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### Murder, Miscarriage, and Women's Choice: Prudence in the Colorado Personhood Debate

Calvin Coker

University of Louisville, [calvin.coker@louisville.edu](mailto:calvin.coker@louisville.edu)

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Title: Murder, Miscarriage, and Women's Choice: Prudence in the Colorado Personhood Debate

Author: Calvin R. Coker

Abstract:

This article analyzes texts circulated in the 2014 debate over Colorado's Amendment 67, the so-called Personhood Amendment, to demonstrate that value claims within the abortion debate are subordinated in favor of discussing the potential legal and philosophical implications of granting fetuses personhood. Using prudence, Robert Hariman's (1991) framework for understanding political action, as a theoretical lens, I argue the personhood debate offers scholars an opportunity to identify and evaluate competing value claims of <life> and <agency> in relation to potential impacts of the amendment. Prudence offers a compelling area for political communication and rhetorical scholars to expand and develop in light of policy failures in the abortion debate, and other key areas.

Keywords: *Abortion, Rhetoric, Prudence, Personhood, Colorado*

In November of 2014, Colorado voters rejected, by a 2-1 margin, Proposition 67, an amendment to the state's constitution that would have extended protection under the law to children in utero (Personhood USA, 2014b). The text of Amendment 67 read:

In the interest of the protection of pregnant mothers and their unborn children from criminal offenses and negligent and wrongful acts, the words "person" and "child" in the Colorado Criminal Code and the Colorado Wrongful Death Act must include unborn human beings. (Amendment 67, 2013, para. 5)

As evidenced by the moderate media attention paid to the "personhood amendment," the Colorado debate was another in a growing series of attempts to enshrine fetal personhood in law.

Fetal personhood legislation surfaced on ballots throughout the country beginning in earnest in 2006, with subsequent appearances in Virginia, Mississippi, Oklahoma, and Colorado among others, signaling capacity for the personhood movement to gain legal momentum (Wetzstein, 2012; Personhood USA, 2014b). Colorado's Proposition 67 was the latest in a series of personhood bills, the third time a "personhood" amendment was proposed to Colorado's constitution, and the third time it was defeated. Importantly, however, the bill "defied the odds and increased Yes votes by 10 percentage points over the first personhood amendment attempt in the state in 2008" despite personhood advocates being outspent by opponents of the bill (Personhood USA, 2014b, para. 3). Despite marginal gains on statewide ballot initiatives, fetal personhood does not exist in any state as of this writing. It seems that personhood is not simply a legal question, easily resolved by popular vote. Rather, personhood is located at the intersection of ethics, and criminal, medical, and family law.

Human morality and ethical behavior has, at its center, the question of personhood. The issue of whom or what constitutes a person has been discussed in detail by philosophers,

biologists, ethicists and, most recently, politicians (Packer, 2013). At its core, the discussion focuses on two interrelated questions: who or what constitutes a moral agent, and who or what deserves protection under the law (Will, 2013)? The present study focuses on a case where the latter discussion, protection under the law, was brought to the forefront in a battle over the need for justice, and the need to protect a woman's autonomy. Proposition 67 would have amended the Colorado state constitution to grant legal personhood to children in utero by ensuring that "the words 'person' and 'child' in the Colorado Criminal Code and the Colorado Wrongful Death Act must include unborn human beings" (Williams, 2013, para. 1). That protection, advocates argued, would resolve existing legal inconsistencies that prevented criminal prosecution in cases where a pregnancy was wrongfully terminated. Opponents, however, suggested that the vague wording of the amendment, and the unclear implications of legal personhood, belied a thinly veiled attempt to ban abortions and contraceptive measures, with language inviting the possibility criminal investigation into occurrences of miscarriages.

Though personhood has been at the center of philosophical and legal considerations for many years, only recently has the term warranted substantive policy discussion as a consequence of an "increased wave of attempts by states in the last five years to establish a personhood framework through statute or constitutional amendment" (Will, 2013, p. 579). Fetal personhood invites controversy in large part because a definition of personhood that includes children in utero would dramatically alter the landscape of property, family, medical, and criminal law. Lindgren (2012) argues that the abortion debate in the United States, as complicated by legal precedents in *Roe v. Wade*, *Parenthood of Southeastern Pennsylvania v. Casey*, and *Gonzales v. Carhart*, situates the viability and personhood of a child in utero at the center of a number of legal questions regarding women's autonomy, right to procreation, and access to medical

services. Of specific note is the impact that personhood would have on access to abortion. Will (2013) suggests that the framework that guarantees legal access to abortion in the United States established in *Roe v. Wade* would be upended if children in utero were extended personhood, as the current precedent relies in part on the distinction made in *Roe* that explicitly rejected personhood, and by extension fetal protection under the Fourteenth Amendment. Brown (2005) argues “because the Supreme Court failed to delineate what other fetal personhood rights a state may give a fetus outside of the abortion context, state legislators have skirted *Roe* by not awarding protections precluded by that holding” (p. 91). As such, it is unclear the extent to which fetal personhood would complicate the legality of seeking or providing abortion services.

Despite legal ambiguity and complicated philosophical implications of fetal personhood, much of the public debate surrounding policy adoption is not couched not in philosophical abstraction, but in material realities. As such, scholars of political communication and rhetoric must be equipped to analyze the various forms and functions of argument in the personhood debate, and how those arguments influence the way individuals and politicians understand the effects of adopting (or failing to adopt) a particular policy. In the context of fetal personhood, the way advocates and opponents conceptualize the material consequences of a policy could dramatically impact the way a personhood amendment is talked about, supported, and enacted. Personhood in the public debate may represent a departure from the contemporary discourse surrounding abortion, a distinct way to conceptualize and disrupt ideological and legislative gridlock between <choice> and <life>.

