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Gillian Calder*

Legislating Emotion, Reading Grief:
Bereavement Leave for Miscarriage and
Stillbirth in New Zealand Law

This paper looks at New Zealand's Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2), an Act that changes Employments Standards legislation to allow bereavement leave for people and their partners at miscarriage and stillbirth. The paper is prompted by the huge media attention that this small change in law received globally. What might Canadian legislators learn by taking a careful look at this New Zealand law that permits an employee time off work to grieve a pregnancy loss? The questions that the legislation provokes are read through the lens of law and emotions literature, situated in the ways that grief has been transformed through the pandemic, and placed against other leave provisions in Canadian law. Taking up Carol Sanger's proposition of "legislation as a mechanism of emotional influence," I examine what this change in law helps us see about the intersections of grief, gender, caregiving and work.

Dans cet article, nous examinons le projet de loi de la Nouvelle-Zélande sur les congés de deuil en cas de fausse couche (projet de loi no 2) qui modifie la législation sur les normes du travail afin d'autoriser le congé de deuil pour les personnes et leurs partenaires en cas de fausse couche et de mortinatalité. L'article est motivé par l'énorme attention médiatique que ce petit changement de loi a reçu au niveau mondial. Que pourraient apprendre les législateurs canadiens en examinant attentivement cette loi néo-zélandaise qui permet à un employé de s'absenter du travail pour faire le deuil d'une perte en cas de fausse couche? Les questions que soulève cette loi sont lues à la lumière de la littérature sur le droit et les émotions, en tenant compte de la façon dont le deuil a été transformé par la pandémie, et en les comparant à d'autres dispositions relatives aux congés dans la législation canadienne. Reprenant la proposition de Carol Sanger selon laquelle « la législation est un mécanisme d'influence émotionnelle », j'examine ce que ce changement de loi nous aide à voir sur les intersections entre le deuil, le genre, la prestation de soins et le travail.

* Associate Professor, University of Victoria, Faculty of Law, Victoria, Canada. This is a paper about grief, written during the COVID-19 pandemic. So, a gentle content warning, that this engages issues that many if not all of us have faced and lived with and through, that sometimes, no matter how prepared we are, catch us off guard. I also acknowledge the depth and breadth of supports that are present to enable those of us with intergenerational care responsibilities, working at times in unsafe, unfamiliar or too familiar environments, to do this kind of work. Huge gratitude to my writing group, for the encouraging lab of ideas, the careful and quiet piece to write and think, and the noisy active listening place for working things through. Massive thank yous to Jessica Lott Thompson, Katie Mysak, Celia Taylor and Jenny Lee for, amongst other things, their research assistance and imprint on this work. And finally, thank you to Rebecca Johnson, Hester Lessard, Kim Brooks, Sharron Fitzgerald, Anna Carline, Thomas Sullivan and Christina Gray for careful reads and important suggestions that have strengthened the story this paper aims to tell.

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I. *Introduction: New Zealand's law*

She discovers that it is possible to cry all day and all night. That there are many different ways to cry: the sudden outpouring of tears, the deep, racking sobs, the soundless and endless leaking of water from the eyes. That sore skin around the eyes may be treated with oil infused with a tincture of eyebright and chamomile. That it is possible to comfort your daughters with assurances about places in Heaven and eternal joy and how they may all be reunited after death and how he will be waiting for them, while not believing any of it. That people don't always know what to say to a woman whose child has died. That some will cross the street to avoid her merely because of this, that people not considered to be good friends will come, without warning, to the fore, will leave bread and cakes on your sill, will say a kind and apt word to you after church, will ruffle Judith's hair and pinch her wan cheek.

– Maggie O'Farrell, *Hamnet and Judith*¹

1. Maggie O'Farrell, *Hamnet and Judith* (Toronto: Alfred A Knopf: 2020) at 287-288.

At the end of March 2021, the New Zealand parliament passed (unanimously) the *Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)* (the “Bill”),² an act that changes employment standards legislation to allow bereavement leave for women and their partners when a pregnancy ends due to miscarriage or stillbirth.³ The amended legislation offers an employee three days of bereavement leave, in addition to what may be available through sickness or other forms of leave, and is inclusive of intentional parents, through surrogacy or adoption. The discussions that surrounded the amendments were at times gendered⁴ in the sense of offering the benefit to “mothers”⁵ and “fathers,”⁶ and the resulting legislation is intentionally exclusive of abortion.⁷

The source legislation addresses bereavement leave at the death of an immediate family member.⁸ The Bill amends the definition of “death of a child” so as to be inclusive of miscarriage and stillbirth.⁹ At the third reading of the legislation, Ginny Andersen, the Labour Party Member of Parliament who introduced the Bill said:

I am proud to live in a country that doesn’t shy away from compassionate, fair, and progressive legislation for women. From being the first in the world to enable women to vote—from, also, our world-leading equal pay legislation—to removing abortion from the Crimes Act, we have a proud history of fairness and equity for women. The passing of this bill shows that once again, New Zealand is leading the way for women, becoming only the second country in the world, as far as I’m aware of, to provide leave for miscarriage and for stillbirth.¹⁰

2. *Holidays (Bereavement Leave for Miscarriage) Amendment Act 2021* (NZ), 2021/10.

3. NZ, *Hansard*, Second Reading: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 29 July 2020 (Ginny Andersen (Labour)), online: <www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200729_20200729_12> [perma.cc/W7YU-55GW].

4. Although the resulting legislation refers to the employee, and thus is inclusive of transgender men and non-binary peoples, the discussion was not transformatively or explicitly inclusive.

5. See e.g. NZ, “Final Report of the New Zealand parliamentary Education and Workforce Committee: commentary on Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)” (27 July 2020), online (pdf): <www.parliament.nz/resource/en-NZ/SCR_99625/117641c8e118b65ac84bb609ca034cd5e989a918> [perma.cc/3SM8-2EW6] (addressing a mother’s knowledge of pregnancy).

6. See e.g. NZ, *Hansard*, Second Reading: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 2 July 2020 (Mark Patterson (New Zealand First)), online: <www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200729_20200729_12> [perma.cc/W7YU-55GW].

7. *Holiday Act 2003* (NZ), 2003/129, s 69(4).

8. *Ibid.*

9. *Ibid.*, s 69(2)(c)-(d).

10. NZ, *Hansard*, Third Reading: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 24 Mar 2021 (Ginny Andersen (Labour)), online: <www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20210324_20210324> [perma.cc/UY3W-BDVQ].

The government, cognitive of its view in the world, held out the legislation as a brave and feminist initiative through which to centre the grief experienced by women at pregnancy loss.

