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## "The Birth of Death": Stillborn Birth Certificates and the Problem for Law

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# “The Birth of Death”: Stillborn Birth Certificates and the Problem for Law

Carol Sanger\*

Queen Victoria [of Spain] was delivered of an infant Prince stillborn at 4 o'clock this morning. . . . The body will be buried without ceremony in the royal pantheon at the Escorial Monastery. When told of her loss, the mother wept . . . .

*Victoria's Son Stillborn*, New York Times, May 22, 1910

*Stillbirth is a confounding event, a reproductive moment that at once combines birth and death. This Essay discusses the complications of this simultaneity as a social experience and as a matter of law. While traditionally, stillbirth didn't count for much on either score, this is no longer the case. Familiarity with fetal life through obstetric ultrasound has transformed stillborn children into participating members of their families long before birth, and this in turn has led to a novel demand on law.*

*Dissatisfied with the issuance of a stillborn death certificate, bereaved parents of stillborn babies have successfully lobbied state legislatures nationwide to issue stillborn birth certificates under newly enacted “Missing Angel Acts.” These Acts raise a perplexing set of questions. While acknowledging the desire of grieving parents to have some form of recognition for their children, it is important to think carefully about just what is being certified in the name of the larger community. How has issuing birth certificates to babies who never lived come to seem a reasonable rather than an eccentric legislative gesture? And importantly, do stillborn birth certificates have implications for other areas of law involving prenatal death, particularly the regulation of abortion?*

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*This Essay discusses the history, meaning, and politics of stillborn birth certificates. Recognizing that Missing Angel Acts may seem a compassionate and seemingly harmless use of law, I want to consider a more complicated story. Law's relationship to mourning practices in the difficult circumstances of stillbirth raises important issues concerning the effective authority of law, the use of legal fictions in modern identity documentation, and the desirability of lines between private and public responses to death.*

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## INTRODUCTION

The delivery of a stillborn child is a confounding event. Stillbirth is a devastating obstetric outcome—a reproductive moment that at once combines birth and death. The term “stillborn” refers to a child who “issues forth” from its mother after twenty weeks of pregnancy, but who has already died in utero or during the birthing process.<sup>1</sup> In other languages this juxtaposition of life and

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1. Twenty weeks is the minimum gestational period for stillbirth as defined by the World Health Organization and in most of the United States. See Robert N. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, AM. J. OBSTETRICS & GYNECOLOGY 433, 433–44 (2007). Other jurisdictions, such as the United Kingdom, define stillbirth as fetal death at twenty-four weeks; still others use sixteen weeks. See Gordon Smith, *Stillbirth*, 370 LANCET 1715 (2007). Because gestational age is sometimes uncertain, other indicia of a developed pregnancy, such as fetal weight or length, are also used to approximate gestational age. See ROBERT WOODS, DEATH BEFORE BIRTH: FETAL HEALTH AND MORTALITY IN HISTORICAL PERSPECTIVE 18–22 (2009). While medical and legal definitions of stillbirth have varied over time and across jurisdictions, the distinguishing feature has been that this is a death late in pregnancy: “a viable fetus born dead.” *Id.* at 19 (“Birth required complete expulsion from the mother and death meant failure to display any vital signs, including

death is met head-on: the child is not stillborn but “born dead”: *nacido muerto*, *totgeboren*, or *mort-ne*. In English, the softer term is used. It suggests that the newborn may simply be still and that there is yet time to discern whether or not it is dead.

Of course, many women who deliver stillborn children today, at least under systems of advanced health care, know before labor begins that the baby is already dead and they deliver with this knowledge. In such cases, birth is a grim experience as the traditional expectations of a newborn’s cry are met instead with silence.<sup>2</sup> Stillbirth is, as poet Seamus Heaney has written, “[the] [b]irth of death.”<sup>3</sup>

This Essay discusses the complications of this simultaneity—the birth of death—as a social experience and as a matter of law. To be sure, for most of Western history, stillbirth has not counted for much on either score. The birth of a stillborn child was regarded as an event of little official moment and to which traditional mourning practices rarely attached. A baby was either born alive—and thereby a person for purposes of family lineage and descent—or it was not.<sup>4</sup> Over time, however, stillbirth has become a more noteworthy phenomenon, increasingly recognized as a fitting occasion for the public expression of grief and for the ceremonial solemnity that attends any other death.

Law’s relation to stillbirth has also changed over time. Early legal concerns were largely criminological: might an unmarried woman’s claim of stillbirth be masking an infanticide? In the late nineteenth century, demographic interests also emerged, as the state’s investment in the composition and well-being of its citizenry, particularly its children, took firmer hold. Public health concerns regarding infant mortality drew attention to stillbirth, which by the mid-twentieth century had been formally recognized as a discrete category of death, recorded among other vital statistics collected by the state.<sup>5</sup>

Such criminological, demographic, and public health interests in stillbirth continue. Stillbirth remains a common defense in modern infanticide prosecutions, and there are on-going efforts to improve stillbirth data collection, particularly in developing countries. But, in addition to these traditional concerns, in the last decade the law has also taken a novel and somewhat therapeutic turn.

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respiration.”). Embryonic or fetal death before the established period is classified as a miscarriage; death after a live birth is classified as neonatal or infant death. See Joy E. Lawn et al., *Stillbirths: Where? When? Why? How to Make the Data Count?*, 377 LANCET 1448, 1448 fig.1 (2011).

2. See, e.g., Otti Trulsson & Ingela Rådestad, *The Silent Child—Mothers’ Experiences Before, During, and After Stillbirth*, 31 BIRTH 189, 192 (2004).

3. Seamus Heaney, *Elegy for a Still-Born Child*, reprinted in ROBERT WOODS, CHILDREN REMEMBERED: RESPONSES TO UNTIMELY DEATH IN THE PAST 166 (2007).

4. Edward Higgs, *A Cuckoo in the Nest? The Origins of Civil Registration and State Medical Statistics in England and Wales*, 11 CONTINUITY & CHANGE 115, 115–34 (1996).

5. See *infra* Part II.

In response to lobbying efforts by bereaved parents dissatisfied with the issuance of a stillborn *death* certificate, well over half the states now issue stillborn *birth* certificates under newly enacted “Missing Angel Acts.” These are laws that authorize parents to request, and require the state to provide, a birth certificate for a stillborn child. The certificates do not replace but are issued in addition to fetal death certificates, which remain compulsory. Stillborn birth certificates are not issued automatically but only upon application by a parent. Arizona passed the first such statute in 2001 and thirty states have since followed suit.<sup>6</sup>

Missing Angel Acts raise a set of perplexing questions about the meaning and status of stillbirth as a social matter, as the subject of legal regulation, and about the interplay between the two categories. How is it that a child who has never taken a breath has come to be understood as a proper subject for a birth certificate in early twenty-first-century America? Why has the movement toward greater recognition of stillborns focused specially on the documentation of birth? And what is the relationship between private or familial responses to stillbirth and public or state responses? The two are surely related, for the transformation of stillborn infants into accepted subjects of private mourning has led to the demand that they also count in the official record—not merely for statistical purposes, but as beings worthy of individual recognition through that traditional marker of arrival, the birth certificate.

In this Essay, I uncover and parse some of the complexities in the relationship between private grief and public recognition in the case of stillbirth. To locate the subject generally within the structures of law and family, I begin in Part I with a brief history of the social and legal practices around stillbirth. I trace how over time stillbirth has become a category for both affective concern and public recognition. I then look at how Missing Angel Acts came into being: their background in public advocacy and how such legislation was developed, drafted, and advanced.

The widespread enactment of Missing Angel Acts also prompts a prior and more philosophical question. How is it that authorizing birth certificates for children who have never lived has come to seem a reasonable rather than an eccentric legislative gesture? Part of the answer is surely compassion toward grieving parents, a compassion that originates, at least in part, from shared understandings about the baby-like status of a stillborn infant. Part II explores the technological and social origins of these understandings, which derive from now familiar attitudes in the United States regarding the vitality and

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6. See *MISSing Angels Bill (MAB) Legislation—State Chart*, M.I.S.S. FOUNDATION (July 25, 2011), [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=76&Itemid=61](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&Itemid=61) (noting that as of July 7, 2011, thirty-one states have enacted Missing Angels Acts). Some of the states have also named the statutes for the particular stillborn baby whose parents lobbied for the legislation. See, e.g., *Katherine’s Law*, FLA. DEP’T OF HEALTH, [http://www.doh.state.fl.us/planning\\_eval/vital\\_statistics/Birth\\_Stillbirth.html](http://www.doh.state.fl.us/planning_eval/vital_statistics/Birth_Stillbirth.html) (last visited Oct. 30, 2011).

personability of the fetus. Many readers will be familiar with the idea that, in wanted pregnancies, social birth now frequently precedes biological birth.<sup>7</sup>

With this phenomenon in mind, how should we think about stillborn birth certificates? What does the certificate mean? Part III suggests several ways to think about this: the stillborn birth certificate as an artifact of mourning, as documentary proof of the baby's existence, or as an aspect of parental identity. Another possibility is that the certificate operates like a posthumous change in status, bracketing the question of whether one who has not lived can receive something posthumously. These characterizations attempt to clarify what parents seek from this form of documentation and the apparent ability of law to provide special consolation.

Yet accepting that Missing Angel Acts may provide meaning and solace for grieving parents may not tell us quite enough. For whatever the merits of the legislation, there is also something unsettling upon first hearing about birth certificates for stillborn children. The sympathetic response may simply be to acquiesce and accept Missing Angel Acts as somewhat peculiar, but at core essentially harmless and possibly beneficial. But before we do that, it is worth investigating the origins or causes of our instinctive uneasiness.

Doing so is not easy. Putting anything into the balance against the exigencies of parental grief may suggest a cold indifference to suffering. That is not the case here. I proceed in my analysis ever mindful of the utter calamity of stillbirth for the parents of a stillborn baby. It is, as novelist Elizabeth McCracken states in her generous memoir of stillbirth, "the worst thing in the world."<sup>8</sup> There is immediate recognition and sympathy for this shattering form of loss and for the desire of some grieving parents to have their baby's existence acknowledged through the mechanism of a birth certificate. At the same time, a birth certificate is an official document that carries the imprimatur of the state. It is therefore important to understand just what is being certified by the state in the name of the larger community when a stillborn birth certificate is issued, and what the implications of this empathic use of law may be.

Part IV addresses five specific concerns. The first considers the nature of a stillborn birth certificate. What exactly does it certify? To what extent might stillborn birth certificates be rightly regarded as a form of legal fiction? What function does the fiction serve, and why must it be legal? What is the special role of law in all this? To answer these questions, I turn to other instances where a person's status is adjusted after death and other cases where a birth certificate is used to capture social, rather than biological, reality.

The second concern regards the therapeutic use of law in the context of stillbirth. Should the law be used to make grieving citizens *feel* better or are

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7. See, e.g., Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 372 (2008).

8. ELIZABETH MCCrackEN, AN EXACT REPLICa OF A FIGMENT OF MY IMAGINATION 155 (2008).

such gestures toward law's affective potential a misstep? And if a misstep, what is the nature of the harm, in light of the declared benefit of the certificates? To think this through, I compare stillborn birth certificates with another legal intervention urged and defended as a mechanism for providing solace: victim impact statements offered up in capital trials by the families of murder victims.

The third concern is the matter of what I call "compulsory reproductive mourning." What are the prescriptive implications of stillborn certificates? By providing for their official issuance, is the state implicitly endorsing one, intensely personal response to this form of familial tragedy and discrediting others? Do stillborn birth certificates not only reflect but shape norms about what to feel and how to value certain lives and relationships?

Fourth, the certificates raise questions about demographic integrity. What are their implications for population figures, for mortality statistics, and for other key demographic indicia?

The fifth and final concern may already have occurred to readers. This is the connection between stillborn birth certificates and the regulation of abortion. To many, the two issues seem obviously and perhaps inevitably linked. Indeed, I am one of the many. In a culture where great effort has gone into securing attributes of personhood for fetuses, stillborn birth certificates may seem like the latest legislative innovation equating unborn life with born life as part of the ongoing political campaign against legal abortion. Despite the compelling appeals by parents, one cannot help but notice the implications of Missing Angel Acts for how we think about other forms of fetal death.

Yet concerns about abortion—whether ideological, political, or strategic—should not overwhelm an analysis of Missing Angels Acts. Stillborn birth certificates have much to say about the nature and purpose of modern identity documentation, about the affective authority of law, and about the relation between private and public responses to death. I want therefore to consider the significance of these matters in their own right, putting the matter of abortion to the side for the moment. Only in the Essay's final section will I return to the connections between stillborn birth certificates and the political culture that now surround abortion. There I pay particular attention to the work done by the rhetoric of birth. Investigating law's relationship to social practices in the difficult circumstances of stillbirth sheds some light on the use and meaning of the word "birth" in twenty-first-century America, and what the effects of this new category of recognition might be.

## I.

### STILLBORN MOURNING PRACTICES OVER TIME

Until the late nineteenth century, the natural death of infants and small children (and the death of their mothers in childbirth) was a regular feature of family life. "Nothing is more common with Infants . . . than to dye on the day

of their Nativity . . . and even to perish before their Nativity in the hidden World of the Womb.”<sup>9</sup> Acknowledging the long-standing debate in the history of childhood over whether in periods of high infant mortality parents grieved such deaths, the historical record seems clear that at least some parents did.<sup>10</sup> Beginning in the seventeenth century, dead and stillborn infants were memorialized in portraits and in poems,<sup>11</sup> and mourned in private letters and diaries.<sup>12</sup> Their effigies were found on tombs of women who died in childbirth, often represented as a swaddled baby in its mother’s arms.<sup>13</sup>

Of course, not all parents mourned, memorialized, or perhaps even missed their stillborn children, and, those who did, did not always do so in the same way. Depending on region, on religion, and on wealth, a hierarchy of rites and responses emerged. In pre-Reformation England and Ireland, for example, still-born children, because unbaptized, were denied burial in hallowed ground and were instead buried in special plots with other unbaptized, mostly illegitimate,

9. RAYMOND A. ANSELMANT, *THE REALMS OF APOLLO: LITERATURE AND HEALING IN SEVENTEENTH-CENTURY ENGLAND* 49 (1995) (quoting physician and treatise writer Thomas Browne).

10. The starting point is Philippe Aries’ “parental indifference theory.” PHILIPPE ARIES, *CENTURIES OF CHILDHOOD* 37 (1973) (“People could not allow themselves to become too attached to something that was regarded as a probable loss.”). See also LAWRENCE STONE, *THE FAMILY: SEX AND MARRIAGE IN ENGLAND, 1500–1800*, at 105–06 (1977) (“There is no evidence, for example, of the purchase of mourning—not even an armband—on the death of very small children in the sixteenth, seventeenth and early eighteenth centuries, nor of parental attendance at the funeral.”). Such claims have been much disputed. Drawing from the diaries of parents in England and America, historian Linda Pollack concludes that there is “no support at all for the argument that parents before the eighteenth century were indifferent to the death of their young offspring, whereas after the eighteenth century they grieved deeply.” LINDA POLLACK, *FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500–1900*, at 141–42 (1983).

11. On painting and photographs, see generally Rosemary Mander & Rosalind K. Marshall, *An Historical Analysis of the Role of Paintings and Photographs in Comforting Bereaved Parents*, 19 *MIDWIFERY* 230 (2003) (discussing seventeenth-century depictions of stillborn children in Holland); see also Sculpture: NICHOLAS STONE, *THE EFFIGY OF ELIZABETH COKE AND HER STILLBORN INFANT* (1634); Painting: JOHN SOUCH, *THE ASTON FAMILY* (1635). On poetry, see Thomas Philapott, *On a Gentlewoman Dying in Child-Bed of an Abortive Daughter*, reprinted in WOODS, *supra* note 3, at 141 (2006).