I submit that the arguments made by opponents to personhood in Colorado were based not in philosophical abstractions, but in concrete, legal consequences. Such a strategy is a break from the existing rhetorical landscape of the abortion debate, which is characterized by opposing,

non-interactive ideographs (Condit, 1990; Hayden, 2009; Lake, 1984). In order to disrupt the stasis inherent in the public debate over abortion in the United States, opponents to personhood couched their claims in the material effect personhood bills would have on women, and how that impact invalidates personhood advocates' claims to broader abstractions such as <justice>.

Hariman (1991) suggests, in debates where higher order abstractions and aesthetic principals are given primacy, the introduction of practical and material concerns can argumentative gridlock.

This insistence on practicality, called *prudence* by Hariman (1991) is visible specifically in the debate over Colorado's Amendment 67, the "personhood amendment."

The proceeding sections are organized in the following way. First, the landscape of the contemporary abortion debate is summarized, paying special attention to the way ideographs and moral abstractions define the parameters of public conversation. Prudence is then discussed in as the way practical considerations can engage ambiguity in ideographs. Applied as a lens of critical analysis to the arguments forwarded for and against the personhood amendment, prudence demonstrates the capacity for practical consideration to disrupt appeals to moral abstractions. Finally, the broader implications of the personhood debate and the application of prudence in the public sphere are addressed.

### **Ideographs and the Abortion Debate**

McGee (1980) argues that ideographs are employed in the political sphere as a mechanism to compel audience members to act. Ideographs function as what Graber (1976) called "condensation symbols," words that simultaneously represent complicated material and ideological realities. Significantly, ideographs have "flexibility as cultural signifiers" tied to the context in which the ideograph itself is placed (Condit & Lucaites, 1993 p. xii). As such, ideographs enact multiple meanings simultaneously. An ideograph exists within a specific

political conversation, as a facet of a given debate, but also within a broader historical context that constrains the meanings that can be assigned. Black (2003) notes the significance of history for rhetorical critics engaged in ideographic analysis, stating, “every time a particular ideograph is used in argument we must look to the past to determine if it fits within the bounds of the past definition” (p. 315). Consequently, what follows are the dominant ideographs in the abortion debate in the United States, along with the argumentative gridlock engendered by continual employment of those ideographs.

Numerous scholars have suggested that one of the defining characteristics of the pro-life movement is the adoption of the ideograph <life>, which implicitly assumes the immorality of abortion in all or nearly all instances (Condit, 1990; Lake, 1986). Hayden (2009) argues that the stance adopted by pro-<life> activists normally manifests as a rigid, unwavering position that equates abortion to murder in terms of impermissibility. That unwavering, decontextualized view of morality is characteristic of deontological ethics (Lake, 1984; 1986). Deontological ethics posits the assessment of an action's morality takes place absent the individual circumstances surrounding the action. An action that passes as moral or immoral independent of circumstance, then, can be universalized as a morally desirable or undesirable action. Packer (2013) suggests that abortion fails the “deontological test” as abortion cannot be universalized as a desirable moral action. Pro-<life> movements assume a deontological stance in part by contending that abortion is comparable to other morally reprehensible acts, such as murder. Indeed, pro-<life> activists are quick to describe a fetus as a human being from the time of conception, which draws immediate parallels between abortion and murder.

Similarly, the debate over fetal personhood invites the use of the ideograph <life>. Lake (1984; 1986) suggests that there is a distinct moral landscape within which the abortion debate

resides that generates tension between ideographs and material terms. In the redefinition of moral terms from concrete examples to moral abstractions, Lake (1984) argues that ideographs in the abortion debate are defined through a Burkean notion of the negative. Burke, according to Lake (1984), suggests that an item could be constituted not by what the object is, but by what it is not—in this instance, defining something as (not) a human. The question of whether or not an entity is considered human is, then, a prior question to other decisions regarding treatment of that entity. If a fetus is understood as a human being, deontological characterization of abortion becomes quite persuasive. In essence, the fetus-as-human frame creates a relational ordering wherein <choice> is naturally subordinate to <life>. To have access to <choice> assumes a value to one's own life, and to assign that value is impossible in a society where one can decide without repercussion to take the life of another. Pro- <life> advocates establish moral and argumentative high ground, a nuanced stance where abortion is not necessarily designated as murder under the law, but functionally indistinguishable from murder rhetorically (Packer, 2013). Such a positioning invites substantive conflict with the ideograph <choice>, since to accept the premise of <life> would invalidate the premise of <choice>. Indeed, ideographs invite the audience to create a hierarchy, as tensions between moral values are difficult to sustain. Negotiation is a constant process, and the maintenance of a status quo that places two “rights” in opposition to each other creates unease (Myrsiades, 2002). As such, proponents of <choice> tend to adopt an alternative argumentative stance that attempts to reconcile the demands of <life> with the need for <choice>.

