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Pain that only she must bear: on the invisibility of women in judicial abortion rhetoric

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ABSTRACT

The graphic and bodily facts of a legal question of rights are relevant to the courts, particularly in questions that directly implicate physical bodies and pain, such as right to die cases, or what level of search may be allowable and when. However, in the case of abortion, or more specifically the bodily ramifications of pregnancy and childbirth, this detail is conspicuously absent. This article, relying on a content analysis of over 220 legal opinions on abortion rights, documents this absence of rhetoric. Particularly in the context of other discussions of pain and physical health risks in these very same cases, the complete absence of an acknowledgement of the bodily ramifications of pregnancy and childbirth appears purposeful, if perhaps not conscious. Reviewing prior literature on abortion rights and abortion rhetoric, it is likely that this lack of language both reflects and reinforces an assumption of women's roles as mothers, a general reluctance to acknowledge the totality of the sacrifices women make in giving birth, and the refusal to acknowledge women's individual interests as whole persons.

KEYWORDS: abortion, bodily integrity, pain, pregnancy, sacrifice, substantive due process

I. INTRODUCTION

It seems that Constitutional protections are often born out of lurid detail, at least if such detail is to be had. When the Supreme Court first introduced the idea that due process violations may lead to the reversal of state criminal convictions in *Brown v. Mississippi*,

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it was after a detailed description of the torture that had led to those convictions.[1] The doctrines of substantive due process and bodily integrity have continued to rely on these types of descriptions from stomach pumping, to the right to refuse medical treatment, to the involuntary insertion of catheters.[2] Feeley and Rubin point to the inclusion of graphic details in trials leading to prison reform.[3] But less-bodily rights may also be based on narrative detail—the exclusionary rule was finalized in *Mapp v. Ohio* after a recitation of the way 'a policeman "grabbed" [Ms. Mapp], "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom . . . '. The phrase 'screaming in pain' appears in over 380 federal judicial opinions, 46 at the circuit court level.[4] The graphic and bodily facts of a legal question of rights are relevant to the courts, particularly in questions that directly implicate physical bodies and pain, such as right to die cases, or what level of search may be allowable and when.

In this context, given the legal decisions on abortion, one would think childbirth was painless.

In *Roe v. Wade* (1973), the Supreme Court expressly acknowledged that requiring a person to carry a fetus to term places considerable physical burdens on that person but remained vague as to what those burdens would be.[5] This is a somewhat surprising fact, given that childbirth is famous for being one of the most painful experiences in the spectrum of human discomfort.[6] The pain itself, of course, is independent from the level of physical risk undertaken by women in carrying a child to term, as well as psychological risk.[7] While these risks are not wholly ignored in judicial opinions, they are blunted, the details hidden, and covered in broad language of 'burdens', 'health', and 'risk' in sharp and stunning contrast to the graphic descriptions courts offer in other contexts. These rhetorical dodges maintain the 'burden' and 'risk' of maternity as a vague unpleasantness, far less striking than the pain and trauma of involuntary medical searches.

It is the goal of this article to cast light on this difference. When pain, illness, and risk of death are such fundamental parts of bodily rights and interests, why are the pain, long-term health implications, and risk of death associated with pregnancy almost wholly absent from discussions on the right to an abortion? Where is the interest in the actual physical burden on women of carrying children to term? It seems her interests

1 297 U.S. 278, 281–82 (1936).

2 *Infra* Section II. B.

3 Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy and the Modern State: How the Courts Reformed America's Prisons*, 62 (1998).

4 According to a Westlaw search performed Aug. 30, 2021.

5 410 U.S. 113 (1973).

6 Eg Nancy K. Lowe, *The Nature of Labor Pain*, 86 Am. J. Obstet. Gynecol. S16 (2002). In a frequently referenced study, Melzack et al. compared 141 Canadian women's ratings of labor pain using the Pain Rating Index of the MPQ with the ratings of patients with other pain syndromes and found that mean labor pain scores were higher in both nulliparous and multiparous women than mean scores previously recorded for outpatients with back pain, nonterminal cancer pain, phantom limb pain, postherpetic neuralgia, toothache, or arthritic pain... only patients with acute pain from the amputation of a digit or those with causalgia reported greater pain on average than women in labor.

7 See, eg Elyssa Spitzer, *Pregnancy's Risks and the Health Exception in Abortion Jurisprudence*, 22 Georgetown J. of Gender & L. 127 (2021) (giving an overview of the risks to women's health from all pregnancies and labor).

are erased in these discussions, dismissed not only as 'pain that only she must bear'[8] but 'pain that only she must know exists'. Hiding these details both reinforces and results from a general lack of empathy for women's physical burdens in pregnancy and childbirth and the refusal to grant that women might have interests of their own even to the detriment of their potential children. The failure to accept this idea (that women deserve to protect themselves sometimes to the detriment of potential children) has been studied in scholarly literature; but I argue that the treatment of pregnancy and labor in judicial opinions on abortion is a particularly striking example.

