Valuing Reproductive Loss

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Our legal system characterizes the unborn in a multiplicity of conflicting ways—from persons to property, from body parts to medical investments. The law of civil wrongs is instructive. It weighs in when misconduct deprives aspiring parents of the child they had hoped to have, whether the transgression takes place during pregnancy or before it. The torts and remedies that govern these cases are riddled with a confusion that comes from treating prenatal life as anything but coherent. The overturning of Roe v. Wade *has cast new light on the neglected doctrine of reproductive loss and deepened a tension about the meaning of prenatal life in both private and public law.*

This Article undertakes the first study of jury verdicts for mismanaged pregnancies and mishandled embryos. This original empirical analysis reveals wildly erratic outcomes. And it lends insight into the influence of racial and class biases about "wanted" children and "deserving" parents. We introduce a framework with which juries should appraise these losses according to three factors. First is the subjective experience of losing a wanted baby. Second is the objective chance of having that baby if not for misconduct. Third is accompanying traumas, such as delivering a dead baby in a stillbirth. Each factor operates to promote reproductive justice and recover principle in how the law treats prenatal death across the landscape of civil awards and criminal restrictions.

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INTRODUCTION

Clayton and Sydney Mayhew recently lost their unborn son, Adam, in Fort Worth, Texas.[1] Had his death been due to abortion, the performing doctor would have faced a $100,000 penalty, first-degree felony conviction, and possible life sentence in prison.[2] These consequences exist even if the abortion occurred at only five weeks pregnant,[3] only a week after pregnancy is discoverable.[4]

But this was not a case of abortion. Adam was stillborn; he died and was stillborn at forty weeks of pregnancy, the very end of pregnancy.[5] His parents believe that had the doctor induced labor earlier, as Sydney repeatedly requested due to extreme pain and discomfort, Adam would be alive today.[6] Instead, Adam was born dead on the same day the doctor begrudgingly agreed to induce labor.[7]

In Texas, the civil law of wrongful death mirrors the criminal abortion statute in that both deem Adam an "unborn child."[8] Yet Texas law forbids wrongful death claims when medical malpractice causes the death of an unborn child.[9] So, the Mayhews are barred from seeking that form of relief for being deprived of their child Adam.

Texas law allows Sydney to sue for her own bodily injury, but limits any such malpractice damages to "the loss of a fetus *as part of* the woman's body," and not for "the loss of the fetus as a separate individual."[10] Malpractice law defines Adam as a body part that parents can't have formed an emotional relationship with.[11] Though they had already named him, Adam was, legally, Sydney's body part.

What if Adam was not yet a part of Sydney's body when he died? What if the Mayhews had used in vitro fertilization (IVF) to create embryos, including an embryo they named Adam, and the embryos were destroyed in a freezer malfunction? Again, Texas's abortion laws define any fertilized egg as a "child."[12] Texas courts haven't yet been called on to decide how to remedy embryos lost in the

1. Interview with Sydney Mayhew (Apr. 24, 2023).

2. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.004–005; TEX. PENAL CODE ANN. § 12.32(a).

3. *See* HEALTH & SAFETY §§ 170A.001(5), 170A.004, 171.201(3).

4. *See Home Pregnancy Tests: Can You Trust the Results?*, MAYO CLINIC, https://www.mayoclinic.org/healthy-lifestyle/getting-pregnant/in-depth/home-pregnancy-tests/art-20047940 [https://perma.cc/C5VA-8E8G] (last visited Aug. 28, 2023).

5. Interview with Sydney Mayhew, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) ("'Individual' includes an unborn child at every stage of gestation from fertilization until birth."), *with* HEALTH & SAFETY § 170A.001(5) ("'Unborn child' means an individual living member of the homo sapiens species from fertilization until birth . . . .").

9. *See* CIV. PRAC. & REM. § 71.003(c).

10. Edinburg Hosp. Auth. v. Treviño, 941 S.W.2d 76, 79 (Tex. 1997).

11. *See* Haskett v. Butts, 83 S.W.3d 213, 218 (Tex. App. 2002) ("[W]e hold that a fetus is a part of the mother's body, and if that body part is injured through negligent treatment, she has a claim for medical negligence for injury to her body.").

12. HEALTH & SAFETY § 171.201(7).

lab.[13] But most states treat the harm in these cases as the destruction of personal property.[14]

Victims like these are frustrated by the law's confused treatment of a would-be baby as at once a person, a body part, and property. The Mayhews tried but couldn't even find an attorney to sue the doctor who would have faced a life sentence in prison if he'd caused the same fetal death through a wanted abortion.[15] Yet the author of Texas's six-week civil abortion ban readily sued for wrongful death on behalf of a man seeking millions of dollars for the alleged father–child relationship his ex-wife's friends denied him when they supported her decision to have an abortion.[16] The wealth of abortion scholarship about the legal treatment of nascent life lays bare the virtual absence of literature about how to value the unborn in the context of what we call "reproductive loss."[17] This category includes cases involving stillbirth (after twenty weeks of pregnancy), miscarriage (before twenty weeks),[18] and the loss of embryos (prior to pregnancy).

Losing a wanted child can be devastating. When wrongful misconduct is to blame, the legal system lacks coherent answers to basic questions: What is the nature of that injury? What makes it more harmful or less? And how much is owed to these victims of reproductive misconduct? The abortion debate has crowded out these questions for decades.[19] With *Roe v. Wade* no longer on the line,[20] maybe there is now space for critical engagement about the law's treatment of reproductive loss.

This Article undertakes the first-ever comprehensive empirical inquiry into damage verdicts for reproductive losses. The results of that study uncover wildly disparate awards that fail to reflect the realities of conceiving, being pregnant, and giving birth. Our analysis highlights the creep of jury bias on damage verdicts, including racist and classist stereotypes about "wanted" children and "deserving" parents. No legal scholarship to date has considered the pernicious

13. *See* Inst. for Women's Health, P.L.L.C. v. Imad, No. 04–05–00555–CV, 2006 WL 334013, at *3 (Tex. App. Feb. 15, 2006) (dismissing embryo-destruction claim because it was characterized as medical malpractice and thus required an expert report the plaintiffs did not include when filing lawsuit); *see also* Saleh v. Hollinger, 335 S.W.3d 368, 372, 376 (Tex. App. 2011) (dismissing embryo-theft claim because it was characterized as medical malpractice and thus required an expert report the plaintiffs did not include when filing lawsuit).

14. *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 175 (2017) (discussing a Rhode Island case permitting recovery of property damages for lost embryo).

15. Interview with Sydney Mayhew, *supra* note 1.

16. *See* Plaintiff's Original Petition at 2–3, 8, 11, Silva v. Noyola, No. 23-CV-0375 (Tex. Dist. Ct. Galveston Cnty. filed Mar. 9, 2023); Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html.

17. *See infra* notes 40–53 and accompanying text.

18. *What Is Stillbirth?*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/ncbddd/stillbirth/facts.html [https://perma.cc/AU6F-Y2F7] (last visited Aug. 29, 2023).

19. Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1076–78, 1110–11 (2021) (discussing how the abortion debate has erased pregnancy loss and complicated efforts to create tort recourse for pregnancy loss).

20. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2242 (2022).

impact these prejudices can have on jury awards for reproductive loss.[21] This Article shines new light on that influence and advances a principled method for redressing it through safeguards to minimize the impact of race and class biases on damages. Our approach highlights subjective factors, such as how plaintiffs experienced their loss, as well as objective ones, such as the chances of live childbirth if there hadn't been misconduct.

Real recognition of reproductive loss also reveals deep inconsistencies in how the government advances its interest in protecting prenatal life. For example, what could justify banning abortion early in pregnancy while conditioning relief for pregnancy loss on viability? Don't people who lose a wanted baby have as strong an interest in their own unborn child as the state? Shouldn't they be able to define that loss for themselves rather than have its meaning imposed by government orthodoxy about when life begins? Taking reproductive loss seriously supports abortion rights and normalizes pregnancy outcomes other than live birth.

This Article seeks to restore moral logic to the legal system's treatment of individuals who procreate and of the nascent human beings at stake. Part I spells out our study into damage verdicts for reproductive loss. Part II shows how racist and classist biases about good and bad parents can creep into the remedies calculus. Part III introduces a framework for assessing these harms according to (1) the subjective experience of not being able to take home a wanted baby, (2) the objective loss of the chance of live childbirth that the misconduct denied them, and (3) trauma related to reproductive loss but distinct from it. Part IV examines the surprising implications these conclusions hold for the laws around abortion in post-*Dobbs* America.

I. EMPIRICAL STUDY OF JURY AWARDS

We conducted an original study into claims that resulted in jury awards for reproductive losses early and late in pregnancy and even before it.[22] The fact patterns range from rear-ended cars that cause someone to miscarry to dropped embryos being stored for fertility patients.[23] Our study considers cases that meet two conditions. First, the reproductive loss must have taken place after conception. Second, the plaintiffs must have sought to have a child. Our data set accordingly excludes, for example, the contamination of embryos intended for stem cell research or any goal other than pregnancy and birth. We also set aside cases involving wrongful sterilization—that is, before there was any fertilized egg.

21. *See infra* Part II.

22. Our data set is on file with the authors and available upon request.

23. *See, e.g.*, Jury Verdict, Lake v. Downing, JVR No. 116476 (N.H. Super. Ct. Cheshire Cnty. 1993) (No. 91-C-173), 1993 WL 457012; Howard Koplowitz, *Frozen Embryo Not a 'Child,' Mobile Judge Rules in Throwing Out Wrongful Death Claim*, AL.COM (Apr. 15, 2022, 6:00 AM), https://www.al.com/news/mobile/2022/04/frozen-embryo-not-a-child-mobile-judge-rules-in-throwing-out-wrongful-death-claim.html [https://perma.cc/JE2H-C9GZ].

A. METHODOLOGY

Our search was divided into post-pregnancy and pre-pregnancy cases. We searched "all state and federal cases" in the Lexis and Westlaw jury verdict databases using the following terms: "pregnan!" AND "stillb!" OR "miscarr!," and we omitted unrelated cases like "miscarriage of justice" matters about wrongful convictions. Then, we filtered the resulting cases according to those that awarded compensation to the plaintiffs. Those verdicts and damage totals were verified against available news reports.

For pre-pregnancy cases, we searched in the same databases in order to include reproductive losses while excluding divorce disputes about leftover embryos. The terms we used were the following: (embryo OR pre-embryo) AND (implant OR "in vitro" "fertilization" IVF OR fertility) AND (loss OR destr! OR contaminat!) AND NOT marr! We removed false positives like surrogacy disputes and children born with disabilities. Again, we cross-referenced the remaining verdicts against available news reports.

The Lexis and Westlaw databases for jury verdicts do not classify cases by outcome. So, this universe of reproductive loss cases was restricted to those with a verdict for the plaintiff and a specified award. We read the resulting 1,489 cases to exclude those that were neither relevant nor informative: defense verdicts, undisclosed settlements, and plaintiffs' verdicts for nonreproductive losses such as misuse of fetal remains or delay in certifying death.[24] That left 158 cases in the final data set.

The study has limitations. For one, our data set is limited to those jury verdicts reported in the Lexis and Westlaw databases. Accordingly, it doesn't include damages awarded in bench trials or arbitration, though these methods of resolution are rare by comparison.[25] A more important limitation is that these cases involve different juries made up of distinct jurors. That varied composition could translate into different awards for noneconomic damages like emotional distress or pain and suffering even if discrete juries were presented the same evidence. The discretion our legal system affords individual juries invites a measure of deviation that's informed by community norms. That kind of variation is predictable. What shouldn't be tolerated is invidious bias.

B. VERDICT RANGES

We analyzed all 158 reproductive loss cases across dozens of the most plausible explanatory variables. These ranged from the plaintiff's age to the stage of prenatal development to the nature of the wrongdoing. Extreme disparities characterized these jury verdicts. This was after we adjusted the award totals in all the

24. A "stillbirth" case was removed in which a baby was born alive and died after. Jury Verdict, Golombek v. Cabrini Med. Ctr., No. 11669/91 (N.Y. Sup. Ct. Mar. 9, 1999), 1999 Jury Verdicts LEXIS 59031.

25. Many of the incidents that lead to reproductive loss would not be resolved through arbitration because the relationships and fact patterns underlying these actions for medical malpractice or negligent driving often do not arise from breaches in contractual agreements that would include arbitration clauses.

cases for inflation based on the value of a dollar in 2022 using the Bureau of Labor Statistics's inflation-adjustment calculator.[26] All discussions of damage verdicts below use this 2022 inflation-adjusted value.

Table 1.

Verdict Range	Pre-pregnancy	Miscarriages	Stillbirths
> $10 million	0	1	7
$5 million–$10 million	1	0	9
$1 million–$5 million	3	7	47
$500K–$1 million	0	3	28
$100K–$500K	0	9	36
< $100K	0	5	2

The six highest verdicts involve additional injuries besides the reproductive loss.[27] These include a woman's physical injury ($15.6 million[28]); two women's deaths ($12.2 million[29] and $33 million[30]); a twin's disability within two different sets of twins ($13.1 million[31] and $19.1 million[32]); and stillbirth ($35 million[33]). But these injuries that extended beyond reproductive loss did not guarantee a verdict in the highest level of damages over $10 million. For example, grave injuries sustained to the surviving twin in one case yielded $7.4 million damages.[34]

The highest verdict for reproductive loss alone was $11.9 million for a stillbirth caused by unreasonable delay in an emergency cesarean section.[35] The three next highest awards, all in the $8–$10 million range, were also stillbirths due to malpractice during labor and delivery.[36] That later stage of pregnancy at loss does not

26. *CPI Inflation Calculator*, BUREAU LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl [https://perma.cc/F5FR-KSV6] (last visited Aug. 30, 2023).

27. The plaintiff in one case miscarried due to a twisted bowel. Jury Verdict, Miller v. Edwards Hosp., No. 05L1192 (Ill. Cir. Ct. DuPage Cnty. Oct. 26, 2010), 2010 Jury Verdicts LEXIS 29224. She thought her medications would leave her unable to give birth and had been looking into adoption. *Id.*

28. *Id.*

29. Jury Verdict, Beverly v. United States, No. 12CV07234 (N.D. Ill. May 10, 2016), 2016 WL 7330909.

30. Jury Verdict, Hayden v. Zarghami, No. 13228/09 (N.Y. Sup. Ct. Kings Cnty. Nov. 26, 2019), 2020 Jury Verdicts LEXIS 304845.

31. Jury Verdict, Ambroziak v. Schwartz, JVR No. 33 (N.J. Super. Ct. Law Div. Middlesex Cnty. 1989) (No. L-060660-87), 1989 WL 388990.

32. Jury Verdict, Cooley v. Perez, No. 41973 (Md. Cir. Ct. Montgomery Cnty. Dec. 9, 1992), 1992 MD Metro Verdicts Monthly LEXIS 999.

33. Jury Verdict, Abellard v. N.Y.C. Health & Hosps. Corp., No. 00967/91 (N.Y. Sup. Ct. Nov. 1997), 1997 Jury Verdicts LEXIS 61858.

34. Jury Verdict, Brown v. Good Samaritan Hosp., Inc., FJVR No. 09:10-28 (Fla. Palm Beach Cnty. Ct. 2009) (No. 1999-CA-7754), 2009 FL Jury Verdicts Rptr. LEXIS 1246.

35. Jury Verdict, Schukraft v. Polin, No. 3120-C (Pa. Ct. Com. Pl. Luzerne Cnty. July 1999), 2009 Jury Verdicts LEXIS 157340.

36. *See* Jury Verdict, Mooney-Hurley v. Kammer, 99 FJVR 5-56 (Fla. Cir. Ct. 1999) (No. CL 97-11169 AD), 1999 WL 378725; Jury Verdict, Davis v. Sanger, JVR No. 423138 (Okla. Dist. Ct. 2003)

explain the $16.4 million damages for the negligent loss of fertility patients' frozen embryos that had not yet been implanted.[37] For many of the miscarriage and stillbirth malpractice verdicts we analyzed, victims were awarded less than $100,000.[38] Nothing in the verdict summaries explain the low valuations; perhaps juries appraised the plaintiffs' losses as less serious, or the defendants less to blame. In some malpractice cases, for instance, things started going awry outside the medical setting, in a car accident or violent encounter with police.[39]

C. LEGAL ACTIONS

We also analyzed the claims that plaintiffs brought to recover damages, given that different legal actions allow for different types of awards. Most states that recognize wrongful death actions apply it to pregnancy loss under the same claim that's available for the tortious death of a living child. Some of these apply wrongful death to losses at any point in pregnancy, but many limit its availability to viable fetuses: stillbirths after twenty-four weeks.[40] Dictated by statute, wrongful death damages are usually limited to awards for the lost relationship between parent and child.[41] Many of these jurisdictions bar recovery for pain and suffering or any emotional distress resulting from pregnancy loss.[42]

States that allow wrongful death claims for pregnancy losses only after viability still recognize the woman's negligence claim under common law for pre-viability miscarriages and stillbirths as injuries to her body, just as she would if the negligent conduct injured her leg.[43] And a few states apply the woman's bodily injury negligence claim to all tortiously caused pregnancy losses.[44] The damages in these negligence claims are limited to the anguish "resulting from the negligent treatment that causes the loss of a fetus *as part of* the woman's body."[45] Damages for lost relationships aren't available because the fetus is not treated as a separate being with which one can have a relationship.[46]

(No. CJ-2001-1395), 2003 WL 24176074; Jury Verdict, Estate of Schariro v. Nahabet, JVR No. 405357 (Mass. Super. Ct. 2000) (No. 97-1995C), 2000 WL 33975838.

37. Jury Verdict, A.B. v. Pac. Fertility Ctr., No. 18-cv-02298 (N.D. Cal. June 10, 2021), 2021 Jury Verdicts LEXIS 7174.

38. *See, e.g.*, Jury Verdict, Rafaelle v. Desal, 14 Trials Digest 214 (Cal. Super. Ct. 1992) (No. 633157), 1992 WL 681797; Jury Verdict, Flaa v. Wright, No. CISCV177959 (Cal. Super. Ct. Jan. 26, 2015), 2015 Jury Verdicts LEXIS 1660; Jury Verdict, Cohen v. Kadner, 9 Trials Digest 117 (Cal. Super. Ct. 1992) (No. WEC123100), 1992 WL 680913; Jury Verdict, Adkins v. U-Haul Co. of Cal., No. 325032 (Cal. Super. Ct. Nov. 20, 2003), 2003 Jury Verdicts LEXIS 47523.

