ban it altogether after *Roe v. Wade* is overturned. Enforcing abortion regulations will thus increasingly rely on the investigation and criminalization of pregnancy loss, harming all pregnant people. The abortion rights and pregnancy loss communities can become important allies and fight this criminalization together.[28] The communities can also work together on the many other ways in which abortion politics harm women experiencing pregnancy loss—including regulations on abortion medications and procedures that harm the ability to treat and manage miscarriage and stillbirth.[29]

Second, an abortion rights strategy aligned with the pregnancy loss community would help normalize all pregnancy outcomes and overcome the single-path narrative that all pregnancies end in a healthy, live birth to a smiling mother. Reconceptualizing abortion, miscarriage, and stillbirth as normal—even if undesired—pregnancy endings could help fight the stigma that affects all pregnant people.[30] Finally, modernizing the abortion rights narrative mirrors the successful anti-abortion strategy to account for both the woman and the fetus in its messaging. Historically, the antiabortion movement focused solely on the fetus, but it became clear that incorporating woman-protective arguments would be necessary to change both the law and public opinion. We suggest that a similar strategy, where the abortion rights movement moves to incorporate the fetus into its messaging, could be strategically advantageous if done in the right way.[31]

In this Article, we first describe the perceived tension between abortion and pregnancy loss that has made it difficult for the abortion rights movement to properly recognize and support people through pregnancy loss. We then explain that these two groups undergo very similar experiences and have much more that unites them than divides them. Next, we look to qualitative social science research to understand how women articulate their attachment to their fetus and what factors create that attachment. We conclude that the attachment is subjective and relational. We argue that tort law already recognizes this same subjective valuation of a lost pregnancy, and that it is wholly inconsistent with the antiabortion understanding of fetal value, which is fixed and biological. Finally, we conclude with a section on what the abortion

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[27] *See* discussion *infra* Part IV.
[28] *See* discussion *infra* Part IV.A.
[29] *Id.*
[30] *See* discussion *infra* Part IV.B.
[31] *See* discussion *infra* Part IV.C.

rights movement can gain from recognizing the subjective importance of fetal attachment and uniting with the pregnancy loss community.

I. THE PERCEIVED TENSION BETWEEN ABORTION AND PREGNANCY LOSS

The Chrissy Teigen anecdote highlighted above perfectly encapsulates the perceived tension between protecting abortion rights and acknowledging the loss associated with miscarriage, stillbirth, and even abortion. When abortion rights activists attempt to recognize the significance of pregnancy loss, they are accused of hypocrisy because of their dismissal of the fetus in the context of abortion.

The tension extends beyond the public narrative. Fear exists that any legal recognition of pregnancy loss will cause a slippery slope to personhood that compromises abortion rights. In this section, we discuss how the anti-abortion movement has attempted to personify the fetus whenever possible and weaponize parental grief after loss for its own agenda. In response, the abortion rights movement often ignores the fetus and the issue of pregnancy loss—at times, even opposing policies to support those experiencing stillbirth for fear of the collateral consequences for abortion.

The abortion debate in our country has created a single-path narrative of pregnancy—that every pregnancy ends with the birth of a living baby unless interrupted by abortion.[32] Both sides use this narrative to stress the importance of their position—abortion either ends a would-be life or it protects people from forced parenthood. This simplistic view of pregnancy helped abortion rights advocates obtain success in both *Roe*, and to a lesser extent, in *Casey*. In *Roe*, the burdens of continuing the pregnancy assumed that a living baby would be born if abortion was unavailable—causing health consequences in pregnancy, mental distress due to childcare and raising an unwanted child, and even the stigma of unwed motherhood.[33] Similarly, in *Casey*, Justice Blackmun noted the health consequences of pregnancy and childbirth and possible negative effects of motherhood on a woman's education, employment, and ability to determine her future.[34] The single-path narrative is also apparent in Justice Alito's leaked draft *Dobbs* opinion, wherein he assumes that if abortion is illegal, the birthing parent can drop the (living) baby off at a fire station under safe haven laws or give the (living) baby up for adoption to the many suitable couples looking to adopt.[35]

The millions of pregnancy losses that occur each year in this country are simply erased. This "abstract model of pregnancy" perpetuated by the abortion debate "is a model of perfect development that inexorably unfolds to

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[32] Lens, WASH. U., *supra* note 13, at 1076.
[33] *Roe v. Wade*, 410 U.S. 113, 153 (1973).
[34] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 927-28 (1992) (Blackmun, J., concurring).
[35] Draft *Dobbs* opinion, 33-34.

healthy birth unless willfully disrupted."[36] Before legalization of abortion, "the opposite of pregnancy was miscarriage, either involuntary or an 'induced miscarriage.'"[37] But "after legalization, the opposite of 'pregnancy' was 'abortion,' and miscarriage became invisible, an event that simply was not supposed to happen."[38] The decades of "choice" rhetoric also reinforced the assumed binary of pregnancy. Choice implies control. But, as millions know, you cannot choose to give birth to a healthy baby. Women may choose to remain pregnant, but this does not dictate the desired outcome of a living birth.[39]

After *Roe* and *Casey*, pregnancy loss slowly began to reemerge in the abortion wars due to the antiabortion fetal personhood strategy:

> [O]ne facet of the longterm, end-game strategy of pro-life forces has included an attempt to have fetuses declared 'children' or 'persons' in as many legal contexts as possible, including child abuse laws, civil wrongful death actions, and criminal homicide and assault statutes. Abortion opponents hope to argue that because state law, in a variety of situations and jurisdictions, treats fetuses as persons, that Fourteenth Amendment jurisprudence should similarly recognize the reality of fetal personhood.[40]

These measures were not always introduced by antiabortion advocates, but they quickly realized their possible beneficial effect in the abortion debate and capitalized.[41] This antiabortion strategy uses "parents' grief [after pregnancy loss] as a weapon, hoping that '[t]he emotional power of parents pleading for legal recognition of their unborn children may sway societal views and incite political action' about abortion."[42]

In response, abortion rights advocates at times opposed legal measures that would recognize fetal value within pregnancy loss. Perhaps the best example is the fight over birth certificates in the case of stillbirth. Originally, stillbirths were recorded legally with both birth certificates and death certificates.[43] That changed mid-century, when states instead gradually started issuing only Fetal Death Certificates for stillbirths.[44] Stillbirth moms recoiled against this terminology—after all, they gave birth to their stillborn babies just

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[36] FREIDENFELDS, *supra* note 14, at 146.
[37] *Id.* at 144.
[38] *Id.*
[39] Lens, WASH. U., *supra* note 13, at 1081.
[40] Kenneth De Ville & Loretta Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999). *See also* Paltrow, *supra* note 15, at 1000.
[41] *See* Paltrow, *supra* note 15 at 1000.
[42] Lens, WASH. U., *supra* note 13, at 1077.
[43] *See* Jill Wieber Lens, *Counting Stillbirths* (on file with author).
[44] *Id.*

as they would a living baby.[45] In 1994, Dr. Joanne Cacciatore started a movement to create "stillbirth birth certificates" after giving birth to her 8-pound stillborn daughter, Cheyenne, at 40 weeks, and being told that she only gave birth to a "fetus."[46] These certificates are memorial only, but they are important to parents after stillbirth as they "publicly affirm[] a relationship,"—"that they are the parents of a baby who was born and who they regard as dear a child as if she had been born alive (a social reality)."[47]

The fiercest resistance to these memorial certificates came from abortion rights advocates.[48] They feared that "issuing certificates to children who have never lived may serve as yet another legal marker equating fetal life with that of born persons and that this will, sooner or later, play its part in the recriminalization of abortion."[49] The stillbirth community was willing to accept "drafting precautions" to ensure that the laws would not affect abortion rights—including language that the certificates would not apply to abortion, would not secure any state rights, and could only be requested by parents.[50] "The revised provisions, working in concert, [were] meant to secure the recognition of stillborn babies without extending them full legal personhood."[51] Still, some objected based on the possibility of "rights creep."[52] Ultimately, most states passed memorial birth certificate laws with such compromise language, but the abortion rights community alienated many in the pregnancy loss community.[53]

The abortion rights movement's more recent response to this anti-abortion strategy is a "studied silence"[54] on pregnancy loss, "opt[ing] to avoid the topics of stillbirth and miscarriage to the greatest extent possible."[55] One recent exception to this general rule is in the context of criminalization of pregnancy outcomes, where abortion rights advocates have sounded the alarm and supported state efforts to curtail these prosecutions.[56] But abortion rights

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[45] Carol Sanger, "*The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 Cal. L. Rev. 269, 306 (2012) [hereinafter Sanger, *The Birth of Death*].

[46] Lens, WASH. U., *supra* note 13, at 1108-09.

[47] Sanger, *The Birth of Death*, *supra* note 45, at 294.

[48] Lens, WASH. U., *supra* note 13, at 1109; Sanger, *The Birth of Death*, *supra* note 45, at 305; Allison Stevens, *The Politics of Stillbirth*, AMERICAN PROSPECT (July 14, 2017) (describing that state chapters of NOW, NARAL Pro-Choice America, Planned Parenthood, the ACLU, and ACOG opposed state bills to create stillbirth birth certificates); Joanne Cacciatore & Suzanne Bushfield, *Stillbirth: A Sociopolitical Issue*, J. WOMEN & SOCIAL WORK 5-7 (2008) (describing the opposition of reproductive rights groups in New Mexico and California).

[49] Sanger, *The Birth of Death*, *supra* note 45, at 305.

[50] *Id.* at 307.

[51] *Id.* at 308.

[52] *Id.*

[53] *Id.*

[54] Linda Layne, *Breaking the Silence: An Agenda for a Feminist Discourse of Pregnancy Loss*, 23 FEMINIST STUD. 289, 294 (1997) ("Because the issues framing the meaning of miscarriage and stillbirth resonate so strongly with the abortion debate, most feminists have maintained a studied silence on the topic.").

[55] Lens, WASH. U., *supra* note 13, at 1062.

[56] *See When Miscarriage Is a Crime*, PLANNED PARENTHOOD (July 29, 2019), https://www.plannedparenthoodaction.org/planned-parenthood-advocates-

advocates still almost always "consciously avoid the parent/child framing for political and strategic reasons"[57] and disregard any "acknowedg[ment] that there was something of value lost" when a pregnancy ended.[58] These boundaries are often seen as "black and white; the 'third rail' of advocacy. Crossing those boundaries, even an inch, is considered to concede too much on either side of the debate."[59]

One consequence of this polarization is that the abortion rights movement's only public narrative of a pregnancy is the "hegemonic binary of 'baby' or 'clump of cells,'" leaving average Americans, many of whom hold nuanced views of the meaning of pregnancy, confused.[60] This devaluation of the fetus alienates those who support abortion rights but also mourn their pregnancy losses.[61] Anthropologist Linda Layne has previously lamented that the abortion rights community has "surrendered the discourse of pregnancy loss to antichoice activists."[62] Our paper attempts to fill this void, and offer a way for the abortion rights movement to support all pregnant people and recognize nuanced fetal value.

Somewhat surprisingly, the more recent and holistic reproductive justice movement has also been relatively silent in its response to pregnancy loss, again with the exception of criminalization.[63] The reproductive justice movement, which women of color started, rejects the individualistic notion of choice and its implied control, instead highlighting that lack of access to a variety of needs surrounding pregnancy undermines choice.[64] The reproductive justice movement focuses on the needs of the whole pregnant person—not just the right to avoid procreation, but also the equally important rights to have a child and parent that child with dignity.[65] Still, despite its broader scope, it has given little attention to miscarriage and stillbirth unless it resulted in prosecution.[66] As noted below, women of color face increased risks of both miscarriage and stillbirth, which makes the issue especially fitting for the reproductive justice community given its emphasis on marginalized

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arizona/blog/when-miscarriage-is-a-crime; Press Release: Attorney General Bonta: California Law Does Not Criminalize Pregnancy Loss, State of California Department of Justice (Jan. 6, 2022), https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-law-does-not-criminalize-pregnancy-loss.

[57] Jamie Abrams, *The Polarization of Reproductive and Parental Decision-Making*, 44 FLA. ST. U. L. REV. 1281, 1319 (2017) (citing I. Glenn Cohen).

[58] Lens, WASH. U., *supra* note 13, at 1062.

[59] Abrams, *supra* note 56, at 1319.

[60] Andrea Becker & Lena R. Hann, *"It Makes It More Real": Examining Ambiguous Fetal Meanings In Abortion Care*, 272 SOCIAL SCIENCE & MEDICINE 1, 5 (2021).

[61] Freidenfelds, 149.

[62] Lens, WASH. U., *supra* note 13, at 1078 (Citing Layne).

[63] Reproductive justice advocates have been sounding the alarm about the criminalization of pregnancy and pregnancy loss for years, especially for people of color. For a fantastic description of this important problem, see Michele Goodwin's book, Policing the Womb.

[64] Lens, WASH. U., *supra* note 13, at 1067-68.

[65] *Id.*

[66] *Id.* at 1078-79.

women's experiences.[67] We hope this Article supports recent efforts to more fully incorporate pregnancy loss into the reproductive justice framework.

II. THE SURPRISING OVERLAP BETWEEN ABORTION AND PREGNANCY LOSS

Although abortion and pregnancy loss are assumed opposites, there is a surprising amount of similarity between the two experiences. One obvious overlap is that the result is the same—the end of a pregnancy other than the birth of a live child. In 2010, 18% of known pregnancies ended in abortion and 17% ended with a fetal loss,[68] although the miscarriage rate is typically higher (around 25%) when considering *all* pregnancies, instead of known or confirmed pregnancies.[69] Both abortion and pregnancy loss challenge the pervading, but problematic, conceptional schema of pregnancy that all pregnancies end in a live birth of a healthy baby.[70]

Numerous other similarities exist. Women of color, poor women, and young women are disproportionately likely to experience both pregnancy loss and abortion. The physical experience of abortion can also be quite similar to both stillbirth and miscarriage depending on the length of the pregnancy when terminated. Cultures of stigma and silence surround abortion, miscarriage, and stillbirth. And last, women experience a wide range of emotional connection (or lack thereof) to the pregnancy—an attachment that is more related to the pregnancy's wantedness,[71] length, and myriad other factors other than whether it ends by miscarriage, stillbirth, or abortion. Overall, we conclude that women experiencing abortion and pregnancy loss, which are often the same women experiencing these events at different points in their reproductive lives,[72] have much more in common than they have dividing them.

A. Race and Class

Marginalized women have more abortions and have higher rates of pregnancy loss. Women of color, especially Black women, are more likely to experience miscarriage. For instance, a recent study in *the Lancet* demonstrated that Black women are 43% more likely to have a miscarriage compared to

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[67] *Id.* at 1071-73.

[68] Aalap Bommaraju, et. al., *Situating Stigma in Stratified Reproduction: Abortion Stigma and Miscarriage Stigma as Barriers to Reproductive Healthcare*, 10 SEXUAL & REPROD. HEALTHCARE 62, 63 (2016).

[69] Many women miscarry before they know they are pregnant. *See* Carla Dugas & Valori H. Slane, *Miscarriage* (last update June 29, 2021). https://www.ncbi.nlm.nih.gov/books/NBK532992/#:~:text=The%20American%20College%20of%20Obstetricians,10%25%20of%20clinically%20recognized%20pregnancies.

[70] *Tone, Visibility, and Scope in Pro-Choice Advocacy*, REAL REASON 22 (Feb. 2010) (on file with authors).

[71] We use the term "wanted" to describe either planned pregnancies or unplanned pregnancies where the pregnant person has access to abortion and chooses to continue the pregnancy.

[72] Sanger-Katz, *supra* note 23.

white women.[73] Another study found that Black women, compared to white women, had similar rates of early miscarriage (when miscarriage is most frequently caused by fetal anomalies), but had a "94% greater hazard for miscarriage after ten weeks," when environmental factors may play a role.[74] Black women also face double the risk of stillbirth—pregnancy loss after twenty weeks—compared to white women.[75] This racial disparity has existed for as long as the United States has maintained statistics on stillbirth, over a century now.[76]

Poor women also face increased risks of miscarriage and stillbirth compared to women of higher socioeconomic status.[77] The risk of stillbirth is double.[78] A study in Sweden noted that a poor woman's risk of stillbirth was even higher than double at term, after 37 weeks, which is problematic because term stillbirths should be the most preventable.[79] Notably, a higher education level lowers the risk of miscarriage and stillbirth, but much more so for white women than Black women.[80]

Women who get abortions are similarly more likely to be poor and women of color. Financial instability is one of the most common characteristics of abortion patients. In 2014, "three-fourths of abortion patients were low income—49% living at less than the federal poverty level, and 26% living at 100–199% of the poverty level."[81] "Poor women were substantially overrepresented among abortion patients in 2008 and 2014, and had the highest abortion index of all subgroups examined in the latter year."[82] Not only are poor women more likely to experience unintended pregnancy—perhaps due to lack of access to contraceptives—but financial instability is one of the predominate reasons women seek abortions.[83]

There are also disproportionate racial effects. Though most abortion patients are white, Black women were more than two and a half times as likely to need an abortion compared to white women.[84] Hispanic women were also more likely to need an abortion compared to white women.[85] Justice Alito noted this racial disparity within the draft *Dobbs* opinion: "A highly

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[73] Siobhan Quenby et al., *Miscarriage Matters: the Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss*, 397 LANCET 1658, Appendix Page 6 (2021).
[74] Sudeshna Mukherjee et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271 (2013).
[75] Lens, WASH. U., *supra* note 13, at 1071.
[76] *Id.*
[77] *Id.*; Filippa Nyboe Norsker et al., *Socioeconomic Position and the Risk Of Spontaneous Abortion: a Study Within the Danish National Birth Cohort*, 2 BMJ OPEN 1, 4 (2012).
[78] Lens, WASH. U., *supra* note 13, at 1072.
[79] *Id.*
[80] Lens, WASH. U., *supra* note 13, at 1073; Norsker et al., *supra* note 72, at 4.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Jenna Jerman, Rachel Jones & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER (May 2016), https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.
[85] *Id.*

disproportionate percentage of aborted fetuses are [B]lack."[86] He implies that overruling *Roe* will cure this "demographic effect"[87] because those fetuses will be born alive—an implication that erases pregnancies loss and specifically, the dramatic racial and class disparities in pregnancy loss rates. Even with abortion unobtainable, so many pregnancies in marginalized populations will still not end with living babies.

Though Black race is often discussed as a risk factor in a variety of reproductive contexts, it is really the effects of systemic racism that harms Black women as patients.[88] And that effect permeates all reproductive health issues. Not only are Black women more likely to need abortions and to experience pregnancy loss, they are also four times more likely than white women to die in childbirth,[89] and ten times as likely to be reported to the police for drug use during pregnancy, despite similar rates of positive drug tests.[90] As Melissa Murray has described, there is also a long and dark history of forcing Black women to procreate during slavery to exploit their bodies for labor and then sterilizing them without their consent during Jim Crow to reduce their power. [91] All told, Black women's reproductive lives have been exploited, policed, and abandoned, and their experience with abortion and pregnancy loss is just one piece of that puzzle.