Here was a sad mysterie  
Work’d up it selfe, both Life and Death, we see,  
Were Inmates in one house, making the womb,  
At once become a Birthplace and a Tomb?

*Id.*

12. See ANSELMANT, *supra* note 9, at 59–61. Anselmant quotes Mrs. Ann Hulton on the death of a stillborn Daughter: “O! Adam, Adam! what hast thou done? My comforts are taken away before I had well received them: was it all lost labour? . . . I shall go to her, but she shall not return to me.” *Id.* at 60. For diarists’ comments on the deaths of children born alive, see POLLACK, *supra* note 10, at 140.

13. See Judith W. Hurtig, *Death in Childbirth: Seventeenth-Century English Tombs and Their Place in Contemporary Thought*, 64 *ART BULL.* 603, 603–15 (1983); see also Nicholas B. Penny, *English Church Monuments to Women Who Died in Childbed Between 1780 and 1835*, J. WARBURG & COURTAULD INSTS. 314, 314–15 (1975) (noting that in this period, dying in childbirth was “common enough to be a matter of universal anxiety and at the same time rare enough to be tragic”). See especially Penny’s depiction of the elaborate monuments to Princess Charlotte and her stillborn son. *Id.* at 326–30.



children.<sup>14</sup> Midwives often disposed of the bodies, “discretely, but without ceremony;” undertakers and even doctors later took on the task.<sup>15</sup> In the United States too, stillborn children seem to have been segregated in death: a 1907 Washington case refers to a special lot “used for the burial of stillborn infants.”<sup>16</sup>

By the early twentieth century, stillborn children in Ireland and England were sometimes buried in the family plot, but typically received no funeral.<sup>17</sup> An Irish mother recalled a stillbirth in the 1940s: “You never named it or nothing. The man that looked after the graves just came and took it and buried it and there was a wee plot in the graveyard.”<sup>18</sup> Loss was often measured in terms of life’s other vicissitudes. As another Irish woman explained, “[t]imes were hard then and you didn’t think so much about it.”<sup>19</sup> Yet there is also Queen Victoria of Spain, who, as other mothers surely did, “[w]ept [w]hen told of her loss.”<sup>20</sup>

As these examples suggest, stillborn children were sometimes the subject of intense, though mostly private, sorrow. Although maternal grief over a stillborn death occasionally made its way into the public arena—a story now and then in a woman’s magazine—the dominant attitude throughout most of the twentieth century was that stillbirth was an event that had best go unspoken.<sup>21</sup> There are several explanations for this. In the nineteenth century, death was a regular part of family life—people often died and were laid out at home. But as death itself became increasingly removed from family life—people now died in hospitals rather than at home—mourning, once “a normal part of the public life of most adults,” became more private, and death was no longer a topic of polite conversation.<sup>22</sup> There was also, in Philip Aries’s phrase, a cultural “interdict[ion] on death,” the moral duty of modern twentieth-century

14. Rosanne Cecil, *Memories of Pregnancy Loss: Recollections of Elderly Women in Northern Ireland*, in *THE ANTHROPOLOGY OF PREGNANCY LOSS: COMPARATIVE STUDIES IN MISCARRIAGE, STILLBIRTH AND NEONATAL DEATH* 179 (Rosanne Cecil ed., 1996). At earlier historical moments, depending on the rank of the infant and conceptions of the afterlife, stillborn infants were at times given full burial dignities. See, e.g., C.A. Hellier & R.C. Connolly, *A Re-assessment of the Larger Fetus Found in Tutankhamen’s Tomb*, 83 *ANTIQUITY* 165 (2009).

15. WOODS, *supra* note 3, at 59.

16. *Wright v. Beardsley*, 89 P. 172, 173 (Wash. 1907) (remanding as excessive the damages awarded to parents for improper burial of their child in a shallow grave in the stillborn lot). The Court noted that “the jury, for some reason—no doubt in part by the mother’s tears—were induced by passion or prejudice to render a verdict in the nature of punitive damages against the appellants.” *Id.* at 174.

17. WOODS, *supra* note 3, at 59; Cecil, *supra* note 14, at 182.

18. *Id.* at 186.

19. *Id.* at 190.

20. *Victoria’s Son Stillborn*, N.Y. TIMES, May 21, 1910, at C3.

21. See Wendy Simonds, *Confessions of Loss: Maternal Grief in True Story, 1920–1985*, in *MOTHERS AND MOTHERHOOD* 111 (Rima D. Apple & Janet Golden eds., 1997); see also WENDY SIMONDS & BARBARA KATZ ROTHMAN, *CENTURIES OF SOLACE: EXPRESSIONS OF MATERNAL GRIEF IN POPULAR LITERATURE* (1992).

22. JAY RUBY, *SECURE THE SHADOW: DEATH AND PHOTOGRAPHY IN AMERICA* 7 (1995) (noting that cemeteries were once popular places for public strolling).

people "to contribute to the collective happiness . . . by appearing to be always happy, even if in the depths of despair."<sup>23</sup>

In addition, over the course of the twentieth century, stillborn death came to represent a particular failure for women, and this too contributed to reticence to discuss or mark its occurrence. As anthropologist Linda Layne has explained, producing a baby distinctively signaled the successful transition to womanhood, at least for married women.<sup>24</sup> Stillbirth (and miscarriage or infertility) disrupted this "[n]arrative[] of [l]inear [p]rogress;"<sup>25</sup> it had become an embarrassment rather than a tragedy. Indeed, as medical obstetric care became increasingly sophisticated, there was even less excuse for reproductive failure, and a miasma of shame, isolation, and silence fell upon women who were not quite able to make it to motherhood.<sup>26</sup> The liminality of stillborn life and the question of just what, if anything, had been lost, further qualified grieving this particular loss.<sup>27</sup> All of this has contributed to what Layne identifies as "a deep-seated cultural taboo concerning pregnancy loss."<sup>28</sup> To the extent condolences are offered following a stillbirth, they have tended to downplay the significance of the death; women are to be cheered up by the reminder that all in all it was lucky they hadn't gotten to know the dead baby any better or their loss would have been much worse.

As we shall see in Part II, only in the mid-1980s did the silence and maternal solitude around stillbirth begin to crack, as familiarity with and affection for fetal life during pregnancy transformed practices and attitudes toward stillborn death. First, however, I want to complement stillbirth's social history with a review of its place in law.

#### *A. Stillbirth in Law*

The law's early concern with stillbirth had little to do with mourning but rather with the detection of crime. Had the infant in fact been born dead, as its unwed mother or her family insisted, or had it instead been killed after its birth in order to protect the woman's honor and livelihood?<sup>29</sup> In these cases, crude

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23. ARIES, *supra* note 10, at 93–94.

24. See LINDA LAYNE, MOTHERHOOD LOST 59 (2001).

25. *Id.*

26. *Id.* The pressure to produce a good baby now extends to the manner of its delivery as well: a vaginal birth with no drugs, or whatever else counts as success these days.

27. Rosanne Cecil, *Introduction: An Insignificant Event? Literary and Anthropological Perspectives on Pregnancy Loss*, in THE ANTHROPOLOGY OF PREGNANCY LOSS, *supra* note 14, at 1 (explaining that the social impact of pregnancy is so complicated because "[i]t does not result in the creation of a new person who is to be incorporated into society, neither is it the loss of one who has been a recognized part of the existing social order").

28. Linda Layne, *He Was a Real Baby with Baby Things*, 5 J. MATERIAL CULTURE 321, 322 (2000). I acknowledge the objection by stillbirth parents to include stillbirth within the term "pregnancy loss;" their argument is precisely that they lost a child, not a pregnancy.

29. DAVID L. RANSEL, MOTHERS OF MISERY: CHILD ABANDONMENT IN RUSSIA (1988) (discussing the history of infanticide after legitimacy became a matter of sin); see also PETER C.

tests such as floating a bit of the baby's lung in water were devised to assess whether the infant had ever drawn breath.<sup>30</sup> Of course, because unwed mothers often concealed their pregnancies and delivered alone and in secret, some illegitimate newborns may well have been born dead;<sup>31</sup> there is still a strong correlation between the incidence of stillbirth and unattended labor,<sup>32</sup> and medical testimony over whether or not a newborn was born alive remains crucial.<sup>33</sup>

A second legal concern was demographic in nature. As historians of vital statistics have explained, the state has many interests in knowing the size, sex, and location of its population. Planning for armies, constructing schools, and drawing boundaries for political representation all depend on reliable data about births and deaths.<sup>34</sup> In addition, public health concerns over infant birth and childhood mortality (including knowing which babies were born in order to vaccinate them) led in 1874 to the compulsory registration of all births and deaths in England and Wales.<sup>35</sup>

Yet stillbirths were excluded from these counts. Neither here nor there in terms of life and death, stillborn babies were not legal persons for purposes of recording lines of descent, and were therefore of little interest in the official record.<sup>36</sup> As stated by one opponent of stillbirth registration, "Why encumber either a birth register, a death register, or even a special register with useless detail?"<sup>37</sup>

There were also social considerations. Unlike burial for infants who died after their birth, medical certification of the cause of death was not required in cases of stillbirth.<sup>38</sup> This meant that stillborn infants could be disposed of

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HOFFER & N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND: 1558-1803* (1981); JOSEPHINE McDONAGH, *CHILD MURDER AND BRITISH CULTURE, 1720-1900* (2003).

30. Elna C. Green, *Infanticide and Infant Abandonment in the New South: Richmond, Virginia, 1865-1915*, 24 J. FAM. HIST. 187, 201 (1999).

31. For example, at least 15 percent of the dead infants autopsied in postbellum Richmond, Virginia were found to have been stillbirths. *Id.*

32. E.M. McClure et al., *Maternal Mortality, Stillbirth and Measures of Obstetric Care in Developing and Developed Countries*, 96 INT'L J. GYNECOLOGY & OBSTETRICS 139 (2007).

33. See *People v. Ehlert*, 811 N.E.2d 620 (Ill. 2004) (reversing mother's conviction because state had not proven unequivocally newborn born alive).

34. See generally EDWARD HIGGS, *THE INFORMATION STATE IN ENGLAND: THE CENTRAL COLLECTION OF INFORMATION ON CITIZENS SINCE 1500* (2004).

35. Gayle Davis, *Stillbirth Registration and Perceptions of Infant Death, 1900-1960: The Scottish Case in National Context*, 62 ECON. HIST. REV. 629, 633 n.31 (2009). In the United States, the impetus for birth registration was similarly driven by Progressive Era reformists concerned about children's well-being. S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 POPULATION STUD. 86, 86 (1950).

36. Higgs, *supra* note 4, at 115-34.

37. Davis, *supra* note 35, at 638.

38. Even when stillbirth registration was required, concerns over the resulting burial costs meant that poorer parents often did not register the stillbirth. Lee W. Thomas, *A Model Reporting Law for Reporting Stillbirth*, 7 AM. J. PUB. HEALTH 46, 52 (1917) ("The expense of proper disposal of the remains of stillbirths is a hardship which comes at a time when the family purse has already been greatly taxed, and this may also be partly responsible for the neglect of parents and doctor to register

cheaply, without fuss, and in secret. This more casual arrangement was thought to protect poor or unwed mothers from unnecessary shame and from accusations of criminality. Indeed, in 1866, the Registrar General in England opposed the compulsory inclusion of stillbirths on the grounds that “to ‘investigate every miscarriage and every abortion and the exact time of conception and the precise period of gestation appears to me an indelicate, indecent, nasty inquiry.’”<sup>39</sup>

Nonetheless, physicians and public health officials in Britain and in the United States continued to insist that the invisibility of stillbirths in the public record compromised the data necessary to understand and to prevent maternal and infant mortality. As one physician argued in the *American Journal of Public Health* in 1915, “[t]he greatest public good derived from the registration of [stillborn] deaths is the accumulation of data.”<sup>40</sup> In 1926, after decades of dispute, stillbirth registration became compulsory in England and Wales, Scotland followed in 1938,<sup>41</sup> and by the mid-twentieth century stillbirths were included among the other vital statistics recorded in the United States.<sup>42</sup> As historian Gayle Davis stated, at long last stillbirth registration “created social, statistical, and medical recognition of the [stillborn] infant as a separate and important entity.”<sup>43</sup> The collection of detailed data on stillbirths remains an important public health goal, both in developing nations where record keeping is often scant, and in developed states where there is concern over correlations between stillbirth and maternal obesity (with its connection to poverty) and over on-going disparities in the incidence of stillbirth and maternal race.<sup>44</sup>

### B. Missing Angel Acts

Recently, a new demand has been made on law’s authority. The parents of stillborn babies in the United States have argued that a fetal death certificate—the only form of documentation that has traditionally accompanied stillbirth—fails to capture the nature of their experience and is an inaccurate, indeed an offensive, bureaucratic response to their circumstances and suffering. The movement developed under the leadership of Joanne Cacciatore, an Arizona mother who started a local support group, Mothers in Sympathy and Support

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the stillbirth.”).

39. Edward Higgs, *The Linguistic Construction of Social and Medical Categories in the Work of the English General Register Office, 1837–1950*, in CATEGORIES AND CONTEXTS: ANTHROPOLOGICAL AND HISTORICAL STUDIES IN CRITICAL DEMOGRAPHY 86, 92 (S. Szreter et al. eds., 2004).

40. Thomas, *supra* note 38, at 46.

41. Davis, *supra* note 35, at 629.

42. WOODS, *supra* note 1, at 74–76; Shapiro, *supra* note 35, at 86.

43. Davis, *supra* note 35, at 630.

44. See generally Marian Willinger et al., *Racial Disparities in Stillbirth Risk Across Gestation in the United States*, 201 AM. J. OBSTETRICS & GYNECOLOGY 469 (2009) (discussing variations in the risk of still-births across races).

("MISS"), following the devastating stillbirth of her daughter in 1993.<sup>45</sup> Cacciatore's personal grief was compounded by Arizona's dispiriting bureaucratic response. After receiving a fetal death certificate in the mail, Cacciatore called the official registry to request her daughter's birth certificate, only to be told that she "didn't have a baby, [she] had a fetus" and could not get a birth certificate.<sup>46</sup> "[C]hannel[ing] her grief and fury into action," Cacciatore set out to change Arizona's law regarding stillbirth documentation.<sup>47</sup>

While MISS continues to provide a network of emotional support for bereaved parents, following Cacciatore's success in Arizona, it has also developed a sophisticated legislative branch, the MISS Foundation, to assist parents in other states to lobby state governments for Missing Angel Acts.<sup>48</sup> To this end, the MISS Foundation offers parents media packs, suggestions for "Meeting with your Legislators," sample letters and testimony, talking points on how to frame the issue with local legislators, and tips on how to move a bill through to passage.<sup>49</sup> Across the country, newspaper headlines have captured the campaign's efforts and its successes: "Out of Grief Grows Desire for Birth Certificates for Stillborn Babies"; "Acknowledging Angels: Fight for Stillbirth Certificates"; "Parents of Stillborn Babies Push For Recognition."<sup>50</sup>

Missing Angel advocacy powerfully locates the authority of parental pain—"I [just] want to acknowledge that Emma [or Cheyenne or Alyssa or Hunter or Brady] existed"<sup>51</sup>—within noble appeals to law—"We are the voices of the children who cannot speak for themselves. We do it for them, in their honor and on their behalf. We will not stop until justice has been done."<sup>52</sup> The response by legislators is not surprising. As former California Senator Abel Maldonado, a bill sponsor, explained in an interview, "I wish you could've sat in on some of the meetings we had with these women . . . [w]hen they bring out

45. M.I.S.S. FOUNDATION, <http://www.missingangelsbill.org> (last visited Oct. 30, 2011).

46. Tamar Lewin, *Out of Grief Grows Desire for Birth Certificates for Stillborn Babies*, N.Y. TIMES, May 22, 2007, at A16. In addition to being the Chief Executive Officer of the M.I.S.S. Foundation, Cacciatore, now Cacciatore-Gerard, is now an assistant professor of Social Work at Arizona State University and runs her own personal bereavement blog. Joanne Cacciatore, BECOMING (Oct. 21, 2011), <http://drjoanne.blogspot.com>.