Mainstream media globally latched onto the story, with the legislation heralded internationally in many of the world's leading news outlets¹¹ as well as less conventional news sources like *Vogue*¹² and *People Magazine*.¹³ Most of the articles lauded New Zealand as a beacon of progressive and compassionate law.¹⁴ Some articles focused on the issues of taboo and silence that often surround miscarriage and stillbirth,¹⁵ drawing from the thorough discussion in New Zealand's parliament recorded in Hansard.¹⁶ Other writers pointed to the pivotal questions raised by offering paid leave in this manner—is pregnancy loss an issue of bereavement or is it an issue

11. See e.g. Tess McClure “New Zealand brings in bereavement leave for miscarriages and stillbirths,” *The Guardian* (25 March 2021), online: <www.theguardian.com/world/2021/mar/25/new-zealand-miscarriages-stillbirths-bereavement-leave> [perma.cc/5UY5-WSQM]; “New Zealand passes miscarriages bereavement leave law,” *National Post* (25 March 2021), online: <nationalpost.com/pmn/news-pmn/crime-pmn/new-zealand-passes-miscarriages-bereavement-leave-law> [perma.cc/3ASN-XMPB]; “New Zealand passes bereavement leave law for miscarriages, stillbirths,” *Asian News International* (25 March 2021), online: <www.aninews.in/news/world/pacific/new-zealand-passes-bereavement-leave-law-for-miscarriages-stillbirths20210325182850/> [perma.cc/WR8F-VCKS]; Rob Picheta, “New Zealand approves paid leave after miscarriage, and encourages the world to follow,” *CNN* (25 March 2021), online: <www.cnn.com/2021/03/25/asia/new-zealand-bereavement-leave-miscarriage-scli-intl/index.html> [perma.cc/U5ZW-DP7P]; “La Nouvelle-Zélande crée un congé payé après une fausse couche,” *Le Monde* (25 March 2021) <www.lemonde.fr/international/article/2021/03/25/la-nouvelle-zelande-cree-un-conge-paye-apres-une-fausse-couche_6074422_3210.html> [perma.cc/C24J-DD8S]; “Nova Zelândia aprova lei que garante licença a mulheres que tiveram aborto natural,” *G1* (25 March 2021), online: <g1.globo.com/mundo/noticia/2021/03/25/nova-zelandia-aprova-lei-que-garante-licenca-a-mulheres-que-tiverem-aborto-natural.ghtml> [perma.cc/CM3W-9LBC].

12. Lauren Valenti, “Why We Need Paid Leave After Miscarriage in the US,” *Vogue* (2 April 2021), online: <www.vogue.com/article/paid-leave-after-miscarriage-us> [perma.cc/J5QL-ET39].

13. Sean Neumann, “New Zealand Unanimously Votes to Give Couples Who Suffer Pregnancy Loss Paid Time Off to Recover,” *People* (25 March 2021), online: <people.com/politics/new-zealand-unanimously-votes-to-give-couples-who-suffer-a-miscarriage-paid-time-off-to-recover/> [perma.cc/PNC8-GQRM].

14. See e.g. Picheta, *supra* note 11 (“New Zealand—the first self-governing country to allow women to vote, in 1893—has passed a number of laws in recent years that have been hailed by women’s rights groups, including moves to reduce the impact of period poverty”).

15. See e.g. McClure, *supra* note 12 (“Green MP Jan Logie said the bill would go some way toward breaking down the taboo and silence that many women still endure after losing a pregnancy”).

16. See e.g. NZ, *Hansard*, Third Reading: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 24 Mar 2021 (Angie Warren-Clark (Labour)), online: <www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansD_20210324_20210324> [perma.cc/UY3W-BDVQ] (“[i]t’s a taboo in this country. We know it’s a taboo in this country to talk about miscarriage. It’s a taboo for us to talk about that we’re trying for pregnancy. It’s a taboo to talk about abortion. It’s a taboo to even talk about menstruation or menopause. It is a taboo for us as women to talk about the things that are natural to us and happen to us, so I’m really delighted to be standing up here, talking about something that happens to 20,000 women per year”). Thank you to Katie Mysak for excellent Hansard research.

of health?¹⁷ And still others begin to question the characterization of New Zealand as “only the second country in the world” to offer a benefit of this kind, pointing to the many other countries, primarily in the Global South, that offer benefits.¹⁸

So, I begin this project here—wondering why this tiny change, to a tiny law, in a tiny country received such a global take up and why it has been so celebrated in North America. Was the curiosity about this legislation tied to cultural understandings of grief, and in particular, the myriad ways in which what it means to grieve has been altered by the COVID-19 pandemic? What was it about this moment that would open such a large conversation on something that is rarely discussed publicly—miscarriage, stillbirth and abortion? Has the pandemic had an adverse impact on maternal and fetal health such that more legal intervention is mandated? How is this discussion altered by its Western-centric framing? Are there popular culture moments that can explain the transformation in public discourse?¹⁹ And how connected was this new law to the way

17. See e.g. Frances Everard, “A Bill Providing leave after miscarriages should extend to abortion,” *New Zealand Herald* (15 April 2019), online: <www.nzherald.co.nz/nz/frances-everard-a-bill-providing-leave-after-miscarriages-should-extend-to-abortion/GGLX3G4OK5QW6P73LVNWCBBZBGI/> [perma.cc/CR63-QRFL] (“[t]reating all pregnancy outcomes as a health issue, and thus equally deserving of leave, is a step in the right direction”).

18. See e.g. China: “Maternity Leave and Allowances in China” (last visited 18 August 2022), online: *Chibrige Law Firm* <chinalawhelp.com/maternity-leave-and-allowances-in-china/> [perma.cc/9KFQ-4PTC]; India: *Maternity Benefit Act 1961* (India), 1961/53, s 9, online (pdf): <labour.gov.in/sites/default/files/TheMaternityBenefitAct1961.pdf> [perma.cc/48D4-59PN]; Philippines: “Availment of the 105-Day Expanded Maternity Leave under Republic Act 11210: Frequently Asked Questions” (last visited 18 August 2022), online: *Philippine Commission on Women* <pcw.gov.ph/availment-of-the-105-day-expanded-maternity-leave-under-republic-act-11210-faqs/> [perma.cc/2KXB-2ZQY]; Mauritius: *Workers’ Rights Act 2019* (Mauritius), 2019/20, s 52(4)(5), online (pdf): <labour.govmu.org/Documents/Legislations/THE%20WORKERS%20RIGHTS%20Act%202019/Consolidated%20Version%20of%20the%20Workers%27%20Rights%20Act%202019%20as%20at%207%20September%202020.pdf> [perma.cc/ZTW2-CPZU]; Indonesia: *Act Concerning Manpower (2003)*, 2003/13, art 82(2), online (pdf): <www.ilo.org/dyn/travail/docs/760/Indonesian+Labour+Law+-+Act+13+of+2003.pdf> [perma.cc/H3A3-WAP7]; Taiwan: “PEO in Taiwan” (last visited 18 August 2022), online: <ins-globalconsulting.com/countries/taiwan/peo/> [perma.cc/2ETX-R25F]; Nicaragua: *Labour Code §141 (Nicaragua)*, online: *International Labour Organization* <www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_countries=NI&p_sc_id=2000&p_year=2011&p_structure=3> [perma.cc/85CN-9M2U]; and Panama: *Labour Code §110, 112 (Panama)*, *International Labour Organization* <www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2011&p_start=1&p_increment=10&p_sc_id=2000&p_countries=PA&p_print=Y> [perma.cc/UEX8-3526].