39. *See* Jury Verdict, Lake v. Downing, *supra* note 23; Jury Verdict, Adkins v. U-Haul Co. of Cal., *supra* note 38.

40. *See* Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955, 973–74, 1004–06 (2019).

41. *See id.* at 969.

42. *See id.*

43. *See id.* at 974.

44. *See id.* at 976.

45. Haskett v. Butts, 83 S.W.3d 213, 217 (Tex. App. 2002) (quoting Edinburg Hosp. Auth. v. Treviño, 941 S.W.3d 76, 79 (Tex. 1997)).

46. *See id.*; Lens, *supra* note 40, at 969–70, 974.

Pre-pregnancy cases are newer. The first American reproductive loss lawsuit over in vitro fertilization was filed in 1995.[47] Three couples sued for the loss of their nine embryos.[48] The Rhode Island court allowed the families to recover for the missing embryos "based on the 'loss of irreplaceable property.'"[49] But judges could be expected to have a hard time determining the amount of damages.

There's no market for frozen embryos, so they lack commercial value in that sense. Then again, so do the family heirlooms and custom-made suits that courts remedy.[50] Courts might assess their value based on the cost of replacement.[51] A problem with that option is that age, health, or other factors make it impossible for many fertility patients to replace their lost sperm, eggs, or embryos. Even if these entities can be replaced, the cost of doing so is probably a fraction of the loss they experience. It would amount to small change for sperm, a few thousand dollars to extract eggs, and a couple more for the procedures to create and store embryos.[52]

The handful of courts that have addressed the issue of compensation for the destruction of frozen embryos have struggled to treat their loss as property damage, a characterization that usually rules out recovery for the likes of pain and suffering or emotional and mental anguish.[53]

Table 2.

Reproductive Loss	**Legal Claim**	**Available Damages**
Embryos pre-pregnancy	Negligence	Damages limited to cost of replacing "property"
Fetus pre-viability	Negligence	Damages limited to emotional distress
	Wrongful death (minority rule)	Damages limited to lost relationship
Fetus post-viability	Wrongful death	Damages limited to lost relationship
	Negligence (minority rule)	Damages limited to emotional distress

47. Frisina v. Women & Infants Hosp. of R.I., No. CIV. A. 95–4037, 2002 WL 1288784, at *1 (R.I. Super. Ct. May 30, 2002).

48. *Id.*

49. *Id.* at *10.

50. *See* Sell v. Ward, 81 Ill. App. 675, 678 (1898).

51. *Cf.* United States v. Arora, 860 F. Supp. 1091, 1099–1100 (D. Md. 1994) (discussing the difficulties of quantifying damages for property with an uncertain market value or speculative damages such as a delay in a research project).

52. *See* Marissa Conrad & James Grifo, *How Much Does IVF Cost?*, FORBES HEALTH (Mar. 7, 2023, 11:47 AM), https://www.forbes.com/health/family/how-much-does-ivf-cost/ [https://perma.cc/E5TS-LQDM].

53. *See* DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 100 (2019).

This mixed bag masks what is in fact the same core injury: the lost chance to have a baby. We wanted to study the determinant of damage totals as a function of the legal claim type, whether negligence, wrongful death, or otherwise. But jury verdict summaries did not always mention the applicable claim. We pivoted to looking into if and when states started applying wrongful death law to pregnancy losses. For instance, Indiana started applying wrongful death law to viable stillbirths in 2009.[54] So, we considered any post-2009 stillbirth claims in Indiana as wrongful death claims. And we assumed viability for verdicts that mentioned "stillbirth," an assumption that'd be incorrect for pre-viability stillbirths between twenty to twenty-four weeks. The data included seventy negligence claims and eighty-seven wrongful death claims.[55]

Table 3.

Verdict Range	Negligence	Wrongful Death	Other
> $10 million	3	5	0
$5 million–$10 million	5	5	0
$1 million–$5 million	21	35	1
$500K–$1 million	16	15	0
$100K–$500K	21	24	0
< $100K	7	0	0

High-dollar verdicts for reproductive loss (totaling greater than $1 million) were about 40% more likely to involve claims of wrongful death than negligence. This may show that juries are more inclined to award higher damages for claims identifying the baby as a separate being and the parent's lost relationship with that baby as compared to damages for emotional distress related to an injured body part or property damage; this certainly seems possible for verdicts for property damage only. But, really, the data do not appear to reflect any coherent story about verdict patterns based on the type of claim or awards it gives rise to.

D. DAMAGE CAPS

Roughly half of states have tort reform statutes to cap the recovery of noneconomic damages for medical malpractice, including for wrongful death claims.[56] Because awards for both emotional distress and lost relationship are noneconomic, these laws can radically curtail recovery for reproductive loss. We found three cases involving application of a noneconomic damage cap: a 2000 California verdict for $1.75 million in noneconomic damages was reduced to

54. Act of May 12, 2009, sec. 8, 2009 Ind. Acts 129 (codified at IND. CODE § 34-23-2-1).

55. Negligence verdicts distinguish damage totals for each individual plaintiff in a couple. Some wrongful death awards don't separate out between would-be parents.

56. *See* Lens, *supra* note 40, at 999–1000, 999 n.344.

$250,000;[57] a 2016 Missouri verdict fell from $2.5 million to $1.17 million;[58] and a 1997 Texas verdict reduced damages from $750,000 per plaintiff to $250,000 per.[59]

Most California verdicts were too low to meet the state's $250,000 cap for noneconomic awards. Just one verdict in the state far exceeded that damage cap: $2.3 million for miscarriage at nineteen weeks, $1.3 million of which was noneconomic.[60] The cap didn't apply because that claim wasn't for medical malpractice,[61] letting the plaintiffs collect all $1.3 million in noneconomic damages awarded. Medical malpractice caps generate disparities that have nothing to do with the reproductive loss: $250,000 if the defendant is a doctor, $1.3 million otherwise. These caps might also deter lawsuits by chilling attorney willingness to bring a case if the capped damages make the suit economically inefficient for the lawyer.[62]

* * *

Our study reveals none of the most plausible explanations—timing of loss/gestational age, type of legal claim, and damage caps—explain verdict totals for reproductive loss. Inconsistencies are expected given that a different jury decides each case. But we suspect racist and classist stereotypes are also at work. The lack of reliable data about plaintiffs' race and class keeps us from testing our hypothesis. But the plausibility of influence alone is enough to merit discussion. That's the next Part.

II. THE INFLUENCE OF RACE AND CLASS

Studies into unconscious bias in civil judgments are in the early stages compared to better developed research about biases in criminal law.[63] The most extensive inquiry on the civil side to date has focused on the disparate effects of using race- and gender-based tables to calculate future lost income in tort cases.[64] A 2020 study found that respondents would award hypothetical Black plaintiffs

57. Jury Verdict, Toliver v. Mehrtash, No. YC 036 320 (Cal. Super. Ct. Los Angeles Cnty. Nov. 20, 2000), 2000 Jury Verdicts LEXIS 61222.

58. Jury Verdict, Hughes v. Niedens, No. 12CY-CV10890 (Mo. Cir. Ct. Clay Cnty. May 12, 2016), 2016 Jury Verdicts LEXIS 13512.

59. Edinburg Hosp. Auth. v. Treviño, 941 S.W.2d 76, 78 (Tex. 1997).

60. Jury Verdict, Borck v. City of Los Angeles, No. 99-11575 (C.D. Cal. Apr. 1, 2009), 2009 Jury Verdicts LEXIS 418159.

61. *Id.* (awarding damages for miscarriage due to stress of sexual harassment and employment discrimination).

62. *See, e.g.*, Kaeleigh P. Christie, Note, *The Unconstitutionality of the Protecting Access to Care Act of 2017's Cap on Noneconomic Damages in Medical Malpractice Cases*, 45 J. LEGIS. 81, 82 n.18, 91 (2018).

63. Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, 509 (2020). For further discussion, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010) and Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 329 n.15 (2018).

64. *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 666–67 (2017).

lower damage totals than white ones in lawsuits against individual defendants, while finding no significant such difference in awards against institutional defendants.[65]

Scholars have argued that racial and class biases are likely to affect juror valuations of noneconomic damages in other contexts. Mark Geistfeld entertains "[t]he possibility that jurors rely on extralegal factors such as gender, race, socioeconomic status, or physical appearance."[66] Dara Purvis found in the context of embryo disputes that "courts repeatedly credit the desires of women to become mothers while dismissing men's emotions" about becoming fathers.[67] And Maytal Gilboa has attributed lower jury awards for pain and suffering damages to the stereotype that Black people, especially Black women, have higher resistance to pain.[68]

This Part interrogates how implicit racial and class bias can affect juror valuations of noneconomic damage awards for reproductive loss. Our verdict data set didn't include reliable information about plaintiffs' race or socioeconomic status. But some award summaries nevertheless gave cause to suspect related biases played a role. One lower end verdict for stillbirth at thirty-seven weeks derided a teenage pregnancy as "unplanned."[69] A higher award for earlier loss said plaintiffs "really wanted this child"; these weren't "19-year-olds who got accidentally pregnant."[70] Another example involved a secretary who sustained a miscarriage when her car was struck from behind.[71] She received paltry compensation in part because "she was not married to the unborn child's father" and "had had two previous voluntary abortions."[72] In another case, prison officials who caused an incarcerated woman's child to be stillborn argued any award "'must be minimal' because her 'conduct at all times prior to the stillbirth was not the conduct of a mother who wanted her baby,'" and also because she couldn't provide evidence that she "would have been able to raise her child or have even been able to keep her child."[73]

Damage determinations for reproductive loss invite juries to rely on biases based on not just class but color, at least implicitly, to distinguish parents seen as

65. *See* Cardi et al., *supra* note 63, at 550.

66. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 785 (1995); *see also* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 770 (1995) (discussing the phenomenon of jurors using "inappropriate" factors such as race and gender in their decisionmaking).

67. Dara E. Purvis, *Frozen Embryos, Male Consent, and Masculinities*, 97 IND. L.J. 611, 638 (2022).

68. Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, 56 GA. L. REV. 651, 677 (2022).

69. Jury Verdict, Fregoso v. Parkview Cmty. Hosp. Med. Ctr., 9 Trials Digest 22d 23 (Cal. Super. Ct. Riverside Cnty. 2018) (No. RIC-17-00645), 2018 WL 7500093.

70. Jury Verdict, Krenzer v. Duroseau, No. 24C10006956 (Md. Cir. Ct. Baltimore City Feb. 20, 2012), 2015 Dolan Media Jury Verdicts LEXIS 11066.

71. Jury Verdict, Lake v. Downing, *supra* note 23.

72. *Id.*

73. Castro v. Melchor, 414 P.3d 53, 58 (Haw. 2018). This case was not included in our data set because it was a bench trial.

good or deserving from bad or undeserving ones. A Louisiana judge described these factors as relevant to consider: past pregnancy losses, the number of living children, the use of (often costly) assisted reproduction, receipt of prenatal care (whether covered by insurance or not), and "preparation for the forthcoming child, i.e., house additions, baby crib and any other indicia of the degree of expectation exuded by the parents."[74] Whatever else such factors might reveal, they track beliefs about parental wealth, "wantedness," "need," and presumptions about grief that routinely connect to race and class.

A. WEALTH

Several of these factors used to value a reproductive loss—technology, prenatal care, preparations—correlate with how much money families have to spend. These considerations are said to show how responsible plaintiffs were or how deserving they are of the parenthood they made careful plans for. But all these factors also require significant investments: medical, commercial, time off from work. That kind of financial flexibility is far more a function of plaintiffs' material resources than the magnitude of injury they suffered when denied the child they hoped to have.[75]

Reproductive loss from the wrongful destruction of frozen embryos is limited to people who can afford fertility treatment in the first place. For example, IVF costs tens of thousands of dollars to extract eggs and fertilize them in the lab.[76] It's rarely insured except by private Wall Street or Silicon Valley employers and is not covered by Medicaid, the government-run health insurance program for low-income people.[77] So relative wealth is typically required to create IVF embryos.[78] The cost-prohibitive nature of fertility treatment crowds out low-income people.[79] So, they're less likely to be victims of

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

75. *See* Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. Rev. 437, 469–70 (2020).

76. *See* Conrad & Grifo, *supra* note 52.

77. *See, e.g.*, Benjamin J. Peipert, Melissa N. Montoya, Bronwyn S. Bedrick, David B. Seifer & Tarun Jain, *Impact of In Vitro Fertilization State Mandates for Third Party Insurance Coverage in the United States: A Review and Critical Assessment*, 20 REPROD. BIOLOGY & ENDOCRINOLOGY, no. 11, 2022, at 2, 8; JENNA WALLS, KATHY GIFFORD, USHA RANJI, ALINA SALGANICOFF & IVETTE GOMEZ, KAISER FAM. FOUND., MEDICAID COVERAGE OF FAMILY PLANNING BENEFITS: RESULTS FROM A STATE SURVEY 17 (2016), https://files.kff.org/attachment/Report-Medicaid-Coverage-of-Family-Planning-Benefits-Results-from-a-State-Survey [https://perma.cc/4KVF-J5NH].

78. Most IVF users are accordingly college-educated white women with high incomes. Ada C. Dieke, Yujia Zhang, Dmitry M. Kissin, Wanda D. Barfield & Sheree L. Boulet, *Disparities in Assisted Reproductive Technology Utilization by Race and Ethnicity, United States, 2014: A Commentary*, 26 J. WOMEN'S HEALTH 605, 606 (2017).

79. *See* Rickie Solinger, *The Incompatibility of Neo-Liberal "Choice" and Reproductive Justice*, *in* REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 77, 77 (2007); Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 601, 610 (2014); Madeline Curtis, Note, *Inconceivable: How Barriers to Infertility Treatment for Low-Income Women Amount to Reproductive Oppression*, 25 GEO. J. ON POVERTY L. & POL'Y 323, 341–42 (2018).

lost embryos.[80] Racial disparities also exist in IVF use.[81] Eighty-five percent of IVF-created embryos in the United States are implanted in white women[82]—far greater than their representation in the general population[83]—while Hispanic and Black women use IVF vastly less than their representation in the general population.[84] So, almost all the eye-popping emotional distress damage awards in embryo-destruction cases end up going to plaintiffs who are wealthy and white, not poor people of color.[85]

The same income disparity divides parents who obtain prenatal care and those who do not. Prenatal care is critical for a healthy pregnancy.[86] But such care is not available to every pregnant person who wants it.[87] Obtaining prenatal care requires health insurance that requires paying premiums that many people cannot afford through the private market.[88] The government-sponsored Medicaid program provides free or low-cost health care to low-income people and covers about half of all births in this country.[89]

But most low-income people can sign up for Medicaid only after learning they are pregnant, thus delaying prenatal care.[90] The Affordable Care Act expanded Medicaid coverage before pregnancy.[91] But not all states accepted Medicaid expansion.[92] Texas is an example. More than one in five women who give birth in

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80. *See* J. Farley Ordovensky Staniec & Natalie J. Webb, *Utilization of Infertility Services: How Much Does Money Matter?*, 42 HEALTH SERVS. RSCH. 971, 974 tbl.1 (2007).

81. *See, e.g.*, *id.* at 985; Tarun Jain, *Racial Disparities and In Vitro Fertilization (IVF) Treatment Outcomes: Time to Close the Gap*, 18 REPROD. BIOLOGY & ENDOCRINOLOGY, no. 112, 2020, at 1.

82. *See* Dieke et al., *supra* note 78, at 605–06.

83. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/LFE046221 [https://perma.cc/GS4L-WJUK] (last visited Sept. 1, 2023) (detailing data from July, 2022).

84. Dieke et al., *supra* note 78, at 606. Even in the few states that mandate insurance coverage for IVF, "utilization rates for [B]lack non-Hispanic and Hispanic women were still lower than the overall utilization rate for those states." *Id.* at 607; *see* Elpida Velmahos, *Federal Ground for Change: Infertility, Employee-Based Health Insurance, and an Unprotected Fundamental Right*, 17 J. HEALTH & BIOMEDICAL L. 267, 291–92 (2021).

85. *See, e.g.*, Jury Verdict, A.B. v. Pac. Fertility Ctr., *supra* note 37 (awarding $15 million in damages, of which more than $14 million was awarded for pain, suffering, and emotional distress, to three women who lost eggs and a married couple who lost embryos).

86. *See* Sara McLafferty & Sue Grady, *Prenatal Care Need and Access: A GIS Analysis*, 28 J. MED. SYS. 321, 322 (2004); Greg R. Alexander & Carol C. Korenbrot, *The Role of Prenatal Care in Preventing Low Birth Weight*, 5 FUTURE CHILD. 103, 104 (1995).

87. *See* Cynthia A. Loveland Cook, Kimberly L. Selig, Barbara J. Wedge & Erika A. Gohn-Baube, *Access Barriers and the Use of Prenatal Care by Low-Income, Inner-City Women*, 44 SOC. WORK 129, 130 (1999).

88. *See* Elizabeth Kukura, *Giving Birth Under the ACA: Analyzing the Use of Law as a Tool to Improve Health Care*, 94 NEB. L. REV. 799, 830 (2016).

89. Usha Ranji, Ivette Gomez & Alina Salganicoff, *Expanding Postpartum Medicaid Coverage*, KFF (Mar. 9, 2021), https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicaid-coverage/ [https://perma.cc/65KZ-EEJH].

90. *See* Kukura, *supra* note 88, at 824–25.

91. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codifed in scattered sections of 42 U.S.C.); *accord* Kukura, *supra* note 88, at 825.