Where the pro-<life> movement embraces a deontological stance on abortion, the pro-<choice> movement is positioned as teleological and context dependent (Lake, 1986). The pro-<choice> movement conceives of abortion as a nuanced action where the potentiality of life must



be reconciled with the necessity of women's reproductive health and agency. Argumentatively, however, the pro-*<choice>* movement is limited. Packer (2013) suggests that an implicit disadvantage of a teleological stance is that transference of ethical values is less readily accessible. Teleological ethical stances assume that assessing the morality of an action is complicated and contingent on contextual elements which render actions (im)moral based on the circumstances in which they occur. Hayden (2009) argues that *<life>* has achieved such salience in part through the parsimony of the position, compared to the relative complexity of arguing for reproductive rights and autonomy. The limitation of *<choice>* is intuitive when abortion and murder are rhetorically similar; murder is defensible in only the most narrow of circumstances. However, framing abortion as context dependent doesn't "lend itself to many analogies" (Packer, 2013, p. 92) and is subsequently at an argumentative and moral disadvantage. At its core, however, the pro-*<choice>* movement does not elevate the ideograph of *<choice>* above the value of *<life>*, but as a competing value claim.

The question of *<choice>* versus moral rightness is clear in even the most rudimentary exercises to frame the debate. Klienman and Ezzel (2012) suggest that framing a conversation of medical access to abortion around morality is a mechanism to foster controversy and legitimate a deontological perspective incommensurate with women's reproductive rights. The inverse of the argument is similarly true: if the question is whether an institution should have the ability to regulate a woman's medical decisions, *<choice>* suggests that the institution must have a pressing and compelling reason to do so. Absent an appeal to *<life>*, it is difficult to justify otherwise intrusive state surveillance and regulation of private decision-making. In this interaction between competing values, one can see that the pro-*<choice>* movement has "employ[ed] a strategy of 'overweighing,'" where they argue the need for the "complete sacrifice

of the opposing values” (Condit, 1990, p. 159).

Overweighing has been employed by pro-*<choice>* activists to shift the debate away from *<life>* and towards ideographs such as *<choice>*, which do not challenge *<life>* but articulate circumstances in which *<choice>* is more important. Dubriwny (2005) argues that using context to depict the actions of women who sought abortions as necessary choices assumes the moral necessity of women's health. Strategies that place individuals and experience at the center of the abortion debate allow for redefinition of key ideographs. Hayden (2009) said members of the 2004 March for Women's Lives emphasized lived experience through *<choice>*, as “participants offered themselves as evidence, articulating the variety of needs, values, and beliefs that are captured in the demand for reproductive rights” (p. 125). Rather than allow pro-*<life>* movements to seize upon women's health as a reason to limit abortions, pro-*<choice>* movements have used women's health as a synecdoche of agency and right to determine their bodily and mental autonomy.

### **Ideographs and Prudence**

Ideographs invite competition and hierarchy, but rarely are the terms of interactions between complex ideographs explicit (Black, 2003; McGee, 1980). By framing ideographs in moral terms, interactions are implied by the rhetors employing them. Rhetors establish a context in which the ideograph is appropriate in part by positioning the terms in opposition to existing political and social norms. Packer (2013) suggests that understanding competing moral ideographs in the political realm can be achieved through a framework of prudence. Prudence, in this context, is an argumentative appeal for interaction, a move to concretize and make real the abstractions called forth by an ideograph. Political actors engaged in prudential argument are, in effect, asking that institutions, movements, and individuals be responsive to potentialities and

eventualities in the material world. Prudence, according to Hariman (1991),

...designates the capacity for effective political response to contingent events. It arises in deliberation, requires implicit understanding of the possible, the probable, and the appropriate within a specific community, and is not reducible to categorical imperatives, deontology, or universal laws (p. 26).

Prudence privileges an assessment of probabilistic circumstances that would (not) result from the passage of a policy, rather than assessing competing moral absolutes as justifications for action.

Prudence, then, is critical to understanding the praxis of rational and performative argument. Hariman (1991) argues that "prudent conduct will be conduct that relies on shared expectations regarding how and how well one might act out one's decision" (p.27), rather than conduct that appeals exclusively to the rule, or the form, of the argument. This is to say that prudence affords scholars a vocabulary to understand and describe political discourse as a response to potentialities and probable harms. Analysis that incorporates Hariman's (1991) conception of prudence would identify attempts by political actors to cast conflicts between ideographs in terms of probabilistic scenarios and situational constraints. Prudence functions as a useful analytical tool in circumstances where political discussions include competing or parallel value claims that fail to account for the material consequences of a policy. Prudence acts as a direct response to entirely rule-based politics by asking what consequences could be wrought from institutional action. It is difficult to discern, however, argumentative approaches that are entirely rule-based. Hariman (1991) contends there are obviously instances in which individuals mix arguments for higher moral principles (life, liberty, the pursuit of happiness) with aesthetic claims about "character, tone, timing" without either appeal corrupting the other (p. 31), as well as practical claims about the impact of an action. The issue arises when scholars and political

actors are unable to deconstruct the arguments regarding the necessity of institutional action. Some arguments can only be understood as problematic through a framework of prudence, as such a framework would reveal interactions of competing claims.

The greatest problem, according to Hariman (1991), is that political actors must "...recogniz[e] how modern societies have become unduly defenseless against aesthetic manipulation because we lack a theory of prudence" (p. 32). In essence, some arguments manipulate particular cognitive processes, and lead otherwise well-intentioned individuals in the political realm astray. A clear example of this defenselessness is the debate over the legality and necessity of abortion in the United States. The debate between pro-*<life>* and pro-*<choice>* activists typifies the weakness of aesthetic politics as political actors on each side appeal to non-intersecting moral claims and appeals to character. Ultimately, each side fails to articulate the impact of legislation designed to liberalize or problematize access. It is from this argumentative failure that prudence, as an analytic tool, can be delineated, refined, and exemplified..