This article proceeds as follows: I begin with a brief overview of the importance of detail and empathy in legal narratives. To highlight this point, I offer several examples of the reliance on such details in judicial rhetoric surrounding substantive due process and bodily integrity. I then review prior studies on the place (and erasure) of women in judicial rhetoric and the hegemonic acceptance and therefore ignoring of women's sacrifices in motherhood. Fascinatingly, while many have studied the treatment and erasure of women in court opinions, few have looked at the erasure of women's actual pain and physical risk in the process of pregnancy and childbirth. I then outline my data and methods and discuss my findings, limitations, and potential areas for future research.

II. BACKGROUND

A. The Importance of the Presence of Detail: Language and the Law

'*Social and moral realities.. [are] indeterminate and subject to interpretation . . . We decide what is, and, almost simultaneously, what ought to be. Narrative habits, patterns of seeing, shape what we see and that to which we aspire*'.[9]

Language in law not only reflects the values and common understandings in society, but it also reaffirms and reinforces the social context (or, at times, challenges that context).[10] Through rhetorical choices of narrative and characterization of events, courts often 'leave out important ingredients, and, hence, distort', whether this is done strategically or instinctively.[11] In debates over rights, narrative is an important ingredient in the perpetuation of dominant beliefs or the opportunity for marginalized voices to make inroads—in the former case, by restating and reinforcing traditional imagery and, in the latter, by offering new, compelling stories and recasting established phenomena in a manner that connects to established values and therefore garners

8 *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

9 Richard Delgado, *A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2416 (1989).

10 Celeste Michelle Condit, Decoding Abortion Rhetoric 4, 14 (1990); Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma* 19 Mich. J. Gender & Law 293, 296 (2012).

11 Condit, *supra* note 10 at 13; Abrams, *supra* note 10 at 297; Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford *Introduction to the U.S. Feminist Judgments Project*, in Feminist Judgements: Rewritten Opinions of the United States Supreme Court (Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford eds., 2016), 4, 5 ('what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies . . . Systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers'.).

empathy.[12] Dominant ideologies and legality in particular may strive to evade these stories and details in an effort to avoid that empathy.[13] Some have argued that legality in particular is unsuited to consideration of 'how people *do* live', as an allowance for empathy and response to personal circumstances would undermine the predictability and rationality of law as well as dominant power structures.[14] 'Nitty-gritty detail', is a necessary aspect of humanizing neglected groups and focusing on their burdens, forcing the law to bend to actual equality, while abstraction and detachment from lived conditions of marginalized people allow law to pretend to equality while avoiding it in practice.[15] This abstraction is one of the ways that law may 'without justification submerge the perspectives of women and other marginalized groups', thereby protecting their continued subordination; and it is one reason feminist legal scholars emphasize the need to increase awareness of the actual experiences of those affected by legal principles.[16] At times, particularly compelling stories may break through these protections, enabling progress for marginalized voices.[17]

Narratives, characterizations, and representations that do make their way into the language of Supreme Court opinions can gain legal coercive power and authority; but even legal language that does not make it this far or is unsuccessful can gain publicity and social and political power by becoming 'part of the social discourse, a high profile, highly public commentary that becomes the foundation for further political strategy and action'.[18] Even rhetoric that loses in court is often used to mobilize reform efforts and change future outlooks.[19] Litigation and legal language can change the way people see their own situation and possibilities for change.[20] In the specific instance of the abortion debate, Kristen Luker has highlighted the way that the legal argument itself was 'consciousness raising' for women who already had personal experience with the damage caused by restrictive abortion laws; until activists specifically offered the opportunity and reasoning for legal change, it did not occur to these women that things could or should be different.[21]

12 Condit, *supra* note 10 at 25–28 ('To be persuasive to the dominant audience, the stories had to use rather than confront the beliefs and social conditions [such as the nuclear family and woman's primary role as mother] in the existing American repertoire. The abortion story did so by respecting the crucial values and characterizations of the culture while redefining the act of abortion itself'.).

13 Lynne Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1575–76 (1987).

14 Henderson, *supra* note 13 at 1575.

15 Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rights L. Rep. 7, 9–10 (1989).

16 Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 836–37 (1990); Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 Wis. Women's L.J. 389, 389–92 (1997); Kristin Luker, *Abortion and the Politics of Motherhood*, 100 (1984).

17 Lucinda Finley, *Breaking Women's Silence in the Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame Law Review 185 (1989); Delgado, *supra* note 9; Condit, *supra* note 10.

18 Abrams, *supra* note 10 at 295; Condit, *supra* note 10 at 96; Douglas NeJaime, *The legal mobilization dilemma*, 61 Emory L. J. 663 (2011); James Moliterno, *The Lawyer as Catalyst of Social Change*, 77 Fordham L. Rev. 1559 (2009); Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 Duke J. of Gender L. Pol'y 127 (2012).

