COMMENT

Miscarriage of Justice: Why All States Should Recognize the Parental Right to Bury a Miscarried Child

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* Loyola University Chicago School of Law, J.D. expected May 2015; Miami University, Oxford Ohio, B.A., 2012. I owe a huge amount of gratitude to the Thomas More Society, where, as a legal intern, I first became aware of the gaps in many states’ laws regarding the burial of miscarried children and which supported me in my efforts to research and write this piece, as well as to the “Robinson” family, whose personal tragedy touched my heart and inspired this article. Thank you also to Jill McNamara, whose experience as a bereavement specialist enriched my thinking and played a large role in the passage of miscarriage burial legislation in my home state of Indiana. Last but certainly not least, I thank my parents, Kevin and Barbara Cook, who raised me to understand that all life is a gift from God, no matter how big or small.
I. INTRODUCTION

Sharon Robinson tragically miscarried on a December morning, giving birth in her home to a lifeless baby boy. At fourteen weeks, the child fit perfectly in her hands, and she cradled him as she waited for the ambulance to arrive. Upon arriving at a New York state hospital, Sharon and her husband, James, requested their son’s body, explaining that they wanted to bury him. The attending nurse responded that they were “looking for it” and referred them to another nurse, who directed them to a hospital supervisor. The hospital pointed to the ambulance personnel, while the ambulance personnel pointed to the hospital. After more than a month without a clear explanation as to what became of their son’s body, the Robinsons filed a notice of claim with the New York courts. Although they would never bury their child, they wanted to prevent other families from experiencing the same loss.

Miscarriage happens every day. According to a 2006 Centers for Disease Control (“CDC”) report, more than one million children die in utero in the United States each year, with

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1 Telephone Interview (June 2013). These names have been changed to protect the privacy of the individuals. At fourteen weeks gestation, an unborn child’s sex is apparent, his arms have reached nearly full length, and his neck has become more defined. See Fetal Development: The second trimester, MAYO CLINIC, (last visited November 4, 2013) http://www.mayoclinic.com/health/fetal-development/PR00113.
2 Id.
3 Telephone Interview (June 2013). Upon arriving at the hospital, Ms. Robinson overheard a conversation between the emergency medical technician (“EMT”) and emergency room nurse, in which the EMT said, “I don’t just want to leave this here.” Id. Based on this conversation, the Robinsons believe that their son’s body arrived at the hospital, but that either the EMT or the ER nurse disposed of the child’s body as medical waste. Id. This belief is not far-fetched. See Michelle Martin, When a baby dies: One couple’s experience helps others know they can bury their child after a miscarriage, CATHOLIC NEW WORLD, July 5, 2009, available at http://www.catholicnewworld.com/cnwonline/2009/0705/1.aspx?a=print (“‘The nurse who gave us the form was almost apologetic that she had to ask [what should be done with the remains of the child],’ [the father of a miscarried child] said. ‘She said just to let the hospital take care of it. She said, ‘It’s medical waste. That’s what people always do.’”).
5 Telephone Interview (June 2013).
6 Id. The Robinsons’ were unable to retain counsel and therefore rescinded their claim. Id.
7 See MARIAN F. MACDORMAN ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION NATIONAL VITAL STATISTICS REPORTS, FETAL AND PERINATAL MORTALITY, UNITED STATES 1 (2006) (reporting 2006 fetal and
the vast majority of deaths—like baby Robinson’s—occurring before the twentieth week of gestation. Although the CDC and many state statutes use the term “fetal death” to describe an in utero death at any stage of pregnancy, the CDC, World Health Organization, and most states only require the collection of mortality data after an unborn child has matured to at least twenty gestational weeks, the approximate age of viability. The terms “miscarriage” and “stillbirth,” though often used interchangeably in lay conversation, are legally distinct. The term

perinatal mortality data in the United States, available at http://www.cdc.gov/nchs/data/nvls/nvls60/nvls60_08.pdf [hereinafter CDC Fetal and Perinatal Mortality]. The CDC estimated that there are more than one million in utero deaths in the United States each year. Id. In 2006, 25,972 of those deaths were stillbirths, meaning that death occurred after at least twenty gestational weeks. CDC Fetal and Perinatal Mortality at 1; see infra notes 11–14 (giving an explanation of the difference between in utero deaths of greater than and less than twenty gestational weeks, known respectively as stillbirths and miscarriages). By subtracting 25,972 from one million and dividing the result by the number of days in a year, one estimates that approximately 2,668 miscarriages occur per day in the United States.

8 CDC Fetal and Perinatal Mortality, supra note 7, at 1. The number of miscarriages in the United States per year is actually higher than most estimates due to the fact that many miscarriages occur before a positive pregnancy test. See Miscarriage Statistics, Hope Xchange (2004), http://www.hopexchange.com/Statistics.htm (stating that if miscarriages that occur before a positive pregnancy test are included, some estimate that forty percent of all conceptions result in in utero death).


11 However, to many parents who experience such a loss, the distinction between a “miscarriage” and a “stillbirth” is wholly irrelevant. John Patton, How to Mourn with the Parents of Stillborn and Miscarried Children, The Gospel Coalition Blog (Sep. 19, 2013, 12:01 AM), http://thegospelcoalition.org/blogs/tgc/2013/09/19/how-to-mourn-with-the-parents-of-stillborn-and-miscarried-children/?fb_action_ids=10153253648040613&fb_action_types=og.likes&fb_source=other_multiline&action_object_map=%7B%2210153253648040613%22%3A%22%A25005640926385%7D&action_type_map=%7B%2210153253648040613%22%3A%22%5D&action_ref_map=[].

Was she stillborn, or was this just a miscarriage? Just a miscarriage? Medically speaking a child is considered stillborn in the United States once she reaches 20 weeks and beyond in the womb.
“miscarriage” generally refers to a child who has died in utero prior to twenty gestational weeks, and the term “stillbirth” refers to a child who has died in utero at or after reaching twenty gestational weeks. However, because gestational weeks are sometimes difficult to determine with precision, some states use a weight criterion instead.

Regardless of the indicia used, the measurement affects more than a healthcare practitioner’s duty to record the death. To parents like the Robinsons, the twentieth week of gestation represents the seemingly arbitrary time at which they would have gained the legal right to bury their son. Although a minority of states require hospitals to notify parents that they can

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12 ROBERT WOODS, DEATH BEFORE BIRTH: FETAL HEALTH AND MORTALITY IN HISTORICAL PERSPECTIVE 1 (2009). However, not all states make the distinction between miscarriage and stillbirth. For example, Delaware uses the term “stillbirth” to refer to all in utero deaths, regardless of the unborn child’s gestational age or weight. DEL. CODE ANN. tit. 16, § 3101 (West 1997). Pennsylvania and Utah use a measurement of sixteen weeks gestational age instead of twenty weeks. 35 PA. STAT. ANN. § 450.105 (West 2012); UTAH CODE ANN. § 26-2-2 (West 2012).

13 ARIZ. REV. STAT. ANN. § 36-329 (2004) (twenty completed weeks or 350 grams); ARK. CODE ANN. § 20-18-603 (West 1995) (350 grams or twenty completed weeks); DEL. CODE ANN. tit. 16, § 3124 (West 1992) (350 grams or twenty completed weeks); GA. CODE ANN. § 31-10-1 (West 2011) (twenty completed weeks or 350 grams); IDAHO CODE ANN. § 39-241 (West 2007) (twenty completed weeks or 350 grams); IOWA CODE ANN. § 136A.2 (West 2004) (twenty completed weeks or 350 grams); KAN. STAT. ANN. § 65-2401 (West 1995) (350 grams); KY. REV. STAT. ANN. § 213.096 (West 1990) (twenty completed weeks or 350 grams); LA. REV. STAT. ANN. § 40:49 (2010) (twenty weeks or 350 grams); MD. CODE ANN., HEALTH-GEN. § 4-213 (West 1997) (twenty weeks or 250 grams); MASS. GEN. LAWS ANN. ch. 111, § 202 (West 1978) (twenty weeks or 350 grams); Mich. Comp. Laws ANN. § 333.2803 (West 2013) (twenty weeks or 400 grams); CODE MISS. R. 15-5-85:5.2 (twenty weeks or 350 grams); MO. ANN. STAT. § 193.165 (West 2004) (twenty weeks or 350 grams); MONT. CODE ANN. § 50-15-403 (2001) (350 grams or twenty weeks); N.H. REV. STAT. ANN. § 5-C:1 (West 2009) (twenty weeks or 350 grams); N.M. STAT. ANN. § 24-14-22 (West 1981) (500 grams); OR. REV. STAT. ANN. § 432.333 (West 1997) (350 grams or twenty weeks); S.C. CODE OF REGULATIONS R. 61-19-21 (twenty weeks or 350 grams); TENN. CODE ANN. § 68-3-102 (West 2010) (twenty weeks or 350 grams); TEX. HEALTH & SAFETY CODE ANN. § 674.001 (West 2007) (350 grams or twenty weeks); VT. STAT. ANN. tit. 18, § 5222 (West 1973) (twenty weeks or 400 grams); W. VA. CODE ANN. § 16-5-1 (West 2006) (350 grams or twenty weeks); WIS. STAT. ANN. § 69.18 (West 2008) (twenty weeks or 350 grams); WOODS, supra note 12, at18-22.

14 Id. 15 See Robin Eisner, Should Parents Bury Miscarriage Remains?, ABC NEWS, Oct. 26, 2013, available at http://abccnws.go.com/Health/story?id=117867 (“[I]n the majority of states, contents of the womb prior to 20 weeks of gestation would be handled like medical waste. Hospitals incinerate the material as they would tumors or gallstones.”); see also Martin, supra note 3 (“Generally, such issues arise when a baby is miscarried before 21 weeks gestation. After 21 weeks, babies who die are released to funeral directors like other people.”).

15 Telephone Interview (June 2013).
control the burial or cremation of remains after any stage of a pregnancy, most states only give parents this choice after twenty weeks of gestation.\footnote{16 See Eisner, supra note 14.}

This Comment discusses a parent’s right under state law to determine the disposition of a miscarried child and how the majority of states are providing either no or inadequate protection to such parents.\footnote{17 Legal scholars and medical personnel often use the phrase “disposition of fetal remains” to refer to burial, cremation, or other arrangements following a miscarriage or stillbirth. See, e.g., 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) (having the title “Disposition of fetus); see also Jean G. Stringham, Judith Hothan Riley, & Ann Ross, Silent Birth: Mourning a stillborn baby, 27 SOCIAL WORK 322, 324 (1987) (stating that hospital staff sometimes refer to burial arrangements for stillborn children as “disposing of the remains”). However, this is often a sterile and insensitive phrase to newly bereaved parents. Id.} All states currently recognize a parent’s right to bury a stillborn child.\footnote{18 See, e.g., IDAHO CODE ANN. § 39-241 (West 2007); IDAHO CODE ANN. § 39-268 (West 2007); see also Martin, supra note 3 (stating that hospitals release stillborn children to funeral directors “like other people”).} However, because a parent’s right to bury a miscarried child varies depending on the state in which the mother miscarries, this Comment focuses on miscarriage specifically.\footnote{19 See Martin, supra note 3 (describing a couple’s experience following a miscarriage before Illinois enacted legislation requiring hospitals to notify parents of their right to bury a miscarried child); see infra Part III (discussing how the fifty states address a parent’s right to determine the disposition of a miscarried child).}

Part II introduces parental rights and burial rights in the United States.\footnote{20 See generally Carol Sanger, “The Birth of Death”: Stillborn Birth Certificates and the Problem for Law, 100 CAL. L. R. 269, 274-82 (2012) (giving a history of stillborn mourning practices over time); see infra Part II.A and II.B (discussing parental rights, burial rights, and private and public responses to in utero deaths over time).} It then discusses the recent widespread enactment of Missing Angel Acts—state statutes that give the parents of a stillborn child the ability to request a commemorative birth certificate.\footnote{21 See Tamar Lewin, Out of Grief Grows Desire for Birth Certificates for Stillborn Babies, N.Y. TIMES, May 22, 2007, available at http://query.nytimes.com/gst/fullpage.html?res=9E07E0DC1F31F931A15756C0A9619C8B63&pagewanted=print; see Sanger, supra note 20, at 279–80 (describing parents’ growing desire for birth certificates for stillborn children); see infra Part II.C (discussing the recent widespread enactment in Missing Angel Acts).} Next, it explains how the popularity of these statutes illustrates society’s evolving understanding of stillbirth and miscarriage.\footnote{22 See Sanger, supra note 20, at 272–73 (discussing the relationship between private grief and public recognition in the case of stillbirth); see infra Part II.C (discussing how the widespread success of Missing Angel Acts illustrates society’s current understanding of miscarriage).}
Part III discusses the current status of state laws regarding a parent’s right to bury a miscarried child.23 This Comment divides the fifty states into three categories—calling them “Notification,” “Upon Request,” and “Silent” States.24 The first category, the Notification States, includes those relatively few states in which state law requires healthcare facilities or practitioners to notify parents of their right to bury a miscarried child.25 The second category, the Upon Request States, includes those states in which state law allows parents to bury a miscarried child upon the parent’s request, but does not require healthcare facilities or practitioners to notify parents of their ability to do so.26 The third category, the Silent States, includes the majority of states, in which relevant statutes make no mention of, and therefore give no protection to, a parent’s right or ability to bury a miscarried child.27

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23 See infra Part III (summarizing how the fifty states currently address a parent’s right to bury a miscarried child). It is unknown how many hospitals across the nation provide the option of burial after miscarriage. See Eisner, supra note 14 (stating that most experts say not enough hospitals provide the option of burial or cremation following a miscarriage). Private hospitals, such as those operated by religious organizations, often require that personnel notify parents of their right to bury a miscarried child even if state law does not mandate it. Cf. Eisner, supra note 14 (describing a couple who struggled to obtain their miscarried child’s remains from a hospital that had recently become a part of the Loyola University Health System). Catholic hospitals regard life as sacred from conception until natural death, and as such must respect and support a parent’s decision to bury a miscarried child, regardless of gestational age. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 23 (2009) (reaffirming the ethical standards of behavior in health care that flow from the Church’s teaching about the dignity of the human person and providing authoritative guidance on certain moral issues that face Catholic health care today).

24 See infra Part III.A through II.C (dividing the fifty states into three categories based on how the different states address a parent’s right to bury a miscarried child). These classifications are those of the author and have not been used in previous literature on the topic. Although the classifications are unique to this Comment, the topic is one that has received increased review and media attention in the United States over the past several years. See, e.g., Eisner, supra note 14 (stating that a growing movement of parents and healthcare professionals are demanding that hospitals give parents the option or burying or cremating a miscarried child).

25 See infra Part III.A (discussing those states in which statute requires healthcare practitioners to notify a parent of the right to bury a miscarried child). This category includes fifteen states: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, South Carolina, Tennessee, Vermont, West Virginia. Id.

26 See infra Part III.B (discussing those states in which parents have the right to bury a miscarried child upon the parent’s request). This category includes seven states: Alaska, Colorado, Maine, Ohio, Oregon, South Dakota, Wisconsin. Id.

27 See infra Part III.C (discussing those states in which parents have no affirmative ability to bury a miscarried child). This category includes twenty-eight states: Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, Wyoming. Id.
Part IV explains why a statute that fully protects a parent’s right to control the disposition of a miscarried child is most favorable. First, Part IV examines the concept of social birth and how advances in obstetric sonography have led more parents to form emotional bonds with their children long before the child’s physical birth. Part IV then explores the psychological, emotional, and spiritual benefits of providing a burial for a miscarried child and explains why legislatures should consider such benefits when crafting legislation on the topic. Part IV then analyzes miscarriage burial legislation in the context of the abortion debate and addresses the opposition to miscarriage burial legislation by some pro-abortion activists. Finally, Part V proposes model legislation that gives full protection to parents who seek to bury a child, regardless of stage of pregnancy.

II. BACKGROUND

To understand the need for legislation that fully protects a parent’s right to bury a miscarried child, it is first helpful to understand the nature of parental rights and burial rights in the United States, as well as how individuals and institutions have historically understood and addressed the death of an unborn child. First, this Part discusses parental rights in the United

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28 Compare 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) (requiring that hospitals notify parents of their right to bury a miscarried child), with COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001) (requiring that hospitals permit parents to bury a miscarried child only upon the parents’ request), and N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987) (making no mention of a parent’s right to bury a miscarried child); see infra Part IV (analyzing why most state statutes addressing the disposition of a miscarried child are not adequate).

29 See infra Part IV.A (examining the concept of social birth in today’s society).

30 See infra Part IV.B (exploring the benefits of state legislation that gives parents the right to determine the disposition of their miscarried or stillborn child).

31 See Murphy S. Klasing, The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases, 22 PEPP. L. REV. 933, 933 (exploring the connections and inconsistencies between wrongful death jurisprudence as it relates to unborn children, criminal homicide of unborn children, and abortion); see infra Part IV.C (analyzing miscarriage burial legislation in the context of the abortion debate).

32 See infra Part V (proposing model legislation to address a parent’s right to determine the disposition of a miscarried child).

