

## TORT LAW'S DEVALUATION OF STILLBIRTH

Jill Wieber Lens\*

*In the United States, more than sixty-five babies die daily due to stillbirth—the death of an unborn baby after twenty weeks of pregnancy but before birth. New medical research suggests that at least one-fourth of those deaths are preventable with proper medical care. Stated differently, one-fourth of stillbirths are due to medical malpractice. In almost all states, tort law provides recourse for mothers after the death of their children due to stillbirth.*

*This Article uses feminist legal theory and empirical research of parents after stillbirth to demonstrate that tort law devalues stillbirth. That devaluation is due to the cognitive bias associating stillbirth with women. Historically, stillbirth only appeared in women's claims for emotional distress. Instead of recognizing her child's death, courts treated, and some courts continue to treat, stillbirth as just as a physical manifestation of the woman's emotional distress. Even when modern courts allow a wrongful death claim for stillbirth, properly recognizing stillbirth as the death of a child, they still devalue the parents' loss by characterizing the child as a nameless, genderless "fetus." Also historically, courts were resistant to claims based on relational injuries, another injury stereotypically associated with women. Even though prenatal attachment theory demonstrates a parent-child relationship is lost in stillbirth, some courts are especially reluctant to recognize the relational injury in the context of death before birth. The cognitive bias associating stillbirth with women has also stunted the development of tort recourse for fathers, as it also will for non-biological parents. Fathers, the "forgotten bereaved," are sometimes denied a claim or given a more limited claim.*

*The remedy for this devaluation is a wrongful death claim for the death of a child—not just a fetus—available to both parents, including recovery for the relational injury. Tort law must also guard against possible undervaluation of the parents' injury based on the supposed replaceability of children or the presence of other living children, and against damage caps' mandatory undervaluation of the parents' injury. The Article also explains how these reforms are supported by tort law theories and explains that the wrongful death claim should be available for all stillbirths, not depending on viability. Last, the Article necessarily explains*

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\* Associate Professor of Law, University of Arkansas School of Law, Fayetteville. I would like to thank Martha Chamallas, Mary Ziegler, Aziza Ahmed, Jamie Abrams, Maya Manian, Dov Fox, Todd Pettys, Alena Allen, Luke Meier, Jordan Woods, Carol Goforth, Alex Nunn, and Frank Griffin for their comments on earlier drafts. I am also indebted to those professionals and scholars who study stillbirth, especially Dr. Joanne Cacciatore, all of whom helped me give words to describe the grief parents suffer. I specifically thank Dr. Joyce Nuner for helping introduce me to this important research. I dedicate this Article to my sweet boy in heaven, Caleb Marcus Lens.

*that tort law's proper recognition of stillbirth poses no threat to the legality of abortion.*

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*"I carried you for every second of your life,  
and I will love you for every second of mine."—Unknown*

#### INTRODUCTION

My son, Caleb, died on June 19, 2017. One minute, his heart was beating, and the next, it was not. His father and I held him in our arms while making funeral decisions no parent should ever have to make. We kissed him for the last time and said goodbye.

Not that any child death is normal, but Caleb's death may have been especially abnormal because he died before he was born. Two weeks before we were scheduled to induce labor, at thirty-seven weeks of pregnancy, my placenta completely detached from my uterus, instantly depriving sweet Caleb of oxygen and necessary nutrients. We had gone to the hospital only because I was feeling uncomfortable, not having any idea of the news we were about to receive. But then, the nurses could not find Caleb's heartbeat. Hours and an ultrasound later, the on-call doctor confirmed what we already knew; Caleb had died. The doctor also explained that I was bleeding internally and needed to deliver Caleb as soon as possible. I needed to deliver my son like I had his sisters, but, this time, my son had already died.

I do not remember much of Caleb's delivery due to the drugs my doctor gave me. Some of the painful contractions woke me up momentarily. My husband was sober for all of it. When I woke up, my husband was holding Caleb.

He was beautiful. He was five pounds, fifteen ounces, and nineteen inches long. He had less hair than his sisters, but looked just like them.

Caleb was stillborn. Medically speaking, miscarriage is the loss of pregnancy before twenty weeks gestational age, and stillbirth is loss of pregnancy after twenty weeks of pregnancy, but before birth.<sup>1</sup> Like most parents, I really had no idea what stillbirth was until it happened to my child. The next morning, I sent an email to my assistant—in response to an email asking if the baby had arrived—that I had “miscarried.” But Caleb’s death was not a miscarriage. It was not even a pregnancy loss. I held Caleb in my arms and kissed him good-bye. I buried my son.

Even though he was dead, Caleb was still born. “[I]n stillbirth there is a birth, somebody was born, and someone did the birthing.”<sup>2</sup> Anthropologist Dr. Linda Layne explains that stillbirth “contradicts two fundamental premises of the women’s-health discourse of pregnancy and birth—that women can control their reproduction and that birth is a natural, joyful experience.”<sup>3</sup> I neither chose my placental abruption nor was his birth joyful, although I can now look back and see much joy in the many hours I got to hold him skin-to-skin and to kiss his sweet little face.

I soon learned about the commonality of stillbirths. In 2013, approximately 24,000 babies died due to stillbirth in the United States.<sup>4</sup> That is over 65 babies each day. Other estimates are higher: “[i]n the United States (U.S.), an estimated 70 stillbirths occur each day, on average 25,000 each year.”<sup>5</sup>

From what we know, due to the apparent quickness of my abruption and the lack of bleeding or pain, nothing could have been done to prevent Caleb’s death. My husband and I are comforted by this. Not all parents have that same comfort. Many stillbirths can be prevented. In fact, a 2018 study concluded “approximately one fourth of stillbirths that occur in the United States are potentially preventable” through medical care.<sup>6</sup> Using the 2013 national data, that means over 6,000 of babies could have been born alive and still be alive today. The authors of the study also emphasized that their estimates were conservative, implying that more than one-fourth of stillbirths could be prevented.<sup>7</sup>

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<sup>1</sup> *Facts About Stillbirth*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 2, 2017), <https://www.cdc.gov/ncbddd/stillbirth/facts.html> [<https://perma.cc/MK9U-EZAV>].

<sup>2</sup> Maureen C. Kelley & Susan B. Trinidad, *Silent Loss and the Clinical Encounter: Parents’ and Physicians’ Experiences of Stillbirth—a Qualitative Analysis*, BIOMED CENT. PREGNANCY & CHILDBIRTH, Nov. 27, 2012, at 13.

<sup>3</sup> LINDA L. LAYNE, MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA 241 (2003).

<sup>4</sup> Marian F. MacDorman & Elizabeth C.W. Gregory, *Fetal and Perinatal Mortality: United States, 2013*, 64 NAT’L VITAL STAT. REP. (2015), available at [https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_08.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_08.pdf) [<https://perma.cc/KP43-2CYC>].

<sup>5</sup> Kelley & Trinidad, *supra* note 2, at 2.

<sup>6</sup> Jessica M. Page et al., *Potentially Preventable Stillbirth in a Diverse U.S. Cohort*, 131 OBSTETRICS & GYNECOLOGY 336, 340 (2018).

<sup>7</sup> *Id.*

After Caleb's death, people often told me that they could not "imagine" our loss. Imaginable or not, it is the exact loss that tort law attempts to compensate when stillbirth is caused by tortious conduct. Examples of such tortious conduct include a doctor giving improper medical care,<sup>8</sup> or a car accident that causes the woman's placenta to detach or causes another complication that kills the child. Whatever the tortious cause, tort law must figure out how to best compensate parents after they unnecessarily lose their unborn child.

Tort law, however, devalues the injury of stillbirth. "Devaluation is a kind of bias that . . . affects value judgments, such as those made about the seriousness of certain conduct or the importance of an activity" or an injury.<sup>9</sup> The bias results from an association between the injury and gender, even though the injury itself lacks that gender.<sup>10</sup> Feminist legal scholar Martha Chamallas has persuasively argued that "contemporary tort law devalues or undervalues the lives, activities, and potential of women . . ."<sup>11</sup> This Article will use feminist legal theory and empirical research of parents after stillbirth to demonstrate that tort law also devalues stillbirth, mostly due to the association of stillbirth with women.

Tort law has always associated stillbirth with women, specifically with "hysterical" women.<sup>12</sup> The first appearance of stillbirth in tort law was in claims brought by women for emotional distress.<sup>13</sup> Tort law has long recognized a distinction between claims for physical injury and non-physical, emotional injuries, originally not allowing any recovery for emotional injuries.<sup>14</sup> Feminist legal scholars have traced that initial resistance to the fact that most early claims for emotional distress were brought by women, creating a cognitive association.<sup>15</sup> Those same cases often also involved miscarriages and stillbirth—the woman was so frightened that the fetus or unborn baby in her womb died.<sup>16</sup>

Undoubtedly, something physical happens to a woman in stillbirth. The baby in her womb dies, and the woman then still delivers that child just like she

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<sup>8</sup> See *id.* at 342 (recommending proper "obstetric surveillance to identify potential placental insufficiency as well as other maternal conditions that can be targeted in efforts to reduce stillbirth . . .").

<sup>9</sup> Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 470 (1998) [hereinafter Chamallas, *Architecture*].

<sup>10</sup> Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 772 (2001).

<sup>11</sup> Chamallas, *Architecture*, *supra* note 9, at 467. For a criticism of feminist tort theory, see generally Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175 (2001).

<sup>12</sup> See Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 65 (1989) ("[H]istorically, women's complaints of pain or injury have often been dismissed as emotional or hysterical complaints.").

<sup>13</sup> See *infra* Section II.A.

<sup>14</sup> See *infra* Section II.A.

<sup>15</sup> See *infra* Section II.A.

<sup>16</sup> See *infra* Section II.A.

would a living baby. But courts chose not to focus on that physical part, instead making stillbirth just a component of a woman's claim for emotional distress.<sup>17</sup> This classification fit well with a rule that courts eventually adopted to limit recovery for emotional distress—that the plaintiff suffer some physical manifestation of that emotional distress. Her child's stillbirth was such a manifestation.<sup>18</sup> Thus, the first major recognition of stillbirth in tort law was not as an injury itself, but as verification that the hysterical woman experienced emotional distress. Even today, some courts still treat stillbirth as a physical manifestation of emotional distress and then struggle to apply tort law's rules that limit recovery in claims for emotional distress, as opposed to physical injury.<sup>19</sup>

Most courts avoid this struggle by recognizing a wrongful death claim for stillbirth, but even this recognition is sometimes devaluing. Specifically, courts still often devalue the parents' loss by treating it as something less than their child's death by focusing on the fact that the baby was still in the mother's womb at the time of death.<sup>20</sup> This leads courts to describe the deceased baby not as the parents' son or daughter, but as a fetus, just a part of the mother's body. The "fetus" characterization of the child that the parent buried devalues the parents' injury.

Not only is stillbirth associated with women, the more general relational injury caused by the death of a child, the lost parent-child relationship, is also associated with women. Both emotional distress and a relational injury will result from, for example, a mother's witnessing of her child's injury or death.<sup>21</sup> Relational injuries, just like emotional distress, were more often claimed by women.<sup>22</sup> Even today, although less so, children are considered to be at the center of the mother's life, but not necessarily the father's life, meaning only women suffer this relational injury.<sup>23</sup> Like it has emotional injuries, tort law has long devalued relational injuries.

Given that tort law is reluctant to recognize relational injuries generally, it is not surprising that tort law would question whether stillbirth even involves a relational injury. How can a relationship be lost in stillbirth when the child never lived outside of the womb? The child was not born alive. A few decades ago, the mother likely never even saw her baby. Today, even if the parents spent time with their baby, they never got to see him open his eyes, hear him cry, or hear him giggle. This reluctance devalues the parents' injury. The parents lost their child, a child who the parents desired and with whom they had already

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<sup>17</sup> See *infra* Section II.A.

<sup>18</sup> See *infra* Section II.A.

<sup>19</sup> See *infra* Section II.A.

<sup>20</sup> See *infra* Section II.A.

<sup>21</sup> See *infra* Section II.B.

<sup>22</sup> See *infra* Section II.B.

<sup>23</sup> See *infra* Section II.B.

bonded—a bond proven true by prenatal attachment theory—despite his dying before birth.<sup>24</sup>

The gendered association of stillbirth and women has not only affected mothers' recovery, it has also affected fathers' recovery. In some states, even still today, a father has no legal recourse against the tortfeasor who killed his unborn child.<sup>25</sup> In other states, a claim exists, technically, but tort law's many emotional distress limited recovery rules made recovery difficult.<sup>26</sup> These same hurdles would also apply to non-biological parents. Even if the father can avoid the emotional distress rules through a wrongful death claim, cultural ideas about grief can easily still cause a jury to undervalue the father's loss after stillbirth; empirical research often refers to fathers as the forgotten bereaved.<sup>27</sup>

Assuming a claim exists, the measures of damages after stillbirth are easily susceptible to undervaluation because of dominant cultural views of stillbirth. Parents are retraumatized by the common reactions to stillbirth—"you can have another" or "at least it wasn't your older child." These cultural devaluations encourage juries to award less in damages if parents have another child or have other living children. Tort law currently does little to prevent undervaluation. Juries' valuations of damages are also often undercut by legislative noneconomic damage caps,<sup>28</sup> the effect of which are especially harsh in cases like stillbirth where the only significant damages are what tort reformers label "noneconomic."

Stillbirth is more than just a terrible loss; it is the death of a baby. Stillbirth does sever a parent-child bond; prenatal attachment is real, and that bond is lost in the baby's death. Stillbirth does not injure only the mother; it injures both parents and even the surviving siblings. Similarly, the things traditionally regarded as making it easy to "get over" stillbirth—a subsequent pregnancy and child, other living children, a young gestational age at the time of death—do not magically lessen the parents' loss. Their child died. There is no magical fix.

To remedy the current devaluation and recognize these realities of stillbirth, a wrongful death claim for the death of a child—not a fetus—must be available for both parents. The wrongful death claim should be available for all stillbirths, meaning all tortious deaths of unborn children after twenty weeks of pregnancy, instead of depending on viability, a concept from abortion law inapplicable to tort recognition of stillbirth. Both damages for mental anguish and the lost parent-child relationship must be available. Tort law must also guard

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<sup>24</sup> See *infra* Section II.B.

<sup>25</sup> See *infra* Section II.C.

<sup>26</sup> See *infra* Section II.C.

<sup>27</sup> I refer to "fathers" here because the empirical research in Section C is specific to fathers; empirical research of same-sex parents after stillbirth is currently lacking. The arguments in the section, however, easily apply to the non-biological parent in a same sex couple. See *infra* note 241 and accompanying text.

<sup>28</sup> See *infra* Section II.D.3.

against undervaluation of damages due to the possibility or presence of other living children.

The compensation and deterrence purposes of tort law support these reforms. Unless tort law recognizes that parents lost their irreplaceable child, it is impossible to compensate parents as best as possible, consistent with corrective justice tort theory. It is also impossible to properly deter tortfeasors, including doctors, unless tort law recognizes that parents lost their irreplaceable child.

Necessarily, this Article will also address the elephant in the room any time we contemplate allowing recovery for the tortious loss of an unborn baby—abortion. The controversy over abortion is so strong it creates concerns that any recognition of the unborn will necessarily infringe on a woman's constitutional right to voluntarily terminate her pregnancy. The reality, however, is that no inconsistency exists between proper compensation for parents that tortiously, and involuntarily, lose their baby, and a woman's right to terminate her pregnancy. The difference in the timing of the two and the long coexistence of legal abortion and criminal laws specific to the (involuntary) death of an unborn child further supports the consistency.<sup>29</sup> Slippery slope concerns cannot be the basis for denying attempts to best compensate parents after stillbirth.

The organization of the Article is as follows. The first Part will provide a primer on stillbirth—its surprising commonality, the evolving treatment of it by parents and doctors, yet the persistent cultural devaluation of it. The second Part of the Article will describe tort law's historical and modern devaluations of stillbirth using feminist legal theory and empirical research of parents after stillbirth. The third Part of this Article will more specifically describe how to remedy tort law's devaluation of stillbirth and explain how that correction is also supported by underlying theories of tort law. The fourth Part will clarify the consistency between tort compensation for stillbirth and the legality of abortion. The last Part briefly concludes.

## I. THE TABOO OF STILLBIRTH

In 2013, the most recent national data available, approximately 24,000 babies died due to stillbirth in the United States.<sup>30</sup> That is over 65 babies each day. Approximately 2.6 million stillbirths occur in the world annually,<sup>31</sup> half of which occur during labor.<sup>32</sup> The rates of stillbirth differ depending on the race of the mother as the rate “for non-Hispanic black women was more than twice the rate for non-Hispanic white women.”<sup>33</sup> The United States's stillbirth rate is

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<sup>29</sup> See *infra* Part IV.

<sup>30</sup> MacDorman & Gregory, *supra* note 4, at 1.

<sup>31</sup> *Ending Preventable Stillbirths*, LANCET (Jan. 2016), <http://www.thelancet.com/pb/assets/r aw/Lancet/stories/series/stillbirths2016-exec-summ.pdf> [<https://perma.cc/B7D3-AK75>].

<sup>32</sup> *Id.*

<sup>33</sup> MacDorman & Gregory, *supra* note 4, at 4.

higher “than in many other high-income countries, and rates continue to decrease in other high-income countries.”<sup>34</sup>

Currently, the United States ranks 25th in the world in third-trimester stillbirths, and many countries have a more than 33 [percent] lower rate. In addition, other high-resource countries have recently reported dramatic decreases in stillbirth. For example, the stillbirth rate in the Netherlands decreased 6.8 percent (1.8/1,000 births) from 2000 to 2015, whereas the U.S. rate declined only 0.4 percent (3.0/1,000 births) during the same period.<sup>35</sup>

Infant mortality has received more attention. The U.S. infant mortality rate decreased 11 percent between 2006 and 2013, but the fetal mortality rate has “remained relatively stable for the past decade.”<sup>36</sup> “In many developed countries, while absolute rates have never been lower, late-fetal mortality is now higher than infant mortality.”<sup>37</sup>

Despite improved access to prenatal care, sophisticated medical technology, and frequent obstetrical visits during the final weeks of a pregnancy, sudden intrauterine infant death rates over the past 20 years have declined only slightly in the United States, and it is greater than 10 times more likely to occur than Sudden Infant Death Syndrome (SIDS).<sup>38</sup>

Multiple studies state that “[m]ore babies die as a result of stillbirth than of all other causes of infant deaths combined . . . .”<sup>39</sup>

Some causes of stillbirth are known. A study of the Stillbirth Collaborative Research Network identified these causes, listed from most to least common: pregnancy with multiple babies; pregnancy complications like placental abruption where the placenta, which provides nutrients and oxygen to the baby, separates from the uterus; problems with the placenta like insufficient blood flow; birth defects; infection; problems with the umbilical cord, like it getting knotted, cutting off oxygen to the baby; mother’s high blood pressure; and assorted medical complications in the mother, such as diabetes.<sup>40</sup> Of the data studied, covering over two and a half years, about one-fourth of stillbirths had no explained cause.<sup>41</sup> Even if a cause is known, such as a placental abruption, the cause of the abruption may be unknown. It is hard to learn more. Data collec-

<sup>34</sup> Page et al., *supra* note 6, at 337.

<sup>35</sup> *Id.* at 341.

<sup>36</sup> *Id.* at 336–37.

<sup>37</sup> Robert Woods, *Long-Term Trends in Fetal Mortality: Implications for Developing Countries*, 86 BULL. WORLD HEALTH ORG. 460, 460 (2008).

<sup>38</sup> Joanne Cacciatore, *Effects of Support Groups on Post Traumatic Stress Responses in Women Experiencing Stillbirth*, 55 OMEGA 71, 72 (2007) [hereinafter Cacciatore, *Support Groups*].

<sup>39</sup> Joanne Cacciatore & Suzanne Bushfield, *Stillbirth: A Sociopolitical Issue*, 23 J. WOMEN & SOC. WORK 378, 380 (2008) [hereinafter Cacciatore, *Sociopolitical*] (internal citations omitted).

<sup>40</sup> See *What Are Possible Causes of Stillbirth?*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.nichd.nih.gov/health/topics/stillbirth/topicinfo/Pages/causes.aspx> [https://perma.cc/8PBE-FXJ4] (last visited Feb. 22, 2019).

<sup>41</sup> See *id.*

tion is difficult as states define stillbirth differently, sometimes based on age and sometimes based on weight.<sup>42</sup> Plus, only 30–40 percent of stillborn babies undergo an autopsy, as parents rarely wish to spend the additional thousands of dollars for one.<sup>43</sup> It is hard to do research without autopsies.<sup>44</sup>

Yet some research does exist. What we do know is that stillbirth is neither inevitable nor unpreventable despite pervasive myths that stillbirths are “mostly due to non-preventable congenital abnormalities.”<sup>45</sup> Only around 7 percent of 2.6 million stillbirths that occur yearly globally (using a 28-week definition of stillbirth) are due to congenital abnormalities, and even some of those abnormalities are actually preventable if the mother takes folic acid.<sup>46</sup> A recent study specific to stillbirths in the United States is also attempting to correct the myth of fatalism surrounding stillbirth. That January 2018 study concluded that “approximately one fourth of stillbirths that occur in the United States are potentially preventable.”<sup>47</sup> More specifically, the study identified these reasons for stillbirth as potentially preventable: stillbirths occurring during childbirth, those due to maternal medical conditions, those due to hypertensive disorders during pregnancy, those due to placental insufficiency, and those occurring in pregnancy with multiples.<sup>48</sup> The study also clarified that it used conservative criteria and that “compelling argument[s] [exist] that many of the stillbirths [the study] did not include as potentially preventable were, in fact, preventable.”<sup>49</sup> This re-

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<sup>42</sup> Sarah Muthler, *Stillbirth Is More Common Than You Think—And We’re Doing Little About It*, WASH. POST (May 16, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/05/16/stillbirth-is-more-common-than-you-think-and-were-doing-little-about-it/?utm\\_term=.b3f738ac1438](https://www.washingtonpost.com/posteverything/wp/2016/05/16/stillbirth-is-more-common-than-you-think-and-were-doing-little-about-it/?utm_term=.b3f738ac1438) [<https://perma.cc/366J-GYMC>]; see also *State Definitions and Reporting Requirements for Live Births, Fetal Deaths, and Induced Terminations of Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION (1997), [https://www.cdc.gov/nchs/data/misc/ito\\_p97.pdf](https://www.cdc.gov/nchs/data/misc/ito_p97.pdf) [<https://perma.cc/5RAL-ZJ4P>].

<sup>43</sup> Muthler, *supra* note 42.

<sup>44</sup> Colleen Snyder, *The Missing Angels Act: Recognizing the Birth of Stillborn Babies*, 39 MCGEORGE L. REV. 544, 548 (2008) (explaining that the lack of consistent protocols for autopsies after stillbirth and even the recording of stillbirths hurts research efforts regarding the causes of stillbirth).

<sup>45</sup> Joy E. Lawn et al., *Stillbirths: Rates, Risk Factors, and Acceleration Towards 2030*, 387 LANCET 587, 597 (2016).