19 Jules Lobel, *Success without Victory: Lost Legal Battles and the Long Road to Justice in America* (2003)

20 Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 John Marshall L. Rev. 671 (2009).

21 Luker, *supra* note 16 at 100–101; 105–08.

For all these reasons, rhetoric in legal cases is important; and, even when oppositional narratives do not succeed in making their way into judicial language, the judicial rhetoric provides a window into the values, assumptions, and narratives that are credited and relied upon by courts as well as those that are dismissed. Critical reading of legal opinions may bring light to hidden biases and 'realities of life' that have been glossed over due to the pervasiveness and self-assurance of dominant perspectives, thereby 'unearthing otherwise hidden factors'.[22] Such hidden factors may often include the perspectives of women and even more so women of color, who exist as 'distanced outsiders, invisible in the long shadows' of the law.[23] This may illuminate the voices that law has not allowed to be heard.[24]

B. The Body in Law: Bodily Integrity and Substantive Due Process

One area of law and American civil liberties where nitty-gritty details have often accompanied legal development is that of bodily integrity and substantive due process. In 1891, the Supreme Court stated that 'No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. The right to one's person may be said to be a right of complete immunity: to be let alone'.[25] Even further, the Court stated 'The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass'.

Since then, the right to bodily integrity has been reaffirmed in several cases, often focusing on the specific bodily nature of the invasion. A right of substantive due process against physical intrusions into the body as part of a criminal search was established in *Rochin v. California*, wherein Justice Frankfurter focused on the fact that 'a doctor forced an emetic solution through a tube into Rochin's stomach against his will', producing vomiting, in order to search for narcotics.[26] Such treatment, Justice Frankfurter found, was 'too close to the rack and screw' and amounted to physical abuse.[27] In *Winston v. Lee*, the Supreme Court stated that, even given a compelling state interest, surgical searches of individuals may be unjustifiable if they endanger the life or health of the suspect and that judging the reasonableness of the intrusion into an individual's bodily integrity may depend in part on whether it involves 'risk, trauma, or pain'.[28] In coming to this

22 Bridget Crawford, Kathryn Stanchi, and Linda Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. Baltimore L. Rev. 167, 184, 186 (2018); Berta Esperanza Hernández-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, in Feminist Judgments: Rewritten Opinions of the United States Supreme Court, 49–51 (Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford eds., 2016), 49–51; Finley, *supra* note 17 at 185.

23 Hernández-Truyol, *supra* note 22 at 51; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

24 James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 697 (1985).

25 *Union P. R. Co. v. Botsford*, 141 U.S. 250 251 (1891).

26 342 U.S. 165, 166 (1952).

27 342 U.S. 172.

28 470 U.S. 753, 761 (1985).

decision, the Court favorably cited nearly a dozen federal cases in the lower courts and emphasized the problems with 'probing beneath [a suspect's] skin', echoing its own description, one page prior, of an earlier case that involved 'intruding into [a suspect's] body'.[29] The Court also made a point of reciting the evidence of level of risk to the suspect's body, and the level of invasion, in some graphic language.

> '*One surgeon had testified that the difficulty of discovering the exact location of the bullet "could require extensive probing and retracting of the muscle tissue," carrying with it "the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." . . . The court further noted that "the greater intrusion and the larger incisions increase the risks of infection."...the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness" . . . and then to search beneath his skin*'[30].

In these cases, the Court presented a fact specific analysis relying on the extent of bodily invasion, dignitary offense, and physical risk of harm to the individual, and lower courts have responded by focusing on details. For example, in *George v. Edholm*, the Ninth Circuit focused on the pain of an anal search, retelling the words of the plaintiff for effect: *'I was screaming I was hollering because it hurted. . . . that violated me'* . . . . The court also mentioned the significant pain and bleeding the search caused, 'that continued after he left the hospital', and detailed the search involved:

> '*[Edholm] opened George's anus with an anoscope and inserted long forceps into George's rectum. He inserted a tube into George's nose, ran the tube into George's stomach, and pumped a gallon of liquid laxative through George's digestive system, triggering a complete evacuation of George's bowels . . . These procedures were "highly intrusive and humiliating." . . . "targeted an area of the body that is highly personal and private"*'.[31]

Similarly, in 2013 the Sixth Circuit determined that a digital rectal examination of a suspect was unreasonable. The court stated that the factors to be balanced in this determination were: (i) 'the extent to which the procedure may threaten the safety or health of the individual', (ii) 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity', and (iii) 'the community's interest in fairly and accurately determining guilt or innocence'.[32]

The court then emphasized that the suspect was 'naked and handcuffed, [] paralyzed, intubated, and anally probed without his consent', and painstakingly retold the details of the intubation and anal probe of the suspect.[33]

At the trial level, the exploration of bodily invasion is even more detailed. In forced catheterization cases, for instance, courts often focus on the pain, the suspect's screams, and the ramifications of the catheterization after the fact. For instance, in *Elliott v. Sheriff of Rush Cty., Ind.*, the court bothered to retell that

29 470 U.S. 760.
30 470 U.S. 764–65.
31 752 F.3d 1206, 1212, 1217–18 (9th Cir. 2014).
32 *U.S. v. Booker*, 728 F.3d 535, 546 (6th Cir.2013).
33 *U.S. v. Booker*, 728 F.3d 535, 547 (6th Cir.2013).