47. Richard Jerome, *Proof of Life: A Campaign by Parents to Get Birth Certificates for Stillborn Babies Stirs Up a Controversy*, PEOPLE (Dec. 11, 2006), <http://www.people.com/people/archive/article/0,,20059699,00.html>.

48. M.I.S.S. FOUNDATION, *supra* note 45.

49. *Id.*

50. See Lewin, *supra* note 46; see also Amanda Palleschi, *Acknowledging Angels: Fight for Stillborn Certificates*, HARRISBURG PATRIOT-NEWS, Mar. 27, 2010, [http://www.pennlive.com/midstate/index.ssf/2010/03/group\\_of\\_pennsylvania\\_women\\_ho.html](http://www.pennlive.com/midstate/index.ssf/2010/03/group_of_pennsylvania_women_ho.html); Chana Joffe-Walt, *Parents of Stillborn Babies Push for Recognition*, NAT'L PUB. RADIO (Feb. 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=7407248>.

51. Lewin, *supra* note 46.

52. *Meeting With Your Legislators*, M.I.S.S. FOUNDATION, [http://www.missingangelsbill.org/index.php?option=com\\_content&view=article&id=50](http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=50) (last visited Oct. 30, 2011) (quoting Cacciatore); Michael Gardner, *Legislation on Stillbirths Entangled in Abortion Fight*, SAN DIEGO UNION-TRIB., June 4, 2009, [http://www.signonsandiego.com/uniontrib/20070604/news\\_1n4still.html](http://www.signonsandiego.com/uniontrib/20070604/news_1n4still.html).

their albums of pictures, with their hands holding their baby's tiny hand my Lord. It's just hard."<sup>53</sup>

To some, the desire for a stillborn birth certificate may seem like playing with words. But, as supporters in California explained during that state's legislative process, "[w]hat may seem to be semantics provides enormous benefits to the women suffering from the immeasurable guilt and feelings of failure . . . it seems cruel to offer a reminder of the death and yet not of the birth."<sup>54</sup> Another mother put it more simply: "To everyone else it's a piece of paper, but to us it's gold."<sup>55</sup> Thus the wording of the certificates matters greatly to supporters. For example, the MISS Foundation has opposed (successfully in some states) legislation authorizing a "Certificate of Stillbirth" on the ground that because the word "stillbirth" connotes death, its inclusion defeats the very purpose of the new document. Several states accept the point; in California, parents are issued a "Certificate of Still Birth" (two words).<sup>56</sup> A second linguistic preference is that the official document should be called a "Certificate of Birth Resulting in Stillbirth" and not a "Certificate of Stillbirth." MISS Foundation materials explain that "there is a subtle, yet immense difference in the two" and that "all states should record births as births . . . whether live or still."<sup>57</sup> Statutory language—the use of the phrase "unborn child," for example—has also mattered to those wary of Missing Angel legislation, as I discuss in Part IV below.

In state after state, Missing Angel legislation has received overwhelming support across party lines. As of July 2011, thirty-one states provide for some form of a stillborn birth certificate.<sup>58</sup> Only one state governor, Bill Richardson of New Mexico, vetoed the legislation on the ground that having two documents for a single event could lead to "confusion and potential fraud" and was "not sound policy."<sup>59</sup> Richardson's 2007 veto was met head-on by Missing

53. Anita Creamer, *Honoring a Life and Loss*, SACRAMENTO BEE, Apr. 4, 2007, at E1, available at <http://www.stillnomore.org/article-honoringlife.htm>.

54. ASSEMBLY COMM. ON HEALTH, A.B. 1929 ASSEMBLY BILL ANALYSIS, 2001–02 Leg., Reg. Sess. (Cal. Apr. 15, 2002).

55. Anya Sostek, *A Precious Piece of Paper*, PITT. POST-GAZETTE, Mar. 2, 2010, at A1.

56. See *Obtaining Certified Copies of Fetal Death & Still Birth Records*, CAL. DEP'T PUB. HEALTH (Sept. 6, 2011), <http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/CertifiedCopiesofFetalDeathStillBirth.aspx>. New York State similarly has enacted legislation providing for a Certificate of Still Birth.

57. See *MISSing Angels Bill (MAB) Legislation—State Chart*, *supra* note 6.

58. *Id.*

59. Letter from Bill Richardson, Governor of New Mexico, to Ben D. Altamirano, President Pro Tempore of the New Mexico Senate (Apr. 6, 2007), available at [www.sos.state.nm.us/Main/Elections/2007/SEM80.pdf](http://www.sos.state.nm.us/Main/Elections/2007/SEM80.pdf). A similar concern was raised a century ago within the medical community:

There are certain states and cities that report stillbirths, as both births and deaths. When we stop to consider that one of the most important functions of vital statistics is to furnish a source of study for the prevention of disease and death, can we possibly get the desired information to aid us in the prevention of stillbirths if we so register them?

Thomas, *supra* note 38, at 50.

Angel proponents. One online headline announced, “[Veto] Stuns Tens-of-Thousands [sic] of Bereaved Parents.”<sup>60</sup> A MISS Foundation spokesman wrote that Richardson had “slapped grieving mothers and fathers in the face.”<sup>61</sup> Emphasizing the political consequences of the veto, Cacciatore stated that Richardson, then a candidate for the Democratic presidential nomination, had “flippantly driven a stake through the heart of [the] legislation” and would lose the votes of “grieving parents across the country.”<sup>62</sup> Revised legislation is now before the New Mexico legislature.<sup>63</sup>

## II.

### FETAL LIFE AND SOCIAL BIRTH

How has a child who has never taken a breath come to be understood as the proper subject of a birth certificate? Certainly the baby has “issued forth” and so in a literal sense has been born or “delivered of its mother,” to use older phrasing. To be sure, birth certificates have traditionally signaled only live births. Yet, for many parents, their stillborn child *has* been alive—a participating member of the family for most of the pregnancy, long before its birth.

This early engagement is due in great part to the common use and visual power of obstetric sonography. The technology has profoundly and permanently altered our relationship to the fetus.<sup>64</sup> Quickening, the physical sensation of fetal movement that formerly concretized pregnancy, now seems pokey and old fashioned as a statement of arrival: “*Of course* there’s a baby in there, we saw it weeks ago!” Pregnant women who undergo ultrasound perceive their baby as being “more real, more vivacious, more familiar, stronger and more beautiful.”<sup>65</sup> Having an ultrasound is understood as an aspect of prenatal care and, like other prenatal maternal behavior, the experience further solidifies the idea of a child.<sup>66</sup>

Ultrasound has made fetuses present in ways that once were possible only after the baby was born. The exuberant question once put to new parents in the past tense—“Was it a boy or a girl?”—is now asked early in pregnancy and in the present tense—“*Is* it a boy or a girl?” The identification of fetal sex often leads to the selection of a gender appropriate name, which adds to the

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60. Press Release, M.I.S.S. Foundation, New Mexico Governor Bill Richardson Stuns Tens-of-Thousands [sic] of Bereaved Parents and Vetoes the MISSing Angels Bill (Apr. 7, 2007), *available at* <http://www.missfoundation.org/pressreleases/newmexicogov.pdf>.

61. *Id.*

62. *Id.*

63. See S.B. 70, 50th Leg., 1st Sess. (N.M. 2011).

64. Sanger, *supra* note 7, at 363–73.

65. K. Dykes & K. Stjernqvist, *The Importance of Ultrasound to First-time Mothers' Thoughts About Their Unborn Child*, 19 J. REPROD. & INFANT PSYCHOL. 95, 95 (2001).

66. As anthropologist Linda Layne explains, for many pregnant women, “[e]ach cup of coffee or glass of wine abstained from . . . add[s] to the ‘realness’ of the baby they are growing within.” LAYNE, *supra* note 24, at 17.

transformation of the fetus into a baby. Within months of conception the fetus not only has a sex, a name, and a face, but he or she now owns things, has prenatal preferences (organic food, Mozart, a smoke-free environment), its own page on Facebook, and a registry at Bloomingdales. In short, social birth—the identification and incorporation of a child into its family during pregnancy—commonly precedes biological birth.

The fact of social birth, perhaps especially in a late-term pregnancy, complicates any understanding of stillbirth. The baby's death in utero is not "intrauterine demise" or "fetal wastage" as stillbirth is referred to in medical literature: it is a death in the family. The stillborn baby's relatives already knew him; they had seen his image, and happily had shown it to their friends and colleagues. The baby's name is no longer retrieved for re-use with a child who survives, a common enough practice in earlier times; rather, the name is kept and preserved for the stillborn baby alone.<sup>67</sup> This is all to say that the stillborn baby's prenatal life as a social being survives his death.

And, over time, the social practices surrounding stillbirth have begun to accommodate this social reality. In contrast to the awkward silence (and often the shame) that accompanied stillbirth even thirty years ago, stillbirth is no longer something to be endured privately but is now a subject fitting for shared sorrow and ceremony. Organizations such as MISS and Share in the United States and the Stillbirth and Neonatal Death Charity ("SANDS") in the United Kingdom offer a range of rituals and protocols to console parents and to guide medical professionals.<sup>68</sup> The stillborn body no longer disappears, to be disposed of somehow or other. Rather, parents are asked if they want to spend time with their infant to hold and admire it, and to say farewell.<sup>69</sup> Hospitals now provide

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67. Daniel Scott Smith, *Child-Naming Practices, Kinship Ties, and Change in Family Attitudes in Hingham, Massachusetts, 1641 to 1880*, 18 J. SOC. HIST. 541, 546 (1985).

68. See JUDITH SCHOTT ET AL., PREGNANCY LOSS AND THE DEATH OF A BABY: GUIDELINES FOR PROFESSIONALS (2007); SHARE: PREGNANCY & INFANT LOSS SUPPORT, INC., <http://www.nationalshare.org> (last visited Oct. 30, 2011); *Supporting Anyone Affected by the Death of a Baby and Promoting Research to Reduce the Loss of Babies' Lives*, SANDS: STILLBIRTH & NEONATAL DEATH CHARITY, <http://www.uk-sands.org/Support/Overview.html> (last visited Oct. 30, 2011).

69. See Elizabeth Heineman, *My Stillborn Child's Life After Death*, SALON (Oct. 6, 2011), [http://life.salon.com/2011/10/07/my\\_stillborn\\_childs\\_life\\_after\\_death](http://life.salon.com/2011/10/07/my_stillborn_childs_life_after_death). In this brief memoir of the week between the birth and burial of her stillborn son, Heineman describes how the funeral director invited the family to visit the baby as much as they wanted, and even to take him home overnight. Recalling that physical intimacy with dead loved ones—holding a hand or stroking a face—used to be normal, Heineman asks, "Why should the body that was Thor transmogrify from a beloved member of the family, from a familiar part of my own body, into a repellent object just because it had died? This was my child." See also Ingela Rådestad et al., *Long-Term Outcomes for Mothers Who Have or Have Not Held Their Stillborn Baby*, 25 MIDWIFERY 422, 422–29 (2009) (reporting a Swedish study in which mothers who held stillborn babies of at least thirty-seven weeks gestation had better outcomes than those who did not). But see P. Hughes et al., *Assessment of Guidelines for Good Practice in Psychosocial Care of Mothers After Stillbirth: A Cohort Study*, 360 LANCET 114, 114–18 (2007) (concluding that parents who were urged to hold stillborn children were more depressed over time than those who did not).



“memory boxes” in which mementos such as the baby’s blanket, footprints, scraps from fetal heartbeat monitors, and baby gifts can be placed.<sup>70</sup> Funerals are now common, and the industry offers special stillborn caskets and other paraphernalia such as stillborn lockets and picture frames. The technological manifestations of modern mourning—webcams at ceremonies, online guestbooks, and memorial websites—now attach to stillborn deaths.<sup>71</sup>

In addition, postmortem photography, a tradition thought to have faded in the late nineteenth century, has reemerged.<sup>72</sup> The term refers to portrait-like photographs taken only after death to provide the living with a keepsake.<sup>73</sup> The practice began in the 1850s when, despite the emergence of itinerant daguerreotypists and commercial photography studios, the likelihood of possessing a photograph of a family member was far from certain. Photography was a relatively new medium and the cameras and chemicals required were not household items. Yet for those who could never afford a painted portrait, the new medium offered the chance to capture the image of a loved one. The practice took on special meaning when early death was not unexpected, as during the Civil War, or simply because of high childhood mortality rates.<sup>74</sup> An advertising broadside from the period alerted parents that “[t]he ruddy cheek

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70. Margaret Godel, *Images of Stillbirth: Memory, Mourning and Memorial*, 22 VISUAL STUD. 253, 257 (2007).

71. In his study of memorial practices for children in contemporary Denmark, Tim Sørensen discusses the special attraction of websites for stillborn children, whose lives have few tangible points of reference. Tim Flohr Sørensen, *Sweet Dreams: Biographical Blanks and the Commemoration of Children*, 16 MORTALITY 161, 161–75 (2011). Sørensen explains that unlike traditional headstones, memorial websites offer “a platform for writing some of the narratives the grave plot cannot harbour and for displaying images prohibited by cemetery regulations or norms.” *Id.* at 167. He describes one such website that provided not only detailed textual accounts of the course of events that lead up to the death of the child, but many subtle comments [that] state what exactly was lost: the anticipation of the girl’s smiles [and] her chubby arms around the parents’ necks. . . . In this regard, the memorial is not so much directed to the deceased child as to the demise of anticipations of what were to be.

*Id.*

72. For example, the nonprofit organization Now I Lay Me Down to Sleep trains photographers to light, stage, and retouch photographs of stillborn babies. The organization defines stillbirth as death after at least twenty-five weeks gestation, so that the babies are quite developed and baby-like in appearance. See NOW I LAY ME DOWN TO SLEEP, <http://www.nowilaymedowntosleep.org/home> (last visited Oct. 30, 2011); see also TOUCHING SOULS: HEALING WITH BEREAVEMENT PHOTOGRAPHY, <http://www.toddhochberg.com/about.html> (last visited Oct. 30, 2011) (Touching Souls charges approximately \$750 for its services).

73. See RUBY, *supra* note 22. Ruby explains that the bereaved were urged, in the words of an early photographic studio advertisement, to “Secure the Shadow, Ere the Substance Fade.” *Id.* at 1.