<sup>46</sup> *Id.*

<sup>47</sup> Page et al., *supra* note 6, at 340. The study specifically used the words “potentially preventable” instead of preventable, and discussed that “[t]here is no generally accepted definition of what constitutes a ‘preventable’ cause of stillbirth.” *Id.* at 337. Assuming that the word “potentially” denotes less than 100 percent preventable, the burden of proof in tort law requires the plaintiff to prove causation only by preponderance of evidence standard. The plaintiff would thus need to show that, more likely than not, the doctor’s negligence caused her child’s stillbirth. This roughly translates to proving facts by 51 percent, not 100 percent.

<sup>48</sup> See *id.* at 339. Study labeled stillbirths at less than twenty-four weeks of gestation, before the baby is viable, and those due to major fetal abnormalities and genetic conditions as unpreventable. See *id.* at 337.

<sup>49</sup> *Id.* at 341.

search exists, but the myth of the unpreventability of stillbirth has likely stunted medical research and prevention efforts.<sup>50</sup>

A 2015 National Vital Statistics Report that summarized the 2013 United States data characterized stillbirth as “a major but often overlooked public health issue.”<sup>51</sup> Parents also overlook this possibility. For the first twenty weeks of the pregnancy, and especially in the first twelve weeks, parents are concerned about miscarriage as research shows that as many as one in four pregnancies ends in miscarriage.<sup>52</sup> After twenty weeks, the worry switches to premature birth—the baby being born before he can survive outside of the womb.<sup>53</sup>

Few parents, if any, ever worry about stillbirth, the death of the baby while inside the womb after twenty weeks. Most parents do not even know about the chance of stillbirth—until it happens to them. After stillbirth, parents surveyed explain that before it happened to them, they “believed that stillbirth is a very rare event.”<sup>54</sup> Most believed that good prenatal care would prevent stillbirth and later learned they were wrong.<sup>55</sup> The same parents also “reported being surprised to learn the actual rates of stillbirth worldwide, or that stillbirth occurs much at all in high-income countries like the U.S.”<sup>56</sup> Parents do not know about stillbirth because they have never been informed of it. Admittedly, the chance of stillbirth is low; stillbirth happens in only about 1 in 160 pregnancies.<sup>57</sup> Given the number of pregnancies, however, that low chance still results in over 24,000 stillbirths a year.<sup>58</sup>

Another reason stillbirth is overlooked is the assumption that it was just a problem in the past. It is true that “[u]ntil the late nineteenth century,” stillbirth and the deaths of young children were common and “a regular feature of family life.”<sup>59</sup> Stillbirth was so common that it was expected to some extent.<sup>60</sup> Regu-

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<sup>50</sup> See Vicki Flenady et al., *Stillbirths: Recall to Action in High-Income Countries*, 387 LANCET 691, 692 (2016).

<sup>51</sup> MacDorman & Gregory, *supra* note 4, at 1.

<sup>52</sup> *Miscarriage*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/pregnancy-complications/miscarriage/> [<https://perma.cc/CV6P-LH6U>] (last visited Feb. 23, 2019) [hereinafter *Miscarriage*].

<sup>53</sup> Kelley & Trinidad, *supra* note 2, at 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; see also Jo Hartley, *Is Photography Helping to Break the Taboo That Surrounds Stillbirth?*, SBS (Aug. 15, 2016, 2:52 PM), <http://www.sbs.com.au/topics/life/family/article/2016/08/15/photography-helping-break-taboo-surrounds-stillbirth> [<https://perma.cc/D6X7-ACQT>] (discussing that the taboo surrounding stillbirth comes from a “lack of awareness of the statistics of stillbirth”).

<sup>57</sup> *Stillbirth: Trying to Understand*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/pregnancy-loss/stillborn-trying-to-understand/> [<https://perma.cc/75QJ-Q6Z3>] (last visited Feb. 23, 2019).

<sup>58</sup> MacDorman & Gregory, *supra* note 4, at 5.

<sup>59</sup> Carol Sanger, “*The Birth of Death*”: *Stillborn Birth Certificates and the Problem for Law*, 100 CALIF. L. REV. 269, 274 (2012).

<sup>60</sup> See *id.* at 274–75.

larity meant less grieving,<sup>61</sup> and a lack of identification of the deceased baby as a part of the family. Parents may have buried stillborn babies, but likely not in a family plot and not with a funeral.<sup>62</sup> Any name chosen for the baby would be re-used for the next living child.<sup>63</sup>

Stillbirth is now less regular, and parents' reactions to stillbirth seem to have changed. Now, parents recognize their deceased baby as having lived—as “a participating member of the family for most of the pregnancy, long before its birth.”<sup>64</sup> Funerals are also more common.<sup>65</sup> In the past thirty years, aggrieved parents also fought for limited external or public recognition of their stillborn children.<sup>66</sup> It is especially jarring to parents when they receive a death certificate for their child, but no birth certificate.<sup>67</sup> Mothers can attest to the fact that stillborn babies are very much still born, yet no birth certificate. Numerous states have passed a “Missing Angels Act,” enabling parents to obtain an official “[C]ertificate of [B]irth [R]esulting in [S]tillbirth” for parents.<sup>68</sup>

Medical treatment for parents after stillbirth has also evolved. The original attitude was that it was best to shield parents from the death of their baby. “Mothers were almost never allowed to see their infants for fear they would be unduly upset, as if they were not already.”<sup>69</sup> The “[s]tandards began to change

<sup>61</sup> I do not mean to imply that individual parents and families did not grieve stillborn babies. But the common practices do not generally reflect grief.

<sup>62</sup> Sanger, *supra* note 59, at 276.

<sup>63</sup> See AMY J. CATALANO, A GLOBAL HISTORY OF CHILD DEATH: MORTALITY, BURIAL, AND PARENTAL ATTITUDES 106 (2015).

<sup>64</sup> Sanger, *supra* note 59, at 282. The theory of prenatal attachment validates this view. See *infra* notes 216–23 and accompanying text (discussing prenatal attachment). Many reasons exist for this evolution. Professor Carol Sanger also explained that “social birth” has changed our conception of stillbirth. See Sanger, *supra* note 59, at 283. “Within months of conception the fetus not only has a sex, a name, and a face, but he or she now owns things, has prenatal preferences (organic food, Mozart, a smoke-free environment), its own page on Facebook, and a registry at Bloomingdales.” *Id.* Another reason the views of stillbirth have changed may be because families do not tend to have as many children as they used to. See Joyce E. McConnell, *Relational and Liberal Feminism: The “Ethic of Care,” Fetal Personhood and Autonomy*, 99 W. VA. L. REV. 291, 296–97 (1996) (describing that “most parents expected to have smaller families and as a result came to view each child as precious and irreplaceable.”).

<sup>65</sup> Sanger, *supra* note 59, at 284.

<sup>66</sup> See *id.* at 280.

<sup>67</sup> Cacciatore, *Sociopolitical*, *supra* note 39, at 380–81 (“How can you die if you never were?”).

<sup>68</sup> *Id.*; see, e.g., ARK. CODE ANN. § 20-18-410 (2018); DEL. CODE ANN. tit. 16, § 3121A (2019); IND. CODE § 16-37-1-8.5 (2018); IOWA CODE § 144.31A (2018); MD. CODE ANN., HEALTH-GEN. § 4-213.1 (West 2018); MO. REV. STAT. § 193.255 (2018); N.J. STAT. ANN. § 26:8-37 (West 2019); TEX. HEALTH & SAFETY CODE ANN. § 192.0022 (West 2017); WIS. STAT. § 69.145 (2017).

<sup>69</sup> Elizabeth Kirkley-Best & Kenneth R. Kellner, *The Forgotten Grief: A Review of the Psychology of Stillbirth*, 52 AM. J. ORTHOPSYCHIATRY 420, 425 (1982); see also Samantha Murphy & Joanne Cacciatore, *The Psychological, Social, and Economic Impact of Stillbirth on Families*, 22 SEMINARS IN FETAL & NEONATAL MED. 129, 130 (2017) (“Until the 1970s, mothers were not allowed to see or hold a baby who died.”).

in the 1980s with the emergence of parental grassroots support groups demanding access to the child.”<sup>70</sup> The emphasis shifted from shielding parents to supporting parents. “[T]he modern standard of care is to offer grieving parents repeated and extended opportunities to have close contact with their baby.”<sup>71</sup> Empirical social science research continues to influence medical care, even studying how the baby should be offered to the parents, and how medical care can help the parents to cope with the loss of their child.<sup>72</sup> Today, “[s]ome [hospitals] routinely photograph stillbirths, give parents photographs, the baby’s name tag, or a lock of hair.”<sup>73</sup> Improved medical care can hopefully prevent the most common regret parents have after stillbirth—not holding their baby at all, or not holding him longer.<sup>74</sup>

Support groups also now exist.<sup>75</sup> In studies, women have emphasized “the value of talking with someone who had gone through this before.”<sup>76</sup> Support groups give parents an opportunity to talk about their babies and the ability to use their knowledge of stillbirth to help others. Research has shown that “[w]omen who participated in support groups after the death of their child to stillbirth experienced significantly fewer traumatic stress symptoms than women . . . who did not attend support groups.”<sup>77</sup>

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<sup>70</sup> Murphy & Cacciatore, *supra* note 69, at 130.

<sup>71</sup> *Position Statement, PREGNANCY LOSS & INFANT DEATH ALLIANCE 2* (Aug. 2016), available at [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_BereavedParentsRighttoSelf-Determination.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_BereavedParentsRighttoSelf-Determination.pdf) [<https://perma.cc/LHB8-WRCP>]; see also Joanne Cacciatore, *The Silent Birth: A Feminist Perspective*, 54 SOC. WORK 91, 93 (2009) [hereinafter Cacciatore, *Feminist*] (“Improved standards of compassionate care in hospitals, supportive nurturance from family and friends, and support groups contribute to a lessening of posttraumatic stress responses and chronic, debilitating grief.”); Sanger, *supra* note 59, at 283–85 (describing changes in hospitals allowing parents to spend time with the infant and preparing memory boxes for parents).

<sup>72</sup> Murphy & Cacciatore, *supra* note 69, at 130–31; Kirkley-Best & Kellner, *supra* note 69, at 426 (describing that research shows “almost unanimous agreement that seeing and holding the infant is helpful in successful grief resolution”).

<sup>73</sup> SALLY CLINE, *LIFTING THE TABOO: WOMEN, DEATH AND DYING* 171–72 (1996); see also Kelley & Trinidad, *supra* note 2, at 11–12 (describing standardized procedure in the UK to offer “photographs and footprints, and strongly encourag[e] parents to hold their stillborn infant” and describing the importance of clinician empathy). In Australia, many hospitals now offer “refrigerated bassinets that allow parents to spend some time with their child.” Hagar Cohen & Alex McClintock, *Chloe’s Story*, ABC NEWS (Apr. 3, 2017, 6:33 PM), <http://www.abc.net.au/news/2016-09-05/chloe-the-story-of-a-stillborn-baby/7805998> [<https://perma.cc/4VF5-ZMEZ>]. The hospital depicted in the news story allows couples “to spend up to seven days with their baby.” *Id.* This practice is unique to Australia. *Id.*

<sup>74</sup> Murphy & Cacciatore, *supra* note 69, at 130; Kirkley-Best & Kellner, *supra* note 69, at 426 (describing that research shows “almost unanimous agreement that seeing and holding the infant is helpful in successful grief resolution”).

<sup>75</sup> See Cacciatore, *Support Groups*, *supra* note 38, at 73.

<sup>76</sup> Kelley & Trinidad, *supra* note 2, at 8.

<sup>77</sup> Cacciatore, *Support Groups*, *supra* note 38, at 83–84.

For parents, support groups are “one of the few ‘safe places’ to talk about their grief” after stillbirth.<sup>78</sup> Any parent who has experienced stillbirth knows firsthand that, outside of a support group, people do not want to talk about it.<sup>79</sup> Many reasons likely exist for the avoidance. Maybe stillbirth makes people uncomfortable.<sup>80</sup> That would not be surprising as stillbirth often involves the death of a baby who could have survived outside of the womb, meaning he was in literally the only place that would kill him. Or maybe people do not talk about stillbirth because they assume the parents do not want to talk about it.<sup>81</sup> Or maybe people do not want to talk about stillbirth because they consciously or unconsciously minimize it. It is “not a lack of sympathy or goodwill that is the problem but the absence of accepted cultural scripts for how to behave in such circumstances.”<sup>82</sup> This means that that “[t]he tragedy of stillbirth is a quiet tragedy.”<sup>83</sup> Even “[f]amily and friends may . . . act as if the birth and death had simply never happened in the first instance.”<sup>84</sup>

The avoidance is surprising because it seems unique to stillbirth. The death of living children is obviously upsetting, but, culturally, we do not avoid it to the same extent. Often, the death of children is highlighted even though adults also died.<sup>85</sup> The child deaths serve as the basis for some action to attempt to prevent further similar child death.<sup>86</sup> A funeral for a deceased child is, of course, appropriate. Similarly, many in society pay great attention to abortions. Many take great actions to attempt to prevent those terminations of pregnancy. Some states even want to mandate proper burial of fetal remains after abortion.<sup>87</sup> But if the death is involuntary and later in pregnancy, little, if any, acknowledgement exists. Culturally, we “do[] not readily embrace practices or rituals to honor the death of a stillborn child.”<sup>88</sup>

The deaths of babies in stillbirth are not acknowledged and neither is the resultant grief.<sup>89</sup> Parents have “all the emotions and loss that would attend the death of any child or loved one,” but lack “the social space to legitimize it or

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<sup>78</sup> *Id.* at 81.

<sup>79</sup> Kelley & Trinidad, *supra* note 2, at 13 (explaining that parents want to talk about their children, but that society does not treat stillbirth as equivalent to the death of a baby).

<sup>80</sup> See JOHN DEFRAIN ET AL., STILLBORN: THE INVISIBLE DEATH 83 (1986).

<sup>81</sup> *Id.*

<sup>82</sup> LAYNE, *supra* note 3, at 69.

<sup>83</sup> Kirkley-Best & Kellner, *supra* note 69, at 420.

<sup>84</sup> JANE LITTLEWOOD, ASPECTS OF GRIEF: BEREAVEMENT IN ADULT LIFE 124 (1992).

<sup>85</sup> Sean Hannon Williams, *Dead Children*, 67 ALA. L. REV. 739, 746–47 (2016) (explaining that when the media “singl[es] out child victims in . . . larger tragedies,” which it commonly does, it “suggest[s] that child deaths are a special tragedy, over and above the tragedy of mere adult death.”).

<sup>86</sup> See *id.* at 747–48 (explaining that legislators often name bills and laws after dead children).

<sup>87</sup> See, e.g., LA. STAT. ANN. § 40:1061.25 (2018).

<sup>88</sup> Kelley & Trinidad, *supra* note 2, at 11.

<sup>89</sup> Kirkley-Best & Kellner, *supra* note 69, at 420.

make space for expressing those emotions.”<sup>90</sup> Imagine if your child died, but you were not “able to grieve openly,” nor “able to openly celebrate or remember [your] baby’s birth and death, long after the experience.”<sup>91</sup> Parents feel isolated due to “the awkwardness and discomfort felt by others when parents of a stillborn try to discuss their experience, or when they try to normalize it by mentioning their stillborn child alongside their live children as part of their family.”<sup>92</sup> The lack of acknowledgement retraumatizes parents and it devalues the parents’ loss.<sup>93</sup>

## II. TORT LAW’S DEVALUATION OF STILLBIRTH

Some of the at least sixty-five daily stillbirths are due to tort. Maybe the defendant texts while driving, hitting a pregnant woman. That collision could cause her placenta to detach from her uterus, killing her unborn baby possibly within minutes. Or, more commonly, the cause is medical malpractice. Maybe the doctor missed early signs of placental abruption on an ultrasound or warning signs during delivery that an emergency caesarean section was necessary. As mentioned in the Introduction, a 2018 study concluded that one-fourth of stillbirths in the United States are preventable through proper medical care.<sup>94</sup> A lack of proper medical care is medical malpractice, meaning one-fourth of stillbirths are due to medical malpractice. At some point, medicine will hopefully advance and be better able to prevent stillbirth. As medical care improves, and more babies can be saved, medical malpractice means some of those babies will still die. Regardless, some of the sixty-five plus daily stillbirths in the U.S. are due to tort, requiring tort law to attempt to compensate parents for the unnecessary death of their unborn baby.

Not surprisingly, “[c]laims for negligently caused stillbirth have vexed the courts of our nation for many years.”<sup>95</sup> Despite the difficulty, most states, either legislatively or judicially, have recognized one or both of two legal claims.<sup>96</sup>

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<sup>90</sup> Kelley & Trinidad, *supra* note 2, at 9; see Joanna Cacciatore et al., *When a Baby Dies: Ambiguity and Stillbirth*, 44 MARRIAGE & FAM. REV. 439, 443 (2008) [hereinafter Cacciatore et al., *Ambiguity*] (discussing how stillborn infants are “often demarcated from other types of child death and [are] rarely legitimized as a real loss.”).

<sup>91</sup> Kelley & Trinidad, *supra* note 2, at 9.

<sup>92</sup> *Id.*

<sup>93</sup> Murphy & Cacciatore, *supra* note 69, at 131 (explaining that “stillbirth is a loss often unacknowledged and invalidated by society”).

<sup>94</sup> See Page et al., *supra* note 6, at 342.

<sup>95</sup> *Tanner v. Hartog*, 696 So. 2d 705, 707 (Fla. 1997); see also *Presley v. Newport Hosp.*, 365 A.2d 748, 750 (R.I. 1976) (“The status of the unborn has long been an especially troublesome area of the law.”).

<sup>96</sup> Some states appear to have not recognized either claim, including Colorado, Montana, and Wyoming. In each of the states, no wrongful death claim appears to exist and I could not find any case law recognizing a malpractice claim. See generally *Stodghill v. Perner*, No. 07CV522, 2010 WL 9103730 (D. Colo. Dec. 5, 2010) (rejecting a wrongful death claim); *Kuhnke v. Fisher*, 683 P.2d 916, 919 (Mont. 1984) (rejecting a wrongful death claim); see also WYO. STAT. ANN. § 1-38-101 (2018).

The majority of states recognize a wrongful death claim for stillbirth.<sup>97</sup> A wrongful death claim is a statutory claim for “certain beneficiaries who suffer from another’s death as a result of a tort.”<sup>98</sup> The beneficiary will still need to establish that the defendant committed a tort, but to sue for a death, the claim must be brought under the wrongful death statute. A wrongful death claim is the same type of claim that would be available for the tortious death of a living child. Applied to stillbirth, parents are allowed to bring a claim and recover damages, whatever type allowed by the statute, if they can prove the death of their unborn baby was due to tort. The most common types of damages available are general mental anguish damages and loss of consortium damages, which compensate for the lost parent-child relationship.<sup>99</sup> The availability, however, depends on what the statute allows.

The minority of states recognize a different claim. They do not recognize stillbirth as a death, but instead treat the death of the unborn baby as an emotional injury to the mother who was carrying the baby at the time of the baby’s death.<sup>100</sup> Thus, the minority of states also recognize a common law tort claim

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<sup>97</sup> At least forty states recognize a wrongful death claim for an unborn child. Numerous states have done so by statute. *See e.g.*, ARK. CODE ANN. § 16-62-102 (2018) (Arkansas); 740 ILL. COMP. STAT. 180/2.2 (2018) (Illinois); IND. CODE § 34-23-2-1 (2018) (Indiana); KAN. STAT. ANN. § 60-1901 (2018) (Kansas); LA. CIV. CODE ANN. art. 2315.2 (2018) (Louisiana); MICH. COMP. LAWS § 600.2922a (2018) (Michigan); MISS. CODE ANN. § 11-7-13 (2019) (Mississippi); NEB. REV. STAT. 30-809(1) (2018) (Nebraska); OKLA. STAT. ANN. tit. 12, § 1053 (West 2018) (Oklahoma); S.D. CODIFIED LAWS § 21-5-1 (2018) (South Dakota); TENN. CODE ANN. § 20-5-106 (2018) (Tennessee); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (West 2017) (Texas, but excepting that no wrongful death claim exists for the death of an unborn child due to medical malpractice). Other states have recognized the claim through judicial interpretation of the state’s wrongful death act. *See Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011); *Summerfield v. Superior Court*, 698 P.2d 712, 724 (Ariz. 1985); *Hatala v. Markiewicz*, 224 A.2d 406 (Conn. Super. Ct. 1966); *Worgan v. Greggo & Ferrara*, 128 A.2d 557, 558 (Del. Super. Ct. 1956); *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394, 395 (D.C. 1984); *Porter v. Lassiter*, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); *Castro v. Melchor*, 366 P.3d 1058, 1065–66 (Haw. Ct. App. 2016); *Volk v. Baldazo*, 651 P.2d 11, 15 (Idaho 1982); *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 832–34 (Iowa 1983); *Mitchell v. Couch*, 285 S.W.2d 901, 906 (Ky. Ct. App. 1955); *State v. Sherman*, 198 A.2d 71, 73 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916, 920 (Mass. 1975); *Verkennes v. Corniea*, 38 N.W.2d 838, 841 (Minn. 1949); *White v. Yup*, 458 P.2d 617, 623 (Nev. 1969); *Poliquin v. Macdonald*, 135 A.2d 249, 251 (N.H. 1957); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826, 830 (N.M. Ct. App. 1980); *DiDonato v. Wortman*, 358 S.E.2d 489, 490 (N.C. 1987); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984); *Werling v. Sandy*, 476 N.E.2d 1053, 1056 (Ohio 1985); *Libbee v. Permanente Clinic*, 518 P.2d 636, 639–40 (Or. 1974); *Amadio v. Levin*, 501 A.2d 1085, 1089 (Pa. 1985); *Presley v. Newport Hosp.*, 365 A.2d 748, 754 (R.I. 1976); *Fowler v. Woodward*, 138 S.E.2d 42, 45 (S.C. 1964); *Nelson v. Peterson*, 542 P.2d 1075, 1077 (Utah 1975); *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92, 94 (Vt. 1980); *Moen v. Hanson*, 537 P.2d 266, 268 (Wash. 1975); *Farley v. Sartin*, 466 S.E.2d 522, 535 (W. Va. 1995); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107, 109 (Wisc. 1967).

<sup>98</sup> DAN B. DOBBS ET AL., *THE LAW OF TORTS* 503 (2d ed. 2011).

<sup>99</sup> *See infra* Section B.