In the Colorado personhood debate, scholars are offered such an opportunity. By employing prudence, the personhood movement fails to adequately respond to compelling objections to the institutionalization of fetal personhood. The following analysis details the way ideographs such as *<justice>* and *<choice>* are used in the public debate over Colorado's personhood amendment, with attention paid to the way concrete, material appeals are used to ground and generate interaction between ideographs. Rather than frame the debate as a dialectic between *<life>* and *<choice>*, advocates for personhood were forced to argue for the personhood amendment through the ideograph *<justice>*. Analysis of the interaction between *<choice>* and *<justice>*, using the framework of prudence, makes clear the failure of the personhood movement to gain traction in the public sphere. Similarly, appeals to simplicity of

implementation failed when met with counterclaims of complexity, inviting into the debate an interrogation of the material consequences of a personhood amendment.

### **Historical Context: Colorado's Personhood Debate and Abortion**

The most recent incarnation of the policy debate over fetal personhood in Colorado centered on Heather Surovik, a 27-year-old woman who miscarried when a drunk driver struck her vehicle. Because of the way Colorado law treated unborn children, no charges were filed based on the loss of the child, whom Surovik had named Brady. To remedy what personhood proponents argued was an obvious deficit in Colorado law, Surovic filed the Brady Amendment, which would have modified Colorado law to afford personhood and, by extension, legal protection to unborn children (Rael, 2013). Following the acquisition of sufficient signatures, the Brady Amendment was added to the 2014 statewide ballot.

It is worth noting that the issue Surovik and other personhood critics isolated, criminal prosecution for unwanted termination of a pregnancy, was resolved without regard to granting legal personhood to fetuses (Asmar, 2013; Rael, 2013). The Unborn Victims of Violence Act of 2004 (UVVA), for example, amends federal laws to extend legal protection to children in utero, and explicitly forbids violent actions taken against fetuses. The UVVA does not, however, grant a fetus full personhood under the law. The bill neither characterizes abortion as a violent act against a fetus, nor full constitutional protection. Colorado had previously addressed crime against pregnant women in state law as well. By amending a 2003 law to criminalize the reckless termination of a pregnancy, and the passage of the Crimes Against Pregnant Women Act in 2013, Colorado offered substantial legal recourse for women who lost their pregnancies due to an outside factor. Advocates for personhood, however, argued that these laws failed to

adequately protect fetal life, and offered cover for “abortionists” (Personhood USA, 2013b, para. 3).

Surovic acted as a representative of the ideals of Personhood USA, a non-profit advocacy group that purports to be “the largest grassroots pro-life organization in the United States” (About Us, 2016, para. 3). Personhood USA was responsible for a number of press releases supporting the amendment, and joined local organizations such Colorado Right to Life, Personhood Colorado, and the political action committee A Voice for Brady in organizing, fundraising, and arguing for the proposition. The opposing side consisted of a wide range of professional, political, and special interest advocacy groups ranging from law (e. g., the Colorado Bar Association), medicine (e. g., the Colorado Medical Society), and pro-~~choice~~ organizations including local and national chapters of Planned Parenthood and NARAL Pro-Choice. The discourses analyzed here were compiled through organizations’ press releases, public statements, websites, and news articles regarding the personhood debate.

The personhood amendment, Proposition 67, was defeated with an almost two to one margin of victory. Interestingly, however, advocates indicate that personhood measures will continue to appear on ballots in the near future. Indeed, court cases in South Dakota and Oklahoma have questioned the constitutionality of these bills, and some scholars suggest that the endgame of the personhood movement is to mount a legal challenge to *Roe v. Wade* in the United States Supreme Court (Will, 2013). In light of substantial restrictions on abortion clinics in states such as Texas and Nevada, it is difficult to explain why a policy consistent with the legal and rhetorical trajectory of the pro-~~life~~ movement would be so resoundingly defeated (Vogel, 2011).

A partial answer may lie in the way <life> and <choice> functioned in the context of the public debate over personhood in Colorado. Hayden (2009) suggests that some of the success of the pro-<life> movement is attributable to the consistent application of <life> in political contexts and the public imagination. However, through strategic redefinition of both <choice> and <life>, Hayden (2009) argues that the pro-<choice> movement was able to achieve rhetorical nuance previously absent from the argumentative landscape characterized by Lake (1986) and Condit (1990) as non-interacting moral positions.

As a part of the broader social and political debate over abortion, personhood advocates were limited in large part by the historical meanings associated with ideographs such as <life>. Black (2003) argues that ideographs, though powerful rhetorical tools, have the capacity to constrain and limit rhetors in particular contexts. To that end, the following section analyzes the ideographs prevalent in the Colorado personhood debate.

### **Appeals to <Justice>**

The debate over personhood mimicked the broader debate over abortion in the United States, but differed in significant ways. Largely, advocates for the personhood amendment attempted to elevate their claims to the same moral level as the pro-<life> movement, but instead of <life> as a dominant value, personhood advocates were left with <justice> due to the nature of the personhood ballot. <Justice> as a value, though powerful, is easier to subordinate than <life>. According to Packer (2013), the post-hoc application of justice in the context of abortion presupposes and concedes that a life has already been lost. Rather than preventing the loss of <life>, <justice> offers restitution and retribution for the affront, with the possibility of laws acting as a deterrent.

<Justice> is specifically invoked in the use of personal narrative. Surovik argued in a television interview, “I had to plan a funeral for a baby that I never got to meet. I had to tear down the nursery.... I want to be an advocate for other pregnant mothers so they don't have to go through what I went through” (Personhood USA, 2014a, para. 3). In this interview, and in comparable speeches given to the Colorado legislature, Surovik and personhood advocates contend the lack of a criminal framework to protect unborn children victimized individuals twice: first, the mother is harmed physically and, second, the mother is robbed of closure the justice system could necessarily afford. <Justice>, then, serves simultaneously as a higher moral ideal, and a practical possibility. If one assumes that <justice> is desirable, and attainable through personhood, the bill could garner support.