B. Physical Experiences

The physical experience of abortion and pregnancy loss is also similar depending on the length of the pregnancy. The vast majority abortions and miscarriages occur in the first trimester of pregnancy—92.7% and 95% respectively.[92] Abortions at or before ten weeks can be completed either with medication or a surgical procedure.[93] Medication abortion through 10 weeks differs little physically from a miscarriage;[94] the medication first stops fetal growth and then causes contractions that expel the embryo.[95] The primary side-effects for both involve bleeding and painful cramping as the body works

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[86] Draft *Dobbs* opinion, 30.
[87] *Id.*
[88] *See Systemic racism, a key risk factor for maternal death and illness,* NATIONAL HEART, LUNG, AND BLOOD INST. (April 26, 2021), https://www.nhlbi.nih.gov/news/2021/systemic-racism-key-risk-factor-maternal-death-and-illness.
[89] Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CENTER REPORT S19, S22 (2017),
[90] *Id.* at S21.
[91] Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, HARV. L. REV. 2025, 2030 (2021).
[92] *CDCs Abortion Surveillance System FAQs*, CENTRS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (last updated Nov. 2021); *A Breakdown of Miscarriage Rates by Week*, HEALTHLINE, https://www.healthline.com/health/pregnancy/miscarriage-rates-by-week.
[93] *Id.*
[94] *Health Facts: Medication Abortion and Miscarriage,* NAT'L WOMEN'S HEALTH NETWORK (Aug. 15, 2019), https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience.
[95] Greer Donley, *Early Abortion Exceptionalism,* 107 CORNELL L. REV. at 6 (forthcoming 2022).

to expel the products of conception from the uterus.[96] Nausea, vomiting, and diarrhea are common side-effects for medication abortion, but also occur less commonly during miscarriages.[97]

The medical treatments are also the same. When missed or incomplete miscarriages occur, patients are offered the same procedures and medications that are used for abortion. Missed miscarriages occur when the embryo or fetus has died, but the body has not recognized the loss.[98] An incomplete miscarriage occurs when the body is unable to expel all the pregnancy tissue.[99] Patients usually learn of their missed or incomplete miscarriages via ultrasound, after which they will be offered the possibility of surgical or medication-based removal of the fetus or embryo.[100] In this case, the patient will often be offered misoprostol, one of the drugs used for abortion, or depending on how far along they are, a vacuum aspiration, D&C, or D&E—the same procedures used for abortion.[101]

Only 1% of abortions in the United States occur after twenty weeks, the timing of stillbirth.[102] The vast majority of states ban abortion between 20 and 24 weeks.[103] A few states, like Colorado and New Mexico, however, allow abortion throughout pregnancy,[104] and women with means will often travel to these states to obtain a later second or third trimester abortion, especially in the case of fetal anomaly. This physical experience of later abortion and stillbirth is also quite similar. Early stillbirths—those between 20-24 weeks—can be treated with the same surgical procedure (D&E) used for 95% of second trimester abortions.[105] Most stillbirths, however, involve childbirth, which sometimes starts on its own and is sometimes induced.[106] Similarly, almost all third trimester abortions (after 28 weeks), which are extremely uncommon, involve birthing a dead fetus—the only difference is that the fetus's heartbeat is typically stopped by an injection before labor is induced.[107]

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96 *Mifeprex Medication Guide*, https://www.fda.gov/media/72923/download#:~:text=Cramping%20and%20vaginal%20bleeding%20are,14%20days%20after%20taking%20Mifeprex.

97 *Miscarriage,* UNIVERSITY OF WASHINGTON MEDICAL CENTER https://www.uwmedicine.org/sites/stevie/files/2018-11/Miscarriage.pdf.

98 Quenby, *supra* note 69, at 1659.

99 *Id.*

100 Arri Coomarasamy et al., *Sporadic Miscarriage: Evidence to Provide Effective Care*, 397 LANCET 1668, 1668 (2021).

101 *Id.* at 1669.

102 *Abortions Later in Pregnancy*, KAISER FAM. FOUND. (Dec. 5, 2019), https://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/.

103 *Id.*

104 *States with Gestational Limits for Abortion*, KAISER FAM. FOUND. (Sept. 1, 2021), https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#note-14

105 *Surgical Abortion (Second Trimester*), UCSF HEALTH, https://www.ucsfhealth.org/treatments/surgical-abortion-second-trimester.

106 Lens, WASH. U., *supra* note 13.

107 After 24 weeks, D&Es are often not recommended. *What Are the Different Types of Abortion*?, HEALTHLINE, https://www.healthline.com/health/types-of-abortion#induction.

Some women even travel to another state for an injection stopping the fetus's heart, then fly home and present as stillbirth to their regular providers, an event likely covered by their insurance.[108]

C. Stigmas and Silence

In addition to the physical similarities, the isolating experiences of abortion and pregnancy loss are similar. Both experiences are shrouded in silence and secrecy. "Both abortion and miscarriage are usually considered 'concealable' events: they are not known to others unless disclosed."[109] This silence means that women often process the experience either alone or with a small cohort of family or friends, "creating a veil of secrecy and shame around a very normal part of human reproduction."[110] And when women break this cultural expectation of silence, they are criticized. For instance, after Chrissy Teigen posted about her pregnancy loss, the loudest criticism she received was that her post was an attempt to garner attention, suggesting that it was inappropriate for her to be open about the experience.[111]

The silence surrounding these two events also cause public underestimation of their prevalence.[112] Between one third and one half of women will experience pregnancy loss,[113] and one and three women will get an abortion.[114] Yet most think these experiences are rare.[115] For instance, in a study of over 1,000 people, the majority believed that miscarriage occurs in less than 5% of pregnancies.[116] Similarly, in a study of over 1,000 registered

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[108] Greer Donley, *Parental Autonomy over Prenatal End-of-Life Decision,* 105 MINN. L. REV. 175 (2020).

[109] Aalap Bommaraju, et. al., *Situating Stigma in Stratified Reproduction: Abortion Stigma and Miscarriage Stigma as Barriers to Reproductive Healthcare*, 10 SEXUAL & REPROD. HEALTHCARE 62, 63 (2016).

[110] *Health Facts: Medication Abortion and Miscarriage*, *supra* note 86.

[111] Alyssa Rosenberg, *Opinion: Chrissy Teigen and John Legend are Heroes, not Oversharers*, WASH. POST. (Oct. 1, 2020), https://www.washingtonpost.com/opinions/2020/10/01/chrissy-teigen-john-legend-are-heroes-not-oversharers/.

[112] Jonah Bardos et al., *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313 (2015).

[113] One in four pregnancies end in miscarriage, but because many women are pregnant multiple times in their lives, more than a quarter of them have experienced miscarriage. In one study, 43% of women admitted to a labor and delivery unit reported having had a miscarriage. Judy Slome Cohain, Rina E. Buxbaum & David Mankuta, *Spontaneous First Trimester Miscarriage Rates Per Woman Among Parous Women with 1 Or More Pregnancies of 24 Weeks or More*, 17 BMC PREGNANCY AND CHILDBIRTH 1, 3 (2017).

[114] Rebecca Wind, *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates.

[115] *See* Bardos et al., *supra* note 105, at 1313; Sarah Kliff, *We Polled 1,060 Americans About Abortion. This Is What They Got Wrong*, VOX (2016), https://www.vox.com/a/abortion-statistics-opinions-2016/poll.

[116] Bardos et al., *supra* note 105, at 1313.

voters, most underestimated the prevalence of abortion—suggesting that less than 20% of women obtain one.[117]

One significant, and painful, effect of the silence and secrecy surrounding abortion and pregnancy loss is stigma. Stigma is defined as "an attribute that is deeply discrediting," reducing the person "from a whole and usual person to a tainted, discounted one."[118] It inures after any pregnancy outcome that challenges our traditional notion of pregnancy as a natural and joyous event. "It is simply easier to retreat to the default conceptualization that pregnancies deliver healthy babies to happy mothers, than it is to make the mental and emotional effort to recognize infertility, stillbirth, miscarriage, [abortion,] and many other 'imperfect' pregnancy outcomes, and the pain and confusion they bring with them."[119]

The same end result of abortion and pregnancy loss also means similar stigmas—the failure to live up to fundamental ideals of womanhood. Historically, "failure to produce offspring … has been a marker of failure as a woman."[120] Abortion and pregnancy loss are analogous in that "[n]either culminates in a wanted child nor, for women, the culturally-idealized state of motherhood."[121] Much has been written about how abortion stigma is based on a woman's "unnatural" rejection of motherhood.[122] But after pregnancy loss, a woman can also feel "blemished" because her body failed the traditional social norm of "producing and bringing home a healthy, living baby."[123] The medicalization of pregnancy has conditioned people to believe that pregnancy loss is avoidable.[124] And women who experience miscarriage are often assumed to "have done a poor job in caring for their pregnancy or . . . have intentionally caused the pregnancy loss in some way."[125] Miscarriage is somehow both "a natural bodily event" and "an abnormal end to a pregnancy."[126]

All of this silence and stigma has led to feelings of blame, shame, and guilt in women who experience abortion, miscarriage, and stillbirth.[127] In one

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[117] Kliff, *supra* note 108.

[118] GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

[119] *Tone, Visibility, and Scope in Pro-Choice Advocacy*, *supra* note 67, at 25.

[120] Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. ONLINE 29, 42 (2017).

[121] Aalap Bommaraju, et. al., *Situating Stigma in Stratified Reproduction: Abortion Stigma and Miscarriage Stigma as Barriers to Reproductive Healthcare*, 10 SEXUAL & REPROD. HEALTHCARE 62, 63 (2016).

[122] Anuradha Kumar, Leila Hessini & Ellen Mitchell, *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH, AND SEXUALITY 625, 628 (2009) (explaining that abortion violates two ideals of womanhood, sexual purity and nurturing motherhood). *See also* Abrams, *supra* note 56, at 311.

[123] Danielle Pollock, et al., *Voices of The Unheard: a Qualitative Survey Exploring Bereaved Parents Experiences of Stillbirth Stigma*, WOMEN BIRTH 2 (2019).

[124] Sanger, *The Birth of Death*, *supra* note 45, at 277; SHANNON WITHYCOMBE, LOST: MISCARRIAGE IN NINETEENTH CENTURY AMERICA, 171 (2019) (explaining that "many Americans believe medicine can fix any reproductive problem").

[125] Bommaraju et. al., *supra* note 114, at 63.

[126] WITHYCOMBE, *supra* note X, at 165.

[127] See e.g., Katherine Gold, et al., *Whose Fault is it Anyway? Guilt, Blame, and Death Attribution by Mothers After Stillbirth or Infant Death*, 26(1) ILLNESS, CRISIS & LOSS 40, 42 (2018).

national study of women after miscarriage, "47% reported feeling guilty, 41% reported feeling that they did something wrong, 41% reported feeling alone, and 28% percent reported feeling ashamed. More than one third (38%) of those with a history of miscarriage felt that they could have prevented it."[128] Studies after stillbirth also show that mothers frequently feel self-blame and external blame,[129] from those in their social circle and their health care providers. They also feel shame and guilt that they failed to prevent their child's death.[130] Notably, a prior abortion can be a complicating factor in a woman's experience of stillbirth, intensifying some of these feelings.[131]

After abortion, the primary and long-lasting emotion is relief,[132] but this does not change the reality that some people also experience negative emotions. For instance, in one study that attempted to capture the complexity of women's emotional experience after abortion, 83% of women surveyed felt relief, 53% of felt guilt, and 64% felt sadness.[133] Feelings of guilt and sadness increased for later abortions and for women who perceived greater community abortion stigma.[134] Feeling guilt, sadness, and even regret did not change the fact that one week later, 95% of patients reported that the abortion was the right choice.[135]

Notably, women can experience these stigmas differently based on "race, class, gender, age, and sexual identity."[136] State policies are often aimed at encouraging fertility for white women, whereas policies that target women of color and poor women usually seek to curb fertility.[137] Studies show that Black women and Hispanic women feel less abortion stigma than white women.[138] But for pregnancy loss, Black women feel more stigma as their loss could "quickly be subject to scrutiny," whereas white women "more often receive the benefit of the doubt about the etiology of miscarriage."[139]

Uncoordinated efforts exist to break the silences and stigmas surrounding pregnancy loss and abortion. Recent campaigns include #ShoutYourAbortion and #ihadamiscarriage. And notably, famous women are discussing their experiences with pregnancy loss and abortion more commonly. Still, the stigmas persist.

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128 Bardos, *supra* note 105.
129 *Id;* Joanne Cacciatore, *The Unique Experiences of Women and Their Families After the Death of a Baby*, 49 SOCIAL WORK IN HEALTH CARE 134, 140 (2010).
130 Gold, et al., *supra* note 119, at 46.
131 JOHN DEFRAIN, STILLBORN: THE INVISIBLE DEATH 36 (1986).
132 Corinne Rocca et al., *Emotions and Decision Rightness over Five Years Following an Abortion: an Examination of Decision Difficulty and Abortion Stigma*, 248 SOCIAL SCIENCE & MEDICINE 1, 4 (2020).
133 Corinne Rocca, et al., *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States,* 45 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 122, 126 (2013).
134 *Id.* at 126-27.
135 *Id.* at 127.
136 Bommaraju et. al., *supra* note 114, at 63.
137 *Id.*
138 *Id.*
139 *Id.* at 68.

D. Connection to the Fetus

So far in this section, we have made the case that women who experience pregnancy loss and abortion are similar demographically, experience very similar physical events, and often feel isolated and stigmatized. The common narrative, however, is that there is one central aspect about which these two groups of women feel very differently: their connection to the fetus. According to dogma, women who have abortions do not see the fetus as a baby or feel any connection to it, while women experiencing pregnancy loss perceive the fetus as a child who they love. It is this exact distinction that makes abortion rights supporters so nervous about supporting women through pregnancy loss. We suggest that this narrative is simplistic and inaccurate.

First, many women experiencing pregnancy loss are not emotionally connected to their pregnancy. In one study, nearly 25% of women after pregnancy loss reported they have just "lost a pregnancy" and did not think they lost a "baby" or a "child."[140] This study by Denise Côté-Arsenault and Mary T.B. Dombeck noted that women experience a range of emotional reactions to pregnancy loss "from a sense of disappointment that quickly dissipates to intense emotional reactions characterized by an extended period of grief and mourning."[141] They explained that "people respond differently to the same life event," and that some women "are quite accepted and relatively unemotional about the [loss]."[142] Women were more likely to report that they lost a baby in the second trimester than in their first.[143] This conforms with other research showing that "grief following miscarriage tends to increase with the length of the pregnancy."[144]

The wantedness of the pregnancy also impacts the emotional reaction to its loss. "'If someone experiences a miscarriage, it is a cultural norm to see it as a devastating loss,' . . . But feeling relieved when a pregnancy ends—perhaps it was not planned, not viable, not financially or socially feasible—is normal too."[145] Historically, some women felt relief and even welcomed miscarriages as a part of fertility control; they did not usually express guilt or

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[140] Denise Côté-Arsenault and Mary Dombeck, *Maternal Assignment of Fetal Personhood to a Previous Pregnancy Loss: Relationship to Anxiety in the Current Pregnancy*, 22:649 HEALTH CARE WOMEN INT'L 649, 651 (2001).

[141] *Id.* at 650.

[142] *Id.* at 651.

[143] *Id.* at 661.

[144] Marina Krakovsky, *Private Loss Visible*, AM. PSYCHOLOGICAL ASSN. (2006), https://www.apa.org/monitor/sep06/loss.

[145] Kaelyn Forde, *When Miscarriage Is a Relief*, GLAMOUR (Oct. 28, 2019), https://www.glamour.com/story/when-miscarriage-is-a-relief. *See also* Marianne Hopkins Hutti, Minerva dePacheco, & Marian Smith, *A Study of Miscarriage: Development and Validation of the Perinatal Grief Intensity Scale*, 27 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 547, 553 (1998).

grief when pregnancies ended, even if in the second trimester.[146] Today, however, any indifferent or positive emotional reaction can make women feel ashamed or further stigmatized because "[w]omen should want to be pregnant. Women should want to *stay* pregnant. And if they cannot become pregnant or cannot stay pregnant, they should mourn the loss of this so-called vital cornerstone of womanhood."[147] As half the country bans abortion and more people are pregnant who do not want to be, relief might be an increasingly common emotional response following loss.

A previous pregnancy loss also impacts attachment in future pregnancies.[148] Prior miscarriage or stillbirth can create a "carry over" memory for the next pregnancy, a constant reminder that progression of a pregnancy does not guarantee the birth of a living baby.[149] "Qualitative studies show that such women, fearing recurrence of loss, attempt to cushion themselves emotionally in subsequent pregnancies by postponing announcement of the pregnancy, resisting attachment to the fetus, and delaying home baby preparations."[150] The Côté-Arsenault and Dombeck study also found that women who had experienced two prior losses were less likely to identify the second pregnancy loss as involving a "baby."[151] This suggests that "[a] first loss may change a woman's perception or expectation of pregnancy, making her more cautious of her emotional investment in subsequent pregnancies."[152]

Conversely, many abortion patients do have a connection to their pregnancies, use the term "baby," feel grief when the pregnancy ends, and seek out ways to say goodbye. Jeanie Ludlow worked in an abortion clinic for ten years before joining academia. She has written that "[v]ery few [abortion] patients say 'fetus' or 'embryo'. The majority say 'baby.'"[153] Abortion counselors are aware of this fact, and as part of their efforts "to meet the patient where they are," counselors and providers will also use the word "baby" when the patient does.[154] Ludlow also noted that "[m]any women do think about their relationship to the fetus when they make their choices to abort, and many consider the baby that fetus is (or will become) to them."[155] The clinic she worked at allowed patients write letters to their "babies." A

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[146] FREIDENFELDS, *supra* note 14 at 43; *see also* SHANNON WITHYCOMBE, LOST: MISCARRIAGE IN NINETEENTH CENTURY AMERICA, 30 (2019) ("In late nineteenth-century America, woman had much less control over when and how many pregnancies they had, and so miscarriages were likely to be a relief, very welcomed, or a reason to celebrate.").

[147] JESSICA ZUCKER, I HAD A MISCARRIAGE: A MEMOIR, A MOVEMENT, xi (2021); *id.* at 49 ("Far too often, those who do not experience sadness or anger following a miscarriage … are made to feel defective by society that has long since demanded female bodies not only procreate, but express a deep, innate desire to do so.").

[148] Côté-Arsenault & Dombeck, *supra* note 132, at 650.

[149] *Id.* at 652.

[150] *Id.* at 653.

[151] Côté-Arsenault & Dombeck, *supra* note 132, at 658.

[152] *Id.* at 661; LINDA LAYNE, MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA 91(2003).