<sup>100</sup> *See, e.g.*, *Justus v. Atchison*, 565 P.2d 122, 133 (Cal. 1977); *Tanner v. Hartog*, 696 So. 2d 705, 708–09 (Fla. 1997); *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988); *Broadnax v.*

not for the unborn child's death, but for the emotional distress the mother suffered. Damages in a negligence claim are limited to general mental anguish.<sup>101</sup> Loss of consortium damages are generally not available.<sup>102</sup>

Legal claims exist, technically. But tort law still devalues stillbirth. It does so expressly by treating stillbirth as something less than the death of a child and by questioning whether the parents had a relationship with their child before stillbirth. Tort law also does so by denying or minimizing the father's injury after stillbirth. Implicitly, tort law also devalues stillbirth by failing to guard against juries' discounting of parents' damages because of the possibility or presence of living children and by capping parents' recovery of their non-economic damages.<sup>103</sup>

#### A. *Something Less Than the Death of Your Child*

"Until well into the twentieth century, the law purported to draw a sharp line between physical injury and property loss on the one hand, and mental distress and relational harm on the other."<sup>104</sup> A legal claim existed for the physical injury and the property loss, but not the mental distress or the relational harm.<sup>105</sup> The main historical reason for the distinction was a fear of fraudulent

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Gonzalez, 809 N.E.2d 645, 649 (N.Y. 2004); *Milton v. Cary Med. Ctr.*, 538 A.2d 252, 256 (Me. 1988); *Modaber v. Kelley*, 348 S.E.2d 233, 237 (Va. 1986). Texas law is more complicated than most. Texas's wrongful death statute has a specific exception for stillbirth due to medical malpractice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.003(c)(4) (West 2017). If the stillbirth is due to a car accident, a wrongful death claim exists. *Fort Worth Osteopathic Hosp. Inc., v. Reese*, 148 S.W.3d 94, 100 (Tex. 2004). But if it is due to medical malpractice, only a negligence claim exists. *Id.* Notably, the medical malpractice negligence claim is subject to a much smaller damage cap than the medical malpractice wrongful death claim. This may seem like a small amount of states, but the group includes the four most populous states—California, Texas, Florida, and New York. These four states had approximately 34 percent of all live births in 2016. *See infra* notes 246–250 and accompanying text. A larger proportion of pregnancies and births also likely means a larger proportion of stillbirths.

<sup>101</sup> *See infra* Section B.

<sup>102</sup> *See infra* Section II.B.

<sup>103</sup> This section uses empirical research of parents after stillbirth to help illustrate how tort law devalues stillbirth. This research is about stillbirth generally—unexplained stillbirth, unpreventable stillbirth, and tortiously caused stillbirth. Tortiously caused stillbirth could cause a different sort of grief—maybe having someone to blame worsens or lessens the grief. The fact that tortious conduct caused the stillbirth may also lessen some anxiety involved with a subsequent pregnancy, but maybe not. I specifically did not cite any research concerning the blame mothers place on themselves after stillbirth because, theoretically, mothers would not blame themselves if someone else tortiously caused the stillbirth. Regardless, it is important to note that the studies are not specific to parents after tortiously caused stillbirth.

<sup>104</sup> Chamallas, *Architecture*, *supra* note 9, at 491.

<sup>105</sup> *Id.* at 491–92, 500. Before briefly reviewing that history, a few clarifications are necessary. First, tort law has never limited the recovery of emotional distress damages if that emotional distress was a result of a physical contact or harm. Thus, if a stillbirth is the result of intentional physical beating, the mother's emotional distress is recoverable in a battery claim. *See Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627, 630 (Tex. 1967) (affirming the award of damages for embarrassment "without the necessity of showing actual physical inju-

claims given the theoretical ease of feigning an emotional injury.<sup>106</sup> Eventually, courts recognized recovery for mental distress, but only in limited circumstances.<sup>107</sup> The modern main reason for the limitation is fear of disproportionate liability.<sup>108</sup> A defendant's tortious conduct may cause many people emotional distress and tort law does not want the defendant to be liable ten times for one conduct. Regardless of the reasons, the physical-mental/-emotional injury distinction remains a part of tort law.

Tort law thus requires classification, but stillbirth is not easily classified.

Many courts have had a particularly difficult time seeing and categorizing the physical and emotional connection between a mother and fetus. The intertwined physical and emotional nature of the response of a woman who experiences a . . . stillbirth does not seem to fit neatly into the standard repertoire of injuries suffered by torts plaintiffs.<sup>109</sup>

Still, courts could have easily treated stillbirth as physical. "In a very real sense, these plaintiffs suffered physical injuries."<sup>110</sup> Stillbirth also easily fits within the definition of "bodily harm," required for a battery claim, an intentional tort.<sup>111</sup> Despite stillbirth involving something physical to the mother, courts opted to treat the injury as emotional. The cases were "fixed on fright, the mechanism of the injury, rather than on the ultimate physical consequences of the defendant's actions."<sup>112</sup>

Feminist legal scholars suggest the main reason courts opted to treat stillbirth as emotional was because it happened to women.<sup>113</sup> They connected tort law's historical resistance to recognizing emotional injuries to tort law's resistance to recognizing injuries that happen to women. Feminist legal scholars Martha Chamallas and Linda Kerber noted that the connection "was forged in the law of torts from the beginning" "[b]ecause the plaintiffs in each of the prominent early cases were women . . ."<sup>114</sup>

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ry"). Similarly, if a stillbirth is the result of a car accident in which the mother was also physically injured, her emotional distress would also be recoverable against the negligent driver.

<sup>106</sup> See Chamallas, *Architecture*, *supra* note 9, at 493.

<sup>107</sup> *Id.* at 491–92.

<sup>108</sup> See *id.* at 494.

<sup>109</sup> MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 103 (2010).

<sup>110</sup> Chamallas, *Architecture*, *supra* note 9, at 525.

<sup>111</sup> See RESTATEMENT (SECOND) OF TORTS § 15 (AM. LAW INST. 1965) ("There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm.").

<sup>112</sup> Chamallas, *Architecture*, *supra* note 9, at 525.

<sup>113</sup> See, e.g., Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 824 (1990).

<sup>114</sup> *Id.* at 815, 824 ("Historically . . . women have tended to bring claims for fright-based injuries far more often than for men."). Scholars have also made a connection between gender and cultural devaluation of stillbirth: "Gender politics is, therefore, at the core of issues related to stillbirth: how society defines stillbirth, the policies related to the acknowledge-

Three distinct types of harms are embedded within these early suits for fright-based injuries: (1) physical injuries, including miscarriages, stillbirths, and hysteria-caused disabilities; (2) emotional distress, often necessitating long periods of bed rest; and (3) the relational harm of losing a potential child.<sup>115</sup>

In the early cases, courts' treatment of these cases reveals a devaluing of the injury because of its gendered nature. In 1897, a Massachusetts court denied recovery to a woman because only "a timid or sensitive person" would suffer such an injury.<sup>116</sup> A New York court denied recovery to a woman in 1896 because her fright was not a legally cognizable injury, even though it also allegedly caused her to miscarry.<sup>117</sup>

The earliest rule allowing recovery, the impact rule, allowed a plaintiff to recover for her emotional distress if she was also physically impacted in some way.<sup>118</sup> That physical impact supposedly verified claims for emotional distress.<sup>119</sup> But it did not allow recovery in a near-miss situation—if the train just missed hitting the plaintiff. Later, a majority of states adopted a different "danger zone" rule for those near-miss situations, allowing the plaintiff to recover for her emotional distress resulting from "fear for her own personal safety."<sup>120</sup> Neither the impact nor the zone of danger rule, however, addressed situations where the plaintiff suffered emotional distress due to seeing someone else injured.

The California Supreme Court later created a rule allowing recovery in such a situation. In *Dillon v. Legg*, a mother suffered emotional distress due to witnessing her daughter be negligently killed.<sup>121</sup> The Court adopted a rule enabling recovery for a bystander depending on whether the emotional injury was foreseeable.<sup>122</sup> Foreseeability will depend on the plaintiff's witnessing the direct victim's injury and the closeness of the relationship between the direct victim and the bystander.<sup>123</sup> The *Dillon v. Legg* bystander test is the current major-

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ment of the life of the stillborn baby, and the social acceptance of these policies." Cacciatore, *Sociopolitical*, *supra* note 39, at 379.

<sup>115</sup> Chamallas & Kerber, *supra* note 113, at 824. More modern examples of devaluation of a woman's injury associated with pregnancy or childbirth can be found in Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 753 (2018); Jamie R. Abrams, *The Illusion of Autonomy in Women's Medical Decision-Making*, 42 FLA. ST. U. L. REV. 17, 31 (2014); and Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 CARDOZO L. REV. 1955, 1983 (2013).

<sup>116</sup> Chamallas & Kerber, *supra* note 113, at 828–29 (internal quotation marks omitted) (quoting *Spade v. Lynn & B.R. Co.*, 47 N.E. 88, 88 (Mass. 1897)).

<sup>117</sup> *See id.* at 828 (discussing *Mitchell v. Rochester Ry.*, 45 N.E. 35 (N.Y. 1896)).

<sup>118</sup> *See id.* at 819.

<sup>119</sup> *Id.* ("The rule allowed courts to indulge in the fiction that an injury traceable to fright was only 'parasitic' to damage stemming from physical impact," and theoretically limited recovery to claims for "material" harms.)

<sup>120</sup> *Id.* at 821 (internal quotation marks omitted).

<sup>121</sup> *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

<sup>122</sup> *Id.* at 920.

<sup>123</sup> *Id.*

ity and theoretically most liberal rule enabling recovery for emotional distress.<sup>124</sup> Feminist legal scholars have argued that *Dillon* “signifies that the law regards a mother’s anguish at witnessing the death or injury of her child as a harm that qualifies for legal protection.”<sup>125</sup>

Regardless of which test used, many states also required, and still require, that the plaintiff’s emotional distress manifest physically.<sup>126</sup> Professors Chamallas and Kerber explain that this requirement “is the modern descendant of the impact rule” and its purposes are to “guard against fraudulent claims, to limit recovery to serious injuries, and to discourage plaintiffs who suffer only transient harm from filing suit.”<sup>127</sup> This requirement was not difficult for many female plaintiffs in early cases as women often alleged that their emotional distress caused loss of pregnancy. Pregnancy loss, both miscarriage and stillbirth, was so frequently claimed “that it has come to typify” claims for negligent infliction of emotional distress.<sup>128</sup>

Thus, the first major recognition of stillbirth in tort was as a “physical problem [that] indicates an underlying emotional problem,”<sup>129</sup> a physical symptom verifying the preceding emotional distress. Other physical symptoms that courts have found to sufficiently manifest emotional distress include a rash,<sup>130</sup> vomiting,<sup>131</sup> and a loss of bladder control.<sup>132</sup> In no way is stillbirth similar to a rash, vomiting, or loss of bladder control. But tort law treats them all the same—as physical manifestations of the emotional distress plaintiffs allegedly suffer. This strong historical association between pregnancy loss and the physical manifestation rule devalues stillbirth as an injury.

The classification of stillbirth as an emotional injury has led to some awkward applications of the impact, danger zone, and *Dillon* rules to negligently caused stillbirth.<sup>133</sup> Florida adopted an exception to the impact rule to allow a claim for negligent causation of stillbirth.<sup>134</sup> Pennsylvania follows the danger zone rule; because of its difficult application to stillbirth, the Pennsylvania Su-

<sup>124</sup> See Chamallas & Kerber, *supra* note 113, at 821–22.

<sup>125</sup> *Id.* at 860.

<sup>126</sup> See *id.* at 820–21 (“Most jurisdictions have retained the requirement; only a minority of states, most notably California, have eliminated it. These more liberal states allow recovery for negligent infliction of serious mental distress, even if unaccompanied by physical manifestations or illness.”).

<sup>127</sup> *Id.* at 820.

<sup>128</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 363 (W. Page Keeton ed., 5th ed. 1984); see also DOBBS, *supra* note 98, at 837 (using miscarriage as an example of a “subsequent physical harm . . . resulting from the emotional distress . . .”).

<sup>129</sup> Lopez v. Geico Ins. Co., No. CIV 11-633 GBW/RHS, 2012 WL 12840821, at \*4 (D.N.M. June 5, 2012).

<sup>130</sup> *Id.* (explaining that a “rash could be said to indicate the reality of the emotional distress.”).

<sup>131</sup> See Marchica v. Long Island R.R. Co., 31 F.3d 1197, 1203 (2d Cir. 1994).

<sup>132</sup> DOBBS, *supra* note 98, at 838.

<sup>133</sup> The application is even more awkward for the father’s claim. See *infra* Section C.

<sup>134</sup> See Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997).

preme Court opted to recognize a wrongful death claim.<sup>135</sup> Applying *Dillon* to stillbirth is the least awkward, but it does result in characterizing the mother as a “bystander” to the negligent conduct, even though it happened to her, as the Nebraska Supreme Court did.<sup>136</sup>

Some courts have more recently treated stillbirth as physical injury. The likely motivation is the difficulty of applying the three emotional distress rules to cases involving stillbirth. Texas law treats stillbirth just like any other “personal injury action[,]” as personal physical injury includes “the loss of [her] fetus.”<sup>137</sup> Florida law classifies a “fetus” as “living tissue of the body,” providing the “mother . . . a legal cause of action the same as she has for a wrongful injury to any other part of her body.”<sup>138</sup> These explanations show that the courts did not suddenly grasp the gravity of stillbirth. To the contrary, the holdings make the death of an unborn baby commensurate with injury to the leg, just a different version of devaluation.

Other modern courts still struggle with the physical versus emotional classification of stillbirth. Until 2004, New York law required a plaintiff mother to demonstrate a physical injury to herself “distinct from that suffered by the fetus and not a normal incident to childbirth” before she could recover damages for her emotional distress.<sup>139</sup> New York also did not and still does not recognize a wrongful death claim,<sup>140</sup> meaning a mother had no legal recourse if her doctor negligently caused a stillbirth. Finally—in 2004, less than fifteen years ago—the highest New York court recognized recovery after stillbirth “even in the absence of an independent injury . . .”<sup>141</sup>

Even if allowed to pursue a claim for the death of their unborn babies, courts still manage to devalue the mother’s injury in their characterizations of unborn babies—as fetuses. A New York court described the parents’ lost child

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<sup>135</sup> See *Amadio v. Levin*, 501 A.2d 1085, 1092 (Pa. 1985) (Zappala, J., concurring) (explaining that it is “hard to conceive how either of these parents, especially the father, could bring himself within even the most expansive rule allowing recovery for negligent infliction of emotional distress”).

<sup>136</sup> See *Andreasen v. Gomes*, N.W.2d 539, 542 (Neb. 1993). *But see* *Sesma v. Cueto*, 129 Cal. App. 3d 108, 115, n.2 (Cal. Ct. App. 1982) (“It is unreasonable to label a woman in labor a ‘bystander’ as to any injury suffered by her fetus, considering the intimate physical and psychic connection between them.”).

<sup>137</sup> See *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481–82 (Tex. 1995). *But see id.* at 483 (Gonzalez, J., dissenting) (noting that the plaintiff mother did not allege any physical injury).

<sup>138</sup> *Singleton v. Ranz*, 534 So. 2d 847, 848 (Fla. Ct. App. 1988). In the same opinion, the Court showed confusion in trying to classify the baby: “An unborn fetus is either a new and separate human being or ‘person,’ temporarily residing within the womb of the host mother, OR it is a part of the mother’s body, OR both.” *Id.* at 847.

<sup>139</sup> CHAMALLAS & WRIGGINS, *supra* note 109, at 103. See, e.g., *Amadio v. Levin*, 501 A.2d 1085, 1088 (Pa. 1985) (explaining that “[t]he parents’ pain and suffering caused by their child’s negligent death has never been recoverable unless the pain and suffering was accompanied by or a result of a physical injury to the parent” but separately recognizing a wrongful death claim).

<sup>140</sup> See *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648 (N.Y. 2004).

<sup>141</sup> *Id.* at 649.

as “stillborn full-term fetus.”<sup>142</sup> A California court described that the mother “does not recall whether she heard or saw the fetus.”<sup>143</sup> Courts also frequently use phrases like “*the* fetus” and “it” despite the gender of the baby assuredly being known.<sup>144</sup> In a Florida case, the doctor objected to the parents’ references to their baby as “their son,” “their child,” or by his name, George, Jr.<sup>145</sup> The appellate court correctly found no error in these references because they demonstrated the parents’ mental distress.<sup>146</sup> Still, the appellate court did find error in the inclusion of “George Hurley, Jr.” on the verdict form and in the jury instructions.<sup>147</sup> The appellate court also suggested that “fetus” would have been a more “*precise*” description of the plaintiffs’ son.<sup>148</sup>

The same devaluing characterizations are also found in wrongful death claims. As this Article argues, a wrongful death claim is the proper claim to use for stillbirth because it recognizes that stillbirth is no different than the death of a living child; tort law provides a wrongful death for the tortious death of a living child and should provide the same claim for tortiously caused stillbirth. But the recognition is superficial as courts often still use language that devalues stillbirth as just the death of a fetus. As an example, in the same case in which it recognized a wrongful death claim, the Montana Supreme Court described the full-term unborn baby—who was actually over 40 weeks gestational age—as a fetus.<sup>149</sup> Other examples include Hawaii and Idaho courts that have applied their states’ wrongful death claims to the deaths of “twin fetuses” and a “viable unborn fetus.”<sup>150</sup>

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<sup>142</sup> *Scott v. Capital Area Cmty. Health Plan, Inc.*, 191 A.D.2d 772 (N.Y. App. Div. 1993) (“stillborn full-term fetus”).

<sup>143</sup> *Sesma v. Cueto*, 129 Cal. App. 3d 108, 112 (Cal. Ct. App. 1982) (describing that the mother “does not recall whether she heard or saw the fetus”).

<sup>144</sup> *See, e.g., Tanner v. Hartog*, 696 So. 2d 705, 706–708 (Fla. 1997) (describing a claim for negligent stillbirth as “directed toward the death of a fetus” as opposed to the death of a living person); *De Jesus v. Mishra*, 93 A.D.3d 135, 139 (N.Y. App. Div. 2012) (noting descriptions including that “the fetus’s heart had conclusively ceased beating” and “that the fetus had irretrievably expired at that time”); *Rupp v. Brown*, 31 S.W.3d 803, 807 (Tex. Ct. App. 2000) (explaining that mother alleged she suffered “mental anguish over the loss of the fetus” and when “scheduling problems caused her to carry a dead fetus in her womb for two days”).

<sup>145</sup> *See Kammer v. Hurley*, 765 So. 2d 975, 978 (Fla. Dist. Ct. App. 2000). The appellate court found no error in the trial court’s allowing these references. *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 979.

<sup>148</sup> *Id.* at 978 (emphasis added).

<sup>149</sup> *See Strzelczyk v. Jett*, 870 P.2d 730, 733 (Mont. 1994).

<sup>150</sup> *See Wade v. United States*, 745 F. Supp. 1573, 1576 (D. Haw. 1990) (interpreting Hawaii’s wrongful death statute to include a claim for a deceased “fetus” and referring to the deceased twin babies as “twin fetuses”); *Volk v. Baldazo*, 651 P.2d 11, 15 (Idaho 1982) (recognizing wrongful death claim for the tortious death of a “viable unborn fetus” and not once using the word baby); *see also, e.g., MICH. COMP. LAWS* § 600.2922a (2018) (providing a wrongful death or negligence claim for “physical injury to or the death of the embryo or fetus”); *Summerfield v. Superior Court*, 698 P.2d 712, 724 (Ariz. 1985) (recognizing a wrongful death claim for the death of an unborn baby and referring to that baby as a fetus);

Another devaluing description of stillbirth is found in a common limitation on damages recoverable in negligence claims, allowing damages for the “mental anguish . . . resulting from negligent treatment that causes the loss of a fetus as part of the women’s body,” but refusing damages for “the loss of a fetus as an individual.”<sup>151</sup> The distinction attempts to distinguish between the loss of a baby as a part of the woman’s body versus just as a baby. What exactly is the difference?<sup>152</sup> The baby was both part of the woman’s body and yet an individual, precluding a distinction. Consider the additional anguish that will result when the mother’s body starts to produce milk a few days after birth. This hormonal process is yet another cruel reminder that her baby died, as her breasts fill up with milk with no baby to breastfeed. It is anguishing.<sup>153</sup> But is it part of losing the “fetus” as a part of the mother’s body, or as a separated baby? It is a hormonal response to the departure of the “fetus” from the mother’s body, but the purpose of that hormonal response is to feed a living baby. Instead of just focusing on compensating the mother for her obvious injury, these forced distinctions make no attempt to understand the injury that is stillbirth.<sup>154</sup>

Devaluation can also be nonverbal. That occurs when courts exclude pictures of stillborn babies at trial. Naturally, a picture of a stillborn child is a picture of a dead child. In the nineteenth century, post-mortem photography was

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Castro v. Melchor, 366 P.3d 1058, 1067 (Haw. Ct. App. 2016); Salazar v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. 1980); DiDonato v. Wortman, 358 S.E.2d 489, 495 (N.C. 1987). *But see* ARK. CODE ANN. § 16-62-102 (2018) (recognizing wrongful death claim for “the death of a person or an unborn child”).

<sup>151</sup> Krishnan v. Ramirez, 42 S.W.3d 205, 215 (Tex. Ct. App. 2001); *see also* Burgess v. Superior Court, 831 P.2d 1197, 1084–85 (Cal. 1992); Smith v. Borello, 804 A.2d 1151, 1163 (Md. 2002); Modaber v. Kelley, 348 S.E.2d 233, 235–37 (Va. 1986).

<sup>152</sup> Krishnan v. Sepulveda, 916 S.W.2d 478, 489 (Tex. 1995) (Gonzalez, J., dissenting) (“[T]he 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.”). “It will not be surprising if the foregoing instructions and definitions profoundly confuses juries, attorneys, and trial and appellate courts.” *Id.*

<sup>153</sup> *See Position Statement, PREGNANCY LOSS & INFANT DEATH ALLIANCE 2* (Aug. 2016), available at [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_PositionStatement\\_LactationIssuesFollowingLoss.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_PositionStatement_LactationIssuesFollowingLoss.pdf) [<https://perma.cc/7TZG-EXXY>] (“Whether or not lactation is expected, the grief experienced by a mother who is not able to breastfeed or offer breast milk to her baby is profound.”); *see also* Joanne Cacciatore, *The Unique Experiences of Women and Their Families After the Death of a Baby*, 49 SOC. WORK HEALTH CARE 134, 142 (2010) [hereinafter Cacciatore, *Unique*] (“There is often a powerful, evolutionary impetus to nurture the baby who died. The emotional state derived from maternal hormones is incongruent with her reality as she cannot physically bond with her baby.”).