There also were attempts by personhood advocates to transfer larger moral claims from the pro-<life> movement to their cause. Numerous press releases referred to the personhood law as “recognizing that unborn children in Colorado are people and should be considered victims of crime” (Personhood USA, 2014b, para 1). To that end, Brady, the name of the Surovik's unborn child, is routinely referred to as an “eight pound two ounce baby boy” who “was not a person” (Personhood USA, 2014a, para. 2) In this discussion of fetus-as-person, the personhood movement attempts to de-individuate pregnant mothers and fetuses. To justify the separation of the mother and the fetus as legal entities, the movement must rhetorically construct the two as separate.

The pro-<life> movement has routinely separated the mother from the fetus rhetorically to characterize the fetus as a human being the law is uniquely charged with protecting. Weingarten (2012) suggests that focusing on the fetus as a distinct entity creates a unique rhetorical circumstance where the fetus itself becomes individuated. The fetus, as a human being,



for a moment becomes equal to the mother, but is quickly elevated above her as a member of a specially protected class. Hart (2014) indicates that discussing the fetus as a class worthy of protecting is a twofold strategy to de-individuate women. By comparing the life of a fetus to the life of individuals under slavery or experiencing genocide, for example, the fetus becomes a protected class, one subject to atrocities at the hand of unnamed aggressors. As such, the notion of protecting a fetus under the law because a fetus is incapable of protecting itself is a *de facto* way to position women as aggressors against a sacred class. Cheu (2012) cites the primary concerns of the Supreme Court in *Parenthood of Southeastern Pennsylvania v. Casey* de-individuated women by contending "... there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing pregnancy to full term" (*Parenthood of Southeastern Pennsylvania v. Casey*, 2012, p. 872). Duden (1993) suggests that women are, through technologies such as abortion, simultaneously victim and victimizer; abortion creates a circumstance where the fetus is an independent agent, acted upon by an outside actor, thereby creating tension between the life of the fetus and the choices of the mother.

Even in this separation, however, the focus of the public debate is not on <life>, but the maintenance of <justice>. Surovik argues, in the summer before the 2014 ballot,

...it's been two years since I was told that we had been struck by a drunk driver ...

Shortly after, I was told that there would be no justice for Brady's death, because under Colorado law, Brady was not a person. (Personhood USA, 2014a, para. 3)

Where the pro-<life> movement suggests that the protection of <life> is a prima facie burden, the personhood movement argues that protection takes the form of post-hoc application of the law. Surovik and others characterized their fight for the personhood amendment as a fight for <justice>. In an interview with NBC News, Surovik said, "If I just sat back and said, 'Poor me,'

then other babies still would not be getting justice” (Pesta, 2014). Though <life> may undergird the appeals to <justice>, the retributive appeals made by Surovic and others do not directly engage the broader deontological claims of the pro-<life> movement. Instead, personhood advocates suggest <justice> is best served in laws that would act as deterrents, or as means of closure for victims of crimes.

### **The Counterpoint: Appeals to <Choice>**

Where the personhood movement's appeals are entwined with but distinct from the pro-<life> movement, opponents were able to achieve direct transference of the pro-<choice> movement's use of <choice>. As far back as 2006, when personhood amendments began appearing on state ballots, advocates were quick to point out that the existence of personhood amendments “gives [pro-choice advocates] another opportunity to explain how personhood amendments threaten all pregnant women, including those going to term,” and that past votes against the bills demonstrated that individuals were “uncomfortable with the government and strangers making personal decisions for families” (The Associated Press, 2009, para. 12). Arguably the most pertinent contention against Proposition 67 was that personhood was a thinly veiled attempt to ban abortion, a notion posited throughout the course of debate and bolstered by the Oklahoma Supreme Court decision to strike down their state's personhood bill (Pesta, 2014). Opponents argued the amendment would also implicate embryonic stem cell research, fertility treatments such as in vitro fertilization, and the inclusion of pregnant women in research (Orovic, 2012). As a consequence of the amendment, the legal status of abortion in Colorado would be in limbo; if fertilized eggs received the same legal protection as born children, the very nature of medical procedures on pregnant women would change dramatically.

Direct appeals to <choice> are abundant in the personhood debate. Planned Parenthood, among other organizations, indicated a personhood amendment would implicate health decisions that “should be left to a woman, her doctor, her family and her faith -- not politicians.” (Orovic, 2012, para. 4). Planned Parenthood Vote Colorado went so far as to run a mailer campaign against Tim Neville, a Republican Senate candidate in Colorado who supported the amendment, indicating that he supported a policy that would allow criminal investigations into a woman’s miscarriage (Salzman, 2015). `Chapin (2014) argues the amendment “would ban abortion in all cases, even for victims of rape and incest, potentially criminalize doctors who terminate life-threatening ectopic pregnancies, and ban many forms of birth control, including the IUD and some types of the Pill” (para. 7). Arguments regarding access to birth control and reliable medical attention form the core of <choice> in the context of the abortion debate (Hayden, 2009), and opponents were quick to mobilize the existing ideograph to problematize the amendment. Paltrow, the director for the national group Advocates for Pregnant Women, grimly argued “as soon as you empower state actors and others, including physicians and husbands, to act as if the fertilized egg, embryo, or fetus is already outside of the woman’s body, they can do almost anything they want to her” (Verlee, 2014, para. 2). <Choice> was invoked to problematize a bill that, though perhaps desirable on face, would fail to achieve its stated ends and invite a cadre of legal burdens on Colorado women.