92. *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (May 24, 2023), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/DM6E-E7WQ] (explaining that as of May 2023, forty-one states including D.C. have adopted the Medicaid expansion).

the state don't receive prenatal care until the second trimester, while one in ten don't until the third trimester, or not at all.[93]

Even insurance coverage—whether private insurance or Medicaid—doesn't guarantee access to prenatal care.[94] Reproductive health care deserts impose geographic obstacles too. Less than one-half of Americans who live in rural towns and other isolated regions live within a thirty-minute drive to the nearest hospital offering perinatal services.[95] A 2022 March of Dimes report found that 36% of all counties in the United States are maternity-care deserts, meaning a county "without a hospital or birth center offering obstetric care and without any obstetric providers."[96] And 61.5% of those maternity-care deserts are in rural counties.[97] The failure to obtain prenatal care thus often reflects barriers to access as opposed to a lack of interest in or desire for having a child.

Another key feature of pregnancy loss cases that depends on income is the ability to prove wrongful misconduct is to blame. Fetal autopsies to determine the cause of stillbirth are rare,[98] owing to their expense and low levels of insurance coverage.[99] Often, only plaintiffs with higher incomes can afford an autopsy out of pocket or specialized insurance plans that might cover it.[100] Lower income plaintiffs will have less money to pay for an autopsy and thus will not have one performed.[101] Consistently, a study of fetal autopsies performed from 2014 to

93. Nina Martin & Julia Belluz, *The Extraordinary Danger of Being Pregnant and Uninsured in Texas*, PROPUBLICA (Dec. 6, 2019, 5:00 AM), https://www.propublica.org/article/the-extraordinary-danger-of-being-pregnant-and-uninsured-in-texas [https://perma.cc/NB8Z-WWZM]. Inability to sign up for Medicaid until discovery of pregnancy (often not until the sixth week) precedes a long application form for which any glitch can delay approval. *Id*. If the delay is too long, a woman may be unable to find a doctor because some doctors will also refuse new patients as early as twenty weeks. *Id*. Plus, not all doctors are eager to treat Medicaid-insured pregnant women: "[P]roviders are paid only about half as much for Medicaid patients as for privately insured ones," so some "Texas OB-GYNs in private practice choose to avoid [the Medicaid system], capping the total of Medicaid patients they accept, limiting the number of high-risk women or opting out altogether." *Id*.

94. *See* Cook et al., *supra* note 87, at 130 (discussing insurance as just one among other factors affecting access to prenatal care); Katy B. Kozhimannil, Rachel R. Hardeman & Carrie Henning-Smith, *Maternity Care Access, Quality, and Outcomes: A Systems-Level Perspective on Research, Clinical, and Policy Needs*, 41 SEMINARS PERINATOLOGY 367, 368 (2017).

95. Comm. on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, *Health Disparities in Rural Women*, 123 OBSTETRICS & GYNECOLOGY 384, 285 (2014).

96. MARCH OF DIMES, NOWHERE TO GO: MATERNITY CARE DESERTS ACROSS THE U.S. 2022 REPORT 5–6 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf [https://perma.cc/U5BS-7HBB].

97. *Id*. at 5.

98. Jill Wieber Lens, *Counting Stillbirths*, 56 U.C. DAVIS L. REV. 525, 544 (2022).

99. *Id*. at 548–49.

100. *See id*.

101. *Id*. Concerns about causation and inevitability can make it difficult to prove liability in a pregnancy loss case. *See* Jill Wieber Lens, *Medical Paternalism, Stillbirth, & Blindsided Mothers*, 106 IOWA L. REV. 665, 709 (2021). The same concerns aren't present in embryo cases where it's clear that the failure of the cryopreserving freezer is what destroyed the embryos even if uncertainty remains about why or how the freezer malfunctioned.

2016 found that women with a doctorate degree had twice the fetal autopsy rate of women with an eighth-grade level of education.[102]

Wealth also affects how plaintiffs prepare for an expected child. These notions of parental preparation trade on classist ideas about deserving parents.[103] The thinking goes that poor parents shouldn't have children who they can't afford to raise the "right" way.[104] On this view, "good" parents prepare for the arrival of their baby by buying organic clothes, fancy strollers, and building extravagant nurseries.[105] Presumably, the "good" parents who spend extensively to prepare for their baby would likely receive higher damage awards. Similarly, would-be parents who can't afford such preparations are seen as "bad" and receive correspondingly less.[106]

Wealth can also impact a jury's judgment about the extent of anguish after reproductive loss. That a plaintiff went back to work shortly after pregnancy loss is often used as evidence of a lack of injury; the distress is inferred to be lesser if one is able to return to work.[107] But that ability to delay return to work depends on income and job status as much as relative suffering. Lower income victims of reproductive loss simply lack the wherewithal to miss work to grieve, process loss, or heal from trauma. Lower income workers are unlikely to have much if any paid time off from work. A federal law called the Family and Medical Leave Act (FMLA) guarantees unpaid time off of work after childbirth, but only live childbirth.[108] Receiving FMLA leave for after miscarriage or stillbirth requires showing a "serious health condition."[109] And even then, FMLA leave is unpaid, making it unhelpful for anyone who still needs an income.

B. WANTEDNESS

How can you tell whether someone *really* wanted the potential baby they claim to have wanted? Wantedness is a freighted concept, not least of all because

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102. Emily A. Oliver, Kara M. Rood, Marwan Ma'ayeh, Vincenzo Berghella & Robert R. Silver, *Stillbirth and Fetal Autopsy Rates in the United States: Analysis of Fetal Death Certificates*, 135 OBSTETRICS & GYNECOLOGY 166S, 166S (2020).

103. *See generally* Ulrika Widding, *Parenting Ideals and (Un-)Troubled Parent Positions*, 23 PEDAGOGY, CULTURE & SOC'Y 45 (2015) (describing views of "good parents" as tracking middle-class values and ideals of involvement and intensive motherhood).

104. *See id.* at 46.

105. *See* Janice D'Arcy, *Shopping for Baby: The Pressure to Buy Needless Stuff*, WASH. POST (Feb. 8, 2012), https://www.washingtonpost.com/blogs/on-parenting/post/shopping-for-baby-the-pressure-to-buy-needless-stuff/2012/02/01/gIQADyqAxQ_blog.html; Annie Midori Atherton, *Babies Don't Need Fancy Things*, ATLANTIC (Oct. 24, 2022), https://www.theatlantic.com/family/archive/2022/10/parents-buying-baby-products-anxiety/671815/.

106. *See* Karen Seccombe, Delores James & Kimberly Battle Walters, *"They Think You Ain't Much of Nothing": The Social Construction of the Welfare Mother*, 60 J. MARRIAGE & FAM. 849, 853–55 (1998).

107. *See, e.g.*, Carey v. Lovett, 622 A.2d 1279, 1290 (N.J. 1993).

108. Pub. L. No. 103–3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601–2654); *accord Family and Medical Leave Act*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fmla [https://perma.cc/Z25F-MF8S] (last visited Sept. 5, 2023).

109. Jessica Beckett-McWalter, Note, *The Definition of "Serious Health Condition" Under the Family Medical Leave Act*, 55 HASTINGS L.J. 451, 466 (2003).

reproduction is uncertain and the journey for some people can be marked by ambivalence before, during, and after pregnancy.[110] Wantedness has to mean something more than whether a pregnancy was intended or planned. Roughly half of pregnancies in the United States are unplanned,[111] but they might still be wanted. Is a pregnancy unwanted if someone ever had any doubts at all? What if those doubts faded after she felt the first kicks? Or after the first ultrasound? And what if doubts linger until childbirth? Or after? Does anything short of her unqualified embrace of a baby from before conception through labor and delivery mean that she didn't *really* want a child, or not in the right kind of way?

Dobbs complicates the notion of wantedness more still. Historian Lara Freidenfelds explains that before *Roe*, when abortion was criminalized in much of the country and therefore less available or common, more unwanted pregnancies ended in miscarriage.[112] After *Roe*, by contrast, many of those unwanted pregnancies ended instead in abortion.[113] In the decades that followed, continuing a pregnancy, at least in states that didn't unduly restrict abortion access, signaled an implicit investment in the pregnancy and affirmative desire to keep it. Declining abortion, given a meaningful right to it, implied a measure of wantedness. After *Roe*, pregnancy losses overwhelmingly occurred in wanted pregnancies.

Even during the half-century under *Roe*, when women theoretically could choose to end their pregnancies if unwanted, police and prosecutors deemed that some women who continued their pregnancies still did not want their pregnancies. More than 1,700 women have been arrested for conduct during pregnancy, usually drug use, between 1973 and 2020.[114] Babies were almost always born alive in these cases, but some involved pregnancy loss, with women arrested for causing their miscarriage or their child's stillbirth.[115] These are women who didn't have an abortion. And still, prosecutors charged them with murder and argued they took drugs purposefully to end their pregnancies or knew that taking drugs would have that effect.

Prosecutors overwhelmingly targeted marginalized women as "bad mothers."[116] First, Black women were singled out for cocaine use, then poor white

110. *See* FOX, *supra* note 53, at 17; *see also* Elizabeth Kukura, *Punishing Maternal Ambivalence*, 90 FORDHAM L. REV. 2909, 2909–10 (2022) (describing the stigma associated with maternal ambivalence in social relations and the law).

111. *Unintended Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/index.htm [https://perma.cc/6C5N-MXXG] (last visited Sept. 5, 2023).

112. LARA FREIDENFELDS, THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF MISCARRIAGE IN AMERICA 139–40 (2020).

113. *See id.* at 143–44.

114. *Arrests and Prosecutions of Pregnant Women, 1973–2020*, PREGNANCY JUST. (Sept. 18, 2021) [https://perma.cc/J8VA-5V6W]; *see* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 315 (2013).

115. *See* Paltrow & Flavin, *supra* note 114, at 300, 321.

116. *See, e.g.*, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 14 (2020).

women for opioids and meth.[117] Poor women and women of color are most frequently prosecuted for conduct during pregnancy.[118] No strong scientific evidence shows affirmatively that cocaine or other drugs used during pregnancy cause parents to lose those pregnancies or children to face long-term health consequences.[119] Yet prosecutors said these are "bad mothers" who did not want their babies, recklessly caused their miscarriage or stillbirth, and failed to grieve their loss properly.[120]

Post *Dobbs*, in states that have banned abortion,[121] not having an abortion is no longer evidence of wantedness.[122] Plus, as before *Roe*, a greater number of unwanted pregnancies will end in pregnancy loss. The future is more pregnancies and more unwanted pregnancies. Supposed "bad mothers" in antiabortion states will no longer be able to point to the lack of abortion as evidence of wantedness. Unwantedness will be assumed. "Bad mother" stereotypes are likely to influence juries. They could lead jurors to suspect that poor people of color didn't want the pregnancy and that they shouldn't be compensated for its loss regardless of the trauma. Or, these stereotypes could drive juries to ignore the trauma of reproductive loss even in an unwanted pregnancy.[123]

Bias can infect judgments about wantedness in other ways too. A jury would likely never doubt wantedness in a case involving destroyed embryos. Fertility patients can show the great lengths they go to secure a child: they exhaust savings and endure prying queries, onerous appointments, and risky medical procedures. All of these testify to how badly they wanted a baby.[124] But again, IVF costs so much in money, time, and more that the couples who have enough resources to access it are mostly white and wealthy. And only these predominantly white and wealthy couples who used IVF are likely to have an easy time demonstrating wantedness.

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117. *See* Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 481 nn.29–30, 487, 489–90 (2021).

118. *See id.* at 489–90; Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion: The Consequences of Overturning* Roe, 22 AM. J. BIOETHICS 3, 9 (2022).

119. *See* Boone & McMichael, *supra* note 117, at 487.

120. *See id.* at 477 n.7, 483.

121. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (June 16, 2023, 4:00 PM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

122. Not that abortion or adoption is any more reasonable for the law to expect as a condition of avoiding prosecution as it is a condition of entitlement to the damages a plaintiff is otherwise owed. As a Wisconsin court recognized, compelling parents to "choose between the child and the cause of action" forces a woman who's already been made unwillingly pregnant into a "choice" that's far from free, trapped between two options, one more emotionally freighted and socially pressurized than the next. Marciniak v. Lundborg, 450 N.W.2d 243, 247 (Wis. 1990). It's unreasonable to condition freedom or recovery on the expectation that a woman extinguish the fetus inside her or relinquish care of the child she gave birth to. For further discussion, see FOX, *supra* note 53, at 123–26.

123. *See* JOHN DEFRAIN, LEONA MARTENS, JAN STORK & WARREN STORK, STILLBORN: THE INVISIBLE DEATH 37 (1986) (describing a mother who blamed herself for her stillbirth because of a prior abortion); FREIDENFELDS, *supra* note 112, at 141 (discussing how women sought abortions in the event of mistimed, unwanted pregnancies in order to fulfill the ideals of motherhood for the middle-class lifestyle).

124. *See* FOX, *supra* note 53, at 102.

C. NEED

Many of the verdict summaries mention whether the plaintiff had other children, without explaining the relevance of that fact. Other cases have implied that the existence of other children, or the possibility of later born ones, mitigates the harm of being wrongfully denied a hoped-for child in the here and now. For example, the New Jersey Supreme Court made much of a mother's subsequent pregnancy in reducing the damages awarded for her newborn's wrongful death.[125] A doctor argued in a Virginia case that subsequently giving birth to twins diminished a mother's harm from her child's stillbirth.[126] The implicit idea is that having kids already, or being able to have them in the future, diminishes the present reproductive loss. This assumption goes beyond whether the plaintiffs wanted a(nother) child. It's that even if plaintiffs wanted the child, perhaps they didn't really *need* one, or didn't need one as much as if it was their only chance.

Race can loom large. A 2001 wrongful sterilization case is instructive. A Black mother, Glenda Ann Robinson, sued her doctor for tying her tubes without her knowledge during the cesarean delivery of her sixth child.[127] She discovered she had been sterilized when she and her husband were thereafter unable to get pregnant.[128] The court took a dim view of Robinson's claim that the misconduct had harmed her, explaining denial of the "ab[ility] to have a seventh child after previously giving birth to six children is hardly something which would offend her reasonable sense of personal dignity."[129] It mattered less to the court that "she and her husband were planning on having a seventh child" than that three of her children were "born out-of-wedlock."[130] In the judge's view, Robinson, a mother of six children already, did not need any more kids, and was not injured when deprived of her ability to have them.[131]

This view of reproductive need risks trading on pernicious stereotypes of Black women as hyperfertile "breeders" and "welfare queens" who have many children to take advantage of government assistance.[132] A doctor who sterilized Black women in California prisons between 1997 and 2003 called his work

125. *See* Carey v. Lovett, 622 A.2d 1279, 1290–91 (N.J. 1993).

126. *See* Modaber v. Kelley, 348 S.E.2d 233, 238 (Va. 1986).

127. Robinson v. Cutchin, 140 F. Supp. 2d 488, 490–91 (D. Md. 2001). *See generally* Yvonne Lindgren, *Commentary on* Robinson v. Cutchin, *in* FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS 121 (Martha Chamallas & Lucinda M. Finley eds., 2020).

128. *See Robinson*, 140 F. Supp. 2d at 491.

129. *Id*. at 493.

130. *Id*. at 491 & n.1.

131. *See* Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1062 (2021) (reviewing FOX, *supra* note 53).

132. *See* Lisa Rosenthal & Marci Lobel, *Stereotypes of Black American Women Related to Sexuality and Motherhood*, 40 PSYCH. WOMEN Q. 414, 417 (2016); *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1443 (1991) (discussing how sterilization abuse in Black women occurred because physicians viewed their family sizes as "excessive"). The breeder stereotype can be traced to slave owners' practice of raping Black women who were presumed to be especially fertile in order to produce more slaves. *See generally* GREGORY D. SMITHERS, SLAVE BREEDING: SEX, VIOLENCE, AND MEMORY IN AFRICAN AMERICAN HISTORY (2012).

"cheaper than welfare."[133] Similar biases apply to Latina and poor women, whose presumed fecundity devalues the struggles of getting pregnant and whatever children they do have: "The myth is that the less money a person has, the more babies a person has: that the poor are unstoppably fertile, popping out baby after baby that they cannot afford to clothe or educate or feed."[134] These tropes live on in child-exclusion family caps on public support that are designed, without evidence, to discourage people who receive benefits from getting pregnant and having children.[135] What these policies actually do is push poor people only further into poverty.[136]

As for the possibility of having future children, "[t]he replacement-child strategy of coping with grief is seen in stillbirth bereavement probably more frequently than in any other case."[137] Until the 1980s, standard medical practice around stillbirth involved taking the baby away as if nothing had happened and simply encouraging a woman to get pregnant again and have a "rainbow baby" born after the storm of a prior loss.[138] This assumption that a subsequent pregnancy will be experienced as a joyful new beginning underestimates how a prior loss can affect a later pregnancy, causing fear and anxiety of another loss.[139]

Marginalized people especially can feel the pressure for a "replacement child" to negate a reproductive loss. When Representative Cori Bush went into preterm labor at sixteen weeks, her doctor declined to intervene, insisting she should just go home and let her unborn child "abort" since she could "get pregnant again because that's what you people do."[140]

The prospect of having other children could help explain why the data show far lower damage awards the younger the plaintiff is. Damages for plaintiffs

133. Julia Naftulin, *Inside the Hidden Campaign to Forcibly Sterilize Thousands of Inmates in California Women's Prisons*, INSIDER (Nov. 24, 2020, 4:45 PM), https://www.insider.com/inside-forced-sterilizations-california-womens-prisons-documentary-2020-11 [https://perma.cc/RQU6-U45Q].

134. Liza Mundy, *A Special Kind of Poverty*, WASH. POST (Apr. 20, 2003), https://www.washingtonpost.com/archive/lifestyle/magazine/2003/04/20/a-special-kind-of-poverty/75d1ae95-72ab-49ba-951d-e4c25cbe07db/.

135. *See* Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 155 (2006); *see also* Ben Christopher, *State Stops Refusing Extra Welfare to Moms Who Have More Children*, CAL MATTERS (June 23, 2020), https://calmatters.org/economy/poverty/2017/01/about-face-state-stops-refusing-extra-aid-to-moms-on-welfare-who-have-more-children/ [https://perma.cc/CGJ2-PWAU] (discussing how welfare reform legislation was designed to discourage women facing poverty from having more children).

136. *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 189–90 (2017).