States, as well as how those rights translate to parents of a miscarried child.\textsuperscript{34} Next, this Part addresses the contours of burial rights in the United States.\textsuperscript{35} Lastly, this Part describes the recent widespread enactment of Missing Angel Acts—legislation that offers parents the opportunity to request a commemorative birth certificate for their stillborn child.\textsuperscript{36} Specifically, it discusses how the success of these statutes nationwide illustrates society’s increasing understanding of and empathy for a parent’s experience with miscarriage and stillbirth and how legislation protecting a parent’s right to determine the disposition of a miscarried child could receive similar nationwide support.\textsuperscript{37}

\textit{A. Parental Rights}

Parental rights are deeply rooted in United States history.\textsuperscript{38} In the early twentieth century, the Supreme Court of the United States held that parental rights deserve constitutional protection because they are fundamental liberty interests protected by the Fourteenth Amendment.\textsuperscript{39} These interests in the care, custody, and management of one’s child are based on the profound tradition of and contemporary respect for families.\textsuperscript{40} Indeed, the severance of

\textsuperscript{34} See infra Part II.A (discussing parental rights in the United States and how they apply to the parents of miscarried children).
\textsuperscript{35} See infra Part II.B (discussing the experience of miscarriage in both the private and public spheres).
\textsuperscript{36} See infra Part II.C (discussing the recent widespread enactment of Missing Angel Acts).
\textsuperscript{37} See infra Part II.C (discussing how the enactment of Missing Angel Acts applies to miscarriage burial legislation).
\textsuperscript{38} See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (holding for the first time that that Fourteenth Amendment liberty interest includes the right to establish a home and bring up children); 32 AM. JUR. PROOF OF FACTS 3D \textit{Parental Rights} § 3 (2007) (citing \textit{Bellotti v. Baird}, 443 U.S. 622 (1979)).
\textsuperscript{39} See Santosky v. Kramer, 455 U.S. 754, 753 (1982) (holding that parents’ fundamental liberty interest in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state); see Linda L. Lane, \textit{The Parental Rights Movement}, 69 U. \textit{COLO. L. REV.} 825, 837 (1998) (summarizing the issues that surround the parental rights debate on both the state and federal levels). The Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law. U.S. \textit{CONST.} amend XIV §1.
\textsuperscript{40} Isaac J.K. Adams, \textit{Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children}, 57 \textit{VAND. L. REV.} 1883, 1886–87, 1892 (2004) (discussing whether a parental liberty interest in the companionship of an adult child should be included within the parental liberty interest); see also Developments in the Law – The \textit{Constitution and the Family}, 93 \textit{HARV. L. REV.} 1156, 1180 (1980) [hereinafter \textit{The Constitution and the Family}] (describing how the Court has consistently looked to tradition in family cases as a source of previously unrecognized substantive due process rights).
parental rights is often considered the most severe and drastic intrusion into the parent-child relationship.\textsuperscript{41}

Three seminal cases laid the foundation for parental rights as a fundamental liberty interest.\textsuperscript{42} In 1923, the Court decided \textit{Meyer v. Nebraska}, in which it affirmatively recognized the parental right to direct a child’s upbringing as “essential” and protected by the U.S. Constitution.\textsuperscript{43} \textit{Meyer} involved the constitutionality of a Nebraska statute that prohibited the instruction of foreign languages to students who had not passed the eighth grade.\textsuperscript{44} The Court found that the statute infringed on the Fourteenth Amendment liberty interests of both the teacher, Meyer, to teach the German language and of the student’s parents to entrust Meyer with


\textsuperscript{42} See \textit{Prince v. Massachusetts}, 321 U.S. 158, 166 (1944) (holding that parental authority is not absolute and that the state may permissibly restrict a parent’s authority under its \textit{pares patriae} power if doing so would protect the child against a clear and present danger); see \textit{Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary}, 268 U.S. 510, 534 (1925) (expanding the Fourteenth Amendment liberty interest to include a parent’s right to choose the mode in which a child receives education); see \textit{Meyer}, 262 U.S. at 399 (1923) (holding that that Fourteenth Amendment liberty interest includes the right to engage in an occupation of one’s choosing, the right to acquire useful knowledge, and the right to establish a home and bring up children); see generally Jocelyn Floyd, \textit{The Power of the Parental Trump Card: How and Why Frazier v. Winn Got It Right}, 85 Chi.-Kent L. Rev. 791, 794–803 (2010) (discussing the seminal cases establishing parental rights).

\textsuperscript{43} \textit{Meyer}, 262 U.S. at 399 (recognizing “bring[ing] up children” as a privilege essential to the “orderly pursuit of happiness by free men”); Lane, supra note 39, at 837; see Heather M. Good, \textit{The Forgotten Child of our Constitution”: The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children}, 54 EMORY L.J. 641, 647 (2005) (examining the applicable standard of review for free exercise and parental rights claims as they relate to the education of minor children). More broadly, \textit{Meyer} marked the first time that the Court invoked the substantive due process to protect personal liberties. William G. Ross, \textit{A Judicial Janus: Meyer v. Nebraska in Historical Perspective}, 57 U. CIN. L. REV. 125, 185 (1988–89). Examining \textit{Meyer} also provides insights into its usefulness as a precedent for emerging laws concerning parental rights. \textit{Id.} at 126. Interestingly, neither parent nor child was a party in \textit{Meyer}. \textit{Id.} at 186.

\textsuperscript{44} \textit{Meyer}, 262 U.S. at 396. Meyer taught the subject of reading in German to a ten-year-old student in violation of this law. \textit{Id.} at 396–97. An historical analysis of \textit{Meyer} is helpful in understanding its context and significance. See Ross, supra note 43, at 133 (explaining how the ethnocentrism engendered by the First World War led to prejudice against foreign-born Americans, especially German-Americans, which precipitated the enactment of legislation to restrict the teaching of foreign languages). Shortly after World War I ended in 1918, Nebraska and numerous other states imposed restrictions on instruction in foreign languages, especially the German language. \textit{Id.} A large reason for these laws was the lingering wartime hostility against German-Americans and a desire that foreign-born children residing in the United States receive a thoroughly “American” education. \textit{Id.} at 133–34. Nebraska argued that the law was necessary to ensure that school children grew into loyal and patriotic citizens and that the statute was a legitimate exercise of its police power. \textit{Id.} at 175–76. While the Court stated that while “[t]he desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate,” it concluded that “mere knowledge of the German language cannot reasonably be regarded as harmful.” \textit{Meyer}, 262 U.S. at 402.
their child’s education.\textsuperscript{45} It further held that arbitrary legislation could not interfere with this liberty.\textsuperscript{46} Although the Court did not clearly articulate a standard of review in \textit{Meyer}, it is now clear that the Court used a higher standard—either intermediate or strict scrutiny—in reaching its decision.\textsuperscript{47} Under strict scrutiny review, a challenged law is only valid when it involves a compelling state interest and is narrowly tailored to achieve that interest.\textsuperscript{48}

Two years after \textit{Meyer}, the Court decided \textit{Pierce v. Society of Sisters}.\textsuperscript{49} The \textit{Pierce} Court analyzed an Oregon statute that required parents to enroll children between the ages of eight and sixteen in a local public school.\textsuperscript{50} The Society of Sisters, a Catholic organization dedicated to the education of children, brought an action alleging that the compulsory public school attendance statute violated the rights of parents to choose where their child attends school, the right of the child to influence the parents’ choice in school, and the right of schools and teachers to engage in the profession of teaching.\textsuperscript{51} The Court reaffirmed the existence and importance of parental rights, and, citing \textit{Meyer}, held that the Oregon statute unreasonably interfered with the parental

\textsuperscript{45} \textit{Meyer}, 262 U.S. at 400. Some scholars have construed the \textit{Meyer} Court’s reference to a parent’s right to hire a teacher as constitutionalizing a vision of the child as essentially private property. Ross, supra note 42, at 186; Barbara Woodhouse, \textit{Who Owns the Child?: Meyer and Pierce and the Child as Property}, 33 WM. & MARY L. REV. 995, 997, 1001 (1992). However, the Court’s opinion strongly suggests that the Court invalidated Nebraska’s statute because it unduly interfered with the non-economic rights of parents and students. Ross, supra note 43, at 186. Had it intended to only convey a property interest, the Court could have based its decision solely upon economic due process without discussing personal liberty. \textit{Id.} at 187.

\textsuperscript{46} \textit{Meyer}, 262 U.S. at 399. While the Court used “reasonable relation” language, it is well established that the Court did not use the rational basis test, as it is understood today. Good, supra note 43, at 647.

\textsuperscript{47} See Good, supra note 43, at 647 (examining the applicable standard of review for free exercise and parental rights claims as they relate to the education of minor children). The Court’s elevation of parental rights to the level of a protected fundamental liberty interest means that strict scrutiny will usually be applied. \textit{Id.} at 645.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary}, 268 U.S. 510, 534–35 (1925) (“Under the doctrine of \textit{Meyer v. Nebraska}...we think it entirely plain that the [state statute involved] ... unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”); see Good, supra note 43, at 647 (stating that \textit{Pierce} extended and elaborated on the holding in \textit{Meyer}).

\textsuperscript{50} \textit{Pierce}, 268 U.S. at 530–31. The practical effect of the statute was to shut down private schools by forcing citizens to attend the public schools. \textit{Id.} at 531–32; Floyd, supra note 42, at 800.

\textsuperscript{51} \textit{Pierce}, 268 U.S. at 532. As in \textit{Meyer}, the parents were not the plaintiffs in the suit. \textit{Pierce}, 268 U.S. at 510; \textit{Meyer}, 262 U.S. at 390. The Society established and maintained primary and secondary schools and taught religious and moral instruction in addition to the subjects normally provided by Oregon public schools. \textit{Pierce}, 268 U.S. at 572. The Society would not have been able to continue offering education and ministry to the public if the Oregon statute were not enjoined. \textit{Id.} at 573.
right to direct the upbringing of a child. As a corollary to that right, the Court recognized that a parent has the responsibility and duty to care for a child’s needs.

Meyer and Pierce illustrate the wide latitude that the Court has given parents in regard to directing the education and upbringing of their children. However, in 1944, the Court placed a narrow limitation on this right in Prince v. Massachusetts. While the Court recognized that parents have the primary right and responsibility to determine the care, custody, and control of their children, it held that those rights are not without boundary. Rather, the state—as parens patriae, or literally, “parent of the country”—has an interest in the welfare of children and may intervene when parents fail in their responsibility to care for their children. However, the Court held that the state may only act as parens patriae upon a showing of necessity and when it is in

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52 Pierce, 268 U.S. at 534–35. This case also involved a religious liberty issue, but the Court made no reference to it explicitly and decided the case solely on parental rights grounds. See Jay S. Bybee, Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origins of Wisconsin v. Yoder, 25 U. L. Rev. 887, 910 (1996) (examining the nature of parents’ due process right to direct the education of their children and its relationship to the First Amendment).

53 Pierce, 268 U.S. at 535 (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); see Good, supra note 43, at 647–48 (quoting this portion of Pierce).

54 Lane, supra note 39, at 838; see Good, supra note 43, at 647 (stating that Pierce extended and elaborated on the holding in Meyer).

55 Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“[N]either the rights of religion nor rights of parenthood are beyond limitation.”); see Lane, supra note 39, at 839 (stating that Prince put a narrow limitation on the right of parental control established by the previous cases). Prince involved a nine-year-old girl’s legal guardian, who permitted the girl sell Jehovah’s Witness materials on street corners in violation of Massachusetts law. Prince, 321 U.S. at 161–63. The law prohibited children from selling newspapers or magazines in public streets and imposed punishment on parents or guardians who compelled a child to do so. Id. The case involved both a First Amendment free exercise claim and a Fourteenth Amendment due process claim. Id. at 160.

56 Prince, 321 U.S. 158, 166–67; Lane, supra note 54, at 839.

57 Prince, 321 U.S. at 166–67; Lane, supra note 54, at 839. See Jim Ryan & Don R. Sampen, Suing on Behalf of the State: A Parens Patriae Primer, 86 Ill. B.J. 684, 684 (1998) (focusing on the expanded version of the parens patriae doctrine, its background, and its current parameters, use, and procedural considerations); see Daniel L. Hatcher, Purpose vs. Power: Parens Patriae and Agency Self-Interest, 42 N.M. L. Rev. 159, 159 (2012) (discussing the conflict between parens patriae purpose and power). The parens patriae concept came from the English common law, and American courts adopted it beginning in the early 19th century. Ryan, supra note 57, at 684. The Supreme Court of the United States reaffirmed in 1890 that parens patriae was “inherent in the supreme power of every state...for the prevention of injury to those who cannot protect themselves.” Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States, 136 U.S. 1, 57 (1890).
the best interests of the child. For example, the state may exercise its parens patriae role when a parent is found to have abused or neglected a child.

Meyer, Pierce, Prince, and their progeny bind all state courts in their interpretation and application of parental rights. State constitutions, state statutes, and the common law also recognize the right to the care and custody of one’s child as fundamental. State statutes protecting parental rights are many. For example, states generally recognize a parent’s right to physical possession of the child, the right to control and manage the child’s earnings and property, the right to have the child bear the parent’s name, the right to prevent adoption of the child without the parents’ consent, the right to make medical decisions of the minor child, and the right to information necessary to exercise the above rights responsibly, among others.

The recognition of parental rights achieves functional and instrumental goals. First, parental rights serve the interests of children.

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58 See BLACK'S LAW DICTIONARY (9th ed. 2009) (describing parens patriae as the state in its capacity as provider of protection to those unable to care for themselves); see Daniel B. Griffith, The Best Interests Standard: A Comparison of the State’s Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients, 7 Issues L. & Med. 283, 290 (1991) (describing the limitations of the parens patriae doctrine).

59 See, e.g., Valmonte v. Bane, 18 F.3d 992, 997 (2d Cir. 1994) (describing how the New York Department of Social Services became involved when it suspected that a mother used excessive corporeal punishment on her daughter).

60 See, e.g., State v. Radcliffe, 194 P.3d 250, 253 (2008) (“When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court’s rulings.”); 20 Am. Jur. 2d Courts § 147.

61 See, e.g., Seth D. v. State Dep't of Health & Soc. Servs., Office of Children Servs., 175 P.3d 1222, 1227–28 (Alaska 2008) (stating that the right to the care and custody of one’s child is a fundamental right recognized by both the federal and Alaska constitutions); In re Adoption of L.D.S., 155 P.3d 1, 4 (Ok. 2006) (recognizing that the right of a parent to the care, custody, companionship, and management of his or her child is a fundamental right protected by the federal and state constitutions); In re Yve S., 819 A.2d 1030, 1043 (Md. App. Ct. 2003) (“The fundamental right of parents to raise their offspring is not only well established in our common law traditions, but also in the relevant enactments of the federal and Maryland legislatures.”).

62 See, e.g., IND. CODE ANN. § 31-19-9-1 (West 2012) (requiring consent of both parents before someone may adopt a child); Lane, supra note 54, at 841.


64 See Francis B. McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 Ga. L. Rev. 975, 1017 (1988) (defining the underlying reasons why parental rights should be respected). For a discussion of why parental rights should be protected, see PARENTALRIGHTS.ORG, http://www.parentalrights.org/ (last visited November 4, 2013) (stating that its mission is to protect children by empowering parents through adoption of the
and emotional development is generally best served in the custody of their parents, who possess what the child lacks in maturity, experience, and capacity for judgment, and who can offer more devotion to the child than the state. Second, the recognition of parental rights advances a variety of social values, including individual freedom and privacy, diversity of views and lifestyles, and free exercise of religious beliefs. Finally, inadequate protection of parental rights can lead to various harmful results, such as the imposition of indoctrination during a child’s formative years.

Where state laws have succeeded in restricting parental rights—as in compulsory school attendance and mandatory vaccinations laws—they have done so because the state satisfied the strict scrutiny test that the Court impliedly used in *Meyer* and later verified in subsequent case law. This test—requiring both that the state show a compelling interest and that the legislation be narrowly tailored to achieve that interest—prevents the state from impinging on parental

Parental Rights Amendment to the U.S. Constitution and by preventing U.S. ratification of United Nations Conventions that threaten parental rights).

McCarthy, *supra* note 64, at 1017–19; see *The Constitution and the Family, supra* note 40, at 1353–54 (stating that parental rights serve the interest of children because parents typically possess a sensitivity to the child’s personality and needs that the state cannot match).

See, e.g., *U.S. v. Green*, 26 F. Cas. 30, 31 (1824) (articulating the notion that a child’s interests are best served by being in the custody of his parents).

As to the question of the right of the father to have custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education.

Id. See McCarthy, *supra* note 64, at 1017–18 (stating that parents typically best care for a child’s psychological and emotional development).

McCarthy, *supra* note 64, at 1017, 1023. For a discussion of the parental free exercise right to direct the religious upbringing and education of their children, see Good, *supra* note 43, at 644 (examining the applicable standard of review for free exercise and parental rights claims as they relate to the education of minor children).

McCarthy, *supra* note 64, at 1017–19. *But see Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“The desire of the Legislature to foster a homogenous people with American ideals . . . is easy to appreciate . . . . But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error.”).

See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); see Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (holding that Massachusetts’s mandatory vaccination law was a legitimate exercise of the state’s police power to protect the public health and safety of all its citizens); see McCarthy, *supra* note 64, at 977–78 (stating that compulsory school attendance, mandatory vaccination, child labor, abuse, and neglect laws—though a limitation on parental rights—have been uniformly acknowledged and accepted).
rights unnecessarily. If the state fails to meet the test’s requirements, the legislation will not survive. For example, the Court has stricken legislation when a state’s motivation is mere administrative efficiency or convenience.

The seminal cases on parental rights clearly involved and addressed children who had already been born. However, the law is evolving in terms of how parental rights and responsibilities are understood in relation to the unborn child. As legislatures increasingly recognize the rights of the unborn child—as has occurred, for example, through the Unborn Victims of Violence Act of 2004, which confers on unborn children the right to be free from injury or death inflicted by criminal offenders—a parent’s rights individually and in relation to the unborn child are being continually reexamined.