19. Two celebrities, Chrissy Teigen and Meghan Markle, were quite public with their stories of miscarriage in 2020, and are often credited or cited in discussions about shifting stigma and ending silence. See e.g. “Chrissy Teigen and John Legend lost their baby—and broke the silence around miscarriages,” *NBC News* (2 October 2020), <www.nbcnews.com/think/opinion/chrissy-teigen-john-legend-lost-their-baby-broke-silence-around-ncna1241744> [perma.cc/SW2G-LTD3]; Meghan, The Duchess of Sussex, “The Losses We Share,” *New York Times* (25 November 2020), online: <www.nytimes.com/2020/11/25/opinion/meghan-markle-miscarriage.html> [perma.cc/9UZY-R8QM].

the events of 2020 and 2021 have transformed our relationship to work? What are the consequences for people seeking to access benefits of framing labour entitlements for pregnancy loss as bereavement?²⁰ What, if anything, should Canada do to address the gaps that exist in our legislative regimes with respect to leave for pregnancy loss?²¹

The plethora of questions this legislation provokes offers a range of theoretical lenses through which to assess its basis as a model for Canadian law. I argue that the most apt body of theory for interrogating this legislative shift is literature drawn from the law and emotions movement; work that can best illuminate the role that grief plays in this story. So, the structure of the paper is as follows. I start with an overview of law and emotions scholarship,²² followed by a brief discussion of the emotion of grief and then by the way that grief has been transformed through the global COVID-19 pandemic.²³ Through bringing a law and emotions lens to workplace legislation, first in New Zealand and then in Canada, I move to elucidate the questions of racial and structural health inequities that have been exacerbated through the COVID-19 global health pandemic. I conclude by taking up Carol Sanger's proposition of "legislation as a mechanism of emotional influence."²⁴ To argue that by taking a careful look at what law offers those living with pregnancy loss we can better see the transformational role that grief has played during a global health crisis in relation to the intersections of gender, caregiving, reproductive health and work.

20. Thank you to Katie Mysak for her assistance in framing this question.

21. Notwithstanding the geographic distance between Canada and New Zealand, these two countries share *inter alia* a common law tradition and a history of colonialism with respect to Indigenous peoples. Other recent issues where Canada has looked to New Zealand law as a model include housing (see e.g. Gary Mason, "New Zealand's bold housing law may be a fit for Canada," *The Globe and Mail* (10 November 2021), online: <www.theglobeandmail.com/opinion/article-new-zealands-bold-housing-law-may-be-a-fit-for-canada/> [perma.cc/PJC7-GCNT]) and sex work (see e.g. Daniel Schwartz, "Sex workers like New Zealand law not Canada's new 'Nordic model' for prostitution," *CBC News* (7 June 2014), online: <www.cbc.ca/news/politics/sex-workers-like-new-zealand-law-not-canada-s-new-nordic-model-for-prostitution-1.2665431> [perma.cc/LTK2-WZ6X]).

22. The work of law and emotions literature is incredibly diverse. For examples of the reach of this work, see Susan A Bandes, ed, *The Passions of Law* (New York: New York University Press, 1999) [Bandes, *Passions of Law*]; Susan A Bandes et al, *Research Handbook on Law and Emotion* (Cheltenham, UK: Edward Elgar, 2021) [Bandes et al, *Research Handbook*]; Julia JA Shaw, *Law and the Passions: Why Emotion Matters for Justice* (New York: Routledge, 2021).

23. A global health pandemic was declared on 11 March 2020. At the date of writing, Canada was still in a state of emergency: "Coronavirus disease (COVID-19) pandemic" (last visited 18 August 2022), online: *World Health Organization* <www.who.int/emergencies/diseases/novel-coronavirus-2019> [perma.cc/FGE3-VBEC].

24. Carol Sanger, "Legislating with Affect: Emotion and Legislative Law Making" (2013) 53 *Nomos* 38 at 40, online: <www.jstor.org/stable/24220329> [perma.cc/3UEM-ERFK].

This paper is dedicated to my friends Sarah Robinson and Arta Johnson.²⁵

II. *Law and emotions*

This story embodies several features of the emotions which it is my endeavor to explain here: their urgency and heat; their tendency to take over the personality and move one to action with overwhelming force; their connection with important attachments, in terms of which one defines one's life; one's sense of passivity before them; their apparently adversarial relation to "rationality" in terms of cool calculation or cost-benefit analysis, or their occasionally adversarial relation to reasoning of any sort; their close connections with one another, as hope alternates uneasily with fear, as a single event transforms hope into grief, as grief, looking for a cause, expresses itself as anger, as all of these can be the vehicles of an underlying love.

– Martha Nussbaum, "Emotions as Judgments of Value and Importance"²⁶

With the starting premise that understanding the delivery of leave and benefits for bereavement is fundamentally about law's capacity to script grief, I turn first to the literature on law and emotions. The work of this discipline is fabulous and diverse. Substantively, there is writing on disgust,²⁷ vengeance,²⁸ remorse,²⁹ anger,³⁰ love,³¹ bitterness,³² unease,³³

25. I didn't want to put these two friends in a footnote. I grieve them, love them, and thank them for the many moments of bravery and beauty they brought to this world.

26. Martha Nussbaum, "Emotions as Judgments of Value and Importance" in Robert C Solomon, ed, *Thinking About Feeling: Contemporary Philosophers on Emotions* (Oxford: Oxford University Press, 2004) 308 at 311.

27. See e.g. Carlton Patrick, "When souls shudder: A brief history of disgust and the law" in Bandes et al, *Research Handbook*, *supra* note 22, 80 at 80-93.

28. For two differing views on vengeance, particularly with respect to understandings of retribution, see Jeffrie G Murphy, "Retribution: Not anger but respect for dignity" in Bandes et al, *Research Handbook*, *supra* note 22, 94 at 94-101; Robert C Solomon, "Justice v. Vengeance: On Law and the Satisfaction of Emotion" in Bandes, *Passions of Law*, *supra* note 22, 121 at 121-148.

29. See e.g. Austin Sarat, "Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture" in Bandes *Passions of Law*, *supra* note 22, 168-190 with a read of the film *Dead Man Walking*.

30. See e.g. Amia Srinivasan, "The aptness of anger" in Bandes et al *Research Handbook*, *supra* note 22, 119 at 119-130.

31. See e.g. Julia JA Shaw, "Law as love" in Shaw, *supra* note 22, 144 at 144-174.

32. For a discussion of bitterness alongside other emotions prevalent in the context of family law, see Solangel Maldonado, "Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce" (2008) 43:2 Wake Forest L Rev 441, online: <www.wakeforestlawreview.com/wp-content/uploads/2014/10/Maldonado_LawReview_4.08.pdf> [perma.cc/LA95-MDEL].

33. For some reflections on unease in the context of punishment, see Danielle S Allen, "Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment" in Bandes, *Passions of Law*, *supra* note 22, 191 at 191-214.

fear,³⁴ resentment and forgiveness,³⁵ cowardice,³⁶ hate,³⁷ shame,³⁸ desire³⁹ and more. But the work is also multidisciplinary,⁴⁰ looking at a range of emotions, processes and fora across legal contexts.⁴¹ What would reading the Bill through the lens of law and emotions, and in particular, through the emotion of grief, make visible? What might be obscured? And who or what is othered by this law?

The field of law and emotions is relatively new,⁴² with most scholars in the field tracing its origins to Susan Bandes' influential text, *The Passions of Law*, published in 1999.⁴³ Although the plethora of legal issues and emotions are expansive, most scholars share the view that, as Bandes and Blumenthal write,

[t]he field of law and emotion draws from a range of disciplines in the sciences, social sciences, and humanities to shed light on the emotions that pervade the legal system. It utilizes insights from these disciplines to identify and assess the implicit and explicit assumptions about emotion that animate legal reasoning, legal doctrine, the behavior of legal actors, and the structure of legal institutions.⁴⁴

34. For a careful and current look at the way that the "cultivation of a climate of fear" can impact law and policy-making, see Julia JA Shaw, "Law as fear" in Shaw, *supra* note 22, 52 at 52-85.

35. For a thick examination of the relationship between forgiveness, resentment, love, and justice, see Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (New York: Oxford University Press, 2016).

36. For a careful read of the codification of "misbehaviour before the enemy," see William Ian Miller, "Fear, Weak Legs, and Running Away: A Soldier's Story" in Bandes, *Passions of Law*, 241 at 241-264.