> *'Deputy Drake and Officer Doug Keith... handcuffed Plaintiff to the surgical table, pulled his pants down, and held Plaintiff's legs in a spread-eagle position . . . . Plaintiff testified, "They were pinning my legs down, yelling at me, telling me to quit screaming, telling me not to cuss at the lady. Telling me I swear to God this and pinning me down, holding me down while she shoved a catheter in me." . . . The procedure was extremely painful, as it required Nurse Tressler to insert a 15 inch catheter up Plaintiff's penis and into his bladder . . . Deputy Drake described Plaintiff as "grunting" and "showing pain" as the catheter was inserted'.*[34]

Similarly, in *Riis v. Shaver* the district court recounts:

> *02:38: Nurse Pam Templeton starts inserting the catheter.*
> *02:40–02:43: Holcombe says, "Oh God almighty, damn!" He scrunches up in what looks like pain and brings his hands down, making contact with Nurse Templeton's arm. Holcombe brings his hands back up, covers his face, and moans.*
> *02:43: An officer places his hand on Holcombe's arm and keeps it there . . .*
> *Holcombe recalled the catheterization as causing "lots of pain"; "I've never been through anything like that before in my life. And it felt like it bottomed out in me. And then I think she pulled back a little bit and then it started bleeding off into the cup, the thing that they were trying to put the urine in." . . . Holcombe felt "degraded" by the catheterization and said he still suffers emotionally. ... He said that it burns when he urinates and that, two or three times a week, he has difficulty urinating.*[35]

These details appear even in cases like *Elliott*, where the court eventually determined that case law already settled whether catheterization was a sufficient bodily invasion to qualify as a search, and even in the circumstance of catheterization, which takes between seconds and a few minutes to complete.

Outside of the case of pregnancy, then, pain, physical invasion, and affront to dignity can be a significant enough intrusion on bodily integrity that even a compelling interest does not justify it, and the actual pain and bodily invasion itself is therefore something to be explored by lawyers and judges in a fact-specific and rhetorically compelling manner. Pregnancy and labor carry extensive bodily repercussions (briefly explored in Section II.C), and the right to an abortion is in part based on the same rights of substantive due process and bodily integrity that underlie the above cases. One might therefore expect that the extent of the bodily implications of pregnancy and labor would be explored similarly at least in a number of trial-level (fact-specific) judicial opinions. However, the historical treatment of women in the law offers reason to think these burdens of motherhood might, instead, be ignored.

C. The Physicality of Pregnancy and Childbirth

Given the relevance pain and physical invasion carry in law, it is worth offering some description of the pain, physical risk, and physical invasion that are the inherent and natural aspects of pregnancy and childbirth. Pregnancy and childbirth are inherently dangerous for the pregnant person. Pregnant people are immunocompromised, more likely to die or suffer severe illness from diseases such as the flu, and the course of

34 *Elliott v. Sheriff of Rush Cty., Ind.*, 686 F. Supp. 2d 840, 851–52 (S.D. Ind. 2010) (Citations omitted).

35 *Riis v. Shaver*, 458 F. Supp. 3d 1130, 1146–47 (D.S.D. 2020), appeal dismissed, No. 20–1958, 2020 WL 6580487 (8th Cir. Aug. 17, 2020), and aff'd, 4 F.4th 701 (8th Cir. 2021).

pregnancy can lead to severe health risks long after giving birth, including sciatica and heart attack.[36] Childbirth can be deadly, resulting in hemorrhage or sepsis, and rates of maternal death have been steadily increasing over the last 30 years.[37] Black women are at particular risk, dying in childbirth at over three times the rate of White women.[38] Judging by maternal mortality rates, abortion is 25 times safer than carrying a child to term for non-Black women and over 38 times safer than carrying a child to term for Black women.[39] But these statistics, if stark, barely scrape the surface of the type of narrative one might expect in the light of the descriptions of forced catheterization provided above.