Although the duty of parents to protect their unborn child continues to develop, there is no question that a pregnant woman has a legal duty to avoid actual or threatened harm to her

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70 See Good, supra note 43, at 647 (examining the applicable standard of review for free exercise and parental rights claims as they relate to the education of minor children). The Court’s elevation of parental rights to the level of a protected fundamental liberty interest means that strict scrutiny will usually be applied. Id. at 645. Under strict scrutiny review, a challenged law is only valid when the law involves a compelling state interest and is narrowly tailored to achieve that interest. Id. Under this standard of review, a parent will likely prevail. Id.  
71 U.S. CONST. amend XIV §1; see Clark v. Manuel, 463 So. 2d 1276, 1284 (La. 1985) (holding that legislation that subject to strict scrutiny will be upheld only if necessary to promote an extremely important or compelling end of government); see John E. Nowak, Ronald D. Rotunda, & J. Nelson Young, Handbook on Constitutional Law 515–35 (1978) (stating that strict scrutiny requires legislation to be both narrowly tailored and serve a compelling government interest).  
72 See, e.g., Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 263 (1974) (holding that fiscal integrity is not a sufficient state interest to sustain a durational residence requirement on out-of-state citizens’ receipt of nonemergency hospitalization or medical care); see, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (holding that a mere showing of a rational relationship between a one-year residency requirement for receiving welfare assistance and state objectives of facilitating planning of welfare budget, of providing an objective test of residency, or of minimizing the opportunity for recipients to fraudulently receive payments from more than one jurisdiction did not constitute compelling state interests).  
74 See Mark H. Bonner & Jennifer A. Sheriff, A Child Needs A Champion: Guardian Ad Litem Representation for Prenatal Children, 19 WM. & MARY J. WOMEN & L. 511, 560 (2013) (examining the case for appointing guardians ad litem for prenatal children in all cases involving substantiated allegations of maternal substance abuse or whenever a concerned person discovers that a pregnant women intends to obtain an illegal abortion).  
unborn child. When a parent fails in this duty, many courts have demonstrated a willingness to act as *parens patriae* in protecting that child from abuse and neglect, both by judicial decision and through guardian *ad litem* representation. For example, in *In re Ruiz*, an Ohio court found that the Ohio child abuse statute covers prenatal children, and in *Whitner v. State*, the Supreme Court of South Carolina held that a mother could be found guilty for child neglect for ingesting drugs during pregnancy. In New Jersey, a private citizen can even petition a judge on behalf of an unborn child if he has reason to believe that the parents are abusing or neglecting the unborn child. This judicial and legislative trend suggests that the child-parent relationship is becoming increasingly understood as operating both pre- and post-birth.

**B. Burial Rights**

Surviving next-of-kin have the right to the immediate possession of a decedent’s body for the purpose of providing a proper burial. This right—known as the right of sepulcher—has existed for hundreds of years. Although the common law did not consider dead bodies as property, modern American courts tend to treat them in a quasi-property context. As such,

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76 See Bonner, supra note 74, at 560.
77 Id. at 513.
79 N.J. Stat. Ann. § 30:4C-11 (West 2012) (providing that when it appears that a child's safety or welfare is endangered, any person or organization having a special interest in the child may petition the State to provide care or custody as the circumstances may require).
80 See, e.g., 755 ILL. COMP. STAT. 65/5 (2011) (listing the people, in the order of priority, who have the right to control the disposition of a decedent’s remains and are liable for the reasonable costs of the disposition); see, e.g., Correa v. Maimonides Medical Center, 629 N.Y.S.2d 673, 675 (N.Y. Sup. Ct. 1995) (holding that the same right to possession of remains for the purpose of burial exists with respect to the remains of a stillborn child as exists with respect to a child born alive).
81 See e.g., Correa, 629 N.Y.S.2d at 675 (stating that New York’s statute giving next-of-kin the right to possess and bury the body of a relative did not circumvent or abrogate any rights or causes of action that have existed under the common law for hundreds of years); see JOHN A. BORRON, 5A MO. PRAC., PROBATE LAW & PRACTICE § 640 (3d ed. 2013) (defining the common law right to sepulcher as “the right to choose and control the burial, cremation, or other final disposition of a dead human body”).
82 See, e.g., Correa, 629 N.Y.S.2d at 675 (stating that courts, through the centuries, have treated dead bodies in a quasi-property context); see Allison E. Butler, *Cause of Action Against Undertaker for the Mishandling of Human Remains*, 35 CAUSES OF ACTION 2D 495 (2007) (stating that most courts recognize that the next-of-kin, absent
courts award damages against anyone who unlawfully interferes with that right or improperly handles the decedent’s body.  

Fifteen states have codified this common law right, dictating by statute the person who is entitled and responsible for the burial of the dead. Scholars sometimes refer to these statutes as “priority-of-decision” laws. In Illinois, for example, unless the decedent has given written instructions or designated a specific person to direct the disposition, the duty first goes to the decedent’s spouse, followed by his children, then parents, and then to next degrees of kin. In approximately twenty-four states, statutes address some aspects of disposition. In the remaining states, court precedent sets forth the order in which a decedent’s survivors are entitled to the remains.

testamentary documentation, have at least a quasi-property right in a decedent’s body for purposes of burial or other lawful disposition for non-commercial purposes).  

See, e.g., Correa, 629 N.Y.S.2d at 675 (stating that it is well settled that a court will award damages against any person who unlawfully interferes with the right of sepulcher or improperly deals with a decedent’s body). A prima facie case in a negligent handling of human remains requires proof of (1) a duty on the undertaker’s part to exercise the degree of care that a reasonably prudent member of the funeral profession would exercise under the circumstances; (2) a breach of that duty; (3) actual harm to the plaintiff because of the breach of duty; (4) a proximate causal connection between the breach of duty and the harm suffered by the plaintiff; and (5) damages. Butler, supra note 82.


See, e.g., 755 ILL. COMP. STAT. 65/5 (2011) (listing the people, in the order of priority, who have the right to control the disposition of a decedent’s remains and are liable for the reasonable costs of the disposition). For a survey of “priority-of-decision” laws, see Murphy, supra note 84, at 400–05 (listing the laws in each state).

755 ILL. COMP. STAT. 65/5 (2011); see Murphy, supra note 82, at 401 (stating that if the deceased has left no clear instructions, the courts generally next look to the surviving spouse, and then to the next-of-kin).

Murphy, supra note 84, at 401. For a survey of “priority-of-decision” laws, see id., at 400–05 (listing the laws in each state).

Murphy, supra note 84, at 400; see, e.g., BORRON, supra note 81 (“The question of who has the right to direct the place and manner of burial of a decedent has not been fully developed in Missouri.”). In addition to the surviving next-of-kin’s interest, the public has a vital interest in the proper disposition of bodies. Burnett v. Surrett, 67 S.W.2d 1041, 1041 (Tex. Civ. App. 1934); Murphy, supra note 84, at 394. In exercising its police power to promote public health, safety, and welfare, states adopt rigorous regulations for the funeral industry, specifying the place and manner in which human remains may be disposed. Memorial Gardens Ass’n, Inc. v. Smith, 156 N.E.2d 587, 593 (Ill. 1959); 22A AM. JUR. 2d Dead Bodies § 1 (2013). The federal government imposes regulations as well. Murphy, supra note 84, at 394. For example, the Department of Occupational Safety and Health Administration (“OSHA”) regulates the use of formaldehyde that may endanger employees who embalm. 29 C.F.R. §1910.1048 (2006); Murphy, supra note 84, at 394–95. Similarly, the Environmental Protection Agency (“EPA”) regulates the disposal of embalming wastewater. U.S. ENV’T PROTECTION AGENCY, FUNERAL HOME WASTE DISPOSAL (2010),
Some courts have long recognized that the right of sepulcher extends to the next-of-kin of stillborn children. In 1934, a New York appellate court affirmed a judgment that found a cemetery association liable for “mental anguish and sorrow” when it negligently lost the body of a stillborn child entrusted to it for burial. More than sixty years later, a New York court awarded parents damages for mental distress resulting from a hospital’s negligent conduct in losing the body of their stillborn child. That court explicitly stated that the parents of a stillborn child had the same burial rights as the parents of a child born alive under New York’s general priority-of-decision law.

More recently, the parents of miscarried—as opposed to stillborn—children have alleged the negligent handling of their child’s body. A Florida couple filed suit in 2011, alleging that an ambulance service employee denied them the opportunity to provide a proper burial for their

available at http://www.epa.gov/region02/water/compliance/more.html; Murphy, supra note 84, at 394–95. Although state and federal agencies impose fewer regulations on cremation, the EPA, for example, does require that created remains scattered at sea be released no closer than three nautical miles from land. 40 C.F.R. §229.1(a)(3) (2006); Murphy, supra note 84, at 393.

89 See Correa v. Maimonides Medical Ctr, 629 N.Y.S.2d 673, 620 (N.Y. Sup. Ct. 1995) (finding that the same right to possession of remains for the purpose of burial exists with respect to the remains of a stillborn child as exists with respect to the remains of a child born alive); see, e.g., Klumbach v. Silver Mount Cemetery Ass’n, 242 A.D. 843, 843 (N.Y. App. Div. 1934) (sustaining an action for mental anguish and sorrow where cemetery association lost the body of a stillborn child entrusted to it for burial).

90 Klumbach, 242 A.D. at 843. Today, this might be termed “negligent infliction of emotional distress.” A prima facie case requires proof of (1) human remains or body; (2) negligent mutilation or withholding of human remains or body; (3) member of decedent’s family; and (4) bodily injury, in some jurisdictions. Butler, supra note 82.

91 Correa, 629 N.Y.S.2d at 619–20. The court cited Klumbach as good law. Id.

92 Correa, 629 N.Y.S.2d at 615, 676 (“[T]he same right to possession of remains for the purpose of burial exists with respect to remains of a stillborn child as exists with respect to remains of a child born alive.”); see also Emeagwali v. Brooklyn Hosp. Center, No. 29765/98, (N.Y. Sup. Ct. Feb. 22, 2006) (holding that parents had a right of sepulcher whether or not the stillborn child was ever alive after delivery); Lubin v. Sydenham Hospital, Inc. 42 N.Y.S.2d 654 (N.Y. Sup. Ct 1943) (holding that damages were recoverable against Defendant hospital that refused to deliver to the mother the body of her child born dead in a calcified condition). Notably, however, the stillborn child in Correa had attained a gestational age of eight months, and it is unknown whether this court would have ruled similarly had the child been a miscarriage. Correa, 629 N.Y.S.2d at 674.

93 See, e.g., C.H.C.A. Bayshore, L.P. v. Ramos, 388 S.W.3d 741, 731 (Tex. Ct. App. 2012) (suing a hospital for alleged negligence and negligent infliction of emotional distress as a result of the hospital giving the parents an amputated toe of another individual instead of their miscarried child for burial); see, e.g., Ambulance Worker Flushed Miscarried Fetus Down Toilet, Suit Says, Ward v. Lifeguard Ambulance Serv., complaint filed (Fla. Cir. Ct., Santa Rosa County, May 11, 2011) (No. 11-364-CA), 2011 WL 2489356 (WJHTH), at *1 [hereinafter Ambulance Worker] (describing a Florida couple who said they were denied the ability to provide a proper burial for their miscarried child because an ambulance service employee flushed the remains down the toilet instead of collecting them for transport to the hospital).
miscarried child when the worker flushed the child’s remains down the toilet instead of collecting them for transport to the hospital.\textsuperscript{94} In 2012, a Texas couple sued a hospital for negligence and negligent infliction of emotional distress when the hospital gave the parents another individual’s amputated toe rather than their miscarried child for burial.\textsuperscript{95} A Minnesota couple filed a claim for wrongful interference with a dead body against a hospital in 2006 when it lost their miscarried child’s body entrusted to it for burial.\textsuperscript{96} These cases demonstrate the current problem—and also the current opportunity—for miscarriage burial legislation in the majority of states across the country.\textsuperscript{97}

\textbf{C. Missing Angel Acts}

Missing Angel Acts—or laws that permit a parent of a stillborn child to receive a commemorative birth certificate in addition to the traditional fetal death certificate—have grown in prevalence and popularity across the country.\textsuperscript{98} Forty-three states now have some form of legislation permitting such certificates.\textsuperscript{99} Although none of these laws includes within its purview a miscarried child, their prevalence indicates an evolving understanding and acceptance

\textsuperscript{94} \textit{Ambulance Worker, supra} note 93. According to the complaint, the mother was sixteen weeks pregnant when she suffered a miscarriage. Complaint, Ward v. Lifeguard Ambulance Serv., No. 11-364-CA, (Fla. Cir. Ct. filed May 11, 2011). When the ambulance responded to the parents’ 911 call, the worker cut the umbilical cord while the mother was still on the toilet, and “at some point” flushed the remains. \textit{Id.} These facts are similar to the Robinsons’ experience in New York in 2012. Telephone Interview (June 2013).

\textsuperscript{95} \textit{C.H.C.A. Bayshore}, 388 S.W.3d at 741. The couple learned of the mix-up only after they had held the funeral. \textit{Id.} Fortunately, they were able to later locate and bury their miscarried child instead. \textit{Id.}

\textsuperscript{96} Gooch v. North Country Regional Hosp., No. A05-576, 2006 WL 771384 (Minn. Ct. App. 2006). The parents had chosen a shared-casket burial for their child. \textit{Id.} In accordance with hospital procedure, the hospital placed the child in a labeled plastic contained for transport to the morgue. \textit{Id.} However, when the couple called the funeral home a few days later to inquire about the date of the funeral service, the funeral-home director informed the couple that the funeral home had not received the child. \textit{Id.}

\textsuperscript{97} See Sanger, \textit{supra} note 20, at 281 (discussing the overwhelming support that Missing Angel Acts have received over party lines); see infra Part III.B-C (discussing the states that currently give less than full protection to parents of miscarried children).

\textsuperscript{98} Sanger, \textit{supra} note 20, at 286; see Lewin, \textit{supra} note 21 (stating that in just six years, nineteen states enacted laws allowing parents who have had stillbirths to get birth certificates).

\textsuperscript{99} See MISSing Angels Bill (MAB) Legislation—State Chart, M.I.S.S. FOUNDATION (October 1, 2013), http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=76&e&it mid=61 (“The M.I.S.S. Foundation believes that all states should record births as births...whether live or still.”).
of a parent’s grief in general at losing an unborn child and desire to take action to acknowledge that child’s life.

Parents and private organizations have a long history of acknowledging and mourning the lives of stillborn children. Since at least the seventeenth century, families have memorialized dead and stillborn infants in portraits and in poems and mourned them in letters and diaries. With the advent of photography in the nineteenth century, memento mori—or postmortem—photography became popular. Families would spend much of their savings on images depicting their loved ones, especially infants and young children, after death.

Parents continue to commemorate their stillborn and infant children today. Recently, postmortem photography has reemerged in popularity, with organizations such as Now I Lay Me Down To Sleep offering parents free professional photography of their stillborn or infant child in order to help parents in their grieving process and facilitate long-term healing.


101 Sanger, supra note 20, at 275; see, e.g., JOHN SOUCH, SIR THOMAS ASTON AT THE DEATHBED OF HIS FIRST WIFE (1635) (depicting Sir Thomas Aston with his wife, who died in childbirth); Thomas Philapott, On a Gentlewoman Dying in Child-Birth of an Abortive Daughter, reprinted in ROBERT WOODS, CHILDREN REMEMBERED: RESPONSES TO UNTIMELY DEATH IN THE PAST 166 (2007).

102 ROBERT HIRSCH, SEIZING THE LIGHT: A SOCIAL HISTORY OF PHOTOGRAPHY 34–35 (2009) (explaining that because photography was a new medium, it is possible that many daguerreotype postmortem portraits, especially those of infants and young children, were the only photographs ever taken of the deceased person); see Memento Mori, MERRIAM-WEBSTER (2013), http://www.merriam-webster.com/dictionary/memento%20mori (defining “memento mori” as a reminder of mortality).

103 Kalb, supra note 100; see generally Rosemary Mander & Rosalind K. Marshall, An Historical Analysis of the Role of Paintings and Photographs in Comforting Bereaved Parents, 19 MIDWIFERY 230, 230 (2003) (examining the place of recent and historical pictorial representations of the dead baby and their relevance to the current care of grieving parents).

104 Kalb, supra note 100, at 54; see Lewin supra note 21 (quoting a mother who said that any way that acknowledges the child is important).

105 Kalb, supra note 100, at 55; NOW I LAY ME DOWN TO SLEEP, https://www.nowilaymedowntosleep.org/home (last visited October 1, 2013).
More recently, the government has acknowledged stillbirth. In the mid-twentieth century states began to formally recognize stillbirth as a discrete category of death, recording it among other vital statistics. Fetal death certificates, now compulsory in every state for stillborn children, became the traditional form of documentation accompanying stillbirth. The data collected for these certificates serves a public health function by facilitating research on the causes of stillbirth and finding potential correlations between stillbirth and social factors such as obesity, poverty, and race. However, many parents argue that fetal death certificates fail to fully capture the nature of their experience, especially when the mother has had to undergo the physical and emotional pain of delivering her stillborn child. To these parents, a fetal death certificate only tells half of the story, neglecting to acknowledge that the child had life, albeit short and existing only within the womb.