[153] Jeannie Ludlow, *Sometimes It's a Child and a Choice: Toward an Embodied Abortion Praxis*, 20 NWSA J. 26, 43 (2008).

[154] Carol Joffe, *Morality and the Abortion Provider,* 74 CONTRACEPTION 1, 2 (2006).

[155] Ludlow, *supra* note 148 at 31.

common sentiment was expressed in this note: "I love you even though I know in my heart I can't keep you. But the memory of you will make me strong. All my love, the mom you'll never meet."[156]

Post-abortion grief and sadness is not commonly discussed in public discourse, but often felt.[157] For instance, 54% of abortion patients feel sadness after their abortion (in addition to positive emotions, like relief, which 83% of patients felt).[158] Just as the length of pregnancy and level of certainty about the pregnancy impacted a woman's reaction to miscarriage, the longer a pregnancy and the less certainty about the abortion decision led to more sadness and grief.[159] In one study of second trimester abortion patients, 67% reported feeling grief.[160] Women are more likely to feel grief after second-trimester abortions for a variety of reasons, including that they had more time with the pregnancy, are more likely to have struggled with the abortion decision, and are more likely to be terminating a wanted pregnancy due to a fetal anomaly or maternal health condition.[161] Women who terminate a wanted pregnancy are especially likely to feel grief and often identify their pregnancy as a child, name the baby, and see themselves as bereaved parents.[162]

Some women who have abortions, especially in the second trimester, are also interested in ways they can commemorate their pregnancy or say goodbye. One possibility is "patient-centered tissue viewing," which allows patients to see the products of conception after the abortion. Patients choose this for a variety of reasons, including "to fulfil curiosity, to cope with or grieve the end of a pregnancy, or merely to come to terms with the experience."[163] In a study of second trimester abortion patients, half of the patients terminating due to fetal anomaly chose to view the fetus, as did 39% of those terminating an unintended pregnancy.[164] This practice challenges the assumption that women cannot have an emotional connection to their fetus while also choosing abortion: "Hegemonic notions of maternal-fetal bonding are complicated by the reality that one can be simultaneously confident in their decision to terminate, emotionally connected to the pregnancy, and want to view the post-abortion tissues."[165]

Some women who terminate because of fetal anomaly choose an induction abortion specifically so that they can meet and hold their baby while

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156 *Id.* at 44.
157 Greer Donley & Jill Wieber Lens, *Second Trimester Abortion Dangertalk*, 62 B.C. L. REV. 2145, 2201-03 (2021).
158 Rocca et al., *Women's Emotions*, *supra* note 125, at 124.
159 *Id.* ("[s]maller proportions of women in the first-trimester group than of those in the near-limit group expressed regret (33% vs. 41%) and sadness (61% vs. 68%)").
160 Inga-Maj Andersson, et al., *Experiences, Feelings and Thoughts of Women Under-going Second Trimester Medical Termination of Pregnancy*, 9 PLOSONE 1, 9 (2014).
161 Ludlow, *supra* note 148, at 40.
162 Andersson et al., *supra* note 155, at 17; Donley, MINN., *supra* note 101, at 229.
163 Lena Hann & Andréa Becker, *The Option to Look: Patient-Centered Pregnancy Tissue Viewing at Independent Abortion Clinics in the United States*, 28 SEXUAL & REPROD. HEALTH MATTERS 500, 501 (2020).
164 Andersson et al., *supra* note 155, at 8.
165 Becker & Hann, *"it makes it more real," supra* note 60, at 8.

saying goodbye.[166] This practice is borrowed from the stillbirth community, where it has become the standard of care after research demonstrated that women are better able to process their grief when given the chance to say goodbye.[167] It is a part of "memory making," which can also include having pictures taken, burying or cremating the remains, or having hand or footprints made. Many of these options are also available to abortion patients upon request.[168] Some abortion patients also request pseudo religious ceremonies as a way of saying goodbye. Ludlow explains that abortion patients would sometime ask her to baptize their fetuses, and even though she was not a minister, she would "sprinkle them with just a little water and wish them well into the next world."[169] Some clinics have religious leaders available for parents.[170]

Also contrary to common wisdom, many abortion patients are worried about fetal pain, even though the scientific consensus is that fetuses cannot feel pain before the third trimester, or around 29 weeks. Concerns over fetal pain is often the reason some women prefer initiating fetal demise before a surgical, second-trimester abortion, though it is not standard. In one qualitative study of women who terminated between 18-23 weeks who were required to get an injection to instigate fetal demise beforehand, 75% indicated afterwards that they would have chosen it even if it had not been required.[171] "While fetal pain during D&E is not supported by scientific literature, women described feeling reassured that [it] allowed for a more "peaceful" abortion."[172] Notably, while most discussions of fetal pain occur within the abortion context, little care is paid to how this debate can affect women after stillbirth, who worry that their stillborn baby was in pain when they died in the womb.

The fact that some abortion patients feel a connection to their fetus and grieve in a way similar to miscarriage or stillbirth does not mean that all—or even most—women have this response to abortion. The reality is that most abortions occur in the first trimester after unintended pregnancies with high levels of certainty about the abortion decision. As a result, the feeling of grief or loss will be much less common. But the common view that abortion patients feel relief to the exclusion of other, more complex emotions, and feel no emotional connection to their fetus is false, just as the narrative that all miscarriage patients are bereaved mothers who lost a child. Women are not a monolith in either group. As we explore below, the development of fetal

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166 Donley & Lens, *supra* note 152, at 2203-04.

167 *Id.*

168 Carole Joffe, *Working with Dr. Tiller: Staff Recollections of Women's Health Care Services of Wichita*, 43 PERSPS. ON SEXUAL & REPROD. HEALTH 199, 200 (2011).

169 Ludlow, *supra* note 148, at 46.

170 Carol Joffe describes how Dr. Tiller's clinic—which provided later abortions, often for fetal anomaly, before his murder by anti-abortion extremists—honored these common requests from parents: "[A] chaplain is available and mourning parents are often able to hold the blanketed fetus in their arms for a private farewell. Joffe*, supra* note 163, at 2.

171 Blair McNamara et al., *A Qualitative Study of Digoxin Injection Before Dilation and Evacuation*, 97 CONTRACEPTION 515, 516, 518 (2018).

172 *Id.*

attachment is a subjective process that depends on a variety of factors unrelated to how the pregnancy ends.

III. UNDERSTANDING SUBJECTIVE FETAL VALUATION AND ITS INCONSISTENCY WITH FETAL PERSONHOOD-AT-CONCEPTION

Many women who experience pregnancy loss and some who experience abortion feel grief and loss. They often report that they lost more than a pregnancy. The antiabortion movement suggests that this evidences fetal personhood. We disagree. Below, we describe the qualitative research on how women experience attachment and loss in pregnancy, which explains that the experience is subjective and relational. We then compare it to how tort law assesses the value of pregnancy loss, which is similarly subjective and relational. Finally, we conclude that this understanding of fetal value as subjective and relational stands in stark contrast to and does not support the antiabortion model of fetal personhood, which is innate, biological, and fixed at conception in every pregnancy.

A. The Experience of Attachment and Loss in Pregnancy

Qualitative research shows that most women (roughly 75%) experience miscarriage and stillbirth as more than a lost pregnancy. Fifty percent of participants said they had lost a baby, 11% said they had lost a baby with a name, and 14% felt they had lost a child who would now be whatever age.[173] The greater the "[e]motional attachment to the fetus," the more likely the participants were to report that they lost more than a pregnancy.[174] The authors in this study used this finding to suggest that most women attributed some level of "personhood" or "potential personhood" to the pregnancy, though they were quick to note that this was a sociological concept, not a legal one.[175]

A related concept is prenatal attachment. "Prenatal attachment is an abstract concept, representing the affiliate relationship between a parent and fetus, which … is related to the cognitive and emotional abilities to conceptualize another human being, and develops within an ecological system."[176] Over the last three decades, researchers have developed the perinatal grief intensity theoretical framework, which, in part, asks women to describe their "mental representation of the pregnancy and baby at the time of

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[173] Côté-Arsenault & Dombeck, *supra* note 132, at 657.
[174] *Id.* at 651.
[175] *Id.* According to the authors, when women selected "baby," their response suggested potential personhood, while the act of naming the baby or aging the child attributed greater levels of personhood. *Id.* at 656.
[176] Anna R. Brandon, et. al., *A History of the Theory of Prenatal Attachment*, 23(4) J. PRENATAL PERINATAL PSYCHO. HEALTH 201, 202 (2009).

the loss."[177] Potential answers include: "the pregnancy did not seem real to me," "it seemed like the loss of pregnancy not the loss of a baby," and "I felt that I had lost my son or my daughter."[178] Research has consistently concluded that the more "real" the pregnancy feels, the greater a woman's attachment and feelings of loss if the pregnancy ends.[179]

A variety of factors influence how and when prenatal attachment develops over the course of a pregnancy. We do not intend to provide an exhaustive list of those relevant factors, but we do want to highlight some. As noted above, an important factor is the length of the pregnancy. Though not dispositive, "[w]omen with longer gestations have more time to develop the mental representations of the baby's identity that become the basis for prenatal attachment, and therefore are likely to experience significant grief with perinatal loss."[180] It takes time for the realness of the pregnancy to set in, and even longer for conceptions of the child to form:

> When women first learn of their pregnancies, they understand that they are pregnant but may not feel pregnant. Later, as they develop pregnancy symptoms, the pregnancy begins to feel real, but the baby within still is more of an idea, an ideal baby without a perceived identity or personality. Later still, the baby begins to feel real, and women start to think of this baby as a son or daughter with specific characteristics and personality traits.[181]

Côté-Arsenault and Dombeck agree: "[a]s pregnancy progresses, evidence of a fetus that is separate from self mounts with increasingly frequent fetal movements and a protruding pregnancy abdomen."[182] In their terms, parents "bestow increments of personhood" as pregnancy progresses, which include "naming the baby, describing the fetus' personality in utero, or preparing a nursery in the home."[183] Nevertheless, some people who have early miscarriages grieve as deeply as those with later losses.[184]

Another important factor in a parent's prenatal attachment is the pregnancy's incorporation into social structures, like families and communities. Anthropologist Linda Layne's research "challenges us to think about the distinction between fetus and baby not by gestational development, but social relationships—the pregnant women with her fetus, her family, and

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[177] Marianne Hutti et al, *Predicting Grief Intensity After Recent Perinatal Loss*, 101 J. PSYCHOSOMATIC RESEARCH 128, 129 (2017) [Hereinafter Predicting Grief Intensity].
[178] Marianne Hutti, et al., *Evaluation of the Perinatal Grief Intensity Scale in the Subsequent Pregnancy After Perinatal Los*s, 42 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 697, 703 (2013).
[179] Predicting Grief Intensity, *supra* note 173, at 129.
[180] Hutti et al., *supra* note 174, at 129.
[181] *Id.*
[182] Côté-Arsenault & Dombeck, *supra* note 132, at 660.
[183] *Id.* at 651.
[184] *Id.*

her community—whether the pregnancy ends in childbirth, miscarriage, or—[Ludlow] would add—abortion."[185] Legal scholars have made the distinction between "social birth," which is "the incorporation of a child into its family," as different from, and often preceding "biological birth."[186] Carol Sanger has explained that though "social birth is not a legal category or status, [] it has tremendous force, inaugurating the fetus into the world of sociality in which playdates, alumni onesies and college savings accounts heave into view."[187]

One important aspect of social birth is the disclosure of the pregnancy to those in one's community, which can accelerate the fetus's standing within social groups. Another is the expectation that the pregnancy will result in a live child. Often, these two factors converge at the same time around the end of the first trimester. Most miscarriages occur in the first twelve weeks of pregnancy, and women are often encouraged to not disclose the pregnancy before then.[188] After 12 weeks and especially after 20 weeks, the vast majority of women feel confident that their pregnancy will end with the birth of a living baby and disclose the pregnancy to their communities, furthering the its social entrance into the world.[189] Most are blissfully unaware that miscarriages still occur after 12 weeks, [190] and that about one in 160 pregnancies end with stillbirth,[191] risks that translate into at least 50,000 second and third trimester pregnancy losses in the United States each year.

Technology has made it easier for women and parents to visualize the pregnancy, ascribe meaning to it, and become attached. Learning the sex of the fetus, which can occur now in the first trimester, "greatly increases the individuation and 'realness' of the fetus as a person."[192] But the technology that has most dramatically changed the experience of pregnancy is ultrasound.[193] Carol Sanger has noted that as soon as ultrasounds were introduced into clinical practice, there were discussions about its use for maternal bonding: "an early and much-cited 1983 study (of two patients!) in the [New England Journal of Medicine] heralded the possibility of ultrasound for maternal-infant bonding before quickening. Seeing the image of one's own fetus might just 'work upon the viewer an emotional transformation, which might in turn inspire the desired behavior," including to reject abortion.[194] Indeed, ultrasound may "transform even an early pregnancy into motherhood."[195]

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185 Ludlow, *supra* note 148, at 42.
186 CAROL SANGER, ABOUT ABORTION 80 (2020).
187 *Id.*
188 Lens WASH. U., *supra* note 13, at 1071.
189 Jill Wieber Lens, *Medical Paternalism, Stillbirth, & Blindsided Mothers*, 106 IOWA L. REV. 665, 674 (2021). [hereinafter Lens, IOWA].
190 The chance of miscarriage still exists after 12 weeks, but it is lower, around 3-4%; but Black women sadly face double the risk of after-10-weeks miscarriage compared to white women. Lens, WASH. U., *supra* note 13, at 1071.
191 Lens, IOWA, *supra* note 184, at 674.
192 LAYNE, *supra* note 147, at 83; *see also* https://sneakpeektest.com/ (selling a direct-to-consumer test that will reveal the fetus's sex in the first ten weeks).
193 Lens, IOWA, *supra* note 184, at 651.
194 Sanger, About Abortion, *supra* note 181, at 112-18.
195 *Id.* at 130. *See also id.* at 122.

Justice Alito's draft *Dobbs* opinion specifically mentions how ultrasounds have created "a new appreciation of fetal life" and that prospective parents wanting a child "have no doubt" that what they see on that ultrasound "is their daughter or son."[196] Before ultrasound, the pregnant person and the fetus were indistinguishable; historically, the fetus had no identity until quickening, when fetal movements could be felt.[197]

Though ultrasound was originally developed for a diagnostic purpose, that fact is often obscured to parents receiving the test.[198] Instead, the sonographer often leans into its medically unnecessary, social purpose: "several studies have documented how medical providers often assign personalities to fetuses during prenatal exams, in order to socialize the pregnant person with the fetus. Clinicians may use humanizing language for wanted pregnancies like 'meeting the baby' or 'he looks like his father' to encourage parental bonding with the fetus."[199] As a result, "[w]omen who undergo ultrasound are more likely to call the fetus a baby and perceive their baby as being 'more vicarious, more familiar, stronger and more beautiful,' 'more real' and 'more there.'"[200] Antiabortion activists have sought to capitalize on this social purpose of ultrasound by requiring the images be shown to women before abortion: "Mandatory ultrasound is intended as a sort of 'preview' of grief."[201]

Ultrasounds changed the experience of pregnancy—and of pregnancy loss. Women used to learn of pregnancy loss by "physiological changes in her body (bleeding and cramping, premature labor, the absence of kicking)," but they now frequently learn of it "through the routine use of devices such as dopplers or sonograms."[202] Sadly, "[a]t one prenatal visit [patients] see and/or hear a heartbeat. At the next visit, where there had been a magical tiny flicker of life on the screen, the screen is deadly still."[203] The social experience of the ultrasound quickly vanishes if something is wrong; "medical terminology is quickly redeployed," and the baby is then relabeled as only a fetus.[204] Layne notes that there was little consideration that this new technology would also reveal pregnancy loss, instead focusing on "the possible benefits to the would-be child in the literature on bonding."[205] Certainly, the modern "ultrasound

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196 *Dobbs* Alito 34.
197 FREIDENFELDS, *supra* note 14, at 38.
198 SANGER, ABOUT ABORTION, *supra* note 181, at 115-16 ("there is nothing inevitable about the prevailing manner of ultrasound screening; nothing requires a screening to be a family occasion or a guided tour that concludes with a souvenir snapshot to take home.").
199 Becker & Hann, *"it makes it more real," supra* note 60, at 3.
200 SANGER, ABOUT ABORTION, *supra* note 181 at 116-17.
201 Sanger, *The Birth of Death*, *supra* note 45, at 302.
202 LAYNE, *supra* note 147, at 85.
203 *Id.* at 84.
204 Victoria Browne, *Feminist Philosophy and Prenatal Death: Relationality and Ethics of Intimacy*, 41 SIGN: J. WOMEN CULTURAL & SOC'Y 385, 402 (2016).
205 LAYNE, *supra* note 147, at 89.

ritual is not organized to accommodate the substantial possibility of early pregnancy loss,"[206] or the reveal of a life-limiting fetal anomaly.

Finally, perhaps the most intuitive factor is the wantedness of the pregnancy. Pregnancy loss research does not explicitly mention wantedness of a pregnancy as a factor, instead assuming a "desired pregnancy" (and not defining desired). But both historical and modern research suggest it plays a role. Historian Shannon Withycombe notes that "19th century women had a wide range of interpretations of pregnancy"[207] and that wantedness impacted their view of the pregnancy and pregnancy loss. She describes how women openly expressed relief after miscarriage in undesired pregnancies, undesired because of the inability to afford another child, the lack of desire to raise another child in a harsh frontier environment, or because they already had a large family.[208] Withycombe posits that women who felt relief after miscarriage, which was common, "were perhaps less likely to have imagined a baby within their body."[209]

Modern research also shows a connection between wantedness and prenatal attachment. Specifically, a study of women in Iran found that women with unplanned pregnancies had a significantly lower prenatal attachment score than those with planned pregnancies.[210] Research in the surrogacy context is also relevant. There, researchers have documented the emotional response to surrogacy to counter claims that surrogacy must be problematic because it traumatically forces a person to give up a baby they became attached to during pregnancy.[211] They found that "maternity, bonding and kinship are not automatic outcomes of pregnancy, but a choice."[212] Surrogates "were vocal about never having the emotions that they felt toward their 'own' child."[213] Thus, intention plays an important role in attachment, and pregnant people may never form an attachment to a fetus they never intend to keep. This also explains why people struggling with infertility might feel attached to an embryo before pregnancy and feel grief when an IVF cycle fails.