74. See Keith F. Davis, “A Terrible Distinctiveness”: *Photographs of the Civil War Era*, in PHOTOGRAPHY IN NINETEENTH CENTURY AMERICA 130, 142–47 (Martha A. Sandweiss et al. eds., 1991). Davis notes that “with death an unignorable reality,” soldiers sat for portraits “to ensure the longevity of at least their image and memory.” *Id.* at 143; see also BEAUMONT NEWHALL, THE HISTORY OF PHOTOGRAPHY 32 (1982) (noting the demand for pictures was due in part to nineteenth century’s “sensitivity to mortality”).

and loved features upon which you are now fondly gazing, ere tomorrow may be pallid in death . . . ."<sup>75</sup>

To modern ears, the practice may sound strange, even ghoulish. But if a bereaved relative was to have any visual remembrance of a loved one—particularly a child—a post-mortem photo was often the only chance.<sup>76</sup> Dead children were dressed up in their finest and posed in life-like positions, such as sitting on a chair, peacefully asleep on a bed, or cradled in their mother's arms.<sup>77</sup> Such pictures were treasured memento mori, as parents paid to have their children's images and their physical connection to their children captured and preserved.

As cameras became more commonplace toward the end of the nineteenth century, the formal practice of post-mortem photography largely disappeared.<sup>78</sup> Parents were more likely to possess a picture taken during the child's life, and *this* became the treasured image in the event of death. In addition to technological advances, there also were cultural shifts in attitudes toward death and bereavement. Displaying a photograph of one's deceased wife or child may once have been a normal, respectful thing to do, but as historian Jay Ruby has noted, over time, taking and displaying pictures of the dead was seen as unseemly rather than respectful.<sup>79</sup> New theories of good and bad mourning took hold, and concepts such as "closure" made clinging to the dead, particularly through a photograph taken after death, seem creepy, if not pathological. Post-mortem photography became a strange practice of the past.

Yet in the last few decades, postmortem photography has made something of a comeback, at least with regard to stillborn infants. Cold clinical photographs taken as pathology specimens by morgue technicians following a stillbirth have been replaced by carefully lit and staged portraits taken by

75. Matthew R. Isenburg, *The Wonder of the American Daguerreotype*, in *AMERICAN DAGUERREOTYPES: FROM THE MATTHEW R. ISENBURG COLLECTION* 9, 10 (Richard S. Field ed., 1989).

76. Not only were children unlikely to have had a sufficiently celebratory moment, but, practically speaking, children were poor photographic subjects. Sitters had to remain perfectly still for several minutes, often with their heads held in place by a neck brace, for the plate to develop clearly. See Reese V. Jenkins, *Technology and the Market: George Eastman and the Origins of Mass Amateur Photography*, 16 *TECH. & CULTURE* 1 (1975).

77. Collections of these poignant photographs are found in RUBY, *supra* note 22; STANLEY BURNS, *SLEEPING BEAUTY I: MEMORIAL PHOTOGRAPHY IN AMERICA* (1990); STANLEY BURNS, *SLEEPING BEAUTY II: GRIEF, BEREAVEMENT IN MEMORIAL PHOTOGRAPHY AMERICAN AND EUROPEAN TRADITIONS* (2002).

78. To be sure, in some poorer communities, the practice continued well into the 1940s. The renowned Harlem studio photographer James Van Der Zee took elaborate commissioned photographs of dead babies often in the arms of parents. As Van Der Zee observed in a later interview regarding a portrait of a baby held by the father alone because the mother was still hospitalized, "If it wasn't for the picture, the mother wouldn't have seen the child for the last time." JAMES VAN DER ZEE, *HARLEM BOOK OF THE DEAD* 83 (1978).

79. RUBY, *supra* note 22, at 7 (noting that in the nineteenth century, death was "a common topic of polite discussion," and mourning "a normal part of the public life of most adults.").

photographers sensitive to the baby's physical condition and the parents' distressed state.<sup>80</sup> As in nineteenth-century photographs, the dead infant is carefully dressed and posed, often in the arms of its parents or holding a toy. And as in the nineteenth century, the photographs are displayed, now not only on mantels or in private albums but on public websites devoted to the images.<sup>81</sup>

To be sure, not all parents want photographs. Elizabeth McCracken explained her husband's decision to decline a postmortem photograph of their stillborn son: "[H]e was afraid we'd make a fetish of it, and he was right. The photo would not have been of our child, just his body."<sup>82</sup>

### III.

#### STILLBORN BIRTH CERTIFICATES

##### *A. Artifacts of Mourning*

In addition to the private artifacts and rituals that now surround stillbirth, the birth certificate itself is increasingly regarded as an artifact of mourning. The certificate has value in part because of its physicality. As McCracken explains: "A still born child is really only ever his death. He didn't live: that's how he's defined. Once he fades from memory, there's little evidence at all, nothing that could turn up, for instance, at a . . . flea market, or be handed down through the family."<sup>83</sup> The birth certificate provides such evidence. Like a lock of hair or a photograph, it can be touched, gazed upon, and handed down. State legislatures are aware of the certificate's presentation value.<sup>84</sup> Oregon identifies its certificate as a "Commemorative Certificate of Stillbirth" and requires that it "shall be suitable for display and shall feature an attractive design with calligraphy-like font, high quality paper, [and] a State of Oregon seal."<sup>85</sup> Parents may order multiple certificates—one for the baby book, another for the grandparents.

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80. See Rachel Meredith, *The Photography of Neonatal Bereavement at Wythenshawe Hospital*, 23 J. AUDIOVISUAL MEDIA MED. 161, 162–64 (2000); see also NOW I LAY ME DOWN TO SLEEP, *supra* note 72; TOUCHING SOULS: HEALING WITH BEREAVEMENT PHOTOGRAPHY, *supra* note 72.

81. For a gallery of hundreds of such photographs, see OUR MISSING ANGELS, <http://www.missingangel.org/beautifulbabies.php> (last visited Oct. 30, 2011).

82. MCCracken, *supra* note 8, at 14. Linda Layne concedes that "baby things"—photographs, gifts, and other objects saved after pregnancy loss—may indeed function as fetishes for bereaved parents. She suggests, however, that the traditional social disregard of pregnancy loss has itself created the need for fetishization: "[I]f the 'realness' of their 'baby' and their loss were not disavowed in the first place, bereaved parents might not have such a need to use things in these ways." LAYNE, *supra* note 24, at 142.

83. MCCracken, *supra* note 8, at 14.

84. See, e.g., SANTA CLARA CNTY. PUB. HEALTH DEP'T, ANSWERS TO YOUR QUESTIONS ABOUT THE CERTIFICATE OF STILL BIRTH, 1 (2008), available at <http://www.sccgov.org/sites/scphd/en-us/Residents/BirthDeath/Documents/QACertificateofStillBirthREV1-08.doc.pdf> (providing that the certificate "will be issued on banknote security paper").

85. Commemorative Certificate of Stillbirth, OR. ADMIN. R. 333-011-0200 (2006), available at

### B. A Public Record

Perhaps more important than its significance as an artifact of mourning, a birth certificate is official, which is crucial to how it conveys meaning to parents. Why is this? When a baby is born alive, the issuance of a birth certificate is not particularly celebratory. It is the baby's arrival, not documentation of arrival that matters. When the actual certificate arrives in the post, one hopes that the parents file it away safely, to be used as needed in the future as proof of eligibility for school starting, for example. But with a stillborn child there will be no school. The certificate is perhaps the only connection between the state and the child available to the parents. It operates as a kind of objective proof that a child was born, and that his or her existence is not just a matter of familial memory but the subject of a *public* record as well. As Cacciatore has stated, "It's dignity and validation . . . It's the same reason why [people] want things like marriage licenses and baptismal certificates."<sup>86</sup>

Should the stillborn birth certificate be regarded as a harmless gesture of official generosity? Might it be viewed simply as the adaptation of a birth ritual that has little significance when a baby is born alive, but that becomes singularly important in the context of stillbirth? As one California mother mused, "The first day of school, prom, seeing her get married. She'll never get those opportunities. I don't get to see my daughter do that, so I want to get whatever I can, you know."<sup>87</sup> In this sense, the birth certificate is transformed from an ordinary "document of passage" to what anthropologist Francoise Freedman has called a "ritual of misfortune."<sup>88</sup>

On the other hand, however profound the parent's loss, is there something fundamentally illogical or fictive about issuing a birth certificate to someone who has never lived? Is it a case of the law acting humanely in response to suffering, or is it more like the Wizard of Oz giving the much beloved scarecrow a diploma?

### C. Establishing Parental Identity

Here it may be useful to consider the function of birth certificates more generally. Certainly they are of great practical importance for the individual, crucial to how one negotiates the administrative state—produced throughout one's life to get a driver's license, a passport, a ration book.<sup>89</sup> But, in addition

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[http://arcweb.sos.state.or.us/pages/rules/oars\\_300/oar\\_333/333\\_011.html](http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_333/333_011.html).

86. Lewin, *supra* note 46. To be sure, marriage licenses and baptismal certificates are *not* the same; the status created by the first is public and legal; the second is private and religious.

87. Jofee-Walt, *supra* note 50.

88. Françoise Barbira Freedman, *Changing Medical Birth Rights in Britain 1970–2010*, in *BIRTH RITES & RIGHTS* 29, 29 (Fatemeh Ebtehaj et al. eds., 2011).

89. Shapiro, *supra* note 35. In the United States, the importance of a birth certificate as a predicate for state benefits became particularly clear during the 1940s, for example to obtain a ration book for a new child, or to prove citizenship to obtain a defense industry job.

to their use in making official claims upon the state, birth certificates have subjective significance for the person. They tell a great deal about who we are, at least according to certain traditional conceits, and thus are constitutive of identity. They organize the facts that define how we hold ourselves out to the world: a public record of one's parents, sex, name, race, and legitimacy. When a person wants to marry, for example, the birth certificate is evidence that one is the right age, the right sex, and, in the days of anti-miscegenation laws, that one was the right race.

But how does any of this apply in the case of a being who is not (and never was) alive? One possibility is that in the case of stillbirth, the certificate is not simply a marker of the child's status as a born person, but also of the parents' status as mother and father.<sup>90</sup> Certainly in the case of live births, birth certificates are important declarations of parentage. Just as modern postmortem photographs of mothers and fathers cradling their dead infant enable them literally to identify themselves as parents, the stillborn birth certificate similarly—and officially—confirms a parent-child relationship, however brief its span. Unlike “widow” or “widower”—words that signal the end of a marriage by death—we have no single word that captures or awards a status to the parent of a stillborn baby.<sup>91</sup> The certificate fills in where vocabulary fails.

A stillborn birth certificate may also honor not only parental status but also the process of birth. Proponents of New York's Missing Angel Act emphasized that “[s]tillbirth mothers carry a fetus to term, endure the pain of delivery and produce mother's milk, yet the state does not recognize them for having given birth.”<sup>92</sup> As one New York mother stated, “I was in labor. I pushed . . . [a]nd [I] deserved more than a death certificate.”<sup>93</sup> Not only has the mother labored, but she has also experienced the physical aftermath of childbirth, such as fatigue and stretch marks.

But whether the stillborn birth certificate marks a process or a status, we see that its subject is not only the child but also the parent's relation to the child. The certificate is proof that a real child—real enough to have its birth recorded—was born to a woman now registered as its mother. This helps resolve

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90. This point is made forcefully in a short M.I.S.S. Foundation video featuring stillborn parents and siblings who directly state, “I *am* a mother,” “I *am* a father,” “I *am* a brother,” and so on. See M.I.S.S. Foundation, *MISS Foundation—Missing Angels Bill PSA*, YOUTUBE (Apr. 27, 2007), <http://www.youtube.com/watch?v=ZNvTDTK-0Jk>.

91. In this regard, Columbia Law School LL.M. student Jamie Abrams (2011) has suggested the evocative term “stillmother.” There has been an exception to mothers whose sons or daughters have died in combat: they are designated as “Gold Star Mothers” and their losses are sometimes officially acknowledged. See JOHN W. GRAHAM, *THE GOLD STAR MOTHER PILGRIMAGES OF THE 1930S: OVERSEAS GRAVE VISITATION BY MOTHERS AND WIDOWS OF FALLEN WORLD WAR I SOLDIERS* (2005) (describing government sponsored trips to European cemeteries in France and England for the Gold Star Mothers of doughboys).

92. William J. Larkin, Jr., New York State Senate Introducer's Apr. 12, 2005, Memorandum in Support, reproduced in N.Y. LEGIS. SERV., *LEGISLATIVE HISTORY*, S. 3111-B (2011).

93. Lewin, *supra* note 46.

the question often put to stillbirth mothers when they later have a second baby and are innocently asked by cheerful well-wishers, "Is this your first?"

*D. A Posthumous Change in Status*

Another way to think about stillborn birth certificates is as something like a posthumous change in the infant's status. The idea is that, although the infant was born dead, by acknowledging the fact of birth (rather than the fact of live birth), the certificate elevates the stillbirth to the same status of the birth of a child born alive. Characterizing the certificate as a form of posthumous recognition may clarify the nature of the benefit sought, the identity of the beneficiary, and what special intervention the law might provide. I therefore want to consider other instances where the law confers a ceremonial status on someone after death.

One example is the posthumous award of citizenship to noncitizen soldiers killed during "periods of . . . hostilities."<sup>94</sup> In such cases, the next-of-kin applies on behalf of the soldier; if successful, they receive a certificate postdating the soldier's citizenship to the time of death.<sup>95</sup> The original legislation made clear that citizenship acquired under these circumstances was expressly and solely "an honorary status commemorating the bravery and sacrifices of" veterans, and not meant to "convey any benefits under the Immigration and Nationality Act to any relative of the decedent."<sup>96</sup>

Who benefits from the honorary status of posthumous citizenship? The soldier receives no tangible benefits, such as the right to be buried in a military cemetery; soldiers are entitled to such burial by virtue of their service alone.<sup>97</sup> Still, the award of citizenship is not automatic; it must be applied for by the next-of-kin who, by virtue of applying, are understood to benefit. Posthumous citizenship would seem to recognize the sacrifice of the soldier *and* of the family in familiar patriotic terms, and in the familiar form of an official certificate. The family may also find solace in achieving for their soldier what he or she had not accomplished in life.

The stillborn birth certificate hints at something like this, though here it is life itself that could not be achieved. In a sense, stillborn infants, like "greencard soldiers," have come close to the goal: they have at least made it to twenty or twenty-four weeks, and some to the very moment of full-term birth.

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94. Posthumous Citizenship for Active Duty Service Act of 1989, Pub. L. No. 101-249, 104 Stat. 94 (1990). Congress has declared that since 2001, *all* military service has been during periods of hostility.

95. *Id.*

96. N-644, *Application for Posthumous Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 27, 2011), <http://www.uscis.gov/n-644>.

97. *Eligibility—Burial and Memorial Benefits*, U.S. DEP'T OF VETERANS AFF. (May 20, 2011), <http://www.cem.va.gov/cem/bbene/eligible.asp>.

In this sense, the birth certificate, like the certificate of citizenship, commemorates both promise and its tragic unfulfillment.

As noted earlier, posthumous citizenship for soldiers was initially a purely honorary status; kin were barred from receiving any derivative immigration or citizenship benefits for themselves.<sup>98</sup> In 2003, however, the law changed. In response to publicity involving noncitizen family members, whose hopes for improved immigration status were dashed by virtue of their soldier's death in Iraq, Congress amended the law to provide for naturalization of surviving kin in certain cases.<sup>99</sup> Thus a posthumous status that was originally and emphatically symbolic has, over a short period of time, acquired more substantive content, a point I will return to shortly.

Military promotion is another example of a posthumous change in status. Here too, surviving kin receive a certificate, and the higher rank can be inscribed on the gravestone.<sup>100</sup> The soldier's enhanced status produces visible, public recognition to be enjoyed by his family, and perhaps his unit. The soldier himself is not the direct beneficiary of the change in status; he or she is dead. Nonetheless, his *memory* is enhanced by the posthumous action.<sup>101</sup> On this account, the stillborn baby's status (though not the baby himself) is benefitted by the posthumous action. Indeed, a stillborn birth certificate might also be viewed as a kind of promotion. It moves the baby from the status of a fetal death to the accomplishment of having been born, even if born dead. Even in the context of desolation, the certificate offers survivors a celebratory moment, however constrained.