These mothers’ grievances found a voice in Dr. Joanne Cacciatore. After the stillbirth of her daughter in 1993, Dr. Cacciatore called the Arizona official registry to ask for her stillborn

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106 See Sanger, supra note 20, at 279 (stating that physicians and public health officials insisted that the invisibility of stillbirth in the public record compromised the data necessary to understand and to prevent maternal and infant mortality).
107 Id. at 271.
108 Some states also require or allow fetal death certificates for miscarried children. ALASKA STAT. ANN. § 18.50.240 (West 1960); ALASKA ADMIN. CODE tit. 7, § 05.450; ARK. CODE ANN. § 20-18-603 (West 1995); GA. CODE ANN. § 31-10-18 (West 2005); HAW. REV. STAT. § 338-8 (West 1981); HAW. REV. STAT. § 338-9 (West 1981); ME. REV. STAT. tit. 22, § 1596 (2004); MD. CODE ANN., HEALTH-GEN. § 4-213 (West 1997); N.Y. PUB. HEALTH LAW § 4160 (McKinney 2012); N.D. CENT. CODE ANN. § 23-02.1-20 (West 2011); OHIO REV. CODE ANN. § 3705.20 (West 2008); R.I. GEN. LAWS ANN. § 23-3-17 (West 2000); V.A. CODE ANN. § 32.1-264 (West 1987).
109 7C NICHOLS CYC. LEGAL FORMS § 172:18 (2013); Sanger, supra note 20, at 279. The forms typically list the stillborn child’s name (if applicable), the parents’ names, the place of death, and other relevant medical and personal information. 7C NICHOLS CYC. LEGAL FORMS § 172:18 (2013).
110 Some of the known or suspected causes of stillbirth according to the National Institutes of Health are genetics, infection, fetal maternal hemorrhage, maternal characteristics, and maternal disease. Silver, supra note 10, at 433–44; Sanger, supra note 20, at 279.
111 Sanger, supra note 20, at 279; see Lewin, supra note 21 (“To thousands of parents who have experienced stillbirth, getting a birth certificate is passionately important, albeit symbolic.”).
112 Sanger, supra note 20, at 279; see MISSING Angels Bill (MAB) Legislation—State Chart, supra note 99 (charting the various states’ enactment of stillborn birth certificate legislation).
113 See Brianne Kraus, A Bond of Death, HUFFPOST, Mar. 4, 2010, available at http://www.huffingtonpost.com/brianne-kraus/a-bond-of-death_b_485445.html (describing the reporter’s connection with JoAnne Cacciatore over their experiences of stillbirth and how Cacciatore’s work has prompted the reporter to
child’s birth certificate, only to be told that because she “didn’t have a baby, [but rather] a fetus,” she could not obtain a birth certificate.\textsuperscript{114} Her shock and pain was intense, and Dr. Cacciatore considered suicide in the days following her daughter’s stillbirth.\textsuperscript{115} However, Dr. Cacciatore channeled her grief instead, founding Mothers in Sympathy and Support (“M.I.S.S.”), a nonprofit organization dedicated to helping families cope with the death of a child and to lobbying state governments for laws allowing the issuance of birth certificates for stillborn children.\textsuperscript{116}

The resulting legislation—often referred to as a “Missing Angel Act”—allows a parent to receive a “Certificate of Birth Resulting in Stillbirth” for a stillborn child, which the hospital furnishes separately from and in addition to the traditional fetal death certificate.\textsuperscript{117} Arizona enacted the first Missing Angel Act in 2001, and other states quickly followed.\textsuperscript{118} Between 2001 and 2013, thirty-one states enacted laws allowing for “Certificates of Birth Resulting in Stillbirth”\textsuperscript{119} while twelve states enacted laws allowing for a “Certificates of Stillbirth.”\textsuperscript{120}

\begin{itemize}
    \item Help lobby in her home state of New York; see also Lewin, \textit{supra} note 21 (describing the experience of a mother of a stillborn child).
    \item The experience of giving birth and death at the exact same time is something you don’t understand unless you’ve gone through it . . . . The day before I was released from the hospital, the doctor came in with the paperwork for a fetal death certificate, and said ‘I’m sorry, but this is the only document you’ll receive.’ In my heart, it didn’t make sense. I was in labor. I pushed, I had stitches, my breast milk came in, just like any other mother. And we deserved more than a death certificate.
\end{itemize}

\textit{Id.}


\textsuperscript{115} See Lewin, \textit{supra} note 21 (“‘I thought about suicide every day after Cheyenne’s birth,’ Ms. Cacciatore said. ‘I loved this baby; I went through all the physical pain of delivering her. I had her baby book prepared, with the place for her birth certificate.’”). For a discussion of the benefits of providing a burial for a child that has died in \textit{utero} on psychological health, see \textit{infra} Part IV.B (examining the benefits of providing a burial for a miscarried child and why state legislature should consider such information when crafting legislation on the issue).


\textsuperscript{117} Sanger, \textit{supra} note 20, at 272; see \textit{Frequently Asked Questions}, \textit{M.I.S.S. FOUNDATION} (October 1, 2013), http://www.missingangelsbill.org/index.php?option=com_content&view=article&id=75&Itemid=41 (describing the origin and purpose of Missing Angels Acts). Generally, these bills are retroactive, allowing parents to request a certificate for a stillbirth that occurred prior to the bill’s enactment. Lewin, \textit{supra} note 21.

\textsuperscript{118} \textit{ARIZ. REV. STAT. ANN.} § 36-330 (West 2004); see \textit{MISSing Angels Bill (MAB) Legislation—State Chart}, \textit{supra} note 99 (charting the various states’ enactment of stillborn birth certificate legislation).

\textsuperscript{119} \textit{ALA.CODE} § 22-9A-13.1 (2011); \textit{ALASKA STAT. ANN.} § 18.50.235 (West 2009); \textit{ARIZ. REV. STAT. ANN.} § 36-330 (West 2004); \textit{ARK. CODE ANN.} § 20-18-410 (West 2007); \textit{WEST’S ANN.CAL.HEALTH & SAFETY CODE} §
These now-prevalent Missing Angel Acts demonstrate the trend in the last decade toward both privately and officially acknowledging the birth and death of a child, despite the fact that the child never took a breath outside the womb.121 Notably, however, the vast majority of states that have enacted stillborn birth certificate legislation do not allow the parent of a miscarried child to obtain such a certificate.122 Nonetheless, the success of stillborn birth certificate lobbying efforts across the nation tends to suggest that legislation requiring a hospital to notify parents of their right to bury a miscarried child would be favorably received as well.123

103040.1 (2007); FLA. STAT. ANN. § 382.0085 (West 2012); GA. CODE ANN. § 31-10-33 (West 2008); IND. CODE ANN. § 16-37-1-8.5 (West 2002); IOWA CODE ANN. § 144.31A (West 2012); LA. REV. STAT. ANN. § 40:92 (2003); ME. REV. STAT. tit. 22, § 2761-C (2009); MD. CODE ANN., HEALTH-GEN. § 4-213.1 (West 2003); MASS. GEN. LAWS ANN. ch. 46, § 1 (West 2002); MINN. STAT. ANN. § 144.2151 (West 2005); MISS. CODE. ANN. § 41-57-31 (West 2007); MO. ANN. STAT. § 193.165 (West 2004); MONT. ADMIN. R. 37.8.307 (2008); NEB. REV. STAT. § 71-606 (2008); N.J. STAT. ANN. § 26:8-37 (West 2009); N.C. GEN. STAT. ANN. § 130A-114 (West 2011); N.D. CENT. CODE ANN. § 23-02.1-27 (West 2011); OKLA. STAT. ANN. tit. 63, § 1-318.2 (West 2008); 35 PA. STAT. ANN. § 450.207 (West 2011); R.I. GEN. LAWS ANN. § 23-3-10.2 (West 2007); S.C. CODE ANN. § 44-63-55 (West 2004); S.D. CODIFIED LAWS § 34-25-329.2 (2007); TENN. CODE ANN. § 68-3-514 (West 2010); TEX. HEALTH & SAFETY CODE ANN. § 192.0022 (West 2005); UTAH CODE ANN. § 26-2-14.1 (West 2002); VA. CODE ANN. § 32.1-258.1 (West 2003); WIS. STAT. ANN. § 69.145 (West 2007); see infra, Appendix Image 2; see MISSING Angels Bill (MAB) Legislation—State Chart, supra note 112.

120 COLO. REV. STAT. ANN. § 25-2-112.3 (West 2004); DEL. CODE ANN. tit. 16, § 3110 (West 2011); IDAHO CODE ANN. § 39-260 (West 2007); 410 ILL. COMP. STAT. ANN. 535/20.5 (West 2003); Mich. Comp. Laws ANN. § 333.2834 (West 2013); N.H. REV. STAT. ANN. § 5-C:75-a (West 2008); N.Y. PUB. HEALTH LAW § 4160-a (McKinney 2012); OHIO REV. CODE ANN. § 3705.23 (West 2003); OR. REV. STAT. ANN. § 432.266 (West 2005); WYO. STAT. ANN. § 35-1-419 (West 1985). Connecticut and Kentucky allow for Certificates of Stillbirth by policy. See MISSING Angels Bill (MAB) Legislation—State Chart, supra note 112. Though containing similar wording and addressing the same concept as a “Certificate of Birth Resulting in Stillbirth,” the M.I.S.S. Foundation does not regard a “Certificate of Stillbirth” as a true certificate of birth and therefore seeks to change the laws in these states to offer a “Certificate of Birth Resulting in Stillbirth.” MISSING Angels Bill (MAB) Legislation—State Chart, supra note 112.

121 Sanger, supra note 20, at 286; see Lewin, supra note 21 (stating that in just six years, nineteen states enacted laws allowing parents who have had stillbirths to get birth certificates).

122 But see, e.g., MO. ANN. STAT. § 193.165 (West 2004) (allowing miscarried children to receive a birth certificate as well); see infra, Appendix Image 2 (showing a map of stillbirth certificate legislation in the United States, specifically indicating which states require the child to be of at least twenty gestational weeks).

123 Efforts to enact miscarriage burial legislation have not received the same extent of lobbying and organization as legislation for birth certificates for stillborns. See Sanger, supra note 20, at 279–80 (describing the M.I.S.S. Foundation, its leadership under Joanne Cacciatore, and its sophisticated legal branch); see Lewin, supra note 21 (describing the enactment of legislation providing for birth certificates for stillborns as a “movement”).
III. Discussion

The fifty states break roughly into three categories in terms of how they address a parent’s ability to determine the disposition of a miscarried child. This Part first addresses those states—referred to in this Comment as the “Notification States”—in which healthcare facilities or practitioners must notify parents of their ability to bury a miscarried child. Next, this Part discusses those states—the “Upon Request States”—in which parents have the option of burying their miscarried child, upon their request, but which have no requirement for healthcare facilities or practitioners to notify parents of that ability. This Part then examines those states—the “Silent States”—in which there is no mention, and therefore no protection, of the parents’ option or ability to bury a miscarried child. Finally, this Part also discusses in depth a state from each of these categories—namely, Florida, Colorado, and New York—focusing on each statute’s legislative history, as well as how the statute plays out in practice.

A. The Notification States

Currently sixteen states—mainly concentrated in the Midwestern and Southern regions of the United States—have enacted legislation that specifically requires healthcare facilities or practitioners to notify parents of their ability to bury a miscarried child. For example, the relevant Illinois statute reads as follows:

124 See infra Part IV.A-C (describing the three categories). These categories are unique to this Comment. See supra note 24 (addressing the uniqueness of these classifications).
125 See infra Part IV.A (discussing those states in which statute requires healthcare practitioners to notify a parent of the right to bury a miscarried child).
126 See infra Part IV.B (discussing those states in which parents have the right to bury a miscarried child upon the parent’s request).
127 See infra Part IV.C (discussing those states in which parents have no affirmative ability to bury a miscarried child).
128 See infra Parts III.A-C (specifically discussing the statutes regarding disposition of a miscarried child in Florida, Colorado, and New York).
A hospital having custody of a fetus following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her right to arrange for the burial or cremation of the fetus. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial or cremation of fetal tissue. If, within 24 hours after being notified under this Section, the mother elects in writing to arrange for the burial or cremation of the fetus, the disposition of the fetus shall be subject to the same laws and rules that apply in the case of a fetal death that occurs in this State after a gestation period of 20 completed weeks or more . . . .

The states with this type of legislation—the Notification States—do the best job of protecting parents of miscarried and stillborn children alike, because parents—but for the hospital’s obligation to inform them—might be unaware of their right or ability to bury their child. While all of the Notification States explicitly place an affirmative duty on hospitals to inform a parent of the ability to bury a child regardless of a child’s gestational age, some significant differences exist among them. Most notably, only five of these states—Indiana, Illinois, Massachusetts, Missouri, and Nebraska—describe this ability as a “right”, the

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COMP. LAWS ANN. § 333.2848 (West 2013); MINN. STAT. ANN. § 145.1622 (West 2008); MO. ANN. STAT. § 194.387 (West 2004); NEB. REV. STAT. § 71-20,121 (2003); S.C. CODE OF REGULATIONS R. 61-19 § 24; TENN. CODE ANN. § 68-3-506 (West 1977); VT. STAT. ANN. tit. 18, § 5224 (West 1973); W. VA. CODE ANN. § 16-5-23 (West 2006). The District of Columbia also falls into this category. D.C. CODE § 7-214 (1992); see infra Appendix Image 1 (depicting a map of the statutes across the United States).

130 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010). For a news article addressing the issue prior to Illinois’ enactment of this legislation, see Eissner, supra note 14 (“While most states, like Illinois, only give parents the choice in the disposition of the remains after 20 weeks of pregnancy, a few states, such as Massachusetts, require hospitals to tell parents they can control burial . . . after any stage of a pregnancy loss.”).

131 See Jason Ferguson, The politics of grief, ORLANDO WEEKLY, Mar. 6, 2003, available at http://www2.orlandoweekly.com/news/story.asp?id=3000 (“Nothing currently prevents a woman from taking possession of fetal remains . . . except her own lack of knowledge of her legal rights). On the other hand, some parents may assume that they have the right and are shocked if they learn that is not the case. See Martin, supra note 3 (describing a Catholic couple who miscarried and child at a hospital and were taken aback by the reaction they received from hospital staff when they expressed their desire to bury their child). By requiring that a hospital inform parents of this right, the legislation in Notification States ensures that a parent will have the opportunity to bury their child, whether it had immediately occurred to them to do so or not.


133 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010); H.B. 1190, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014); MASS. GEN. LAWS ANN. ch. 111, § 202 (West 1978) (“Before disposition, the physician or person in charge of the hospital shall ensure that the parent is informed of his right to direct either burial, entombment, or cremation of the fetal remains . . . .”); MO. ANN. STAT. § 194.378 (West 2004); NEB. REV. STAT. § 71-20,121 (2003).
remaining states either describe it as an “option” or give it no label at all. In addition, the various state statutes differ in terms of which parent must give authorization for disposition. The Alabama, Arkansas, Kansas, and Tennessee statutes require that both parents give authorization for the disposition of the miscarried or stillborn child, whereas Georgia, Indiana, Massachusetts, Nebraska, Vermont, and West Virginia require the authorization of only one parent. Florida, Illinois, Minnesota, and Missouri all specify that the mother must be the one to give authorization. Michigan requires the authorization of both parents, or the mother’s authorization if she is unmarried. South Carolina requires permission from the next-of-kin prior to disposition, which in most cases is one or both of the parents. Interestingly, three of the sixteen states—Indiana, Massachusetts, and Missouri—also require that the hospital also inform a parent of the availability of a chaplain or other form of counseling.

While some of these sixteen states enacted laws regarding the disposition of miscarried and stillborn children in the early twentieth century, other states have more recently modified

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138 Mich. Comp. Laws Ann. § 333.2848 (West 2013) (“[B]efore final disposition…the funeral director…shall obtain from the parents, or parent if the mother is unmarried, an authorization for final disposition…..”).
139 S.C. Code of Regulations R. 61-19 § 24. South Carolina does not have a statute on disposition of miscarried or stillborn children. The relevant regulation is not worded as succinctly as that of the other Notification States, but it appears to have the same practical effect.
existing statutes in order to better protect a parent’s ability to bury a miscarried child.\textsuperscript{141} For example, Florida enacted its current law—the Stephanie Saboor Grieving Parents Act—in 2003.\textsuperscript{142} Stephanie Saboor—a resident of Orlando and the bill’s namesake—miscarried her child at ten weeks.\textsuperscript{143} However, because Saboor was in Illinois at the time of her miscarriage—and because Illinois was one of only five Notification States at the time—she was able to bury her child in a cemetery.\textsuperscript{144} Had Saboor miscarried in Florida, she would have had the option by law to bury her child, but only upon Saboor’s request; the hospital would have no duty to inform her of that ability.\textsuperscript{145} Had Saboor not so requested—either deliberately or due to her lack of awareness of that ability—a Florida hospital would have treated the child as a “medical incident,” disposing of the child in any manner not posing a public health hazard.\textsuperscript{146}

In February 2003, a local Orlando television station aired a series titled “Choice to Grieve,” focusing on this gap in Florida law and its effect on women such as Saboor.\textsuperscript{147} After the broadcast, callers flooded the station, expressing outrage over the current Florida law and sharing their own stories and hospital experiences following a miscarriage.\textsuperscript{148} Due to this strong

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\textsuperscript{143} Florida Staff Analysis, S.B. 2082, 3/29/2003; see Ferguson, supra note 131 (describing Saboor’s experience with the burial of her miscarried child).

\textsuperscript{144} Ferguson, supra note 131. At that time, Illinois was only one of five states that required hospitals to treat all miscarriages, regardless of time of gestation, equally. Id.

\textsuperscript{145} Florida Staff Analysis, S.B. 2082, 3/29/2003. While the hospital would likely have had a policy encouraging sensitivity to each patient’s circumstances, beliefs, and customs at a time of loss, it may or may not have included informing the parents of their option of burying the miscarried child. Id.

\textsuperscript{146} See Ferguson, supra note 131 (stating that the series honed in on the fact that Florida law treats the death of a miscarried child as a “medical incident,” after which the hospital disposes the remains like clinical waste and sends the parents on their way); see Eisner, supra note 14 (stating that in the majority of states a miscarried child would be handled like medical waste, and hospitals would incinerate the child’s remains as they would tumors or gallstones).

\textsuperscript{147} See Ferguson, supra note 131 (describing the series and its effect on viewers). The broadcast was part of WKMG-TV Local 6’s “Problem Solver” series. Id.

\textsuperscript{148} See Ferguson, supra note 131 (“After the initial newscast, Local 6 reported that they were besieged by callers outraged by the law . . . .”). One caller had miscarried twice and had been treated in two entirely different by ways by the same hospital. Id.
\end{flushleft}
public reaction, the station aired three more broadcasts on the subject.¹⁴⁹ Meanwhile, State Representative Randy Johnson wrote a bill—House Bill 0089—in an attempt to remedy the perceived problem and showed the original broadcast during a Florida House Committee debate.¹⁵⁰ The bill passed unanimously in both the Florida House and Senate, and became effective on May 27, 2003.¹⁵¹ The Stephanie Saboor Grieving Parents Act reads:

A health care practitioner [or facility] . . . having custody of fetal remains following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial of the fetal remains . . . .¹⁵²

Florida’s enactment of the Stephanie Saboor Grieving Parents Act has had two main practical consequences.¹⁵³ First, the law required the Florida Department of Health and the Agency for Health Care Administration to create forms for health care practitioners and facilities to present to a mother, informing her of her ability to bury her child.¹⁵⁴ As a result, every woman who experiences a miscarriage or stillbirth in the state of Florida now has the knowledge

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¹⁴⁹ See Ferguson, supra note 131 (stating that the station aired three more broadcasts on the topic). One of the broadcasts showed State Rep. Randy Johnson displaying the Local 6 footage to a House Committee meeting debating the Stephanie Saboor Grieving Parents Act. Id.
¹⁵² FLA. STAT. ANN. § 383.33625 (West 2003). The statute also requires that the Florida Department of Health adopt rules to develop forms to be used for notifications and elections by the health care practitioner. Id.
¹⁵³ See FLA. STAT. ANN. § 383.33625 (West 2003) (describing various requirements for health care practitioners, health care facilities, and government agencies). Florida women saw the legislation as fixing a legal technicality that cheated them of their right to grieve. See Ferguson, supra note 131 (describing feedback from callers who viewed the Local 6 footage, “A Choice to Grieve”).
¹⁵⁴ FLA. STAT. ANN. § 383.33625 (West 2003); see DISPOSITION OF FETAL REMAINS FORM, FLORIDA AGENCY FOR HEALTH CARE ADMIN., available at http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Hospital_Outpatient/forms/dispositionoffetalremains3100-0006r011005.pdf (advising parents that they have choices concerning the final disposition of a miscarried child, as provided by the Stephanie Saboor Grieving Parents Act).
necessary to make an informed decision about whether to bury her child. The second—and perhaps less obvious—effect of this law is that it holds practitioners and facilities accountable for failing to follow proper procedures upon learning of a mother’s preference regarding the disposition of her child.