Like all the factors we list, wantedness is not determinative of attachment. For instance, in pregnancies after loss, pregnant people often experience less attachment to very wanted pregnancies protect themselves emotionally.[214] And in one interesting qualitative study of the emotional

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[206] FREIDENFELDS, *supra* note 14, at 164.
[207] WITHYCOMBE, *supra* note X, at 34.
[208] *Id.* at 30.
[209] *Id.* at 21.
[210] Sedigheh Pakseresht, et al., *Physical Health and Maternal-Fetal Attachment among Women: Planned versus Unplanned Pregnancy*, 6(3) Int'l J. of Women's Health & Reprod. Sci. 335, 340 (2018).
[211] *See* Elly Teman & Zsuzsa Berend, *Surrogate Non-Motherhood: Israeli and US Surrogates Speak*, 25 ANTHROPOLOGY & MEDICINE 296, 297 (2018); Olga B.A.van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13(1) HUMAN REPROD. UPDATE 53, 56 (2006). ("Research, which has looked at attachment, has found that surrogate mothers are less attached to the fetus").
[212] Teman & Berend, *supra* note X, at 308.
[213] *Id.* at 299-300.
[214] Côté-Arsenault & Dombeck, *supra* note 132, at 652.

response to miscarriage, the authors conclude that "emotional reactions to miscarriage cannot be predicted by initial pregnancy intentions."[215] Indeed, some women "with intended and strongly desired pregnancies, experienced only mild disappointment or feelings of inconvenience or even relief."[216] On the other hand, "[o]ther participants, including some with unplanned pregnancies, reported profound grief that continued to affect their lives months later."[217]

It is important to note that abortion politics over the past fifty years have greatly influenced the experience and characterization of the fetus as a pregnancy, a baby, or a child. Women today grew up consuming, subconsciously or consciously, narratives of pregnancy from the abortion debate. "One of the most important components of the abortion debates, in terms of their impact on pregnancy loss, is the pro-life argument that human life, and therefore personhood, begins at conception."[218] For decades, the anti-abortion movement has trained us to "invest deeply in pregnancy very early on."[219] Their hope is this "emotional investment" will lead Americans to "support pro-life legislation."[220] A woman may look at her 8 week ultrasound and see nothing that resembles a baby, much less a child,[221] but antiabortion advocacy "teaches the viewer imaginative strategies for connection emotionally with it as such"[222]—indoctrinating that lack of doubt that Justice Alito mentioned in the *Dobbs* draft opinion.[223] Catholic theologians posited that legal abortion would "cheapen[] life," but in some ways, the opposite occurred. "[P]regnancies that were not aborted demanded commitment" and investment.[224] "From this perspective, prenatal life appeared cheaper in the nineteenth century, when a woman with an unplanned pregnancy might take a wait-and-see attitude," hoping for a miscarriage.[225]

In contrast, the abortion rights movement has historically described a pregnancy as a "clump of cells," if it addresses the fetus at all.[226] This messaging is often inconsistent with the abstract idea of pregnancy women have formed. And when women feel distress after losing a pregnancy, this messaging can be isolating and alienating.[227] "Given the lack of meaning attributed to embryos

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[215] Rachel Flink-Bochacki et al., *Family Planning and Counseling Desires of Women Who Have Experienced Miscarriage*, 131 OBSTETRICS & GYNECOLOGY 625, 627 (2018).
[216] *Id.* at 628.
[217] *Id.*
[218] FREIDENFELDS, *supra* note 14, at 145, 147 (2020).
[219] *Id.* at 149.
[220] *Id.* at 147.
[221] *Id.* at 160 ("[F]ew people, even those who experience early ultrasound as a moment of profound bonding, would claim to be able to easily see the baby in an early scan.").
[222] *Id.* at 148.
[223] Draft Dobbs opinion, 34.
[224] FREIDENFELDS, *supra* note X, at 224.
[225] *Id.*
[226] Becker & Hann, *"it makes it more real," supra* note 60, at 1.
[227] FREIDENFELDS, *supra* note 14, at 149. (explaining that the oversimplified message that personhood begins at birth "is troubling to the many women who are politically pro-choice but mourn their miscarriages").

and fetuses in the pro-choice movement, the miscarriage support literature tends to borrow from pro-life language and imagery."[228] The antiabortion movement confirms the appropriateness of sorrow or grief after even early pregnancy loss "because a baby has died."[229] Leaning into antiabortion sentiment for comfort, however, "reinforces the idea that the only appropriate way to treat an early miscarriage is as the loss of a child."[230] There is no alternative, nuanced discussion that gives space for women's attachment to the fetus during pregnancy, and grief after its loss, without conceding personhood: there is no "cultural imagery regarding pregnancies" beyond the "'baby vs clump of cells'" dichotomy.[231]

Some might suggest that this history is only more reason why the fetus should be ignored—that the modern attachment to the fetus is a manipulation of anti-abortion messaging that we should be attempting to deprogram. We think this is the wrong response. Like it or not, this attachment in pregnancy is not likely to change—too many cultural shifts have occurred. "Diminishing the fetus" will now only seem "out of touch, misguided, or even callous and cold."[232] And more importantly, women are capable of holding this nuance: "Pro-choice women may scoff at 'I'm a Child, Not a Choice' placards and at the same time feel excitement looking at the scan of an expected grandchild. This is not inconsistency but rather an awareness of context."[233] The abortion rights solution, therefore, should not be to "diminish a woman's joy at imagining the child inside her" or to disengage her from "the magical thinking that lets us have a relationship with our baby before it is born."[234] Instead, we argue that the proper response is to emphasize the pregnant person and their subjective relationship with the pregnancy—a relationship that is theirs to craft and not based on any fixed or immutable characteristics of the fetus.

B. Tort Law's Recognition of Subjective and Variable Loss

The subjective and variable loss suffered in pregnancy loss is at the center of every tort claim where the plaintiff alleges that defendant's tortious conduct caused the miscarriage or stillbirth. Even though pregnancy loss researchers stress that the extent of the loss after miscarriage and stillbirth "is not truly measurable,"[235] tort law requires a jury to do so.

Most states allow a tort claim for pregnancy loss, but not all losses. Most states limit the claim to stillbirths after viability, borrowing the concept

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[228] *Id.* at 149.
[229] *Id.*
[230] *Id.*
[231] Backer & Hann, *"it makes it more real," supra* note 60, at 6.
[232] *Tone, Visibility, and Scope in Pro-Choice Advocacy*, *supra* note 67, at 19
[233] SANGER, *The Birth of Death*, *supra* note 45, at 103.
[234] *Tone, Visibility, and Scope in Pro-Choice Advocacy*, *supra* note 67, at 19.
[235] Denise Côté-Arsenault, *Theoretical Perspectives to Guide the Practice of Perinatal Palliative Care,* in PERINATAL PALLIATIVE CARE: A CLINICAL GUIDE 17 (Erin M. Denney-Koelsch & Denise Côté-Arsenault eds., 2020)

from abortion jurisprudence.[236] Other states allow a tort claim for all stillbirths, but not miscarriages.[237] This distinction reflects pregnancy loss research noting that fetal attachment typically grows as the pregnancy progresses as does the expectation that a pregnancy will end with a living baby.[238] A few states allow a tort claim for all pregnancy losses, allowing all pregnant people at least the chance of recovering damages in tort.[239]

Two types of tort claims exist in the case of pregnancy loss: a wrongful death claim and a negligence claim.[240] The wrongful death and negligence claims differ in their origins and their available damages. A wrongful death claim is statutory. It is the same claim a parent has if a living child were tortiously killed.[241] A majority of states recognize the wrongful death claim for stillbirth.[242] Negligence claims, on the other hand, are based in the common law. Negligence claims have jurisdictional difference. For instance, some states require a physical injury other than the pregnancy loss; others apply the very restrictive negligent infliction of emotional distress duty rules, which severely limit the situations in which a plaintiff can recover such damages.[243]

The available damages also differ for the two claims. Since the wrongful death claim is statutory, the damages available depend on the statute. Most states allow recovery for damages for the lost relationship between the parent and child.[244] In the context of a parent suing for the death of a child in utero, these damages compensate for the lost parent-child activities and interactions like reading to your child, activities that would have "generated ongoing, occurrent emotions, ideas, perceptions, and other experiences for both parties."[245] The damages also reflect the lost parental identity, as being a parent is one "of the most important roles we play in life" and the tortfeasor robbed the parent of that experience.[246] Recovery of emotional distress damages is less common for wrongful death.[247] The reverse is true for the negligence claim, which includes damages for emotional distress, but not the lost relationship.[248] For example, Texas negligence law allows damages for the "mental anguish … resulting from negligent treatment that causes the loss of a fetus as part of the woman's body," but not for "the loss of the fetus as an

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[236] Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L. J. 955, 1004, n. 369 (2019). [hereinafter Lens, NEV.].
[237] *Id.*
[238] *Id.* at 1005.
[239] *Id.* at 1004, n. 369.
[240] *Id.* at 969.
[241] *Id.*
[242] *See generally id.*
[243] *Id.* at 973-74.
[244] Jill Wieber Lens, *Children, Wrongful Death, & Punitive Damages*, 100 B.U. L. Rev. 437, 447-48 (2020). [hereinafter Lens, B.U.].
[245] Joellen Lind, *Valuing Relationships: The Role of Damages for Loss of Society*, 35 N.M. L. REV. 301, 304 (2005).
[246] *Id.*
[247] Andrew J. McClurg, *Dead Sorrow: A Story about Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 26-27 (2005).
[248] Lens, NEV., *supra* note 221, at 976.

individual."[249] Whether juries can distinguish these types of damages and only award one or other is, of course, another question.[250]

The most interesting distinction between the wrongful death and negligence claims, however, is their conceptions of the fetus. Australian law professor Hannah Robert explains the three main schools of thought regarding the fetus: the pregnant person and the fetus are a single entity with the pregnant person being the only legal person; the pregnant person and the fetus are separate, legal persons; and an idea of the pregnant person as "not-one-but-not-two" such that the fetus is an "other," but not a legal person.[251] Robert, also a stillbirth mom, argues that the not-one-but-not-two approach best reflects the complexity of pregnancy and pregnancy loss.

A negligence claim after pregnancy loss is consistent with the pregnant person and fetus as a single entity where the pregnant person is the only legal person. The pregnancy loss is conceived of as an injury the woman suffers in her body, which she does. It also, however, treats the fetus as a body part. The claim is the same whether her leg is injured or she gives birth to her six-pound stillborn child. Presumably a jury would award more emotional distress damages for pregnancy loss than for a broken leg, but no guarantee exists because damages are individualized, not objective.

A wrongful death claim, on the other hand, conceives of the fetus as separate from the mother, recognizing a self-other relationship. This approach reflects how most women feel that the death of their stillborn baby is the death of a child, and something much graver than a broken leg. This recognition of separateness between mother and (unborn) child in a wrongful death claim is usually seen as an antiabortion victory because numerous courts applied wrongful death law by concluding that the word "person" in the statute also included a fetus after 20 weeks. The original motivation for these "person" conclusions, however, had nothing to do with biology, personhood, or abortion.[252] Instead, it was due to the strange outcome where a fetus injured in the womb could recover in tort after birth, but no claim existed for tortious fetal death;[253] killing a fetus, despite being a graver injury, was not subject to recovery. Courts also applied wrongful death law to stillbirth due to the illogic of allowing parents a wrongful death claim when a baby dies shortly after birth, but not before; if parents suffered a cognizable injury in the first instance, they also did in the second.[254] Certainly, some more recent legislative amendments to clarify that "person" included fetuses were motivated by antiabortion

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[249] *Krishnan v. Ramirez*, 42 S.W.3d 205, 215 (Tex. Ct. App. 2001).

[250] *See* Lens, NEV., *supra* note 221, at 990-92 (criticizing the attempt to parcel damages for the intangible losses after stillbirth); Krishnan v. Sepulveda, 916. S.W.2d 478, 489 (Tex. 1995) (Gonzalez, J., dissenting) ("The Court is asking the trier of fact to do the impossible: ascertain damages for mental anguish to the mother 'as a result of the occurrence in question' yet unrelated to the baby's death.")

[251] Robert, *supra* note 256, at 2.

[252] Lens, B.U., *supra* note 229.

[253] *Id.*

[254] *Id.*

strategy to accord full legal personhood to a fetus, especially if applied to miscarriage, but this was not the original purpose.[255]

Even though wrongful death recognizes the parent and potential child as separate, a wrongful death claim is not based on the pregnant person and fetus as separate legal persons. A wrongful death claim creates no legal rights for the fetus. To the contrary, the only one with a legal right under the wrongful death claim is the parent. Moreover, the separate legal persons model "relies on a fictionalized view of pregnancy—where both fetus and mother are visible but disaggregated in a way that ignores the relationship between them …."[256] A wrongful death claim does not ignore that relationship. To the contrary, the relationship between the pregnant person and the potential child is integral to the claim. The pregnant person's damages are based on that lost developing relationship. Thus, the pregnant person is not displaced with only a focus on the dead fetus.[257]

This wrongful death treatment of the fetus is actually more consistent with what Robert called the "not-one-but-not-two" school of thought than the separate legal persons approach. The fetus is not a legal person, but is human and the woman-fetus relationship is a "developing self-other relationship."[258] This idea of a developing self-other relationship fits in well with research on prenatal attachment and pregnancy loss described above. The main recoverable damages for wrongful death in cases of pregnancy loss reflects this developing self-other relationship. The damages available are either for the lost relationship, emotional distress, or possibly both. This is an individualized and subjective determination—no presumption exists that the woman is injured by any lost relationship or that she was emotionally distressed by the pregnancy loss. To the contrary, the woman must demonstrate her actual injury—the extent, if any, of the relationship lost and/or her emotional distress—to be able to recover damages. Again, no actual injury is presumed.[259] The jury may very well find that little relationship existed or minimal emotional distress. This

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[255] *Id.*

[256] Robert, *supra* note 256, at 9.

[257] Robert also argues that the separate legal persons approach erases "the location of the fetus within the woman's body." As she points out, when tortious fetal death is inflicted through the mother's body, it also violates mother's bodily integrity and "the integrity of the maternal-fetal boundary within the mother's body." *Id.* This is a valid criticism.

[258] *Id.*

[259] A concurring federal judge in Louisiana suggested these factors "to determine the extent of damages suffered by the parents" for wrongful death damages after stillbirth:

> 1. the stage of pregnancy at which the stillbirth occurs; 2. the medical history of the mother with respect to previous childbirths; 3. the number of children the couple presently has; 4. whether the mother used artificial means to induce pregnancy, i. e., fertility drugs; 5. the probability of pregnancy going to full term; 6. any prior history of miscarriage; 7. prenatal care of the stillborn child; 8. parental preparation for the forthcoming child, i. e., house additions, baby crib and any other indicia of the degree of expectation exuded by the parents.

Danos v. St. Pierre, 383 So. 2d 1019, 1030-31, n.15 (La.App.1980), aff'd, 402 So. 2d 633 (La.App.1981).

may be especially true in cases of early miscarriage, in the few states that allow a wrongful death claim for miscarriage.

Just because a legal claim exists for tortiously caused stillbirth, however, does not mean that pregnancy loss is legally acknowledged to a similar extent as what the woman feels. Miscarriage and stillbirth are both dismissed as just "women's issues."[260] Legal outcomes reflect cultural underestimation. Pregnancy loss is often culturally perceived as a minor or non-event. Platitudes like "you can have another," "it wasn't meant to be," or "you're lucky that it wasn't one of your living children who died" are common. Courts have even considered a subsequent child as evidence that a pregnancy loss was not that injurious,[261] even though evidence of remarriage is inadmissible when a spouse has died.[262] And even if the jury were to find that the mother was severely injured, popular caps on the recovery of "noneconomic" damages means that a mother receives only a reduced amount of her damages in cases of both pregnancy loss and the deaths of living children.[263]

Notably, this cultural and legal callousness surrounding the value of pregnancy loss sits in stark contrast to the antiabortion sentiment that each abortion ends a priceless life and forever traumatizes the woman.[264] In most states, it would be difficult to recover in tort for a miscarriage at 6 weeks of pregnancy; certainly, wrongful death damages for a lost relationship are not available. Yet, a woman who terminates her "unborn child" at 6 weeks will forever be traumatized. [265]

C. Subjective Fetal Value is Distinct from Legal Personhood

Roe is gone, but the fight over abortion is far from over. Overruling *Roe* means returning the issue to the states, and roughly half the country is expected to keep abortion legal. The antiabortion movement has made clear that their goal is to end abortion nationwide. It will likely pursue this goal in two paths. First, it will attempt to legislate a federal abortion ban. But so long as the filibuster is in place, it is unlikely that federal legislation will pass. The second is to constitutionalize the antiabortion concept of fetal personhood—the idea that life begins for everyone at conception and that the word "person" in the Fourteenth Amendment includes all conceived life. As a result, fetal

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260 Lens, NEV., *supra* note 221, at 971-72.

261 *Id.* at 994.

262 *Id.*

263 Lens, B.U., *supra* note 229, at 472-73.

264 *See e.g.*, WISC. STAT. ANN. § 253.10 (requiring disclosure of the risk of "psychological trauma" before abortion); TENN. CODE § 39-15-214 (describing the "[w]omen who have an abortion suffer from post-traumatic stress disorder at a rate higher than veterans of the Vietnam war" and have "an 81% increase risk of mental trauma after an abortion")

265 Philosopher Amy Berg has argued that if the antiabortion movement truly believed every fertilized embryo was a person, it would presumably do more to fight pregnancy loss given that many more fertilized embryos die from failure to implant, miscarriage, and stillbirth than abortion. Amy Berg, *Abortion and Miscarriage,* 174 PHILOSOPHY STUDIES 1217, 1217 (2017).

personhood is likely to take centerstage in fights ahead. As they have in the past, antiabortion advocates will likely weaponize grief after pregnancy loss as evidence of fetal personhood. This anti-abortion strategy will once again make abortion rights activists wary.

This wariness of a slippery slope will create a temptation to stay the course, avoid conceptualizing the fetus, and push back on any efforts that recognize fetal value. Instead of remaining silent on these issues, however, we offer a way forward. The subjective and relational fetal value described above, which a pregnant person may or may not feel and which develops at different rates for different reasons, is fundamentally inconsistent with the antiabortion vision of legal personhood, which is objective and independent.

As pregnancy loss researchers make clear, their conception of fetal personhood is subjective, anthropological, or philosophical, not legal. Anthropologist Linda Layne, for instance, explains that her research involves an "anthropologically informed view of personhood, that is, that personhood is culturally constructed," that "may be undertaken with some embryos and not others."[266] Feminist bioethicists have called this highly subjective process "calling into personhood."[267] Importantly, they note that the fetus does not innately have any personhood value—someone else must draw that out: "a fetus cannot participate in personhood or the practice of personhood; it must be called into personhood by other persons. When this does not happen, no value accrues."[268] One poignant example Layne offers of this cultural construction of prenatal attachment includes women who test positive for pregnancy, but are not actually pregnant—the embryonic sac is empty or it is a molar pregnancy. No possibility of legal or even biological personhood is possible because of the lack of an embryo, but "if that pregnancy was known and desired, the would-be mother (and others) may have already begun the process of constructing a new person."[269] On the other hand, people mistake early miscarriages for late periods everyday. These early pregnancies are not even registered, much less emotionally constructed.