37. Julia Shaw's chapter on "Law as hate" is a deeply insightful reading on the role that hate has played "to the foundation, operation and legitimisation of law." See Julia JA Shaw in Shaw, *supra* note 22, 86 at 86-115.

38. See e.g. Dan M Kahan, "What's *Really* Wrong with Shaming Sanctions" (2006) 84:7 Tex L Rev 2075, DOI: <20.500.13051/209> in which he takes up the "shame debate" in order to re-engage and in some dimensions refute arguments made in his 1996 article: Dan M Kahan, "What Do Alternative Sanctions Mean?" (1996) 63:2 U Chicago L Rev 591, DOI: <10.2307/1600237>. The more current piece offers a careful reconsideration of the role that shame plays in punishment that affirms rather than denigrates the core values of citizens.

39. See e.g. June Carbone & Naomi Cahn, "Family law and emotion" in Bandes et al, *Research Handbook*, *supra* note 22, 197 at 197-214 for an analysis of how sexual desire, amongst other emotions, and related behaviour is tied to the legal obligations that inhere from intimate relationships. See also Calder, *infra* note 47 at 67.

40. For a multi-disciplinary approach to the topic of remorse and law, see e.g. Steven Tudor et al, "Remorse: Multi-disciplinary perspectives on how law makes use of a moral emotion" in Bandes et al, *Research Handbook*, *supra* note 22, 131 at 131-145.

41. See e.g. Emily Kidd White, "Images of reach, range, and recognition: Thinking about emotions in the study of international law" in Bandes et al, *Research Handbook*, *supra* note 22, 492 at 492-513.

42. The most recent anthology on law and emotion is Bandes et al, *Research Handbook*, *supra* note 22. This handbook captures the evolution of the discipline and brings the leading voices in this field together in conversation.

43. Bandes, *Passions of Law*.

44. Susan A Bandes & Jeremy A Blumenthal, "Emotion and the Law" (2012) 8 Annual Rev L & Soc

Many law and emotions scholars take up as their starting point the deeply engrained notion that reason and emotion are cleanly separable spheres of human existence and that law rightly privileges and admits only the former.⁴⁵ Much of the work then takes off to challenge this prevailing legal narrative of a strict dichotomy by examining the myriad and concrete ways that “emotion in concert with cognition leads to a truer perception and, ultimately, to better (more accurate, more moral, more just) decisions...”⁴⁶ Bringing a law and emotions lens to any legal question offers thus a unique and enriching perspective but also a necessary means through which to unearth the institutional bases foundational to legal change, one in which we can see reason *and* emotion as complements in the search for truth.⁴⁷

Where the literature can be particularly insightful is when the issue is one, as here, that has a particularly gendered dimension. As Julia Shaw argues, law has a tendency to prioritize “masculine” values such as rationality and objectivity over context and nuance, with what she calls “modern law-making” not geared towards empathetic understandings and judgment.⁴⁸ In challenging the assumed hierarchy of reason over emotion, reading an issue through a law and emotions lens can elucidate the still prevalent view that emotion might be helpful in explaining the lives of “suffering women” but not, as Abrams and Keren argue, “directing the work of deliberative legal actors.”⁴⁹ That is, in work that centres women’s reproductive choices, emotion can be seen as an “inward, bodily affair” rather than a means through which to identify the rich array of “norms, practices, and structures” that inhere in areas of law as complex as abortion.⁵⁰ I argue that drawing on law and emotions can better elucidate areas of law where human experience is profoundly diverse, embodied and affective. Drawing on law and emotions as the theoretical framework here is to ground my argument that “[l]egal thought requires an understanding of emotions not simply as defects of rationality, but also as a distinctive mode

Science 161 at 161, DOI: <10.1146/annurev-lawsocsci-102811-173825>.

45. Terry A Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field” (2006) 30:2 L & Human Behavior 119 at 120, DOI: <10.1007/s10979-006-9029-9>.

46. *Ibid* at 122, quoting Bandes, *Passions of Law*, *supra* note 22 at 7.

47. Gillian Calder, “‘Whose body is this?’: On the role of emotion in teaching and learning law” in Bandes et al, *Research Handbook*, *supra* note 22, 62 at 68, citing Angela P Harris & Marjorie M Shultz, “‘A(nother) Critique of Pure Reason’: Toward Civic Virtue in Legal Education” (1993) 45:6 Stan L Rev 1773 at 1786, DOI: <10.2307/1229127>.

48. Julia JA Shaw “Law as compassion” in Shaw, *supra* note 22, 116 at 124.

49. Kathryn Abrams & Hila Keren, “Who’s Afraid of Law and the Emotions?” (2010) 94:6 Minn L Rev 1997 at 2032, online: <scholarship.law.umn.edu/mlr/517/> [perma.cc/2V6U-C5ZE].

50. *Ibid* at 2028.

of apprehending and navigating the world around us.”⁵¹ Getting to the root of the affective dimensions of this law can open insights into otherwise misunderstood questions of value in conversations about reproduction and loss.

As might be expected in a new theoretical discipline within law, most law and emotions work focuses on case law; on judicial decision-making and lawyering. The story that flows from this small New Zealand law, however, is a story about cultivating emotion through *legislation* with respect to who should grieve and what is grievable. In a 2013 article, Carol Sanger writes about the intentional use of legislation, primarily in the context of abortion laws in the US, to “produce or satisfy a specific emotional state in those who are subject to the law.”⁵² This is both in terms of positive emotions—“social good which might be encouraged by the law” —but also to bring about “behavior that the law cannot otherwise legitimately regulate but that is likely to result once a person has been ‘emotionally’ cultivated to feel a particular way.”⁵³

While noting that “impassioned protest and engagement” is present in almost all legislation, Sanger demonstrates that it is important to pay attention to attempts, such as New Zealand’s, to mobilize emotion through law.⁵⁴ Reading a statute through a critical approach to law and emotions makes visible the ways that law can have both an expressive purpose and an intention to alter behaviour;⁵⁵ another means through which attention to norms, commitments and inherent values that are otherwise ignored can be directed.⁵⁶ Sanger notes that some subjects are more susceptible to emotional appeal, pointing to those that deal, as here, with family or with death.⁵⁷ Through a law and emotions lens we can show how “framing labour entitlements for pregnancy loss as bereavement leave forces a particular narrative of grief upon those who wish to access them.”⁵⁸ Reading this New Zealand law, with an eye to what we can or should do in the Canadian context, is to also query the ways that supports can exist that open up diverse approaches to and understandings of grief.

I draw the notion of “reading law” from the recent work of Senthorun Raj⁵⁹ as a form of methodology. My goal here is to ask what reading

51. *Ibid* at 2074.

52. Sanger, *supra* note 24 at 47 [emphasis omitted].

53. *Ibid* at 48,49.

54. *Ibid* at 40.

55. *Ibid* at 43.