The trend among states seems to be toward recognizing the rights of parents to determine the disposition of a miscarried child. Indiana became the most recent state to enact miscarriage burial legislation when Indiana Representative Hal Slager (R-Schererville) introduced H.B. 1190 in January 2014. The bill received substantial support from the legislature, and Indiana Governor Mike Pence signed the bill into law on March 25, 2014. The law, effective October 1, 2014 requires health care facilities to disclose to the parent or parents of a miscarried child, both orally and in writing, their right to determine the final disposition of the child’s remains as well as inform the parent or parents of any counseling that may be available concerning the death of the child. With the passage of this law, Indiana went from being one of the weakest to now one of strongest states in terms of recognition and protection of a parent’s right to bury a miscarried child.

B. The Upon Request States

Seven states—the “Upon Request States”—give parents the ability to bury a miscarried child, but only upon the parent’s request; unlike the Notification States, these states’ laws do not

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155 All Florida hospitals must present the Florida Agency for Health Care Administration form to the parent of a miscarried child. Fla. Stat. Ann. § 383.33625 (West 2003); Disposition of Fetal Remains Form, supra note 154.

156 See Fla. Stat. Ann. § 383.33625 (West 2003) (“If the mother chooses the option of using the procedures provided by general law, the facility or health care practitioner in custody of fetal remains shall follow the procedures set forth in general law.”); see Ambulance Worker, supra note 93 (describing a Florida couple who sued in 2011, alleging that an ambulance worker flushed their miscarried child down the toilet rather than transporting the child to the hospital); see supra Part II.B (describing the Ambulance Worker case in more detail).


159 Id.
require health care facilities or practitioners to notify parents of this ability. For example, Ohio’s statute reads as follows:

With regard to the product of a fetal death, on the request of the mother and in compliance with the public burial ground or cemetery's ordinances, a public burial ground or cemetery shall inter the product of the fetal death in accordance with one of the following: (1) In a single grave within the public burial ground or cemetery that contains, or will contain, the remains of a parent, sibling, or grandparent; (2) In another location of the public burial ground or cemetery, including a separate burial ground for infants, on a temporary or permanent basis.

States with this type of legislation have taken a step toward protecting a parent’s right to bury a miscarried child, but they fall short of fully protecting that right. By putting the burden on a parent to request the child’s remains for burial, there is a risk that the parent will—during an intensely emotional and stressful time—either be unaware of this ability and therefore never ask, or, be aware of this ability but fail to make a request quickly enough following the

\[160\] ALASKA ADMIN. CODE tit. 7, § 05.530 (2013) (“A burial-transit permit may be issued by a local registrar for the disposition of a fetus with a gestation period of less than 20 weeks, with or without the filing of a fetal death certificate; provided all other requirements have been met.”); COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001) (“In every instance of fetal death, the health care provider, upon request of the pregnant woman, shall release to the woman or the woman’s designee the remains of fetal death for final disposition in accordance with applicable law.”); CODE ME. R. 10-146, Ch. 1, § 7 (2013) (“[A] burial-transit permit for disposition of the remains of a fetus of less than 20 weeks gestation…shall be issued upon presentation of a statement from the facility that the parents have chosen to dispose of the remains outside the facility….”); OHIO REV. CODE ANN. § 759.49 (West 2008; OR. REV. STAT. ANN. § 432.317 (West 2009) (“Upon the request of a parent…a disposition permit may be issued for a fetus that is not reportable as a fetal death.”); S.D. CODIFIED LAWS § 34-25-32.6 (1998) (“The hospital clinic, or medical facility shall discuss or disclose the method of disposition with the woman who had the miscarriage.”); WIS. STAT. ANN. § 69.18 (West 2008) (“No person may effect final disposition of a stillbirth without written authorization of [a parent]…..”).

\[161\] OHIO REV. CODE ANN. § 759.49 (West 2008). Interestingly, this statute refers only to the duty of a public health ground or cemetery—not a hospital or health care facility. However, the statute’s legislative history shows that its purpose was to give parents additional options for arranging a burial following a miscarriage and to enhance communication and information sharing between hospitals and parents. OH. GOV. MESS, June 11, 2008. See also OHIO REV. CODE ANN. § 3727.16 (West 2008) (requiring a hospital to provide the mother of a miscarried child with a short description of the hospital’s procedures for disposing of the miscarried child). Also of interest is that the statute precludes any hospital or hospital employee from civil liability for good faith compliance with its terms. Id.

\[162\] Compare OHIO REV. CODE ANN. § 759.49 (West 2008) (requiring that a mother request a burial for her miscarried child), with 410 ILL. COMP. STAT. ANN. 535/20 (West 2002) (requiring that a hospital notify a mother of her right to arrange for the burial or cremation of a miscarried child).
miscarriage.\textsuperscript{163} This leads to inconsistencies among hospitals in how they handle such situations.\textsuperscript{164}

As in the Notification States, the statutes in the Upon Request States differ in terms of which parent must make the request to bury a miscarried child.\textsuperscript{165} In Ohio, Colorado, and South Dakota, the mother must make the request, whereas Maine requires that both parents make the request.\textsuperscript{166} In Oregon, one parent must make the request.\textsuperscript{167} Wisconsin’s law mimics the wording of traditional burial rights statutes in that it utilizes a priority-of-decision list, with a parent listed first, followed by an adult brother or sister of the child, a grandparent, and then any person authorized or under obligation to bury the child.\textsuperscript{168} In Alaska, the statute is unclear as to who must make such a request, speaking of the ability to bury a miscarried child in the passive

\textsuperscript{163} For example, Colorado requires that a mother make the request “prior to or immediately following” the removal of the child from her body, whereas Alaska makes no timing specifications. ALASKA ADMIN. CODE tit. 7, § 05.530 (2013); COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001).
\textsuperscript{164} Colorado Committee Summary, H.B. 01-1308 (2001); see also Ferguson, supra note 131 (describing a woman who had miscarried twice and had been treated in two entirely different ways by the same hospital).
\textsuperscript{165} Compare OHIO REV. CODE ANN. § 759.49 (West 2008) (requiring that the mother make the request), with CODE ME. R. 10-146, Ch. 1, § 7 (2013) (requiring that both parents make the request).
\textsuperscript{166} COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001); CODE ME. R. 10-146, Ch. 1, § 7 (2013); OHIO REV. CODE ANN. § 759.49 (West 2008); S.D. CODIFIED LAWS § 34-25-32.6 (1998). South Dakota’s statute states that “[t]he hospital, clinic, or medical facility shall discuss or disclose the method of disposition with the woman who had the miscarriage.” S.D. CODIFIED LAWS § 34-25-32.6 (1998). The wording of this statute—specifically the words “discuss” and “disclose”—makes the application of this law unclear. Under this formulation, a healthcare facility could potentially dispose of the miscarried child as it sees fit and then merely disclose the manner of disposition to the mother after the fact. Despite the ambiguity of this statute, for the purposes of this Comment it will be an Upon Request State due to its specific treatment of miscarried children.
\textsuperscript{167} OR. REV. STAT. ANN. § 432.317 (West 2009) (“Upon the request of a parent or the parent’s authorized representative, a disposition permit may be issued for a fetus that is not reportable as a fetal death.”).
\textsuperscript{168} WIS. STAT. ANN. § 69.18 (West 2008); see supra Part III.B (describing “priority-of-decision” laws in burial rights statutes generally).

No person may effect final disposition of a stillbirth without the written authorization of any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of authorization, and in the absence of actual notice of opposition by a member of the same or a prior class: 1. A parent of the stillbirth. 2. An adult brother or sister of the stillbirth. 3. A grandparent of the stillbirth. 4. Any other person authorized or under obligation to dispose of the stillbirth.

WIS. STAT. ANN. § 69.18 (West 2008). Although Wisconsin does not define “stillbirth” and “miscarriage” in its code, it often uses the terms interchangeably and specifies when any gestational week or weight requirement applies. Id. In this particular section of the statute—taking into consideration the statute as a whole—it appears that the term “stillbirth” includes all in utero deaths, not just those of twenty gestational weeks or more. Id. The statute does not elaborate on who else might be “authorized or under obligation” to control the disposition of the child. However, it’s conceivable that should it become necessary, this would refer to extended next-of-kin.
None of the Upon Request States refers to a parent’s “right” to determine the disposition of a miscarried child, speaking only in terms of the “option” to determine disposition or requiring that the hospital or other healthcare facility gain “authorization.”

In June 2001, after five months of debate, Colorado passed its statute—entitled “Fetal deaths—treatment of remains.” The statute reads:

In every instance of fetal death, the health care provider, upon request of the pregnant woman, shall release to the woman or the woman's designee the remains of a fetal death for final disposition in accordance with applicable law. Such request shall be made by the pregnant woman or her authorized representative prior to or immediately following the expulsion or extraction of the fetal remains. Unless a timely request was made, nothing in this section shall require the health care provider to maintain or preserve the fetal remains.

Sixteen members of the Colorado House of Representatives first proposed the bill on February 1, 2001, with the initial version reading: “In every instance of fetal death, the health care provider treating a pregnant woman shall give the woman . . . the remains of a fetal death for final disposition . . . .” However, on February 20, 2001 the Colorado House amended the bill to add the language “upon request.” The documents tracing the bill’s legislative history do not reveal the legislature’s reasoning for making this change.

\[169\] Compare ALASKA ADMIN. CODE tit. 7, § 05.530 (2013) (“A burial-transit permit may be issued . . . for the disposition of a fetus with a gestation period of less than 20 weeks . . . .”); \[170\] with OR. REV. STAT. ANN. § 432.317 (West 2009) (“Upon the request of a parent or the parent’s authorized representative, a disposition permit may be issued for a fetus that is not reportable as a fetal death.”).

\[171\] Compare 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) (speaking in terms of the mother’s “right”), with COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001) (speaking in terms of a pregnant woman’s “option”).


\[175\] See Colorado House Journal, 2001 Reg. Sess. Add. (amending the bill to add the words “upon request”). For other states with “upon request” language, see OHIO REV. CODE ANN. § 759.49 (West 2008) and OR. REV. STAT. ANN. § 432.317 (West 2009).

This phrase and the explicit preclusion of liability suggests that that Colorado House wanted to protect physicians from a potential breach of duty. For a discussion of medical malpractice litigation, see Dr. Darshak Sanghavi, Medical Malpractice: Why Is It So Hard For Doctors to Apologize?, THE BOSTON GLOBE, Jan. 7, 2013,
Also of note is the Colorado legislature’s insertion of a phrase that precludes health care professionals from all civil or criminal liability, suit, or sanction with regard to any action taken in good-faith compliance with the provisions of this section.176 It is no doubt due to this phrase that no cases have cited this statute since its enactment in 2001.

C. The Silent States

The twenty-seven “Silent States”—roughly concentrated in the Western and Eastern regions of the United States—make no explicit mention of parents’ right or ability to bury or otherwise arrange for the disposition of a miscarried child.177 For example, North Carolina has no statute specifically addressing the disposition of a miscarried or stillborn child.178 Its two most relevant statutes—titled “Death registration” and “Persons required to keep records and provide information” respectively—read:

. . . In the case of death or fetal death without medical attendance, it shall be the duty of the funeral director or person acting as such and any other person having


176. COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001) (“Nothing in this section shall prohibit the health care provider from requiring a release of liability for the release of the remains of a fetal death prior to such release. . . . A health care provider shall be immune from all civil or criminal liability, suit, or sanction with regard to any action taken in good-faith compliance with the provisions of this section.”) See OHIO REV. CODE ANN. § 3727.16 (West 2008), for a similar provision.

177. ARIZ. ADMIN. CODE § R9-19-302 (2007); CAL. HEALTH & SAFETY CODE § 7054.3 (West 1971); CONN. GEN. STAT. ANN. § 7-64 (West 2004); DEL. CODE ANN. tit 16, § 3151 (West 1992); HAW. REV. STAT. § 338-23 West 1981); IDAHO CODE ANN. § 39-268 (West 2007); IOWA ADMIN. CODE R. 641-97.12(144); KY. REV. STAT. ANN. § 213.096 (West 1990); LA. REV. STAT. ANN. § 40:52 (2003); MD. CODE ANN., HEALTH-GEN. § 4-215 (West 2008); MD. CODE REGS. 10.03.01.05 (2013); MISS. CODE ANN. § 41-39-1 (West 1964); MISS. CODE ANN. § 41-39-3 (West 1976); MONT. CODE ANN. § 50-20-105 (1974); MONT. ADMIN. R. 37.21.115 (1974); NEV. REV. STAT. ANN. § 440.360 (West 1941); N.H. REV. STAT. ANN. § 5-C:79 (West 2007); N.H. REV. STAT. ANN. § 5-C:78 (West 2013); N.H. REV. STAT. ANN. § 290:3-a (West 2013); N.J. STAT. ANN. § 26:6-11 (West 1965); N.M. STAT. ANN. § 24-14-23 (West 1985); N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987); N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987); N.C. GEN. STAT. ANN. § 130A-115 (West 2011); N.D. CENT. CODE ANN. § 23-02-1-30 (West 2008); OKLA. STAT. ANN. tit. 63, § 1-319 (West 2011); 35 PA. STAT. ANN. § 450.504 (West 2009); R.I. GEN. LAWS ANN. § 23-3-18 (West 1993); 25 TEX. ADMIN. CODE § 1.133 (1994); UTAH CODE ANN. § 26-2-17 (West 2007); VA. CODE ANN. § 32.1-265 (West 1979); WASH. REV. CODE ANN. § 70.58.250 (West 2009); WYO. STAT. ANN. § 35-1-420 (West 1973). New Hampshire requires written authorization from a parent regarding disposition, but only for a child of more than twenty gestational weeks. N.H. REV. STAT. ANN. § 5-C:79 (West 2007); N.H. REV. STAT. ANN. § 5-C:78 (West 2013); N.H. REV. STAT. ANN. § 290:3-a (West 2013).

178. See N.C. GEN. STAT. ANN. § 130A-115 (West 2011) (addressing fetal death registration); see N.C. GEN. STAT. ANN. § 130A-117 (West 1983) (addressing who must keep records and provide information of fetal death).
knowledge of the death to notify the local medical examiner of the death. The body shall not be disposed of or removed without the permission of the medical examiner. If there is no county medical examiner, the Chief Medical Examiner shall be notified.\(^{179}\)

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\ldots \text{When a dead body or dead fetus of 20 weeks gestation or more is released or disposed of by an institution, the person in charge of the institution shall keep a record showing the name of the decedent, date of death, name and address of the person to whom the body or fetus is released and the date of removal from the institution. If final disposition is made by the institution, the date, place, and manner of disposition shall also be recorded . . . .}^{180}\]

As in North Carolina, many state statutes refer only to the duties of the local health officer, medical examiner, funeral director or other person responsible for safely handling the remains, making no mention of the parent’s role.\(^{181}\) Other statutes require specific procedures for stillborn children, but not for miscarried children.\(^{182}\) For example, Idaho’s statute—titled “Authorization for final disposition”—states:

The mortician or person acting as such who first assumes possession of a dead body or stillborn fetus shall make a written report to the registrar of the district in which death or stillbirth occurred or in which the body or stillborn fetus was found within twenty-four (24) hours after taking possession of the body or stillborn fetus, on a form prescribed and furnished by the state registrar and in accordance with rules promulgated by the board.\(^{183}\) The written report shall serve as permit to transport, bury or entomb the body or stillborn fetus within this state, provided that the mortician or person acting as such shall certify that the physician, physician assistant or advanced practice professional nurse in charge of the patient's care for the illness or condition which resulted in death or stillbirth has been contacted and has affirmatively stated that [said person]...will sign the certificate of death or stillbirth.\(^{183}\)


\(^{181}\) See e.g., ARIZ. ADMIN. CODE § R9-19-302 (2007) (“To obtain a disposition-transit permit for human remains from a fetal death, a funeral establishment or responsible person shall submit the following information to the local registrar or deputy local registrar of the county where the fetal death occurred or the state registrar . . . .”).

\(^{182}\) See, e.g., N.H. REV. STAT. ANN. § 5-C:79 (West 2007) (discussing procedures for the disposition of fetal remains, with “fetal remains” defined as a child that has reached twenty weeks gestation or more). It is important to see the definitions of specific words or phrases, such as “fetal death,” when interpreting miscarriage burial statutes.