<sup>154</sup> Another difficult scenario would be the surrogacy context. Presumably, only the pregnant woman would be able to recover damages because the fetus was part of her body, but not the actual parents. That does not make sense though as the expectant parents would likely be more apt to suffer injury than the pregnant woman. And what if the baby in the pregnant surrogate was made from the parents’ egg and sperm? Would then the fetus actually be a part of the expectant mother’s body even though the fetus is not literally inside that expectant mother?

common, and pictures of deceased children were comforting to parents.<sup>155</sup> The “photographs of children brought the living child’s face and form back to their parents.”<sup>156</sup> But then cameras became more common and parents could be comforted by pictures of their child when still alive—“taking and displaying pictures of the dead was [then] seen as unseemly rather than respectful.”<sup>157</sup> This sentiment feeds well into the legal standards courts use in determining whether to admit photographs—how “gruesome” photographs could unfairly prejudice the jury.<sup>158</sup> A photo of a stillborn baby has an inherent “gruesomeness” to it; it is a picture of a dead baby. Not surprisingly, numerous courts have excluded pictures of stillborn babies.<sup>159</sup>

Professor Carol Sanger hinted at this inherent gruesomeness in her description of postmortem photography of stillborn babies, describing that the photos are “[c]arefully lit portraits sensitive to the baby’s *often distressed* physical condition . . . .”<sup>160</sup> This assumption of distress is likely due to the inaccurate assumption that stillbirth is unpreventable, possibly due to some sort of abnormality.<sup>161</sup> Stillborn babies are unlikely to look any more distressed than living ones, however. Both are cleaned before given to the mother. Especially if full-term, stillborn babies just look like sleeping babies.<sup>162</sup> And even if not full-term, a stillborn baby at only twenty-five weeks will look like a living, sleeping, premature baby of the same gestational age, a picture of which would not be seen as gruesome.

The picture is one of the only things parents have to prove the baby’s existence.<sup>163</sup> The photo provides a “record of social identity for parent and for

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<sup>155</sup> See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN THE TWENTY-FIRST CENTURY 140 (2017).

<sup>156</sup> *Id.* at 136.

<sup>157</sup> Sanger, *supra* note 59, at 285.

<sup>158</sup> See *Heimlicher v. Steele*, 615 F. Supp. 2d 884, 927 (N.D. Iowa 2009) (discussing Rule 403’s admissibility test of weighing probative value versus prejudicial effect and that gruesomeness of photos does not automatically make them inadmissible).

<sup>159</sup> See, e.g., *Navarro de Cosme v. Hosp. Pavia*, 922 F.2d 926, 930–31 (1st Cir. 1991) (affirming discretionary exclusion from evidence of “inflammatory,” “gruesome” photographs of stillborn fetus in medical malpractice action against doctor and hospital); *Steele v. Atlanta Maternal-Fetal Med., P.C.*, 610 S.E.2d 546, 553–54 (Ga. Ct. App. 2005) (affirming discretionary exclusion of “emotionally provocative” and “inflammatory” photographs of stillborn fetus on grounds that their “slight probative value was substantially outweighed by the danger of unfair prejudice.”); *Kelly v. Al-Qulali*, 728 N.W.2d 852 (Iowa Ct. App. 2007) (affirming discretionary exclusion from evidence of photographs of stillborn fetus offered as evidence on loss of consortium claim).

<sup>160</sup> SANGER, *supra* note 155, at 136 (emphasis added).

<sup>161</sup> See *supra* notes 45–50 and accompanying text (describing and dispelling the myth that stillbirth is unpreventable).

<sup>162</sup> See *Heimlicher v. Steele*, 615 F. Supp. 2d 884, 927 (N.D. Iowa 2009) (describing the photographs as “show[ing] what appears to be a sleeping, fully-clothed or covered, newborn infant.”).

<sup>163</sup> LAYNE, *supra* note 3, at 99 (explaining that pictures of stillborn babies “play a critical role in establishing the reality of the baby.”); see *id.* at 127 (explaining the importance of the

child.”<sup>164</sup> The picture also proves that the baby was in fact a baby—not just a fetus, a distinction relevant to the extent of the parents’ loss and jury’s determination of damages. “Unduly sterilizing a party’s trial presentation can unfairly hamper her ability to shape a compelling and coherent exposition of the facts.”<sup>165</sup> Parents can testify about their loss, but, especially due to misconceptions about stillbirth, only the picture can really communicate their loss.<sup>166</sup> Even if the baby is distressed physically, only the picture can show the jury that even a stillborn baby is a baby.

That tort law treats stillbirth as less than the death of a child is not surprising given that the dominant cultural view is the same. Stillbirth is “a terrible loss,” but not the same as losing a child.<sup>167</sup> Even physicians, in one study, explained stillbirth as “*like . . . losing a family member,*” as opposed to actually losing a family member.<sup>168</sup> If the baby had survived birth and later died, that was a loss of a family member. But if the baby did not survive birth, the death was not of a family member. The deaths are not “equivalent.”<sup>169</sup> “While most infant and child deaths are socially recognized as traumatic and worthy of mourning, stillbirth is generally treated as a non-event that is not as weighty as the death of a live-born child.”<sup>170</sup>

The deaths are different because the stillborn baby never took a breath outside of the womb. “The metaphor of taking that first breath in the world carries strong moral significance for many people . . . .”<sup>171</sup> A baby born premature at 25 weeks who later dies was a member of the family, but a full-term stillborn baby who never takes that first breath is not. In reality, “at the end of gestational development,” the cutoff of a first breath “makes little sense medically and is essentially arbitrary.”<sup>172</sup> But still, that first breath is paramount. Parents’ “mourning experience” after the death of an infant, even a premature infant, is validated, but grieving after stillbirth “is generally decried by society in general.”<sup>173</sup>

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baby’s footprints because they represent “not only generic humanness but the idea of the unique individuality of each person.”)

<sup>164</sup> SANGER, *supra* note 155, at 140.

<sup>165</sup> *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 314 (3d Cir. 2004).

<sup>166</sup> See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 295 (2013) (discussing the emphasis in evidence law on “the importance of narrative richness and each side’s opportunity to shape the moral force of its case,” partially necessary because “jurors have preexisting conceptions about stories that affect how they process evidence . . .”).

<sup>167</sup> Kelley & Trinidad, *supra* note 2, at 12.

<sup>168</sup> *Id.* at 13; see also Cacciatore et al., *Ambiguity*, *supra* note 90, at 444 (explaining that “people will not acknowledge the child who died at birth as a member of the family.”).

<sup>169</sup> Kelley & Trinidad, *supra* note 2, at 10.

<sup>170</sup> Joanne Cacciatore et al., *Condemning Self, Condemning Other: Blame and Mental Health in Women Suffering Stillbirth*, 35 J. MENTAL HEALTH COUNSELING 342, 343 (2013) (internal citations omitted).

<sup>171</sup> Kelley & Trinidad, *supra* note 2, at 13.

<sup>172</sup> *Id.*

<sup>173</sup> Cacciatore, *Feminist*, *supra* note 71, at 91.

But to parents, stillbirth is no different than infant death. “[P]arents describe the grief of stillbirth as being just as deep, painful, and significant as it would be to lose an infant who is born and survives a few weeks in intensive care.”<sup>174</sup> When asked what “they most wanted the general public to know about stillbirth and how it affects families,” parents overwhelmingly answered that “*a stillbirth is a death in the family*.”<sup>175</sup> Plainly, stillbirth is the death of your child.<sup>176</sup> Whether the child—who has a name,<sup>177</sup> who “is real and will always be remembered as part of the[] family”<sup>178</sup>—took a breath outside of the womb is irrelevant to the extent of the parents’ loss.<sup>179</sup>

And it is the parents’ loss that tort law is attempting to compensate. The best way for tort law to do so is to recognize a wrongful death claim, allowing parents the same recourse they already have if their living child dies due to tort. Appropriate damages may very differ depending on if the child is unborn or twelve years old, but a wrongful death claim should be available for both unnecessary deaths.

Importantly, within that wrongful death claim, tort law must be careful to not minimize the parents’ loss, which is exactly what happens when the court describes the unborn baby as a fetus.<sup>180</sup> True, medically speaking, an unborn baby is a “fetus” until birth. But doctors and nurses rarely use the term “fetus” in a desired pregnancy. “[M]edical professionals are more likely to socially support the attribution of ‘baby’ or ‘child’ status to the fetus;”<sup>181</sup> at the ultrasound, the doctor points out the baby’s foot, not the fetus’s foot. It is only if “something goes wrong,” like a stillbirth, that “the medical terminology is quickly redeployed”<sup>182</sup> and the baby is only a fetus.

But even if doctors were actually consistent in their use of “fetus,” “[m]edical terminology provides definitions and benchmarks for biological stages of prenatal development, but it does not tell us what the word ‘fetus’ means in other contexts,”<sup>183</sup> or whether the word “fetus” is even applicable in other contexts. Stillbirth is a different context. No legal reason exists requiring

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<sup>174</sup> Kelley & Trinidad, *supra* note 2, at 10.

<sup>175</sup> DEFRAIN ET AL., *supra* note 80, at 127–28.

<sup>176</sup> Joanne Cacciatore & Jill Wieber Lens, *The Ultimate in Women’s Labor: Rethinking Feminism Around Pregnancy, Birthing, and Grieving a Dead Baby*, in ROUTLEDGE INTERNATIONAL HANDBOOK OF WOMEN’S SEXUAL & REPRODUCTIVE HEALTH (Jane M. Ussher, Joan C. Chrisler, Janette Perz, eds., forthcoming 2019) (describing stillbirth as the death of a child).

<sup>177</sup> DEFRAIN ET AL., *supra* note 80, at 61 (“The overwhelming majority of parents (nearly 90 percent) considered the baby a part of the family and named the baby.”).

<sup>178</sup> Kelley & Trinidad, *supra* note 2, at 10, 12.

<sup>179</sup> *Id.* at 13.

<sup>180</sup> *See id.*

<sup>181</sup> Victoria Browne, *Feminist Philosophy and Prenatal Death: Relationality and the Ethics of Intimacy*, 41 SIGNS: J. WOMEN CULTURE & SOC’Y 385, 402 (2016).

<sup>182</sup> *Id.*

<sup>183</sup> SANGER, *supra* note 155, at 73.

courts to devalue stillbirth by calling the unborn baby a fetus or requiring courts to exclude pictures, the one piece of evidence that the baby was more than a fetus. “Most [parents] refer to the loss as a baby,”<sup>184</sup> who has a name, and many parents of stillbirth just want to hear that name said out loud.<sup>185</sup> Courts should similarly use the name that the parents chose, like the Wisconsin Supreme Court did by calling the baby Brianna,<sup>186</sup> or the Alabama Supreme Court recently did by calling the unborn baby Tristan.<sup>187</sup>

### B. *No Lost Parent-Child Relationship*

Relational injuries can be based either on the changing of the relationship or the ending of it. For instance, a relationship is necessarily changed if a spouse or child is severely injured. Second, a relationship is completely lost if the family member dies. Tort law treats these two extents of relational injuries differently.<sup>188</sup> The potential relational injury in stillbirth is the relationship lost to death, the lost parent-child relationship.

A relational injury is different than general emotional distress or mental anguish. Professor Joellen Lind eloquently explained this distinction in the context of a wrongful death of a child. The lost relationship includes the lost opportunities—the parent missing out on “read[ing] books to her, or teach[ing] her to ride a bicycle.”<sup>189</sup> “[T]hese activities would have generated ongoing, occurrent emotions, ideas, perceptions, and other experiences for both parties.”<sup>190</sup> But the loss is deeper than just opportunities. The parent-child relationship “as a totality would have affected the [parent’s] personality formation and development, goals, and life course, and would have had other transfiguring consequences.”<sup>191</sup> Being a parent is one “of the most important roles we play in life,” a “role[] that can define in large part who we are.”<sup>192</sup>

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<sup>184</sup> *Position Statement*, PREGNANCY LOSS & INFANT DEATH ALLIANCE 4 (Aug. 2016), available at [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_BereavedParentsRighttoSelf-Determination.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_BereavedParentsRighttoSelf-Determination.pdf) [<https://perma.cc/LHB8-WRCP>].

<sup>185</sup> Kelley & Trinidad, *supra* note 2, at 9, 13 (explaining that the parents in the study “were emphatic that they wanted to talk about their children.”).

<sup>186</sup> *Pierce v. Physicians Ins. Co. of Wis.*, 692 N.W.2d 558, 567 (Wis. 2005); see also *Shattuck v. Gulliver*, 481 A.2d 1110 (Conn. Super. Ct. 1984) (describing the stillborn baby as the parents’ “son”); *Spangler v. Bechtel*, 958 N.E.2d 458, 460 (Ind. 2011) (describing the death of the parents’ “full-term baby daughter” and as the parents’ “child”).

<sup>187</sup> See generally *Hamilton v. Scott*, No. 1150377, 2018 WL 1224234, at \*14 (Ala. Mar. 9, 2018).

<sup>188</sup> DOBBS, *supra* note 98, at 812 (explaining that the availability of loss of consortium damages for wrongful death depends on the state statute); *id.* at 842 (explaining the common law availability of loss of consortium damages for the injury of a family member, and that the availability of a claim for parents after a child’s injury is limited).

<sup>189</sup> Joellen Lind, *Valuing Relationships: The Role of Damages for Loss of Society*, 35 N.M. L. REV. 301, 305 (2005).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 306.

<sup>192</sup> *Id.*

Tort law, however, just as it devalues emotional distress, also devalues relational injuries. “Like emotional harms, relational injuries continue to rank at the bottom of the legal hierarchy of injuries. At different historical periods, certain relational claims have gained visibility, but there has never been widespread legal protection for this type of injury.”<sup>193</sup> The common law did not recognize relational injuries; it did not provide any claim for the relational injury that occurs when a family member dies due to tort.<sup>194</sup> In the mid 1850’s, legislatures began creating wrongful death statutes, but still damages for the lost relationship were not available because damages were statutorily limited to “pecuniary” losses.<sup>195</sup> Many thought it proper to limit damages to lost economic contributions because it was “consider[ed] . . . degrading and perhaps even immoral to evaluate human life and human relationships according to commercial measures.”<sup>196</sup>

A pecuniary measurement, however, automatically limits recovery for the deaths of certain groups of people. Essentially, “the death of someone not earning money—a child, an older person, a homemaker—resulted in little or no recovery.”<sup>197</sup> In fact, economically, losing a child actually saved parents money. Many may have hesitated to “commodify the parent-child relationship by placing a monetary value on children’s lives,”<sup>198</sup> but a pecuniary-only measure devalues that same relationship.

Gradually, legislatures and courts expanded recovery for wrongful death to include damages for loss of society and companionship, more simply put as the loss of the relationship.<sup>199</sup> The damages are called loss of consortium damages. A parent’s damages after a child’s wrongful death are called loss of filial consortium damages.<sup>200</sup> Even today, however, loss of consortium damages are not guaranteed. Loss of spousal consortium damages are uncontroversial, but states still pause at whether to award loss of parental or filial consortium damages.<sup>201</sup> If the state recognizes only a negligence claim after stillbirth, the mother’s recovery is limited to mental anguish damages; loss of filial consortium damages are not available.

Just as they did for emotional injuries, feminist legal scholars suggest a main reason courts historically and still today devalue the injury of lost rela-

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<sup>193</sup> Chamallas, *Architecture*, *supra* note 9, at 500.

<sup>194</sup> STUART M. SPEISER, 1 RECOVERY FOR WRONGFUL DEATH 28 (2d ed. 1975).

<sup>195</sup> DOBBS, *supra* note 98, at 808.

<sup>196</sup> Chamallas, *Architecture*, *supra* note 9, at 497.

<sup>197</sup> DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 674 (2d ed. 1993).

<sup>198</sup> Chamallas, *Architecture*, *supra* note 9, at 497.

<sup>199</sup> See DOBBS, *supra* note 98, at 812.

<sup>200</sup> See, e.g., *Hancock v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 54 S.W.3d 234, 237 (Tenn. 2001) (allowing recovery of loss of filial consortium damages in wrongful death claim).

<sup>201</sup> See *id.* at 237 n.2 (noting that thirty-two states allow recovery of filial consortium damages in a wrongful death claim).

tionship, especially the lost child-parent relationship, is because of the association of that injury with women. Professors Chamallas and Wriggins specifically describe that “an important relational element [existed for] the bystander claim that flowed from the fact that it was often the injured party’s family member who was on hand to witness the injury and suffer distress as a result.”<sup>202</sup> Really, the claim was “primarily a way to vindicate damage to a relationship . . . most prominently, maternal ties to children—than with compensating for nervous shock and trauma.”<sup>203</sup>

This association between mothers and relational injuries, then, according to feminist legal theory, explains why “[a]t different historical periods, certain relational claims have gained visibility, but there has never been widespread legal protection for this type of injury.”<sup>204</sup> And still today, “[c]onsistent protection for loss of consortium of children, parents, grandparents, and siblings is notably lacking.”<sup>205</sup>

Tort law is already reluctant to recognize the parent’s relational injury when a living child dies. It is no surprise that tort law then tends to devalue the relational injury after stillbirth, when the association to women is even stronger because the child was still in the mother’s womb. The California Supreme Court explained that:

The parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb; but the mother and father of a child born alive have seen, touched, and heard their baby, have witnessed his developing personality, and have started the lifelong process of communicating and interacting with him.<sup>206</sup>

Said another way, the “rich experiences upon which a meaningful parent-child relationship is built . . . do not begin until the moment of birth.”<sup>207</sup> An Illinois appellate court similarly explained that “[i]n the death of an unborn fetus, no guidance, love, affection or security has been exchanged. While parents may love and have affection for an unborn child, the child cannot be said to have returned such affection.”<sup>208</sup> The court acknowledged that little difference exists between stillbirth and the death of a child moments after birth, but believed

the initial bonding which takes place at birth cannot be dismissed so easily. The length, intensity and quality of the parent-child relationship are determinative of the loss experienced by the parent. Certainly, birth is a proper point at which to begin to measure the loss of a child’s society.<sup>209</sup>

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<sup>202</sup> CHAMALLAS & WRIGGINS, *supra* note 109, at 113.

<sup>203</sup> *Id.* at 116.

<sup>204</sup> Chamallas, *Architecture*, *supra* note 9, at 500.

<sup>205</sup> *Id.* at 502.

<sup>206</sup> *Justus v. Atchison*, 565 P.2d 122, 133 (Cal. 1977).

<sup>207</sup> *Id.*

<sup>208</sup> *Hunt v. Chettri*, 510 N.E.2d 1324, 1326 (Ill. App. Ct. 1987).

<sup>209</sup> *Id.*; *see also* *Denham v. Burlington N. R.R. Co.*, 699 F. Supp. 1253, 1256 (N.D. Ill. 1988) (“Unborn Baby Hughes had not been born at the time of his death. Therefore, his fa-

Professor Steven Smith also once noted a similar distinction between a relationship that existed with a living child and a relationship that could have existed with a child never born. “[I]t is far easier to visualize what was at stake when the concrete particulars—the first steps and the birthday parties and the heart-to-heart talks—are actual memories and not just conceptual possibilities.”<sup>210</sup> Any lost anticipatory joys—“seeing a child grow, taking care of her, teaching her, playing with her”—“will have a hazy, impersonal aspect; there is no actual child with a particular giggle, with dimples and unruly hair and a homely toothless grin, for the couple’s reflections to distill around.”<sup>211</sup>

Tort law’s devaluation of the lost unborn child-parent relationship is consistent with the dominant cultural view that stillbirth is not really that devastating because the parents had not yet bonded with the child. “Some view [stillbirth] as a reproductive loss and not the death of a child—they may feel that since the parents did not experience the child outside the mother’s body, there was minimal attachment or love.”<sup>212</sup> This view is apparent in another odd reaction to stillbirth—that the parents should be thankful it was not an older child that died, or thankful that the death happened before the parents brought the baby home and got a chance to bond with him.<sup>213</sup> It is why “parents’ grief and mourning are often felt to be ‘abnormal,’ since others cannot readily see the attachment that existed between parent and child before birth.”<sup>214</sup>

But even if the pre-birth parent-child relationship “is not appreciated” “socially [or] even medically,” it exists.<sup>215</sup> “[M]ost women and many parents do in

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ther and brother cannot recover for the ‘loss of society’ of Unborn Baby Hughes.”); *DiDonato v. Wortman*, 358 S.E.2d 489, 494 (N.C. 1987) (“When a child is stillborn we simply cannot know anything about its personality and other traits relevant to what kind of companion it might have been and what kind of services it might have provided. An award of damages covering these kinds of losses would necessarily be based on speculation rather than reason”).

<sup>210</sup> Stephen D. Smith, *Missing Persons*, 2 NEV. L.J. 590, 603 (2002); see Malinda L. Seymour, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 853 (2017) (discussing that “[a]doption law does not allow mothers to relinquish parental rights prior to the birth of the child” because the “law recognizes that the baby may not seem real to the mother until after the child is born . . .”); see also John Roger Mann, Note, *The Fetus as a Person in Wrongful Death Actions*, 57 U. COLO. L. REV. 895, 903 (1986) (“Those interests protected by wrongful death statutes—earning ability, consortium, comfort, society, guidance, and companionship—are the existing qualities of actual persons. The fetus, as a potential person, has no existing ‘personal’ qualities for which survivors can be compensated, only the possibility of developing such protectable interests after birth.”); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 557 n.18 (1962) (advocating for wrongful death claim for stillbirth, but suggesting “the mental anguish of the parents may be greater in situations where they actually see the child before its death . . .”).

<sup>211</sup> Smith, *supra* note 210, at 602.

<sup>212</sup> Cacciatore, *Unique*, *supra* note 153, at 144.

<sup>213</sup> *Id.*

<sup>214</sup> Kirkley-Best & Kellner, *supra* note 69, at 420.

<sup>215</sup> Kelley & Trinidad, *supra* note 2, at 13.

fact bond with their baby over the 8 to 9 months of pregnancy.”<sup>216</sup> “The theory of prenatal attachment posits that a unique relationship develops between parents and fetus long before a child is born.”<sup>217</sup> The bond is even more appreciable today due to medical advancements—blood tests to reveal gender as early as twelve weeks pregnant, and three-dimensional ultrasounds to better see the baby.<sup>218</sup> Researchers introduced the notion of prenatal attachment as early as the 1940s and 1950s.<sup>219</sup> The research continued and in the 1990s, researchers introduced attempts to measure the “extent of ‘the unique affectionate relationship that develops between a woman and her foetus.’”<sup>220</sup> The purposes of measurements include identifying women who may have difficulty further bonding with the baby after birth, which can have negative long-term effects for both the baby and mother.<sup>221</sup> Regardless, decades of research confirms that a unique and affectionate relationship develops between parents and their child long before birth.<sup>222</sup>

And that unique and affectional relationship is lost in stillbirth. Stillbirth undoubtedly causes parents mental anguish—especially when a mother has to deliver her child knowing that he has already died. But “mental anguish” simply “cannot speak to the enduringly disrupted life plans and transformed life ex-

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<sup>216</sup> *Id.*; see also Julie F. Pallant et al., *Psychometric Evaluation and Refinement of the Prenatal Attachment Inventory*, 32 J. REPROD. & INFANT PSYCHOL. 112, 112 (2014) (“The relationship between a mother and child does not begin at birth, but develops throughout the pregnancy.”).

<sup>217</sup> Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*, 10 (NIH Public Access, 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3083029/pdf/nihms184421.pdf> [<https://perma.cc/23FT-MP5X>].

<sup>218</sup> LAYNE, *supra* note 3, at 93 (explaining that one way medical technologies “appear to be changing the experience of pregnancy loss” is by “changing the expectations regarding biomedicine’s abilities to guarantee a live birth.”).