56. Calder, *supra* note 47 at 68, citing Abrams & Keren, *supra* note 49 at 2000, 2004.

57. Sanger, *supra* note 24 at 50.

58. Thanks to Katie Mysak for this articulation.

59. Senthorun Sunil Raj, *Feeling Queer Jurisprudence: Injury, Intimacy, Identity* (London:

the New Zealand Bill—framing labour entitlements for pregnancy loss as bereavement leave—makes visible. Raj’s work shows that reading emotion is one means through which to bring institutional responsibility into focus. His analysis of United States Supreme Court same-sex marriage case law is illustrative. By reading those decisions through the lens of emotion Raj makes visible that approaching marriage equality through a heteronormative frame leaves marginalized LGBTQ+ folk without the institutional supports to thrive.⁶⁰ Reading the New Zealand amendment to bereavement leave through the lens of grief thus enables a series of questions to come to the forefront. Does a law on pregnancy loss mandate a particular narrative of grief? Does this law aim to produce desirable emotional effects or is there a broader systemic aim tied more transformationally to work?⁶¹ What does the law condemn and what does it shelter as a result? And how, if we read this legislation through the lens of grief, can we connect affect to other questions of ethical and political judgment and practice?⁶²

III. *Grief*

*You will grow up differently, in the love I will always have for you.
You will grow up elsewhere, among the murmurs of the world, in the
Mediterranean, in Sasha’s garden, in the flight of a bird, at daybreak, at
nightfall, through a young girl I will meet by chance, in the foliage of
a tree, in the prayer of a woman, in the tears of a man, in the light of a
candle, you will be reborn later, one day, in the form of a flower or a little
boy, to another mother, you will be everywhere my eyes come to rest.
Wherever my heart resides, yours will continue to beat.*

– Valérie Perrin, *Fresh Water for Flowers*⁶³

To answer the questions that arise through bringing a law and emotions lens to laws aimed to address bereavement leave in the context of pregnancy loss, the first step is an interrogation of grief as an emotion. And while I may use grief and bereavement interchangeably throughout this paper, they are not synonymous. Grief is a natural and adaptive reaction, a painful but necessary mental recalibration to accommodate a new absence;⁶⁴ and

Routledge, 2020).

60. *Ibid* at 133.

61. Abrams & Keren, *supra* note 49 at 2033.

62. Judith Butler, “Precariousness and Grievability—When is Life Grievable?” (16 November 2015) online (blog): *Verso* <www.versobooks.com/blogs/2339-judith-butler-preciousness-and-grievability-when-is-life-grievable> [perma.cc/52MW-2NYQ].

63. Valérie Perrin, *Fresh Water for Flowers*, translated by Hildegard Serle (New York: Europa, 2020) at 313.

64. Joe Pinsker, “All the Things We have to Mourn Now,” *The Atlantic* (1 May 2020), online:

a much broader concept that incorporates the emotional experience of bereavement. But grief is not a monolithic entity, instead, it is a way of being that has itself a complexity of manifestations. Complicated grief, for example, is a prolonged grief experience—six months or more—capturing an emotional response to loss.⁶⁵ Communal grief brings a form of unity and connection that helps those who grieve deal with mortality.⁶⁶ Disenfranchised grief, alternatively, is a phenomenon that occurs when a bereaved individual's relationship to the deceased or their grief goes unrecognized.⁶⁷

Weaving into a law and emotions read of bereavement legislation, the variegation of what counts as grief pushes to the surface, particularly in the context of pregnancy loss, the issues around lives that are deemed worthy of grief⁶⁸ and the “social marginalization that occurs when dominant social mores are not responsive to the mourning we may feel for particular lost lives.”⁶⁹ So, part of this story on how to interrogate legislation through the lens of grief is understanding what grief is, and the role of law and policy in mediating, scripting and mandating grief. But another part is temporal. How has the pandemic shaped our collective experience of grief, and how has that influenced the decision to legislate for pregnancy loss bereavement in our current world? How does legislating grief contribute meaning to the value of certain forms of loss?

IV. *Grief in a global pandemic*

I am writing about my father in the past tense, and I cannot believe that I am writing about my father in the past tense.

– Chimamanda Ngozi Adichie, *Notes on Grief*⁷⁰

Alongside devastating health consequences, the COVID-19 pandemic has without question shifted how and where we grieve; and in the process curtailed normal expressions of grief and cultural mourning. It seems like

<www.theatlantic.com/family/archive/2020/05/grief-mourning-death-pandemic/610933/> [perma.cc/7WPK-S973], citing George A Bonanno, *The Other Side of Sadness: What the New Science of Bereavement Tells Us About Life After Loss* (New York: Basic Books, 2009).

65. Sarah Elizabeth Petry, Dalton Hughes & Anthony Galanos, “Grief: The Epidemic Within an Epidemic” (2021) 38:4 *American J Hospice & Palliative Medicine* 419 at 419, DOI: <10.1177/1049909120978796>.

66. Pinsker, *supra* note 64.

67. Petry et al, *supra* note 65 at 420.

68. Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 165.

69. *Ibid* at 165.

70. Chimamanda Ngozi Adichie, *Notes on Grief* (Toronto: Alfred A Knopf, 2021) at 67.

common parlance to talk about grieving the losses of the ordinary and the everyday, things like not being able to watch a child's baseball game, alongside the griefs of immeasurable loss. My colleague Roshan Danesh wrote about the death of both his son and his father in the summer of 2020: "The pandemic has caused many ruptures in our ways of living—some of which will be permanent. It is also causing some changes in our experiences of death."⁷¹ Communal and complicated grief have been exacerbated by the pandemic—disenfranchised grief even more so; and this is acutely true within marginalized communities.

In a 2021 study published in the *Lancet*, the authors wrote: "The adverse effects of the COVID-19 pandemic are not limited to the morbidity and mortality caused directly by the disease itself. Nationwide lockdowns, disruption of health-care services, and fear of attending health-care facilities might also have affected the wellbeing of pregnant people and their babies."⁷² This study found increased maternal mortality, stillbirth, maternal stress and ruptured ectopic pregnancies during the pandemic; they also found that outcomes differed greatly between high-income settings (where there was restructuring and remote delivery), and low- and medium-income settings where there was a particular increase in stillbirth.⁷³ And they partially attribute this to fear of public spaces, lockdowns, reduced public transport and loss of child care. The authors write: "In all settings, the impact is greatest on the most vulnerable individuals in the population: in Nepal, hospital deliveries decreased, most markedly amongst disadvantaged groups, and in the UK, 88% of pregnant women who died during the first wave of the pandemic were from Black and minority ethnic groups."⁷⁴

It is shocking but perhaps not surprising; women's healthcare is often adversely affected in humanitarian disasters. And consequently, women are more likely to be experiencing workplace grief than ever before as the pandemic impacts all elements of daily life. Will legislation that addresses disenfranchised grief, through recognition and value, draw on the lessons of the pandemic? Will it have any effect on the kinds of preterm birth,

71. Roshan Danesh, "Dying in pandemic times: My son and my father passed away in a 6-week span," *Victoria Times Colonist* (30 July 2020), online: <www.timescolonist.com/opinion/dying-in-pandemic-times-my-son-and-my-father-passed-away-in-a-6-week-span-4683053> [perma.cc/MG4H-HZEU].

72. Barbara Chmielewska, et al, "Effects of the COVID-19 pandemic on maternal and perinatal outcomes: a systematic review and meta-analysis" (2021) 9:6 *Lancet* 759 at 759, DOI: <10.1016/S2214-109X(21)00079-6>.

73. *Ibid* at 769-770.

74. *Ibid* at 770.

stillbirth and maternal mortality that have been uniquely present? And what shifts will it elicit in our relationship to paid work?

V. *What a law and emotions lens helps us see*

*what is stronger
than the human heart
which shatters over and over
and still lives*

– rupi kaur⁷⁵

So, what does reading this legislation through the lens of grief help us to see? On the surface this New Zealand legislation is a law that warrants its celebration—it attempts to destigmatize a human experience that is too often mired in secrecy and silence. But it is also a law that is drawing wariness, particularly as issues tied to abortion are once again in the public realm in regressive ways.⁷⁶ How can family be redefined so that pregnancy loss can be recognized without reifying the status of a fetus in a manner that promotes harm? Let me now turn to four issues visibilized by reading this New Zealand Bill through the lens of law and emotion, with an eye to concluding with clear reflections on the paths that Canada, and other jurisdictions, could now follow.