This celebratory potential is further illustrated by the case of posthumous pardons and exonerations for wrongful criminal convictions. Consider criminal defendants exonerated by DNA evidence brought to light only after their deaths. Certainly the state may have an interest in correcting a particular injustice out of principled concern for the integrity of the legal system.<sup>102</sup> More

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98. *N-644, Application for Posthumous Citizenship*, *supra* note 96.

99. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703, 117 Stat. 1392, 1691 (2003) ("Requirements for Naturalization through Service in the Armed Forces of the United States").

100. DEP'T OF THE ARMY, ARMY REGULATION 600-8-29: OFFICER PROMOTIONS 15 (2005), available at [http://www.apd.army.mil/pdffiles/r600\\_8\\_29.pdf](http://www.apd.army.mil/pdffiles/r600_8_29.pdf).

101. Here we might consider Thomas Nagel's notion of "posthumous harms," the idea that posthumous events may harm not only survivors, but also and more importantly the people who have died. THOMAS NAGEL, *MORTAL QUESTIONS* (1979). Under Nagel's "post mortem thesis," law can be used to help correct events following death that can be bad for us, such as leaving behind a poor widow, an illegitimate child or, in the case of stillbirth, not being considered as having ever lived. See *id.* at ch. 1. In contrast, under the "mortem thesis," defended by Epicurus, people who die cannot suffer from whatever happens after death. On this view, death leaves its victims immune from posthumous harms and the law has no business in trying to protect dead people's interests. Consequently, posthumous awards can only redress harms suffered by those who have survived, such as the surviving fiancé or the parents of a stillborn child. I thank Mathilde Cohen for this discussion.

102. "*Injustice Anywhere Is a Threat to Justice Everywhere*," Lt. Henry O. Flipper Receives the First Posthumous Presidential Pardon in U.S. History, ARNOLD & PORTER LLP,

often, however, surviving family members press the case in order to set the record straight.<sup>103</sup> In 2006, for example, the British government pardoned three hundred soldiers shot for cowardice during the First World War, some of whom now are thought to have been suffering from shellshock.<sup>104</sup> As the grandchildren of one executed soldier explained, “We were determined for my mother[’s] sake because she always said . . . he died fighting for his country.”<sup>105</sup> The stillborn birth certificate may in spirit be most like a posthumous exoneration in that it seeks to offset a sort of cosmic injustice: the child’s death before birth.

As these examples show, posthumous changes in status appear to benefit surviving relatives significantly. On this account, the question of whether or not states should provide stillborn birth certificates to parents who want them seems easy to resolve. The infant itself cannot be harmed, its parents may benefit, and so why object? To use an economic conceit, no one is made worse off and the parents are better off—a Pareto improvement. This may, however, be too quick and too comforting a conclusion. Before concluding on something like humanitarian grounds that an infant who is born dead should be treated in law—even ceremonially—like an infant who was born alive, it is worth considering a set of philosophical, practical, and political concerns about Missing Angel Acts.

#### IV.

##### FIVE CONCERNS

##### *A. The Logic of the Thing: Stillborn Birth Certificates as a Legal Fiction*

There may be a sense of uneasiness upon first hearing about birth certificates for children who have never lived. For many, there is something

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<http://www.arnoldporter.com/publications.cfm?action=view&id=263> (last visited Oct. 30, 2011); see also Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251, 1255–92 (1999). Although the dead (in contrast to their memory) cannot in fact benefit, pardons have been expressed in terms of benefit to the deceased: “This good man has now completely recovered his good name.” See *Ex parte* Grossman, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”).

103. See, e.g., Robert Mackey, *Texas Mother ‘Ecstatic’ About Posthumous Pardon for Wrongfully Convicted Son*, THE LEDE BLOG (Mar. 2, 2010, 12:36 PM), <http://thelede.blogs.nytimes.com/2010/03/02/texas-mother-ecstatic-about-posthumous-pardon-for-wrongfully-convicted-son> (quoting the mother of a wrongly convicted suspect as saying: “I just know that Tim is up there smiling”). Indeed, the state often strenuously opposes efforts to adduce evidence that an innocent person was executed in part because of the implications of such a finding for systemic reform. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA, 1997–2009 (2010), [http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct\\_Exec\\_Sum.pdf](http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf).

104. *More Than 300 WWI Soldiers Receive Pardons*, BBC NEWS (Aug. 16, 2006, 11:14 GMT), [http://news.bbc.co.uk/2/hi/uk\\_news/4796579.stm](http://news.bbc.co.uk/2/hi/uk_news/4796579.stm).

105. *Id.*



inherently illogical about the proposition. Birth certificates have traditionally, and uncontroversially, signified a live birth.<sup>106</sup> Of course, one could argue that the word “birth” on a birth certificate does not have to mean live birth. Certainly a stillborn baby has “issued forth,” and so in a sense was born.<sup>107</sup> This is the parental argument: “I held her, I touched her, I gave birth to a child, a baby, and because she didn’t take one breath outside my womb, they don’t consider her a baby.”<sup>108</sup>

Still, the law’s concern is with the objective meaning of words in a legal document, not the subjective meaning of the document itself. The intensity of the desire of some parents for this form of recognition is immediately granted. At the same time, a birth certificate is the official record of when and where a person is born and to whom. We might find it unsettling, for example, if parents could petition to change the actual date of a child’s birth to one more meaningful to the family.

Or is this insistence on accuracy and the integrity of birth certificates a bit too fastidious? As things stand now, other inventions on birth certificates are tolerated. Consider the practice of issuing a new birth certificate following a child’s adoption.<sup>109</sup> In traditional closed adoptions, the name of the adoptive mother is substituted for that of the birth mother, and a new birth certificate issued. The original certificate is sealed and the new one, with its intentionally inaccurate information about who was the child’s mother on the day of birth, accompanies the child through life. The practice developed in the mid-twentieth century to protect the reputation of unwed mothers at a time when illegitimate birth was highly stigmatized.<sup>110</sup> “Clean start” birth certificates were also thought to normalize the adoptive family by mimicking the documentation provided to a biological family. By treating the adoption just like a birth, the new certificate kept the fact of adoption a secret not only in the public record,

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106. Live birth is defined as the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes, or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached. Heartbeats are to be distinguished from transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps.

NAT’L CTR. FOR HEALTH STATS. U.S. DEP’T HEALTH & HUMAN SERVS., STATE DEFINITIONS AND REPORTING REQUIREMENTS FOR LIVE BIRTHS, FETAL DEATHS, AND INDUCED TERMINATION OF PREGNANCY 2 (1997), available at [www.cdc.gov/nchs/data/misc/itop97.pdf](http://www.cdc.gov/nchs/data/misc/itop97.pdf).

107. Recall also that Queen Victoria of Spain “was *delivered* of a stillborn son,” a common historical formulation for the process of birthing, though I think we would not call her son a “newborn.” *Victoria’s Son Stillborn*, *supra* note 20 (emphasis added).

108. Veronica Torrejón, *Advocates Fight to Get Birth Certificates for Stillborn Babies in Pennsylvania*, MORNING CALL (Mar. 29, 2010), [http://articles.mcall.com/2010-03-29/news/all-quote.7220711mar29\\_1\\_birth-certificates-stillborn-planned-parenthood](http://articles.mcall.com/2010-03-29/news/all-quote.7220711mar29_1_birth-certificates-stillborn-planned-parenthood).

109. See, e.g., *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010).

110. E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* (1998).

but also in the community and in the family.<sup>111</sup> In short, to further prevailing theories about child development and family well-being in mid-twentieth-century America, the law tolerated—indeed, insisted upon—certain fictions on the official second birth certificate.

More recently, the law has authorized the amendment of birth certificates to record a different sort of change in personal identity: a person's sex.<sup>112</sup> Indeed, in a few American states, a new certificate is issued so that the sex change is recorded back to the date of birth.<sup>113</sup> It is this "reverting back" that creates a fiction, at least in cases where a person's sex has been changed rather than misidentified. The amended certificate does not reflect the person's status at birth. Rather, the amended certificate recognizes the social significance of a birth certificate. The person is entitled by virtue of the new certificate to align one's history with the present; he or she may, for example, marry someone of the (now) opposite sex.<sup>114</sup> The birth certificate is something like a passport for life; it tells the world who the law says you may rightfully represent yourself as being—your particulars—and in this regard the amendments are not fictional, but accurate.

States permit the amendment of birth certificates with regard to other changes often considered fundamental to identity, with differing requirements of proof depending on the nature of the change.<sup>115</sup> These include changes in one's name, legitimacy status, and race or ethnicity.<sup>116</sup> In addition, some states, such as Hawaii, permit amending a birth certificate to reflect "a legal determination of the *nonexistence* of a parent and child relationship" for a person identified as a parent on the certificate.<sup>117</sup> Such provisions deal

111. JUDITH S. MODELL, *A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION* (2002).

112. See, e.g., *Somers v. Superior Court*, 92 Cal. Rptr. 3d 116 (Ct. App. 2009) (allowing for the issuance of a new California birth certificate to reflect the gender reassignment of a nonresident born in California).

113. See, e.g., *Who Is Allowed to Apply for an Amended Certificate of Birth?*, HAW. DEP'T HEALTH, <http://hawaii.gov/health/vital-records/vital-records/newbirthcert.html> (last visited Oct. 30, 2011); Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705, 715 n.87 (2007). See generally Dean Spade, *Documenting Gender: Incoherence and Rulemaking*, 59 HASTINGS L.J. 731 (2008). The U.K. Gender Recognition Act approaches the problem differently in that there is no requirement of surgical change, as is the case generally in the United States with regard to amending one's birth certificate on account of a sex re-identification. Rather, in the United Kingdom, a certificate of gender recognition can be obtained on evidence that the person has lived for two years in his or her preferred gender.

114. *In re Lovo-Lara*, 23 I. & N. Dec. 746 (B.I.A. 2005).

115. See, e.g., *Correcting a Vital Record*, N.J. DEP'T HEALTH & SENIOR SERVS. (Jan. 3, 2011, 7:58 AM), <http://www.state.nj.us/health/vital/amend.shtml>. New Jersey categorizes corrections to birth certificates as ancillary items, nonancillary items, and typographical errors.

116. See, e.g., *Toledano v. Drake*, 161 So. 2d 339 (La. Ct. App. 1964) (ordering a change in birth records to reflect that the plaintiff was white rather than "colored").

117. *Who Is Eligible to Apply for an Amended Birth Certificate?*, HAW. DEP'T HEALTH, <http://hawaii.gov/health/vital-records/vital-records/newbirthcert.html> (last visited Oct. 30, 2011) (emphasis added).

primarily with cases where paternity has been legally established in a man not designated as the father on the original birth certificate.<sup>118</sup> As in the case of adoption, the nature of this change involves not only an identifying feature about the person but about her relation to another. This is especially illuminating in the context of stillbirth, where a core parental claim is that the certificate publically affirms a *relationship*. The argument is not that their child was born alive (a fiction) but rather that they are the parents of a baby who was born and who they regard as dear a child as if she had been born alive (a social reality).

On occasion the law has acknowledged the existence of a prenatal social relationship in determining aspects of a stillborn's legal status. An interesting case arose in the European Court of Human Rights. In 2001, a Russian mother, Natalya Znamenskaya, sought to establish the paternity of her stillborn baby so that the correct patronymic could be inscribed on the infant's tombstone.<sup>119</sup> (Because Znamenskaya was married at the time of conception, her legal husband and not the baby's biological father was presumed to be the father.)<sup>120</sup> The Russian court rejected Znamenskaya's petition on the grounds that the statute establishing paternity applied only to children who were born alive.<sup>121</sup>

Znamenskaya then brought an action before the European Court of Human Rights (the "ECHR"), arguing that Russia's refusal to establish her child's proper paternity violated Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>122</sup> Article 8 provides that "[e]veryone has the right to respect for his private and family life."<sup>123</sup> The ECHR agreed, noting that because "the applicant must have developed a strong bond with the embryo whom she had almost brought to full term and that she expressed the desire to give him a name and bury him, the establishment of his descent undoubtedly affected her 'private life.'"<sup>124</sup> Under these circumstances, to allow "a legal presumption . . . to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible . . . with the [State's] obligation to secure effective 'respect' for private and family life."<sup>125</sup> In *Znamenskaya*, the ECHR granted the mother's request in part because to do otherwise benefitted no one; because both men had died, neither incurred a support obligation.<sup>126</sup> Thus the case highlights the importance of considering

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118. See, e.g., CAL. DEP'T OF PUB. HEALTH, ACKNOWLEDGEMENT OF PATERNITY/PARENTAGE (2008), available at <http://www.sonoma-county.org/health/services/pdf/paternity.pdf>.

119. *Znamenskaya v. Russia*, 44 Eur. Ct. H.R. 15 (2005).

120. *Id.* at para. 11.

121. *Id.* at paras. 16–17.

122. *Id.* at para. 3.

123. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, June 1, 2010, Eur. Ct. H.R., available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

124. *Znamenskaya*, 44 Eur. Ct. H.R. at para. 27.

125. *Id.* at para. 31.

126. *Id.* at para. 29.

social reality within a framework of legal harm and benefit. I take up the question of whether stillborn birth certificates are similarly harmless in the section on abortion regulation below.

There are, of course, limits on the law's engagement with social realities. I offer two simple examples as a way of locating uncontroversial boundaries between private and public recognition of cherished relationships. The first concerns marriage. The Church of Jesus Christ of Latter Day Saints provides a ceremony for the remarriage of deceased persons to one another.<sup>127</sup> While this form of marriage, like posthumous baptism, may satisfy the spiritual dictates of believers, I suspect there would be serious hesitation to have states issue marriage licenses in such cases, to be recorded among other vital statistics, were such a request made. (It hasn't been.)

Similarly, parents have been known to disinherit children who, among other failings, marry outside the family faith. The refrain often is something like, "My son is dead to me." Yet while courts will uphold the parent's devise and disinherit the disobliging child, they surely would not issue the parent a death certificate for their child, however "dead" to them their child might be. Again we see that, with few exceptions, the law refuses the use of marriage and death certificates for expressive purposes.<sup>128</sup>

### B. The Therapeutic Use of Law

The term "therapeutic jurisprudence" refers to the proposition that official interactions with law can benefit people psychologically. The concept developed in the context of involuntary civil commitment hearings, where advocates for the mentally ill argued that respectful treatment of their clients was not only a matter of procedural fairness but had therapeutic value as well.<sup>129</sup> The idea of therapeutic jurisprudence has since developed to include the general proposition that "law should value psychological health . . . and when consistent with other values . . . should attempt to bring about healing and wellness."<sup>130</sup>

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127. *LDS Temple Marriage and Sealing Ceremony*, MORMON TEMPLE ENDOWMENT, <http://www.lds-mormon.com/veilworker/marriage.shtml> (last visited Oct. 30, 2011).