<sup>219</sup> See generally Anna Maria Della Vedova et al., *Assessing Prenatal Attachment in a Sample of Italian Women*, 26 J. REPROD. & INFANT PSYCHOL. 86 (2008) (mentioning research done by Deutsch and Winnicott describing the mother’s attachment to her unborn baby).

<sup>220</sup> *Id.* at 88.

<sup>221</sup> See Pallant et al., *supra* note 216, at 122.

<sup>222</sup> This research explains that prenatal bonding in desired pregnancies increases as the pregnancy progresses. See *infra* notes 374–75 and accompanying text. Justice Kennedy claimed, without evidence, that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child . . . it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). His conclusion ignores the distinction between a desired and undesired pregnancy, and the fact that almost all abortions take place well before twenty weeks of pregnancy, the first point at which stillbirth is even possible. See *infra* notes 408–12 and accompanying text. Professor Maya Manian addressed this paternalistic speculative risk of regret. See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 224–27 (2009).

periences” due to stillbirth.<sup>223</sup> Stillbirth is not just something the parents should be over within months or years. Grief based on the lost child-parent relationship will continue. An injury based on a lost parent-child relationship is “by its nature, more a road not taken, more a whole form of life that is missed, than a harm that diminishes in degree.”<sup>224</sup> Before stillbirth, the parent “had an opportunity to become a different person through the relationship—to occupy a special role—but that opportunity is no more.”<sup>225</sup>

“The death of a child by itself is transformative because it obliterates the parental role in regard to that child.”<sup>226</sup> This transformation is especially drastic after stillbirth—“[t]he parents of a stillborn child probably have one of the hardest times of any bereaved adult dealing with the reality of the death and the permanence of changed expectations that it entails.”<sup>227</sup> Research shows that parents, especially mothers, question their parenthood after stillbirth.<sup>228</sup> “Even if they have older living children, the full scope of their parenthood is ambiguous because most people will not acknowledge the child who died at birth as a member of the family.”<sup>229</sup> After the baby’s death, “there are no tangible signs of parenthood . . .”<sup>230</sup> “[U]nlike a growing child or an adult, who leave behind a trail of existence, an unborn child lacks the material traces of social life.”<sup>231</sup> If a stillborn baby is not a member of the family, then the parent is not really a parent. “Researchers have been keen to point out that parents will question how many children they have and, for the first-time parent, there is also the doubt about whether they are a mother or a father at all.”<sup>232</sup> Parents are “rob[bed] [] of their identity as parents, based on the fact that their baby did not survive.”<sup>233</sup>

Moreover, even if a parent-child relationship with an unborn baby is merely expected—which it is not as prenatal attachment demonstrates—its expected nature is not a reason to deny damages. Even with the death of a living child, much of the lost companionship is merely expected. Professor Lind specifically noted the expectation nature of consortium damages—although “loss-of-society damages depend on feelings and emotional bonds, they also exhibit the forward-looking, expectation-based attributes of contract law.”<sup>234</sup> This is because

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<sup>223</sup> See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 171 (2017). “[M]ental anguish misrepresents the character of reproductive harms to decisional autonomy and individual well-being.” *Id.* at 163.

<sup>224</sup> Lind, *supra* note 189, at 308.

<sup>225</sup> *Id.* at 306.

<sup>226</sup> *Id.* at 334.

<sup>227</sup> Kirkley-Best & Kellner, *supra* note 69, at 424.

<sup>228</sup> See Cacciatore, *Unique*, *supra* note 153, at 136–42.

<sup>229</sup> See Cacciatore et al., *Ambiguity*, *supra* note 90, at 444.

<sup>230</sup> *Id.* at 443–44.

<sup>231</sup> See Linda L. Layne, *Breaking the Silence: An Agenda for a Feminist Discourse of Pregnancy Loss*, 23 FEMINIST STUD. 289, 300 (1997).

<sup>232</sup> Murphy & Cacciatore, *supra* note 69, at 131.

<sup>233</sup> Kelley & Trinidad, *supra* note 2, at 13.

<sup>234</sup> Lind, *supra* note 189, at 305.

consortium “damages contemplate a developmental thing that would have flourished over time—a lost human interaction.”<sup>235</sup> Additionally, remember the deeper layer of consortium damages that compensate a parent no longer being a parent, another future-looking expectation damage. Thus, even if the parent-unborn child relationship is only “expected,” that lost expectation is exactly what consortium damages compensate.

Parents are also robbed of more than hazy and impersonal anticipatory joys. Remember that current medical practice encourages parents to spend time with their stillborn baby.<sup>236</sup> Parents will count his ten fingers and ten toes, touch his skin, and kiss him over and over. The baby will be both seen and touched. He is neither hazy nor impersonal, and neither will be parents’ hopes of his smile and giggles. Notably, Professor Smith’s point about “conceptual possibilities” and “hazy, impersonal” anticipatory joys concerned a couple’s decision to not have a child, a situation very different than stillbirth.<sup>237</sup> Also, it is hard to see how the anticipatory joys will be any hazier after stillbirth than they would be after the death of an infant alive for mere days or months.

“[S]tillborn infants count to these parents, and the love and sorrow the parents feel are real.”<sup>238</sup> The Iowa Supreme Court recognized so, noting that the lost relationship “does not necessarily relate to the child’s birth. And the parents’ loss certainly does not vanish because the deprivation occurred prior to birth. To the deprived parent the loss is real either way.”<sup>239</sup> An Arizona court similarly explained:

Before the twins were born, the [parents] developed a relationship with them. They spoke, sang and read to them; they developed love for them and expectations for their future . . . . [A] parent’s loss of a child’s expected love and companionship does not vanish simply because the child is lost before birth.<sup>240</sup>

Social science research confirms that these courts are correct, and parents should be able to recover consortium damages because stillbirth severs the parent-child relationship just like any other child death does.

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<sup>235</sup> *Id.* at 302; *see also id.* at 305 (explaining that consortium damages “focus on the missed opportunity of interacting over time with another in a significant relationship”).

<sup>236</sup> *See supra* notes 74–76 and accompanying text.

<sup>237</sup> Smith, *supra* note 210, at 602–03.

<sup>238</sup> Kelley & Trinidad, *supra* note 2, at 13.

<sup>239</sup> *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983).

<sup>240</sup> *Burnham v. Miller*, 972 P.2d 645, 647 (Ariz. Ct. App. 1998).

*C. Devaluing the Father's Injury*<sup>241</sup>

“[T]here should be little dispute that the stillbirth of a child as a result of medical negligence will be deeply hurtful to the mother, producing extraordinary grief and anguish.”<sup>242</sup> No one doubts that stillbirth is devastating for the mother. Professors Chamallas and Wriggins argue that courts were slow to recognize a negligence claim after stillbirth because of its gendered nature—the assumption that stillbirth, only, or at least most severely, injures the mother.<sup>243</sup> The gendered nature slowed down the recognition of a tort claim, and it continues to stunt the evolution of the tort claim—by denying claims for aggrieved fathers and non-biological parents.

Whether a non-birth parent, including both fathers and non-biological parents, should have a claim is a question for the states that recognize only a negligence claim. Any statutory wrongful death claim provides a claim for both parents, yet valid concerns should exist whether the father's grief is still underestimated or discounted. But if only a negligence claim exists, state courts struggle with whether non-birth parents even have a claim after stillbirth. A few of those negligence-only states have specifically recognized the father's claim.<sup>244</sup> But others still refuse, or make the father's claim much more difficult.

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<sup>241</sup> This section's title refers to the father, as opposed to non-birth parents generally, only because the empirical research cited herein is specific to fathers. But the arguments apply equally as well to the non-birthing parent in a same-sex couple. *See generally* Joanne Cacciatore & Zulma Raffo, *An Exploration of Lesbian Maternal Bereavement*, 56 SOC. WORK 169 (2001) (explaining that bereavement of gay and lesbian couples after miscarriage, stillbirth, or child death has not been thoroughly studied). The legal and policy arguments, however, apply equally as well to any non-birth parent. Another commonly forgotten bereaved are siblings. *See* Murphy & Cacciatore, *supra* note 69, at 130 (explaining that siblings “mourn both the baby and the loss of their previous relationship with their parents”); *see also* Position Statement, PREGNANCY LOSS & INFANT DEATH ALLIANCE 4 (Aug. 2016), [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_PositionStatement\\_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_PositionStatement_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf) [<https://perma.cc/28LY-NZQM>] (“Children alive at the time of loss suffer two losses: the sibling they were expecting and the parents they knew before the loss. They live with parents whose behaviors are altered by intense grief . . .”). Despite the verified grief, courts have refused siblings a claim:

Although the children knew of the impending birth of a sibling, given their ages, 4 and 7, the relationship between them and the fetus was, as a matter of law, not sufficiently developed to be regarded as an intimate familial one. The children simply lacked the life experiences required to enable them to appreciate the consequences of a stillbirth.

*Andreasen v. Gomes*, 504 N.W.2d 539, 542 (Neb. 1993).

<sup>242</sup> *Pierce v. Physicians Ins. Co. of Wis., Inc.*, 692 N.W.2d 558, 571 (Wis. 2005) (Prosser, J., concurring).

<sup>243</sup> CHAMALLAS & WRIGGINS, *supra* note 109, at 104 (“To try to isolate a wholly separate injury to the mother—and to deny recovery when it is lacking—is a dramatic example of refusing to recognize an injury unless an identical harm can be suffered by a man.”).

<sup>244</sup> *See, e.g.*, *Tanner v. Hartog*, 696 So. 2d 705, 709 (Fla. 1997); *Milton v. Cary Med. Ctr.*, 538 A.2d 252, 256 (Me. 1988); *Giardina v. Bennett*, 545 A.2d 139, 139 (N.J. 1988); *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 86–87 (N.C. 1990).

Those include populous states like Texas,<sup>245</sup> New York,<sup>246</sup> and California,<sup>247</sup> the three of which that made up almost 30 percent of all live births in the nation in 2016.<sup>248</sup> Naturally, those states are also likely to have a significant portion of stillbirths,<sup>249</sup> yet no or little recourse for fathers if the stillbirth is tortiously caused.

The reason that a negligence claim for the non-birth parent is problematic is because of tort law's limited recovery rules for emotional distress claims, the type of claim a father or non-birth parent has. As already discussed, tort law is hesitant to recognize recovery for emotional distress, and thus created specific limited liability duty rules discussed earlier—the impact rule (was the father impacted by the negligent conduct), the danger zone (was his physical safety at risk), or the *Dillon* test (did he witness the injury to his child).<sup>250</sup> A father will usually neither be impacted by nor at physical risk from the tortious conduct. If he did not witness the injury, if he was not present at the car accident, he has no claim. Even if present for the stillbirth, that may not be enough.<sup>251</sup> Also, a non-birth parent does not physically deliver the baby, meaning some other physical manifestation must occur in order to recover.<sup>252</sup> Further duty issues exist if the claim is for medical malpractice. Traditionally, the doctor owes a duty to the patient mother.<sup>253</sup> Even if the non-birth parent witnesses the malpractice, if no duty is owed, no malpractice claim can exist.

That said, none of the traditional fears related to expanding recovery for emotional distress apply. The injury is genuine, foreseeable, and liability would not be disproportionate. First, it is hard to doubt the genuineness of any parent's injury after stillbirth. Specific to non-birthing fathers, empirical research of parents after stillbirth demonstrates the genuineness of the injury, research that often refers to fathers as the “forgotten bereaved.”<sup>254</sup> One reason fathers are forgotten is that their grief may be less apparent; “most men are socialized

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<sup>245</sup> *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995). Texas recognizes a wrongful death claim for stillbirth due to tort other than medical malpractice. TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (West 2017). If due to medical malpractice, only a negligence claim is available.

<sup>246</sup> *Broadnax v. Gonzalez*, 809 N.E.2d 645, 648–49 (N.Y. 2004).

<sup>247</sup> *See Justus v. Atchison*, 565 P.2d 122, 136 (Cal. 1977). Virginia also appears to only allow a claim for the mother. *See generally Modaber v. Kelley*, 348 S.E.2d 233 (Va. 1986).

<sup>248</sup> *See Joyce A. Martin et al., Births: Final Data for 2016*, 67 NAT'L VITAL STAT. REP. 17, 25–26 (2018).

<sup>249</sup> State by state stillbirth data is difficult because some states measure stillbirth by the weight of the baby and some by the gestational age of the baby. *See Muthler, supra* note 42.

<sup>250</sup> *See supra* notes 119–25 and accompanying text.

<sup>251</sup> *See infra* notes 266–70 and accompanying text.

<sup>252</sup> *See supra* note 126 and accompanying text.

<sup>253</sup> *See Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995).

<sup>254</sup> Denise Côté-Arsenault & Joann O'Leary, *Understanding the Experience of Pregnancy Subsequent to a Perinatal Loss*, in PERINATAL AND PEDIATRIC BEREAVEMENT IN NURSING AND OTHER HEALTH PROFESSIONS 159, 165 (Beth Perry Black et al. eds., 2015).

not to discuss their feelings and to avoid emotionally charged situations.”<sup>255</sup> Despite appearance, fathers, like mothers, have “high levels of angst”<sup>256</sup> and “significantly higher levels of depression”<sup>257</sup> after stillbirth.<sup>258</sup> Additionally, “bereaved fathers experience more anger while bereaved mothers struggle more with guilt.”<sup>259</sup> The guilt that fathers do feel is most often related to their inability to make the mothers feel better.<sup>260</sup> “Fathers are in a difficult position [after a stillbirth] for a number of reasons: they are expected to take care of the wife emotionally; they are expected to continue to work and pay the bills; and they need to grieve for their lost baby themselves.”<sup>261</sup>

Research shows that fathers “tended to return to work sooner and with fewer challenges than did the mothers.”<sup>262</sup> The choice to quickly return to work, for either parent, may not be voluntary<sup>263</sup>; it is just the reality of needing to earn money to pay the bills.<sup>264</sup> “After the death of a loved one, only 60 percent of private sector workers get paid time off—and usually just a few days.”<sup>265</sup> Statistics are unknown, but given the paucity of paid parental leave among private employers, it would be very surprising if “loved one” in a be-

<sup>255</sup> Cacciatore, *Feminist*, *supra* note 71, at 91 (internal quotation marks omitted) (quoting LAYNE, *supra* note 3, at 131).

<sup>256</sup> Cacciatore et al., *Stillbirth and the Couple: A Gender-Based Exploration*, 11 J. FAM. SOC. WORK 351, 365 (2008) [hereinafter Cacciatore et al., *Stillbirth*].

<sup>257</sup> Cacciatore, *Feminist*, *supra* note 71, at 91.

<sup>258</sup> *See id.* Some differences noted in the research is that mothers’ grief tends to last longer. *See* Cacciatore et al., *Stillbirth*, *supra* note 256, at 365. At the same time, men may delay their grief, though, as one study showed that men displayed more grief than women twelve years after the baby’s death. *See* Joann O’Leary, *The Trauma of Ultrasound During a Pregnancy Following Perinatal Loss*, 10 J. LOSS & TRAUMA 183, 197 (2005).

<sup>259</sup> Cacciatore et al., *Stillbirth*, *supra* note 256, at 353.

<sup>260</sup> *Id.* at 354 (explaining that “bereaved fathers struggle with their multiple roles feeling powerless to support and protect their loved ones”) (quoting Deborah Smith Armstrong, *Emotional Distress and Prenatal Attachment in Pregnancy After Perinatal Loss*, 34 J. NURSING SCHOLARSHIP 339, 344 (2002)) (internal quotation marks omitted).

<sup>261</sup> *Id.* (quoting John De Frain et al., *The Psychological Effects of a Stillbirth on Surviving Family Members*, 22 OMEGA 81, 97 (1990)) (internal quotation marks omitted).

<sup>262</sup> *Id.* at 364.

<sup>263</sup> *See* Landry v. Clement, 711 So. 2d 829, 836 (La. Ct. App. 1998) (pointing to plaintiff’s staying away from work for three months as evidence of her damages); McCann v. ABC Ins. Co., 640 So. 2d 865, 875–76 (La. Ct. App. 1994) (noting that plaintiff’s grief did not allow her to work for a couple of months).

<sup>264</sup> *See* Cacciatore et al., *Stillbirth*, *supra* note 256, at 354.

<sup>265</sup> SHERYL SANDBERG & ADAM GRANT, OPTION B: FACING ADVERSITY, BUILDING RESILIENCE, AND FINDING JOY 20 (2017); *see also* Murphy & Cacciatore, *supra* note 69, at 132 (describing the potential economic impacts of stillbirth, including that it may cost parents “lower wages over the life course”). Sandberg and Grant further explain the adverse economic effects of the lack of bereavement time: “In the United States alone, grief-related losses in productivity may cost companies as much as \$75 billion annually. These losses could be decreased and the load could be lightened for people who are grieving if employers provided time off, flexible and reduced hours, and financial assistance.” SANDBERG & GRANT, *supra* note 265, at 20.

reavement policy covered an unborn baby. An early return to work for either the father or mother does not indicate a lack of injury.<sup>266</sup>

Second, a non-birth parent's injury is foreseeable. If malpractice, the obstetrician will likely have a relationship with the parent if he or she attended prenatal medical appointments.<sup>267</sup> "In counseling and providing services to a woman relating to her pregnancy, there inherently (biologically necessarily) is one and only one other identifiable individual with the potential to be a victim . . .—the father."<sup>268</sup> Even if not biological, the parents are identifiable.

Last, recognizing a claim for the non-birth parents creates only one or two more claims, meaning liability will not grow disproportionately,<sup>269</sup> nor will the amount of litigation. "[T]he mother's claim would essentially always be present and the likelihood of a paternal claim without participation of the mother seems vanishingly small . . ."<sup>270</sup> Even in adoption or surrogacy contexts, both non-birth parents would have, at most, two claims.

Something else is likely lurking underneath these legal technicalities, something specific to fathers—a view of "a world in which children are central to their mothers' emotional lives,"<sup>271</sup> but not their fathers' emotional lives.<sup>272</sup> Some may still even question whether fathers have emotional lives.

That was the controlling worldview when the California Supreme Court decided *Dillon v. Legg* and enabled recovery of emotional distress damages for witnessing injury to another.<sup>273</sup> The case involved a mother witnessing injury to her daughter, and Justice Tobriner emphasized the nature of the mother-child relationship in his opinion.<sup>274</sup> In fact, "[m]uch of Tobriner's opinion is written in gender-specific language (*mother*, rather than parent) . . ."<sup>275</sup> In his own later explanation of the case, Justice Tobriner explained recovery as the "natural justice" of the mother's claims.<sup>276</sup> At the same time, he made the *Dillon* test

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<sup>266</sup> *But see* Carey v. Lovett, 622 A.2d 1279, 1290 (N.J. 1993) (mentioning the mother's return to work as evidence of a lack of damages within decision to reduce damages the jury awarded).

<sup>267</sup> *See* Fox, *supra* note 223, at 217–18 (arguing for recognition of duty from doctor to non-patient partner in reproductive context because "partner's participation in the treatment process triggers a duty").

<sup>268</sup> *See* Meleney-Distasio v. Weinstein, No. FSTCV136018746S, 2014 WL 7462584, at \*8 (Conn. Super. Ct. Nov. 20, 2014).

<sup>269</sup> *See id.* at \*12, \*17 (dismissing fears of disproportionality and recognizing duty owed to both mother/patient and father for "wrongful abortion" claim when parents terminated pregnancy after doctor's mistaken diagnosis of significant genetic fetal abnormality).

<sup>270</sup> *Id.* at \*9.

<sup>271</sup> Chamallas & Kerber, *supra* note 113, at 857.

<sup>272</sup> Seymore, *supra* note 210, at 830 ("Much of law ascribes to men the desire to avoid fatherhood and a basic disinterest in their children.").

<sup>273</sup> *See* Dillon v. Legg, 441 P.2d 912, 914 (Cal. 1968).

<sup>274</sup> *Id.* at 921.

<sup>275</sup> Chamallas & Kerber, *supra* note 113, at 857.

<sup>276</sup> *Dillon*, 441 P.2d at 914.

gender neutral, allowing fathers to recover damages for their emotional distress.<sup>277</sup>

Nine years later, the California Supreme Court applied that gender-neutral *Dillon* test to a father's claim for emotional distress after stillbirth. In *Justus v. Atchison*, the Court denied a wrongful death claim for stillbirth and also denied the father a negligence claim based on *Dillon*.<sup>278</sup> The father was present for the medical malpractice that killed his full-term unborn child, who the Court described only as "the fetus."<sup>279</sup> One reason the Court denied recovery was because the father did not witness the death. Although he was "in attendance at the death of the fetus, that event was by its very nature hidden from his contemporaneous perception: he could not see the injury to the victim . . . ."<sup>280</sup> His emotional distress was caused "not from what he saw and heard during the attempted delivery, but from what he was told after the fact"<sup>281</sup>—presumably a difference of mere hours at the most and possibly minutes at the least. The Court further denied recovery because the father "was in the delivery room by his own choice" and should have been "prepared for the possibility of unpleasant or even harrowing experiences."<sup>282</sup> Justice Tobriner concurred in *Justus*, but only discussed his agreement that a wrongful death claim should not be available because "the wrongful death of a fetus" is "a wholly intangible injury to plaintiffs for which any monetary recovery can provide no real compensation."<sup>283</sup>

California courts have backed off this *Justus* holding to an extent. A lower court allowed a father's claim to proceed because he alleged more than presence in the delivery room—"[h]ere, however, plaintiff alleges that he learned of the death by his own observation of the cessation of life in the fetus and that his shock and distress were occasioned by that sensory and contemporaneous realization of the death."<sup>284</sup> Another lower court avoided *Dillon* completely by classifying the father as a direct victim, analogizing his claim to a recognized claim by a couple against a doctor for misdiagnosis of syphilis causing the couple emotional distress.<sup>285</sup> Also, the California Supreme Court has clarified that voluntary presence does not necessarily preclude recovery.<sup>286</sup> But the claim will still be difficult. "Apart from a plaintiff who because of medical training or

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<sup>277</sup> *Id.* at 923–25.

<sup>278</sup> *Justus v. Atchison*, 565 P.2d 122, 136 (Cal. 1977).

<sup>279</sup> *Id.* at 135 (emphasis added).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 136.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* (Tobriner, J., concurring).

<sup>284</sup> *Austin v. Regents of the Univ. of Calif.*, 152 Cal. Rptr. 420, 422 (Cal. Ct. App. 1979).

<sup>285</sup> *Sesma v. Cueto*, 181 Cal. Rptr. 12, 16 (Cal. Ct. App. 1982).