1. *This is a compassionate law*

First, the law as presently structured recognizes the impact of miscarriage and stillbirth on all pregnant people, their partners, former partners and families by offering a short period of recognition and leave. In a world that is isolating and alienating, this is a moment of care. We can all query what it means to progress on any legal issue, but what specific inclusion of stillbirth and miscarriage in bereavement law offers is recognition that grief is a reality of this all too common form of loss.⁷⁷ The law, as written, is a reminder that compassion without justice is no more than sentimentality; justice without compassion are steps on a path to tyranny.⁷⁸

75. rupi kaur, *the sun and her flowers* (Toronto: Simon and Schuster, 2018) at 109.

76. In late 2021 the United States Supreme Court was asked to reconsider *Roe v Wade*, the longstanding law on the constitutionality of abortion in the United States. See e.g. Michele Goodwin, “I was Raped by My Father. An Abortion Saved My Life,” *The New York Times* (30 November 2021), online: <www.nytimes.com/2021/11/30/opinion/abortion-texas-mississippi-rape.html> [perma.cc/2UCS-XUXC].

77. In Canada, for example, it is estimated that between 15 per cent and 25 per cent of all pregnancies end in miscarriage: “Chapter 7 Infographic: Perinatal Loss in Canada” (last modified 26 April 2021), online: *Public Health Agency of Canada* www.canada.ca/en/public-health/services/publications/healthy-living/infographic-perinatal-loss-canada.html [perma.cc/8YX6-VKUX].

78. Shaw, *supra* note 48 at 140.

In a pandemic world, where there has been so much loss, a law that works to recognize and destigmatize the grief that is for so many the inevitable result of pregnancy loss is a “potent [signal] of what we value.”⁷⁹

2. *We are living in a health crisis with profound racial and structural inequities*

Second, it is not, however, clear that bereavement leave for pregnancy loss gets at structural harm. Alongside disproportionate reproductive health outcomes, we have also seen a rise in PTSD, anxiety and depression from those who have had adverse pregnancy outcomes, with a corresponding and direct impact on marginalized peoples. Black, Indigenous and racialized women are more likely to be sole or primary providers for their families and are also disproportionately likely to be working in lower-wage jobs that do not currently provide paid leave time.⁸⁰ A law that reimagines the relationship between bereavement, pregnancy loss and work has the potential for systemic change. But, offering a short bereavement leave, without more, is unlikely to address the more systemic issues underlying reproductive health legislation.

As a result, legislating grief in this fashion—recognizing pregnancy loss as bereavement and thus entitling workers to a short period of leave—does not on its face go far enough. Who is most at risk for pregnancy loss? What kind of benefit might address precarity within that loss? How does bereavement leave track across racial and structural inequities? How does this law address the impact of pregnancy loss for those who do not or cannot work? Reading this law through the lens of grief shows that there is a correlation between low-wage workers and those at risk for maternal health issues,⁸¹ and that “[m]ental health care and emotional support are not routinely threaded into maternal health care.”⁸² To address systemic harm, an emergent law must recognize the integral and integrated issues of pregnancy loss through a substantive equality lens.

79. Abrams & Keren, *supra* note 49 at 2071.

80. See Sheila Block, Grace-Edward Galabuzi & Ricardo Tranjam, *Canada's Colour Coded Income Inequality* (Toronto: CCPA, 2019). For a similar analysis in the New Zealand context see Matthew Hobbs et al, “Reducing Health Inequity for Māori People in New Zealand” (2019) 394:10209 *Lancet* 1613, DOI: <10.1016/S0140-6736(19)30044-3>.

81. Raina Delisle, “Did you know that Canadians are entitled to paid leave after a miscarriage?” (25 January 2022), online: *Today's Parent* <www.todayparent.com/getting-pregnant/trying-to-conceive/paid-leave-after-miscarriage-canada/#> [perma.cc/C45Q-KA2F].

82. Valenti, *supra* note 12.

3. *Legal responses differ when they are addressing issues of grief rather than issues of health*

Third, and relatedly, “[w]hat compounds the sense of loss and grief is the fact that women still face enormous stigma and shame when they suffer a pregnancy loss and are often not encouraged to talk about their experience and loss.”⁸³ Policies, such as paid time off and economic support payments, can promote healthy grieving and prevent complicated or disenfranchised grief.⁸⁴ Lack of institutional support for bereaved individuals in the workplace devalues the experience of grief and precludes healthy mental and physical responses.⁸⁵ Disenfranchised grief thrives in exactly these conditions and, arguably, acknowledgement is the only real medicine for grief.

To this end, providing paid leave after miscarriage, stillbirth and abortion is important. But bereavement leave is short in duration—here only three days. And the health consequences of pregnancy loss are often more long-term, both physically and emotionally. And there is no question that responses and experiences differ and are unique. Should the issues of grief and health be separated? I argue that we should be thinking about the interrelationship between health, law and time in a more complex way. A legislative regime that pays specific attention to the intersocietal and mental health aspects of pregnancy loss has the potential to be both inclusive and transformative.

4. *This law is gendered in both progressive and problematic ways*

And finally, the New Zealand law explicitly excludes those who have terminated their pregnancies, whatever the reason, from accessing bereavement leave. There are complex debates that continue for some around abortion when the framework for the question is a determination of whether or not you have experienced the kind of loss that enables you to take time off work to grieve. Similarly, there are risks in the inclusion of abortion in that the law is arguably mandating a certain form of emotion in a context in which the choice to terminate can be experienced simultaneously as both a harrowing loss and a necessary condition of autonomy.⁸⁶ And as Carol Sanger so eloquently argues, there are powerful reasons for talking more about abortion in appropriate contexts to avoid the harms that flow from secrecy. Offering a benefit that includes abortion in a bereavement leave context offers normativity and choice, while

83. *Ibid.*

84. Petry et al, *supra* note 65 at 420.

85. *Ibid* at 421.

86. My thanks to Hester Lessard for underlining this point.

ensuring privacy for those that want it.⁸⁷ Again, responses and experiences differ and are unique. To not include abortion, however, is to structure the law in a way that creates a hierarchy of pregnancy loss with some forms deserving of leave, grief and recognition, and other forms not, perpetuating the narrative that abortion is wrong.

The law is also gendered in that it aims to be inclusive, granting leave to partners, former partners and intentional families. And yet it risks reifying the notion that only women get pregnant; the discussion that surrounds the New Zealand law, for example, draws heavily on the language of “motherhood.”⁸⁸ And in other jurisdictions seeing pregnancy in an inclusive manner is likely to trigger debate.⁸⁹ Not explicitly including transgender men and non-binary peoples is to further others in the construction and implementation of this amending legislation. A law and emotions read of this New Zealand law is to pay attention to who continues to be othered by this law and its construct.

VI. *What Canada should do*

*We ignite not in the light, but in lack thereof,
For it is in loss that we truly learn to love.
In this chaos, we will discover clarity.
In suffering, we must find solidarity.*

– Amanda Gorman⁹⁰

The questions posed here by reading this law through a law and emotions lens, demonstrate that this is a critical and much needed area for legislative action and legal change. They also signal caution, particularly at a moment of global health crises and fluctuating social mores. Legal actors should feel the responsibilities that arise from forcing a particular narrative of grief that inheres through the choice of a particular legislative regime

87. See Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First-Century America* (Cambridge, MA: Harvard University Press, 2017) 214-238.