\(^{183}\) IDAHO CODE ANN. § 39-268 (West 2007).
The Silent States offer the least protection to parents of miscarried children who wish to bury their child.\textsuperscript{184} Although some hospitals may independently adopt procedures for discussing a miscarried child’s disposition with parents, a hospital in a Silent State is not required to do so by statute.\textsuperscript{185} The lack of such requirement inevitably leads to inconsistencies and makes the parents’ experience following a miscarriage largely dependent on a given hospital’s policies.\textsuperscript{186}

The ramifications are clearly and painfully illustrated by the Robinsons’ story introduced at the beginning of this Comment.\textsuperscript{187} The statute in the Robinsons’ home state of New York explicitly excludes miscarried children from its burial statute.\textsuperscript{188} Because the Robinsons’ son

\textsuperscript{184} Compare \textsc{Idaho Code Ann.} § 39-268 (West 2007) (making no mention of a parent in regard to the disposition of a miscarried child), with 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) ((requiring that a hospital notify a mother of her right to arrange for the burial or cremation of a miscarried child), and \textsc{Ohio Rev. Code Ann.} § 759.49 (West 2008) (requiring that a mother request a burial for her miscarried child).


\textsuperscript{186} See Ferguson, supra note 131 (describing a woman who had miscarried twice and had been treated in two entirely different ways by the same hospital). For an online group discussion regarding an Oklahoma physician who supposedly refused to give a mother her miscarried child’s remains for burial, see Lauren’s Mommy, \textit{Question About Miscarriage Remains}, BABY GAGA (Dec. 9, 2007), http://www.babygaga.com/t-140682/question-about-miscarriage-remains.html.

\textsuperscript{187} Telephone Interview (June 2013); see also Ferguson, supra note 131 (describing a mother who had miscarried twice and was treated in two entirely different ways by the same hospital).

\textsuperscript{188} \textsc{N.Y. Pub. Health Law} § 4162 (McKinney 1987) (“A permit shall be required for the removal, transportation, burial or other disposition of remains resulting from a fetal death, other than fetal tissue, hydatidiform mole or other evidence of pregnancy recovered by curettage or operative procedures or other products of conception of under twenty weeks uterogestation . . . .”). Most states prohibit a body’s burial unless a local registrar of vital statistics issues a burial permit. See, e.g., \textsc{Ohio Rev. Code Ann.} § 3705.17 (West 2000) (“The body of a person . . . shall not be interred, deposited in a vault, cremated, or otherwise disposed of . . . until a burial permit is issued by a local registrar . . . of vital statistics.”). A local registrar will not issue a burial permit until a physician issues a satisfactory death or fetal death certificate with the local registrar. \textit{Id.}
died at fourteen weeks gestation, he fell outside of the statue’s purview.\textsuperscript{189} Moreover, because New York’s statute is silent on a parent’s role in determining the disposition of a child of less than twenty gestational weeks, the hospital where Sharon went following her miscarriage was not required to first gain authorization from the Robinsons’ before taking action, even though both Sharon and James immediately expressed their desire to bury their son upon arriving at the hospital.\textsuperscript{190} Whereas New York case law has recognized that parents have the right to bury a stillborn child,\textsuperscript{191} Sharon—just six weeks shy of reaching twenty weeks of pregnancy—had no recourse under current New York law.\textsuperscript{192}

\textbf{IV. Analysis}

This Part explains why legislation that protects a parent’s right to determine the disposition of a miscarried child is more favorable than legislation that does not.\textsuperscript{193} First, this Part examines the concept of social birth and how advances in obstetric sonography have led more and more parents to form emotional bonds with their unborn children long before the child’s physical birth.\textsuperscript{194} Next, this Part explores the benefits of providing a burial for a miscarried or stillborn child and how appropriately crafted legislation giving parents the opportunity to do so at any stage of pregnancy is beneficial to both parents and the state.\textsuperscript{195}

\textsuperscript{189} Telephone Interview (June 2013). For a discussion on how soon after a miscarriage a parent must request the child’s remains for burial, see Part V (proposing model legislation).
\textsuperscript{190} N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987); Telephone Interview (June 2013).
\textsuperscript{191} See, e.g., Correa v. Maimonides Medical Center, 629 N.Y.S.2d 673, 675 (N.Y. Sup. Ct. 1995) (holding that the same right to possession of remains for the purpose of burial exists with respect to the remains of a stillborn child as exists with respect to a child born alive); see supra Part III.B (discussing burial rights generally and case law on the right of sepulcher as applied to stillborn children).
\textsuperscript{192} N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987); Telephone Interview (June 2013).
\textsuperscript{193} Compare 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) (requiring that hospitals notify parents of their right to bury a miscarried child), with COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001) (requiring that hospitals permit parents to bury a miscarried child only upon the parents’ request), and N.Y. PUB. HEALTH LAW § 4162 (McKinney 1987) (making no mention of a parent’s right to bury a miscarried child).
\textsuperscript{194} For a discussion of social birth, see Sanger, supra note 20; see infra Part V.A (examining the concept of social birth in today’s society).
\textsuperscript{195} See Cacciatore supra note 100, at 378 (“Giving birth to a dead baby is one of the most profound losses that a woman can suffer and has a wide variety of emotional, cognitive, psychological, spiritual, and physiological
Finally, this Part examines miscarriage burial legislation in the context of the abortion debate, identifying the ways in which state law already protects parents and unborn children outside the context of abortion—in tort, criminal, and property law.  

A. Social Birth

Social birth—the identification and incorporation of a child into his or her family during pregnancy—now commonly precedes physical birth and leads parents to perceive a miscarriage as a death in the family. The term’s origins are in the context of adoption, where it expresses how an adopted child becomes a complete part of the adoptive family, as if he or she had been biologically born into it. Both legally and socially, the adopted child is made a member of the adoptive family with full standing. The term’s adaptation to the realm of the unborn child illustrates how a biological child becomes a full, participating member of the family during pregnancy and long before birth.

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196 See generally, Paul B. Linton, The Legal Status of the Unborn Child Under State Law, 6 U. ST. THOMAS J.L. & PUB. POL’Y 141, 143 (2011) (exploring how state laws protect unborn children outside of the abortion context— in criminal law, tort law, health care law, property law, and guardianship law); see infra Part V.C (analyzing miscarriage burial legislation in the context of the abortion debate).

197 Sanger, supra note 20, at 283. “Physical birth” refers to biological birth. Id.

198 See Fred L. Kuhlmann, Intestate Succession by and from the Adopted Child, 28 WASH. U. L. REV. 221, 248 (1943) (stating that the term “social birth” is well chosen and aptly expresses the fact that the adopted child is now regarded as completely a part of the adoptive family as if he had been born into the family); see Hallie E. Still-Caris, Legislative Reform: Redefining the Parent-Child Relationship in Cases of Adoption, 71 IOWA L. REV. 265, 265 (1985) (stating that adoption embraces the notion that an adopted person is “born” into the adoptive family, a “social birth” as significant as biological birth).

199 See Kuhlmann, supra note 198, at 248 (“The relatives as well as the immediate family customarily accept the child into the family circle as a matter of course.”); see Still-Caris, supra note 198, at 265 (considering adoption in the context of donative transfer laws).

200 See Sanger, supra note 20, at 282 (discussing how a stillborn child has been alive—a participating member of the family—for most of the mother’s pregnancy and long before birth). For a discussion of how to bond with one’s child in the womb, see Marianne Littlejohn, How to Bond With Your Unborn Baby, SPIRITUAL BIRTH, http://www.spiritualbirth.net/how-to-bond-with-your-unborn-baby (last visited Nov. 5, 2013).
Technological advances in obstetric sonography are a large contributor to social birth. Ultrasounds allow parents to see their child in detail long before the child’s physical birth and have been widely used to confirm early pregnancy, determine gestational age, assess the child’s growth, manage multiple pregnancies, diagnose pregnancy-related complications, and assess abnormalities. Three-dimensional ultrasound photos replaced two-dimensional black-and-white images in the early 2000s. Today, four-dimensional ultrasounds provide the opportunity to observe subtle facial expressions and individually recognizable features.

More than ever previously possible, the availability and widespread use of these technologies has transformed the experience of pregnancy for parents, further confirming the reality of the pregnancy and providing an opportunity to “meet” the baby as early as six weeks gestation. As a result of this emotional bond, parents hang ultrasound images—their baby’s first picture—on their refrigerator and share the images on Facebook and with family and friends, thereby inviting others to share in the experience. Ultrasounds also detect the child’s

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201 Sanger, supra note 20, at 282 (“Pregnant women who undergo ultrasound perceive their baby as being ‘more real, more vivacious, more familiar, stronger and more beautiful.’”) (quoting K. Dykes & K. Stjemqvist, The Importance of Ultrasound to First-time Mothers’ Thoughts About Their Unborn Child, 19 J. REPROD. & INFANT PSYCHOL. 95, 95 (2001)); see also Eisner, supra note 14 (stating that parents are becoming more attached to their unborn children due in part to technological advances such as ultrasounds).

202 Sanger, supra note 20, at 282; see John Lai Yin & Samantha Mei Che Pang, Ethical Analysis of Non-Medical Fetal Ultrasound, 16 NURSING ETHICS 637, 637 (2009) (describing ultrasound as a well-recognized prenatal test used to visualize and determine the condition of a pregnant woman and her unborn child).

203 Yin, supra note 201, at 638; see Asim Kurjak, Guillermo Azumendi, & Wiku Andonotop, et al., Three- and four-dimensional ultrasonography for the structural and functional evaluation of the fetal face, 196 AM. J. GYNECOL. 16, 16–18 (2007) (discussing how three-dimensional and four-dimensional ultrasonography can be used for the structural and functional evaluation of an unborn child’s face).

204 Yin, supra note 201, at 638; Kurjak, supra note 203, at 16–18 (2007).

205 See Julie Roberts, ‘Wakey, wakey baby’: narrating four-dimensional (4D) bonding scans, 34 SOCIOLOGY OF HEALTH AND ILLNESS 299, 300 (2011) (discussing how commercial companies in the United Kingdom market four-dimensional ultrasound scans to expectant parents for the stated purpose of reassurance, to promote bonding, and to get the “baby’s first picture”); see also Aparna Atluru, Kalli Appleton, & Sanja Kupesic Plavsic, Maternal-Fetal Bonding: Ultrasound Imaging’s Role in Enhancing This Important Relationship, 6 DONALD SCH. J. ULTRASOUND OBSTET. GYNECOL. 408 (2012) (discussing how the use of two-dimensional, three-dimensional, and four-dimensional ultrasounds may create differences in the amount of maternal-fetal bonding).

sex early in pregnancy, leading parents to name their unborn child prior to birth, paint the
nursery, buy clothing and toys, and even begin to save for the child’s college tuition.\textsuperscript{207}

Because social birth often precedes physical birth, parents who experience a miscarriage
are understandably devastated by the death of their child, feeling the pain as deeply as if the child
had died after having been born alive.\textsuperscript{208} For example, studies show that fathers who saw their
child in an ultrasound image expressed a greater sense of loss than those who did not.\textsuperscript{209}
Furthermore, mothers who deliver a child who has died \textit{in utero} endure both the physical pain
that comes with childbirth and emotional pain of the death of their child—a full member of their
family.\textsuperscript{210}

\textsuperscript{207} Sanger, supra note 20, at 282–83; see Susan Michelle Tyrell, \textit{Amazing photos of Nathan, miscarried at 14 weeks, show unborn baby's humanity}, LIFENEWS.COM, Sep. 23, 2013, available at
http://www.usnews.com/education/best-colleges/paying-for-college/articles/2013/07/31/kick-off-college-savings-before-a-child-is-born (encouraging parents to begin saving for their child’s college tuition before the child is born); see \textit{Preparing for Your Baby’s Arrival}, SUTTER HEALTH,
suggestions for essential nursery equipment in preparation for an unborn child’s birth).

\textsuperscript{208} See Lewin, supra note 21 (describing the experience of a mother of a stillborn child).

The experience of giving birth and death at the exact same time is something you don’t understand
unless you’ve gone through it . . . . The day before I was released from the hospital, the doctor
came in with the paperwork for a fetal death certificate, and said ‘I’m sorry, but this is the only
document you’ll receive.’ In my heart, it didn’t make sense. I was in labor. I pushed, I had
stitches, my breast milk came in, just like any other mother. And we deserved more than a death
certificate.

\textsuperscript{209} See Joann O’Leary & Clare Thorwick, \textit{Fathers’ Perspectives During Pregnancy, Postperinatal Loss}, 35 J.
OBSTET. GYNECOL. NEONATAL NURS. 78, 79 (2005) (presenting information about the father’s perspective during
the experience of a pregnancy following perinatal loss). Some scholars suggest that fathers who attend the
ultrasound scan can come to “know” the unborn child as much as the mother. \textit{Id.}

\textsuperscript{210} See Cacciatore supra note 100, at 378 (“Giving birth to a dead baby is one of the most profound losses that a
woman can suffer and has a wide variety of emotional, cognitive, psychological, spiritual, and physiological
consequences.”); see also Tyrell, supra note 207 (“‘I wanted to feel the pain and to let the reality of it wash over me
. . . . I wanted to be very present and to feel every contraction. I felt it was my honor to labor for my son.’”).
The relationship between parents and their unborn child—which grows stronger and begins earlier as technology continues to advance—is profound, and the impact of social birth on society is permanent. These relationships and understandings have the power to move hearts and change laws, as they did when Dr. Cacciatore joined with other men and women to successfully lobby for birth certificate legislation for stillborn children in forty-four states and counting. With the right leadership and teamwork, legislation requiring hospitals to inform parents of their right to bury a miscarried child could be similarly successful.

B. Burial and the Grieving Process

Taking into account a parent’s legitimate understanding of a miscarriage as a death in the family and the trauma the experience brings, it is useful to examine how arranging for the burial of a miscarried child affects a parent’s level of grief. Though each family’s values, beliefs and cultural practices will affect its decisions differently and influence the particular type of burial

211 See Sanger, supra note 20, at 282 (stating that technology has profoundly and permanently altered society’s relationship to life inside the womb).

212 See Cacciatore, supra note 100, at 381–82 (describing how the grassroots efforts of women and men led to the passage of the first law to provide birth certificates for stillborn children); see Eisner, supra note 14 (stating that a growing movement of parents and healthcare professionals are demanding that hospitals give parents the option or burying or cremating a miscarried child).


214 While not all parents of miscarried or stillborn children will choose a burial—some opting for cremation instead—the benefits of burial and cremation in relation to a parent’s level of grief are similar. See Wijngaards-De Meij, Leoniek, The Impact of Circumstances Surrounding the Death of a Child on Parents’ Grief, 32 DEATH STUDIES 237, 248–49 (2008) (considering whether parents adjust to the death of a child differently based on the choices they make regarding certain changeable and unchangeable circumstances, such as whether to bury the child). Instead of a private burial, some parents choose a hospital burial, which is a communal burial that the hospital arranges. See ANGELA WHITTEN ET AL., SENSITIVE DISPOSAL OF ALL FETAL REMAINS: GUIDANCE FOR NURSES AND MIDWIVES, ROYAL COLLEGE OF NURSING 4 (2007), available at http://www.rcn.org.uk/__data/assets/pdf_file/0020/78500/001248.pdf (instructing nurses and midwives in the United Kingdom of a parent’s option to choose a private burial, a hospital burial, cremation, or a burial outside of a cemetery). However, at least one study has shown that families who authorized a hospital to bury their miscarried child were dissatisfied in comparison to families who had arranged the burials themselves. See Stringham, supra note 17 at 324 (finding that families who authorized a hospital to bury their miscarried child were more dissatisfied than families who had arranged private burials). The families’ reasons for dissatisfaction included not having been informed of different burial options and costs, not knowing where the hospital buried the child, not having a marker for the child, and not having a funeral or other burial rite. Id.
the family might choose, most burials involve some kind of ritual to recognize and help remember a child’s life. These rituals provide a vehicle for the expression and containment of strong emotions, ease feelings of anxiety, and provide structure and order in times of chaos.\footnote{A ritual is a publicly or privately enacted cultural device that facilitates the preservation of social order and provides ways to comprehend the complex and contradictory aspects of human existence within a given social context. See Bronna D. Romanoff & Marion Terenizio, \textit{Rituals and the Grieving Process}, 22 DEATH STUDIES 697, 698 (1998) (examining the function of funeral and bereavement rituals in contemporary Western society and considering the relationship between rituals and complicated and disenfranchised grief). A burial ritual need not be religious in nature. See, e.g., MICH. COMP. LAWS ANN. § 333.2848 (West 2013) (“This section . . . does not require a religious service or ceremony as part of the final disposition of fetal remains.”); see also \textit{Why a Funeral?}, DELMARVA FUNERAL SERVICE ASSOCIATION (last visited November 2, 2013), http://www.delmarvafuneralservice.com/whyafuneral.html [hereinafter \textit{Why a Funeral?}] (correcting the misconception that funerals are only for religious people). However, when religion is involved, it typically influences various aspects of a ritual, including the nature of bodily display and the formality and solemnity of services. See T. O’Rourke, Brian H. Spitzberg, & Annegret F. Hannawa, \textit{The Good Funeral: Toward an Understanding of Funeral Participation and Satisfaction}, 35 DEATH STUDIES 729, 733 (2011) (studying the relationship between funeral satisfaction and the various roles attendees can perform).}

Funeral rituals and memorial services, for example, provide these healing functions for grieving parents.\footnote{Romanoff, \textit{supra} note 215 at 698. Mental health professionals have long recognized the role that rituals play in the resolution of grief and healing. \textit{Id.} at 706.}

Funerals—which provide an opportunity for an outward display of grief and affirm the miscarried child’s relationship with his parents and the community—have psychological, emotional, and spiritual benefits for bereaved parents.\footnote{Romanoff, \textit{supra} note 215 at 698. A “funeral” refers to a ceremony in which the decedent’s body is present, whereas a “memorial service” refers to one in which the body is generally absent. O’Rourke, \textit{supra} note 215, at 730.}

As with any significant loss, a miscarriage causes intense psychological and emotional responses including guilt, depression, anxiety, anger, shock, denial, and detachment.\footnote{Romanoff, \textit{supra} note 215, at 698; see also O’Rourke, \textit{supra} note 215, at 730. Funerals are one of the oldest signs of human social ritual. O’Rourke, \textit{supra} note 215, at 743, 746 (“Research indicates that emotional expression tends to provide a healthy form of release, and funerals provide a socially sanctioned environment for such expression”).}

Psychologically, a funeral serves to confirm the finality of the loss and makes a miscarried child’s death a reality to parents, thereby allowing
them to begin the healing process.\textsuperscript{220} Research suggests that mothers who see and hold their miscarried or stillborn child have fewer symptoms of anxiety and depression than mothers who do not.\textsuperscript{221} Funerals can also provide social support, which lessens the effects of trauma and stress.\textsuperscript{222} Because bereaved parents have a higher relative risk than non-bereaved parents of being hospitalized for affective disorders, funerals have the potential to play an important role in preventing or ameliorating debilitating illness following a miscarriage.\textsuperscript{223}

Emotionally, a funeral provides closure and gives parents an opportunity to say goodbye to their beloved child.\textsuperscript{224} Studies have found that parents who say goodbye—whether in words or symbolically—have lower levels of grief during the first two years after a child’s death than

\textsuperscript{220} See Why a Funeral?, supra note 215 (explaining why funerals are a valuable experience to help in the mourning process). The five stages of grief are (1) denial and isolation, (2) anger, (3) bargaining, (4) depression, and (5) acceptance. See Julie Axelrod, The 5 Stages of Loss and Grief, PSYCH CENTRAL, http://psychcentral.com/lib/the-5-stages-of-loss-and-grief (last visited November 2, 2013) (describing the five universal stages of mourning).