<sup>286</sup> *Ochoa v. Superior Court*, 703 P.2d 1, 9 (Cal. 1985) ("While in a proper case it may be said that a bystander assumed the risk of traumatic shock, we cannot say that in the ordinary course of events the voluntary or involuntary presence of the plaintiff should be a decisive factor in determining whether plaintiff has stated a *Dillon* cause of action.").

other unusual circumstances is capable of diagnosing intrauterine fetal death, a plaintiff suffering emotional distress as a consequence of witnessing a stillbirth will probably be unable to recover after *Justus*, although the emotional distress is foreseeable.”<sup>287</sup> And *Justus* is from the same Court celebrated for expanding recovery for emotional distress in *Dillon*.<sup>288</sup>

With respect to the outdated view of fatherhood, dissenting Justice Gonzalez of the Texas Supreme Court said it best: “[B]y holding that the mother but not the father may bring such a claim, the Court perpetuates the myth that only a woman grieves and suffers the mental anguish caused by the loss of a baby in the womb.”<sup>289</sup> We know this is a myth; empirical research demonstrates that “the trauma of infant loss . . . profoundly affects fathers . . . .”<sup>290</sup> Even the United States Supreme Court has recognized “the deep and proper concern and interest that a devoted and protective husband has in his wife’s pregnancy and in the growth and development of the fetus she is carrying.”<sup>291</sup> No reason exists to deny the father, or any non-birth parent, a claim after the death of their unborn children.

#### D. The Undervaluing of Damages

Even when not expressly devaluing stillbirth though, tort law still implicitly undervalues it. Valuation of all intangible injuries is difficult.<sup>292</sup> Juries are rarely told anything more than to award an amount to compensate the plaintiff for her injury.<sup>293</sup> In a Hawaii case, a jury awarded the mother \$250,000 for her emotional distress and \$100,000 in consortium damages after stillbirth.<sup>294</sup> A

<sup>287</sup> Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 595 (1982).

<sup>288</sup> See Chamallas & Kerber, *supra* note 113, at 855–58.

<sup>289</sup> *Krishnan v. Sepulveda*, 916 S.W.2d 478, 483 (Tex. 1995) (Gonzalez J., dissenting). One Texas appellate court agreed with Justice Gonzalez and recognized the father’s claim. See *Parvin v. Dean*, 7 S.W.3d 264, 279 (Tex. Ct. App. 1999). Essentially, if Texas is willing to pretend that the death of the baby is a physical injury to the mother, then it should also be a physical injury to the father based on his sperm contribution. The court sarcastically refused to “assume that the physiology of every living person derives only from the mother and that a child’s physiological makeup includes no part of the father.” See *id.* The same court later disagreed, however. *Reese v. Fort Worth Osteopathic Hosp., Inc.*, 87 S.W.3d 203, 206 (Tex. Ct. App. 2002). The Texas Supreme Court later expressly overruled the *Parvin* court’s analysis concluding that Texas’s lack of a wrongful death claim for stillbirth violated equal protection. *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 97 n.1 (Tex. 2004).

<sup>290</sup> O’Leary, *supra* note 258, at 185; see also Seymore, *supra* note 210, at 831 (explaining how the nature of fatherhood has changed and how it is now “widely suggested that contemporary fathers are now expected to have, and to desire, a closer, more emotionally involved and nurturing relationship with their children.”).

<sup>291</sup> *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976).

<sup>292</sup> See Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 781–82 (1995) (explaining that no objective guideline exists for measuring intangible injuries).

<sup>293</sup> *Id.* at 781.

<sup>294</sup> *Castro v. Melchor*, 366 P.3d 1058, 1061 (Haw. Ct. App. 2016).

Florida jury awarded parents \$2.5 million dollars for their emotional distress due to stillbirth.<sup>295</sup> A Texas jury awarded a mother \$250,000 for her emotional distress.<sup>296</sup> And an Iowa jury awarded parents \$1.71 million in damages for loss of consortium after stillbirth.<sup>297</sup>

Neither the high awards nor their inconsistency is surprising.<sup>298</sup> Damage awards are supposed to be specific to the injured plaintiff—to compensate her specific emotional distress and/or loss consortium after delivering her dead son.<sup>299</sup> If specificity is required, each award will and should be different. “The range of experiences following the death of a child tend to vary with the age of the child, the cause and context of the death and the personalities and experiences of the parents—both having and losing a child can mean different things to different people.”<sup>300</sup>

One thing that is consistent in damage awards, however—likely undervaluation. Tort law fails to guard against the influence of common cultural devaluations of stillbirth, devaluations that stillbirth is somehow lessened by the replaceability of children and the presence of other children. Tort law also mandates undervaluation through the currently popular caps on noneconomic damages, the effect of which is especially harsh in cases of stillbirth because parents have no significant economic damages.

### 1. “You Can Have Another”

Tort law recognizes a doctrine called mitigation of damages, which requires a plaintiff to act reasonably after her injury to mitigate, to lower, her damages. “Because emotional distress takes place entirely within the plaintiff’s mind, it could be difficult to observe or verify whether he took appropriate ex post care.”<sup>301</sup> But after stillbirth, the answer to helping relieve emotional distress seems pretty easy—just have another baby. If parents did not do so, arguably they have failed to mitigate their damages. They are choosing to continue

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<sup>295</sup> *Kammer v. Hurley*, 765 So. 2d 975, 977 (Fla. Dist. Ct. App. 2000).

<sup>296</sup> *Krishnan v. Ramirez*, 42 S.W.3d 205, 211 (Tex. Ct. App. 2001).

<sup>297</sup> *Heimlicher v. Steele*, 615 F. Supp. 2d 884, 937 (N.D. Iowa 2009). The court reduced the damage award to \$1.55 million after concluding the jury did not use appropriate amounts to deduct the costs of raising the child. *Id.* at 941–42; see also William Glaberson, *After Stillbirth, Courts Try to Put a Price on a Mother’s Anguish*, N.Y. TIMES (Aug. 23, 2011), <http://www.nytimes.com/2011/08/24/nyregion/in-stillbirth-malpractice-cases-courts-try-to-put-price-on-mothers-anguish.html> [<https://perma.cc/VP4E-BATM>] (discussing the difficulty of determining damages in the first cases brought in New York after the law was finally changed to allow recovery after stillbirth).

<sup>298</sup> See Geistfeld, *supra* note 292, at 784.

<sup>299</sup> See *id.* at 781.

<sup>300</sup> LITTLEWOOD, *supra* note 84, at 122; see also Kirkley-Best & Kellner, *supra* note 69, at 421 (“It is important to remember that grief is a very individual experience.”).

<sup>301</sup> Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 503 (2001).

to grieve. Or, maybe the parents never really wanted a baby as evidenced by their decision to not try again.

This mitigation-like sentiment has also appeared in numerous court decisions. The New Jersey Supreme Court mentioned the mother's subsequent pregnancy within its decision to reduce the damages the jury awarded.<sup>302</sup> A defendant argued before the Virginia Supreme Court that the mother was not really injured by her son's death due to stillbirth because she later gave birth to twin girls.<sup>303</sup> Similarly, a Florida court mentioned the parents' inability to have another child in affirming the damages the jury awarded.<sup>304</sup>

"The replacement-child strategy of coping with grief is seen in stillbirth bereavement probably more frequently than in any other case."<sup>305</sup> This is one of the comments that cuts the hardest after the death of an unborn baby—"you can have another."<sup>306</sup> Apparently, the birth of that later child will somehow magically lessen the grief from losing a child.

Many years ago, the medical community also thought the best thing for a woman would be to "have another baby in order to help put the loss behind her."<sup>307</sup> Even though parents today do not simply re-use the baby's name for the next child,<sup>308</sup> an idea persists that a new baby can help fix things. Babies

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<sup>302</sup> Carey v. Lovett, 622 A.2d 1279, 1290 (N.J. 1993).

<sup>303</sup> Modaber v. Kelley, 348 S.E.2d 233, 238 (Va. 1986).

<sup>304</sup> Kammer v. Hurley, 765 So. 2d 975, 978 (Fla. Ct. App. 2000) (explaining that the mother's "inability to conceive [any other children] . . . was germane to the issue of damages for the mental pain and anguish caused by the loss of the [parents'] only child."); see also Sylvester v. Liberty Mut. Ins. Co., 237 So. 2d 431, 432–33 (La. Ct. App. 1970) (Miller, J., dissenting) (voting to affirm the damages awarded to parents after the wrongful death of their two 12-year-old daughters for numerous reasons, including that the mother "has been unable to conceive, and has been treated by two gynecologists, to no avail."). Social science research has not documented whether grief is worsened because of biology, but no research has been this specific. Unlike the other incorrect assumptions about grief—that you can just have another, that other children make this easier—however, this assumption will cause the jury to increase any damages awarded. Thus, even if inaccurate, it is an inaccuracy that will benefit the grieving parents.

<sup>305</sup> Kirkley-Best & Kellner, *supra* note 69, at 423.

<sup>306</sup> Sarah Meaney et al., *Parents' Concerns About Future Pregnancy After Stillbirth: A Qualitative Study*, 20 HEALTH EXPECTATIONS 555, 558 (2017) (discussing the unhelpful responses received by parents of stillborn babies, including being "told that they were young and that they would [have] plenty of opportunities to have more children"); see also Kelley & Trinidad, *supra* note 2, at 8 ("For [the] parents in these focus groups, the most common and most hurtful comments were reassurances that they would have another baby."); Kirkley-Best & Kellner, *supra* note 69, at 425 (explaining that "society expected that a young mother would not grieve for a stillbirth," a thought validated by the immediate response of telling the mother to not worry because she could have another child).

<sup>307</sup> Meaney et al., *supra* note 306, at 555; see also *supra* notes 69–74 and accompanying text (describing the changes in medical practices following stillbirth).

<sup>308</sup> Sanger, *supra* note 59, at 283.

born after a previous miscarriage, stillbirth, or infant death are referred to as “rainbow babies”—the new baby is a rainbow after the storm.<sup>309</sup>

Empirical research of parents after stillbirth, however, demonstrates that replaceability is false. Parents who have lost a baby do not want any baby—they want the baby they lost. Parents find the replaceability sentiment “dismissive” and that it “fail[s] to recognize or respect” the parents’ loss.<sup>310</sup> The sentiment also fails to appreciate that the parents “lost a particular, loved baby, and that for a parent, there is no substitute for a dead child.”<sup>311</sup> “Grief for the deceased baby does not go away just because there is a new pregnancy” or a new baby.<sup>312</sup>

The replacement child strategy also severely underestimates the trauma that can accompany a subsequent pregnancy. “Unquestionably, fear plays a role in the decision for another baby.”<sup>313</sup> If we could see within that decision, we would likely see parents wondering what if the next baby also dies.

[I]t is impossible to repeat the experience of prenatal care, labor, and the birthing process without stimulating painful past memories. Rather than being a time of joy, expectation, and a new beginning, the subsequent pregnancy can become a reactivation of the previous event, causing fear and anxiety that death can happen again.<sup>314</sup>

<sup>309</sup> Melissa Willets, *What It Means to Be a ‘Rainbow Baby’ and Why Rainbow Babies Are Beautiful*, PARENTS, <https://www.parents.com/baby/what-it-means-to-be-a-rainbow-baby-and-why-rainbow-babies-are-beautiful/> [<https://perma.cc/FM7P-5EWM>] (last visited Feb. 19, 2019).

<sup>310</sup> Kelley & Trinidad, *supra* note 2, at 8.

<sup>311</sup> *Id.*; see also Kirkley-Best & Kellner, *supra* note 69, at 424 (“[P]arents of stillbirths mourn for the particular baby they lose, not just for the wish of a child.”).

<sup>312</sup> Côté-Arsenault & O’Leary, *supra* note 254, at 164 (discussing research showing that “[w]omen with a prior pregnancy loss have been found to have higher levels of depression during pregnancy and for up to 33 months after the birth of a healthy child.”); see also *Position Statement*, PREGNANCY LOSS & INFANT DEATH ALLIANCE 6 (Aug. 2016), [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_PositionStatement\\_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_PositionStatement_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf) [<https://perma.cc/28LY-NZQM>] (discussing that parents “also struggle with attaching after birth and trusting this baby will stay alive.”). *But see* Murphy & Cacciatore, *supra* note 69, at 131 (“[T]he most important factor that influenced depressive symptoms in this study was not having a live-born baby in the three years following the loss. This risk increased if the baby was the third child and rose again when the stillborn baby was the fourth or fifth born in the family.”).

<sup>313</sup> Cacciatore, *Unique*, *supra* note 153, at 143; see also Fox, *supra* note 223, at 193 (discussing the invasion of privacy that would occur if plaintiffs were forced to consider abortion or adoption to mitigate damages after wrongful pregnancy/imposed procreation).

<sup>314</sup> O’Leary, *supra* note 258, at 185; see also *Position Statement*, PREGNANCY LOSS & INFANT DEATH ALLIANCE 3 (Aug. 2016), [http://www.plida.org/wp-content/uploads/2012/01/PLIDA\\_PositionStatement\\_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf](http://www.plida.org/wp-content/uploads/2012/01/PLIDA_PositionStatement_PrenancyAfterPerinatalLossRequiresUniqueCare.pdf) [<https://perma.cc/28LY-NZQM>] (“The response to losing a wished-for child is related to the degree of personhood assigned to the unborn and the level of expectation one has for pregnancy. Fear and anxiety are not limited to women who have experienced a loss late in pregnancy but, rather, have been found in women who experience early miscarriage . . .”). Despite extensive research documenting the risks of “anxiety, depression, and attachment issues to the baby

Simple doctor visits to hear a heartbeat turn into anxiety attacks.<sup>315</sup> An ultrasound is supposed to be reassuring, but for many of these parents, the last time they had an ultrasound, it revealed that their baby had died. “Each ultrasound brings back the fear of seeing another dead baby,”<sup>316</sup> and can “elicit traumatic memories, resulting in behaviors similar to what has been found in people who experience PTSD.”<sup>317</sup>

Research shows that “women pregnant after the loss of a stillborn child were more vulnerable to case-level symptoms of PTSD, suffering the dual psychological burden of trauma and bereavement.”<sup>318</sup> Research shows the same for fathers.<sup>319</sup> In one study, fathers reported:

They were ‘exhausted emotionally’ and frequently inquired if their pregnant partners were still feeling movements. Their perceived “. . . role of protector was intensified although they were aware that they had no control of the outcome” and while they had to stay strong on the outside, inside they felt stressed and vulnerable.<sup>320</sup>

The chances of depression in the subsequent pregnancy increase the shorter the time it follows stillbirth.<sup>321</sup> In fact, a small study in the late 1970s showed “the only predictor of morbid grief reactions was the presence of a surviving twin or subsequent pregnancy within five months of the loss.”<sup>322</sup>

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that follows, prenatal care for these families has not significantly changed.” *Id.* at 2. Cacciatore, *Unique*, *supra* note 153, at 143 (“As in any circumstance involving trauma, when the traumatized person returns to the place or state in which the original trauma occurred, there is likely to be some degree of physical, emotional, and psychological distress . . .”).

<sup>315</sup> Côté-Arsenault & O’Leary, *supra* note 254, at 164 (“High anxiety is common leading up to prenatal appointments, due to the fear that something bad will be found . . .”).

<sup>316</sup> O’Leary, *supra* note 258, at 192; *id.* at 187–88 (“[V]alidation of a baby’s death through visual technology suggests that an ultrasound examination in a subsequent pregnancy would be a uniquely different experience.”).

<sup>317</sup> *Id.* at 184.

<sup>318</sup> *Id.* at 185.

<sup>319</sup> Murphy & Cacciatore, *supra* note 69, at 131.

<sup>320</sup> *Id.* (quoting Joann O’Leary & Clare Thorwick, *Fathers’ Perspectives During Pregnancy, Postperinatal Loss*, 35 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 78, 81 (2006)); see also O’Leary, *supra* note 258, at 185 (explaining that “fathers in a subsequent pregnancy have reported keeping feelings of worry and stress level from their partner in order to stay strong for the rest of the family.”); *id.* at 186 (explaining that “the trauma of infant loss and the subsequent pregnancy profoundly affects fathers.”).

<sup>321</sup> See Alessandra Biaggi et al., *Identifying the Women at Risk of Antenatal Anxiety and Depression: A Systematic Review*, 191 J. AFFECTIVE DISORDERS 62, 69 (2016). Many studies have shown potential long-term negative consequences for rainbow babies. Research also shows possible issues after a successful birth. Research shows that the mother may compare the replacement child to the lost child, leaving the replacement child to “live[] in the shadow of the dead child, often incapacitated by death phobias and fears of abandonment.” Kirkley-Best & Kellner, *supra* note 69, at 423. The mother may also unintentionally treat the replacement child as “responsible for their sibling’s death,” forcing the child to “live in a hostile-dependent environment with [his] parents.” *Id.* Ultimately, a subsequent pregnancy to replace a baby is not a good idea; “becoming pregnant to resolve a loss appears to be a pseudo-resolution, detrimental to all parties involved.” *Id.*

<sup>322</sup> Kirkley-Best & Kellner, *supra* note 69, at 424.

Tort law specifically guards against the replaceability sentiment for loss of spousal consortium damages. If a spouse dies, the jury is not allowed to reduce the amount of loss of consortium damages because of potential remarriage.<sup>323</sup> In fact, courts exclude evidence of the surviving spouse's remarriage or prospective remarriage,<sup>324</sup> meaning the jury will never even hear about it. The spouse's consortium damages "are fixed at the time of death."<sup>325</sup> The loss of the spousal relationship will always exist, and the surviving spouse will be compensated for it.

A few courts also apply this sentiment when children die, including two Louisiana lower courts. The first was in a case involving the death of a living child: "While it is true that the [parents] subsequently had two daughters, the [parents] testified that the girls could not take the place of their lost son."<sup>326</sup> Another Louisiana court said the same after stillbirth:

We do not feel that subsequent pregnancies and births should be considered as mitigating factors, unless offered to directly rebut prior testimony. The [parents] did not testify at trial that they were unable to conceive and have more children, and it would be highly prejudicial and unfair to the [parents] to focus the jury's attention on the subsequent pregnancies instead of on the loss at hand.<sup>327</sup>

This Louisiana court is correct—subsequent pregnancies do not magically lessen the injury that is death due to stillbirth. Loss of filial consortium damages, just like loss of spousal consortium damages, are fixed at the time of death.<sup>328</sup>

## 2. "You're Lucky to Have Your Other Children"

Related to replaceability is an idea that stillbirth is less devastating if parents have other living children. The Utah Supreme Court expressed this sentiment when it recognized a wrongful death claim after stillbirth.<sup>329</sup> When dis-

<sup>323</sup> DOBBS, *supra* note 197, at 675 ("Remarriage of a surviving spouse after the death is usually ignored in fixing damages; the remarried spouse recovers as if support and consortium would be lost for the rest of the plaintiff's life.").

<sup>324</sup> See, e.g., *Randles v. Ind. Patient's Comp. Fund*, 860 N.E.2d 1212, 1232 (Ind. Ct. App. 2007) ("Indiana has long held that evidence of remarriage is not admissible to mitigate damages in a wrongful death action."); *Stuart v. Consol. Foods Corp.*, 496 P.2d 527, 529–30 (Wash. Ct. App. 1972) (discussing that evidence of remarriage is inadmissible in wrongful death claim).

<sup>325</sup> DOBBS, *supra* note 197, at 675.

<sup>326</sup> *McCann v. ABC Ins. Co.*, 640 So. 2d 865, 875 (La. Ct. App. 1994); see also *Nelson v. Holley*, 623 S.W.2d 604, 608 (Mo. Ct. App. 1981) (rejecting mother's argument that trial court's admission of testimony regarding other living children encouraged jury to think that other children mitigated mother's loss of child).

<sup>327</sup> *Landry v. Clement*, 711 So. 2d 829, 836 (La. Ct. App. 1998).

<sup>328</sup> See *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 317 (Fla. Dist. Ct. App. 2012) (Wetherell, J., concurring in part and dissenting in part) (finding damage awards from child wrongful deaths unanalogous because the death of a child "is a far more traumatic loss than the loss of a spouse to lung cancer after a lifetime of smoking").

<sup>329</sup> See *Nelson v. Peterson*, 542 P.2d 1075, 1077 (Utah 1975).

cussing whether it was proper for the jury to hear that the stillborn child was “illegitimate,” the Court explained:

The appellant had seven other children, and her mental anguish might not be so acute at the loss of an illegitimate fetus as would be if she had no children and the one expected was legitimate. Many women undergo abortions in such a situation, and the jury was entitled to know all the circumstances if they were to fairly appraise the quantum of mental anguish which appellant suffered.<sup>330</sup>

Although the case did not involve stillbirth, this sentiment was also visible in *Robinson v. Cutchin*.<sup>331</sup> The mother sued her doctor for battery after a procedure left her unable to have additional biological children.<sup>332</sup> The court denied recovery partially because “the fact that she was not able to have a seventh child after previously giving birth to six children is *hardly* something which would offend her reasonable sense of personal dignity.”<sup>333</sup>

Although it is undoubtedly true that, after losing a child, parents “consciously appreciate[] the miracle of a healthy child,”<sup>334</sup> empirical research of parents after stillbirth demonstrates that the existence of other living children does not magically lessen grief. Research of surviving siblings shows that some parents are so overwhelmed with grief after stillbirth that they, unfortunately, check out on their other living children.<sup>335</sup> The research notes that surviving siblings suffer two losses—the loss of their baby brother, and the loss of their former relationship with their parents.<sup>336</sup> This change in the parents, despite other living children, shows that parents are not able to just move on based on the joy of their other children.

Research of parents of multiples where one baby does not survive shows the same:

Most mothers were keen to stress that the joy of giving birth to a surviving baby from a twin pregnancy did not detract from their grief for the baby who died. They pointed to (well meaning) platitudes made by some health professionals who suggested that although they had suffered a bereavement, there was comfort to be had in having another baby who had survived. All of the mothers interviewed felt strongly that one baby cannot ‘replace’ another.<sup>337</sup>

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<sup>330</sup> *Id.*

<sup>331</sup> *Robinson v. Cutchin*, 140 F. Supp. 2d 488 (D. Md. 2001).

<sup>332</sup> *Id.* at 490.

<sup>333</sup> *Id.* at 493 (emphasis added). Professors Chamallas and Wriggins thoroughly criticize the *Robinson* opinion and its “disconcerting tendency to devalue plaintiff’s procreative interests and to minimize her suffering.” CHAMALLAS & WRIGGINS, *supra* note 109, at 110. They also argue that the devaluation is especially problematic because of the historical denial of self-determination for African American women with respect to childbearing. *Id.*

<sup>334</sup> Joann O’Leary & Jane Warland, *Intentional Parenting of Children Born After a Perinatal Loss*, 17 J. LOSS & TRAUMA 137, 145 (2012).

<sup>335</sup> See Côté-Arsenault & O’Leary, *supra* note 254, at 164–65.

<sup>336</sup> See *id.*

<sup>337</sup> Judy Richards et al., *Mothers’ Perspectives on the Perinatal Loss of a Co-Twin: A Qualitative Study*, BIOMED CENT. PREGNANCY & CHILDBIRTH, July 2, 2015, at 4.

Understandably, parents reported “intense but mixed feelings of grief, joy, anxiety and depression.”<sup>338</sup> The parents also reported feeling pressure to be “ok” after the loss—to be “strong” for the surviving child.<sup>339</sup>

Moreover, parenting after stillbirth is just different.<sup>340</sup> Parenting styles can change; parents “[knew] the worst possible outcome because it had happened to them.”<sup>341</sup> Parents experience “contradictory feelings of simultaneous joy and grief.”<sup>342</sup> The joyous moments—hearing your children laugh, seeing them playing together—seemingly would lessen parents’ grief. But the happy moments are also sad. The stillborn baby should also be there laughing and playing.