88. See e.g. the Hansard debates at second reading in the New Zealand parliament for numerous examples of gender-exclusive language surrounding motherhood: NZ, *Hansard*, Second Reading: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) 29 July 2020, online: <www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200729_20200729_12> [perma.cc/W7YU-55GW].

89. For a good conversation about inclusion with respect to pregnant persons, see Emma Green, “The Culture War Over ‘Pregnant People,’” online: *The Atlantic* <www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/> [perma.cc/T7ML-PC3W].

90. Amanda Gorman, “The Miracle of Morning” (April 2020), cited in Joshua Barajas, “Amanda Gorman’s poetic answer to pandemic grief: ‘Do not ignore the pain,’” online: *PBS* <www.pbs.org/newshour/arts/amanda-gormans-poetic-answer-to-pandemic-grief-do-not-ignore-the-pain> [perma.cc/2BFP-8VPE].

at the risk of signalling what can or should count as proper mourning for pregnancy loss.⁹¹

Canada does not, at the time of writing, offer bereavement leave for pregnancy loss through federal legislation. The Canadian Labour Code⁹² mandates up to five days bereavement leave for the loss of an immediate family member, a definition that is not inclusive of miscarriage, stillbirth or abortion for federally regulated industries and workplaces. Provincially, every jurisdiction except Nunavut guarantees workers bereavement leave of between two and seven days; but again, pregnancy loss is not explicitly included as an event that warrants leave, and not all jurisdictions offer paid leave.⁹³

The main mechanism for public benefits in Canada is instead Employment Insurance (EI).⁹⁴ Most options connected to pregnancy loss are through maternity leave, where we are motivated not by grief, but to protect women's role in the workplace through instilling broader legislative support relative to reproductive health. In Canada, if you lose a pregnancy before 20 weeks you may be eligible for EI sickness benefits, and if you lose a pregnancy after 20 weeks you may be eligible for maternity benefits.⁹⁵ These benefits are for the individual who experiences the pregnancy loss only, and come with restrictive eligibility requirements and benefit levels.

Leave—that is time away from work with or without benefits—is protected in the public realm through corresponding provincial regimes. Most employment standards legislation in Canada will offer some form of leave for miscarriage or stillbirth,⁹⁶ as part of sickness when the loss is early and as maternity leave when the loss is later in the term. In very general terms, it is fair to say that Canadian law does provide mechanisms through which a person who has experienced a pregnancy loss can take time away from work to heal. And in some jurisdictions, the time can be quite generous. But it does not do so in a way that offers, as the New Zealand law purports to do, a public means for destigmatizing miscarriage, stillbirth and abortion by recognizing the importance of time away from work to grieve. And it does not provide leave and benefits that are inclusive of others impacted by the loss, that embrace the precarity of

91. Sanger, *supra* note 24 at 59.

92. *Canada Labour Code*, RSC 1985, c L-2.

93. See e.g. *Employment Standards Act*, RSBC 1996, c 113, s 53.

94. *Employment Insurance Act*, SC 1996, c 23.

95. For an explanation of special benefits under EI, see “EI maternity and parental benefits: Special circumstances” (last modified September 26, 2021): *Government of Canada* <www.canada.ca/en/services/benefits/ei/ei-maternity-parental/special-circumstances.html> [perma.cc/8R46-CAF7].

96. See e.g. *Employment Standards Act*, *supra* note 94, s 50(2)(3).

work and work relationships, and that offer a more structured way to think about gender, grief, caregiving and work.

In thinking about changes to maternity and parental leave in Canada, almost 20 years ago I argued that “the choice by policy-makers to deliver the benefit for maternity and parental leave through (un)employment insurance, has perpetuated the gendered nature of the benefit itself.”⁹⁷

How and where we deliver benefits matters. Legislating pregnancy loss supports can and should exist in ways that do not constrain people’s agency or limit the conversation to how one manifests one’s grief.⁹⁸ Drawing on the plethora of questions raised above, I argue that Canada’s next steps should be compassionate, paying attention to the inequities of our time through intentional and inclusive legislation.

1. *Offer compassion*

It is time for Canada to offer paid leave for those who experience pregnancy loss, including those who choose abortion. Alongside maternity and parental leave provisions, there should also be a benefit that takes up the critical issues of stigma and secrecy, choice and agency, while offering a complex, post-pandemic view of health. In this way, a new law would confront the emotion/reason dichotomy at the heart of law and emotions analysis, and model instead a “way by which legal actors and institutions can both accommodate and influence critical dimensions of human experience.”⁹⁹ Compassion in this context means reimagining the connection between privatization and stigma, as well as the messaging that grief is meant to be experienced *at home*, further privatizing the experience of pregnancy loss. One corresponding remedy may be a better understanding of, and resources for, pregnancy loss and grief within workplaces, such that a person might experience nuanced support if at work when they are addressing the fallout of grief.

2. *Pay attention to health inequities*

As Canada works to put in place a regime that can best accommodate the diversity of ways in which the grief of pregnancy loss is experienced, the structural divides that the pandemic has elucidated must be accommodated. A way of thinking through what is a best practice for accommodating pregnancy loss needs to pay attention to a diversity of intersocietal norms and expectations.¹⁰⁰ Any individualizing response

97. Gillian Calder, “A Pregnant Pause: Federalism, Equality and the Maternity and Parental Leave Debate in Canada” (2006) 14:1 *Fem Leg Stud* 99 at 100, DOI: <10.1007/s10691-006-9017-y>.

98. Thank you again to Katie Mysak for careful framing of this argument.

99. “Introduction” in Bandes et al, *Research Handbook*, *supra* note 22 at 13.

100. For a reflection on the ways to think carefully about the relationship between law and time, see

is to ignore the often-collective practices of care surrounding birthing practices, death and ceremony, particularly ones that may be integral to Indigenous communities. The question should not be how much time is appropriate, but rather how can we as a society best support people within their communities of care at pregnancy loss.¹⁰¹

A bright line response—everyone gets three days, for example—signals how grief *should* be experienced in this context. The result is to further other those whose response or experience is different. Similarly, to offer a perhaps unlimited or flexible response will privilege those whose workplaces can accommodate that kind of absence. Canada's response should pay attention to how the temporal dimension of the law is structured to avoid the risk of a narrative that is linear, attached to a certain form of work or that ties the period of bereavement leave to the moment immediately following the loss.¹⁰²

3. *Model inclusive solutions*

Tinkering with amendments to existing bereavement leave, sickness leave or maternity leave regimes will not offer a complete answer to the issues posed. Bereavement leave is brief, sickness leave raises privacy concerns, and maternity leave makes the female body normative and draws lines around the timing of loss. Benefits through EI are also tied to strict eligibility requirements and limited in amounts. In thinking through where the gaps exist, however, the potential for an inclusive, standalone law seems possible; one that reimagines the mental health dimensions of sickness leave, that includes abortion, that broadens the societal responsibilities of maternity and parental leave, that pays attention to the intersocietal and often collective practices of birthing¹⁰³ as well as marginalization and precarity in today's world.

Gillian Calder, "'Finally I Know Where I am Going to be From': Culture, Context, and Time in a Look Back at *Racine v. Woods*" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 173-189

101. Thank you to Christina Gray for this important reflection on questions of a western-centric notion of time.

102. My thanks to Kim Brooks for raising these particular questions of time and space and for encouraging me to think through where and how some people might feel most supported when addressing the complexity of pregnancy loss and related grief.