Implicit in personhood would also be a host of legal challenges that would infringe on pregnant women’s rights. Will (2013) suggests that personhood could lead to invasive police investigations into lost pregnancies to determine circumstance, intent, and whether or not the pregnant mother was acting in the best interest of the child. Paltrow, mentioned above, indicated in an interview with NBC news that the ballot initiative would

... make every pregnant woman the potential perpetrator of a violent crime—whether she has an abortion, experiences a pregnancy loss, or goes to term having done anything including smoking a cigarette that someone views as creating a risk to the fertilized egg, embryo or fetus (Pesta, 2014, para. 6).

Indeed, it is less a question of whether such investigations would lead to prosecutions, but whether the very act of investigating is an infringement on individual rights to privacy and undue search (Will, 2013). <Choice>, then, has multiple roles. It represents not only a woman's right to choice and autonomy, but her right to act unencumbered by the state.

Hayden (2009) suggests that rearticulating the way individuals conceive of <choice> is possible by locating the literal bodies of women at the center of the debate. Dubrinwy (2005) argues that one of the major successes of the 1969 Redstockings protest was refocusing the debate not on the act, but on the agent, and her circumstances. Similarly, in Colorado, the rights of pregnant women held preeminent status in the debate. Personhood was cast not in moral abstraction, but in material terms, the way the law would affect science, research, and medical access.

### **Prudence as Rejoinder**

Prudence offers a clear framework for evaluating the competing value claims in the debate between personhood advocates and opponents. In effect, prudence elucidates the power of circumstance in the arguments against personhood. Where pro-<life> advocates are able to dismiss objections to abortion framed around circumstantial acceptability as unlikely, or a small price to pay in the service of protecting life, the personhood debate makes clear that the material reality of the world post-personhood would directly and negatively impact women. Will (2013) suggests that implementing fetal personhood would be much more complicated, and likely much

more damaging to women, than pro-*<life>* advocates are willing to admit. By framing the debate around the consequences of the personhood amendment, a strategy normally ineffective in the broader public debate about abortion, pro-*<life>* advocates were put at a distinct disadvantage because of their inability to sidestep practical concerns that implicated their underlying moral calculus.

The use of prudence in the personhood debate allows scholars to evaluate interactions between arguments. Advocates of the ballot adopt a deontological view of *<justice>*, suggesting that *<justice>* is free from the constraints of circumstance. Rather than determining *<justice>* on a case-by-case basis, a deontological view of justice would contend there are moral certitudes. The current law, they argue, “disallows prosecution for crimes against children in the womb, allowing drunk drivers and perpetrators of violent crime against pregnant women to avoid criminal charges” (Personhood USA 2013a, para. 1). Though *<justice>* is being upheld in the abstract, the actual implementation of the law would fail to bring about *<justice>* by substantially burdening pregnant women and subjecting them to unjust forms of government interference.

Public discussion of the legal consequences of the personhood bill demonstrates how prudence is important to the abortion debate writ large, as it places a higher burden of proof on both sides. Packer (2013) argues circumstantial objections to the contention that abortion is murder, and therefore never morally permissible, can no longer be sidestepped by appealing to the moral high ground. The practical and legal concerns of the ballot's opponents are not couched in unlikely eventualities, but logical conclusions related to the value claims both sides are making. Under a framework of prudence, policymakers and activists would be forced to reconcile the ideal of justice with the reality of a world where abortion are not only inevitable, but also desirable in specific circumstances. Prudence would ask activists to frame the debate in

terms of competing contingencies, alternative hypotheses of what may happen as a consequence of legislation. Such a frame would necessitate clash between competing perspectives on female choice versus the life of a fetus, a feature not present in the current discussion of abortion.

### **Appeals to Simplicity**

In addition to the use of existing ideographs, the personhood debate in Colorado centered in part on the actual implementation of the bill. The second major argument forwarded by personhood advocates is the relative simplicity of implementing a personhood amendment. Advocates argued that enshrining fetal personhood in law was not a complicated question. Will (2013) indicates that the personhood movement is about adopting “a biological definition of personhood that would attach full moral status and legal protection to the life of the preborn and place them on equal footing with the born” (p. 25). On face, then, personhood amendments to a state constitution would function similar to the 14<sup>th</sup> amendment to the U.S. Constitution by enshrining the moral status of a fetus in such a way that would be protected by law.

Much like the conception of <justice> discussed above, the relatively simple argument for moral status functions in a way that transfers existing attitudes of the pro-<life> movement by reducing the issue to an acontextual and unwavering stance. The question of “conditional” morality, as indicated by Packer (2013), is among the most powerful arguments the pro-<life> movement has at its disposal. If one accepts that claims to moral high ground exist in the personhood movement, all other considerations become irrelevant issues.

For that reason, advocates for personhood also pushed against hypothetical scenarios of implementation as reasons to avoid a personhood amendment. Richey (2012) suggests that the Oklahoma Supreme Court decision striking down personhood on constitutional grounds implies the impossibility of future legal battles, as “it would appear that no further discussion or vote will

be allowed if opponents can raise one hypothetical application that would conflict with federal law if the proposed amendment were passed” (para. 4). By minimizing the legal impact of the bill, but heralding the legislative basis for protecting the unborn, the personhood movement attempts to sidestep outstanding concerns about personhood upending existing moral frameworks. Surden (2008) cites Kristi Burton, an eventual sponsor of the 2014 personhood initiative, on a discussion over what laws would be modified: “[the personhood movement] tr[ies] not to focus on some of the issues that will be taken care of later on” while denying any possible risk personhood poses to access to abortion (para 4).