\textsuperscript{221} See Why a Funeral?, supra note 215 (explaining why funerals are a valuable experience to help in the mourning process); see also Joanne Cacciatore, Ingela Radestad, & J. Frederik Foren, Effects of Contact with Stillborn Babies on Maternal Anxiety and Depression, 35 BIRTH 313, 318 (2008) (investigating the effects of women seeing and holding their stillborn baby on the risk of anxiety and depression in a subsequent pregnancy and in the long term).

Parents grieve for differing periods of time and differ in how they come to terms with a loss. Wijngaards-De Meij, supra note 214, at 245; see also Johnson, supra note 219 (“When it comes to grieving the death of a loved one, there are no linear patterns, no ‘normal’ reactions, no formulas to follow.”). Although men and women grieve the loss of a child, women tend to grieve the death of a child more than men. See Wijngaards-De Meij, supra note 214, at 247 (giving means and standard deviations of grief and depression by gender and the cause of a child’s death). This may be due to the social role of fathers as an expected support to their partners. See William Badenhorst, Samantha Riches, Penelope Turton, & Patricia Hughes, The Psychological Effects of a Stillbirth and Neonatal Death on Fathers: Systematic Review, 27 J. PSYCHOSOM. OBSTET. GYNECOL. 245, 254 (stating that fathers may be unable to succumb to emotional distress because they then might be unable to care for their partners). For photos of a mother holding her miscarried child, see Tyrell, supra note 207 (“‘His little body was so perfect, with ten tiny fingers and ten tiny toes. He had a nose, a mouth, two little eyes and ears.’”).

\textsuperscript{222} JoAnne Cacciatore, The Effects of Social Support on Maternal Anxiety and Depression After Stillbirth, 17 HEALTH SOC. CARE COMM. 167, 168 (“Social support plays a vital role in buffering the effects of trauma and mediating stress.”). A funeral has social benefits not only for the parents, but also for friends and family as well. Why a Funeral?, supra note 215.

\textsuperscript{223} See Wijngaards-De Meij, supra note 214, at 238 (examining the relationship between the circumstances surrounding the death of a child and psychological adjustment among bereaved parents). If a parent experiences depression or has suicidal thoughts, the parent should contact a doctor. See Patricia Johnson, Grief, Trauma, or Depression?, FOCUS ON THE FAMILY (2007), http://www.focusonthefamily.com/lifechallenges/emotional_health/coping_with_death_and_grief/grief_trauam_or_depression.aspx (explaining the different symptoms of grief, depression, and trauma).

\textsuperscript{224} See Why a Funeral?, supra note 215 (explaining why funerals are a valuable experience to help in the mourning process). “Saying goodbye” can be carried out in words or symbolically. See also Wijngaards-De Meij, supra note 214, at 240 (describing studies in which bereaved parents better adapted to their child’s death if they had the opportunity to say goodbye).
parents who do not or cannot do so. Funerals also provide a forum for parents to embrace their pain and sadness, with parents who participate in the funeral by telling stories, crying, or otherwise interacting with others experiencing the most benefits.

Funerals can also be spiritually beneficial to the parents of a miscarried child. For example, Catholicism teaches that each human being has inherent dignity from the moment of conception. As such, Catholic parents find it important to treat the child’s body with great respect. Although parents may not always be able to keep the remains of a miscarried child for burial—as when a woman unknowingly miscarries within the first few weeks of her pregnancy—giving a worthy burial when possible encourages parents to trust in God and hope that by his mercy, they will see their son or daughter again.

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225 Wijngaards-De Meij, supra note 214, at 247–48. Some parents use photography to capture their final goodbyes. See Kalb, supra note 100, at 54 (describing professional volunteer photographers who take photos of stillborn children for parents at no cost).
226 Why a Funeral?, supra note 215; see also O’Rourke, supra note 215, at 746 (finding that the social negotiation of emotion and confirmation of one another’s emotions is the most important feature of funeral satisfaction).
227 See Tyrell, supra note 207 (describing a home burial in which parents read the Bible, prayed, worshipped, and thanked God for the life they had gotten to know in the womb and hold after death). Heaven’s Gain, a family-run company selling caskets for miscarried and stillborn children, allows individuals to buy caskets and donate them to a local hospital, clinic, or doctor’s office for a family who loses a child in the future. See Need Help/Helping Others, HEAVEN’S GAIN, http://www.heavensgain.com/id60.html (last visited November 2, 2013) (enabling others to help in its ministry assist parents who have suffered a miscarriage or stillbirth).
228 See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, supra note 23, at 23 (reaffirming the ethical standards of behavior in health care that flow from the Church’s teaching about the dignity of the human person and providing authoritative guidance on certain moral issues that face Catholic health care today); see also Martin, supra note 3 (quoting a clinical ethicist on Catholic teaching and practices).
229 See Martin, supra note 3 (“As persons created in the image and likeness of God, we have intrinsic dignity. We are body-soul creatures, and the body shares in the dignity of the whole person.”). See also Tyrell, supra note 207 (“It was simple and beautiful,” [the mother of a miscarried boy stated about the burial. ‘It honored the Lord and Nathan. It shouted significance about a life that many would disregard.’]).

As regards children who have died without Baptism, the Church can only entrust them to the mercy of God, as she does in her funeral rites for them. Indeed the great mercy of God who desires that all men should be saved, and Jesus’ tenderness toward children which caused his to say: “Let the children come to me, do not hinder them,” allow us to hope that there is a way of salvation for children who have died without Baptism.

Id.
See also Martin, supra note 3 (stating the importance of acknowledging the life that was growing inside the womb); cf. Eisner, supra note 14 (“‘If a women [sic] missed a period for two weeks and then menstruates because of a miscarriage, should she save the pads for burial since many miscarriages occur like this?’”).
Providing a funeral for a miscarried child is an option regardless of a parent’s socioeconomic status.\(^{231}\) Although many people assume that providing a funeral is expensive, funeral homes often offer burial services for stillborn or miscarried children for free or for a nominal charge.\(^{232}\) In addition, some religious cemeteries have arrangements with local hospitals in which they offer graves for a minimal cost and waive the customary fee for the grave’s opening and closing.\(^{233}\) These options allow parents to experience the benefits of providing a burial for their miscarried child without incurring financial stress.\(^{234}\)

State legislators should consider these benefits when considering legislation that protects a parent’s right to bury a miscarried child.\(^{235}\) Input from individuals with intimate familiarity with the issues serves to educate legislators, flesh out the advantages and disadvantages of a given bill, and inform the legislature of how the bill might affect a particular section of the

\(^{231}\) See Why a Funeral?, supra note 215 (citing ALAN WOLFELT, CREATING MEANINGFUL FUNERAL CEREMONIES: A GUIDE FOR CAREGIVERS (2011)) (dispelling the myth that funerals are too expensive). One family bought a wooden box for the child’s remains at JoAnn Fabrics and a plot for burial at a cemetery for $75.00. Martin, supra note 3. See also HEAVEN’S GAIN, http://www.heavensgain.com/index.html (last visited November 2, 2013) (providing caskets specifically for miscarried or stillborn children at prices ranging from $58 to $375).

\(^{232}\) See Stringham, supra note 17, at 325 (stating that some funeral directors consider such burials a community service); see also Eisner, supra note 14 (stating that many funeral homes offer their services to families of a miscarried child without charge).

\(^{233}\) For example, Catholic Cemeteries had an arrangement with hospitals in the archdiocese of Chicago in which funeral directors—either volunteers or under contract with the hospitals—would receive and transport a miscarried child to a designated Catholic cemetery. See Martin, supra note 3 (quoting a deacon who describes burying miscarried children as a ministry that shows care, concern, and solidarity with those who have suffered such a personal loss). Upon arrival at the cemetery, the director buries the child in the Holy Innocents section in a common, unmarked grave. Id. The “Holy Innocents” is a reference to King Herod’s massacre of children in his attempt to kill the infant Jesus. Feast of the Holy Innocents, ENCYCLOPÆDIA BRITANNICA (last visited November 2, 2013), http://www.britannica.com/EBchecked/topic/269793/Feast-of-the-Holy-Innocents. Parents may also have the option of burying a miscarried child in the backyard of their home or on another plot of land not within a traditional cemetery. See Tyrell, supra note 207 (according to Texas law, the parents of a miscarried child of fourteen weeks gestation were able to take the child home and bury him on a spot of land in Texas where the mother grew up).

\(^{234}\) See SKYLAR’S GIFT FOUNDATION, http://skylersgift.org/about/ (last visited November 3, 2013) (providing funding for and raising awareness of services that provide after-life care for families who have endured the loss of premature infants); see also STAR LEGACY FOUNDATION, http://starlegacyfoundation.org/us/ (last visited November 3, 2013) (raising funding and awareness so that better technology, education, and research are available to families of stillborn infants).

population. Openness and transparency within a legislature also allows citizens to participate in what is sometimes the most important stage of legislation.

The Colorado legislature discussed the benefits of burial prior to enacting its statute on the topic, soliciting comments, opinions, and observations from members of the community. For example, a woman discussed her family’s experience with miscarriage and stated that hospitals need a plan in place to handle inconsistencies in how they handle miscarriage remains. In addition, a Catholic priest discussed the healing effects of funerals while a Christian pastor discussed his experience with helping people cope with the death of a loved one, stating that funerals are an effective way to achieve closure. Such testimony on individuals’ experiences, their request for and support of the legislation, and the relative lack of public testimony in opposition to the bill demonstrates the public’s interest in such legislation and reflects the legislative process’s responsiveness to matters of public concern.

See Kurtz, supra note 235 (stating how legislative committees perform the primary work of obtaining expert and public opinion on issues before the legislature). Some state legislature website make this explicit. See also General Information, NORTH DAKOTA LEGISLATIVE BRANCH, http://www.legis.nd.gov/general-information (last visited November 3, 2013) (“You have the right, as do all citizens, to testify before the North Dakota Legislative Assembly on any bill or resolution.”). Citizen participation in the state legislative process—such as that elicited in the Colorado legislature—is important. Id. When citizens participate in the legislative process, they regard the government as more legitimate. Id. When they regard their government as legitimate, they are more likely to obey laws, support the government, and accommodate differing points of views. Id.


Colorado Committee Summary, H.B. 01-1308; see also Kurtz, supra note 235 (“The linkage between citizens and their government is obviously strengthened when the public has ample opportunity to have their concerns heard by the legislature.”).

Colorado Committee Summary, H.B. 01-1308; see also Ferguson, supra note 131 (describing a woman who had a miscarriage twice and was treated in two entirely different ways by the same hospital).

Colorado Committee Summary, H.B. 01-1308; see also Ferguson, supra note 131 (stating that the Florida legislature showed video footage of women who had traumatic experiences with miscarriage during its debate on the Stephanie Saboor Grieving Parents Act).

Colorado Committee Summary, H.B. 01-1308. Modern technology now makes it possible for legislative committees to receive public testimony from remote locations by means of audio- and videoconferencing. Kurtz, supra note 235.
C. Miscarriage and the Abortion Debate

Some commentators have expressed concern that legislation requiring a hospital to notify parents of their right to bury a miscarried child would inherently assert the personhood of the miscarried child and could therefore indirectly infringe on a woman’s right under current law to an abortion.\(^{242}\) While most commentators do not go so far as to suggest that parents experiencing the death of an unborn child are disingenuous in their grief and support of miscarriage burial legislation, they have expressed concern that such legislation might nevertheless provide inadvertent support to the pro-life cause.\(^{243}\) However, such arguments are not compelling enough to override the interests of parents of miscarried children to bury their child because nothing in \textit{Roe v. Wade} or subsequent law precludes states from extending the protection of the law to the parents of unborn children outside of the context of abortion.\(^{244}\) This fact is illustrated by a survey of tort, criminal, and property law, which show the many ways in which state law protects unborn children.\(^{245}\)

\(^{242}\) See Sanger, \textit{supra} note 20, at 305 (stating that supporters of legal abortion have been concerned that issuing stillborn birth certificates may serve as a legal marker equating unborn life with that of born life and that this will play a part in the recriminalization of abortion). However, not all commentators have reacted in this way. When the Colorado legislature solicited comments and opinions from members of the community prior to enacting its current statute on the disposition of a miscarried child, a Planned Parenthood employee stated that Planned Parenthood was not taking a stand one way or the other. Colorado Committee Summary, H.B. 01-1308. In addition, a woman discussed her experience with miscarried and answered questions about how the bill would affect the legal status of an unborn child. \textit{Id.} Finally, one of the Florida Representatives answered questions about how the bill would affect the legal status of an unborn child. \textit{Id.}


\(^{244}\) See Linton, \textit{supra} note 196, at 143.

\(^{245}\) See Linton, \textit{supra} note 196, at 143 (exploring how state laws protect unborn children outside of the abortion context – in criminal law, tort law, health care law, property law, and guardianship law); see Klasing, \textit{supra} note 31, at 933 (exploring the connections and inconsistencies between wrongful death jurisprudence as it relates to unborn children, criminal homicide of unborn children, and abortion).
Personhood is the cultural and legal recognition of the equal and unalienable rights of human beings.\textsuperscript{246} In the context of unborn life, the personhood movement seeks to establish the humanity of the unborn child in order to protect their constitutional guarantees to life, liberty, and the pursuit of happiness.\textsuperscript{247} In \textit{Roe v. Wade}, Justice Blackmun stated, “If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment.”\textsuperscript{248} Although the \textit{Roe} Court held that an unborn child is not a “person” within the meaning of the Fourteenth Amendment, neither \textit{Roe} nor \textit{Planned Parenthood v. Casey} diminished the states’ authority to define the legal status of the unborn child outside the context of abortion or ability to confer rights upon the unborn child that do no interfere with the exercise of the “abortion liberty” recognized in \textit{Roe}.\textsuperscript{249}

Some supporters of legal abortion have expressed concern that giving parents the ability or right to bury a miscarried child may essentially equate unborn life with that of born persons and that this will, sooner or later, play its part in the re-criminalization of abortion.\textsuperscript{250} For example, when the Florida House was considering the Stephanie Saboor Grieving Parents Act in 2003, the \textit{Orlando Weekly} published an opinion article in which the author stated that “[t]his Stephanie Saboor Grieving Parents Rights Act, regardless of the positive effect it might have for women who miscarry, is another incremental end-run around \textit{Roe}.”\textsuperscript{251} The author also stated that “[w]omen who miscarry in Florida already have those choices. Nothing currently prevents a woman from taking possession of fetal remains except her own lack of knowledge of her legal rights.”\textsuperscript{252}

\begin{footnotes}
\item[247] Id.
\item[249] Linton, \textit{supra} note 196 at 143.
\item[250] See Sanger, \textit{supra} note 23, at 305.
\item[251] Ferguson, \textit{supra} note 124.
\item[252] Id.
\end{footnotes}
Not all supporters of legal abortion have been opposed to legislation giving parents the right or ability to bury a miscarried child. When Colorado considered the passage of its miscarriage burial legislation in 2001, a Planned Parenthood employee testified that Planned Parenthood would take no stand for or against the bill. A citizen and one of the legislators also testified, answering questions about how the bill would affect the legal status of an unborn child. The subsequent passage of the bill suggests that ample consideration of the issue and input from individuals and organizations on both sides of the abortion debate supported a conclusion that the legislation was sound.

Indiana Representative Hal Slager, who authored Indiana’s current bill regarding miscarriage burial legislation, has also addressed the concern. An *Indianapolis Star* news article states, “Slager says it’s not a right-to-life bill. It’s not a reproductive rights bill and has nothing to do with abortion. Political organizations that oppose each other on that issue agree. It’s a bill, they say, that’s sensitive to a particular kind of grief.”

A survey of tort, criminal, and property law demonstrates many other contexts in which state law protects unborn children outside the context of abortion. Tort law currently protects unborn children and their parents. For example, most states have either directly or indirectly rejected viability as an appropriate marker for determining liability for nonfatal prenatal injuries and allow actions to be brought for such injuries without regard to the stage of pregnancy when they were inflicted. In fact, no state court has rejected a cause of action for prenatal injuries

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253 See Colorado Committee Summary at 164.
254 Id.
255 Id.
257 Linton, *supra* note 196, at 146; see also Klasing, *supra* note 31, at 934 (“The majority of state courts that have addressed the issue now recognize the possibility of a wrongful death action against a tortfeasor who causes the death of an unborn fetus.”).
258 Wolfe v. Isbell, 280 So.2d 758, 761 ( Ala. 1973) (holding that an action can be maintained for wrongful death arising from injury to an unborn child, whether or not the unborn child was viable when the injury was inflicted, if

viability. Two of these states also allow recovery where the death occurs after quickening, and eleven states allow recovery regardless of the stage of pregnancy when the injury and death occur.