137. Elizabeth Kirkley-Best & Kenneth R. Kellner, *The Forgotten Grief: A Review of the Psychology of Stillbirth*, 52 AM. J. ORTHOPSYCHIATRY 420, 423 (1982).

138. Lens, *supra* note 40, at 994–95.

139. *See* Joann O'Leary, *The Trauma of Ultrasound During a Pregnancy Following Perinatal Loss*, 10 J. LOSS & TRAUMA 183, 185 (2005).

140. Michele Munz, *U.S. Rep. Cori Bush Reveals How She Nearly Lost Her Two Babies*, ST. LOUIS POSTDISPATCH (May 7, 2021), https://www.stltoday.com/lifestyles/health-med-fit/health/u-s-rep-cori-bush-reveals-how-she-nearly-lost-her-two-babies/article_2925e2b3-6720-595c-ad22-edfa2103e69c.html.

twenty-five and under averaged just under $700,000,[141] while those thirty-five and older received an average award of over $1,700,000,[142] more than two-and-a-half times the amount younger plaintiffs got. This disparity could also reflect other factors such as medical complications that tend to be greater when people get pregnant later in life. But juries may too be using age as a proxy for reproductive *need* under the assumption that younger plaintiffs could just have another kid, or that older ones have less chance for another.

Hewing compensation too closely to family size undervalues the loss of any would-be child beyond the first.[143] It also risks disadvantaging victims among

141. *See* Jury Verdict, Rios v. GHS-Parkview Hosp., No. 170 (Pa. Ct. Com. Pl. Phila. Cnty. Nov. 19, 2001), 2001 Jury Verdicts LEXIS 50065; Jury Verdict, Ferrara v. Bernstein, JVR No. 53081 (N.Y. Sup. Ct. N.Y. Cnty. 1989) (No. 14033 / 84), 1989 WL 394359; Jury Verdict, Estate of Lind v. Mem'l Hosp., JVR No. 65991 (Ill. Cir. Ct. 1989), 1989 WL 394883; Jury Verdict, Hill v. Meyer, JVR No. 65992 (Mich. Cir. Ct. Oakland Cnty. 1990) (No. 86-319391), 1990 WL 463505; Jury Verdict, Estate of Mapp v. Wright, JVR No. 141242 (Fl. Cir. Ct. Brevard Cnty. 1993) (No. 93-1785-CA-T), 1994 WL 751131; Jury Verdict, Doe v. Rosenwasser, No. 96-CV-367 (Ohio Ct. Com. Pl. Portage Cnty. Nov. 21, 1997), 1997 OH Trial Rptr. LEXIS 1116; Jury Verdict, Sutton v. Winter Haven Hosp., Inc., FJVR No. 98:7-94 (Fla. Polk Cnty. Ct. 1998) (No. GC-G-96-2256), 1998 FL Jury Verdicts Rptr. LEXIS 1675; Jury Verdict, Rodriguez v. Gynecological Surgical Servs., No. 023650 (N.Y. Sup. Ct. Bronx Cnty. Mar. 21, 2001), 2001 Jury Verdicts LEXIS 48372; Jury Verdict, O'Sullivan v. Hofrichter, No. 990591602S (Conn. Super. Ct. Hartford Cnty. Dec. 24, 2002), 2002 CT JAS Pub. LEXIS 244; Jury Verdict, Adkins v. U-Haul Co. of Cal., *supra* note 38; Jury Verdict, Nell v. Fruiterman, No. L203083 (Va. Cir. Ct. Fairfax Cnty. Apr. 5, 2003), 2003 VA Metro Verdicts Monthly LEXIS 156; Jury Verdict, Dorsey v. Detroit Cmty. Health Connection, No. 02-CV-73602 (D. Mich. Jan. 16, 2004), 2004 Jury Verdicts LEXIS 51516; Jury Verdict, McDougal v. Soleymani, No. 64D01-0503-CT-1792 (Ind. Super. Ct. Porter Cnty. Nov. 15, 2007), 2007 IN Jury Verdicts Rptr. LEXIS 890; Jury Verdict, McGee v. Advoc. Health & Hosps. Corp., JVR No. 498447 (Ill. Cir. Ct. Cook Cnty. 2007) (No. 02-L-5438), 2007 WL 6066112; Jury Verdict, Krenzer v. Duroseau, *supra* note 70; Jury Verdict, Sosa v. Chowdhury, No. 10A0-CC00356 (Mo. Cir. Ct. Jasper Cnty. Feb. 21, 2012), 2012 Jury Verdicts LEXIS 7303; Jury Verdict, Sanchez v. Garcia, No. 2011-007830-1 (Tx. Tarrant Cnty. Ct. Mar. 19, 2013), 2013 Jury Verdicts LEXIS 7753; Jury Verdict, Iniestra v. Silva, No. 09-L-015470 (Ill. Cir. Ct. Cook Cnty. Aug. 28, 2014), 2014 Jury Verdicts LEXIS 9532; Jury Verdict, Fregoso v. Parkview Cmty. Hosp. Med. Ctr., No. RIC1700645 (Cal. Super. Ct. Riverside Cnty. Oct. 23, 2018), 2018 Jury Verdicts LEXIS 34930.

142. *See* Jury Verdict, Kenney v. Bridges, No. 2017 CA 003143 M (D.C. Super. Ct. July 24, 2018), 2018 Jury Verdicts LEXIS 32438; Jury Verdict, Hughes v. Niedens, *supra* note 58; Jury Verdict, Flaa v. Wright, *supra* note 38; Jury Verdict, Holmes v. Robert Wood Johnson Univ. Hosp., No. UNN-L-3300-08 (N.J. Super. Ct. Union Cnty. May 2, 2012), 2012 Jury Verdicts LEXIS 16212; Jury Verdict, Beverly v. United States, *supra* note 29; Jury Verdict, Sicker v. Fish, No. cv-2002-042237 (Ohio Ct. Com. Pl. Summit Cnty. Nov. 14, 2003), 2003 Jury Verdicts LEXIS 51030; Jury Verdict, Cartegena v. Leber, No. L-6057-99 (N.J. Super. Ct. Feb. 2002), 2002 Jury Verdicts LEXIS 41650; Jury Verdict, Aranibar v. Doyle-Vallery, FJVR No. 02:6-39 (Fla. Manatee Cnty. Ct. 2001) (No. 2000-CA-5132), 2002 FL Jury Verdicts Rptr. LEXIS 1386; Jury Verdict, Estate of Schariro v. Nahabet, *supra* note 36; Jury Verdict, Fields v. Davis, No. L97380 (Va. Cir. Ct. Sept. 1991), 1991 VA Metro Verdicts Monthly LEXIS 347; Jury Verdict, Roland v. Piedmont Med. Ctr., JVR No. 209867 (S.C. Super. Ct. York Cnty. 1997), 1997 WL 801955; Jury Verdict, Stark v. Semeran, No. 3134/92 (N.Y. Sup. Ct. Onondaga Cnty. Mar. 1, 1996), 1996 Jury Verdicts LEXIS 63803; Jury Verdict, Reid v. Minkowitz, JVR No. 153977 (N.Y. Sup. Ct. Erie Cnty. 1992) (No. 1298-89), 1992 WL 715238; Jury Verdict, Ledford v. Martin, JVR No. 50157 (N.C. Super. Ct. Richmond Cnty. 1989) (No. 86 CVS 318), 1989 WL 391493.

143. *See* FOX, *supra* note 53, at 104.

Black and Latino families who are twice as likely as white or Asian families to have four or more children.[144]

Yet we found only one case that eschewed the relevance of other kids on jury awards for reproductive loss. A 1998 Louisiana judge explained that the court did "not feel that subsequent pregnancies and births should be considered as mitigating factors" in appraisals of a present loss because "it would be highly prejudicial and unfair . . . to focus the jury's attention on the subsequent pregnancies instead of on the loss at hand."[145]

D. GRIEF

Some verdict summaries mention *prior* pregnancy losses, again without explaining their putative bearing on damages.[146] Studies show women with prior losses can exhibit less grief in subsequent losses, whether because they put their guard up the next time or become less attached or bond less.[147]

If prior pregnancy losses imply less distress and lower awards, Black and poor women will be disproportionately disadvantaged because they are more likely to have experienced such past loss. Black women face double the risk of late miscarriage compared to white women, while both Black and poor women face double the risk of stillbirth compared to white women and higher income women.[148]

Cultural perceptions can also affect how juries measure grief.[149] Black women in particular "confront a multitude of invisible experiences that have historically influenced their daily lives and their management of life changes such as [involuntary pregnancy loss]," including "religious and cultural values and beliefs, racism, health status, and other issues related to morbidity and mortality," and the "[stereo]typical role of African American women within the family structure."[150]

This stereotype of the "strong Black woman" who is resilient and self-sacrificing can make it hard for Black female plaintiffs to prove their grief and the injury

144. *See Childlessness Falls, Family Size Grows Among Highly Educated Women*, PEW RSCH. CTR. (May 7, 2015), http://www.pewsocialtrends.org/2015/05/07/childlessness-falls-family-size-grows-among-highly-educated-women/st_2015-05-07_childlessness-12/ [https://perma.cc/QY7A-VHUC].

145. Landry v. Clement, 711 So. 2d 829, 836 (La. Ct. App. 1998).

146. *See, e.g.*, Jury Verdict, Lake v. Downing, *supra* note 23.

147. *See* Denise Côté-Arsenault & Mary-T. B. Dombeck, *Maternal Assignment of Fetal Personhood to a Previous Pregnancy Loss: Relationship to Anxiety in the Current Pregnancy*, 22 HEALTH CARE FOR WOMEN INT'L 649, 661 (2001). One study found that those who had experienced two losses were less likely to identify later pregnancies as involving a "baby" or "child," *id.* at 657, suggesting a "more cautious" shift in "perception or expectation" about any "emotional investment in subsequent pregnancies," *id.* at 661.

148. Reuters Health, *Stillbirth Risk Higher for Black Women*, REUTERS (Nov. 17, 2009, 12:51 PM), https://www.reuters.com/article/us-stillbirth-risk/stillbirth-risk-higher-for-black-women-idUSTRE5AG4B920091117 [https://perma.cc/Z3EB-4G7F]; Olof Stephansson, Paul W. Dickman, Anna LV Johansson & Sven Cnattingius, *The Influence of Socioeconomic Status on Stillbirth Risk in Sweden*, 30 INT'L J. EPIDEMIOLOGY 1296, 1299–1300 (2001) (discussing stillbirth risk disparities between poor and higher income women).

149. *See* Paulina Van & Afaf I. Meleis, *Coping with Grief After Involuntary Pregnancy Loss: Perspectives of African American Women*, 32 J. OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 28, 29 (2003).

150. *Id.*

it responds to.[151] Juries may invoke this stereotype to demand more intense expressions of suffering or reduce damages at any rate based on unreasonable expectations that Black women are harmed less than other victims of reproductive loss.

III. A MORE PRINCIPLED APPROACH TO DAMAGES

Wrongfully denying a person the chance to reproduce foists unwanted childlessness that erodes agency over a profound dimension of life.[152] Many people go to great lengths to try to conceive or carry a child. Americans rate their inability to have a child as no less devastating than divorce or diagnosis with a terminal illness.[153] Those who can get pregnant endure the physical and emotional experiences associated with gestation.[154] Reproductive loss is a real and serious injury.[155] And yet compensation for that loss is too often arbitrary at best. A sounder approach to determining damages would proceed in three steps.[156]

The first tasks the jury with assessing what losing a baby means to the plaintiff: what being denied that child would have been worth to them, that is, if live birth had been a sure thing. This inquiry turns on evidence about what having that child meant to these individuals and how that loss has affected them. We recommend specific measures to minimize the role of race and class bias on jury estimates at this stage.

The second step asks if not for the defendant's misconduct, how likely would the plaintiff have been to take home a baby? Borrowing from tort doctrine on loss of chance of recovery, this step reduces the total from step one in proportion to the plaintiff's preexisting chances of live childbirth. Here, too, we build in ways to avoid perpetuating obstetrical racism and classism in damage awards.

The third step invites juries to increase the amount from step two to reflect related but distinct traumas that go beyond the reproductive loss: for example, giving birth to a dead baby or being enlisted to cause prenatal death through bad advice about associated risks. The upshot is a principled approach, part subjective and part objective, that honors jury discretion yet reins in the risks of pernicious biases.

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151. *See id.* at 32.

152. *See* Dov Fox, *Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating*, 118 COLUM. L. REV. ONLINE 94, 109–10 (2018), https://columbialawreview.org/content/making-things-right-when-reproductive-medicine-goes-wrongreply-to-robert-rabin-carol-sanger-and-gregory-keating/ [https://perma.cc/9ES4-X3NQ].

153. *See* A. D. Domar, P. C. Zuttermeister & R. Friedman, *The Psychological Impact of Infertility: A Comparison with Patients with Other Medical Conditions*, 14 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 45, 46, 49 tbl.1 (1993).

154. *See* FOX, *supra* note 53, at 17.

155. *See* Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 419, 430 (2020).

156. Our framework assumes a plaintiff who was the birthing parent and intended to raise the child. Different circumstances exist, for example, in surrogacy. There, the intended parents would likely suffer emotional distress, the lost relationship, and possibly trauma regarding the last chance to have a baby. The surrogate could have damages related to emotional distress and trauma associated with birth.

A. AN INDIVIDUALIZED SUBJECTIVE INJURY

First, the jury should assess how much a live-born child would have been worth to the plaintiff. This step affirms the jury's role to value an individual plaintiff's reproductive loss. And it empowers the plaintiff to present testimony or other evidence about what her own loss means to her and the distinctive impact that it has had on her life.[157]

The magnitude of that harm could be illustrated by evidence about life activities such as lost jobs or broken marriages.[158] In our data, one plaintiff testified she held her stillborn son for three days—the nurses put the baby's body in a freezer to preserve him and then the mother would hold him until he thawed on repeat for three days.[159] Parents have told similar stories in wrongful death of (living) children cases. One wrongful death case relied on a mother's testimony that she slept in her young child's hospital room for days before he died.[160] Another leaned on the frequency of letter correspondence between a father and his teenage son.[161] One judge permitted testimony that a mother had trouble sleeping and would walk miles to her child's gravesite at night.[162] Others express their grief in ways that are less vivid or manifestly visible from the outside. One jury assessed damages for grief based in part on evidence of severe weight loss and insomnia.[163]

Courts welcome expert testimony or medical diagnoses.[164] Psychiatrist or psychologist testimony is often admitted to offer a more removed and experienced perspective than the plaintiff's own testimony.[165] Psychiatrists might testify to what the loss of a child means generally, to the grief that a family member has felt, to their prognosis going forward, to personality changes and medical diagnoses from introversion and anger to anxiety and depression.[166]

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157. This might also include the physical and other tolls that pregnancy and egg extraction can take on people who sustain miscarriage or embryo loss in fertility treatment. *See* FOX, *supra* note 53, at 17. Notably, we reject any "reasonableness" damage limitation in this first step, like courts have imposed in cases involving special property, such as destroyed animals or family heirlooms. *See generally* Campins v. Capels, 461 N.E.2d 712 (Ind. Ct. App. 1984) (affirming damages awarded based on reasonable sentimental value of property). Although some courts have treated especially destroyed frozen embryos as damaged special property, our approach does not. Frisina v. Women & Infants Hosp. of R.I., No. CIV. A. 95–4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002). Step two imposes the only reasonableness limitation based on the preexisting chances the plaintiff had of live childbirth.

158. *See, e.g.*, OKLA. STAT. ANN. tit. 12, §§ 1053, 1055 (allowing evidence of occupation and earning capacity, among other factors, for damages calculations); Currens v. Hampton, 939 P.2d 1138, 1142 (Okla. 1997) (allowing testimony of loss of companionship of deceased child); Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995) (allowing a surviving spouse to recover for loss of companionship).

159. Jury Verdict, Hughes v. Niedens, *supra* note 58.

160. *See In re* Med. Rev. Panel Bilello, 621 So.2d 6, 10 (La. Ct. App. 1993).

161. *See* Straub v. Schadeberg, 10 N.W.2d 146, 149 (Wis. 1943).

162. *See* J. Paul Smith Co. v. Tipton, 374 S.W.2d 176, 183 (Ark. 1964).

163. *See* Gulf States Utils. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App. 1983).

164. James L. Isham, Annotation, *Recovery of Damages for Grief or Mental Anguish Resulting from Death of Child—Modern Cases*, 45 A.L.R.4th 234 (1986).

165. *See, e.g.*, Angrand v. Key, 657 So. 2d 1146, 1149 (Fla. 1995); Gaither v. City of Tulsa, 664 P.2d 1026, 1031 (Okla. 1983); Wilson v. Lund, 491 P.2d 1287, 1291 (Wash. 1971) (en banc).

166. *See, e.g.*, Pawlak v. Brown, 430 So. 2d 1346, 1353 (La. Ct. App. 1983).

Whatever the form of the evidence, the important part of this first stage of the damage calculation is that it enables the plaintiffs to explain their loss. This first stage rejects antiquated limitations and assumptions about what reproductive loss is or should be like and frees plaintiffs to describe their reproductive loss as they experienced it and continue to. But again, this recognition must also be accompanied by safeguards to help guard against the influence of biases based on color or class.