Thus, social construction of pregnancy is subjective and variable, not biological or innate: "Although a woman and possibly her partner might view their fetus as a person during pregnancy, this judgment does not occur at any one point in time and varies among pregnant women."[270] As Layne explains, "the process of constructive personhood may be undertaken with some embryos and not others."[271] As explored above, this construction depends on the pregnancy's intentionality, its length, ultrasound visualizations, disclosure to others, or the myriad rituals to prepare for the new arrival. For some, this

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[266] LAYNE, *supra* note 147, at 240.
[267] Byron J. Stoyles, *The Value of Pregnancy and the Meaning of Pregnancy Loss*, 46 J. SOCIAL PHILOSOPHY 91, 94 (2015).
[268] *Id.*
[269] *Id.*
[270] Côté-Arsenault & Dombeck, *supra* note 132 at 657; *see also id.* at 660 ("Personhood is not based on biological facts but is a complex sociocultural phenomenon.")
[271] LAYNE, *supra* note 147, at 240.

process may begin when partners decide to try to get pregnant.[272] Others who have suffered a prior loss may "dehumanize, minimize, and medicalize the subsequent pregnancy" and "postpone and/or attenuate the sociocultural work of constructing a person."[273] And other pregnant people may never begin this process, especially if the pregnancy is unwanted and abortion is quickly decided upon. Every experience is different. The damages calculation in tort confirms this concept of subjectivity: that every person's loss will be valued differently based on their individual relationship with the potential child.

Not only is fetal value subjective, it is also relational. Neither tort law nor pregnant people view the fetus as entirely separate; the value is in the baby's relationship with the world, which depends on the pregnant person.[274] "Any interaction [the fetus has] with the law or any other legal actor must by necessity involve the mother."[275] The damages for fetal death are not based on an entirely separate person. As Lens has written previously: "A wrongful death claim . . . does not create any legal right for the baby. . . . It is the parents' claim and it awards the parents damages for the lost affectional tie, the loss of their relationship with their baby." Moreover, '[t]he parent's loss does not depend on the legal status of the child; indeed the absence of the child is the crux of the suit.'"[276] The Supreme Court said the same in *Roe,* specifically noting that the tort law concept of wrongful death in pregnancy was relational and therefore did not bestow independent fetal rights: "Such an action, however, would appear to be one to vindicate the *parents' interest* and is thus consistent with the view that the fetus, at most, represents only the potentiality of life."[277]

This subjective, relational vision of fetal value is dramatically different from what is promoted by anti-abortion legislators, which presumes that life and personhood begin at conception. That is, every fertilized egg is a person entitled to life and thus, abortion is necessarily illegal. Indeed, this belief forms the basis of a constitutional theory that could lead to a nationwide abortion ban—that the word "person" in the Fourteenth Amendment applies to a zygote at conception,[278] enshrining it with the right to life and outlawing abortion everywhere (or so the theory goes).[279] The Court explicitly rejected

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[272] *Id.*

[273] *Id.* at 241.

[274] The pregnant person is not the only one who might be attached to a pregnancy. The other parent, the grandparents, and others might have some attachment or attribute some personhood to the fetus. But the pregnant person's interest trumps because only she has both the attachment (most likely, the strongest attachment) and is also growing the child in her body. Robert's concept of not-one-but-not-two seems applicable here—you cannot disaggregate the pregnancy from the pregnant person. The pregnant person is integral.

[275] Hannah Robert, *The Bereavement Gap: Grief, Human Dignity and Legal Personhood in the Debate over Zoe's Law*, 22 J. LAW & MED. 1, 3 (2014).

[276] Lens, NEV., *supra* note 221, at 1009-10.

[277] *Roe v. Wade*, 410 U.S. 113, 170 (1973) (emphasis added).

[278] *See generally* Brief for Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George In Support of Petitioners, Dobbs. v. Jackson Women's Health, No. 19-1392 (2021).

[279] Some might argue that even if the Court were to find that the Constitution recognizes personhood at conception, it would not necessarily ban abortion nationwide because it would fail the state action requirement. For instance, in *DeShaney*, 489 US 189 (1989) the Court found there was no state action when a state allowed corporal punishment of a child because the

this argument in *Roe*, but that precedent no longer has effect.[280] Given the current makeup of the Supreme Court, this possibility should be taken seriously. Indeed, Justice Alito's *Dobbs* draft opinion, though not explicitly taking a position on fetal personhood, includes hints that he would be persuaded by such an argument.[281]

The Supreme Court has not articulated a consistent framework for personhood to guide a possible reconsideration of fetal personhood. As Zoe Robinson has described, "'no coherent body of doctrine or jurisprudential theory exists' to determine who or what is a constitutional person."[282] This means the Court decides personhood on "an ad hoc basis, right-by-right and claimant-by-claimant" basis.[283] But we do know that constitutional personhood is fundamentally distinct from biological humanness. Person "has a legal meaning which includes some non-humans (such as corporations), and excludes some humans. Its purpose is not to define human life, but to enable an autonomous interaction with the law."[284] For instance, felons and aliens are both humans, but the Court has denied them certain constitutional rights.[285] Thus, "[i]t is important to recall . . . that what is at stake in the designation as a constitutional person is not a declaration of a person's humanity. Rather, at stake is recognition of a legal status under the Constitution."[286] The question of constitutional personhood is therefore completely detached from the philosophical question of when life begins—a question our paper does not address. Rather, we are concerned only about whether the recognition of subjective fetal value discussed above would lead to constitutional personhood; we conclude that it does not.

The subjective fetal value we discuss in this Article does not support the antiabortion personhood-at-conception model. The fetal value is created by, and dependent on, the individual pregnant person—some pregnant people feel attached to their fetus, attributing various levels of "personhood" to it at different points in the pregnancy. Others do not. By contrast, the antiabortion concept is based on biology—it is fixed and objectively presumed for all pregnancies. The antiabortion personhood-at-conception model erases the pregnant person's subjective experience of pregnancy; subjective fetal value depends on it. The antiabortion concept assumes fetal separateness, where the

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state did not inflict the abuse, the parents did. We think this is an important caveat that should be further explored, but our paper focuses on showing that *even if it were true* that personhood-at-conception could ban abortion nationwide, recognizing subjective, relational fetal value will not lead to it. It is also worth noting that even if fetuses were persons, some abortions could still be permissible because of other rights, like the right to self-defense if the pregnancy endangered a woman's life or the right to parental autonomy if the fetus suffered a life-threatening fetal anomaly. Donley, *supra* note X, at X.

[280] *Roe*, 410 U.S. at 158.

[281] Draft Dobbs opinion pages 22 (citing with approval: "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being.").

[282] Zoe Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 608 (2016).

[283] *Id.*

[284] Robert, *supra* note 256, at 3.

[285] Robinson, *supra* note 262, at 632-45.

[286] *Id.* at 634.

fetus is an entirely independent person equal to, and cancelling out, the pregnant person; subjective personhood as recognized by tort law treats the pregnant person and fetus as not one but also not two—a developing self-other relationship occurring inside of and subsumed by the pregnant person. Antiabortion advocates may see subjective fetal personhood as supporting their arguments, but it doesn't. These two concepts are radically different and irreconcilable.

The history of pregnancy loss is also relevant to the personhood-at-conception model. This history matters because conservative and originalist Supreme Court Justices will likely ground their determination of constitutional personhood on the meaning of "person" at the time the Fourteenth Amendment was ratified. (Though the Court might be tempted to look to the uptake of modern tort and criminal law statutes that have supposedly bestowed personhood to fetuses, this would require it to adopt a "living" interpretation of the Constitution, which the conservative majority opposes.) In *Roe*, the Court explained that in our country's early years, abortions were common before quickening, the time fetal movement is first felt,[287] meaning fetuses were not considered persons and indeed, abortion was a fundamental right.[288] A group of constitutional law scholars, however, recently argued in an amicus brief for *Dobbs* that *Roe's* historical analysis was wrong—that the quickening divide had disappeared and abortion at any point in pregnancy was considered immoral, if not illegal when the Fourteenth Amendment was adopted.[289] Professor Aaron Tang has refuted many of the examples upon which they rely, concluding that "[a]s of ratification, 21 of 37 states continued to recognize the very prequickening abortion right that was universally embraced at the founding."[290]

The historical analysis thus far has focused on what the abortion laws at the time said, but those laws miss a crucial understanding of how women understood and experienced pregnancy at that time. Knowledge of pregnancy in the late 1880s was very limited. No lab test existed to determine pregnancy until 1927 and it was used sparingly given that it involved injecting the woman's urine into mice.[291] Before then, a certain diagnosis of pregnancy wasn't possible until the middle of the second trimester, when fetal movement occurred and the doctor could detect a fetal heartbeat.[292] Women did not and could not rely on missed periods to prove pregnancy—missed and irregular periods were common in that time for a variety of reasons, including illness, poor nutrition, and challenging living and working conditions.[293] Miscarriages

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[287] *Roe v. Wade*, 410 U.S. 113, 133-40 (1973).

[288] For a defense of this position, see David Gans, *Reproductive Originalism,* 75 SMU LAW REVIEW FORUM 191 (2022).

[289] *See generally* Brief for Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George In Support of Petitioners, Dobbs. v. Jackson Women's Health, No. 19-1392 (2021).

[290] Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, 58, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921358.

[291] FREIDENFELDS, *supra* note 14, at 170.

[292] *Id.* at 167.

[293] *Id.* at 20-21.

were also mistaken for late periods, further complicating the predictability of menstrual cycles.[294] Women commonly sought and obtained treatment for irregular periods, not fully understanding when missed periods were for pregnancy or other reasons.[295] It is no wonder the abortion laws at that time were hardly enforced[296]—if the state could not prove pregnancy, it could not prove abortion or distinguish the treatment offered to induce periods versus to induce miscarriage. The former, known as menstrual regulation, was common, and products to induce a period were sold openly, without any moral or legal concern.

Even if women were aware of pregnancy, there was no widespread belief that a baby or person was growing in the womb. Withycombe notes: "Markedly different from our current obsession with 'the baby' inside the bump, nineteenth-century women's understanding of what was inside their bodies was more fluid. For some women, it was a person in the making, and for others it was a more nebulous object, or an object that became a person only at birth."[297] A woman knew that whatever was in her "moved and grew," but she did not necessarily consider it to be a "distinct body or person."[298] This fluidity remained even with the growth of embryology throughout the nineteenth century, a growth made possible due to research on fetal tissue after pregnancy loss. Even with education on fetal development, "many women undoubtedly viewed [the fetus] as animalistic or eerily similar to insects." [299]

Quickening was also the time at which the general population deemed the fetus "alive."[300] As a result, there was thus little to no "distinction[] between contraception, abortion, and miscarriages" before quickening and "no obvious moral distinction [existed] between intervening before or after conception."[301] It was impossible to tell "whether a woman's period came because she avoided conception or because she disrupted a very early conception."[302] Similarly, "there was no way to tell whether a late period had reappeared because of something the woman did, or whether it would have happened anyway."[303] A few antiabortion doctors insisted that life began at conception and the science of human embryology did develop throughout the nineteenth century.[304] But still the line between spontaneous miscarriages and induced abortions was blurred,[305] with one author deeming it equally immoral if a pregnancy ended because the woman orgasmed during sex or if she took drugs.[306] Even if a state did ban abortions before quickening, it's very unclear how these bans could

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294 *Id.*
295 *Id.*
296 Tang, *supra* note X, at 58.
297 WITHYCOMBE, *supra* note X, at 39.
298 *Id.* at 36.
299 *Id.* at 39.
300 FREIDENFELDS, *supra* note 14, at 38.
301 *Id.*
302 *Id.*
303 *Id.*
304 *Id.* at 39, 85.
305 *Id.* at 39.
306 *Id.* at 39-40.

have been enforced with no way to confirm pregnancy until weeks into the second trimester.

Additionally, women did not see their miscarriages or abortions as moral failings, nor did they feel guilt or despair.[307] To the contrary, they were part of life and necessary fertility control so that women could better avoid the exhaustion and danger of closely spaced pregnancies.[308] In 1800, a woman had seven children on average.[309] But by 1900, a woman had an average of between three and four children.[310] The reality of the inability to control fertility meant "a social world in which miscarriage was not a failure of motherhood, the products of miscarriage were not children or infants, and doctors could freely take away fetal tissues for scientific study and display."[311] Miscarriages were also a welcome way to naturally reduce fertility, and "induced miscarriage" (i.e., abortion) was simply another option.[312] "Many authors who were trying to convince women that inducing abortion was immoral lamented the uphill battle they seemed to be fighting, since so many women seemed unconcerned by miscarriage and, like the physicians, did not differentiate it from abortion."[313] Again, even if some states did ban abortions before quickening around the time of ratification, at most this was a projection of (male) legislators' aspirational beliefs on the populace rather than a reflection of widespread, moral consensus about fetal personhood given women's opinions and practices.[314]

Moreover, modern-day, practical problems exist with defining a legal person at conception. First, there is an important distinction between conception and implantation—conception occurs when the egg and sperm unite; implantation occurs when the fertilized egg implants in the uterus and starts to grow, typically a week or two later. There is no medical test for conception. Home and hospital-grade pregnancy tests look for a hormone called hCG, which is only released after implantation.[315] This is why the earliest a pregnancy can be detected is two weeks after conception—after implantation has occurred. This inability to know if conception has occurred means that after ovulation, any woman could possibly be the vessel of a microscopic

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[307] *Id.* at 43; *see also* WITHYCOMBE, *supra* note X, at 21 ("neither women's reactions to miscarriage nor medical discussions of pregnancy loss employed a language of failure or blame").

[308] FREIDENFELDS, *supra* note 14, at 26, 43.

[309] *Id.* at 36.

[310] *Id.*

[311] WITHYCOMBE, *supra* note X, at 6.

[312] *Id.* at 37.

[313] *Id.* at 40.

[314] One irony with this line of reasoning is that it might be particularly vulnerable to efforts to reintroduce menstrual regulation, through "period pills." Wendy R. Sheldon & Beverly Winikoff, *Could "Missed Period Pills" Be the Future of Reproductive Health Care?,* MS. MAGAZINE (Jan. 8, 2021), https://msmagazine.com/2021/01/08/could-missed-period-pills-be-the-future-of-reproductive-health-care/. Researchers are currently studying the use of abortion inducing drugs without any confirmation of a pregnancy, creating a possible loophole to state abortion bans because no one is knowingly ending a pregnancy. *Period Pills*, https://www.periodpills.org/.

[315] FREIDENFELDS, *supra* note 14, at 186.

person, leading to problematic outcomes the public might not tolerate, like refusing non-urgent medical care to women in the second half of their cycles due the possibility of disrupting a pre-implantation pregnancy.[316] In a similar vein, state personhood measures were often unsuccessful even in antiabortion states because of their potential effects on IVF and birth control.[317] Embryos are also much harder to personify than fetuses.[318]

Second, scientists have estimated that "[o]nly about 30 percent of fertilized eggs successfully implant and develop into term pregnancies and live births. The other 70 percent perish, about half before implantation, and many more during the first weeks after implantation."[319] The human reproductive system is remarkably "inefficient" in that a "majority of conceptions are not viable."[320] The distinction between conception and implantation is also why IVF, where a fully developed embryo is injected into a womb under optimal conditions, is successful only 55% of the time in women under 35, and much less so for every older age bracket.[321] It is much harder to argue that conception guarantees the right to life when the vast majority of those conceived 'persons' die long before they would be born.[322]

Last, in the decades since *Roe*, the antiabortion movement has argued that the right to privacy was an affront to states' rights. One of Mississippi's prime arguments in *Dobbs* was that *Roe* was wrongly decided because abortion is so divisive that state legislatures should be allowed to come to different conclusions about the legality of abortion.[323] Justice Kavanaugh—a needed

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[316] Can a woman get a mammogram or be prescribed potentially risky pharmaceuticals in the second half of her cycle when conception might have occurred, but before a pregnancy test can confirm it? This isn't hyperbolic – some hospitals already refuse radiation-emitting tests, like mammograms, in this window unless a person is on birth control. https://twitter.com/dr_moayedi/status/1528733727282585601. Oklahoma recently passed a law creating civil liability for any "abortion" after *conception*. Hospitals and doctors in Oklahoma might become increasingly nervous about treatments that could theoretically prevent implantation after conception (i.e., an abortion under that law).

[317] Maya Manian, *Lessons from Personhood's Defeat,* 74 OHIO ST. L. J. 1, 12-17 (2013). The fact that personhood initiatives could outlaw certain fertility treatments is a particularly challenging political hurdle because conservative, "pro family" voters may be especially concerned about efforts to limit families' ability to procreate. Some legal scholars have argued there might be other consequences that Republicans might not like, like citizenship for fetuses conceived on U.S. soil. Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process, and Citizenship*, 76 WASH. & LEE L. REV. 91 (2020).

[318] For instance, polls have shown that less than a third of respondents would be opposed to medical research using the extra embryos created after IVF, even though they will be destroyed. Matthew C. Nisbet, *The Polls – Trends, Public Opinion about Stem Cell Research and Human Cloning* 68 PUBLIC OPINION QUARTERLY 131, 146 (2004).

[319] FREIDENFELDS, *supra* note 14, a t186. *See also*, Gavin E. Jarvis, *Early Embryo Mortality In Natural Human Reproduction: What The Data Say*, 5 F1000Res (2016) (describing the sources of the 70% estimation and positing that the percentage might be closer to 40-60% failure to implant).

[320] *Id.* at 192.

[321] Rachel Gurevich, *The Chances for IVF Pregnancy Success*, VERY WELL FAMILY (April 20, 2020), https://www.verywellfamily.com/what-are-the-chances-for-ivf-success-1960213.

[322] FREIDENFELDS, *supra* note 14, at 186.

[323] Brief for Petitioners, *Dobbs v. Jackson Women's Health*, No. 19-1392 (July 22, 2021) at 21-22.

fifth vote on any abortion case—approvingly cited this line of reasoning during the *Dobbs* oral argument: "because the Constitution is neutral, that this Court should be scrupulously neutral on the question of abortion, neither pro-choice nor pro-life. . . . we should leave it to the states and we should be scrupulously neutral on the question.[324] The about-face that would be necessary to find, years after it declared in *Dobbs* that "the constitution makes no reference to abortion,"[325] that abortion must be banned nationwide because of fetal personhood, would be astonishing. Still, most also thought that *Roe* being overruled was also not possible. Abortion advocates need to be prepared for fetal personhood arguments, including the ability to explain that subjective valuation of the fetus does not support legal personhood at conception.