To combat opposing notions of complex and damaging implementation, advocates for personhood routinely defended the simplicity of the personhood amendment by characterizing opponents as lying, misleading voters, or framing the debate poorly. Both Surovik and Mason, the Communications Director of Personhood USA, argued that opponents’ claims of criminalizing miscarriage were outlandish, and not the intention of the bill. Surovik claimed,

Planned Parenthood and the media are trying to take the focus off of Brady, to ignore him to push their own agendas. Let me be clear: this amendment is about Brady, and his life, and justice for women who have suffered the tragedy that I have suffered. (Personhood USA, 2013c, para. 5)

As further press releases indicated, when the discussion shifted to whether women would be investigated for miscarriages, “this unfounded accusation from Planned Parenthood is a blatant fabrication intended to scare and mislead voters” (Personhood USA, 2013d, para. 4). Tuttle (2014) argues that the notion the bill would be used to criminalize miscarriage “runs contrary to both experience and law” (para. 5). Advocates for personhood, however, failed to provide a description of what the legal ramifications of personhood would be, absent the capacity to try

individuals for murder of a fetus. No clear articulation was presented that offered a compelling counternarrative to the slippery slope of complexity furthered by opponents to personhood.

### **Appeals to Complexity**

Comparatively, a consistent refrain from opponents to the personhood ballot was that the actual implementation of the law would create a host of legal challenges. The Colorado Bar Association, and the Colorado Women's Bar Association, came out strongly against the bill based on "far-reaching consequences that would have a dramatic impact on the laws and jurisprudence in Colorado if it were to be adopted" (Crocker, 2010). Citing the nearly 20,000 times the word "person" occurs in Colorado regulations and statutes, legal experts were quick to point out that the actual implementation of the bill would dramatically alter "criminal law, family law, trusts and estates, real estate law, elder law, tort law, juvenile law, health law, and business law" in the state (Crocker, 2010, para. 4).

Opponents further suggested personhood would complicate the legal status of fertilized eggs, stem cell research, and in vitro fertilization. They raised concerns about "the effect this kind of legislation can have on the exclusion and treatment of women in clinical research" (Guidry-Grimes & Victor, 2012, p. 1), and whether or not personhood would, in effect, ban many forms of birth control. Most damaging, however, are the hypothetical claims that implicate the life of the mother. NARAL Pro-Choice Colorado indicated that many forms of birth control, miscarriages, the termination of ectopic pregnancies, and substance abuse during pregnancy would invite court cases privileging the right of the fetus to life above the life and agency of the mother, even in circumstances where a litany of medical experts would support the necessity of termination (Surdin, 2008). These questions about pregnant women's agency following the passage of a personhood bill not only refer back to the right to medical treatment posited by the



pro-~~choice~~ movement, but also argue the very real possibility that, independent of the moral claims that the personhood movement forwarded, the personhood amendment was a poor way to legislatively achieve the ends of protecting fetal life.

### **Prudence as Rejoinder**

In the context of discussing the hypothetical implementation of the bill, prudence is relevant to the resolution of competing claims regarding potential consequences. Advocates for personhood were asked to defend the hypothetical implementation of their amendment. Where opponents of personhood developed scenarios that could result from the passage of the amendment, advocates were left on the defensive, characterizing the scenarios of opponents as misleading, untrue, or unlikely. A framework of political discourse that privileges prudence, however, would ask that policies be implemented based on probabilistic scenarios that would take into account real and on-going consequences that would result from the law. As such, prudence makes clear why the personhood amendment failed. When faced with damning potentialities, advocates came up short.

Packer (2013) submits that framing the debate in terms of competing policies, rather than competing morals, demonstrates how a framework of prudence implicates and indicts the claims of the pro-~~life~~ movement. At its core, the preceding discussion of policy centers on implementation, rather than exclusively on the policy's form or ethical considerations. Advocates for the personhood amendment, however, attempted to sidestep such considerations in favor of appeals to abstract moral principles. The debate was sufficiently grounded in hypothetical consequences so typical appeals to higher ethics failed to provide adequate support for the passage of personhood.

### **Implications and Conclusions**

Prudence is desirable in the political sphere, as a theory of prudence “would allow any competent participant to better understand how politics works when it works well” (Hariman, 1991, p. 26). Packer (2013) hints at the implicit problems of legislation enacted because of appeals to dogma and rigid moral rules. Rather than achieving effective policies that respond to the real needs of citizens, laws are implemented or enforced in such a way that ignores material realities experienced by the polity. A prime example of this disconnect occurs in the abortion debate. Deontological claims about the moral necessity of limiting abortion leave no room for exceptions, even when exceptions are not only intuitively necessary (such as instances of rape, incest, or when the pregnancy threatens the life of the mother), but also supported by a plurality of the public (Abramowitz, 2010). The failure of the Colorado personhood amendment can be understood by evaluating arguments through the framework of prudence. As advocates of personhood failed to adequately articulate or defend the possible implications of a personhood amendment, the bill failed to gain traction. Prudential appeals made seeking the moral high ground to sidestep practical concerns an untenable strategy. Rather than framing the debate as competing value claims, where pro-*<life>* advocates have an advantage, prudence narrows the discussion to one of potentialities and contingencies.