1. The Changed Lived Experience of Reproductive Loss

Courts first developed the doctrine governing reproductive losses in the late 1800s.[167] Courts categorized pregnancy loss as an "emotional" harm, despite its manifest physical characteristics, to designate it as a lesser injury in a tort system that has always prioritized damages for physical harm and property damage.[168] Recovery for emotional injury was also restricted by conditions such as the impact rule—allowing compensation for emotional distress only if the incident involved a physical impact.[169] Some historical restrictions remain.[170] For example, Florida law no longer applies the impact rule to stillbirth cases,[171] but still applies it to miscarriages.[172] And even where the restrictions have since been lifted, the "emotional" injury categorization persists, devaluing the injury. Another historical limit distinguishes negligence claims from wrongful death.[173] Juries are instructed to award compensatory damages for emotional distress in negligence cases and for the lost relationship with the plaintiff's child in wrongful death cases.[174]

These damage restrictions and devaluations persist even though the lived experience of reproductive loss has changed dramatically—including expectations that pregnancy will end with loss, and understandings of what is growing in utero. When courts first classified them in the early 1900s, miscarriages were so common that they were expected.[175] With little control over fertility, many women even welcomed miscarriages as a way to space out pregnancies and preserve their health.[176] Stillbirths were much more common than today, too.[177] So were infant

167. *See* Lens, *supra* note 40, at 972.
168. *See id*. at 970–71.
169. *Id*. at 972–73.
170. *See id*. at 973.
171. *See* Tanner v. Hartog, 696 So. 2d 705, 708 (Fla. 1997).
172. *See* Thomas v. OB/GYN Specialists of Palm Beaches, Inc., 889 So. 2d 971, 972 (Fla. Dist. Ct. App. 2004).
173. *See* FOX, *supra* note 53, at 48.
174. *See* Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1686 (2022).
175. *See* Lens, *supra* note 40, at 972; SHANNON WITHYCOMBE, LOST: MISCARRIAGE IN NINETEENTH-CENTURY AMERICA 30, 67–68 (2019) (explaining that women expected their pregnancies to end in miscarriage).
176. WITHYCOMBE, *supra* note 175, at 30.
177. FREIDENFELDS, *supra* note 112, at 15.

deaths—parents could expect that at least one of their live-born children would die as babies.[178]

Today's miscarriage rate is still at least 25%.[179] Yet, in a study published in 2015, 55% of those surveyed were under the misimpression that miscarriage occurred in less than 5% of pregnancies.[180] Few realize that stillbirth happens to over 20,000 families each year in the United States.[181] This dramatic underestimation of pregnancy loss is owed in part to how the abortion debate has erased it by assuming every pregnancy ends in either abortion or live birth.[182] Pregnant people today grew up with this binary, what Freidenfelds called the abstract idea of pregnancy: "[A] model of perfect development [that] inexorably unfolds to healthy birth unless willfully disrupted."[183] Pregnancy loss is erased from the discussion, creating unrealistic expectations about pregnancy.[184]

Medical advances in the care of premature babies contribute to this underestimation of pregnancy loss. These advances helped to reduce the U.S. infant mortality rate by 60% from 1965 to 1983.[185] In the 1970s, preemies born before thirty weeks rarely survived; by 1992, more than 90% of such babies did.[186] As of the 1990s, babies born as early as twenty-three weeks routinely survived.[187] Those born that early today are even more likely to survive and less likely to have debilitating disabilities.[188]

Another factor that's fueled the misperception that medicine can fix all reproductive woes is the development of IVF.[189] A third of U.S. adults have either undergone fertility treatment or know someone who has.[190] In 2019, one in every fifty babies born in the United States was conceived with assisted reproductive

178. *See* Lens, *supra* note 75, at 452–55.

179. Carla Dugas & Valori H. Slane, *Miscarriage,* NAT'L LIBR. OF MED. (June 27, 2022), https://www.ncbi.nlm.nih.gov/books/NBK532992/ [https://perma.cc/XFM7-SQSS].

180. Jonah Bardos, Daniel Hercz, Jenna Friedenthal, Stacey A. Missmer & Zev Williams, *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313, 1313 (2015).

181. *See* Lens, *supra* note 98, at 544.

182. *See* Donley & Lens, *supra* note 174, at 1658.

183. FREIDENFELDS, *supra* note 112, at 146.

184. Lens, *supra* note 19, at 1059, 1081–82.

185. L. Joseph Butterfield, *Regionalization of Neonatal Intensive Care*, *in* NAT'L INSTS. OF HEALTH PUB. NO. 92-2786, NEONATAL INTENSIVE CARE: A HISTORY OF EXCELLENCE (1992).

186. *See* Philip Sunshine, *The Neonatal Intensive Care Unit Today*, *in* NEONATAL INTENSIVE CARE: A HISTORY OF EXCELLENCE, *supra* note 185.

187. Anne M. Jorgensen, *Born in the USA – The History of Neonatology in the United States: A Century of Caring*, NICU CURRENTS, June 2010, at 8, 11.

188. Nicola Davis, *Survival of Premature Babies More Likely Now than in Mid-1990s, Study Shows*, GUARDIAN (Aug. 16, 2017, 6:30 PM), https://www.theguardian.com/society/2017/aug/16/survival-of-premature-babies-more-likely-now-than-in-mid-1990s-study-shows [https://perma.cc/97JZ-LJVL].

189. *See* WITHYCOMBE, *supra* note 175, at 171.

190. Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ [https://perma.cc/4SCR-5CA9].

technology.[191] IVF embryos can also be screened for conditions such as Tay-Sachs and cystic fibrosis.[192]

These advances have generated unrealistic expectations about people's ability to get pregnant, remain pregnant, and have a child.[193] Newfound powers to mediate the processes of procreation have made unexpected outcomes only less tolerable. Historian Elaine Tyler May observes that "[t]he more options that appear possible and legitimate, . . . the less willing [Americans] are to accept a reality that differs from their desires."[194] But medicine can't fix all reproductive health problems. Medicalization has had little to no effect in reducing either miscarriages or stillbirths.[195] Plus, IVF isn't always successful.[196] When it does result in a pregnancy, IVF pregnancies face double or triple the risk of stillbirth.[197]

Another dramatic change in the experience of reproductive loss is the modern pressure on prenatal bonding. Not until the 1950s did the attachment theory of parenting insist children "needed to develop an intense and loving 'attachment' to a primary caretaker" (the mother) to succeed.[198] Bonding upon birth was introduced in the 1970s.[199] Researchers then posited that maybe bonding actually began before birth given that women grieved their stillborn babies "even if they were never given a chance to see the child."[200] In 1976, scholars argued "[b]y the end of the second trimester, the pregnant woman becomes so aware of the child within her and attaches so much value to him that she possesses something very dear, very important to her, something that gives her considerable pleasure and pride."[201] It wasn't long before that bond was taken to begin earlier still, as soon as the woman found out she was pregnant. In a popular parenting book in the early 1980s, pediatrician William Sears described prenatal care in terms of "parenting your unborn child."[202]

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191. *State-Specific Assisted Reproductive Technology Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION [https://perma.cc/CE2N-WM2Y] (last visited Sept. 6, 2022).

192. *See PGD, Preimplantation Genetic Diagnosis for Genetic Disorders*, ADVANCED FERTILITY CTR. OF CHI., https://advancedfertility.com/fertility-treatment/ivf/pgd/ [https://perma.cc/4V83-T4K6] (last visited Sept. 6, 2023).

193. *See* LINDA L. LAYNE, MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA 95 (2003) (explaining that the "overreporting of neonatology's 'miracle babies,' combined with the underreporting of pregnancy losses" drives reproductive expectations "higher than the level of medical competence").

194. ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 255 (1995).

195. LAYNE, *supra* note 193, at 95.

196. *See* FOX, *supra* note 53, at 107–08.

197. *See* B Bay, S Boie & US Kesmodel, *Risk of Stillbirth in Low-Risk Singleton Term Pregnancies Following Fertility Treatment: A National Cohort Study*, 126 BRIT. J. OBSTETRICS & GYNECOLOGY 253, 255–56, 258 (2018).

198. FREIDENFELDS, *supra* note 112, at 64.

199. *Id*. at 71–72.

200. *Id*. at 73.

201. Reva Rubin, *Maternal Tasks in Pregnancy*, 1 J. ADVANCED NURSING 367, 369 (1976).

202. WILLIAM SEARS, CREATIVE PARENTING: HOW TO USE THE NEW CONTINUUM CONCEPT TO RAISE CHILDREN SUCCESSFULLY FROM BIRTH TO ADOLESCENCE 41–46 (1982).

Ultrasounds at mid-pregnancy were standard by the 1990s, changing everything for prenatal bonding.[203] Carol Sanger explains ultrasounds were originally a diagnostic tool, but were quickly deployed to enhance "maternal-infant bonding" through "an emotional transformation" of "even early pregnancy into motherhood."[204] Ultrasound providers increase bonding more still by using terms such as "meeting the baby" and "assign[ing] personalities to fetuses during prenatal exams, in order to socialize the pregnant person with the fetus."[205] So "[w]omen who undergo ultrasound are more likely to call the fetus a baby and perceive their baby as being 'more vivacious, more familiar, stronger and more beautiful,' 'more real' and 'more there.'"[206] Ultrasounds also enabled discovery of the baby's sex, another measure of personification.[207] Now, a simple blood test can reveal sex as early as ten weeks. The purpose of the noninvasive prenatal testing is screening to uncover heightened risks of certain chromosomal disorders.[208] But they can urge parents to use he/she labels in the first trimester. This impacts another modern pregnancy ritual that's moved earlier in pregnancy: gender reveal parties.[209]

Antiabortion rhetoric too encourages prenatal personification through narratives that teach pregnant people to "invest deeply in pregnancy very early on"[210] and see a child at even the eight-week ultrasound.[211] *Dobbs* mentions this lesson that parents "have no doubt" that image "is their daughter or son."[212] So a miscarriage becomes less pregnancy loss and more the death of a baby. These narratives also "reinforce[] the idea that the only appropriate way to treat an early miscarriage is as the loss of a child."[213]

The internet has also hastened prenatal bonding. Freidenfelds shows how pregnancy websites extend "the emotional intensity of parenting earlier and earlier into pregnancy."[214] These websites advise daily rituals of talking and reading and

203. *See* Donley & Lens, *supra* note 174, at 1679; FREIDENFELDS, *supra* note 112, at 155.

204. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 113, 130 (2017). That's how it happened that, during the *Roe* era, antiabortion states mandated an ultrasound before an abortion could be legally performed (when it could). *Id.* at 118.

205. Andréa Becker & Lena R. Hann, *"It Makes It More Real": Examining Ambiguous Fetal Meanings in Abortion Care*, 272 SOC. SCI. & MED. 1, 3 (2021).

206. SANGER, *supra* note 204, at 116–17.

207. *See* Donley & Lens, *supra* note 174, at 1679.

208. Vardit Ravitsky, Marie-Christine Roy, Hazar Haidar, Lidewij Henneman, John Marshall, Ainsley J. Newson, Olivia M.Y. Ngan & Tamar Nov-Klaiman, *The Emergence and Global Spread of Noninvasive Prenatal Testing*, 22 ANN. REV. GENOMICS & HUM. GENETICS 309, 311 (2021).

209. *See* Prati A. Sharma, *To Reveal or Not Reveal: That Is the Question!*, CONCEPTION DIARIES (Jan. 15, 2017), https://www.theconceptiondiaries.com/to-reveal-not-reveal-that-is-question/ [https://perma.cc/2TSU-A6L5].

210. FREIDENFELDS, *supra* note 112, at 149.

211. *See id.* at 147–48 (discussing a pro-life group's 2006 campaign referring to a picture of a thirty-hour-old embryo as a person).

212. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022).

213. FREIDENFELDS, *supra* note 112, at 149.

214. *Id.* at 76.

writing letters to the baby, and taking pictures of the baby bump.[215] At least one pregnancy website sends emails to new "moms" when they are still only five weeks pregnant—that is, "[b]arely pregnant enough to trigger a positive home pregnancy test."[216]

IVF technology has pushed the felt attribution of parenthood earlier still—before a positive pregnancy test, even before implantation of the fertilized egg in the uterus.[217] Preparation for IVF includes ultrasounds: "Every day or two the would-be mother (and perhaps the would-be father, too) witnesses the gradual growth and development of her egg/s and anticipates the climax of ovulation when the mature egg will be 'expelled.'"[218] Linda Layne analogizes this process to pregnancy and birth: "Ripening follicles may be counted by would-be parents as the first stage of a pregnancy and sometimes attributed potential or quasi personhood."[219] Once an egg is fertilized, some clinics give couples a picture of their embryos, at which point some patients name them.[220] Some become attached to those embryos like they would a pregnancy and experience a failed IVF cycle as a miscarriage.[221] Studies confirm some couples see their frozen embryos as "independent potential children in their own right, . . . referring to them as siblings of their living children,"[222] or as genetic children "deliberately created to be part of their family."[223]

In short, reproductive loss today looks nothing like it did in the early 1900s, when white, male judges were determining how to treat pregnancy loss legally. So much has changed in even just the past fifty years. In 1977, the California Supreme Court wrote "[t]he parents of a stillborn fetus have never known more than a mysterious presence dimly sensed by random movements in the womb."[224]

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215. *Id.*

216. *See id.* at 115–17 (discussing how the author received an email from babycenter.com inviting her to "join the BabyCenter Moms panel" a week after registering with the website at four weeks pregnant).

217. *See* LAYNE, *supra* note 193, at 83.

218. *Id.* at 88.

219. *Id.* at 88–89.

220. *See id.* at 83, 89.

221. *See id.*

222. Robert D. Nachtigall, Gay Becker, Carrie Friese, Anneliese Butler & Kirstin MacDougall, *Parents' Conceptualization of Their Frozen Embryos Complicates the Disposition Decision*, 84 FERTILITY & STERILITY 431, 433 (2005).

223. Sonja Goedeke, Ken Daniels, Mark Thorpe & Elizabeth du Preez, *The Fate of Unused Embryos: Discourses, Action Possibilities, and Subject Positions*, 27 QUALITATIVE HEALTH RSCH. 1529, 1533 (2017).

224. Justus v. Atchison, 565 P.2d 122, 133 (Cal. 1977) (en banc). This description also reflects outdated medical treatment for stillbirth. Prior to the 1980s, it was exceedingly common for doctors to take the baby away after stillbirth—never allowing the parents to see the baby. *See* Lens, *supra* note 40, at 965. The idea was that the birthing parent should simply move on and get pregnant again. *See id.* at 964–65. But stillbirth researchers are unanimous that parents benefit from spending time with the baby. *See id.* at 966 & n.71. And the current medical standard of care is to encourage the parents to spend time with their baby. *Id.* Thus, parents very much have seen and touched their baby.

Parents today are urged to bond with the baby as soon as the positive shows up on a home pregnancy test (if not before in the case of IVF), see the baby on an ultrasound as early as six weeks of pregnancy (if not before in the case of IVF), and are bombarded with emails that the baby (at twenty weeks) is now the size of a sweet potato and learning to suck his or her thumb.[225] Pregnancy today is much more than a mysterious presence. Not much about pregnancy today would make any sense to anyone in the 1970s. And none of it would make any sense to someone in the early 1900s, yet the law from that era still governs recovery rules for reproductive loss today.

2. Freedom to Define the Loss

We propose freedom from antiquated labels that constrain recognition of a plaintiff's injury. Victims of reproductive loss should be entitled to explain their injury as they experience it. Commentators scoffed at the wrongful death claims brought for frozen embryos after a freezer malfunctioned at a Cleveland fertility clinic.[226] The threat that lawsuit posed to the abortion right under *Roe* took priority over the plaintiffs' sense that losing embryos they'd named felt like the loss of children.[227]

The wrongful death notion of losing a loved one fits some plaintiffs' reproductive losses, but not others. A plaintiff who considers her miscarriage to be a pregnancy loss should be able to categorize it as a pregnancy loss, not forced into the wrongful death loss of a person. A plaintiff who considers her stillborn baby to be her child should be able to define her loss accordingly as the death of her child. The state should not impose the definition of that loss on anyone, lest plaintiffs be deprived of agency over a loss only they experience, not the state.

The proper focus lies on the injury—the reproductive loss the plaintiff suffered at any point from pre-pregnancy to full-term stillbirth. Each person can experience these reproductive losses differently. Maybe one plaintiff had already named a frozen embryo, whereas another had not yet on the eve of her due date. Or, maybe a plaintiff considers her term stillborn son to be her son, and another plaintiff considers her early miscarriage to be the loss of a pregnancy at most. Plaintiffs should be allowed to convey their reproductive loss the way they experience it.

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225. *See* SANDRA MATTHEWS & LAURA WEXLER, PREGNANT PICTURES 12 (2000); Catherine Donaldson-Evans, *20 Weeks Pregnant*, WHAT TO EXPECT (Sept 30, 2022), https://www.whattoexpect.com/pregnancy/week-by-week/week-20.aspx [https://perma.cc/8MAJ-N294].

226. *See* Ariana Eunjung Cha, *These Would-Be Parents' Embryos Were Lost. Now They're Grieving—and Suing*, WASH. POST (Aug. 24, 2018, 7:39 PM), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving–and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4_story.html.

227. Julia Jacobo, *Couple Argues That Lost Frozen Embryo Was a Person, Lawsuit States*, ABC NEWS (Aug. 3, 2018, 3:15 AM), https://abcnews.go.com/US/couple-argues-lost-frozen-embryo-person-lawsuit-states/story?id=56994691 [https://perma.cc/4GC3-S55P].

3. The Risks of Arbitrariness and Unjust Bias

The intangible character of reproductive loss makes it hard to assess.[228] That indeterminacy also makes this an inviting place for implicit race- and class-based biases to go undetected. Marginalized people's interests in having a child matter just as much as wealthy white people's, as do the injuries they suffer when wrongfully deprived of that child. Consistent with reproductive justice principles,[229] these litigants must receive a fair trial uninfected by pernicious bias.

There are several ways for courts to promote this measure of fairness in reproductive loss cases. For one, judges might admonish jurors to set aside impermissible considerations that would exacerbate disparate damages for similarly injured parties.[230] So as not to put jurors on the defensive or provoke their resistance, judges should instruct about the kinds of biases that most people share, conscious and unconscious.[231]

Psychological evidence is mixed on whether this strategy is on its own effective—or even counterproductive. It's possible that calling out biases gives the false impression that biases are true or the calling out itself could threaten a juror's core belief or identity.[232] Judicial instructions should therefore affirm jurors' sense of self-worth in ways that buffer the psychic cost associated with keeping an open mind about threatening information.[233] Studies show these instructions can reduce biases jurors are made aware of for short periods of time.[234]

Instructions specific to reproductive loss should identify biases about women of color and/or poor women that may lead jurors to misbelieve that they didn't really want, need, or deserve a child.[235] Juries could also be advised about the lack of access to prenatal care, or that a quick return to work might simply

228. One California Supreme Court justice called stillbirth "a wholly intangible injury to plaintiffs for which any monetary recovery can provide no real compensation." *Justus*, 565 P.2d at 136 (Tobriner, J., concurring). Yet courts already determine suitable dollar awards for other intangible harms at stake in nuisance, trespass, privacy intrusion, fiduciary breach, or pain and suffering. *See* FOX, *supra* note 53, at 68–69.