Though we have demonstrated that the concept of subjective fetal value and tort law's recognition of it do not support the antiabortion personhood-at-conception model, other legal conceptions do. The most notable example is state criminal law. As we've discussed, tort law is private law, empowering the pregnant person to bring a claim and recover damages for the lost relationship with her baby or her emotional distress at the loss. Criminal law, on the other hand, is public law and is controlled by the state, not the pregnant person. Thirty-eight states have fetal homicide laws, enabling a prosecutor to seek criminal punishment for the killing of a fetus with criminal intent.[326] Twenty-nine of those states allow prosecution at any stage of pregnancy; the other nine limit it to later pregnancies.[327]

Though these laws were originally created to vindicate the pregnant person's loss, similar to tort law, they do not similarly reflect a subjective and relational understanding of fetal value. The pregnant person's attachment to the pregnancy controls damage recovery in tort law, but is irrelevant under criminal law. Most state criminal laws can be enforced as early as conception,[328] whereas tort wrongful death claims are overwhelmingly limited to losses after at least 20 weeks of pregnancy.[329] Criminal laws treat the fetus as entirely separate and erase the pregnant person,[330] whereas the pregnant person's loss

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[324] At another juncture, Justice Kavanaugh had this colloquy with respondents: "Justice Kavanaugh: And so, for the -- if you were to prevail, the states, a majority of states or states still could or – and presumably would continue to freely allow abortion, many states; some states would be able to do that even if you prevail under your view, is that correct? MR. STEWART: That's consistent with our view, Your Honor. It's -- it's one that allows all interests to have full voice and -- and many of the abortions we see in certain states that I don't think anybody would think would be moving to change their laws in a more restrictive direction."

[326] *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated May 1, 2018), https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

[327] *Id.*; *see also* Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and their Potential Applicability to Pregnant Women who Harm their own Fetuses*, 89 Ind. L. J. 847 (2014)

[328] Murphy, *supra* note 298, at 164.

[329] *See* Lens, NEV, *supra* note 221, at 1004.

[330] Some states have written these laws to as specific to a fetus or unborn child, defining a criminal punishment for the killing of a fetus or unborn child. Cal. Penal Code 187 ("murder is the unlawful killing of a human being, or a fetus"); Ill. Comp. Stat. 5/9-1.2 (intentional

is integral to the tort claim. Even more problematically, seven states allow prosecutors to prosecute the pregnant person for the death of her child—most often in the case of illegal drug use in pregnancy, even though the scientific evidence supporting the causal connection between drug use and pregnancy loss is weak at best.[331] Unlike tort law, criminal law creates an independent and objective understanding of fetal value, similar to what antiabortion advocates seek.

Even though we have argued that acknowledging subjective, relational fetal value does not evidence fetal personhood, we recognize that the antiabortion movement will nevertheless try to capitalize on this recognition and manipulate it. We cannot discount this risk, but the truth is that it will pursue this line of argument, exploiting attachment in pregnancy and grief after loss, regardless of whether abortion-rights advocates acknowledge attachment and grief. The abortion-rights advocates' choice then is either to keep ignoring the subject or provide an alternative view that acknowledges it without harming abortion rights. And as we explain below, we think the benefits of an abortion rights movement that can recognize subjective, relational fetal value outweigh the risks. In particular, we describe how it might allow for a unified front in combatting the criminalization of pregnancy and counter the woman-protective rationale promoted by the antiabortion movement.

IV. WHAT THE ABORTION RIGHTS MOVEMENT CAN GAIN FROM RECOGNIZING AND SUPPORTING WOMEN THROUGH PREGNANCY LOSS

Though a longstanding boundary has prevented abortion rights supporters from recognizing fetal attachment, we think a greater acknowledgment of the fetus, and in particular, the bond that can develop in the context of certain pregnancies, could actually help the abortion rights movement. This acknowledgement is necessary to prepare for the future of abortion law—a future where abortion is banned in half the country and pregnancy losses become inherently suspect and criminalized.[332] We are already seeing the beginnings of this reality unfold.[333] This section spotlights the reality that abortion laws harm all pregnant people, especially those experiencing pregnancy loss. An abortion rights movement that can highlight this reality and support all pregnant people—as the reproductive justice movement always

homicide of an unborn child). Other states, however, have written these laws by defining persons to include fetuses. Ark. Stat. Ann. 5-1-102(13); Kan. Stat. Ann. 21-5419 (defining "person" and "human being" to include a fetus).

[332] *See* Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 BOST. U. L. REV. 1111,1145 ("As more women use medication abortion—with many accessing the medication online and without medical supervision—more women may be vulnerable to prosecution.").

[333] Carrie N. Baker, *Texas Woman Lizelle Herrera's Arrest Foreshadows Post-Roe Future*, MS. MAGAZINE (April 16, 2022), https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion/.

envisioned—could win hearts and minds. But to do so, the abortion rights movement needs to be able to defend a variety of pregnant persons' interests—including those who view their loss as death of a child or potential child.

This section also argues that the abortion rights and pregnancy loss movements benefit from the normalization of all pregnancy endings—abortion, miscarriage, and stillbirth. Last, this section describes that a proper accounting of fetal attachment within the abortion rights movement will also respond to the antiabortion community's re-positioning of itself as supporting both the fetus and the woman. An account of subjective fetal value will allow the abortion rights movement to also position itself as a defender of the pregnant person and *her* interest in the fetus, potentially resonating with more Americans who hold nuanced views on a pregnancy's value.

A. Preparing for the Further Entanglement of Abortion and Pregnancy Loss in a World without Roe

Abortion rights are at an inflection point. In June 2022, the Supreme Court overturned *Roe v. Wade*.[334] As of the time of this writing, X states have banned almost all abortions.[335] Abortion seekers in those states have only a few options. The first is to travel to a state that permits abortion. But given the high cost of last-minute, long-distance travel, coupled with the fact that three quarters of abortion patients are low income or poor, travel will not be an option for many people.[336] The second option is to continue a pregnancy against their will. Some people will be forced to do this, but because of the third option—self-managed abortion at home—it may be less common than people recognize. Self-managed abortion involves a pregnant person obtaining medication abortion through the mail from remote or online sources, as described in more depth below. Data from Texas is illustrative: after SB8 went into effect, roughly 50% of abortion seekers were beyond the 6-week legal limit. Roughly 20% went to neighboring states, 15% self-managed their abortion, and remaining 15% had unknown outcomes and presumably stayed pregnant.[337] Self-managed abortion mimics the experience of pregnancy loss, making it difficult for states to enforce strict abortion laws without further investigating and criminalizing miscarriage and stillbirth.

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[334] Note: we have edited the draft under the assumption that something like Alito's draft opinion becomes law. We will edit it further this summer to account for the final version.
[335] Add.
[336] *See* Molly Hennessy-Fiske, *Even with Roe vs. Wade in place, low-income women struggle to get abortions in Texas*, LA TIMES (May 8, 2022), https://www.latimes.com/world-nation/story/2022-05-08/even-with-roe-v-wade-in-place-low-income-women-struggle-to-get-abortions-in-texas.
[337] *See* Samuel Dickman & Kari White, *How Some Texans Are Getting Abortions Despite a Devastating Law*, N.Y. TIMES (March 24, 2022), https://www.nytimes.com/2022/03/24/opinion/texas-abortion-funds-sb8.html.

But even outside of criminalization, there are numerous ways that abortion restrictions harm those experiencing pregnancy loss by affecting available medical treatment. Again, experiences in Texas already confirm these effects. Many pharmacies in Texas have stopped filling prescriptions for drugs used to treat miscarriage out of the fear that they could be sued under abortion laws.[338] And a woman in Texas who found out her wanted pregnancy had a fatal fetal anomaly was faced with the choice of traveling out of state for an abortion or waiting for her child's stillbirth.[339] These effects will only grow in a post-*Roe* world.

1. Increased Criminalization of Pregnancy Loss and Abortion

Even when *Roe v. Wade* was still law, criminalization of pregnancy loss was already on the rise.[340] Pregnant people are most often criminalized for pregnancy loss when drug use is involved (despite little to no evidence that the drug use caused the loss).[341] Aziza Ahmed argues that prosecutions of pregnancy and parenting started to increase as the welfare state retreated: "Rather than support women with social services and treatment, women lost custody of their children and found themselves in prison."[342] In her book, *Policing the Womb,* Michele Goodwin describes how poor women and women of color are disproportionately targeted for prosecution during all stages of pregnancy.[343] Seventy-five percent of prosecutions of pregnant women are women of color[344]—even though white women are equally likely to use drugs in pregnancy.[345] And when that drug use and pregnancy loss occur together, even when there is no evidence that the pregnant person was intending to end their pregnancy, the perceived relationship between pregnancy loss and

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338 *See* Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022), https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages.

339 *Austin Woman Shares Story Crossing State Lines,* THE STATESMAN (Nov. 18, 2021), www.statesman.com/story/news/politics/state/2021/11/18/texas-abortion-law-austin-woman-shares-story-crossing-state-lines/6271335001/?nocache=1.

340 Caroline Reilly, *When a Miscarriage Becomes a Jail Sentence*, REWIRE (Oct. 21, 2021), https://rewirenewsgroup.com/article/2021/10/21/when-a-miscarriage-becomes-a-jail-sentence/.

341 The vast majority of prosecutions for conduct while pregnant involve pregnancies that do not end in pregnancy loss, but instead with the birth of a healthy child—again showing the lack of clear connection between drug use and pregnancy loss. Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L. J. 475, 487 (2020).

342 Ahmed, *supra* note X, at 1120.

343 *Id.* at 489.

344 MICHELLE GOODWIN, POLICING THE WOMB, (2020); Criminalizing *Pregnancy: Policing Pregnant Women Who Use Drugs In The USA*, AMNESTY INT. (May 23, 2017), https://www.amnesty.org/en/documents/amr51/6203/2017/en/

345 Boone & McMichael, *supra* note 304, at 489.

abortion plays a role: "in many cases, these women are collateral damage in the fight over abortion."[346]

As abortion has become more difficult to access in the United States, there has been a significant increase in the utilization of self-management for abortion.[347] Self-managed abortion occurs when women obtain abortion outside of the traditional healthcare setting, typically by purchasing abortion medication online.[348] Though many women will purchase medication directly from international pharmacies, other women are accessing abortion with the help of an international provider. The most well-known organization providing this care, AidAccess, started offering abortion services to Americans in 2017 and provides thousands of abortions every year to Americans.[349] The AidAccess model pairs patients with a doctor in another country who evaluates whether they are a good candidate for self-management.[350] If so, the provider will call in a prescription for medication abortion to an international pharmacy, which will mail her the medication to take at home (even when doing so is illegal). In a post-*Roe* world, one could also imagine a similar setup of providers or private citizens mailing abortion medication from unrestrictive states to women in restrictive states for them to take at home illegally.[351]

The greater reliance on self-managed abortion will require antiabortion states to change their strategy for criminalization. Historically, it has been untenable to criminalize women for obtaining an abortion.[352] The public simply found it unpalatable. The vast majority of abortion laws instead criminalize providers.[353] However, states may no longer be able to effectively criminalize providers who help women self-manage abortion because those providers will be outside of their jurisdiction.[354] This is the same reason that

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[346] *When Prosecutors Jail a Mother for Miscarriage*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html.

[347] Donley, CORNELL, *supra* note 87, at 174-75; *see also See* Rachel Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 1, 6 (2017), https://www.guttmacher.org/sites/default/files/article_files/abortion-incidence-us.pdf; Rachel Jones, et. al., *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. 16 (Sept. 2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

[348] Donley, CORNELL, *supra* note 87, at 174-75.

[349] Jones, Whitwer & Jerman, *supra* note 4, at 10; *Who Are We*, AIDACCESS, https://aidaccess.org/en/page/561.

[350] Donley, CORNELL, *supra* note 87, at 135.

[351] David S. Cohen, Greer Donley & Rachel Rebouche, *The New Abortion Battleground*, forthcoming COLUM. L. REV., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931

[352] Oberman, *supra* note 312, at 5 (explaining that the antiabortion movement's "official position is that women are abortion's "second victims," deserving compassion rather than punishment.").

[353] *Id.*

[354] States will surely attempt to criminalize conduct outside of their borders, but genuine legal questions exist as to whether they have that authority *See* Cohen, Donley & Rebouche, *supra* note X.

no one has been able to stop AidAccess from its operations. AidAccess continued to provide services even after the Food & Drug Administration issued a warning letter.[355] Because the FDA was unable to reach the organization, it started reaching patients themselves, seizing their medication, and blocking their payments.[356] At least one instance exists where prosecutors investigated a woman for illegal abortion after her medication was seized.[357] If states want effective abortion restrictions without a self-management loophole, they will most likely need to criminalize those who have abortions.[358]

Criminalizing self-managed abortion, however, will be logistically challenging—most self-managed abortions happen in a person's own home where their privacy is protected.[359] But a small percentage of women will need additional medical care: "When illegal abortion goes wrong, women wind up in the emergency room, bleeding."[360] Even when the most effective medication abortion protocols are used perfectly with a provider's assistance, roughly 1% of women will have incomplete abortions and closer to 5% will seek out additional care.[361] Self-management without a provider's involvement may result in worse outcomes because people may "take the wrong drugs at the wrong dosage too late into pregnancy, all of which puts them at risk of hemorrhage and incomplete miscarriage."[362] Typically, incomplete abortion is treated at a hospital with a surgical procedure to remove the retained tissue.

In states where abortion is illegal, ideological hospital staff may be eager to report people they suspect self-managed abortion.[363] But one serious practical obstacle exists: incomplete abortions look exactly like incomplete miscarriages. Not only are the symptoms and presentation the exact same, as of right now, there is no clinical mechanism to test someone for abortion-

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355 Warning Letter from FDA to Aid Access. Food & Drug Admin. (March 8, 2019), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/aidaccessorg-575658-03082019.

356 Sarah McCammon, *European Doctor Who Prescribes Abortion Pills to U.S. Women Online Sues FDA*, NPR (Sept. 9, 2019) https://www.npr.org/2019/09/09/758871490/european-doctor-who-prescribes-abortion-pills-to-u-s-women-online-sues-fda.

357 *Id.*

358 Oberman, *supra* note 312, at 6 ("The advent of abortion drugs complicates the problems of detecting and enforcing abortion laws because there are no doctors involved.").

359 Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in An Era of Self-Managed Care*, 107 CORNELL L. REV. (forthcoming 2022).

360 Oberman, *supra* note 312, at 5.

361 Donley, CORNELL, *supra* note 87, at 125-28.

362 Oberman, *supra* note 312, at 5; Ahmed, *supra* note X, at 1145 ("the unmonitored use of abortifacients can result in abortions when the pregnancies are outside of the legal or medically proscribed period for an abortion to take place.").

363 "There have been several cases where hospital workers have called the police on patients after suspecting intent to end their pregnancy, calling patient-provider confidentiality into question." Gabriela Weigel, Laurie Sobel Follow, and Alina Salganicoff, *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, KAISER FAM. FOUND (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/ [Hereinafter *Understanding Pregnancy Loss*].

inducing drugs taken buccally.[364] Thus, there will be no way to tell if a person who appears at the hospital with pregnancy-related bleeding is experiencing miscarriage or complications from a self-managed abortion.

In a way, medication abortion returns us to the late 1800s—a time in which the line between miscarriages and abortions was blurred. Except this time, the difficulty in distinguishing is much more likely to mean increased suspicion surrounding pregnancy loss and villainization of suspected abortions as opposed to the acceptance of both.[365] Indeed in El Salvador, where abortion is illegal, hundreds of women have been prosecuted for miscarriages and stillbirths because of suspected abortion.[366] An investigation of these prosecutions showed that every single one involved a provider in a public hospital reporting an indigent, non-paying patient.[367] Poland, another country where abortion is illegal, recently announced that it would create a register where doctors are required to report all known pregnancies and miscarriages, which scholars were quick to point out could be used to identify and prosecute self-managed abortion.[368]

Like it is in El Salvador, "the emergency room will host a crime scene investigation. Doctors will find themselves torn between strong norms protecting confidentiality and the pressure to see their patients as criminals."[369] Even with *Roe* on the books, we are already seeing this unfold in the United States.[370] An Iowa woman was prosecuted after she fell down the stairs and confided in a nurse that the pregnancy had been unplanned and she had considered abortion.[371] As noted above, Lizelle Herrera was arrested after hospital staff reported her miscarriage to authorities as suspected abortion.[372]

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[364] Donley, CORNELL, *supra* note 87, at X. It is possible that a vaginal application of the drugs will leave traces behind that are detectable.

[365] Suspicion did not seem to surround pregnancy loss during the late 1800s and early 1900s. *See* FREIDENFELDS, *supra* note 14, at 27 (explaining the honor in acting to space out pregnancies to preserve the woman's and children's health); Katherine Parkin, *"Joy Turned to Sorrow": Stillborns in Howard County, Indiana, 1890-1940*, 45(1) J. OF FAMILY HIST. 64, 67 (2020) ("community newspapers never reflect a suspicion that women who delivered stillborns had intentionally terminated their pregnancies").

[366] Elisabeth Malkin, *They Were Jailed for Miscarriages. Now, Campaign Aims to End Abortion Ban*, N.Y. TIMES (April 9, 2018), https://www.nytimes.com/2018/04/09/world/americas/el-salvador-abortion.html ("In El Salvador, where a total ban on abortion leads to an immediate suspicion of women whose pregnancies do not end with a healthy baby.")

[367] Michelle Oberman, *Abortion Bans, Doctors, and the Criminalization of Patients,* 48 HASTINGS CENTER REPORT 5, 5 (2018).

[368] Weronika Strzyżyńska, *Poland Plans to Set Up Register of Pregnancies To Report Miscarriages*, THE GUARDIAN (Dec. 3, 2021), https://www.theguardian.com/global-development/2021/dec/03/poland-plans-to-set-up-register-of-pregnancies-to-report-miscarriages.

[369] Oberman, *supra* note 312, at 6.

[370] Gabriela Weigel, Laurie Sobel, Alina Salganicoff, *Criminalizing Pregnancy Loss and Jeopardizing Care: The Unintended Consequences of Abortion Restrictions and Fetal Harm Legislation*, 30 WOMEN'S HEALTH ISSUES 143 (2020).

[371] *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy…Seriously*, ACLU (Feb. 11, 2010), https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously.

[372] Baker, *supra* note X.

And many other U.S. cases exist where the discovery of self-managed abortion occurred in an emergency room and led to prosecution. A mother in Pennsylvania was sentenced to eighteen months in prison for buying medication abortion online for her daughter after an ER visit.[373] Kenlissia Jones and Purvi Patel were charged with murder after self-inducing an abortion later in pregnancy and seeking medical care.[374] Other cases exist.[375] Without any constitutional protection for abortion, all pregnancy losses will be subject to even greater scrutiny.

We know that implicit bias, classism, and racism will play a huge role in which women are suspected and investigated, just as prosecutors already target marginalized women when they criminalize drug use in pregnancy. Those least likely to be suspected of abortion are those who were actively trying to become pregnant, already sought prenatal care, and showed up to the hospital at the advice of their OBGYN—a group much more likely to be wealthy, educated, white women.