128. There is the case of statutory posthumous marriage from France. In 1959, in response to a tragic dam disaster, President de Gaulle authorized posthumous marriages, or *mariage posthume*, in cases where there was unequivocal proof that the dead person had intended to marry his or her fiancé. C. CIV. art. 171 (Fr.). The law extended the tradition of proxy marriages that had developed in the First World War. Loi No. 59-1583 du 31 décembre 1959, relative aux mesures d'aide immediate prises par l'Etat à l'occasion de la rupture du barrage de Malpasset [Law No. 59-1583 of Dec. 31, 1959, Relating to Immediate Relief Measures Taken by the State on the Occasion of the Dam Failure at Malpasset], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.], Jan. 8, 1960, p. 259. In a *mariage posthume* the new spouse receives no inheritance rights, but the marriage legitimates the couple's children. Here several sorts of benefits accrue posthumously: the emotional satisfaction of having been married, the (perhaps) enhanced social status to the widow or widower, and the benefits of legitimacy to any children. Thus the marriage is not only expressive, but also has practical implications.

129. DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

130. Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in

The movement for stillborn birth certificates is similarly premised on the proposition that law has therapeutic potential and can soothe the emotional needs of a distressed constituency.<sup>131</sup> Missing Angel Acts mean to alleviate the terrible pain that follows a stillbirth. In a sense, the birth certificate offers a form of administrative solace. As the legislative sponsor of the California Missing Angels Bill stated, the certificate “is a hug from California for grieving mothers.”<sup>132</sup>

Are there other instances where legislatures have responded to demands that legislation attend to the emotional needs of the polity? One example is victim impact evidence in capital trials. These are presentations in court by the bereft families of murder victims in which family members testify about how special the victim was and how much he or she meant to them. In 1991, the Supreme Court held that victim impact evidence in capital murder cases, even before sentencing, was not prejudicial to the defendant, but rather could help the jury assess his moral culpability.<sup>133</sup> While victim impact evidence has traditionally consisted of oral statements, some courts now permit victim impact videos that offer a photo montage of the victim’s life, sometimes set to music, much like the video tributes played at weddings or funerals.<sup>134</sup>

Victims’ rights groups have argued that addressing the court is necessary for relatives to achieve “closure,” though, as Susan Bandes has pointed out, the term is not an accepted psychological concept; “closure” has no established definition and means different things to different people.<sup>135</sup> Even so, it may be that some surviving relatives will feel better if, in the halls of justice, they can tell the defendant to his face what the personal costs of the crime have been for them. But, as Bandes has also observed, not all relatives choose to make statements, or to make vengeful statements: some find consolation in silence or in forgiveness.<sup>136</sup> Because of the inherent complexity of the category of

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INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE 26 (Kate Diesfeld & Ian Freckleton 2003); see David B. Wexler, *International Network on Therapeutic Jurisprudence*, INT’L NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.law.arizona.edu/depts/upr-intj> (last visited Oct. 30, 2011).

131. It is useful to distinguish the concept of therapeutic jurisprudence from monetary compensation for pain and suffering, including the pain and suffering of bereavement. The tort system remains in place in most states to award damages to parents for stillbirths caused by medical or other forms of negligence. See, e.g., *Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004); *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988). Missing Angel Acts are aimed at a different aspect of grief: not its monetary value, but rather its assuagement through an expressive or therapeutic use of law. As one stillbirth mother put it, the birth certificate operates as “a sort of terrible consolation prize.” See also William Glaberson, *After Stillbirth, Courts Try to Put a Price on a Mother’s Anguish*, N.Y. TIMES, Aug. 23, 2001, at A1.

132. Gardner, *supra* note 52.

133. *Payne v. Tennessee*, 501 U.S. 808 (1991).

134. Christine M. Kennedy, *Victim Impact Videos: The New Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1029 (2008).

135. Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, LAW & CONTEMP. PROBS., Spring 2009, at 1.

136. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of*

“emotional needs,” it may be that law should proceed cautiously in such areas. In the case of victim impact evidence, Bandes argues that it is important at least to try to “untangle what one’s religion might urge, from what psychiatry might try to achieve, from what politics might dictate, and all of those from what the law can, should or even attempt to accomplish.”<sup>137</sup>

Should there be constraints on law’s compassionate instincts when grieving parents press lawmakers?<sup>138</sup> One reason for concern is the difficulty of determining the appropriate scope of legal compassion. At present U.S. birth certificate legislation is limited only to stillbirths (fetal death after twenty weeks). But many women experience grief following a miscarriage (pregnancy loss before twenty weeks) and some engage in mourning rituals similar to those that accompany stillbirth: naming the child, cherishing its possessions, and giving a place of honor to sonograms taken earlier in pregnancy.

If some women’s responses to miscarriage are not qualitatively different from responses to stillbirth, should birth certificates be issued here too?<sup>139</sup> There is already some suggestion of this kind of expansion. A Santa Clara County informational brochure on California’s Certificate of Stillbirth lists among its frequently asked questions, “If I had a miscarriage (under 20 weeks gestation) what are my options?”<sup>140</sup> The answer provided is simple and striking: “The disposition of a fetus of less than 20 weeks uterogestation does not require a fetal death/stillbirth certificate.”<sup>141</sup> But will a certificate be issued if the parents apply for one in the case of miscarriage? Indeed, some couples undergoing in vitro fertilization now express a preference for “disposal ceremonies” when thawing and discarding unused frozen embryos.<sup>142</sup> Should

*Government*, 27 FORDHAM URB. L.J. 1599, 1601–02 (2000).

137. *Id.*

138. We might want to distinguish legal responses to grieving from other forms of emotional distress, where in certain instances, the law has withdrawn mechanisms of redress. I have in mind the abolition of causes of action for wounded feelings occasioned by the break-up of a romantic relationship. Once vibrant, by the mid-twentieth century, suits for breach of promise to marry or seduction were abolished by “anti-heartbalm statutes.” See Nathan P. Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979, 986–96 (1935); see also MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 33–38 (1985); SASKIA LETTAMAIER, *BROKEN ENGAGEMENTS: THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800–1940* (2010); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996). One reason for the abolition was that discerning fault in the break-up of a romantic relationship was not really possible; in addition, women who brought such causes of action came to be regarded over time as gold-diggers rather than helpless victims.

139. The question of how late miscarriages should be treated with regard to burial, for example, has also arisen in Australia. See, e.g., Anne Barker, *Couple Demands Hospital Miscarriage Policy Changes*, ABC (June 14, 2007, 6:10 PM), <http://www.abc.net.au/pm/content/2007/s1951683.htm> (explaining that a seventeen-week miscarried fetus was given to parents in a plastic container to take home).

140. SANTA CLARA CNTY. PUB. HEALTH DEP’T, *supra* note 84.

141. *Id.*

142. Anne Drapkin Lyerly et al., *Fertility Patients’ Views About Frozen Embryo Disposition: Results of a Multi-institutional U.S. Survey*, 93 FERTILITY & STERILITY 499 (2010); see also Denise

the law recognize or in some way certify the existence of these earlier forms of prenatal life?

Here I reintroduce the distinction between private mourning and legal recognition of that mourning, or what might be characterized as the distinction between rites and rights. Some couples may want to bury their embryos, or to have them blessed, or to otherwise commemorate lives that did not come into being.<sup>143</sup> Different cultures offer still other rituals; certain Japanese sects, for example, provide shrine gardens where small effigies representing the soul of a stillborn, miscarried, or aborted fetus can be placed and honored.<sup>144</sup>

All these practices offer solace to those who have suffered a stillbirth or pregnancy loss. Yet they remain *private* rites and *private* responses. It is the demand that law participate in these practices that causes uneasiness, because at that point a delicate but important line has been crossed regarding official complicity with private feelings, spiritual needs, and personal rituals.

This uneasy juxtaposition of public and private reveals itself in the simple matter of vocabulary: what are “angels” doing in the title of public legislation? Certainly one understands the many levels of comfort that angel imagery may provide to grieving parents. As Layne discusses in her study of stillborn parent support groups, the angel-infant locates the infant in heaven, perhaps being cared for by other relatives; it suggests an eventual reunion in heaven; and, in an inverted form of nurturance, it continues the family relationship as the angel watches over its parents.<sup>145</sup>

Angels also suggest “an ongoing life which is taking place elsewhere” so that the stillborn child’s absence “is not the absence of non-existence but the absence of non-presence.”<sup>146</sup> The “missing” part of Missing Angels adds to this aura of presence; like soldiers missing in action or like missing children on

Grady, *Parents Torn Over Fate of Frozen Embryos*, N.Y. TIMES, Dec. 4, 2008, at A26 (describing how some IVF couples choose to have unused embryos “placed in the woman’s body at a time in her cycle when she would probably not become pregnant, so that they would die naturally”). The issue of grieving pregnancy loss becomes even more complicated in cases of blighted ova where there is an amniotic sac but no fetus. As Helen Keane has pointed out, “babies lost due to blighted ova are memorialized on pregnancy loss sites in the same way as other early miscarriages,” even though what is being mourned never existed biologically. Helen Keane, *Foetal Personhood and Representations of the Absent Child in Pregnancy Loss Memorialization*, 10 FEMINIST THEORY 153, 169 n.15 (2009).

143. For example, the Jewish rite of male circumcision, normally “an intimate and reinvigorating view of life’s beginning,” has been performed for a newborn who died shortly after birth. See Mark S. Litwin, *A Young Life Passes, and a Ritual of Birth Begins*, N.Y. TIMES, Jan. 24, 2011, at D5. As the physician/mohel who performed a posthumous circumcision poignantly explained, “This was [the parents’] only unsullied moment with [their son], all they might remember. With no life ahead to pin dreams on, [the infant] had paused for one intense and ephemeral instant before being wrapped in the ancient tradition of his ancestors.”

144. HELEN HARDACRE, *MARKETING THE MENACING FETUS IN JAPAN* (1997).

145. Linda Layne, *Of Fetuses and Angels: Fragmentation and Integration in Narratives of Pregnancy Loss*, 9 KNOWLEDGE & SOC’Y 29, 42–46 (1992).

146. Keane, *supra* note 142, at 160. Keane further suggests that the prominence of angel imagery in pregnancy loss culture draws from the “high levels of religiosity . . . and belief in God and the afterlife found in the United States.” *Id.* at 161.

milk cartons, the word suggests that the loved one is not gone, but out there somewhere. Finally, there is the consoling conceit, found also among poor mothers in Brazilian shantytowns, that God specially needed *this* infant and called it back—its death part of a larger heavenly scheme.<sup>147</sup> A favored saying within the stillborn community is “God must have needed another angel.” It is not hard to appreciate the comfort provided by this sort of religious and spiritual imagery. Yet states might pause before inscribing angels *in law* under a constitutional structure that separates civic from religious sentiment.<sup>148</sup>

Finally, there is the question of law’s competence to provide solace in these circumstances. As a the spokesperson for a state representative who voted against California’s first iteration of Missing Angels Legislation explained, “While [the representative’s] heart went out to anyone who lost a child to stillbirth, you can’t really vote legislation for grief and closure.”<sup>149</sup> In contrast, Missing Angel supporters believe that legislators *can* vote for closure. As the National Stillborn Society explains on its website, to deny a woman a stillborn birth certificate “is to tell her she is a failure. It is an open wound upon her soul that will never heal unless and until her sacrifice is recognized; just as live birth mothers are recognized.”<sup>150</sup> The prediction may be true for some women; consolation in grief would seem a deeply subjective and unassailable matter.<sup>151</sup>

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147. Layne, *supra* note 145, at 43 (“How exactly this life fits into God’s ‘special plan’ is usually left unexamined, simply taken on faith.”). See also NANCY SCHEPER-HUGHES, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* 416 (1998) (discussing the comfort to mothers “angel-babies”).

148. This is not to say that Missing Angel Acts are necessarily unconstitutional. Courts would be likely to hold that their primary purpose is not to advance religion but to provide solace to bereaved parents. Angels might be looked upon, like “In God We Trust” on coins or the Ten Commandments on courthouse walls, as conveying an essentially secular message. See, e.g., *Van Orden v. Perry*, 545 U.S. 677 (2005) (finding that the Ten Commandments merely acknowledge the role of religion in the Nation’s heritage); see also Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010).

149. Sara Cardine, *Helping Ease the Pain: New State Law Gives Grieving Parents a Record of Their Stillborn Child’s Birth*, STOCKTON REC., Feb. 8, 2008, [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20080208/A\\_LIFE/802080313/-1/A\\_NEWS](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20080208/A_LIFE/802080313/-1/A_NEWS).

150. *Why We Need a Certificate of Still Birth*, NAT’L STILLBIRTH SOC’Y, <http://www.stillnomore.org/goal2.htm> (last visited Oct. 30, 2011). Attaining closure for stillbirth is also used in marketing by malpractice attorneys. See Joseph Hernandez, *Can Pursuing a Medical Malpractice Claim for Stillbirth of a Baby Bring Closure to the Parents?*, ARTICLESNATCH.COM, <http://www.articlesnatch.com/Article/Can-Pursuing-A-Medical-Malpractice-Claim-For-The-Stillbirth-Of-A-Baby-Bring-Closure-To-The-Parents-/893543> (last visited Oct. 11, 2011) (“A monetary recovery can never make up for the loss families suffer under such circumstances but perhaps it can help them achieve a certain amount of closure.”). There are also Elizabeth McCracken’s observations after she and her husband eventually scattered the ashes of their stillborn son into the sea: “Finally we drove away. We had to get on the road; it was time for the rest of our lives. . . . But if you ask me whether this felt like closure, I’ll tell you what I have come to believe: Closure is bullshit.” MCCracken, *supra* note 8, at 103.

151. Another issue arises with regard to law’s competence to provide solace—the accuracy of the claim about what is at stake, what the law is meant to address. Missing Angel Acts are characterized as a legislative response to grief, yet parents of stillborn children may have other emotional responses, such as shame or anger or guilt that may motivate the desire for birth certificates.



But it is important to consider how providing *this* form of consolation may have costs, not to those who claim a direct benefit from stillborn birth certificates, but for those who may be harmed indirectly. In Section IV.E, I take up the implications of Missing Angel Acts for one such category, women seeking abortions.<sup>152</sup>

### C. Compulsory Reproductive Mourning

I move now from the influence of social practices on law to the influence of law on social practices, and here too a set of concerns emerges. The first concern is that as bereavement practices become officially entrenched, they may take on a prescriptive quality, providing a template for how one is supposed to respond to death. Consider, for example, the description of stillbirth in the Santa Clara County pamphlet informing women about California's Certificate of Still Birth: "This is not an early loss or abortion; rather, this is a baby who is born dead."<sup>153</sup> Quoting from the MISS Foundation, the publication then explains that the Certificate "extends much needed dignity and compassion to women who endure the death of the birth of their baby."<sup>154</sup>

This publication goes beyond informing women how to download the proper form or where to send their twenty-dollar fee. The statements define stillbirth as a particular kind of event and suggest what suffering mothers of stillborn children need (or are supposed to need) and how they can get it. Other practices may push in this same direction, as when hospitals send patients letters of condolence or provide them with mourning materials or with referrals to support groups. Yet these are private gestures, not official ones, and that distinction—the place of law in all of this—remains crucial to the concerns expressed here.

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See LAYNE, *supra* note 24, at 146 (discussing the common phenomenon of guilt and self-blame by stillbirth mothers). Legislators must take at face value the characterization of need as asserted by their constituents, but law may indeed be working above its pay grade in attempting to provide solace. I do not know how stillborn birth certificates issued in response to parental grief might work in relation to other affective states, such as anger or guilt. I note simply that legislative attempts to attend to emotional needs under these circumstances may be more complicated than they first appear.