229. *See, e.g.*, Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS, no. 2, 2010, at 42, 42 (discussing how women of color are seeking to broaden the scope of reproductive freedom to include social justice concerns beyond abortion rights).

230. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L & POL'Y REV. 149, 169 (2010).

231. *Cf.* Lee J. Curley, James Munro & Itiel E. Dror, *Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making*, 62 MED. SCI. & L. 206, 208–09, 212 (2022) (describing how witnesses' biases may affect their interpretations of evidence and suggesting that jurors should be informed of the effects of these biases on witnesses' objectivity).

232. *See* Bennett, *supra* note 230, at 169.

233. *See* Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1040–41 (2014).

234. Cardi et al., *supra* note 63, at 557.

235. *See supra* Sections II.B, II.C.

indicate an economic inability to delay a paycheck.[236] Jurors could also be told that the ability to pay for IVF or to undertake expensive preparations may reflect income levels more than the extent of desire for the child.[237]

Plaintiffs' attorneys must also be sensitive to and attempt to preempt potential biases. For example, if the parent did return to work shortly, the plaintiff's testimony must include an explanation that the return to work was economically necessary, not voluntary. If a stillbirth parent did not spend much time with her baby after his birth, did the medical staff encourage her to do so and address possible cultural reasons why a parent may have declined?[238] Did the parent have access to a CuddleCot that would cool the baby and prolong the amount of time the parent could have with the baby?[239] This could of course lead to some awkward questions on direct examination: "You already have five living children, why did you want another?" But it's better to tee up these issues instead of leaving the jury to default to stereotypes.

Dan Kahan and colleagues suggest that expressing moderation and equivocation within groups can make jurors more willing to entertain attitudes they come in skeptical about.[240] The psychological literature suggests a mechanism to stimulate such identity affirmation by instructing each juror "to speak in turn and to identify not only his or her own position but also the strongest counterargument to it" to disrupt divisive assumptions and make it easier to share ambivalence.[241]

Instructing jurors before they are seated to deliberate in this give-and-take way reduces reliance on automatic biases they may not endorse or hang onto upon reflection and improve the chances they will over the course of a trial "have given sympathetic attention to evidence contrary to their cultural predispositions."[242] Diversifying juries in reproductive loss cases can further reduce biases via "intergroup understanding."[243]

B. PROBABILISTIC RECOVERY

Plaintiffs' loss as they experience it may not reflect hard facts about the chances to procreate. Live childbirth is the expectation, but not necessarily the reality. Badly behaving specialists shouldn't be liable for disease, accidents, cancer treatment, prenatal history, and age. These factors leave at least one in eight American couples today unable to conceive or gestate on their own—apart from

236. *See supra* Section II.A.

237. *See supra* Section II.A.

238. *See* Lens, *supra* note 19, at 1097–98 (discussing the standard of care for stillbirth and complicating cultural stigmas).

239. *See* Jane E. Brody, *A Device That Gives Parents of Stillborn Babies Time to Say Goodbye*, N.Y. TIMES (Jan. 14, 2019), https://www.nytimes.com/2019/01/14/well/family/a-device-that-gives-parents-of-stillborn-babies-time-to-say-goodbye.html.

240. *See* Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffery J. Rachlinski, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 896–97 (2012).

241. *Id.* at 897.

242. *Id.*

243. Cardi et al., *supra* note 63, at 557.

any misconduct.[244] Stage two recognizes this reality and reduces damages consistent with that reality (with one exception to avoid perpetuating obstetrical racism and classism). This reduction in damages also has expressive value, hopefully helping to normalize reproductive loss.

1. Preexisting Reproductive Difficulties

Sometimes reproductive loss owes less to medical misconduct than age and medical problems. Zsa Zsa Dunjee was a thirty-six-year-old whose diabetes and infected fallopian tubes left fertility treatment futile.[245] A court found "no record facts to support the conjecture" Dunjee could have conceived, even if her doctor hadn't provided shoddy care.[246] Because she "had no real chance of becoming pregnant" anyway, the court declined to hold the negligent doctor liable for any contribution that his bad behavior made to that marginal and "speculative loss."[247]

Age and sex are the most salient factors affecting reproductive health. Women have a shorter biological clock.[248] "Their fixed number of eggs grow fragile over time, increasing the risk of miscarriages or genetic anomalies for women who hold off on procreation until they're older, whether to focus on career, find a partner, or any other number of reasons."[249] For the first time in 2016, women ages thirty to thirty-four gave birth at higher rates than women in their late twenties.[250] Around thirty-five, the chances of becoming pregnant decline sharply for many women as their eggs decrease in number and quality.[251] Women ages thirty-eight to forty have a 22% chance of getting pregnant.[252] The average forty-one-year-old woman's chances decline to 12.4%, while women ages forty-three to forty-

244. *See* DIV. OF REPROD. HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, 2012 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 3 (2014), https://stacks.cdc.gov/view/cdc/26477 [https://perma.cc/UH2T-253Z] (noting that 12% of women of childbearing age have sought treatment for infertility).

245. *See* Dunjee v. Weather, No. 93-2657 c/w 93-13094, slip op. at 6 (La. Civ. Dist. Ct. Sept. 3, 2009); *In re* Dunjee, 57 So.3d 541, 552 (La. Ct. App. 2011).

246. *In re Dunjee*, 57 So.3d at 552.

247. *Id*. at 551–52 (quoting *Dunjee*, slip op. at 10). For further discussion, see FOX, *supra* note 53, at 107.

248. "Male fertility doesn't decline as dramatically with age. Men replenish sperm throughout their lives, [making] biological offspring [possible] later. . . . That reproductive leeway won't make much difference to straight couples who are committed to conceiving with half of the genetic material from each partner." FOX, *supra* note 53, at 106. But a man's larger window might enable reproduction longer for people open to using donor eggs or a surrogate. *See id*.

249. *Id*. at 105.

250. *See* BRADY E. HAMILTON, JOYCE A. MARTIN, MICHELLE J.K. OSTERMAN, ANNE K. DRISCOLL & LAUREN M. ROSSEN, DIV. OF VITAL STAT., U.S. DEP'T HEALTH & HUM. SERVS., REPORT NO. 002, BIRTHS: PROVISIONAL DATA FOR 2016, at 3 (2017), https://www.cdc.gov/nchs/data/vsrr/report002.pdf [https://perma.cc/ZAS2-9LLQ].

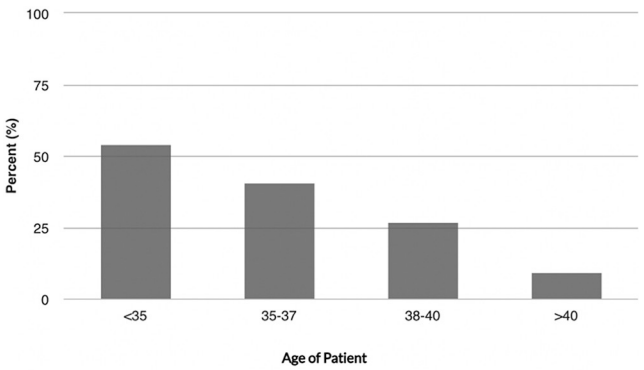
251. *See* Am. Coll. of Obstetricians & Gynecologists Comm. on Gynecologic Prac. & Prac. Comm. of the Am. Soc'y for Reprod. Med., *Female Age-Related Fertility Decline*, 123 OBSTETRICS & GYNECOLOGY 719, 719 (2014).

252. *Id*.

four have a 5% chance of getting pregnant.[253] By forty-five, their chances drop to 1%.[254]

And IVF (for those who can afford it) doesn't guarantee pregnancy. Again, age matters most.[255] For instance, Figure 1 reveals that female fertility patients under thirty-five take home a baby about 50%–60% of the time.[256] Rates are lower for older patients, higher for younger ones.

Figure 1. 2020 IVF Success Rates for Patients Using Their Own Eggs.



Getting pregnant does not guarantee live childbirth either. The chances of giving birth to a living child grow over the course of a pregnancy. Some estimate that the risk of miscarriage may be as high as 20% at five weeks pregnant but lessens dramatically to below 5% after twelve weeks.[257] But the risk of pregnancy loss doesn't disappear. After twenty weeks, the risk of stillbirth is 1 in 175, which still translates to more than 21,000 stillborn babies each year in the United States.[258] Circumstances that affect the risks include age, egg quality, and prior pregnancy losses.[259] Using IVF to get pregnant itself can

253. *Id.*

254. *Id.*

255. *See* Siladitya Bhattacharya, Abha Maheshwari & Jill Mollison, *Factors Associated with Failed Treatment: An Analysis of 121,744 Women Embarking on Their First IVF Cycles*, 8 PLOS ONE, no. 12, Dec. 2013, at 12.

256. *See Assisted Reproductive Technology (ART) Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&rdRequestForward=True&ClinicId=9999&ShowNational=1 [https://perma.cc/Y756-CHXX] (choose the tab "Success Rates: Patients Using Own Eggs"; then choose "What percentage of actual egg retrievals resulted in live-birth deliveries?" from dropdown) (last visited Sept. 6, 2023).

257. *See* Lyndsay Ammon Avalos, Claudia Galindo & De-Kun Li, *A Systematic Review to Calculate Background Miscarriage Rates Using Life Table Analysis*, 94 BIRTH DEFECTS RSCH. 417, 422 fig.3 (2012).

258. *What is Stillbirth?*, *supra* note 18.

259. Amy Kiefer, *Lies, Damned Lies, and Miscarriage Statistics*, EXPECTING SCI. (Aug. 26, 2015), https://expectingscience.com/2015/08/26/lies-damned-lies-and-miscarriage-statistics/ [https://perma.cc/6FCN-RLW7].

triple the risk of stillbirth.[260]

Step two reduces damages from step one by whatever lower chances the plaintiff had of live childbirth before the tortious conduct. Probabilistic recovery comes from the loss-of-chance rule in medical malpractice tort cases, wherein a doctor is liable for damages only based on how much the doctor lowers the plaintiff's chance of survival.[261] Thus, if the medical malpractice killed a plaintiff with only a 40% chance of survival, the doctor has to pay damages specific only to that lost 40% (calculated based on taking 40% of full damages for death). We propose much the same in step two in determining damage awards for reproductive loss.

Say a pregnant patient had a 99% probability of live birth if her doctor had performed the emergency cesarean section the standard of care dictates. That failure caused the baby's stillbirth. The likelihood the baby would have been born alive otherwise should entitle the plaintiff to damages close to those entitled had malpractice caused their baby's death shortly after live birth. By contrast, suppose a couple had a 30% chance of live birth if their fertility clinic hadn't dropped their tray of embryos. Those lower odds of pregnancy and parenthood, before the wrongful embryo loss, would discount their absolute loss by the three-in-ten chance that competent care would have given them to reproduce with their frozen embryos. The largest step-two reductions would take place in cases involving destroyed IVF embryos; the smallest will occur in term stillbirth cases.

One court held that a plaintiff should "not be entitled to recover" for reproductive loss if her pregnancy had "no chance of success" anyway but conditioned that denial on her "know[ing] and underst[anding]" these facts.[262] Medical professionals often fail to disclose the precarious nature of fertility treatment or pregnancy to people who want a child.[263] So, people are often unaware of just how common reproductive loss is. Still, damages should reflect the reality that many embryos don't become living babies. Calculating damages based on this reality could increase awareness and motivate disclosure to inform those who might experience loss.

2. Impermissible Factors

Probabilistic recovery is sensitive to the risks that plaintiffs brought to their reproductive care. But there are two such factors that shouldn't factor into this loss-of-chance calculus: race and class. For one, marginalized persons already face increased risk of pregnancy loss. A 2021 study found Black women 43%

260. ALESSANDRO GHIDINI, MANISHA GANDHI, JENNIFER MCCOY & JEFFERY A. KULLER, SOC'Y FOR MATERNAL-FETAL MED., SMFM CONSULT SERIES #60: MANAGEMENT OF PREGNANCIES RESULTING FROM IVF, at B8 (2022), https://www.smfm.org/publications/435-smfm-consult-series-60-management-of-pregnancies-resulting-from-in-vitro-fertilization [https://perma.cc/KPT9-4FHN].

261. *See, e.g.*, Matsuyama v. Birnbaum, 890 N.E.2d 819, 832–33 (Mass. 2008).

262. Witt v. Yale-New Haven Hosp., 977 A.2d 779, 787–88 (Conn. Super. Ct. 2008) (quoting Del Zio v. Presbyterian Hosp. in N.Y., No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450, at *14 (S.D.N.Y. Nov. 9, 1978)).

263. Lens, *supra* note 101, at 674.

more likely to miscarry than white women.[264] Black women also face double the risk of stillbirth.[265] A 2022 study from the United States identified the biggest cause of these "reproductive health disparities" as the "backdrop of racism" that they take place against.[266]

Studies also show that poor women face a heightened risk of miscarriage and double the risk of stillbirth compared to women with greater means. A 2001 study of pregnancies in Sweden found a more than double increase in preventable stillbirths for women with the lowest socioeconomic status compared with the highest.[267] Another study in England found a similar disparity in risk based on class.[268]

If the likelihood of miscarriage or stillbirth closely tracks race and class, and if these chances were baked into damage awards, then the awards would risk ratifying troubling disparities in obstetric care. The specific negligent providers being sued aren't to blame for those inequalities. But the legal system shouldn't reinforce them either. These considerations should, to the extent feasible, be excised from general considerations of age and health that inform that loss of chance.

Tort scholars long ago noticed this same problem in damages based on lost wages. Because of the speculative nature of determining future lost wages damages for young children,[269] litigators turned to government-created wage tables. These tables are based on race, ethnicity, and gender.[270] The original thought was

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264. Siobhan Quenby, Ioannis D Gallos, Rima K Dhillon-Smith, Marcelina Podesek, Mary D Stephenson, Joanne Fisher, Jan J Brosens, Jane Brewin, Rosanna Ramhorst, Emma S Lucas, Rajiv C McCoy, Robert Anderson, Shahd Daher, Lesley Regan, Maya Al-Memar, Tom Bourne, David A MacIntyre, Raj Rai, Ole B Christiansen, Mayumi Sugiura-Ogasawara, Joshua Odendaal, Adam J Devall, Phillip R Bennett, Stavros Petrou & Arri Coomarasamy, *Miscarriage Matters: The Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss*, 397 LANCET 1658 app. at 6 (2021). Earlier studies concluded that Black women face twice as great a risk of miscarriage at ten to twenty weeks. *See* Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz & Katherine E. Hartmann, *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1276 (2013).

265. Marian Willinger, Chia-Wen Ko & Uma M. Reddy, *Racial Disparities in Stillbirth Risk Across Gestation in the United States*, 201 AM. J. OBSTETRICS & GYNECOLOGY 469.e1, 469.e6 (2009). Stillbirth statistics consistently show more stillbirths for deliveries by people of color. Carol J. Rowland Hogue & Robert M. Silver, *Racial and Ethnic Disparities in United States: Stillbirth Rates: Trends, Risk Factors, and Research Needs*, 35 SEMINARS PERINATOLOGY 221, 221–22 (2011). One study attributed the widening gap to the disparate impact of COVID-19 and increased barriers to abortion. Latoya Hill, Samantha Artiga & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/ [https://perma.cc/S2DU-93VE].

266. Terri-ann Monique Thompson, Yves-Yvette Young, Tanya M. Bass, Stephanie Baker, Oriaku Njoku, Jessica Norwood & Monica Simpson, *Racism Runs Through It: Examining the Sexual and Reproductive Health Experience of Black Women in the South*, 41 HEALTH AFFS. 195, 195 (2022).

267. Stephansson et al., *supra* note 148, at 1299–1300.

268. Sarah E Seaton, David J Field, Elizabeth S Draper, Bradley N Manktelow, Gordon C S Smith, Anna Springett & Lucy K Smith, *Socioeconomic Inequalities in the Rate of Stillbirths by Cause: A Population-Based Study*, 2 BMJ OPEN, no. 2, 2012, at 1, 4.

269. *See* Leo M. O'Connor & Robert E. Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 NOTRE DAME L. REV. 354, 359 (1972).

270. *See* Yuracko & Avraham, *supra* note 63, at 331–32.

that using these more specific tables enabled more accurate estimates of damages.[271] But even a cursory review of the tables reveals that white people earn dramatically more than their Hispanic or Black counterparts.[272] The tables also reflect historical and longstanding pay gaps.[273] Relying on those tables perpetuates those gaps.[274] Scholars have argued that using these tables could encourage businesses to allocate risk toward minority communities,[275] distort actuarial science,[276] and discriminate based on gender, ethnicity, and race, violating the Fourteenth Amendment.[277]

Judge Weinstein agreed in the case of *G.M.M. v. Kimpson* and found the use of race- and ethnicity-based tables unconstitutional.[278] G.M.M. was a young Hispanic boy suffering from lead paint poisoning due to the landlord's failure to maintain a safe premises.[279] Marginalized children overwhelmingly make up the plaintiffs in lead paint cases.[280] Judge Weinstein held that the ethnicity of a child could not be "relied upon to find a reduced likelihood of his obtaining higher education, resulting in reduced damages in a tort case."[281] State legislatures have also taken notice of this problem. In 2019, California passed a law prohibiting the calculation of "damages for lost earnings or impaired earning capacity . . . [from being] reduced based on race, ethnicity, or gender."[282]

Race and class should likewise be precluded from consideration in step two of damage determinations for reproductive loss. Other factors such as age and sex may be considered when they bear on reproductive health. Jurors may also account for a plaintiff's preeclampsia or prior stillbirth, even if obstetrical racism and classism might have played a role. Reduction based on the decreased chance of live childbirth due to prior stillbirth is proper. But reduction based on the decreased chance of live childbirth simply due to race or class is ruled out by its invitation of economic and racial stereotypes and discrimination. Tort law should not go easier on defendants who harm marginalized children relative to those

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271. *Id.* at 362.