Empirical research shows that the presence of other living children does not magically lessen the damages parents suffer after stillbirth. Tort law must guard against any possibility that a jury would consciously or unconsciously devalue stillbirth because the parents have other living children.

### 3. Noneconomic Damage Caps

It may not matter if the jury undervalues the parents’ loss, however, because some state legislatures have already mandated undervaluation. That is because of noneconomic damage caps. The purported distinction between economic and noneconomic damages is that economic damages, like lost wages, are measurable because of the relevant market, but no objective monetary measure exists for emotional distress or relational injuries.<sup>343</sup> At this point, the majority of states cap the recovery of noneconomic damages in some way,<sup>344</sup> and more may do so in the future.<sup>345</sup>

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<sup>338</sup> *Id.* at 10.

<sup>339</sup> *Id.*

<sup>340</sup> See DEFRAIN ET AL., *supra* note 80, at 157 (“It was the very rare parent who saw no effect at all on his or her childrearing attitudes and behavior.”); O’Leary & Warland, *supra* note 335, at 147.

<sup>341</sup> O’Leary & Warland, *supra* note 334, at 147.

<sup>342</sup> Richards et al., *supra* note 337, at 4.

<sup>343</sup> See Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 383 (2006) (explaining that “[n]oneconomic damages might be best understood in contrast with economic damages, which are those expenses that can be traced to a loss with a market value. Medical expenses, lost wages, and lost profits are economic losses. Noneconomic losses, on the other hand, refer to those losses that have no easily calculable market value. This category includes such diverse damages as compensation for physical pain, mental suffering, disfigurement as a harm in itself, loss of bodily function, loss of enjoyment of life, and embarrassment.”); see also Chamallas, *Architecture*, *supra* note 9, at 503–04. The claim by proponents of the caps is that the caps are warranted because the “real” losses, i.e., the economic damages, are still available, the implication being that noneconomic loss is somehow less essential to a fair system of compensation. *Id.*

<sup>344</sup> See, e.g., Elliot M. Kroll & James M. Westerlind, *Arent Fox LLP Survey of Damage Laws of the 50 States Including the District of Columbia and Puerto Rico*, ARENT FOX, LLP (2012), <https://www.arentfox.com/sites/default/files/Downloads/bio/2012201220122012Aug>

Many scholars have already noted that the effect of these caps is harshest in cases where the plaintiff suffers mainly noneconomic damages, like victims of sexual assault.<sup>346</sup> Stillbirth is another one of those cases. Parents will have some economic damages, mainly funeral expenses. But the vast majority of parents' damages are noneconomic—general mental anguish and loss of consortium. And recovery of those intangible, noneconomic damages will be capped.

Noneconomic damage caps mean parents will not be fully compensated for the negligently caused deaths of their children.<sup>347</sup> True, those parents would be the first to tell you that no amount of money can truly compensate; money does not bring their babies back. In fact, the inability of money to truly compensate for noneconomic harm is a common justification for damage caps.<sup>348</sup> But pretending that an arbitrary, pre-set amount of noneconomic damages—\$250,000 or \$400,000<sup>349</sup>—comes even close to compensating parents is insulting.

The vast majority of states that cap the recovery of noneconomic damages do so only in medical malpractice claims.<sup>350</sup> The purpose of medical malpractice damage caps is to protect doctors from high awards, although doctors re-

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AugWedWed/AF-Survey-of-Damage-Laws.pdf [https://perma.cc/HX2D-5M6M] (explaining that nineteen states cap the recovery of noneconomic damages, and that fifteen of those states caps apply only to medical malpractice claims).

<sup>345</sup> See, e.g., *Arkansas Lawmakers Put Cap on Lawsuit Damages On '18 Ballot*, U.S. NEWS, (Mar. 1, 2017, 4:53 P.M.), <https://www.arkansasonline.com/news/2017/mar/01/arkansas-law-makers-put-cap-lawsuit-damages-18-ball/> [https://perma.cc/UVU3-VVDU].

<sup>346</sup> See, e.g., Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1278 (2004) [hereinafter Finley, *Hidden Victims*]; Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 851 (1997) [hereinafter Finley, *Female Trouble*].

<sup>347</sup> Many scholars have already documented that caps of noneconomic damages disproportionately affect female plaintiffs. See generally Finley, *Hidden Victims supra* note 346; Finley, *Female Trouble, supra* note 346; Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

<sup>348</sup> See Chamallas, *Architecture, supra* note 9, at 490, 497–98.

<sup>349</sup> Many states have different rules for wrongful death versus negligence claims, and allowing plaintiffs greater recovery, if death is involved. For example, some states have no cap at all for wrongful death claims. See, e.g., LA. CIV. CODE ANN. art. 2315 (2018); LA. STAT. ANN. § 40:1231.2 (2018) (capping recovery for malpractice claims, but not capping recovery in wrongful death claims). Or, some states set the cap at a higher amount, enabling greater recovery, for wrongful death. See, e.g., MO. REV. STAT. § 538.210 (2018) (setting cap on noneconomic damages in medical malpractice claim at \$400,000 for cases involving “personal injury” and at \$700,000 in cases involving death); TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301, 74.303 (West 2017) (setting different monetary caps for medical malpractice claims involving injuries versus wrongful death). Presumably, this is because legislatures think more noneconomic damages should be recoverable after death than after nonfatal injury. If the state recognizes a wrongful death claim after stillbirth, parents may get full recovery if no cap exists, or a more general recovery if a more generous wrongful death damage cap exists. Thus, parents will either be fully compensated or a little bit less undercompensated if a wrongful death claim exists.

<sup>350</sup> See generally Kroll & Westerlind, *supra* note 344 (explaining that the vast majority of noneconomic damage caps apply only to medical malpractice claims).

main liable for potentially large economic damages awards, which can easily be extensive in a typical medical malpractice claim involving physical injury to a younger person who could have extensive damages based on years of future lost wages and future medical expenses.

Consider the effect of a medical malpractice cap on noneconomic damages applied to stillbirth. Some parents can recover for their full damages after a stillbirth, and some will receive much less—depending on who negligently caused the stillbirth. If the stillbirth is caused by a defendant texting while driving, the parents will be able to receive their full damages. That unreasonable driver does not know that the woman is pregnant, but he must pay all of the parents' damages.

But if a doctor causes the stillbirth, the mother's recovery of noneconomic damages will be capped. The doctor is the one person the parents trusted the most to help bring the baby into the world. Most commonly, the mother's relationship with her obstetrician would have started at least at the beginning of the pregnancy, or even earlier in cases of infertility. The woman-obstetrician relationship is different than a normal doctor-patient relationship:

Because of the intimate nature of obstetrician and gynecology care and the critical role these physicians play in some of the most memorable times in women's lives, particularly in caring for them during pregnancy and childbirth, patients are more likely to develop closer and more personal relationships with their obstetricians and gynecologists.<sup>351</sup>

The baby is dead, and the one person the parents trusted the most tortiously caused it.

Parents really only have noneconomic damages. And if caps exist, parents will be undercompensated. As examples, in Texas, the mother can recover \$250,000 if her doctor's negligent conduct killed her unborn baby.<sup>352</sup> In Missouri, parents can recover only \$700,000 if a doctor negligently kills their unborn baby.<sup>353</sup> And in California, the mother can also only recover \$250,000 for her unborn child's unnecessary death.<sup>354</sup> In all three states, had the parents also had some lost wages, those economic damages would be fully recoverable. Damage caps are not specific to cases of stillbirth, but their effects are harsh in cases where the significant damages are noneconomic. Stillbirths are one of those cases, and damage caps further devalue parents' injury after stillbirth.

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<sup>351</sup> Isha Patel et al., *Patient Satisfaction with Obstetricians and Gynecologists Compared with Other Specialties: Analysis of US Self-Reported Survey Data*, 2 PATIENT RELATED OUTCOME MEASURES 21, 25 (2011).

<sup>352</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 2017).

<sup>353</sup> MO. REV. STAT. § 538.210 (2018).

<sup>354</sup> CAL. CIV. CODE § 3333.2 (West 2018).

### III. TORT LAW PRINCIPLES AND THEORIES SUPPORT A WRONGFUL DEATH CLAIM FOR STILLBIRTH

A wrongful death claim should be available for stillbirth.<sup>355</sup> This is the type of claim that is available for an infant who lives a few minutes after birth;<sup>356</sup> it should also be available for stillbirth. Both mental anguish and loss of consortium damages should be available because parents experience both mental anguish and a loss of the parent-child relationship. A wrongful death claim also cleanly recognizes both parents' ability to recover damages for the wrongful death of a child, helping minimize the current gendered nature of stillbirth.

As part of recognizing a wrongful death claim, tort law must also be careful to avoid implicit or unintentional devaluation of stillbirth. Language matters; "unless the full effect of injuries are articulated and explained, they can more easily be minimized."<sup>357</sup> Parents did not just lose a fetus, they lost their desired, unborn child with whom they had already bonded, and courts should describe that loss appropriately. Courts must also clarify that even unborn children are not replaceable and that other children do not lessen injury after stillbirth.

Tort law purposes and theories support these suggested reforms. The main purpose of tort law is to compensate injured victims.<sup>358</sup> Consistent with this compensation purpose is corrective justice theory, under which "tort law is understood as aiming to restore an equilibrium that has been disturbed by the tortfeasor's conduct."<sup>359</sup> It restores that equilibrium "by ordering that the full value of the loss be transferred to the responsible party via a damage payment equal to the value of the loss,"<sup>360</sup> or at least a payment as close to the value of the loss as possible.<sup>361</sup>

The parents' loss is the child's death, a loss that causes parents both mental anguish and a lost relationship, two different types of damages. It is impossible

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<sup>355</sup> Admittedly, problems exist with wrongful death claims for the deaths of minor children. Damages for wrongful death are generally based on expected economic contributions, and children no longer make significant economic contributions to their family, leaving only "noneconomic" damages recoverable for the parents. See STUART M. SPEISER, 1 RECOVERY FOR WRONGFUL DEATH 112 (2d ed. 1975). Despite the problems with the valuation of damages after the death of a child, a wrongful death claim is still appropriate because it recognizes that stillbirth involves the death of the parents' child.

<sup>356</sup> See *Stidam v. Ashmore*, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959) (adopting a wrongful death claim for stillbirth because of existence of a such a claim or a baby who dies after birth, recognizing the inability to "reconcile the two propositions, that if the death occurred after birth there is a cause of action, but that if it occurred before birth there is none.").

<sup>357</sup> CHAMALLAS & WRIGGINS, *supra* note 109, at 175.

<sup>358</sup> See RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979).

<sup>359</sup> John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 570 (2003).

<sup>360</sup> *Id.*

<sup>361</sup> Christopher J. Robinette, *Party Autonomy in Tort Theory and Reform*, 6 J. TORT L. 173, 176 (2013) (explaining that corrective justice theory focuses on "erasing the harm to the greatest extent possible").

to award damages as close to the value of the loss as possible unless both types of damages are available. Also, it is impossible to obtain equilibrium-restoring damages if the parents' injury is viewed as the loss of a "fetus," instead of as their unborn child. That a fetus and an unborn baby are viewed differently is clear from the abortion debate,<sup>362</sup> and the difference matters when juries are determining how much to award.

The second main purpose of tort law is to deter wrongdoers.<sup>363</sup> The more that tort law devalues stillbirth, the weaker the message sent to doctors and others to avoid causing stillbirth. Consider the message sent when tort law treats stillbirth as a mere physical manifestation of emotional distress, like a rash. Or the message sent by labelling stillbirth as the death of a "fetus" and denying the unborn-child parent relationship lost. A similarly weak message is sent by denying the father a claim, denying his injury after his child dies. None of these messages communicate the devastation parents will suffer due to stillbirth, meaning potential tortfeasors are not properly incentivized to avoid causing stillbirth.

Correct recognition is especially important for obstetricians, who routinely see miscarriages and stillbirths. A devastating experience for parents may just be a Friday in the office for an obstetrician; this is not to say that obstetricians are insensitive, although some can be, but obstetricians are desensitized to pregnancy loss because they see it more often. That desensitization may explain why "physicians in [a 2012] study conceptualized stillbirth as more like a miscarriage than like the death of an infant, whereas parents see it the other way around."<sup>364</sup> Tort law must ensure that tortfeasors' conceptions of injuries match the injureds' conceptions. It is impossible to properly incentivize doctors to provide proper medical care if tort law treats the death of a child as something less than the death of a child.

Proper recognition of stillbirth is also supported by another interpretative theory of tort law—civil recourse theory, which explains that "a person ought to be permitted civil recourse against one who has violated her legal rights."<sup>365</sup> Tort law thus "empowers victims of these wrongs to demand of the wrongdoer responsive action as redress for the wrong."<sup>366</sup> Applying civil recourse theory to stillbirth is a bit difficult because civil recourse theory sought to describe tort law as it is and the status quo is limited recognition of the injury that is stillbirth.<sup>367</sup> However, states that recognize a wrongful death claim do purport to

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<sup>362</sup> Sanger, *supra* note 59, at 305 ("Part of the strategy to make abortion hard to get and hard to choose has been to define fetuses and embryos as infants, children, persons, and victims throughout the law.").

<sup>363</sup> See RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW. INST. 1979).

<sup>364</sup> Kelley & Trinidad, *supra* note 2, at 13.

<sup>365</sup> Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82 (1998).

<sup>366</sup> John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 343 (2011).

<sup>367</sup> Professor Chamallas specifically criticized civil recourse theory because it

treat stillbirth like the death of a child. To truly empower parents, however, those cases should be about the death of a family member, not a fetus, and there should be no doubt that prenatal attachment is real, for both a mother and father.

Underlying tort theory requires proper recognition of stillbirth, but I also understand that states are generally hesitant to expand liability for injuries like stillbirth that cause only “emotional” damages. I thus understand why states may want to limit the ability to bring a claim.<sup>368</sup> The current line most states draw is at viability,<sup>369</sup> allowing a claim only if the unborn baby was old enough to likely survive on his own outside of the mother’s womb.<sup>370</sup> There is no clear gestational age of viability, and it will necessarily change as medicine advances.

Conditioning the claim on viability, however, means the claim’s availability still rests on the arbitrary cutoff at that first breath outside of the womb. Even though still in the womb, if the baby could have survived and taken that first breath, he was a family member and the wrongful death claim exists. But if not, the parents’ loss is of something less than their child. The viability condition thus focuses on the unborn baby as an individual. The wrongful death claim, however, is focused on the parents’ anguish and lost parent-child rela-

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largely just accepts that in the tort hierarchy of types of harm, physical harm is privileged over emotional and relational harm. . . . Relational harms, such as loss of consortium for the injury or death of intimate family members, are treated as marginal, collateral claims, as mere appendages to claims for physical or emotional harms.

Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 534–35 (2013).

<sup>368</sup> Although I do question this practically. Around 6,000 unborn babies unnecessarily dying each year is far too many, but 6,000 lawsuits really are not that many more.

<sup>369</sup> For the list of the states that recognize a wrongful death claim, see *supra* note 97. The vast majority of these states condition recovery on viability, making it easier to here cite the states that do not. *See, e.g.*, ARK. CODE ANN. § 16-62-102 (2019) (Arkansas); 740 ILL. COMP. STAT. § 180/2.2 (2018) (Illinois); MISS. CODE ANN. § 11-7-13 (2018) (Mississippi) (conditioned on “quick[ening],” meaning after the mother has felt the baby move); NEB. REV. STAT. § 30-809(1) (2018) (Nebraska); OKLA. STAT. tit. 12, § 1053 (2018) (Oklahoma); Mack v. Carmack, 79 So. 3d 597 (Ala. 2011); Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955) (conditioned on quickening); Connor v. Monkem Co., 898 S.W.2d 89 (Mo. 1995); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 788 (S.D. 1996); Nelson v. Peterson, 542 P.2d 1075 (Utah 1975); Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 109 (Wisc. 1967). Assumedly, many states opted to use viability as a cutoff because *Roe* noted that the State’s interest in protecting potential life is strongest at the point of viability. *See Roe v. Wade*, 410 U.S. 113, 163 (1973); Stinnett v. Kennedy, 232 So. 3d 202, 220 (Ala. 2016) (Parker, J., concurring) (“Essentially, Alabama previously applied the viability standard established in *Roe v. Wade* to determine which unborn children received protection under the law and which did not.”) (citations omitted). Thus, states rely on a concept from the abortion context despite abortion and stillbirth having little, if anything, in common. *See generally infra* Part IV (discussing the lack of tension between abortion rights and recognition of stillbirth).

<sup>370</sup> *See Roe*, 410 U.S. at 160 (“Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.”).

tionship, which do not depend on the baby's ability to take a breath outside the womb.

If a line must be drawn, cutoff at twenty weeks of pregnancy would be proper, necessarily enabling recovery for all stillbirths, but not miscarriages. The reason for the twenty-week cutoff is based on the reasonableness of the unborn child-parent bond.<sup>371</sup> Before twenty weeks, that bond is inherently fragile. Many pregnancies are lost naturally before twenty weeks, meaning parents already should be wary of whether the pregnancy will end with the birth of a (living) child.<sup>372</sup> Before twenty weeks, parents' hopes are less justified. But after twenty weeks, the risk of pregnancy loss dramatically decreases and parents' belief that their child will be born alive is reasonable.<sup>373</sup> Tort law should award compensation to parents who justifiably have developed a parent-child relationship and lose that relationship due to tortiously caused stillbirth.

Basing the line on the fragility of the parent-child relationship instead of viability is also more consistent with research on prenatal attachment. Some research does show that "prenatal attachment scores increase with the weeks of gestation."<sup>374</sup> This makes sense as the longer the child and parent are able to bond, the greater the bond will be. Research specific to grief after stillbirth similarly showed that "more intense grieving responses are associated with later losses in pregnancy."<sup>375</sup> Notably, a twenty-week cutoff also matches most states' requirement of a death certificate for the unborn baby after twenty weeks of pregnancy.<sup>376</sup>

That said, viability will still be relevant, not as a cutoff point, but for causation. In the January 2018 study on stillbirths, the authors discussed their method

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<sup>371</sup> The reasonableness and extent of the parent-child relationship relates well to how a wrongful death claim is the parents' claim for their loss, as opposed to a claim that gives the unborn child some legal or inherent rights. See *infra* notes 413–18 (discussing the lack of tension between recognition of stillbirth and abortion rights because the wrongful death claim is the parents' claim). Notably, the reasonableness and extent of the parent-child relationship is a concept that has no application to abortion, the legality of which usually depends on viability.

<sup>372</sup> See *Miscarriage*, *supra* note 52 (discussing women's familiarity with miscarriage because of its rate being possibly as high as 25 percent).

<sup>373</sup> See *id.* (describing miscarriage, pregnancy loss before twenty weeks of pregnancy, as "the most common type of pregnancy loss").

<sup>374</sup> Anna Maria Della Vedova et al., *Assessing Prenatal Attachment in a Sample of Italian Women*, 26 J. REPROD. & INFANT PSYCHOL. 86, 89, 95 (2008) (discussing research that found that "women who had previously experienced a perinatal loss," and thus are keenly aware of the risk of naturally losing the pregnancy, "were significantly less attached to the foetus").

<sup>375</sup> *Id.*; but see Kirkley-Best & Kellner, *supra* note 69, at 425 (discussing a 1980 study that "compared grief reactions to types of loss (miscarriage, stillbirth, and neonatal death) and concluded no quantifiable differences existed."); *id.* (cautioning results of studies of grief with the caveat that "great individual differences and a variety of other factors . . . may account for both quantity and quality of response to loss in pregnancy.").

<sup>376</sup> See *State Definitions and Reporting Requirements for Live Births, Fetal Deaths, and Induced Terminations of Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION 3–4 (1997), <https://www.cdc.gov/nchs/data/misc/itop97.pdf> [<https://perma.cc/8K8R-89GC>].

of determining the definition of a “preventable” stillbirth.<sup>377</sup> They defined stillbirths before 24 weeks of pregnancy and fetuses under a certain weight as not preventable because “[s]uch fetuses would be considered previable or periviable and might not be candidates for operative delivery and resuscitation in many centers.”<sup>378</sup> Suppose a doctor allegedly committed malpractice by not delivering a twenty-week baby despite seeing a partial placental abruption likely to lead to the placenta completely detaching from the uterus. Assuming this is malpractice, it is not the cause, in tort terms, of the unborn baby’s death because that baby likely would not have survived had the doctor delivered him. This will be true in any case where the only way to save the baby would be to deliver him. In tort terms, the deaths of some non-viable unborn babies are inevitable and thus the tortfeasors could not be held liable for those deaths. Thus, viability will still be relevant for causation, but not as a cutoff.

I would not, however, advocate compromise on the actual valuation of parents’ damages. Numerous states believe noneconomic damage caps are necessary to protect doctors and/or businesses. But those states are also happy to subject those same doctors and businesses to very high economic damage awards. In cases involving stillbirth, parents suffer no significant economic damages, so almost the parents’ entire damage awards will be noneconomic and capped. Arbitrarily limited damage awards neither compensate nor deter as tort theories require. No magic solution exists for juries to use to value damages to compensate stillbirth. The awards will likely be high, but appropriately so.

#### IV. NO THREAT TO LEGALITY OF ABORTION

It is impossible to address tort law’s recognition of stillbirth without also commenting on the elephant in the room—abortion.<sup>379</sup> In both the public health and legal contexts, stillbirth is often associated with abortion.<sup>380</sup> Some believe that the association is why stillbirth is often overlooked in the public health context.<sup>381</sup>

Abortion is a voluntary termination of pregnancy. And a woman has a constitutional right to abortion, a right the Supreme Court first recognized in *Roe v.*

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<sup>377</sup> Page et al., *supra* note 6, at 337.

<sup>378</sup> *Id.*

<sup>379</sup> See Joanne Cacciatore et al., *Condemning Self, Condemning Other: Blame and Mental Health in Women Suffering Stillbirth*, 35 J. MENTAL HEALTH COUNSELING 342, 343 (2013) (“Concerned researchers and clinicians have asserted that the stillbirth is systematically avoided as a public health issue by . . . reproductive rights foes and activists . . .”).

<sup>380</sup> See, e.g., *Smith v. Borello*, 804 A.2d 1151, 1162–63 (Md. 2002) (citing the constitutional right to abortion within discussion of whether the baby’s death is like a loss of the mother’s “body part[s]”); see also *Aka v. Jefferson Hosp. Ass’n, Inc.*, 42 S.W.3d 508, 516 (Ark. 2001) (citing *Roe v. Wade* when discussing whether an unborn baby is a “person” enabling a wrongful death claim); *Amadio v. Levin*, 501 A.2d 1085, 1098 n.5 (Pa. 1985) (same); *Presley v. Newport Hosp.*, 365 A.2d 748, 756 (R.I. 1976) (same).

<sup>381</sup> See Cacciatore et al., *supra* note 379.