152. In that regard, there is a final consideration regarding law's ability to provide solace. Dana Delger has powerfully argued that the law is incompetent to do what Missing Angel supporters want most and that is "to raise the dead." Dana Delger, Pudding, Rocketship, Violence and the Word: Examining the Relationship Between Stillbirth Birth Certificates and Abortion Through the Lens of Memoir (Dec. 18, 2009) (unpublished manuscript) (on file with author). Historically, parents believed that dead and unbaptized infants were sometimes raised from the dead: in certain regions of France, parents made pilgrimages to special shrines where they would lay their dead infant on an altar and pray for resuscitation. People would gather round to watch and as soon as a sign of life—a twitch or a breath—was spotted, priests would baptize the child, who would then immediately die again, now saved. See Jacqueline Simpson, *The Folklore of Infant Deaths: Burials, Ghosts, and Changelings*, in REPRESENTATIONS OF CHILDHOOD DEATH 12 (Gillian Avery & Kimberley Reynolds eds., 2000).

153. SANTA CLARA CNTY. PUB. HEALTH DEP'T, *supra* note 84. The pamphlet explains further that the baby "could even be a post-term baby [sic] who went to 42 gestational weeks and who might weigh more than ten lbs, but, who dies one minute prior to birth is considered 'stillborn.'"

154. *Id.*

This is not to suggest that parental grief following stillbirth is inauthentic, but rather that emotions may be shaped by formal expectations of a particular response. That is, one can be guided to expressions of grief and expectations of solace, just as one can be guided to expressions and expectations of vengeance and closure in the case of victim impact statements: “this must be what a loving survivor does at trial because the law has provided for it.”

We are certainly familiar with the normative force of cultural practices with regard to nonlegal procreative rites. Consider the parental display of sonograms. As one pregnant woman explained about showing her baby’s ultrasound scan to friends and co-workers, “I wouldn’t be a good mommy if I didn’t.”<sup>155</sup> But surely there is no single manner of good motherhood with regard to either pregnancy or to stillbirth. Many, perhaps most, women regard a stillbirth at twenty or more weeks as the death of their precious baby. But it is worth considering whether the source for that characterization properly belongs to law.<sup>156</sup> In this regard, we might locate Missing Angel Acts within the emerging field of “law and emotion,” the multi-disciplinary attempt to understand how “law reflects or furthers conceptions of how humans *are*, or *ought to be*, as emotional creatures.”<sup>157</sup>

A final consideration regarding guided expressions of grief concerns its sphere of influence. Historian Leslie Reagan has argued in the context of miscarriage that legitimating a movement that demands sorrow in response to involuntary pregnancy loss reinforces the view that voluntarily terminations should be treated similarly.<sup>158</sup> In the United States, various legal mechanisms

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155. Sallie Han, *Seeing the Baby in the Belly: Family and Kinship at the Ultrasound Scan*, in *THE CHANGING LANDSCAPE OF WORK AND FAMILY IN THE AMERICAN MIDDLE CLASS* 243 (Elizabeth Rudd & Lara Descartes eds., 2008). Indeed, as I discuss below, prenatal ultrasound images—their significance as proof of a real baby—may both deepen the grief that parents of a stillborn experience and help assuage it by providing a memento.

156. To some extent, the law has already introduced the idea of grief as an inevitable consequence of pregnancy loss, although it has done so in the context of intentional rather than involuntary pregnancy loss. In upholding Nebraska’s ban on late term abortions performed by intact D&E (dilation and extraction), the Supreme Court in *Gonzales v. Carhart* noted that:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

550 U.S. 124, 159–60 (2007).

157. Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy on an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119, 119, 131 (2006). *See generally* *THE PASSIONS OF LAW* (Susan Bandes ed., 2001). Missing Angel Acts are particularly interesting in that unlike statutes that attempt to *cultivate* specific emotions in people as a legislative goal—hope in the case of certain social welfare programs, or guilt in the case of mandatory ultrasound statutes—Missing Angel Acts are constituent driven and attempt to respond to the existing emotional state of grief. *See generally* Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 *CALIF. L. REV.* 319 (2007) (on hope); *see* Sanger, *supra* note 7 (on guilt).

158. Leslie J. Reagan, *From Hazard to Blessing to Tragedy: Representations of Miscarriage in*

have been put in place to make sure pregnant women grasp this point. For example, a growing number of states require women seeking an abortion to undergo ultrasound and be offered a look at the image of their fetus before they can legally consent to the procedure.<sup>159</sup> Mandatory ultrasound is intended as a sort of “preview” of grief, although there are almost no acceptable expressions of loss for the millions of women yearly<sup>160</sup> who voluntarily terminate a pregnancy. The contrast with the United Kingdom on this point—what counts as permissible grief—is striking. In explaining the scope of their services to grieving parents, guidelines from the British organization Stillborn and Neonatal Death Charity (“SANDS”) explain:

Your baby may have been stillborn or died during or soon after birth. He or she might have spent some time in a special care baby unit. It may be that your baby died at an earlier gestation or that you had to make the difficult decision to end your pregnancy. We offer support whenever a baby dies.<sup>161</sup>

Under this protocol, feelings of maternal loss upon the death of a baby or fetus from any cause, including abortion, are recognized and accepted as a matter of social practice, rather than intensified and politicized as a matter of law.<sup>162</sup>

#### *D. Demographic Integrity*

In 2007, New Mexico Governor Bill Richardson vetoed his state’s Missing Angel Legislation stating that “[h]aving two documents for a single vital event can lead to confusion and potential fraud, and is not sound policy.”<sup>163</sup> A similar concern was raised by the American College of Obstetrics and Gynecology in response to a 2002 version of California’s Missing Angel legislation: “Requiring a new type of vital record which collects the same information required by the fetal death certificate . . . creates more difficulty in attempting to accurately determine the number and causes of these types of fetal death.”<sup>164</sup> Such concerns about the integrity of public records are familiar; recall the nineteenth-century arguments that the absence of compulsory stillbirth registration compromised data collection and thwarted efforts to improve background social conditions.<sup>165</sup>

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*Twentieth-Century America*, 29 FEMINIST STUD. 356 (2003).

159. Sanger, *supra* note 7, at 375–79.

160. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005).

161. *Welcome to Sands*, SANDS: STILLBIRTH AND NEONATAL DEATH CHARITY, <http://www.uk-sands.org/About-Sands.html> (last visited Oct. 30, 2011).

162. One U.S. exception is A Heartbreaking Choice, an online support group for women who abort following a serious prenatal diagnosis. A HEARTBREAKING CHOICE, <http://www.aheartbreakingchoice.com> (last visited Oct. 30, 2011).

163. Letter from Bill Richardson, *supra* note 59.

164. ASSEMBLY COMM. ON HEALTH, *supra* note 54.

165. Thomas, *supra* note 38, at 50.

To be sure, the registration of stillbirths has always been complicated, in part because even the fact of a stillbirth was not always clear. To secure an infant's salvation, baptisms were sometimes rushed so that a questionable birth was counted as a live one.<sup>166</sup> Medical evidence on when death occurred was often contested. Moreover, there has never been uniformity in what gestational period defines stillbirth.<sup>167</sup> This has been especially problematic in the United States where each state determines the definition of stillbirth. Most recently, the World Health Organization has created a new category called "perinatal death" to include deaths from twenty weeks gestation to one week after birth.<sup>168</sup> From a public health perspective, this muddling is troublesome. As demographer Robert Woods explains:

When the distinction between fetal death and infant death is blurred it will be difficult to ascertain the true level of mortality and, since the broad picture of morbidity is often judged via the absence of death, the health of a society, its improvement, and comparative position cannot be assessed with any certainty.<sup>169</sup>

There may be more subtle public health implications of collapsing the categories of prenatal death, or of homogenizing responses to different forms of prenatal death. Leslie Reagan has argued that, in the context of miscarriages, while the emphasis on maternal grief may seem empathic and apolitical, the story is more complicated: "Public fixation on miscarriage as a personal tragedy rather than a public-health problem . . . deflects attention from . . . inequities in health care, education, and income that produce particularly high infant-mortality rates among African Americans."<sup>170</sup> Similar correlations appear in modern stillbirth statistics,<sup>171</sup> and perhaps public awareness of stillbirth through Missing Angel Acts will encourage research on its underlying causes. Indeed, the MISS Foundation has expanded its mission to include providing support for research and education on stillbirth.<sup>172</sup>

Of course, even in Missing Angel Act states, stillbirths must also be recorded for purposes of vital statistics as fetal deaths, whatever other certificate the state may choose to issue. Perhaps then, there is little risk of

166. WOODS, *supra* note 3, at 43 (noting that in nineteenth-century France, "emergency baptisms" by midwives and doctors on fetuses in utero or during parturition may have led to the overcounting of live births).

167. See, e.g., INT'L COMM'N ON CIVIL STATUS, CIVIL STATUS AND PERINATAL DEATH IN ICCS MEMBER STATES, (1999), available at <http://www.ciec1.org/Etudes/DecesPerinatal/CIECDecesTraductionAngl.pdf> (comparing definitions among member states).

168. Robert M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, AM. J. OBSTETRICS & GYNECOLOGY 434 (2007).

169. WOODS, *supra* note 1, at 1.

170. Reagan, *supra* note 158, at 370.

171. Willinger et al., *supra* note 44, at 1 (reporting that African American women have 2.2-fold increased risk of stillbirth compared to white women).

172. *Prevention and Research*, M.I.S.S. FOUNDATION, <http://www.missfoundation.org/family/research/prevention.html> (last visited Oct. 30, 2011).

statistical confusion. Stillborn children will not be mistaken for children who were born alive for administrative or actuarial purposes. Oregon, for example, requires the number from the fetal death certificate to be included on the Commemorative Certificate of Stillbirth.<sup>173</sup>

Yet, as anthropologist Susan Greenhalgh has observed, “the process of making up persons often brings surprises, for the forms and politics of personhood that emerge may be quite different from those intended by the bureaucrats in the state.”<sup>174</sup> One such surprise, from China, may be useful in thinking about the consequences of official categories attached to birth. In the late 1970s, China instituted a “one-couple, one child policy” under which having only one child was encouraged, two the strictly enforced upper limit, and three “resolutely prohibited.”<sup>175</sup> Compliance was largely enforced in the cities, but in rural areas peasants resisted and had surplus children. These children now make up China’s “black population,” a cohort of at least one million persons whose births were illegal and so were not registered with the state.<sup>176</sup> Demographically, the black population is “uncounted and uncountable;”<sup>177</sup> practically, its members, because illegal persons, are entitled to no state services.<sup>178</sup>

The two cases—the black population and the Missing Angels—are uncanny mirror images of one another. The black population exists in fact but their births go unrecorded. In contrast, stillbirths are officially recorded but the babies themselves do not exist as living persons. Greenhalgh concludes that, although some of the demographic effects of China’s family planning program have been carefully studied, by taking the state’s classifications of persons as “givens,” population specialists “may have missed important categories of personhood that are rendered invisible by (even as they are simultaneously produced by) the state discourse.”<sup>179</sup>

As with the “black population,” it may be possible to miss the work that Missing Angel Acts do, not so much by skewing demographic accuracy but rather by establishing and defining basic categories of being, categories which then acquire social meaning. Compulsory registration of stillbirths in the early twentieth century established stillborn infants “as a separate and important entity,” largely in the interest of public health.<sup>180</sup> Yet critical demographers

173. Commemorative Certificate of Stillbirth, OR. ADMIN. R. 333-011-0200 (2006), available at [http://arcweb.sos.state.or.us/pages/rules/oars\\_300/oar\\_333/333\\_011.html](http://arcweb.sos.state.or.us/pages/rules/oars_300/oar_333/333_011.html).

174. Susan Greenhalgh, *Making Up China’s “Black Population,”* in CATEGORIES AND CONTEXTS, *supra* note 39, at 148, 149.

175. *Id.* at 160.

176. *Id.* at 165. Greenhalgh observes that although China’s one-family, one-child policy was “[c]reated to modernize the population, [it] has had the perverse effect of creating a substantial, albeit unenumerated, class of unplanned, distinctly ‘unmodern’ persons.” *Id.*

177. *Id.* at 161.

178. *Id.*

179. *Id.* at 166.

180. Davis, *supra* note 35, at 630.

now recognize “the immanence of change in the content and meaning of even the most basic categories.”<sup>181</sup> Stillborn birth certificates cannot help but influence how stillborn infants are understood, and what the categories of birth, viable fetal life, and prenatal death mean. With this in mind, it is time to turn to the relationship between Missing Angel Acts and other laws pertaining to the life and death of unborn children.

### *E. Stillbirth and Abortion: Commemorating Life Before Birth*

Might stillborn birth certificates have consequences for the subsequent regulation of abortion? Supporters of legal abortion have been concerned that issuing certificates to children who have never lived may serve as yet another legal marker equating fetal life with that of born persons and that this will, sooner or later, play its part in the recriminalization of abortion.<sup>182</sup> The concern is that Missing Angel legislation, however compassionately conceived, deepens cultural familiarity with the idea of prenatal death as the loss of a *child*. The certificate demonstrates that the stillborn child is loved, mourned, and should be recognized in the same ways as any other child.

Wariness about stillborn birth certificates arises against the background of a comprehensive set of federal, state, and municipal laws aimed at regulating abortion out of existence.<sup>183</sup> Part of the strategy to make abortion hard to get and hard to choose has been to define fetuses and embryos as infants, children, persons, and victims throughout the law. Examples include the Unborn Victims of Violence Act,<sup>184</sup> the Born-Alive Infants Protection Act,<sup>185</sup> and federal regulations designating fetuses as children as the means of providing pregnant women with prenatal care.<sup>186</sup> South Dakota pulls no punches in this regard: it requires doctors to inform patients that an abortion “will terminate the life of a whole, separate, unique, living human being”<sup>187</sup> and defines a “human being” as “an individual living member of the species of *Homo sapiens*, including the unborn human being during the entire embryonic and fetal ages from

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181. Simon Szreter et al., *Contextualizing Categories: Towards a Critical Reflexive Demography*, in CATEGORIES AND CONTEXTS, *supra* note 39, at 3, 7.

182. See Allison Stevens, *The Politics of Stillbirth*, AM. PROSPECT (July 16, 2007), [http://prospect.org/cs/articles?article=the\\_politics\\_of\\_stillbirth](http://prospect.org/cs/articles?article=the_politics_of_stillbirth).

183. As one federal appellate judge put it, “[I]n many places, burdensome regulations have made abortions effectively unavailable, if not technically illegal. It is this type of regulation—micromanaging everything from elevator safety to countertop varnish to the location of the janitors’ closets—that is challenged in this case.” *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Envtl. Control*, 317 F.3d 357, 371–72 (4th Cir. 2002) (King, J., dissenting) (upholding various state abortion regulations).

184. Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2006).

185. Born-Alive Infants Protection Act, 1 U.S.C. § 8 (2006).

186. State Children’s Health Insurance Program, 67 Fed. Reg. 61,955, 61,974 (Oct. 2, 2002) (revising the definition of *child* to mean “an individual under the age of 19 including the period from conception to birth”).

187. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2010).

fertilization to full gestation.”<sup>188</sup> *Roe v. Wade* may have removed the language of homicide or murder as a matter of constitutional law, but the statutory identification of all prenatal life as human beings is meant to come as close to that characterization as possible. This poses a direct challenge to a premise of the decision in *Roe* that “the unborn have never been recognized in the law as persons in the whole sense.”<sup>189</sup>

With stillborn birth certificates, the rhetorical work is done not by equating the word “child” or “person” with “fetus” but rather by focusing on the concept of birth. It is the fact of birth—issuing forth dead or alive—that elevates the stillborn child and compels his recognition in terms that are socially familiar. The power of the word “birth” in the context of fetal death has been seen in the case of abortion late in pregnancy—deliberately called by the invented term “partial birth abortion” by pro-life groups in the United States and subsequently banned by Congress by the Partial Birth Abortion Ban Act in 2004.<sup>190</sup>

My point is not that Missing Angel supporters are fronting for a pro-life agenda.<sup>191</sup> The MISS Foundation adamantly distances itself from the debate and urges supporters not to

use any language about “fetal rights” or other vernacular which may stir up discussion. . . . Our agenda is not one that challenges reproductive freedom. . . . We recommend that you do not state your personal opinion in any meeting and that you refrain from using any type of abortion rhetoric, either for or against, in your meetings and letters.<sup>192</sup>

Indeed, recently the MISS Foundation has argued for Missing Angel Acts in pro-choice terms: “Recognizing the birth of [stillborn] babies . . . is what is right; it is pro-woman; it is pro-choice.”<sup>193</sup>

188. *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

189. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

190. *Partial Birth Abortion Ban Act*, 18 U.S.C. § 1531 (2003). For a chronology of how the nonmedical term “partial birth abortion” came into strategic being and use during the 1990s, see Anne W. Esacove, *Dialogic Framing: The Framing/Counterframing of “Partial-Birth” Abortion*, 74 SOC. INQUIRY 70, 74–92 (2004).

191. When pro-life organizations such as the National Right to Life want to get involved in a legislation that may on first glance seem distant from the concerns of abortion, they know how to do so and are direct about taking appropriate credit. A good example is the passage nationwide a decade ago of “safe haven laws” designed to prevent incidents of “dumpster babies.” See Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

192. M.I.S.S. FOUNDATION, *supra* note 45. To be sure, there may be some link between pro-life sentiments and a history of reproductive difficulty. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 151 (1984) (reporting that one-third of pro-life activists interviewed came to the issue after experiencing their own “problem of parenthood: an inability to conceive, a miscarriage, a newborn child lost to congenital disease or defect, or an older child lost to childhood illness”).

193. See *MISS Foundation—Missing Angels Bill PSA*, *supra* note 90. I take the use of “pro-choice” here to mean that a woman may apply for a stillborn birth certificate if she so desires; the certificates are not issued automatically under the authorizing legislation.

Yet despite the common vocabulary, it is not surprising that there is tension between the two groups. Parents who advocate for stillborn birth certificates want their stillborn children—beings who died before birth—acknowledged as children. Those who support legal abortion necessarily resist characterizing even late term fetuses as children, at least as a matter of law. Thus, however discrete the intended purpose, there is concern that Missing Angel Acts might be used to thwart legal access to abortion. Some opponents have been concerned with the cultural message of the legislation—the implicit relationship between acknowledging birth and establishing fetal personhood. Others have more practical concerns. For example, opponents to proposed legislation in California feared that the birth certificate could be used to require the reporting of legal abortions performed after twenty weeks gestation and therefore interfere with patient privacy.

State legislators have sought to disaggregate stillborn birth certificates from the on-going politics of abortion. As the sponsor of Rhode Island's bill stated, "At this time, I'm going to ask both sides to stand down."<sup>194</sup> As a substantive component of "standing down," a number of drafting precautions have been taken to distinguish stillborn death from elective abortion in Missing Angel Acts. For example, most states specify that stillborn birth certificates can be issued only in cases of "unintended," "spontaneous," or "naturally arising fetal demise."<sup>195</sup> Many clarify that the certificate "shall not constitute proof of a live birth,"<sup>196</sup> and that it cannot be used "to secure any right, privilege or benefit in this State."<sup>197</sup> To address the concerns of past or potential abortion patients that the certificates could be used to "out" them, states have provided that parents alone and no one else may request a stillborn birth certificate. In response to pro-choice concerns raised during the enactment process, New York replaced references to "stillborn child" with the word "fetus."<sup>198</sup> Finally, California explicitly affirms women's existing rights to reproductive privacy.<sup>199</sup>

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194. Steve Peoples, *At the Assembly—House Approves Issuing Birth Certificates for Stillborn Babies*, PROVIDENCE J., May 2, 2007, at B1.

195. See, e.g., CAL. HEALTH & SAFETY CODE 103040.1(a) (Deering 2011) ("naturally occurring intrauterine fetal death"); MO. REV. STAT. §§ 193.165, 193.255.7 (2004) ("spontaneous"); TEX. HEALTH & SAFETY CODE §§ 192.0022(a)(1), (b)(1) ("unintended").

196. S.B. 3111B, 234th Leg., Reg. Sess. (N.Y. 2011) (to be codified at N.Y. PUB. HEALTH LAW § 4160a) (defining stillbirth as "the unintended intrauterine death of a fetus that occurs after the clinical estimate of the twentieth week of gestation").

197. A.B. 3, 76th Leg., Reg. Sess. (Nev. 2011) (prefiled).

198. Compare A.B. 1731, 232d Leg., Reg. Sess. (N.Y. 2009) ("[C]ertificate will be provided to the parent or parents of a stillborn child."), with S.B. 3111B, 234th Leg., Reg. Sess. (N.Y. 2011) ("The Registrar . . . shall issue a certificate of still birth to the parent or parents named on [the] fetal death certificate."); see also Letter from Assemblywoman Sandy Galef to Assembly colleagues (June 1, 2011) (encouraging members to co-sponsor the new "Certificate of Stillbirth" legislation because the language change resolved pro-choice concerns).

199. CAL. HEALTH & SAFETY CODE 103040.1(k). Such compromises are not without resistance from pro-life organizations. Two groups, the California Pro-Life Council and the Capitol Resource Center, withdrew their support for the California Missing Angel bill after the amendment



The revised provisions, working in concert, are meant to secure the recognition of stillborn babies without extending them full legal personhood. Using the language of therapeutic jurisprudence, the statutory compromises might be seen as acknowledging accepted limits of the therapeutic project: law attempting to “bring about healing” so long as the attempts are “consistent with other values.”<sup>200</sup> In the Missing Angel context, the other values are the constitutional protections around the basic right to choose abortion.

Yet concern about Missing Angel Acts remains because once a category or status is established, it may take on a life of its own. Legal status is a common—indeed an important—mechanism for the distribution of value and goods in a society, and over time more substantive benefits may attach to that status. For example, over time posthumous citizenship became a source of immigration benefits for kin in a kind of “rights creep,” as the meaning, use, and entitlements of that status expanded.<sup>201</sup>

There has already been a gesture toward this kind of expansion in the context of stillbirth. Four Missing Angel states—Arizona, Alaska, Indiana, and Missouri—have gone beyond issuing birth certificates and now provide parents with a dependent tax deduction in the year of the stillborn’s birth.<sup>202</sup> The sponsors of such legislation have explained that the deduction will provide parents with funds they might use toward funeral expenses and that this might help to soften the blow they have sustained.<sup>203</sup>

#### CONCLUSION

Stillbirth, like the death of other children within a family, is a deep, perhaps unfathomable loss. Elizabeth McCracken tells readers right from the

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recognizing women’s reproductive rights was added. A spokesman argued that the amendment would affirm abortion on demand and was tantamount to an affirmation of *Roe v. Wade*. Gardner, *supra* note 52 (“In the [Pro-Life Council] view, no pro-life lawmaker can, in good conscience, vote for this radical pro-abortion hijacking of an otherwise decent bill.”). And in 2009, the New York State chapter of the National Organization of Women formally opposed what they called New York’s “So-called ‘Missing Angel Act’” which “[u]nder the guise of providing comfort to women . . . poses a deliberate entree to governmental control of women’s pregnancies.” *NOW—New York State Oppose Memo*, NAT’L ORG. FOR WOMEN (Mar. 24, 2009), [http://www.nownys.org/leg\\_memos\\_2009/oppose\\_a1731.html](http://www.nownys.org/leg_memos_2009/oppose_a1731.html). Family Planning Advocates of New York State, which represents New York’s Planned Parenthood Affiliates, later endorsed the legislation, calling it “medically accurate” and “an important step towards recognizing the pain parents experience in losing a wanted pregnancy.” Letter from M. Tracey Brooks, President and CEO of Family Planning Advocates of New York State, to Sandra Galef, New York Assemblymember (June 6, 2011) (on file with author).

200. Winick, *supra* note 130.

201. See *N-644, Application for Posthumous Citizenship*, *supra* note 96.

202. *MISSING ANGELS Bill (MAB) Legislation—State Chart*, *supra* note 6. In addition, the City Council of Wasilla, Alaska recently passed a resolution approving a one-time tax deduction for the birth of a stillborn child. Wasilla City Council Res. No. 06-09, (Alaska 2006), *available at* <http://www.cityofwasilla.com/ftp/legislation/resolutions/2006%20resolutions/06-09reso.pdf>.

203. See *Governor Signs Bill on Tax Break for Stillborn Children*, ASSOCIATED PRESS, May 10, 2004, *available at* <http://www.missfoundation.org/pressreleases/index.html>. The Arizona deduction is \$2,300. *Id.*

start: "A child dies in this book: a baby. A baby is stillborn. You don't have to tell me how sad that is. It happened to me and my husband, our baby, a son."<sup>204</sup>

How families mourn their dead is a profoundly personal matter. In contrast to practices in past centuries, the death of a stillborn child is now understood as an event worthy of social recognition. Hospitals and medical staff, religious and spiritual communities, families and support groups, the helping professions, and even commercial enterprises offer an array of bereavement rituals that seek to acknowledge and honor stillborn babies and often their parents as well. In this Essay, I have posed the question of whether law should be added to this list through its provision of an additional mechanism of consolation, the stillborn birth certificate.

Missing Angel Acts seek to expand the traditional significance of a birth certificate from marking a live birth to marking the birth of a viable infant who was born dead. Other countries, including many in Western Europe, provide for stillborn certificates—though not stillborn *birth* certificates—straightforwardly and without the contentious political concerns that accompany legislation in the United States having to do with fetal life or death.<sup>205</sup> In France, for example, parents may request that the name and birth date of a stillborn child (*un enfant né sans vie* or a "child born without life") be recorded on the *état civil*, the official record of all civilly documented events—birth, parentage, marriage, and so on—in a person's life.<sup>206</sup>

Some have argued that the inability to provide similar documentation in the United States results directly from the polarized and ever-present politics that surrounds abortion. There is an accusatory hint of this in the MISS Foundation's promotional video, in which Joanne Cacciatore states that the enactment of Missing Angel Acts "should not fall victim to anyone's political agenda."<sup>207</sup> Indeed, when one hears the appeals of bereaved parents, it seems churlish to oppose stillborn birth certificates on grounds connected to the regulation of abortion, especially when the statutes themselves address the most worrisome concerns: the Acts do not apply to voluntary termination of pregnancy; the state does not issue the certificates automatically but only by parental request; the legislation does not refer to the stillborn child as a child or unborn child or baby; and the certificates may not be used as proof of a live birth. These are among the statutory provisions that distinguish the legal treatment of the involuntary termination of pregnancy that is stillbirth from the legal treatment of abortion and of live births.

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204. MCCRACKEN, *supra* note 8, at 16.

205. See INT'L COMM'N ON CIVIL STATUS, *supra* note 167. The stillbirth is recorded in the *livret de famille* section.

206. See *Mise à jour du livret de famille*, SERVICE-PUBLIC.FR, <http://vosdroits.service-public.fr/F18910.xhtml> (last visited Oct. 30, 2011).

207. MISS Foundation—Missing Angels Bill PSA, *supra* note 90.

Yet it is worth pausing one last time to consider why those who defend legal abortion still have some special concerns about Missing Angel Acts, and why these concerns may be especially difficult for Missing Angel advocates to understand. Taking up the latter question first, the two forms of harm—being denied the exquisitely prized birth certificate on the one hand, and some sort of future, possible, trickle-down erosion of *Roe* on the other—may register as incommensurable forms of loss. The death of a wanted baby late in pregnancy is stingingly real; in contrast, the loss for Missing Angel skeptics appears if not remote, then at least speculative. It may also be that, for women who have lost a child to stillbirth, the “loss” to women who do not want to become mothers (or to have additional children for those who already are mothers) registers not as a loss at all but something more like ingratitude.

There is also the matter of causation, which returns to the nature of the concern as well as to why that concern may seem remote or exaggerated. In other instances where enacted legislation benefits one group at a cost to another, the relation between benefit and cost is often more direct. If public money is allocated for a new prison, the new school that I may prefer will not be built and the accounting relation between the two is relatively clear. With Missing Angel Acts, the causal relation between stillborn birth certificates and oppressive abortion regulation is much less direct: the certificates themselves are not anti-abortion measures. Rather, they contribute to a thicker mix of cultural signs and coordinates in which fetal and embryonic life are claimed as full human persons, not just through specific pro-life legislation but through a wider range of signals and cues.

Some, but not all, of these signals and cues are legislative, such as the specific pro-life legislation designating fetuses as children for purposes of insurance coverage. Others are embodied in how embryonic and fetal life is talked about more generally, and in areas that would seem to have little to do with the concerns of either pro-choice or Missing Angel advocates, such as Hurricane Katrina. Consider the opening of philosophers Robert George and Christopher Tollefsen’s book *Embryo*. The authors describe how little Noah Markham, “one of the *youngest* residents of New Orleans to be saved from Katrina,” nearly drowned in the hurricane’s flood waters, but was rescued by emergency responders.<sup>208</sup> It turns out that at the time of his rescue Noah was an embryo floating along with 1400 other frozen embryos in a canister of liquid nitrogen.<sup>209</sup> The authors conclude that if the responders “had never made it to Noah’s hospital . . . there can be little doubt that the toll of Katrina would have been fourteen hundred human beings higher than it already was.”<sup>210</sup>

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208. ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* 2 (2008).

209. *Id.*

210. *Id.*

Whether one has doubts or not, my point here is simply that the issue of when prenatal life counts as a “human being” for purposes of being treated as the moral and legal equal of postnatal persons is part of what Americans continue to talk and argue about. This is the larger context in which Missing Angel Acts participate: the slow mediation of law through cultural practices. As we know, law and culture are in constant interplay with one another. Beliefs and behaviors, such as bereavement practices, influence law, as the enactment of Missing Angel Acts makes clear. The law in turn influences behavior and so it goes, in what one scholar has called “the near-total entanglement of law and culture.”<sup>211</sup> Just as the certificate becomes an artifact, so too does the statute itself.

The issue then is whether there are reasons to hesitate before blurring traditional markers between life and death and between private and public mourning *as a matter of law*. And if we do blur these lines, how should we conceptualize and measure the costs of doing so? Proponents and skeptics measure these costs quite differently and I have tried to explain why this is so. While there may be no reconciling the two positions, perhaps we should return to the carefully worded statement by the Family Planning Advocates of New York State (the “FPA”), the organization that represents New York’s Planned Parenthood affiliates and family planning centers. On June 6, 2011, the FPA wrote a letter in support of New York’s Missing Angel Act—support that, according to the bill’s sponsor, made enactment possible after eight years of legislative wrangling.<sup>212</sup> The FPA stated that it “[did] not have any objections to this bill and believes this legislation is an important step towards recognizing the pain parents experience in losing a wanted pregnancy.”<sup>213</sup> The statement importantly qualifies the term “pregnancy” by distinguishing between wanted and unwanted pregnancies and respecting mothers’ desires with regard to both. Perhaps it is enough to throw down a marker (this Essay) noting this difference as meaningful for the application of law and hoping for some deeper consideration in consequence.

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211. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 56 (2001).

212. *Bill Passed to Provide Certificates for Stillborn Babies*, JOURNAL NEWS, June 29, 2011, <http://www.lohud.com> (link broken), available at N.Y. LEG. SERV., LEGISLATIVE HISTORY S. 3111-B (2011).

213. Letter from M. Tracey Brooks, *supra* note 199.