272. *Median Usual Weekly Earnings of Full-Time Wage and Salary Workers by Race and Hispanic or Latino Ethnicity*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/charts/usual-weekly-earnings/usual-weekly-earnings-over-time-by-race.htm [https://perma.cc/6V8Q-TUEW] (last visited Sept. 6, 2023).

273. *See* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1438–39 (2005); Chamallas, *supra* note 64, at 75; Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 311 (2004).

274. *See, e.g.*, Chamallas, *supra* note 273, at 1439.

275. *See* Avraham & Yuracko, *supra* note 64, at 664–67.

276. *Id.* at 679–80.

277. *See* Yuracko & Avraham, *supra* note 63, at 336–48.

278. 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015).

279. *Id.* at 131.

280. *See* Chamallas, *supra* note 273, at 1440.

281. *Kimpson*, 116 F. Supp. 3d at 128–29.

282. CAL. CIV. CODE § 3361; *see* Nora Freeman Engstrom & Robert L. Rabin, *Calif. Bars the Calculation of Tort Damages Based on Race, Gender and Ethnicity*, LAW.COM: THE RECORDER (Nov. 12, 2019, 4:40 PM), https://www.law.com/therecorder/2019/11/12/calif-bars-the-calculation-of-tort-damages-based-on-race-gender-and-ethnicity/ [https://perma.cc/9C2E-6H5E].

who harm white children. It should likewise reject a reproductive-care standard that reflects patients' color or class and has the effect of telling doctors or others to treat these pregnant people differently along those lines.

C. DISTINCTIVE TRAUMA

A final inquiry is required to determine damages for reproductive loss. In some cases, wrongdoing inflicts related traumas over and above the reproductive loss itself. In these cases, the jury should have discretion to increase awards in recognition of that distinct trauma.

1. Birthing Your Dead Child

One such example is if the birthing parent gives birth to a lifeless baby. Stillborn babies are *still born*: a birth that is "physiologically identical to that of a live born baby" yet "significantly more traumatic."[283] That the gestating parent still gives birth to a dead baby usually comes as a shock.[284] The same "complex, biological, hormonal, and physiological changes" occur as when the baby is alive, but "without the presence of a live baby to balance the trauma with joy, or fulfill the evolutionary yearning . . . to nurture the newborn."[285] Thus, "[g]iving birth to a stillborn baby involves physical, emotional, and cognitive trauma."[286]

That proximity to a child's death recalls the California Supreme Court's holding in the landmark torts case of *Dillon v. Legg*.[287] *Dillon* recognized the special emotional harm a parent can suffer by witnessing a child's death.[288] This harm is distinct from the general harm a parent can suffer when their child is killed tortiously; this is the harm of the distinctive psychological trauma that's associated with witnessing a child's severe injury or death with that parent's own eyes. "With stillbirth, the parent is not only at the scene of their child's death, the birthing parent's body *is* the scene of the death."[289] In these cases, tortious conduct killed the unborn child inside the plaintiff's body "[a]nd the birthing parent is then a literal 'human coffin' until they give birth to their child."[290]

Actually *seeing* death isn't possible in stillbirth. The California Supreme Court found visual observance important in denying a father's claim for his child's stillbirth due to medical malpractice.[291] But such a narrow interpretation misses the point of *Dillon*. When the New Jersey Supreme Court adopted the *Dillon* test, it

283. Joanne Cacciatore, *The Unique Experiences of Women and Their Families After the Death of a Baby*, 49 SOC. WORK HEALTH CARE 134, 135 (2010).

284. Lens, *supra* note 101, at 667.

285. Cacciatore, *supra* note 283, at 136.

286. *Id.*

287. 441 P.2d 912 (Cal. 1968) (en banc).

288. *See id.* at 925.

289. Jill Wieber Lens, *Informed Consent Law's Role in Stillbirth Prevention: Response to Meghan Boone, Brietta Clark, and Nadia Sawicki*, 107 IOWA L. REV. ONLINE 65, 81 (2022).

290. *Id.*

291. Justus v. Atchison, 565 P.2d 122, 135 (Cal. 1977) (en banc). The court insensitively said that the dad "had been admitted to the theater" (presumably of his child's death), "but the drama was being played on a different stage." *Id.*

emphasized the "profound and abiding sentiment of parental love" and explained that "no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure."[292] This same wrenching helplessness can exist with stillbirth—an inability to protect your baby in utero coupled with the need to still give birth.

2. Hurting the One You Want

The next category includes cases of misconduct that enlist a plaintiff's own hand in bringing about the unwanted reproductive loss, resulting in haunting emotions beyond losing the hoped-for baby. Pregnancy loss often brings self-blame,[293] blame by others,[294] guilt,[295] and shame.[296] These emotions are often amplified when misconduct gives plaintiffs the sense that they themselves contributed to a would-be child's death. One example is "wrongful abortion": when bad medical advice leads a woman to terminate a healthy pregnancy on the mistaken grounds that it would have been too dangerous for the mother or child.[297]

Cindy Baker was two months pregnant when an abnormal pap smear indicated perils of proceeding into the second trimester.[298] Her doctor ordered a biopsy to test for malignant cells in her cervix.[299] Baker testified that her doctors called her in to break the news when the test came back from the lab: "Your pap smear came back Stage III. It's on the verge of becoming invasive cancer."[300] He told her that the only way to treat it was to terminate the pregnancy "as quick as possible."[301] He made the appointment for her that week.[302] Only after having the abortion did Baker learn that she was healthy.[303] Her tests had never indicated a greater threat of cancer.[304]

In recommending an abortion, her doctor overstated the risks of keeping the pregnancy.[305] Baker could have kept her pregnancy and had the child that she and her husband so desperately wanted without any special risk to her own life or the baby's. She was haunted day and night with "panic attacks" and "feelings of

292. Portee v. Jaffee, 417 A.2d 521, 526 (N.J. 1980).

293. *See* Katherine J. Gold, Ananda Sen & Irving Leon, *Whose Fault Is It Anyway? Guilt, Blame, and Death Attribution by Mothers After Stillbirth or Infant Death*, 26 ILLNESS, CRISIS & LOSS 40, 41 (2018).

294. *See* Danielle Pollock, Elissa Pearson, Megan Cooper, Tahereh Ziaian, Claire Foord & Jane Warland, *Voices of the Unheard: A Qualitative Survey Exploring Bereaved Parents Experiences of Stillbirth Stigma*, 33 WOMEN & BIRTH 165, 166 (2020).

295. *See* Gold et al., *supra* note 293, at 42.

296. *Id.*

297. For further discussion, see FOX, *supra* note 53, at 99.

298. Baker v. Gordon, 759 S.W.2d 87, 88–89 (Mo. Ct. App. 1988).

299. *Id.* at 88.

300. *Id.* at 89.

301. *Id.*

302. *Id.* at 89–90.

303. *Id.* at 90.

304. *Id.*

305. *Id.* at 89–90.

suffocation" at the horror that she'd "had the abortion for no reason at all."[306] What Baker reasonably perceived as her own role in bringing about the resulting reproductive loss compounded the damage it did to her.

Wrongful abortion can involve another level of trauma, which explains why New York treated it differently than other cases involving pregnancy loss. Until recently, New York law conditioned recovery for pregnancy loss on a pregnant person suffering a separate physical injury independent of pregnancy loss, a requirement that severely limited qualifying tort claims.[307] But in 1987, a New York court allowed a couple to recover damages for emotional distress when a health care provider's malpractice in misdiagnosing a fetal abnormality induced an abortion that they opposed on moral and religious grounds.[308]

Wrongful abortion isn't the only context in which reproductive losses enlist victims into traumatic self-blame. Another example comes from the pandemic. Ginger Munro hadn't been vaccinated for COVID-19 when her daughter Elliotte was stillborn at twenty-seven weeks.[309] After Munro contracted the disease, her placenta separated from the uterine wall.[310] Munro's doctor failed to tell her that placental problems such as abruption are a common complication of unvaccinated COVID infection during pregnancy.[311] Now Munro wrestles with feelings of guilt surrounding her daughter's death.[312] The amplified self-blame connected to a specific action or inaction can be especially debilitating for those without access to mental health care.[313]

3. Last Chance to Reproduce

Another example is when the plaintiff's reproductive loss was also their last chance to have a child. A subsequent child does not erase a prior reproductive

306. *Id.* at 90. For discussion of similar cases, see Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 507, 508, 510–17 (2005) and Brandy Zadrozny, *Parents Sue Doctors over "Wrongful Abortion,"* DAILY BEAST (Apr. 14, 2017, 12:26 PM), http://www.thedailybeast.com/articles/2015/01/29/parents-sue-over-wrongful-abortion.html [http://perma.cc/JJR7-KZB8].

307. Tebbutt v. Virostek, 483 N.E.2d 1142, 1143 (N.Y. 1985), *abrogated by* Broadnax v. Gonzalez, 809 N.E.2d 645 (N.Y. 2004).

308. Martinez v. Long Island Jewish Hillside Med. Ctr., 512 N.E.2d 538, 538–39 (N.Y. 1987). The original jury verdict awarded Carmen Martinez $125,000 and Arthur Martinez $25,000. Martinez v. Long Island Jewish Hillside Med. Ctr., 504 N.Y.S.2d 693, 693 (App. Div. 1986). The intermediate appellate court reversed the decision, holding that "[n]o cause of action exists to recover solely upon a claim of emotional injuries suffered by a mother as the result of physical harm done to her child in utero." *Id.* The highest appellate court reversed and remanded due to the "unusual circumstances," allowing recovery for emotional harm because the doctor owed her a duty of care. *Martinez*, 512 N.E.2d at 539. On remand, the intermediate appellate court found the jury award excessive and declined to reinstate it. Martinez v. Long Island Jewish-Hillside Med. Ctr., 519 N.Y.S.2d 53, 53 (App. Div. 1987).

309. Duaa Eldeib, *"God, No, Not Another Case." COVID-Related Stillbirths Didn't Have to Happen*, PROPUBLICA (Aug. 4, 2022, 6:00 AM), https://www.propublica.org/article/covid-maternity-stillbirth-vaccines-pregnancy [https://perma.cc/V8RK-TZJV].

310. *Id.*

311. *Id.*

312. *Id.*

313. Lens, *supra* note 98, at 587–88.

loss, but the jury should still be able to consider the distinctive suffering that can accompany the wrongful denial of a plaintiff's final opportunity to conceive. Psychology studies on the impact of infertility suggest that the inability to have any child tends to cause greater heartache than missing out on an additional one.[314]

In disputes between former spouses about whether to use their frozen embryos, courts have also gauged the relative strength of reproductive interests on whether the parties already have offspring or might yet be able to. In a 2012 Pennsylvania case, a woman sought to implant their cryopreserved embryos over her ex-husband's objection.[315] The couple hadn't reached a prior agreement about what should happen to the embryos if they divorced.[316] So, the court balanced their reproductive interests, concluding that hers, in favor of procreation, were more compelling under the circumstances.[317] Not only was she childless, but her age (forty-four), health (cancer survivor), and marital status (single) meant that the embryos were "likely her only chance at genetic parenthood and her most reasonable chance for parenthood at all," given that adoption agencies prefer married couples.[318]

A similar idea applies to reproductive loss. While a possible later baby doesn't undo the pain of reproductive loss, losing your last chance to have a baby is nevertheless a trauma that juries should be allowed to consider in determining the amount of damage awards.

4. Somewhere Out There

A fourth kind of trauma happens in "switch" cases when one couple's embryo is misimplanted into another potentially unknown fertility patient, making it "possib[le] that the child that they wanted so desperately" could "be born to someone else and that they might never know his or her fate."[319] This isn't just "emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child."[320] Again, the trauma here stands for something more than the reproductive loss itself: namely, not knowing about a genetic child who might be elsewhere in the world.

These are the sort of additional traumas juries should be authorized to recognize with greater damage awards beyond what the first two stages would produce. To review, the initial, subjective inquiry asks juries to estimate the magnitude of loss for the live-born child that the particular plaintiffs had been hoping to have. Next, juries would reduce that total for a guaranteed baby by any actual lower

314. *See* Arthur L. Greil, Karina M. Shreffler, Lone Schmidt & Julia McQuillan, *Variation in Distress Among Women with Infertility: Evidence from a Population-Based Sample*, 26 HUM. REPROD. 2101, 2102 (2011).

315. Reber v. Reiss, 42 A.3d 1131, 1133 (Pa. Super. Ct. 2012).

316. *Id*. at 1136.

317. *Id*. at 1142.

318. *Id*. at 1133, 1139–40.

319. Perry-Rogers v. Obasaju, 723 N.Y.S.2d 28, 29–30 (App. Div. 2001).

320. *Id*. at 29.

chance the plaintiffs already had to have one, apart from the defendant's wrongdoing. At both steps, measures must be adopted to avoid relying on race or class biases.

IV. IMPLICATIONS FOR ABORTION LAW

For decades, the subject of reproductive loss has been treated as off-limits for advocates of abortion rights. It was thought impossible to recognize that reproductive loss involves a real and substantial *loss* without imperiling the right to abortion.[321] The fall of *Roe* can open space for honest discussion of reproductive loss: how (often) it happens, who faces a greater risk and why, what it means for people who suffer it, how race and class affect that experience, how we think and talk about that loss outside of the law, and what the legal system should do about it.

Dobbs demands new strategies. Antiabortion advocates have long deployed private law to shape public law by trying to define fetuses as persons under doctrines such as wrongful death, and then carry that legal status over from tort law to restrictions on abortion. Today, abortion rights advocates could similarly enlist the subjective character of reproductive loss—that honors a person's judgment about her loss—in a bid to restore and shore up entitlements to reproductive freedom. Reproductive loss is subjective, specific to each plaintiff. Recognizing the individualized nature of this loss fortifies the case for abortion rights—letting patients decide what an unwanted pregnancy means for them—and gives cause to resist antiabortion efforts to ascribe fetal personhood in an identical way for all citizens, including those who take a different view of their own pregnancies and losses.[322] This move also corrects the record that pregnancies don't always turn into living babies, normalizing both pregnancy loss and abortion.

A. UNBORN DOUBLE STANDARDS

Abortion opponents seek to save unborn life from abortion but lack similar resolve to avert embryo destruction or pregnancy loss, finding "widespread [miscarriage] to be surprising and perhaps regrettable, but certainly not a key moral issue of our time."[323] Indeed, "the death of an embryo is not the kind of loss that upsets [most of] us the way the loss of children and infants does, nor indeed even a cause of the sorrow we might feel when a late-term pregnancy is terminated in stillbirth."[324]

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321. Donley & Lens, *supra* note 174, at 1659–61.

322. *See* Patrick Lee, *The Next Step After* Dobbs*: Recognizing the Personhood of the Unborn*, NAT'L REV. (July 17, 2022, 6:30 AM), https://www.nationalreview.com/2022/07/the-next-step-after-dobbs-recognizing-the-personhood-of-the-unborn/.

323. Toby Ord, *The Scourge: Moral Implications of Natural Embryo Loss*, 8 AM. J. BIOETHICS 12, 18 (2008).

324. Daniel Wikler & Andrew Koppelman, *If an Embryo Is Now a Person, Mortality Rates Just Soared in Alabama*, WASH. POST (July 6, 2022, 5:56 PM), https://www.washingtonpost.com/outlook/2022/07/06/infant-mortality-self-abort-alabama/.

Despite intense media attention on freezer malfunctions at two fertility clinics in the summer of 2018, no antiabortion legislator has introduced legislation to regulate fertility clinics to make such failures less likely.[325] The only votes against a 2021 federal law to fund research to reduce stillbirth[326]—studies show that nearly a quarter of American stillbirths are potentially preventable and almost half of stillbirths at term are potentially preventable[327]—came from representatives opposed to abortion.[328] It is hard to explain opposition to abortion in terms of support for the same prenatal life that goes otherwise unprotected. This incongruence gives cause for deep skepticism of "states' claims that restrictions on abortion serve the state's interest in protecting potential life."[329]

One court has already recognized this inconsistency when it concluded that restrictions on abortion required changing the state's tort doctrine around reproductive losses. The preamble to a 1986 Missouri twenty-week abortion ban affirmed that "[t]he life of each human being begins at conception," that "[u]nborn children have protectable interests in life, health, and well-being," and that the "parents of unborn children have protectable interests in the[ir] life, health, and well-being."[330] In 1995, the Missouri Supreme Court determined that this preamble also meant that the word "person" in Missouri's wrongful death law must also include nonviable fetuses.[331] The preamble did not "expressly amend" the wrongful death law,[332] but it was a "relatively clear expression . . . that parents and children have legally protectable interests in the life of a child from conception onward."[333] If life "begins at conception" and parents and unborn children have rights from that moment within the abortion context, the same must be true in the wrongful death context.

Dobbs puts pressure on other states to confront similar inconsistencies that treat the unborn one way when it comes to restricting abortion and a vastly different way for purposes of redressing reproductive loss. Florida passed a ban on abortions after six weeks but treats all pregnancy loss in tort as merely an injury

325. *See* Cha, *supra* note 226.

326. SHINE for Autumn Act of 2021, H.R. 5487, 117th Cong. (2021).

327. Jessica M. Page, Vanessa Thorsten, Uma M. Reddy, Donald J. Dudley, Carol J. Rowland Hogue, George R. Saade, Halit Pinar, Corette B. Parker, Deborah Conway, Barbara J. Stoll, Donald Coustan, Radek Bukowski, Michael W. Varner, Robert L. Goldenberg, Karen Gibbins & Robert M. Silver, *Potentially Preventable Stillbirth in a Diverse U.S. Cohort*, 131 OBSTETRICS & GYNECOLOGY 336, 336, 338 (2018).

328. *See Roll Call 416, Bill Number: H.R. 5487*, U.S. HOUSE OF REPRESENTATIVES: OFF. OF THE CLERK, https://clerk.house.gov/Votes/2021416 [https://perma.cc/AK9K-T2X3] (last visited Sept. 6, 2023).

329. Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 232 (2018).