*Wade*,<sup>382</sup> although the Court later limited that right in *Planned Parenthood v. Casey*.<sup>383</sup> Despite (or maybe due to) the constitutionality, abortion remains controversial. And some states remain eager to restrict or regulate abortion. Current popular laws include banning abortions after a certain gestational age,<sup>384</sup> restricting the use of government funds to pay for abortions,<sup>385</sup> restricting private insurance coverage of abortion expenses,<sup>386</sup> requiring doctors providing abortions to have privileges at hospitals,<sup>387</sup> requiring abortion clinics to be ambulatory centers,<sup>388</sup> a mandatory waiting period,<sup>389</sup> a mandatory ultrasound,<sup>390</sup> and mandatory burial of fetal remains.<sup>391</sup>

Fears of additional regulation on abortion gives some reason to pause before recognizing tort recovery for stillbirth.<sup>392</sup> “[I]f one were to acknowledge there was something of value lost,” if we were to validate parents’ grief after stillbirth, “one would thereby automatically accede the inherent personhood of embryos/fetuses.”<sup>393</sup> Similarly, any “legal marker equating fetal life with that of born persons” could be made part of efforts to restrict abortion rights.<sup>394</sup> “Be-

<sup>382</sup> *Roe v. Wade*, 410 U.S. 113, 170 (1973).

<sup>383</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (allowing states to regulate abortion so long as the regulation does not pose an undue burden on the woman’s ability to obtain an abortion); see also Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1195–96 (2017) (warning that *Roe v. Wade* may easily be overruled in the near future).

<sup>384</sup> See, e.g., GA. CODE ANN. § 31-9B-2 (2019).

<sup>385</sup> See, e.g., N.D. CENT. CODE § 14-02.3-03 (2017).

<sup>386</sup> *Id.*

<sup>387</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.0031 (West 2017), *invalidated by* *Whole Woman’s Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016).

<sup>388</sup> *Id.* § 245.010, *invalidated by* *Whole Woman’s Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016).

<sup>389</sup> FLA. STAT. § 390.0111 (2019).

<sup>390</sup> *Id.*

<sup>391</sup> LA. STAT. ANN. § 40:1061.25 (2018).

<sup>392</sup> Applying wrongful death claims to stillbirth has actually been one focus within the pro-life strategy to limit abortion rights. Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 335 (1999) (“[O]ne facet of the long-term, 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 . . . civil wrongful death actions . . .”); see also Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 977–79 (1995) (suggesting that fighting for reversal of *Roe v. Wade* is likely to be unsuccessful and that the abortion opponents should instead focus on “wrongful death law” to “place[] proper value on an unborn child” and that “[t]he emotional power of parents pleading for legal recognition of their unborn children may sway societal views and incite political action.”).

<sup>393</sup> Layne, *supra* note 231, at 305.

<sup>394</sup> Sanger, *supra* note 59, at 305. For legal scholarship describing the perceived conflict between tort compensation for the tortious loss of an unborn baby and abortion, see Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597 (1986); Rita M. Dunaway, *The Personhood Strategy: A State’s Prerogative to Take Back Abortion Law*, 47 WILLAMETTE L. REV. 327, 327 (2011); Megan Fitzpat-

cause 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.”<sup>395</sup>

To see validation of that fear, look no further than a recent opinion from the Alabama Supreme Court in a stillbirth case.<sup>396</sup> One issue on appeal was the language used at trial to refer to the unborn baby.<sup>397</sup> Justice Parker, who has been criticized as attempting to dismantle *Roe v. Wade* by emphasizing the personhood of unborn babies,<sup>398</sup> wrote separately to explain he would have found error if the trial court “affirmatively prevented [the mother] from using Tristian’s name before the jury, or taken any action to denigrate his humanity.”<sup>399</sup> He clarified that “[a]ny efforts to stifle the recognition of an unborn child’s humanity[] ‘should be all the more intolerable in Alabama, where the express, emphatic public policy of our State is to uphold the value of unborn life.’”<sup>400</sup> This case was about stillbirth, not abortion.<sup>401</sup> But Justice Parker felt the need to also comment on abortion.

The tension between abortion and recognition of stillbirth was also evident in state legislative debates over the creation of something akin to birth certificates after stillbirth. State vital recognition of stillbirth is limited to a death certificate—no birth certificate, despite the fact that mothers still very much gave birth. Groups of aggrieved parents fought for passage of “Missing Angels Acts,” creating something like a “Certificate of Birth Resulting in Stillbirth.”<sup>402</sup> Concerns were raised by pro-choice advocates: “Might, for example, states start issuing or even requiring birth certificates for aborted fetuses?”<sup>403</sup> Former Governor of New Mexico Bill Richardson even vetoed a popular stillbirth birth certificate bill.<sup>404</sup> He claimed it was because of administrative concerns, but many

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rick, Note, *Fetal Personhood After the Unborn Victims of Violence Act*, 58 RUTGERS L. REV. 553, 553–54 (2006); Amy Lotierzo, *The Unborn Child, a Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 289 (2006); Joyce E. McConnell, *Relational and Liberal Feminism: The “Ethic of Care,” Fetal Personhood and Autonomy*, 99 W. VA. L. REV. 291, 291–92 (1996); Erica Richards, Note, *Loss of Potential Parenthood as a Statutory Solution to the Conflict Between Wrongful Death Remedies and Roe v. Wade*, 63 WASH. & LEE L. REV. 809, 810 (2006).

<sup>395</sup> Layne, *supra* note 231, at 294.

<sup>396</sup> See generally *Hamilton v. Scott*, No. 1150377, 2018 WL 1224234 (Ala. Mar. 9, 2018).

<sup>397</sup> *Id.* at \*7.

<sup>398</sup> See, e.g., Nina Martin, *This Alabama Judge Has Figured Out How to Dismantle Roe v. Wade*, PROPUBLICA (Oct. 10, 2014), <https://www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade> [<https://perma.cc/DP67-YEDJ>].

<sup>399</sup> *Hamilton*, 2018 WL 1224234, at \*10 (Parker, J., concurring).

<sup>400</sup> *Id.* (Parker, J., concurring) (quoting *Stinnett v. Kennedy*, 232 So. 3d 202, 224 (Ala. 2016) (Parker, J., concurring)).

<sup>401</sup> *Id.* at \*1.

<sup>402</sup> See SANGER, *supra* note 155, at 4.

<sup>403</sup> *Id.* Although it is worthwhile to pause and note that states have long issued death certificates for stillbirth, which presumably should also threaten abortion.

<sup>404</sup> Allison Stevens, *The Politics of Stillbirth*, PROSPECT (July 13, 2007), <http://prospect.org/article/politics-stillbirth> [<https://perma.cc/MBD4-BWLTV>].

suspected he did not want to lose pro-choice voters in his run for President.<sup>405</sup> In most other states, compromises were reached—mainly clarifications that the certificates would not apply to abortions and requiring parents to request the certificate—and many states now have stillbirth birth certificates.<sup>406</sup> Regardless, “[t]he Missing Angel example illustrates how cautious the subject of abortion has made everyone and how attentive citizens have become to even the possibility of a connection to abortion.”<sup>407</sup>

This purported overlap of stillbirth and abortion is odd given that stillbirths and abortions happen at very different times in pregnancy. By definition, stillbirths do not occur until after twenty weeks of pregnancy. The vast majority of abortions happen before twenty weeks of pregnancy; in 2015, almost 99 percent of abortions happened before 21 weeks of pregnancy.<sup>408</sup> Some of these slightly over 1 percent of abortions that occur after twenty weeks are due to medical conditions, either for the mother or the unborn baby.<sup>409</sup> Simply because of the duration of the pregnancy, stillbirth is different than abortion. And recognizing parents’ loss in stillbirth then has little practical effect on abortion, the vast majority of which happen before stillbirth is even possible.

To explain the consistency between tort recognition of stillbirth and the legality of abortion, it is important to start with the fact that tort law specifically recognizes a woman’s right to choose, through a wrongful birth claim. Courts first adopted this claim after *Roe v. Wade*.<sup>410</sup> Generally, wrongful birth is a medical malpractice claim based on the obstetrician’s failure to diagnose birth defects.<sup>411</sup> “The crux of the case turns on plaintiff’s causal assertion that she would have chosen to terminate the pregnancy if she had been properly advised or treated.”<sup>412</sup> A woman has this right and can recover compensation if tortiously deprived of it.

Many mistakenly believe that tort recognition of stillbirth would infringe on the right to abortion, usually fearing that tort recognition would accord some legal status on the unborn baby. This mistake is especially understandable if a wrongful death claim is based on courts’ interpreting the word “person” in the statute to include an unborn baby. A wrongful death claim, however, does not create any legal right for the baby. It is not a claim for the deceased—it is a claim for “certain beneficiaries who suffer from another’s death as a result of a

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<sup>405</sup> *See id.*

<sup>406</sup> *See supra* note 68 and accompanying text.

<sup>407</sup> SANGER, *supra* note 155, at 4.

<sup>408</sup> *CDCs Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 19, 2018), [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm) [<https://perma.cc/CW2C-98DR>].

<sup>409</sup> *See* Maggie Fox, *This Doctor Just Explained Late-Term Abortion—On Twitter*, NBC NEWS (Jan. 30, 2018, 6:28 PM), <https://www.nbcnews.com/health/health-news/doctor-just-explained-late-term-abortion-twitter-n842611> [<https://perma.cc/G29Y-6W9A>].

<sup>410</sup> *See id.*

<sup>411</sup> CHAMALLAS & WRIGGINS, *supra* note 109, at 128.

<sup>412</sup> *Id.* at 128–29.

tort.”<sup>413</sup> It is the parents’ claim and it awards the parents damages for the lost affectional tie, the loss of their relationship with their baby.<sup>414</sup> “The 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.”<sup>415</sup>

The Supreme Court clarified this exact point in *Roe*.<sup>416</sup> It mentioned wrongful death claims in discussing whether other laws recognized whether life “begins before live birth” or whether laws “accord[ed] legal rights to the unborn.”<sup>417</sup> The Court then explained that the wrongful death claim “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.”<sup>418</sup>

To further clarify the consistency, wrongful death statutes often include a specific exception for legal abortion. Illinois law, for example, states that no wrongful death cause of action exists “against a physician or a medical institution for the wrongful death of a fetus caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given.”<sup>419</sup> Similarly, due to the legality, the father would not have a claim against the woman after abortion. Although the father may well suffer emotional distress due to the

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<sup>413</sup> DOBBS, *supra* note 98, at 804. This is the distinction between a wrongful death claim, the surviving family’s claim, and a survivorship cause of action, which is the decedent’s claim. “Survival statutes do not provide for an independent action in favor of the deceased’s dependents.” *Id.* “They provide for the survival of whatever action the deceased herself would have had if she had been able to sue at the moment of her death.” *Id.*

<sup>414</sup> See Chamallas, *Architecture*, *supra* note 9, at 500–01 (explaining that wrongful death claim compensates for the loss of a relationship within her discussion of tort law’s inherent hierarchy of injuries).

<sup>415</sup> *Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983).

<sup>416</sup> *Roe v. Wade*, 410 U.S. 113, 170 (1973).

<sup>417</sup> *Id.* at 161.

<sup>418</sup> *Id.* at 162 (emphasis added). That the wrongful death claim protects the parents’ interest in their desired unborn child is another reason for the suggested twenty-week cutoff for the wrongful death claim, based on whether the parents’ expectation of having a living baby is reasonable. See *supra* note 371 and accompanying text. The concept of reasonableness of the parents’ interest in having their desired baby has no application in abortion law.

<sup>419</sup> 740 ILL. COMP. STAT. 180/2.2 (2018); see also *Doe v. Planned Parenthood/Chi. Area*, 956 N.E.2d 564 (Ill. App. Ct. 2011) (dismissing various claims against an abortion clinic, including wrongful death, negligent infliction of emotional distress, and alleged violations of the Illinois Consumer Fraud and Deceptive Business Act); *Acuna v. Turkish*, 930 A.2d 416 (N.J. 2007) (dismissing wrongful death, survival, and emotional distress claims).

abortion,<sup>420</sup> the constitutionality of abortion shields the woman from liability in tort.<sup>421</sup>

Possibly more importantly, compensation after stillbirth does not confer some less-defined inherent personhood or value that could threaten the legality of abortion. Tort law frequently awards mental anguish and loss of consortium damages without also conferring some special legal status on the injury. For instance, courts have awarded anguish-like damages for negligent destructions of property, like “wedding photos, baby pictures, and documents with emotional value that were irreplaceable.”<sup>422</sup> Courts have also awarded loss of consortium damages after the tortious death of a pet animal.<sup>423</sup> No one questioned whether those cases meant animals now have inherent personhood or value comparable to personhood. The loss of wedding pictures and animals are not at all comparable to stillbirth, in my opinion. The point though is that tort law awards these damages frequently without creating some sort of new legal rule regarding the value of pictures and animals. Instead, those court decisions mean that others who tortiously lose special pictures or animals can seek compensation. Similarly, awarding mental anguish and loss of consortium damages after stillbirth does not create some new precedent that would chip away at abortion rights.

Another clear distinction between a wrongful death claim and abortion is existence of opposing interests. In the wrongful death context, the mother’s interest in the unborn child and the state’s interest in the same unborn child align—both want the pregnancy to be successful and for the child to be born alive. Those interests do not align in the case of abortion. The state is still interested in protecting the life of the unborn child, but the woman lacks the same interest. And pregnancy and possible birth of that child will affect the woman in a way it will affect no one else. That is why, as the Court held in *Roe*, the woman has a right to choose to not become a mother. The difference in the

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<sup>420</sup> See *infra* Section C. (discussing the father’s loss after stillbirth). See Seymore, *supra* note 210, at 841. Professor Malinda Seymore summarized the results of studies of men’s reactions to abortion. The “unsurprising” result was that “different men experience abortion differently.” *Id.* In one study, men expressed grief, sadness, anger, and experienced various symptoms of post-traumatic stress disorder. *Id.* In another study of men in months or a year after the abortion, “most participants said that they were satisfied with the abortion decision, expressing feelings of relief.” *Id.*

<sup>421</sup> See Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1201–02 (2014) (finding that the constitutionality of abortion precludes it from being extreme and outrageous conduct); see also *id.* (explaining that allowing the father a tort claim would “function exactly like a requirement of spousal consent, held unconstitutional long ago.”).

<sup>422</sup> See *Dubey v. Pub. Storage, Inc.*, 918 N.E.2d 265, 283 (Ill. Ct. App. 2009).

<sup>423</sup> See, e.g., *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987) (affirming that the loss of companionship could be used as an element in determining damages in a property damage case, similar to the treatment of other items of sentimental value, such as heirlooms and photographs, but refusing to extend an independent cause of action for loss of companionship).

aligning versus competing interests is a simple reason why the recognition and regulation of stillbirth and abortion can and should differ, yet still be consistent.

The same differing interests exist in the criminalization of the death of an unborn child and abortion. “As of 2005, at least thirty-three states criminalized the killing of a fetus under regular homicide statutes, separate feticide laws, or judicial interpretations of the criminal code.”<sup>424</sup> Some of these state statutes have existed for a long time; California passed its first statute in 1970, years before *Roe*.<sup>425</sup> Like they have with wrongful death claims, the pro-choice side opposed these criminal measures. As Professor Carolyn B. Ramsey explained, that opposition is an overreaction: “While critics of fetal homicide laws often depict them as a monolithic threat to reproductive freedom, this broad-brush approach is more polemical than informative.”<sup>426</sup> Instead, the two measures can easily coexist, and have for many years, given the differing interests; “[w]hen the law criminalizes the lethal conduct of a third-party attacker, there are no competing interests to weigh.”<sup>427</sup>

Last, denying recovery, pretending as if parents do not really lose anything in stillbirth, denies reality. Some women, and men, very quickly develop a relationship with their unborn child. That has always been true. It was true when the Court decided *Roe*. And it is even sometimes true in abortion.<sup>428</sup> Downplaying this reality is neither persuasive nor credible. Devaluing one woman’s loss after stillbirth does not protect another woman’s abortion rights.

The reality is that abortion is complicated. To glibly state “[a]pparently, because of the unique relationship between a mother and her fetus, a woman is allowed to perform a harmful action that would not be allowed by others” is oversimplifying.<sup>429</sup> Some parents view stillbirth as the loss of their child and other parents choose, for whatever reason, to terminate a pregnancy. As Professor Sanger explained: “This is not inconsistency but rather an awareness of context.”<sup>430</sup>

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<sup>424</sup> Carolyn B. Ramsey, *Restructuring the Debate Over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734 (2006).

<sup>425</sup> *Id.* at 733.

<sup>426</sup> *Id.* at 743.

<sup>427</sup> *Id.* at 740.

<sup>428</sup> SANGER, *supra* note 155, at 132–33 (discussing the difference between feelings of loss and regret after abortion).

<sup>429</sup> Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 971 (1995).

<sup>430</sup> SANGER, *supra* note 155, at 104; *see also id.* at 103 (explaining that “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”); *id.* at 81 (“Even those who do not regard an ultrasound image as proof of personhood understand that it functions as such for others.”). *But see id.* at 4 (discussing inherent concern that “it may no longer be possible to cabin the culture or political meaning of anything to do with fetal life or death in the United States”). Sometimes context cannot readily explain away an inconsistency. For example, in a Colorado case, a Catholic hospital found the abortion and wrongful death contexts separate enough to be able to argue that unborn child is not a person in the liability for wrongful death con-

Context often controls views on abortion. This is certainly true on a personal level. A pro-choice woman can still doubt that she could ever have an abortion. Similarly, a pro-life woman may want an abortion after rape or incest. The American public also takes a “contextual view of homicide and to recognize that abortion does not equate to fetal murder.”<sup>431</sup> Context also controls legally; a law can exist based on the sentiment that all life is precious, yet still allow abortion in cases of rape or incest.<sup>432</sup>

“[W]omen’s attitudes regarding prenatal life are not fixed or universal.”<sup>433</sup> This is true for abortion and for involuntary pregnancy loss. Women have different opinions about their losses in miscarriages, pregnancy loss before twenty weeks, the same timeframe in which the vast majority of abortions taken place. If early, some may not believe that they lost a child. Or even if they believe they lost a child, they had not named that child nor considered him a part of the family.<sup>434</sup> But for stillbirth, pregnancy loss after twenty weeks, including the unborn baby dying during labor, the vast majority of parents believe that they lost a child. Tort’s law recognition of another contextual view of unborn babies specific to stillbirth does not affect another woman’s right to choose abortion.

A woman’s rights to reproductive health should not be limited to her right to abortion. This recognition reflects the shift from the reproductive rights movement to the more recent reproductive justice movement.<sup>435</sup> Instead of focusing almost exclusively on abortion, the reproductive justice movement is “equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”<sup>436</sup> In stillbirth, the woman chose to keep that pregnancy and bonded with her child. After twenty weeks of pregnancy, she reasonably expected to give birth to a living child. A woman who loses that choice and her child in a tortiously caused stillbirth should be able to sue that tortfeasor for her child’s wrongful death. Con-

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text. Ben Brumfield & Kyung Lah, *Lawyers for Catholic Hospital Argue That a Fetus is Not a Person*, CNN (Jan. 27, 2013, 1:02 PM), <https://www.cnn.com/2013/01/26/us/colorado-fetus-lawsuit/index.html> [<https://perma.cc/NSF3-L852>]; see generally *Stodghill v. Pelter*, No. 07CV522, 2010 WL 9103730 (D. Colo. Dec. 5, 2010).

<sup>431</sup> Ramsey, *supra* note 424, at 731–32; see also *id.* at 730 (“The widely held view that third-party killers of fetuses should suffer serious criminal penalties contrasts with the public’s enduring support for legal but limited access to abortion.”).

<sup>432</sup> See John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 444 (1996) (“This position risks moral inconsistency: If they oppose abortion because they believe that the fetus is an entity with interests, then protecting only fetuses with certain genes, or only those not conceived by rape or incest, is morally inconsistent.”).

<sup>433</sup> SANGER, *supra* note 155, at 146.

<sup>434</sup> See LAYNE, *supra* note 3, at 8.

<sup>435</sup> See Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579, 594 (2017) (explaining that the reproductive rights movement focuses almost exclusively on abortion rights, and that the reproductive justice movement believes the abortion focus “diverts attention away from a range of other reproductive experiences.”).

<sup>436</sup> Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 343 (2013).

sistent with reproductive justice theory, proper recognition of stillbirth and abortion rights can and should coexist.

#### CONCLUSION

Normally, the best way to accentuate an injury is to recognize a specific claim. That accentuation is apparent in tort law's specific recognition of wrongful birth and wrongful life claims, which really are medical malpractice claims with distinct injuries. Professor Dov Fox recently also suggested a specific "reproductive negligence" claim to identify and highlight the unique harms of imposed procreation, deprived procreation, and confounded procreation.<sup>437</sup> He specifically explained the need for a distinct claim to accentuate these harms.<sup>438</sup>

For stillbirth, though, the problem is not the lack of distinction. Instead, the problem is the distinction. Consider statistical recognition of stillbirth. Deaths due to stillbirth are "not counted in infant mortality data,"<sup>439</sup> meaning the death of an infant before his or her first birthday.<sup>440</sup> Little, if any, developmental difference exists between a full-term stillborn baby and a baby born alive. But babies born alive—premature and full-term—who later die are counted in infant mortality data.<sup>441</sup> Stillborn babies are not. "A country's rate of infant mortality is commonly used as a marker to measure societal well-being. Yet, stillbirths, even at full-term, are not counted in infant mortality data, thus, affecting public perception, funding, and research."<sup>442</sup>

Tort law's distinct treatment similarly devalues stillbirth. The best way for tort law to recognize and value stillbirth then, is to remove the distinction. Stillbirth is the death of a child. Just like any childbirth, the mother delivered the baby. And the parents got to hold that baby before having to say goodbye. Stillbirth is no different than the death of a child, and tort law should recognize it as such.

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<sup>437</sup> See generally Fox, *supra* note 223. He does not mention tortiously caused pregnancy loss, whether it be miscarriage or stillbirth. It seems to fit best in his category of deprived procreation. But stillbirth is also very different than the examples he provides in this category: fertility clinics negligently losing eggs, sperm, or embryos, and wrongful abortion—a doctor misadvising couples of potential birth defects, causing the woman to abort an actually healthy fetus. See *id.* at 194. None of those examples involve burying a child. He did not advocate, nor would I advocate, a wrongful death claim for the loss of eggs, sperm, or embryos.

<sup>438</sup> See *id.* at 212.

<sup>439</sup> Cacciatore, *Feminist*, *supra* note 71, at 92.

<sup>440</sup> *Infant Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> [https://perma.cc/NU5B-GYXR] (last visited Apr. 21, 2019).

<sup>441</sup> See Karen Kaplan, *Premature Births a Big Factor in U.S. Infant Mortality Rate*, L.A. TIMES (Sept. 24, 2014, 1:20 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-infant-mortality-us-ranks-26th-20140924-story.html> [https://perma.cc/2KBU-7H7X].

<sup>442</sup> Cacciatore, *Feminist*, *supra* note 71, at 92.