It is difficult, in the context of an academic journal, to reach the type of descriptive language that might be used for several reasons. First, pain is difficult to describe. Elaine Scarry famously stated that pain destroys language, reducing the individual to a pre-language state and that even if medical language could begin to approach description of pain, the inevitable inaccuracy of language in describing pain makes political choices like the use of torture possible.[40] Moreover, pain is subjective and, to the observer, untestable, which has led society, courts, doctors, and even those suffering to doubt that their pain is 'real'.[41] Instead, pain may be discounted as purely psychosomatic, imagined, or outright false, and patients who complain of chronic or uncredited pain may become stigmatized, further encouraging the dismissal of their complaints.[42] This dismissal is even more likely when the sufferer is a member of an already stigmatized group, as are women and people of color.[43] Women's complaints of pain are often disbelieved either because they are seen as hysterical or because their efforts to avoid that image make them seem to be coping too well to be in serious pain.[44] Black and indigenous women experience this stigma even more intensely, as it intersects with racism and remaining racist tropes that Black women do not feel pain.[45]

36 Spitzer, *supra* note 7; Francesca Laguardia, *If the Fetus is a Person—Is It Relevant? An Argument on the Rights of Pregnant Women*, 56 No. 5 Crim. Law Bulletin ART 9 (2020); Luo, Yongwen, and Kai Yin, *Management of pregnant women infected with COVID-19*, 20 Lancet Infect. Dis. 513 (2020).

37 Centers for Disease Control and Prevention, *Pregnancy Mortality Surveillance System*, https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm (accessed Aug. 27, 2021).

38 Gianna Melillo, *Racial Disparities Persist in Maternal Morbidity, Mortality and Infant Health*, Proceedings of the American Diabetes Association's 80TH Scientific Sessions (June 13, 2020), https://www.ajmc.com/view/racial-disparities-persist-in-maternal-morbidity-mortality-and-infant-health.

39 Melillo, *supra* note 38 and Katherine Kortsmit, Tara C. Jatlaoui, Michele G. Mandel; Jennifer A. Reeves, Titilope Oduyebo, Emily Petersen, and Maura K. Whiteman, *Abortion Surveillance—United States 2018* Surveillance Summaries, table 14 (November 27, 2020), https://www.cdc.gov/mmwr/volumes/69/ss/ss6907a1.htm#T14_down.

40 Elaine Scarry, The Body in Pain: The Making and Unmaking of the World (1987) at 4, 8, 12–13.

41 Daniel Goldberg, *Pain, Objectivity and History: Understanding Pain Stigma*, 43 Med. Humanities 238 (2017); Maya Dusenberry, Doing Harm: The Truth About How Bad medicine and Lazy Science Leave Women Dismissed, Misdiagnosed, and Sick, 100–101 (2018).

42 Goldberg, *supra* note 41; Daniel Goldberg, *INTRODUCTION: On Stigma & Health*, 45 J. Law Med. Ethics 475 (2017); Diane Hoffman, & Anita Tarzian, *The Girl Who Cried Pain: A Bias against Women in the Treatment of Pain*, 29 J. Law Med. Ethics 13 (2001); Dusenberry, *supra* note 41 at 100–101.

43 Goldberg, *supra* note 41; Hoffman & Tarzian, *supra* note 42.

44 Hoffman and Tarzian, *supra* note 42; Dusenberry, *supra* note 41 at 94–105.

45 Saraswathi Vedam, Kathrin Stoll, Tanya Khemet Taiwo, Nicholas Rubashkin, Melissa Cheyney, Nan Strauss, Monica McLemore, Micaela Cadena, Elizabeth Nethery, Eleanor Rushton, Laura Schummers, Eugene Declercq, and the GVtM-US Steering Council, *The Giving Voice to Mothers study: inequity and mistreatment*

Just as this stigma is more likely to occur in regard to already stigmatized groups, medical research has documented the refusal to acknowledge the extent of suffering women experience during pregnancy specifically and afterward. Doctors (and society) dismiss several crippling pregnancy-related pains as 'normal' without describing or acknowledging the extent of pain, such as pelvic and lower back pain.[46] This response to the suffering of pregnancy echoes doctors' common responses to other specifically female pain, such as that of endometriosis, or menstrual pain, which is often dismissed as 'normal period pain'.[47] It is also echoed in law, for instance, in Justice Stevens's dissenting opinion in *Harris v. McRae* that 'the government may properly presume that no harm will ensue from *normal* childbirth'. (emphasis added).[48]

But dismissal by others is not the only reason these descriptions are difficult to find. Women, feeling these social pressures, also edit themselves in describing their pain. Some hide their pain in an effort to avoid looking hysterical.[49] Others downplay their pain out of embarrassment, or a feeling of guilt that they are not adequately coping with a 'normal' process.[50] Additionally, some research theorizes that women subconsciously avoid associating their children with the pain of pregnancy and childbirth and therefore modify the language they use to describe it (instructed to label 'excruciating pain' at a certain numeric level will use the number but refuse to use the word 'excruciating').[51]

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during pregnancy and childbirth in the United States, 16 Reprod. Health 1 (2019); Hoffman, Kelly M., Sophie Trawalter, Jordan R. Axt, and M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False beliefs about Biological Differences between Blacks and Whites*, 113 PNAS 4296 (2016); Dána-Ain Davis, *Obstetric Racism: The Racial Politics of Pregnancy, Labor, and Birthing*, 38 Med. Anthropol. 560 (2019); see also Tressie Mcmillan Cottom, Thick, 81–89 (2019).