Women who have not yet obtained prenatal care will likely be prime suspects of self-managed abortion. But most pregnancy losses occur within the first eight weeks, often when one might be considering abortion for an unintended pregnancy, but before OBGYNs actually schedule the first prenatal appointment.[376] With almost 50% of U.S. pregnancies unintended, and 30% of women who continue their pregnancy reporting that they considered abortion, the prenatal care proxy will be extremely overbroad.[377] Plus, lack of insurance delays prenatal care for many. In states that have not expanded Medicaid access, poor women (who are predominately women of color) cannot sign up for Medicaid coverage for pregnancy until after they are pregnant,[378] a delay that partially explains why women of color are more likely to receive no or late prenatal care.[379] A recent Propublica article explained that

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373 Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES (Sept. 22, 2014), https://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html.

374 *NAPW Decries Arrest of Georgia Woman as 'Murderer' for Having an Abortion*, NAT'L ADVOCATES FOR PREGNANT WOMEN (June 9, 2015), https://www.nationaladvocatesforpregnantwomen.org/napw-statement-napw-decries-arrest-of-georgia-woman-as-murderer-for-having-an-abortion/.

375 Mark Joseph Stern, *A Quiet Victory*, SLATE (June 5, 2014), https://slate.com/human-interest/2015/06/jennie-linn-mccormack-case-court-strikes-down-idahos-abortion-laws.html.

376 Jade M. Shorter et al., *Early pregnancy care in North America: A proposal for high-value care that can level health disparities*, 104 CONTRACEPTION 128, 129 (2021).

377 *Understanding Pregnancy Loss*, *supra* note 329.

378 Nina Martin & Julia Belluz, *The Extraordinary Danger of Being Pregnant and Uninsured in Texas*, PROPUBLICA (Dec. 6, 2019), https://www.propublica.org/article/the-extraordinary-danger-of-being-pregnant-and-uninsured-in-texas.

379 Samantha Artiga et al., *Racial Disparities in Maternal and Infant Health: An Overview*, KAISER FAM. FOUND. (Nov. 10, 2020), https://www.kff.org/report-section/racial-disparities-in-maternal-and-infant-health-an-overview-issue-brief/.

in Texas, about 21% of women do not access prenatal care until the second trimester and 10% do not start until the third trimester, if at all.[380]

A failure to have the "appropriate" grief response to pregnancy loss—or worse, a response of relief—will also likely create a suspicion of self-managed abortion. But once abortion is illegal, miscarriages will more often occur in unwanted pregnancies,[381] meaning more people will feel relief after miscarriage, just as they did before abortion was legal.[382] And as discussed in Section II, a person's emotional reaction to the ending of a pregnancy is not necessarily connected to its cause—people may grieve abortions and feel grateful for miscarriages. "The prosecution of women for self-inducing abortion or abandoning a stillbirth represents a moral panic rooted in the idea that women who are pregnant must behave in line with a true maternal instinct."[383]

Early losses are not the only ones that will be scrutinized. The line between abortion and pregnancy loss can similarly be blurry for later losses. The Chrissy Teigen example is illustrative. The media widely reported her son's death as a pregnancy loss. But this characterization assumes that he died independently from the placental abruption while still in the womb. This fact has very little impact on the experience of losing a wanted pregnancy, but it is the technical difference between a stillbirth and an induction abortion. When labor is induced before natural fetal death, it is considered an abortion.[384] In Teigen's case, the abortion would likely have been performed because her son was too premature to survive outside of the womb, and she was losing an enormous amount of blood in the meantime.[385] Teigen's account never categorizes her loss or explicitly stated whether her son had already died before labor began. However, many of her statements suggest that labor was induced before his death and that he died during or after birth as part of an induction abortion.[386]

In a post-*Roe* world, this blurriness will provide additional reason for states to question second- and third-trimester pregnancy losses. Though medication abortion is only approved to terminate pregnancies in the first trimester, many women self-managing, who may not know how far along they are, have used it much later, often well into their second or third trimesters. When that happens, it will typically induce labor of an incredibly premature

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380 Martin & Belluz, *supra* note 335.
381 FREIDENFELDS, *supra* note 14, at 144.
382 *Id.* at 139.
383 Ahmed, *supra* note X, at 1146.
384 *See induction abortion*, U. Michigan Health, https://www.mottchildren.org/health-library/tw2562.
385 Teigen, *supra* note 3.
386 Teigen implied in numerous locations that Jack did not die before labor was induced. *See* Teigen, *supra* note 3. ("a boy that would have never survived in my belly"); *Id.* ("After a couple nights at the hospital, my doctor told me exactly what I knew was coming — it was time to say goodbye. He just wouldn't survive this, and if it went on any longer, I might not either."); *Id.* ("I stupidly compared it to dogs I had "put down" in the past — how I never wanted to let go until we absolutely knew it was time, that they were suffering far too much.").

fetus, who may or may not be able to survive outside the womb. In a famous case, Purvi Patel was arrested and convicted of feticide and child abuse after her self-managed abortion led to the live birth of a barely viable baby who died on her bathroom floor. Patel needed urgent medical attention for retained tissue and proceeded to the hospital, where she was immediately suspected of self-management. An investigation led detectives to find baby's body and the ruminants of the medication she had ordered online. After spending two years behind bars, her feticide conviction was overturned, but this and many other similar cases suggest that premature labor, late miscarriage, and stillbirth will be investigated in certain situations.

Given this future where abortion and pregnancy loss are even further entangled, we should expect more prosecutions of adverse pregnancy outcomes. Undoubtably, some people will be prosecuted who genuinely did not end their pregnancy, and many more pregnancy loss patients will endure questioning and scrutiny that adds to their anxiety, self-blame, and grief. This is not to suggest that abortion patients are more deserving of this investigation and criminalization—they are not—but to highlight that any pregnancy related criminalization harms *all* pregnant people, not just abortion patients.

2. Abortion Regulations' Unintended Impact on Pregnancy Loss

Criminalization is not the only way that abortion restrictions harm patients suffering pregnancy loss, further underscoring that these communities already share an interest in fighting abortion restrictions. For instance, byzantine and onerous abortion laws can delay treatment when pregnancy loss is near certain, but viability has not been entirely ruled out. Many women learn during their first ultrasound that their pregnancy is measuring weeks behind where it should be.[387] When the woman is certain of her last menstrual period or the day she ovulated, this is almost always an indication of a missed miscarriage. However, many providers will force the patient to wait two weeks for a second ultrasound to confirm that the pregnancy is not developing; this is done to ensure that a patient is not mistaken about her last missed period and earlier in her pregnancy than believed.[388] Without that additional failsafe, the providers fear that treating the miscarriage would be confused with abortion, which comes with legal risks.[389] But forcing someone who is certain of her last missed period—and therefore knows with confidence that she is experiencing a miscarriage—to wait two weeks for treatment is emotionally

[387] Colleen Judge-Golden & Rachel Flink-Bochacki, The Burden of Abortion Restrictions and Conservative Diagnostic Guidelines on Patient-Centered Care for Early Pregnancy Loss, 138 J. Obstetrics & Gynecology 467 (2021).
[388] *Id.* at 468.
[389] *Id.*

scarring and serves no clinical purpose.[390] Often, the only places that will treat these women immediately are abortion clinics.[391]

The same effect has been observed with late miscarriage or stillbirth. Catholic hospitals' refusal to perform abortions has a long and well-documented history of delaying care for pregnancy loss, creating life-threatening medical emergencies.[392] For instance, if a woman's water breaks long before viability, the standard of care is to induce labor or surgically remove the fetus—the fetus will not be able to survive long enough to live outside the womb, and the woman in the meantime risks a life-threatening infection. However, religious hospitals refuse to perform this medically necessary care if there is any evidence of cardiac activity, risking the woman's health and prolonging her suffering even though the fetus will not survive.[393] Physicians have described numerous cases in which women who are septic and near death with fetal parts half way through their cervixes being denied surgical treatment because of a faint fetal heartbeat.[394]

These horror stories will be more common if abortion is not just inconsistent with hospital policy, but is illegal. Even secular hospitals must evaluate the legal risks in treating an inevitable miscarriage with abortion. In Poland and Ireland, where abortion has been illegal, women have died waiting for their fetus's heart to stop beating.[395] And already, women in Texas have reported harrowing interstate travel for abortions in cases of life-threatening ectopic pregnancy and early labor.[396] One story involved a Texan boarding a flight while in labor with a non-viable fetus because the hospital refused to treat her with a life-saving abortion.[397] To be clear: in a post-*Roe* world, this is how pregnant people will die. Hospitals will delay care too long and not be able to save the person's life; or her life will be saved, but her uterus will be sacrificed, along with her future fertility.

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[390] *Id.* at 470. ("By prioritizing 100% diagnostic certainty over patients' personal preferences and risk tolerance, early pregnancy loss guidelines unnecessarily and harm- fully restrict patient autonomy.")

[391] *Id.*

[392] *See e.g.*, Lori Freedman et al., *When there's a heartbeat: miscarriage management in Catholic-owned hospitals*, 98 AM. J. PUBLIC HEALTH 1774 (2008); Lee Hasselbacher et al., *"My Hands Are Tied": Abortion Restrictions and Providers' Experiences in Religious and Nonreligious Health Care Systems*, 52 PERSPECTIVES SEXUAL REPRODUCTIVE HEALTH 107 (2020).

[393] A new report suggests that non-Catholic hospitals in the South similarly limit access to medically necessary abortions. THE SOUTHERN HOSPITALS REPORT, COLUMBIA LAW SCHOOL (2020), ttps://lawrightsreligion.law.columbia.edu/content/southern-hospitals-report.

[394] Freedman, *supra* note 348.

[395] Vanessa Gera, *Pregnant Woman's Death Puts Spotlight On Polish Abortion Law*, AP NEWS (Nov. 2, 2021), https://apnews.com/article/abortion-business-poland-reproductive-rights-warsaw-b341c34d236d51fdda36c2fc7a8aa88c; Jessica Valenti, *Justice for Savita*, the Nation (Nov. 15, 2012), https://www.thenation.com/article/archive/justice-savita/.

[396] Caroline Kitchener, *The Texas Abortion Ban Has A Medical Exception. But Some Doctors Worry It's Too Narrow To Use*, THE LILY (Oct. 22, 2021), https://www.thelily.com/the-texas-abortion-ban-has-a-medical-exception-but-some-doctors-worry-its-too-narrow-to-use/

[397] Sarah Mccammon & Lauren Hodges, *Doctors' Worst Fears About The Texas Abortion Law Are Coming True*, NPR (March 1, 2022), https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months.

Abortion laws not only delay the treatment of pregnancy loss, they also restrict the types of treatments available. As Donley has argued, regulations that limit the distribution of an abortion drug, mifepristone, also make the drug nearly impossible to prescribe for missed or incomplete miscarriage, though it is also the more effective treatment.[398] As described above, some women experiencing miscarriage may need help starting or finishing the process of expelling the dead pregnancy tissue.[399] Healthcare providers can prescribe medication for missed or incomplete miscarriages. The medications used for miscarriage are the same medications used for abortion.[400] Typically, providers prescribe the drug misoprostol in these instances because there are no limitations on its use, and it is therefore much easier to access. But recent research has shown that when misoprostol is used in combination with mifepristone (the traditional abortion regimen), it is more effective.[401] The problem is that mifepristone is the only FDA-approved drug to terminate a pregnancy, and it has been subject to a variety of regulatory hurdles that make it difficult for providers to prescribe.[402] As a result, it is often not an option for miscarriage management. There has been a recent effort to highlight that the regulations limiting the distribution of mifepristone—which are unnecessary in their own right[403]—are also harming providers ability to treat miscarriage.[404] Both groups could work together to deregulate mifepristone.

If *Roe* is reversed and abortion becomes illegal, accessing any medications to treat missed or incomplete miscarriage might be difficult because of the drug's association with abortion. For instance, in Malta, where abortion is illegal, physicians do not prescribe medication or allow surgery to speed up a miscarriage.[405] Those options are only given after 3-4 weeks have passed and the woman is facing health risks.[406] As mentioned, in Texas, many pharmacies have stopped filling prescriptions for drugs used to treat miscarriage out of the fear that they could be sued under abortion laws.[407] Even worse, many states have introduced laws that would ban all abortion inducing drugs in their state, meaning that these drugs would immediately become unavailable for miscarriage management.[408] Thus, in antiabortion states,

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398 Donley, CORNELL, *supra* note 87, at 137-38.
399 *Id.* at 138.
400 *Id.*
401 *Id.*
402 *Id.*
403 *Id.*
404 Amanda Allen and Cari Sietstra, *Miscarriages Are Awful, and Abortion Politics Make Them Worse*, N.Y. TIMES (June 22, 2021), https://www.nytimes.com/2021/06/22/opinion/miscarriage-abortion.html.
405 Jessica Grosse, *Overturning Roe Will Make Miscarriage Care Worse*, N.Y. TIMES (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/opinion/roe-miscarriage-health.html
406 *Id.*
407 *See* Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NPR (May 10, 2022), https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages.
408 Caroline Kitchener, Kevin Schaul and Daniela Santamariña, *The Latest Action On Abortion*

providers may decide that it is too risky to treat miscarriage, instead forcing women to sit with the delayed trauma of prolonged loss as they wait for their bodies to recognize that their baby has died.

In addition to regulation of abortion medication, bans on abortion procedures also greatly impact the treatment of miscarriage and stillbirth. First, even though the surgical procedures used for abortion are also helpful treatment for women experiencing pregnancy loss, residency programs without abortion training are much less likely to teach them. As a result, physicians without abortion training are three times less likely to offer surgical procedures to help women experiencing pregnancy loss, even though many women prefer surgical removal over induction and birth of a dead baby.[409] Recent laws that ban particular abortion procedures, like the bans on the most common second-trimester abortion procedure (D&E), are likely to have a chilling effect of physicians offering D&Es to women experiencing pregnancy loss, even though the laws only preclude D&Es for live fetuses.[410] In a post-*Roe* world, D&Es may not be taught or performed in parts of the country, forcing women with late miscarriages or early stillbirths to deliver their dead babies. An antiabortion movement that has recently pushed perinatal hospice programs as an alternative to abortion in the context of fetal anomaly is unlikely to worry about this. To them, it is better for women's "mental health" to force pregnancy, labor and delivery, and the death of a child rather than anything that could resemble abortion.[411]

Abortion laws do not exist in a vacuum; they have unintended effects that harm all pregnant people, especially those experiencing pregnancy loss. And abortion bans mean more pregnancy losses, right as the best treatments disappear. "[A] substantial proportion of abortions represent what would have been miscarried pregnancies in a prior generation;"[412] post-*Roe*, some of these miscarriages will again occur. Also, especially in cases of fetal anomaly, the illegality of abortion means an increase in stillbirths and infant deaths.[413] Given that fetal anomalies affect 3-5% of all pregnancies, these cases will become increasingly likely.[414] Finally, and perhaps most importantly, without abortion access, more high-risk pregnancies will exist, suggesting that maternal mortality will also increase.[415]

Legislation Across The States, WASH. POST (last updated May 2, 2022), https://www.washingtonpost.com/nation/interactive/2022/abortion-rights-protections-restrictions-tracker/.

409 *Understanding Pregnancy Loss*, *supra* note 329.

410 *Id.;* Weigel, Sobel & Salganicoff*, supra* note 309.

411 Donley & Lens, *supra* note X, at 181.

412 FREIDENFELDS, *supra* note 14, at 144.

413 Donley & Lens, *supra* note 152, at 2171, n.183.

414 Donley, MINN., *supra* note 101, at 181.

415 Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019 (2021).

B. Normalizing all Pregnancy Outcomes

Each year in the United States, millions of pregnancies end in miscarriage.[416] Hundreds of thousands of pregnancies each year end with abortion.[417] Tens of thousands of others end in stillbirth.[418] Other babies are born alive, but not expected to live long. A large proportion of people will experience at least one of these endings in their reproductive lives, along with pregnancies that end with the birth of a living, healthy baby. A natural reproductive life involves a variety of pregnancy outcomes. It is not abortion *or* a healthy baby *or* pregnancy loss. "Despite the rhetoric of the antiabortion movement drawing lines between women who are mothers and women who abort pregnancies, in reality pregnancy loss or termination and motherhood often coexist for the same woman."[419] It is abortion *and* pregnancy loss *and* healthy babies all in one lifetime.

Abortion is not usually thought of as a pregnancy loss, but it easily qualifies as a pregnancy ending and is just as common. Normalizing all pregnancy endings—those that end with a live birth and those that don't—will go a long way to end the shame and stigma that surround both pregnancy loss and abortion. "Re-integrating abortion with other common pregnancy outcomes advances our thinking about what a 'normal' pregnancy is. As a result, we can have a much richer idea of the possible scenarios when a woman finds out she is pregnant—and that has big payoffs for everybody involved, not only advocates for abortion rights."[420] When pregnancy loss is normalized, abortion is no longer "an abrupt interruption before a natural goal is reached" that "subverts nature."[421] To the contrary, it is just one of the many ways pregnancies end before birth. "While our first goal may be to work on bringing abortion in from the margins, we will eventually need to find ways to enhance our shared consciousness of the full range of a real pregnancy's possible outcomes."[422]

Women after miscarriage and stillbirth may not appreciate being associated with abortion, possibly resenting the decision to voluntarily end a pregnancy. But acknowledging both abortion and pregnancy loss as pregnancy endings does not conflate them. Abortion, miscarriage, and stillbirth are different, albeit not nearly as different as mainstream discourse implies.

Normalizing all pregnancy outcomes should help alleviate some of the stigma associated with outcomes other than live birth. The current "normal" pregnancy ending of a "warm and healthy infant in its mother's arms" means that "anything else at all is a kind of aberration," leading to self-blame and silence. The emphasis should instead be that there is more than one normal

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416 ZUCKER, *supra* note 140, at 17.

417 *CDCs Abortion Surveillance System FAQs*, CDC, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

418 *What is Stillbirth*, CDC, cdc.gov/ncbddd/stillbirth/facts.html (last accessed Jan. 2, 2022).]

419 WITHYCOMBE, *supra* note X, at 33.

420 *Tone, Visibility, and Scope in Pro-Choice Advocacy*, *supra* note 67, at 28.

421 *Id.* at 23.

422 *Id.* at 24.

ending to pregnancy.[423] That ending may be undesired or wanted, but it is normal. And the more that all pregnancy outcomes (from abortion, to pregnancy loss, to premature birth) are normalized, the less women will feel isolated and stigmatized for non-"normal" outcomes. At the very least, raised awareness should help with some of the shock that women can feel after miscarriage and stillbirth, shock that is likely at least somewhat caused by the abstract single-path idea of pregnancy.

Plus, normalizing all pregnancy outcomes could help fight criminalization efforts by making it more difficult for prosecutors to prove causation after pregnancy loss. For instance, in one "homicide by child abuse" case after stillbirth, the "prosecution advanced a seriously distressing proposition related to perfection in pregnancy" that assumed "all pregnancies produce healthy babies and that absent so-called depraved conduct on the part of pregnant women, stillbirths do not occur."[424] That's obviously not true. Many people who smoke, use recreational or pharmaceutical drugs, or consume alcohol in pregnancy go on to have healthy babies; many people who do none of those things experience miscarriage and stillbirth. Causation should be difficult to prove—especially when the burden of proof is beyond a reasonable doubt. This reality, however, is hidden by silence and stigma.