330. MO. REV. STAT. § 1.205.1(1)–(3) (1986).

331. *See* Connor v. Monkem Co., 898 S.W.2d 89, 92 (Mo. 1995) (en banc). The wrongful death law already applied to viable fetuses. *See id*. at 91.

332. *Id*. at 92.

333. *Id*. at 93.

to the woman's body.[334] Indiana,[335] Kentucky,[336] and Idaho[337] are among the states that criminalize abortion at conception, but reserve wrongful death suits for reproductive losses to viable stillbirths. Mississippi also bans abortion from the outset of pregnancy, while restricting wrongful death recovery of a fetus until the person carrying it is able to perceive movement—that is, at what's called "quickening," which can occur as early as sixteen weeks.[338] Ohio, too, writes this disconnect about prenatal life into its laws, banning abortion after six weeks, yet limiting recovery for wrongful death to viable fetuses.[339]

Texas's abortion law defines an unborn child at conception, a definition that seemingly also applies to embryos before implantation,[340] theoretically also applying to embryos created for IVF. Yet its wrongful death law defines an unborn child "at every stage of gestation" only.[341] Arkansas's abortion ban defines "unborn child" as "an individual organism of the species Homo sapiens from fertilization until live birth," and defines fertilization as "the fusion of a human spermatozoon with a human ovum."[342] Arkansas's wrongful death law similarly defines the unborn as a "child" from conception, yet also has an exception that the law does not apply "before transfer to the uterus of the woman of an

334. *See* FLA. STAT. § 390.0111 (making a six week ban's effectiveness contingent upon a Florida Supreme Court decision finding either that the state constitution does not protect the right to abortion or that a state law banning abortion after 15 weeks is constitutional); Tanner v. Hartog, 696 So. 2d 705, 708–09 (Fla. 1997) (explaining that damages for stillbirth are for "the death of a fetus," not "the death of a living person," and limited to the "mental pain and anguish and medical expenses incurred incident to the pregnancy").

335. *See* IND. CODE § 34-23-2-1 (defining the term "child" to include "a fetus that has attained viability" for the purposes of wrongful death recovery); *id.* § 16-34-2-1 (making abortion "in all instances . . . a criminal act," save for narrow exceptions including rape or incest (before ten weeks post-fertilization) or "serious health risk to the pregnant woman" (before twenty weeks post-fertilization)).

336. *See* KY. REV. STAT. ANN. § 311.772 (criminalizing abortion "from fertilization to full gestation and childbirth," save for substantial risk of death of or permanent injury to the pregnant woman); Miller v. Bunch, No. 2019-CA-1856-MR, 2021 WL 402552, at *3 (Ky. Ct. App. Feb. 5, 2021) (finding that cause of action could be maintained for a stillborn child's wrongful death because she was, at the time, "a viable fetus" and therefore "a legal person").

337. *See* Volk v. Baldazo, 651 P.2d 11, 15 (Idaho 1982) (holding that "a cause of action exists . . . for the wrongful death of a viable unborn fetus," but reaching no conclusion as to whether such action "can be predicated upon the injury and death of a non-viable fetus"); IDAHO CODE § 18-622 (criminalizing abortion with exceptions for those necessary to prevent the death of the pregnant woman or in cases of rape or incest).

338. *See* MISS. CODE. ANN. § 11-7-13 (specifying wrongful death recovery for "any person or . . . unborn quick child"); MISS. CODE ANN. § 41-41-45 (banning all abortions other than where "necessary for the preservation of the mother's life" or "where the pregnancy was caused by rape").

339. OHIO REV. CODE ANN. § 2919.195 (criminalizing any abortion "after the detection of a fetal heartbeat," other than to prevent death or permanent injury of the pregnant woman); Williams v. Marion Rapid Transit, 87 N.E.2d 334, 340 (Ohio 1949) (holding that plaintiff could recover in wrongful death and personal injury case because, while unborn at the time of injury, she had reached the point of viability).

340. TEX. HEALTH & SAFETY CODE ANN. § 170A.001 (defining "unborn child" "from fertilization until birth," explicitly "including the entire embryonic . . . stages of development"). By contrast, the wrongful death statute makes no such mention of embryos. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4).

341. CIV. PRAC. & REM. § 71.001(4).

342. ARK. CODE ANN. § 5-61-303.

embryo created through in vitro fertilization."[343] These contrasting policies raise a couple of puzzles. What could justify treating an embryo as tantamount to a person under public law yet closer to property under private law? Why treat new life differently—for the sake of that life alone, on its own terms—depending on location in a freezer or a uterus?[344] More broadly, how can the state's interest in preserving prenatal life start at conception or six weeks, but the would-be parents' interest doesn't start until viability?[345]

One answer might be that affording prenatal life a higher status in one legal context like abortion doesn't require affording them that higher status in another like tort relief. But treating embryos as persons under any one part of the law at least implies such personhood elsewhere, such that treating embryos as persons for the purpose of abortion law seems to suggest they might also be so for cases involving reproductive loss.

The peculiar history of wrongful death torts is instructive. Legislatures enacted wrongful death statutes to fill a gap in the early common law.[346] Negligence liability for bad injuries attached only if a plaintiff survived; if he died, the defendant went free. Wrongful death suits were designed to deter misconduct and compensate the victim's survivors. Originally, recovery was allowed only for economic losses such as funeral expenses and a loved one's lost wages. Now, most jurisdictions also let plaintiffs recover under wrongful death for nonpecuniary loss of relationships. This allows parents to recover for the wrongful death of relatives and other dependents whose death pains them in nonfinancial ways, including babies whose injuries had been inflicted before they were born.[347]

That expansion to infant deaths resulting from harms incurred during pregnancy invited yet another dilemma. Wrongful death now afforded relief to new parents whose fetuses survived until birth, but not those whose fetus was hurt so badly that it died before it was born. Remedies were lesser for a harm that was worse. To start addressing this paradox, most states expanded the action once more, this time to cover fetuses capable of surviving on their own. Because wrongful death statutes limit their application to the death of a "person," that move required defining fetuses as persons—just for the purpose of allowing would-have-been parents to recover for reproductive loss. Such personhood recognition was limited: it didn't entitle a fetus to any rights of its own, or to make

343. ARK. CODE ANN. § 16-62-102.

344. *See* Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 336 (2014); Dov Fox, *The State's Interest in Potential Life*, 43 J.L., MED. & ETHICS 345, 347–48 (2015).

345. States that ban abortion yet limit tort relief for reproductive losses might point to the difficulty of knowing or showing the cause of miscarriage. When it applied wrongful death law to pregnancy losses, the Rhode Island Supreme Court fretted it had "opened the door to highly speculative if not totally meritless claims for relief." Presley v. Newport Hosp., 365 A.2d 748, 754 (R.I. 1976). But the Court was assuaged that "the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it." *Id.* And in other reproductive loss cases, like those involving the destruction of frozen embryos, causation might be relatively easy to prove.

346. Lens, *supra* note 75, at 445–46.

347. *See* FOX, *supra* note 53, at 17.

claims on others, including on the pregnant person, even against her destruction of that fetus by exercising a right to abortion. So too might the "personhood" some states are now affirming in their abortion law mean something different than in the doctrine of reproductive loss.

This history explains how the law got to be this way. But it doesn't resolve an enduring puzzle after *Dobbs*: that is, how a state's interest in prenatal life could begin earlier and be stronger than that of parents.[348]

B. SUBJECTIVE FETAL PERSONHOOD

After *Dobbs*, abortion rights advocates have even more reason to take pregnancy loss seriously. The absence of constitutional abortion rights deflates the threat that "[t]he emotional power of parents pleading for legal recognition of their unborn children may sway societal views and incite political action" to ban abortion in ways that states already do.[349] It's true antiabortion advocates have deployed the grief of pregnancy loss before to lobby legislatures and argue in courts that fetuses lost to wrongful miscarriage or stillbirth should be treated like living children so that this characterization supports abortion restrictions.[350] Abortion rights advocates have often responded by steering clear of "reproductive loss talk" for fear that inflating the unborn's legal status in the private law context would end up limiting abortion rights under constitutional law.[351] Linda Layne observes abortion rights advocates in effect "surrendered the discourse of pregnancy loss" to antiabortion advocates.[352]

But minimizing reproductive loss won't protect abortion rights. And recognizing reproductive loss won't threaten abortion rights. As Greer Donley and Lens recently argued, there is no tension between abortion rights and recognizing the "loss" in reproductive loss for the simple reason that this loss is subjective.[353] A plaintiff might herself believe she lost a child, a baby, a pregnancy, or property.[354] That understanding depends on many factors including the length of the pregnancy, the incorporation of the pregnancy into social structures (aka "social birth"), the use of technology such as ultrasounds, and a pregnancy's wantedness.[355] All of these circumstances can affect what the pregnant person thinks of

348. *See* Dov Fox & Jill Wieber Lens, *Texas Says a Fetus Is a Child, Except when a Parent Sues a Negligent Doctor or State Official*, SLATE (Aug. 24, 2023), https://slate.com/news-and-politics/2023/08/texas-fetus-abortion-malpractice-ken-paxton.html [https://perma.cc/ZJS8-XG6K].

349. Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 978–79 (1995).

350. Donley & Lens, *supra* note 174, at 1659.

351. *See id.* at 1660. The reproductive justice movement has also shied away from reproductive loss, also likely due to fears about fetal personhood. Lens, *supra* note 98, at 539. This avoidance is not possible, however, given the reproductive right to have a child—a right that includes the right to *stay* pregnant. *See id.* at 540.

352. LAYNE, *supra* note 193, at 239.

353. *See* Donley & Lens, *supra* note 174, at 1694–95.

354. *See id.* at 1723.

355. *Id.* at 1677–82. Even wantedness can vary, especially in wanted pregnancies after pregnancy loss, when women feel less fetal attachment. *Id.* at 1682.

the embryo or fetus. The pregnant person may think of the fetus as a person, and another may easily think of the fetus as a fetus or of the fetus as a pregnancy.

This subjectivity is fundamentally irreconcilable with the antiabortion premise that legal personhood objectively begins at conception.[356] The antiabortion idea is that, as soon as the sperm and egg combine, there is a child, no different than a baby who has already been born alive. Emphasizing the subjective nature of reproductive loss in step one of our damages framework stands in stark contrast with this antiabortion orthodoxy by conditioning any characterization of the unborn on how the plaintiff experiences her reproductive loss.[357]

Tort law can help explain the subjectivity of harm in reproductive loss. When a plaintiff sues for wrongful miscarriage, or stillbirth or embryo destruction, no injury is automatically presumed.[358] The plaintiff must demonstrate her actual emotional distress or the lost parent–child relationship.[359] The jury then awards damages based on the plaintiff's evidence of actual injury. A parent shouldn't be forced to seek damages recovery for a "person" under wrongful death recovery if she believes she lost a "pregnancy," or be limited to arguing damage awards for an injured body part when she believes her child died.[360] This variability in step one of our valuation reinforces abortion rights by undermining the antiabortion uniform enforcement of legal personhood at conception. Rather than the state imposing identical terms for every reproductive loss, plaintiffs should be free to make sense of and define that loss for themselves.

Reproductive loss can be devastating. There's no virtue in shying away from that devastation in an unfounded hope that doing so might serve to preserve abortion rights. It won't. We also encourage states where abortion remains legal to reevaluate their approaches to tort recovery for reproductive loss. Some states do both already—abortion is legal in Illinois until viability, yet wrongful death recovery exists for all pregnancy losses.[361] Kansas makes abortion legal until twenty-two weeks and allows wrongful death recovery for all pregnancy losses.[362] We also encourage these states to allow more flexibility, empowering plaintiffs to define if they lost a pregnancy or their child. States can expand tort redress for reproductive loss even before implantation and let plaintiffs define their injury without threatening abortion rights.

356. *Id.* at 1694–95.

357. *Id.*

358. *Id.* at 1688–89.

359. *Id.*

360. *See* Leslie J. Reagan, *From Hazard to Blessing to Tragedy: Representations of Miscarriage in Twentieth-Century America*, 29 FEMINIST STUD. 356, 357–59, 363, 369–70 (2003) (discussing how individuals define their experience with miscarriage in varying ways and how others, including doctors and social movements, have attempted to define that loss for the individual instead).

361. 740 ILL. COMP. STAT. 180/2.2; 775 ILL. COMP STAT. ANN. 55/1-25.

362. KAN. STAT. ANN. §§ 60-1901, 65-6724.

C. NORMALIZING REPRODUCTIVE LOSS

Another advantage of recognizing both the frequency and subjective experience of reproductive loss is its power to help overcome "the myth of the perfect pregnancy."[363] Procreation is far from perfect for so many. Even when people are able to conceive and get pregnant, about half of implanted embryos are lost between fertilization and birth.[364] And if pregnancy starts at conception, then failed implantation—when a fertilized egg can't implant in the uterus—itself constitutes a pregnancy loss.

Other people who get pregnant still are unable to bring a baby home. Many of those pregnancies that do progress from embryo to fetus die before they can be born alive.[365] Contributing causes include biology, environment, socioeconomic status, state (in)action such as the refusal to expand Medicaid coverage for the prenatal care crucial to mitigating miscarriage and stillbirth risks, and the criminalization of prenatal drug use that operates as a deterrent to pregnancy patients seeking out such care.[366] Meanwhile, other reproductive losses result from misconduct by abusive partners or drunk drivers or careless doctors.[367]

Our original, three-part framework for appraising reproductive losses must be informed by these realities. The "perfect pregnancy" is false and pernicious. A Missouri court recognized the stigma associated with infertility in a 1990 case: a couple sued a fertility clinic after the clinic authorized a TV station to show the couple's unblurred faces in a story about the "medical miracle" of assisted reproduction.[368] The couple had only told the woman's mom that they'd used IVF to conceive their triplets;[369] they had twice declined interviews and refused to be filmed to shield their "procreative secrets" from public view.[370] The state appeals court allowed the couple's suit to proceed, explaining that the "physical problems which exist with the couple's reproductive systems" and their ability to "perform[] sexually[] are matters that could embarrass a reasonable person."[371]

Stigma shrouds pregnancy loss as well. Women who miscarried report feeling guilty, ashamed, and alienated, as if they did something wrong.[372] In studies after stillbirth, women similarly report feeling guilt, blame, and alienation.[373] Black women often report feeling additional stigma related to fears they could "quickly

363. *See* FREIDENFELDS, *supra* note 112, at 38–39.

364. *See* Gavin E. Jarvis, *Early Embryo Mortality in Natural Human Reproduction: What the Data Say*, F1000RESEARCH, June 7, 2017, at 1.

365. *See* LAYNE, *supra* note 193, at 70.

366. *See supra* Sections II.A, III.B.1; Boone & McMichael, *supra* note 117, at 481–84, 522.

367. *See, e.g.*, Jury Verdict, Fields v. Davis, *supra* note 142; Jury Verdict, Stark v. Semeran, *supra* note 142.

368. Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 491–93 (Mo. Ct. App. 1990).

369. *Id.* at 492.

370. *Id.* at 491–92.

371. *Id.* at 503.

372. Donley & Lens, *supra* note 174, at 1669–70.

373. *Id.* at 1670.

be subject to scrutiny."[374] Abortion is stigmatized too. Courts have long grappled with the privacy violation of "abortion outing."[375] The stigma in all these contexts finds roots in perceived failings of motherhood, either unchosen (infertility, embryo destruction, pregnancy loss) or voluntary (sterilization or abortion).[376]

Acknowledging these complications in the way that our reproductive loss framework does can help to normalize the sometimes-hard truths about pregnancy and reproductive life. Greater awareness of the reality that many pregnancies don't end with live childbirth might galvanize efforts to reduce avoidable miscarriages and stillbirths through increased funding and insurance coverage for prenatal care. It can also enhance familiarity and comfort with pregnancies ending in abortion.

CONCLUSION

I'll love you forever,
I'll like you for always,
As long as I'm living
my baby you'll be.[377]

The verse comes from an iconic children's book, *Love You Forever*, by Robert Munsch. The book is a "timeless classic, telling the story of an unbreakable bond between parent and child."[378] It was inspired by the author's two "dead babies,"[379] his stillborn children.[380]

This Article has argued that our legal system should take losses like theirs seriously, in contrast to the casual and even callous treatment they too often receive today when others' misconduct is to blame. We have sought to make three main contributions. First is to expose the role that racial and class biases play—biases about who *deserves* to be a parent, who really *wants* a child, and who *needs* one—in decisions about tort liability and damage awards in the context of reproductive loss.

Second, we introduced a principled method of determining remedies for reproductive loss. Our three-part framework would have juries appraise these losses according to (1) the subjective experience of losing a wanted baby; (2) the objective chance of having one if not for misconduct; and (3) accompanying traumas, such as birthing a dead baby.

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374. Aalap Bommaraju, Megan L. Kavanaugh, Melody Y. Hou & Danielle Bessett, *Situating Stigma in Stratified Reproduction: Abortion Stigma and Miscarriage Stigma as Barriers to Reproductive Healthcare*, 10 SEXUAL & REPROD. HEALTHCARE 62, 68 (2016).

375. *See* Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1545–47 (2003); *see also* SANGER, *supra* note 204, at 61–68 (discussing multiple cases in which evidence of a prior abortion was used against women as negative character evidence or revenge).

376. *See* Donley & Lens, *supra* note 174, at 1669.

377. ROBERT MUNSCH, LOVE YOU FOREVER (1986).

378. *Love You Forever*, BARNES & NOBLE, https://www.barnesandnoble.com/w/love-you-forever-robert-n-munsch/1002322471 [https://perma.cc/M72T-4CEG] (last visited Sept. 7, 2023).

379. *Love You Forever*, ROBERT MUNSCH, http://robertmunsch.com/book/love-you-forever [https://perma.cc/K9HP-6F5L] (last visited Sept. 7, 2023).

380. *Id.*

Finally, the Article spells out the public-law implications for abortion regulations after *Dobbs*. How can a state make it a crime to end an early pregnancy, yet hold out until viability to remedy the wrongful denial of a wanted child? Restoring moral coherence to reproductive loss both normalizes it and destigmatizes this sometimes-devastating experience. Emphasizing the deeply subjective dimension of that loss also breathes new life into the case to resurrect abortion rights after the fall of *Roe*.