The necessity of prudence in the United States extends well beyond the abortion debate. This analysis suggests that intersecting ideographs employed in the debate over personhood demonstrate the rhetorical problems associated with the wider abortion debate in the United States. Policy stalemates and ideological rigidity have become the norms as a consequence of routine appeals to *<life>* and *<choice>*, which privilege moral abstractions over material realities. Contemporary appeals to aesthetic, moral principles are abundant, and belie an underlying political gridlock that prevents compromise and practical response to growing

problems. In many public sphere debates over policy, abstract conceptions like <liberty> and <justice> are privileged in order to ignore rational consequences, or justify farfetched scenarios. The prevalence of moral and aesthetic claims, though not intrinsically problematic, impacts the viability of reform measures that respond to public concerns. Prudence as a theoretical framework, and a practical strategy of argumentation, implicates two common scenarios in public sphere deliberation: the justification of outrageous conclusions, and moral condemnation brought to bear on reformers.

Appeals to aesthetic principles, as this study implies, have the capacity to sidestep practical concerns and dominate debates. For example, <liberty> can be used to justify outlandish conclusions not grounded in material realities. Where advocates for personhood were able to center the conversation on probabilistic circumstances to disrupt the rhetorical dominance of <life>, the strategic use of <liberty> in tandem with farfetched scenarios in the gun control debate decenters the debate from likely legislative implications. Such a strategy diverges noticeably from personhood advocates' use of <life>, but the dominance of a particular ideograph is an intractable part of the debate. Ultimately, <liberty> is held in higher regard than the material consequences of gun policy, a circumstance that may be resolved through the adoption of prudence. If probability were weighted more heavily in public debates, it is conceivable that the dominance of aesthetic claims would be weakened, or even broken. The ambiguity of <liberty> allows for strategic definition of the parameters of a debate and, by extension, limiting particular conclusions or policy possibilities (McGee, 1980). Harpine (2016) suggests that opposition to gun control is sometimes grounded in historical narratives and appeals to abstract concepts such as <liberty> and <tyranny>. Prudence, as conceptualized here, could empower scholars to disentangle and analyze not only ideographic dominance, but also

instances where outcomes are taken to be representative anecdotes, regardless of whether those scenarios are probabilistic. A disconnect in the public sphere debate exists between the likely consequences of proposed legislation, and possible scenarios whose implications are inflamed by adherence to <liberty>. This disconnect is overdetermined, a combination of gun control proponents unable or unwilling to press on the likelihood of scenarios such as the wholesale seizures of firearms, and pundits and politicians who rapidly pivot between legislative speculation and appeals to aesthetic principals of <liberty>. As such, the use of new theoretical frames that privilege probability over dogma could alter gridlocked debates.

Prudence would also be useful in instances of existing laws whose implementation has been problematic for politically disenfranchised groups. Some policies and positions are framed as morally just, so much so that reform is politically contentious and undesirable. Such positions, and the bills that ensue, are immune from criticism because the implementation of the policy is far less important than the moral standard the bill supports. For example, consider laws that govern the physical limitations on the living spaces of sexual offenders, specifically pedophiles. Pedophiles are, rightly, vilified as a special kind of evil; child abuse is morally reprehensible, acceptable in no circumstances, and policies must be enacted that protect vulnerable populations. Obviously, the question of what to do with sex offenders is both moral and practical. Sexual violence is unacceptable (a moral claim), and propagators of sexual violence exist (a practical one). Discourse that surrounds sexual offenders, however, allows the dominance of moral abstractions at the expense of practical arguments. Sexual violence is morally impermissible, but how sexual offenders are treated under the law is a related but different question. Take, for example, laws that limit the locations registered sex offenders may set up residence. Recently, some activists have taken advantage of loopholes in zoning laws that allow the establishment of

“pocket parks” which effectively ban sex offenders from many neighborhoods in Los Angeles (Bachrach, 2013, para. 1). Pocket parks, small parcels of land labeled as “parks” by cities, serve only the practical purpose of complicating the living situations of sex offenders. Such actions are fine and good, clever even, as long as the material reality assumed by the creation of pocket parks matches the moral reality described by politicians. This is to say that the capacity to limit the living space of dangerous sexual predators is, indeed, necessary, assuming that those individuals are immoral, prevalent, and repeat offenders. The ideographic claims of <public health, > <safety, > and <community> are privileged as accurate descriptions of reality threatened by the existence of sex offenders. Such a reality, however, may not be the case. A person labeled a sex offender under the law is likely not a pedophile, and may in fact be subject to substantial burden under the law. Many criminal laws regarding sex offender registration have little to no distinction between a crime such as public indecency and molestation (Leon, 2011). Reform of such laws, however, would be decried on moral terms. To alter zoning laws would be a “liberalization” of criminal policy, being “soft” on sex offenders. There exists, perhaps, a middle ground that acknowledges the impermissibility of particular acts while still crafting a policy, and a discourse, that appropriately interacts with and governs the world. By privileging abstract moral considerations, however, such a middle ground is lost.

Prudence, as defined by Hariman (1991), is easier in theory than it is in practice. Acknowledging contingent circumstances is difficult in political calculation, requiring adequate resources, a capability for risk assessment, and a level head when addressing deeply held moral convictions. In the discussion of the Brady Amendment in Colorado, however, one can see prudence in action. Political actors framed the debate around the impact of a policy, and in those potentialities determined a personhood amendment was not the ideal way to protect children in

utero under the law. The future of research into both the rhetoric of abortion, and prudence, is fertile. Personhood appears to be a new frontier of the abortion debate, and a great many legal battles will be fought before the United States resolves questions about access to abortion.

Fortunately, as Hariman (1991) indicates, “for those dissatisfied with the routines of the present, [prudence] has a future rich with promise” (p. 26).

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