The abortion rights movement could promote this normalization in a variety of ways. In litigation, abortion rights groups can better acknowledge the reality of pregnancy loss. When describing the burdens on women if forced to continue a pregnancy, they should not only mention those burdens related to giving birth and raising a child. Rather, some forced to continue a pregnancy will instead bear the burden of pregnancy loss. By reinforcing this possibility in abortion messaging, it will help to break this abstract single-path idea of pregnancy within abortion discourse.

Another example of normalization is a recent bill filed in Congress to create paid leave after pregnancy loss. The "Support Through Loss" Act provides three days of paid leave after a pregnancy loss, an unsuccessful assisted reproductive technology attempt, a failed adoption match, a failed surrogacy arrangement, or "a diagnosis or event that impacts pregnancy or fertility."[425] This last instance is very broad, seemingly including a fetal diagnosis that may motivate an abortion. The bill is admirably inclusive, recognizing that growing one's family is not always easy, and that abortion may be involved. We also admire the bill in California that prohibits any prosecutions on the basis of adverse pregnancy outcome—a term that encompasses pregnancy loss and abortion.[426] These efforts have an important

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[423] FREIDENFELDS, *supra* note 14, at 193 ("We need a new picture of pregnancy that includes the 70 percent of conceptions that do not make it to nine months.").

[424] Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47(6) HASTINGS CTR. REPORT S19, S21 (2017).

[425]https://pressley.house.gov/sites/pressley.house.gov/files/Support%20Through%20Loss%20Act%20Bill%20Text.pdf.

[426] Cal. AB 2223, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2223

destigmatizing effect, and abortion rights groups should support efforts like these.

Normalization would also involve an emphasis that abortion is not just health care, but one part of reproductive life—a life that can include infertility, pregnancy, fetal anomalies, miscarriage, stillbirth, childbirth, abortion, nursing, post-partum care, etc. This broader emphasis of abortion as just one piece of the reproductive puzzle is especially important because women can and do experience numerous of these outcomes. The reproductive justice movement is already doing some of this work, highlighting that the right not to have a child is not any more important than the right to have a child and to parent that child with dignity.[427] As mentioned, though, the movement has somewhat shied away from miscarriage and stillbirth, with only a few mentions within its literature and advocacy, presumably due to fears related to personhood. If the reproductive justice community could "dispel this fear [of personhood] and overcome our paralysis, there are numerous ways feminists can help alleviate some of the unnecessary suffering and alienation that now accompanies pregnancy loss."[428]

Moreover, this fear of personhood makes it extremely difficult to rally support for legal measures that could help prevent stillbirth. It's almost impossible to say the word "baby" or even "fetus" without triggering fears of the slippery slope, especially now as abortion rights are crumbling. Normalization and integration of pregnancy loss and abortion rights communities can specifically help with pregnancy loss legal measures, highlighting that both sides have an opportunity to gain from this partnership.

Family planning providers can also play a role in this normalization by expanding their scope of practice. One innovative approach is being tested at the University of Pennsylvania's Division of Family Planning.[429] The family planning center modeled itself after early pregnancy care centers that exist in other countries.[430] The center not only provides family planning counseling and abortions, but also prenatal care for pregnant people who are too early in their pregnancies for their first OB appointment. The primary issue they see is early pregnancy bleeding. Because their facilities already have ultrasound imaging, they can easily determine whether the bleeding is indicative of a miscarriage, helping women avoid treatment at an emergency department, where women (especially women of color) report greater dissatisfaction with their care.[431] And because pregnancy loss management and abortion care are treated with the same medication and surgical procedures, their providers are more than competent to treat these patients if a loss is occurring.[432] Not only does this model integrate abortion, prenatal care, and pregnancy loss management in an interesting way, but it would also provide a safe haven for

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[427] Lens, WASH. U., *supra* note 13, at 1067-68.
[428] LAYNE, *supra* note 147, at 241.
[429] Shorter et al., *supra* note 333, at 128.
[430] *Id.*
[431] *Id.* at 129.
[432] *Id.* at 129-30.

pregnant people experiencing a suspected loss who might be worried about criminalization. Indeed, in a post-*Roe* world, providers in red states might establish similar centers with the goal of treating both pregnancy loss and complications from self-managed abortion without asking questions or ever knowingly offering abortion care.

C. Rejoinder to the Woman-Protective Rationale

"It has long been a truism of the abortion debate … that those who support abortion rights concentrate on women and those opposed focus on the fetus."[433] But antiabortion advocates started to deviate from this truism decades ago to strategically focus on women *and* the fetus.[434] This shift started before *Roe* and significantly took hold after the Supreme Court decided *Casey*.[435] When the Court agreed to hear *Casey*, Americans United for Life had "hoped to legislate and litigate *Roe's* reversal; instead *Casey* entrenched *Roe* and explained the abortion right as protecting women's liberty as equal citizens."[436] In the 1990s, "the nation was coming to understand women as constitutional rights holders differently than at the time of *Roe*."[437] *Casey* was a reflection of those changing norms—in upholding the right to an abortion before viability, the Court articulated the right as necessary for women "to participate equally in the economic and social life of the Nation."[438]

The antiabortion movement then realized that rebranding itself as pro-woman was necessary to win public support.[439] As Reva Siegal notes: "Seeking to respond to *Casey*—and to appropriate the political authority of feminism—antiabortion advocates increasingly began to argue that women's liberty, equality, and health required banning abortion."[440] Under the guise of "feminist frames," it "called this new generation of health-justified abortion restrictions pro-woman, pro-life laws."[441] Within a decade of the *Casey* decision, "abortion foes launched a fresh war against legal abortion by presenting themselves as the true protectors of women's health."[442] It focused on its success in *Casey*, emphasizing the need for informed consent and waiting period statutes to protect women from uninformed decisions they would later regret.[443] Common second-trimester abortion procedures have been banned to protect women from supposed psychological distress.[444]

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433 Frances Kissling, *Is there Life after Roe, How to Think about the Fetus*, 25 Conscience 10 (2004).
434 Reva B. Siegal, *Why Restrict Abortion? Expanding the Frame on June Medical*, 2020 SUP. CT. REV. 277, 277 (2020).
435 MARY ZIEGLER, AFTER ROE 173-75 (2015).
436 Siegal, *supra* note 386, at 296.
437 *Id.* at 4.
438 *Casey*, 505 U.S. at 856.
439 MARY ZIEGLER, ABORTION IN THE LAW IN AMERICA 145 (2020).
440 Siegal, *supra* note 386, at 17.
441 *Id.* at 4.
442 ABORTION IN THE LAW IN AMERICA, *supra* note 391, at 145.
443 *Id.*
444 Donley & Lens, *supra* note 152, at 2174-79.

The rise of the woman-protective rationale is well documented in the legal scholarship.[445] Many have called attention to its reliance on sexist stereotypes.[446] Most of the laws are based on the idea that pregnant women are vulnerable to the undue influence of abortion providers, and that they need to be encouraged toward their natural role as mothers because of their inevitable regret and psychological distress to abortion.[447] Though the changed makeup of the Supreme Court has made antiabortion activists more shameless about promoting fetal life above all else,[448] the woman-protective rationale remains a vital part of anti-abortion strategy and legislation.[449] And more importantly, the anti-abortion movement has long seen this rationale as the key to "changing hearts and minds."[450] "By stressing arguments about the damage that abortion did to women, pro-lifers hope to convince voters that most movement members were more compassionate, honest, and reasonable than their opponents."[451] The narrative shift made an impact: "The appeal to traditional roles in the language of feminism was powerful, taking persuasive authority from each."[452]

In essence, we suggest that the abortion rights movement consider pursuing a mirror strategy—that in light of this potential partnership with the pregnancy loss community, there is an opportunity for greater recognition of the fetus in traditional abortion rights messaging. We are not the first to argue that the abortion rights movement needs to find a way to account for the fetus. As described below, abortion providers started this discussion a decade ago. However, we are the first to bring the debate into the legal scholarship and crucially, to argue that recognizing subjective, relational fetal value is distinct from legal personhood, which is the main reason supporters avoid it.

In 2011, Francis Kissling—the former president of Catholics for Choice and director of an abortion clinic—argued that the abortion rights movement should better account for the fetus in its messaging. She noted that "people can hold contradictory things and complex values at the same time" and that an abortion rights movement that is "able to talk both about fetuses and their value and about women is… going to win over the majority of the American people."[453] Kissling recommended working toward "the development of an abortion praxis that combined respect for the fundamental right of women to choose abortion with an ethical discourse that included the exploration of how other values might also be respected, including the value

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445 *See e.g.,* Siegal, *supra* note 386, at 4.

446 *See e.g., id.* at 4. ("As movement sources show, pro-woman, pro-life laws restrict abortion to protect a pregnant woman's health *and* to protect unborn life, reasoning from the traditional sex-role-based assumption that becoming a mother promotes a woman's "health.")

447 *Id.*

448 *See* Brief for Amici Curiae Scholars, *supra* note 268.

449 Donley & Lens, *supra* note 152.

450 ABORTION IN THE LAW IN AMERICA, *supra* note 391, at 144-45.

451 *Id.* at 144.

452 *Id.* at 21.

453 Francis Kissling, *Time For A New Approach To Abortion Rights*, NPR (Feb. 21, 2011), https://www.npr.org/2011/02/21/133941176/Op-Ed-Time-For-A-New-Approach-To-Abortion-Rights.

of developing human life."[454] Jeannie Ludlow supported Kissling's vision, suggesting that "a more accurate understanding of abortion, which includes a full range of women's relationships to their fetuses and how these various relationships shape individual abortion experiences" could "begin the process of deconstructing the dichotomies that characterize the U.S. abortion debate and strengthen general public support for even challenging situations."[455] Fundamentally, they argued that the complete avoidance of the fetus in canonical abortion rights discourse was alienating many people who did not see abortion as a black and white issue.

Kissling's statements prompted a backlash among those supporting abortion rights,[456] but providers continued Kissling's message. For instance, a group of OBGYNs and abortion providers at the University of Michigan have argued that "[a]cknowledging the fetus, its meaning and value, may also make a powerful contribution to pro-choice discourse."[457] It is not surprising that abortion providers are the ones leading this charge. "Despite the erasure of the fetus in many public prochoice narratives, providers see fetuses every day in their work and are able to process complex and sometimes conflicting ideas about the fetus while remaining resolved and committed to abortion care"[458] In fact, some have even been critical of Kissling's account because they thought it misses the abortion provider experience, which has never been "coarsened toward fetal life" and frequently finds many ways to respect it.[459] But the truth is that the abortion provider narrative is still quite disconnected from the broader national discourse. In fact, providers specifically spoke out because they felt their perspective was marginalized within the broader abortion rights movement.[460]

Despite these nontraditional voices growing louder, the "canonical pro-choice discourse" continues to focus entirely on the woman.[461] This is despite the fact that "the 'keep your laws off my body'" messaging "has, over time, lost some of its impact."[462] "When we talk about abortion only through frames of privacy or autonomy, we create a situation that is in some ways the inverse of a woman's invisibility: now, it is the fetus that is invisible."[463] Failure to acknowledge the fetus "in the course of battling so called 'fetal personhood' initiatives will not be strategic with middle audiences" who see this omission "as disconnected at best, and dishonest or manipulative at worst."[464] "The question for the movement is how you can acknowledge the fetus

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454 *Id.*
455 Ludlow, *supra* note 148, at 28, 43.
456 *Id.* at 29-30.
457 Lisa A. Martin et al., *Dangertalk: Voices of Abortion Providers*, 184 SOC. SCI. & MED. 75, 82 (2017).
458 Becker & Hann, *"it makes it more real," supra* note 60, at3.
459 Joffe, *supra* note 163.
460 Martin et al., *supra* note 409, at 82.
461 *Tone, Visibility, and Scope in Pro-Choice Advocacy, supra* note 67, at 8.
462 *Id.*
463 *Id.* at 16.
464 *Id.* at 9.

appropriately without losing your primary focus on the woman."[465] Just as the antiabortion movement moved to incorporate the visibility of women into their messaging after *Casey*, we suggest that the abortion rights movement can similarly allow the fetus to be visible without undermining its own position. "The goal is to construct a frame that holds not just the fetus, and not just the woman, but the two of them together."[466]

We suggest the answer lies in the lived experience of pregnancy and in how tort law values the fetus: subjectively and in relationship with the pregnant person. As described in Section III, women develop an attachment with the fetus over the course of pregnancy at different rates and for different reasons. If an attachment has formed and that baby dies naturally or through abortion, she grieves the lost relationship—both present and imagined future. It is *her* loss that is compensated if the baby dies, and her grief to carry. The death of the fetus happens in her body. No one can claim to have a greater interest in the fetus than her. "To deny [that social construction of personhood] takes place is simply foolish."[467] Rather, "[a] cross-culturally informed, progressive, 'social constructionist' model of personhood would help feminists deal with the thorny issues of how to reconcile" the moral and social importance of fetuses and an abortion rights stance.[468] By embracing a subjective, relational understanding of fetal attachment, the abortion rights movement can open itself up to recognizing and supporting women through all kinds of emotionally difficult pregnancy endings—miscarriage, stillbirth, and abortion.

Anti-abortion messaging has attempted to use the intuitive conception of separateness to create an adversarial relationship between the separate entities: the woman and the fetus.[469] But that extrapolation is itself counterintuitive. In all other areas of law, parents are presumed to have natural love and affection for their children that make them the best decision makers for their kids.[470] The fact that so many women who terminate identify their pregnancy as a baby and contemplate their relationship to the potential child before terminating "complicate[s] the simplistic politics of abortion by emphasizing the similarities between abortion and motherhood and collapsing the differences between concern for women . . . and concern for fetal life. In other words, . . . abortion as one possible outcome of potential motherhood."[471]

By re-emphasizing the relationship between the woman and her fetus in the context of a wanted pregnancy *and* possibly abortion, it reminds the listener that women consider their options seriously when choosing abortion because it is *their* relationship at issue. The interests of the fetus are often on the forefront of women's minds when considering termination. They are

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[465] *Id.* at 16.
[466] *Id.* at 20.
[467] LAYNE, *supra* note 147, at 241.
[468] *Id.* at 241.
[469] *See* Karpin, *supra* note 56, at 326.
[470] Donley, MINN., *supra* note 101, at 192.
[471] Ludlow, *supra* note 148, at 43-44.

worried about bringing a child into the world when they cannot give it the love, financial security, physical protection, time, or energy they believe their child deserves. They may think they could be a better mother to a future child, who might not exist but for the abortion. And most who have abortions are already mothers; for them, their other children are also central to their decision. In fact, a "high proportion of women cit[e] their obligation to their current children as a primary reason for terminating a pregnancy."[472] Jamie Abrams has described the impossible bind women can find themselves in when they think abortion is the best parenting decision for their living children. In this scenario, which child's best interest should they honor, the living or the unborn?[473] It is ironic that the antiabortion movement paints these parents as villains for trying to do what is best for the kids who already exist.

This reframing of abortion as an act of motherly love (either in the best interests of living children, future children, or even the child aborted) cuts against abortion stigma by challenging the assumption that abortion and motherhood are antithetical.[474] In fact, studies on abortion storytelling show that the predominate, autonomy-based rhetoric of the abortion rights movement are "apparent but not dominate" in women's accounts.[475] Rather, women often discuss their abortion in the context of morality—i.e., that their abortion was morally unremarkable, morally justified, or morally desirable.[476] Moreover, the fact that "many storytellers conceptualized the moral status of their fetus as a life or potential life" was "not incompatible with framing abortion as morally desirable."[477]

This approach has some risks—the main ones being that it reinforces traditional gender norms and the idea of the "good" abortion.[478] It also completely erases those who have abortions to avoid parenthood altogether. However, we are not suggesting that the autonomy-based narrative should disappear; rather, that it can be supplemented with nuance that recognizes that women make abortion choices for a variety of reasons, many of which consider their relationship with the fetus, their living children, and their communities in addition to their own needs and interests. The antiabortion messaging, which frames abortion decisions as selfish, is simplistic and misses this nuance.

Conclusion

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[472] Andrea Becker *My Abortion Made Me a Good Mom': An Analysis of the Use of Motherhood Identity to Dispel Abortion Stigma*, 20 REPROD., HEALTH, AND MEDICINE 219, 225 (2019).
[473] Abrams, *supra* note 56, at 50.
[474] Becker, *supra* note 424, at 234-35
[475] Sarah Larissa Combellick, *"My Baby Went Straight to Heaven": Morality Work in Abortion Online Storytelling,* SOCIAL PROBLEMS, 1, 2 (2021). *See also*, Becker, *supra* note 424, at 235.
[476] Combellick, *supra* note 427, at 2.
[477] *Id.*
[478] *See* SANGER, *The Birth of Death*, *supra* note 45, at 226; Rigel C. Oliveri, *Crossing the Line: The Political and Moral Battle over Late-Term Abortion*, 10 YALE J.L. & FEMINISM 397, 431 (1998).

The "Unborn Children Garden" is located on the grounds of the Buddhist Zojoji Temple in Tokyo, Japan.[479] It is filled with stone Jizo statutes that represent aborted fetuses, miscarriages, and stillborn babies.[480] People "come to stand before these monuments to express their grief, fears, confusions, and hopes of forgiveness."[481] Abortion is entirely legal before twenty weeks in Japan and "is not sundered by the kind of debates about abortion that are common in the West."[482]

As the Garden signifies, pregnancy loss and abortion have much more in common than in contrast. This Article breaks down the presumed tension that has divided abortion rights and pregnancy loss advocates and recasts them as great potential allies in the fight for reproductive justice moving forward. Abortion rights supporters need not fear that any recognition of fetal value—a recognition that the experience of pregnancy loss demands—would cause a slippery slope to fetal personhood under the Constitution. Fetal value within pregnancy loss is subjective and relational, irreconcilably distinct from the fixed and biological understanding of fetal personhood pushed by those opposing abortion. Though some risk exists that this nuance would be manipulated, we explain that the abortion rights movement has more to gain then lose from acknowledging subjective, relational fetal value, especially in a post-*Roe* world where abortion and pregnancy loss are inexorably intertwined.

Changing hearts and minds is imperative post-*Roe*. Abortion rights advocates need to experiment with new narratives that might capture new allies. We suggest a framing that champions both the pregnant person and *her* interest in the fetus, if any interest exists. This framing could appeal to the many people who hold nuanced views on the meaning of pregnancy without also threatening abortion rights.

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[479] Sheryl Wudunn, *In Japan, a Ritual of Mourning for Abortions*, N.Y. Times (Jan. 25, 1996).
[480] *Id.*
[481] *Id.*
[482] *Id.*