103. How are Māori birth and death practice accommodated within the Bill and the amended legislation? See e.g. "Te mate Pepi mai roto: Pregnancy loss" (last visited 22 August 2022), online: <www.nationalwomenshealth.adhb.govt.nz/womens-health-information/maternity/pregnancy-loss/> [perma.cc/PF3R-HP96]; Arihia Latham, "Recovering whakapapa: How tikanga aids Māori mothers in a western system" (3 September 2020), online: *The Spinoff* <thespinoff.co.nz/partner/te-hiringa-hauora/03-09-2020/recovering-whakapapa-how-tikanga-aids-maori-mothers-in-a-western-system> [perma.cc/Y52M-UEBD].

VI. *Conclusion: Looking forward*

Grief is a cruel kind of education. You learn how ungentle mourning can be, how full of anger. You learn how glib condolences can feel. You learn how much grief is about language, the failure of language and the grasping for language. Why are my sides so sore and achy? It's from crying, I'm told. I did not know that we cry with our muscles. The pain is not surprising, but its physicality is: my tongue unbearably bitter; as though I ate a loathed meal and forgot to clean my teeth; on my chest, a heavy, awful weight; and inside my body, a sensation of eternal dissolving. My heart—my actual physical heart, nothing figurative here—is running away from me, has become its own separate thing, beating too fast, its rhythms at odds with mine. This is an affliction not merely of the spirit but of the body, of aches and lagging strength. Flesh, muscles, organs are all compromised. No physical position is comfortable. For weeks, my stomach is in turmoil, tense and tight with foreboding, the ever-present certainty that somebody else will die, that more will be lost.

—Chimamanda Ngozi Adichie, *Notes on Grief*¹⁰⁴

One of the first pieces of legislation in Canada in the wake of New Zealand's new law was Bill 220,¹⁰⁵ which passed first reading in the provincial Legislative Assembly of Alberta on 15 June 2021 when it was referred to the Standing Committee on Private Bills and Private Members' Public Bills. That committee recommended on 3 November 2021 that the Bill proceed, with debate on the concurrence motion taking place on 22 November 2021.¹⁰⁶ This legislation proposed an amendment to the province's employment standards legislation to offer up to three days of unpaid bereavement leave at the occurrence of "the end of an employee's pregnancy by way of a stillbirth or miscarriage" or "the end of another person's pregnancy by way of a stillbirth or miscarriage, if the employee (i) is the person's spouse or common-law partner, or (ii) is a person who would have been a parent of a child born as a result of the pregnancy."¹⁰⁷

Given that Alberta is one of Canada's most conservative provinces, the legislation and the debates that surrounded it are of interest and importance; a bellwether of laws likely to emerge and an indication of

104. Chimamanda Ngozi Adichie, *Notes on Grief* (Toronto: Alfred A Knopf, 2021) at 6-7.

105. See Bill 220, *Employment Standards (Expanding Bereavement Leave) Amendment Act, 2021*, 2nd Sess, 30th Leg, Alberta, 2021, online (pdf): <docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_2/20200225_bill-220.pdf> [perma.cc/3NW7-5BW5] [Bill 220].

106. See "Bill 220: Employment Standards (Expanding Bereavement Leave) Amendment Act, 2021" (last visited 22 August 2022), online: *Legislative Assembly of Alberta* <www.assembly.ab.ca/assembly-business/bills/bill?billinfoid=11926&from=bills> [perma.cc/VTC3-4ZF2].

107. See Bill 220, *supra* note 106, ss 2(b)-2(c)(i). This would amend the *Employment Standards Code*, RSA 2000, c E-9, s 53.983(2)(b)-(c).

the direct influence of the New Zealand law. First, the Hansard debate throughout late 2021 shows that the Alberta legislation has broad non-partisan support for the work that it does to destigmatize miscarriage and stillbirth.¹⁰⁸ Second, the narrow political nature of this amendment is also made apparent, as the legislation was intentionally exclusive of abortion, and specifically refers to partners and parents but not a broader conceptualization of who might be grieving a pregnancy loss.¹⁰⁹ Third, it ties the amendment to bereavement, which means that the leave is only three days and unpaid, and the definition of pregnancy loss is narrow.

This draft law, however, was a step in the right direction for building awareness, decreasing stigma and adding to the narrative around loss. Legislating for this form of leave is to take up directly an area of law that is deeply gendered and intersectional, evocative of emotion and dealing with death as part of life. Reading these amendments through a complex law and emotions lens shows the kind of work and advocacy necessary to ensure substantive and structural change.¹¹⁰ It is encouraging to see that although this private member's bill died on the order paper at the proroguing of the legislature of Alberta in early 2022, the law was reintroduced, this time as a government bill, coming into force in May 2022.¹¹¹ Importantly, the legislation includes an amendment that will ensure this law is inclusive of abortion.¹¹²

Legislation that considers the diverse experiences that pregnancy loss encapsulates alongside its frequency, its physical health dimensions and its

108. See discussion in “Bill 220: Employment Standards (Expanding Bereavement Leave) Amendment Act, 2021,” Debate on concurrence motion, Alberta, Legislative Assembly, *Alberta Hansard*, 33-2 (22 November 2021) at 6321-6327, online (pdf): <docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_30/session_2/20211122_1330_01_han.pdf#page=23> [perma.cc/YRT3-L3PM].

109. Aditi Loveridge, the head of Calgary-based Pregnancy and Infant Loss Support Centre gave evidence before the Committee raising the significance of omitting abortion and termination with attention to the large number of people she meets who have experienced this form of pregnancy loss and are seeking support. See *ibid* at 6323.

110. In the April 2022 federal budget, the federal government indicated an intention to amend the Canada Labour Code “to provide additional support to federally regulated employees who experience a miscarriage or stillbirth.” See: <https://www.hrreporter.com/focus-areas/compensation-and-benefits/what-hr-needs-to-know-about-budget-2022/365687>. Alongside Alberta's law, this is likely to be the catalyst for more change in Canada.

111. Bill 17, *Labour Statutes Amendment Act, 2022*, 3rd Sess, 30th Leg, Alberta, 2022, online (pdf): <docs.assembly.ab.ca/LADDAR_files/docs/bills/bill/legislature_30/session_3/20220222_bill-017.pdf> [perma.cc/9TPQ-NZCH].

112. See discussion in “Bill 17: Labour Statutes Amendment Act, 2022,” Committee of the whole, Alberta, Legislative Assembly, *Alberta Hansard*, 33-3, (11 May 2022) at 1334-1351, online (pdf): <docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_30/session_3/20220511_1330_01_han.pdf#page=16> [perma.cc/DL9G-EERA] (the amendment removes the language of stillbirth and miscarriage and replaces it with “the pregnancy of the employee ends other than as a result of a live birth” at 1334).

stigma is an important outcome of this tempestuous time, and could offer a means of support in a world that has become disproportionately harder for some more than others.¹¹³ And doing so in a way that is inclusive of the complexity of reproductive health issues that impact gender-diverse communities today will be a model for other forms of activism and change. As Canada begins to attend to grief and loss as mental health considerations, not only for the person who has experienced the loss, but for their partners, former partners and for the intended parents in the context of adoption or surrogacy, the interrelated issues of law, grief, gender and caregiving will guide us toward embodied, inclusive and forward-looking solutions.

113. It is important to note that this call for bereavement leave for pregnancy loss is coming at the same time that the United States Supreme Court overturned *Roe v Wade* impacting accessibility to abortion throughout the United States. See: *Dobbs v Jackson Women's Health Organization* 597 U.S. ____ (2022), online (pdf): < https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf>.