Criminal law also protects unborn children and their parents. More than two-thirds of states have enacted laws that define the killing of an unborn child—outside the scope of

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261 Porter, 87 S.E.2d at 100; Rainey v. Horn, 72 So.2d 434, 434 (Miss. 1954); MISS. CODE ANN. § 11-7-13 (West 2004) (amending wrongful death statute to include an “unborn quick child”). Quickening is the physical sensation of an unborn child’s movement. Sanger, supra note 20 at 143.

262 740 ILL. COMP. STAT. ANN. 180/2.2 (West 2010) (amending wrongful death statute to apply to an unborn child regardless of the stage of gestation or development); Mack v. Carmack, 79 So.3d 597 (Ala. 2012). But see Miller v. Infertility Grp. of Ill., Inc., 897 N.E.2d 837 (Ill. App. Ct. 2008) (holding that the statute does not apply to a pre-implanted fertilized ova); Danos, 402 So.2d at 638–39 (rejecting viability requirement) (codified at LA. CIV. CODE ANN. art. 26 (1999)) (“An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death.”); Warvelle v. Women’s and Children’s Hosp., Inc., 704 So.2d 778, 781 (La. 1998) (citing LA. CIV. CODE ANN. art. 26); Conner v. Monkm Co. Inc., 898 S.W.2d at 89 (interpreting statute setting forth rule of construction); Wiersma v. Maple Leaf Farms, 543 N.W.2d 787 (S.D. 1996) (interpreting wrongful death statute); Carranza, 267 P.3d at 913–15; Farley, 466 S.E.2d at 522 (interpreting wrongful death statute); MICH. COMP. LAWS ANN. § 600.2922a (West 2010); NEB. REV. STAT. ANN. § 30-809(1) (West 2010) (amending wrongful death statute to include “an unborn child in utero at any stage of gestation”); OKLA. STAT. ANN. tit. 12, § 1053(F) (West Supp. 2012); OKLA. STAT. ANN. tit. 63, § 1-730; S.D. CODIFIED LAWS § 21-5-1 (1987) (amending wrongful death statute to include “an unborn child”); TEX. CIV. PRAC. & REM. CODE ANN. § 71.001(4) (West 2008) (defining “individual” in wrongful death statute to include “an unborn child at every stage of gestation from fertilization until birth”); Linton, supra note 196, at 148 (collecting the cases).

263 Linton, supra note 196, at 143; Klasing, supra note 31, at 961.
abortion—as a form of homicide. Of these states, more than one-half make the killing of an unborn child a crime, without regard to gestational age. Although fetal homicide statutes have been repeatedly challenged on a variety of federal and state constitutional grounds, no fetal homicide statute has ever been struck down.

Finally, property law protects unborn children and their parents. A child conceived before the death of a parent who dies intestate but who is subsequently born alive inherits as if he or she had been born during the lifetime of the decedent. And, subject to certain exceptions, if a person fails to provide in his or her will for a child born after the will is executed, the omitted

\[\text{Linton, supra note 196, at 143. See, for example, the statutes listed infra note 265.}\]
\[\text{AL. CODE § 13A-6-1(a)(3) (2011); ALASKA STAT. § 11.81.900(b)(62) (2010); ALASKA STAT. §§ 11.41.150 to 170 (2010) (substantive offenses); ARIZ. REV. STAT. ANN. § 13-1102(A), (B) (2010); ARIZ. REV. STAT. ANN. § 13-1103(A)(5), (B) (2010); ARIZ. REV. STAT. ANN. § 13-1104(A), (B) (2010); ARIZ. REV. STAT. ANN. § 13-1105(A)(1), (C) (2010); GA. CODE ANN. § 16-5-80 (West 2007); GA. CODE ANN. § 40-6-392.1 (West 2007); GA. CODE ANN. § 52-7-12.3 (West 2007 & Supp. 2010); IDAHO CODE ANN. § 18-4016 (2004); IDAHO CODE ANN. § 18-4001 (2004); IDAHO CODE ANN. § 18-4006 (2004); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-2.1; 720 ILL. COMP. STAT. ANN. 5/9-3.2 (West 2002); IND. CODE ANN. § 35-42-1-6 (West 2011); KAN. STAT. ANN. § 21-5419 (West 2011); KY. REV. STAT. ANN. §§ 507A.010–060 (West 2008); L.A. REV. STAT ANN. § 14-2(A)(11) (2007); L.A. REV. STAT ANN. § 14:32.5 (2007); LALLA. REV. STAT ANN. §§ 14:32.6 to .8 (2007); MICH. COMP. LAWS ANN. §§ 750.90a to .90f (West 2004); MINN. STAT. ANN. §§ 609.266 to .2665, 609.268 to .2691 (West 2009); MISS. CODE ANN. § 97-3-37 (West 2011); NEB. REV. STAT. ANN. §§ 28-388 to -394 (LexisNexis 2009); N.D. CENT. CODE §§ 12.1-17.1-01 to -04, 12.1-17.1-07, -08. (1997); OHIO REV. CODE ANN. § 2903.01(A), (B) (West 2010); OHIO REV. CODE ANN. § 2903.02(A) (West 2010) (murder); OHIO REV. CODE ANN. § 2903.03(A) (West 2010) (voluntary manslaughter); OHIO REV. CODE ANN. § 2903.04(A), (B) (West 2010); OHIO REV. CODE ANN. § 2903.041(A) (West 2010); OHIO REV. CODE ANN. § 2903.05(A) (West 2010); OHIO REV. CODE ANN. § 2903.06(A) (West 2010); OHIO REV. CODE ANN. § 2903.09(A), (B) (West 2010); OKLA. STAT. ANN. tit. 21, § 691 (West 2012); OKLA. STAT. ANN. tit. 63, § 1-730(4) (West 2012); 18 PA. CONST. STAT. ANN. §§ 2601 to 2605, 2607 to 2608 (West 1998); S.C. CODE ANN. § 16-3-1083 (2011); S.D. CODIFIED LAWS § 22-1-2(31) (2011); S.D. CODIFIED LAWS § 22-1-2(50A) (2011); S.D. CODIFIED LAWS § 22-16-1 (2011); S.D. CODIFIED LAWS §§ 22-17-6 (2011); TENN. CODE ANN. § 39-13-214 (West 2012); TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2011); TEX. PENAL CODE § 1.07(a)(38); UTAH CODE ANN. § 76-5-201(1)(a) (West 2010); W. VA. CODE ANN. § 61-2-30 (West 2010); WIS. STAT. ANN. § 939.75(1) (West 2005); WIS. STAT. ANN. § 940.01(1)(b) (West 2005); WIS. STAT. ANN. § 940.02(1m); WIS. STAT. ANN. § 940.05(2g); WIS. STAT. ANN. § 940.06(2) (West 2005); WIS. STAT. ANN. § 940.08(2) (West 2005); WIS. STAT. ANN. § 940.09(1)(c), (cm), (d), (e); WIS. STAT. ANN. § 940.09(1g)(c), (cm), (d) (West 2005); WIS. STAT. ANN. § 940.10(2) (West 2005); WIS. STAT. ANN. § 940.04(1) (West 2005); see Linton, supra note 196, at 143-46 (collecting statutes).}\]
child receives a share in the estate equal in value to what he or she would have received if the
testator had died intestate or a share that is equal to that given to children named in the will.269

As this myriad of tort, criminal, and property laws demonstrates, the unborn child and the
parents are subject to protection under the law, despite challenges to their constitutionality under
abortion rights jurisprudence.270 Though some commentators may object to legislation that
protects a parent’s right to bury a miscarried child, those objections would likely not hold muster
in a court of law based on existing precedent.271

V. PROPOSAL

It is important that states appropriately craft miscarriage burial legislation so as to aid
parents in understanding their right to provide a burial for their miscarried child if they so
choose.272 Not only is such legislation beneficial to parents, but it is also a responsible action by
the state, which must legislate on the safe and responsible disposal of such remains regardless of
whether it simultaneously protects parents.273 Without legislation, situations such as the
Robinsons’ will continue to occur; with legislation, unnecessary insults to injury following the
death of an unborn child can be easily avoided.274

Appropriate legislation must take into consideration the realities of miscarriage in the
United States, including its prevalence, the parents’ grieving process, and the benefits of

269 See, e.g., FLA. STAT. ANN. § 732.302 (West 2010); GA. CODE ANN. § 53-4-48 (West Supp. 2010); see Linton,
 supra note 196, at 153 (collecting the statutes).
270 Linton, supra note 196, at 143; Klasing, supra note 31, at 934.
271 See Sanger, supra note 20, at 305 (stating that supporters of legal abortion have been concerned that issuing
stillborn birth certificates may serve as a legal marker equating unborn life with that of born life and that this will
play a part in the recriminalization of abortion).
272 Such laws would prevent women from inconsistencies. See Ferguson, supra note 131 (describing a woman who
had miscarried twice and had been treated in two entirely different ways by the same hospital).
273 See infra Part IV.B (describing the psychological, emotional, and spiritual benefits to providing burial for a
miscarried child); see supra note 88 (describing EPA and OSHA regulations).
274 Telephone Interview (June 2013); see Eisner, supra note 14 (describing a mother who endured a long struggle
with an Illinois hospital to recover the remains of her miscarried child before Illinois enacted its statute protecting
parents’ right to bury a miscarried child).
providing a burial.\textsuperscript{275} Legislation must also take into consideration the realities of parental rights, recognizing that this country clearly invests parents with the right—coupled with the responsibility—to direct decisions regarding their children.\textsuperscript{276} Finally legislation must take into consideration the realities of the health care facilities and practitioners, understanding the need for succinct and clear guidelines that do not require guesswork as to the law’s meaning.\textsuperscript{277}

Taking into account these realities, the following are clear: a) legislation must protect a parent’s right to bury a miscarried child, regardless of the child’s gestational age or weight, b) legislation must require hospital and emergency medical staff to notify parents of this right, c) legislation would ideally require that hospital staff notify parents of their ability to seek counseling following a miscarriage, and d) legislation must clearly indicate to hospital facilities and staff their duties under the law such that there is no room for ambiguity.\textsuperscript{278}

\textit{A. Model Legislation}

Even those states that have statutes most fully protecting a parent’s right to bury a miscarried child vary in how they express that right.\textsuperscript{279} Model legislation combines elements of various state statutes in order to arrive at a statute that a) protects a parent’s right to bury a miscarried child, b) requires hospital and emergency medical staff to notify parents of this right, and c) requires that hospital staff notify parents of their ability to seek counseling following a miscarriage.\textsuperscript{280} Based on these factors, model legislation might take the following form:

\textsuperscript{275}See \textit{supra}, note 7 (describing miscarried and stillbirth in the United States in 2006).
\textsuperscript{276}See \textit{supra}, Part II.A (giving a background of the law on parental rights in the United States).
\textsuperscript{277}See \textit{supra}, Part II (providing a background of parental rights, burial rights, and their interplay with the medical field).
\textsuperscript{278}See \textit{infra}, Part V.A (proposing model legislation).
\textsuperscript{279}Compare 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010) (describing a parent’s ability to bury a miscarried child as a “right”) \textit{with} ALA.CODE § 22-9A-16 (1992) (describing that a parent must give authorization before a miscarried child is disposed); see \textit{infra} Part III.A (describing the similarities and differences among the various state statutes in the Notification States category).
\textsuperscript{280}The primary state statutes used to create his model legislation were Florida, Illinois, Massachusetts, Michigan, and Missouri. FLA. STAT. ANN. § 383.33625 (West 2003); 210 ILL. COMP. STAT. ANN. 85/11.4 (West 2010); MASS.
(a) Prior to final disposition of a miscarried or stillborn child—regardless of the duration of pregnancy—a hospital, maternity center, medical care facility, or any person assuming responsibility for final disposition of the child, must notify at least one parent, both orally and in writing of:

1. the parent’s right to arrange for the burial or cremation of the child; and
2. the availability of a chaplain or other counseling concerning the death of the child, whether provided by the facility or another provider.

(b) If, within 48 hours after being notified under this Section, the parent elects in writing to arrange for the burial or cremation of the child, the disposition of the child shall follow the procedures set forth in general law.

First and foremost, this proposed legislation explicitly protects a parent’s right to bury a child who has died in utero—regardless of that child’s gestational age or weight. In addition, unlike the Upon Request States, the model legislation requires that health care practitioners and facilities explicitly notify at least one parent of the right to burial. This ensures that parents are aware of their right and ability to choose burial if they desire. The model legislation also gives parents ample time to make this decision by including a timing requirement. The requirement gives a parent forty-eight hours in which to make a decision regarding burial, which is long enough for a parent to weigh the decision but short enough that a hospital can function.

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281 Note that statutes in the various states use different terms when referring to a child who has died in utero. Compare N.H. REV. STAT. ANN. § 5-C:1 (West 2009) (defining “fetal death” as the complete expulsion or extraction of fetus of at least twenty weeks gestation or weighing 350 grams), with MONT. CODE ANN. § 50-15-101 (2007) (defining “fetal death” as the death of a fetus prior to complete expulsion or extraction from a mother regardless of duration of pregnancy). See also NEB. REV. STAT. § 71-20,121 (2003) (using the term “child born dead” instead of “fetal death”). These terms can be substituted into this model legislation as long as the statute retains its coverage of all in utero deaths regardless of gestational age or weight.

282 See supra Part III.B (describing the statutes in the Upon Request states).

283 See Jason Ferguson, The politics of grief, ORLANDO WEEKLY, Mar. 6, 2003, available at http://www2.orlandoweekly.com/news/story.asp?id=3000 (“Nothing currently prevents a woman from taking possession of fetal remains . . . except her own lack of knowledge of her legal rights). On the other hand, some parents may assume that they have the right and are shocked if they learn that is not the case. See Martin, supra note 3 (describing a Catholic couple who miscarried and child at a hospital and were taken aback by the reaction they received from hospital staff when they expressed their desire to bury their child). By requiring that a hospital inform parents of this right, the legislation in Notification States ensures that a parent will have the opportunity to bury their child, whether it had immediately occurred to them to do so or not.
efficiently and administratively following a miscarried child’s death. Finally, the model legislation requires that a health care practitioner or facility notify a parent of the availability of a chaplain or other counseling service following the miscarriage. This provision helps ensure that parents receive as much support as possible during the traumatic experience of miscarriage, notifying them that spiritual and emotional guidance are accessible.

B. Potential Problems With Model Legislation

The model legislation poses two potential problems. First, the legislation requires that a healthcare practitioner notify only one parent of the right to bury a miscarried child. Ideally, both parents, if present, would discuss the options and agree on a course of action. However, it is conceivable that a mother and father would fail to discuss the options or disagree as to which option they should pursue. This lack of communication or disagreement could then potentially place the healthcare practitioner or facility in a predicament as to how to proceed with the child’s body. An alternative would be to require both parents to request that a miscarried child be buried. This would ensure that the parents are each aware of the decision to be made. However, it might be impossible if the father is not present, or if the woman or man is incompetent or medically impaired. For this reason, this model legislation requires notification

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284 For example, Colorado requires that a mother make the request “prior to or immediately following” the removal of the child from her body, whereas Alaska makes no timing specifications. ALASKA ADMIN. CODE tit. 7, § 05.530 (2013); COLO. REV. STAT. ANN. § 25-2-110.5 (West 2001).
285 See, e.g., MASS. GEN. LAWS ANN. ch. 111, § 202 (West 1978) (“Before disposition, the parent shall be informed . . . of the availability of a chaplain if any for counsel.”); MO. ANN. STAT. § 193.165 (West 2004) (“The facility shall make counseling concerning the death of the fetus available to the mother.”).
286 See Florida Staff Analysis, S.B. 2082, 3/29/2003 (Requiring that the mother be informed but not the father, while under s. 470.0294, F.S, a legally authorized person could authorize a funeral director to dispose of fetal remains when a fetal death certificate has not been issued, i.e., at less than 20 weeks’ gestational age).
287 See infra Part III.A-B (discussing the differences among the statutes in terms of how many or which parent must make the request for the miscarried child’s remains).
288 See ALA.CODE § 22-9A-16 (1992); ARK. CODE ANN. § 20-18-604 (West 1995); KAN. STAT. ANN. § 65-67a10 (West 2008); TENN. CODE ANN. § 68-3-506 (West 1977) (requiring that both parents give consent.)
to only one parent so as to maximize the likelihood that one or both parents will make an informed decision regarding the child’s disposition.\(^{289}\)

The second potential problem with this model legislation is in regard to the timing of a parent’s request to bury a miscarried child. This model legislation grants a parent forty-eight hours in which to make a decision regarding the disposition of a miscarried child. Unlike the majority of state statutes, which have no timing requirements whatsoever, this provision gives boundaries to both the parent and the healthcare practitioners, who each have important roles in facilitating the child’s ultimate disposition. Of the states that currently have timing restrictions, the time range is fairly large. Some states require that a parent make a request before or immediately after a miscarried child is removed from the mother’s womb. In contrast, other states allow up to fourteen days for a parent to make a decision regarding disposition. This model legislation attempts to allow a reasonable period of time for the decision so as to allow parents the opportunity to contemplate and understand their options, while also respecting a health care facility’s need for timely action.

Neither of these potential problems is detrimental to the success of the model legislation. Should all states adopt legislation similar in content to this model legislation, the parental right to determine the disposition of a miscarried child will be protected to the furthest extent of the law.

VI. CONCLUSION

The majority of U.S. states fall short of protecting a parent’s right to bury a miscarried child, preventing those parents who would choose that option from doing so and from experiencing the peace and closure that would come as a result. As is demonstrated by the widespread enactment of Missing Angel Acts in the last decade, legislation allowing parents the right to be informed of their ability to bury a miscarried child would be similarly well-received,\(^{289}\)

\(^{289}\) See infra Part V.A (proposing model legislation).
by legislators and the public alike. The model legislation proposed in this Comment would require health care facilities and practitioners to notify parents of their right to bury a miscarried child, thereby ensuring that parents who wish to bury their child have the ability to do so. Though some commentators have expressed concern that such legislation would infringe on the “abortion liberty,” a survey of how unborn children and their parents are addressed in tort, criminal, and property law demonstrates that such concerns are unfounded. For all of these reasons, a parent’s right to determine the final resting place of a stillborn or miscarried child is worthy of the protection of the law.