46 See, eg discussions of doctors' response to pelvic pain and lower back pain associated with pregnancy: Helen Elden, Ingela Lundgren, and Eva Robertson, *The Pelvic Ring of Pain: Pregnant Women's Experiences of Severe Pelvic Girdle Pain: An Interview Study*, 2 Clin. Nurs. Stud. 30, 38 (2014); Eva Haukeland Fredriksen, Karen Marie Moland, and Johanne Sundby, *'Listen to Your Body': A Qualitative Text Analysis of Internet Discussions Related to Pregnancy Health and Pelvic Girdle Pain in Pregnancy*, 73 Patient Educ. Couns. 294, 297 (2008); Era Vermani, Rajnish Mittal, and Andrew Weeks, *Pelvic Girdle Pain and Low Back Pain in Pregnancy: A Review*, 10 Pain Practice 60 (2009); H. Pierce, C.S.E. Homer, H.G. Dahlen, and J. King, *Pregnancy-Related Lumbopelvic Pain: Listening to Australian Women*, Nurs. Res. Pract. 1 (2012); Jo Mackenzie, Esther Murray, and Joanne Lusher, *Women's Experiences of Pregnancy Related Pelvic Girdle Pain: A Systematic Review*, 56 Midwifery 102 (2018); Annelie Gutke, Jill Boissonnault, Gill Brook, and Britt Stuge, *The Severity and Impact of Pelvic Girdle Pain and Low-Back Pain in Pregnancy: A Multinational Study*, 27 J. Women's Health 510, 511 (2018); Margareta Persson, Anna Winkvist, Lars Dahlgren, and Ingrid Mogren, *'Struggling with Daily Life and Enduring Pain': A Qualitative Study of the Experiences of Pregnant Women Living with Pelvic Girdle Pain*, 13 BMC Pregnancy Childbirth 111 (2013).

47 Dusenberry, *supra* note 41, at 219–222; Rebecca Greene, Pamela Stratton, Sean D. Cleary, Mary Lou Ballweg, and Ninet Sinaii, *Diagnostic Experience among 4,334 Women Reporting Surgically Diagnosed Endometriosis*, 91 Fertility sterility 32 (2009); Mary Lou Ballweg, *Blaming the Victim: The Psychologizing of Endometriosis*, 24 Obstet. and Gynecol. Clinics 441 (1997).

48 449 U.S. 297, 354 (1980) (J. Stevens, Dissenting); see also Eileen McDonagh, Breaking the Abortion Deadlock: From Choice to Consent, 28–29 (1996).

49 Hoffman and Tarzian, *supra* note 42; Dusenberry, *supra* note 41 at 94–105.

50 Zevia Schneider, *An Australian Study of Women's Experiences of Their First Pregnancy*, 18 Midwifery 238, 243 (2002); Persson et al., *supra* note 46; Helen Elden, Ingela Lundgren, and Eva Robertson, *Life's Pregnant Pause of Pain: Pregnant Women's Experiences of Pelvic Girdle Pain Related to Daily Life: A Swedish Interview Study*, 4 Sexual Reprod. Healthcare 29 (2013). See also Margaret A. Crichton and Vanda K. Wellock, *Pain, Disability and Symphysis Pubis Dysfunction: Women Talking*, 6 Evidence-Based Midwifery 9 (2008) ('Some of the women smiled at their recollections, particularly if their husband or partner had described the movement with humour. This use of humour may have been in an effort to explain or mask the embarrassment they might have felt'.).

For all these reasons, it is difficult to find stirring, affective descriptions of the pain associated with pregnancy and giving birth. Moreover, the conditions that occur over the course of pregnancy, childbirth, and postpartum are too numerous to be described outside of a textbook, and accumulating women's narratives would be beyond the scope of this project. The following sections make an effort to offer the beginnings of such a description, but the reader should be advised they are, necessarily, inadequate.

1. Pregnancy

Pregnancy itself lasts, approximately, for 9 months, and it can be months of starvation, severe dehydration, and muscle wasting if the pregnant person suffers from hyperemesis gravidarum, causing the hospitalization of 10s of 1000s of women every year.[52] However, well before reaching hyperemesis gravidarum, 'normal' pregnancy-related nausea and vomiting 'has a pervasive, detrimental impact on women's family, social, and professional lives'.[53] Nausea occurs in 70–80% of pregnancies, and, according to at least one study, brings the quality of life down to a level roughly comparable to that of women suffering from fibromyalgia or post-traumatic stress disorder.[54] While 50% of pregnant people are relieved of nausea and vomiting the end of the first trimester, 10% will continue to experience the symptoms past 22 weeks, and for some women, symptoms may last the entire pregnancy.[55] Women's own descriptions of nausea are intense: '*I was just vomiting constantly . . . .It would be so severe that I'd be crying at the end of it. It was really, really bad, but you know, it was something that I knew I had to suffer . . . .I just felt like, "When is this going to end? . . . "*'. '*People said three months, it should finish for three months. It went on and on and on, and I just couldn't cope . . . '*.[56] During this time, work and family life is impaired, with a majority of women stating that it caused difficulties with their partners, majorly adversely affected their ability to care for their children, and forced them onto sick leave.[57] Of course, very few women have the ability to simply absent themselves from work for months, so women instead are forced to work through their suffering.

Pregnancy also very commonly results in general pains and discomfort such as headaches, carpal tunnel pain, back pain, round ligament pain, heartburn, hemorrhoids, leg cramps, sciatica, dizziness, and urinary leaking.[58] These pains are less treatable than

51 Lowe, *supra* note 6.

52 Marlena S. Fejzo, Sue Ann Ingles, Melissa Wilson, Wei Wang, Kimber MacGibbon, Roberto Romero, and Thomas M. Goodwin. *High Prevalence of Severe Nausea and Vomiting of Pregnancy and Hyperemesis Gravidarum among Relatives of Affected Individuals*, 141 European J. obstet. gynecol. reprod. biol. 13 (2008); Lindsey J. Wegrzyniak, John T. Repke, and Serdar H. Ural, *Treatment of Hyperemesis Gravidarum*, 5 Rev. obstet. gynecol. 78 (2012).

53 Renee Lacroix, Erica Eason, and Ronald Melzack, *Nausea and Vomiting during Pregnancy: A Prospective Study of Its Frequency, Intensity, and Patterns of Change*, 182 Am. J. Obstet. Gynecol. 931 (2000).

54 Kristine Heitmann, Hedvig Nordeng, Gro C. Havnen, Anja Solheimsnes, and Lone Holst, *The Burden of Nausea and Vomiting during Pregnancy: Severe Impacts on Quality of Life, Daily Life Functioning and Willingness to Become Pregnant Again–Results from a Cross-Sectional Study*, 17 BMC pregnancy childbirth 1 (2017).

55 Lacroix et al., *supra* note 53 at 933–34.

56 Louise Locock, Jo Alexander, and Linda Rozmovits, *Women's Responses to Nausea and Vomiting in Pregnancy*, 24 Midwifery 143 (2008).

57 Heitmann et al., *supra* note 54.

58 Eg Eva Dasher, *7 Common Pregnancy Aches and Pains*, Babycenter.com (December 29, 2020), https://www.babycenter.com/pregnancy/your-body/7-common-pregnancy-aches-and-pains_10327839; American Pregnancy Association, *Sharp Pregnancy Pains*, https://americanpregnancy.org/healthy-pregna

they would be in non-pregnant individuals, as many medications are restricted during pregnancy. Instead, pregnant people are advised to 'go on a walk', apply heat, or practice breathing exercises in order to cope with their discomfort.[59]

Just how bad is this pain? One category of pregnancy discomfort that has received attention recently is that of lower back and pelvic girdle pain (PGP). Studies suggest that PGP and lower back pain occur in approximately 50% of pregnant people and that 20% of pregnant people experience severe enough PGP to require medical assistance.[60] The pain itself is described as exhausting, interfering with daily life, and constant.[61] Women describe it as '*"excruciatingly sore at night . . . It was horrific . . . It was scary not being able to walk properly . . . I felt rotten all the time."*[62] *. . . "I had an enormous pain, which was inconceivable . . . I thought I would break into two parts . . . "*[63] *. . . "all I know is I couldn't control how much pain . . . I couldn't hold it in . . . "*[64].

Elden et al. state one theme of women's narratives on PGP is that 'pain dominates their existence'.[65] They describe women experiencing immobility, 'the feeling of being paralyzed. During the night, they didn't even dare to walk to the bathroom, but crawled instead. Some women suffered this immobility for a short while, others for a couple of hours, and some up to twelve hours before the sensation past'.[66] As these attacks can recur, women live their lives in fear of triggering their return, making the pain, immobility, and compensation for it a constant part of their lives.[67] The pain itself can also be constant. Wellock and Crichton mention two women, one of whom emailed that she intended to kill herself and another who threatened her doctors that she would kill herself if they did not 'end[] her pain by performing a cesarean section'.[68]

In a separate article, the same team describes the incapacity and embarrassment caused by this 'normal' pain (the following quotes are from three separate women): '*I was cooking you know and when I feel I want to go to the toilet I feel it suddenly . . . . I couldn't reach upstairs and I was very much in pain . . . "(sobs)" "Sometimes in the bedroom, 1 have to roll on to the floor . . . and you get up to go to the bathroom and it's very difficult . . . one time I bad to crawl to the bathroom . . . "* (This woman reported that she wet herself before she reached the bathroom and became very upset)'.[69]

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ncy/pregnancy-complications/sharp-pain-pregnancy/; Office on Women's Health, *Body Changes and Discomforts*, U.S. Dept. of Health and Human Services, https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/body-changes-and-discomforts.

59 American Pregnancy Association, *supra* note 58; Office on Women's Health, *supra* note 58.

60 Gutke et al., *supra* note 46 at 511; see also Mackenzie et al., *supra* note 46, estimating severe pain from PGP occurs in 14–22% of pregnancies.

61 Mackenzie et al., *supra* note 46.

62 Ciara Close, Marlene Sinclair, Dianne Liddle, Julie Mc Cullough, and Ciara Hughes, *Women's Experience of Low Back and/or Pelvic Pain (LBPP) during Pregnancy*, 37 Midwifery 1, 4 (2016).

63 Persson et al., *supra* note 46.

64 Vanda K. Wellock and Margaret A. Crichton, *Understanding Pregnant Women's Experiences of Symphysis Pubis Dysfunction: the effect of pain*, 5 Evidence-Based Midwifery 40 (2007).

65 Elden et al., *supra* note 46, at 35.

66 Elden et al., *supra* note 46, at 35.

67 Elden et al., *supra* note 46, at 35.

68 Wellock and Crichton, *supra* note 64.

69 Crichton and Wellock, *supra* note 50.

2. Labor

The most famous aspect of giving birth is the pain and bodily damage of labor itself. Labor is widely understood to be one of the most painful events in human experience if not the most painful.[70] It is, in fact, defined as pain; specifically the lower back, pelvic, and vaginal pain that are caused by contractions, tissue distension, stretching, and tearing associated with cervical dilation as well as by the pressure and stretching of bone, muscle, and tissue, which are associated with pushing a baby's head through one's birth canal and vagina.[71] Eighty per cent of women experience vaginal or perineal tearing during labor.[72]

The pain of labor is well publicized but rarely described; and when it is described, the value of childbirth generally precedes the description or follows quickly on its heels. One study, for instance, presents the following descriptions: '"*There are no words to describe the pain you have to go through. All I wanted was for [the baby] to hurry up and come out. But you won't remember once it's over. That's why you give birth again.*" . . . "*When I was in labor, the pain was something I had never experienced in the whole world. Right before the baby was born there was more pain than I could think of*."' The authors of the study note of some participants; 'Sometimes they cried out to the Lord, saying, "*Dios mio! Jnopeudo! Jnoguantomas!*" or "My God! I can't bear it any more!" but they accepted pain as an obligation of a woman's life, with stoic dignity and courage'.[73] It is worth noting that these studies often describe women's desire to have a child as one of the primary aspects of women's ability to cope with their pain.[74]

Pain during labor is most commonly treated with an epidural, but epidurals are often delayed or denied to women if doctors believe they are not sufficiently dilated or that they are too close to giving birth.[75] Additionally, this form of anesthesia, which requires an unusually large needle inserted into the patient's spine as the patient attempts to hold still while experiencing contractions,[76] can itself result in extremely

70 Lowe, supra note 6; Cynthia Wong, *Advances in Labor Analgesia*, 1 Int. J. women's health 139 (2010).

71 Spitzer, *supra* note 7 at 160 and 195 and 218–220; Wong, *supra* note 70.

72 See, eg Markus Harry Jansson, Karin Franzén, Ayako Hiyoshi, Gunilla Tegerstedt, Hedda Dahlgren, and Kerstin Nilsson, *Risk Factors for Perineal and Vaginal Tears in Primiparous Women—The Prospective POPRACT-Cohort Study*, 20 BMC Pregnancy Childbirth 749 (2020).

73 Lynn Clark Callister, Inaam Khalaf, Sonia Semenic, Robin Kartchner, and Katri Vehvilainen-Julkunen, *The Pain of Childbirth: Perceptions of Culturally Diverse Women*, 4 Pain Manag. Nurs. 145 (2003).

74 Callister et al., *supra* note 73; Natalie Van der Gucht and Kiara Lewis, *Women's Experiences of Coping with Pain during Childbirth: A Critical Review of Qualitative Research*, 31 Midwifery 349 (2015).

75 Cynthia A. Wong, Barbara M. Scavone, Alan M. Peaceman, Robert J. McCarthy, John T. Sullivan, Nathaniel T. Diaz, Edward Yaghmour R-Jay L. Marcus, Saadia S. Sherwani, Michelle T. Sproviero, Meltem Yilmaz, Roshani Patel, Carmen Robles, and Sharon Grouper, *The Risk of Cesarean Delivery with Neuraxial Analgesia Given Early Versus Late in Labor*, 352 New England J. Med. 655 (2005); Callister et al., *supra* note 73. See also Elysha Krupp, *Women Are Being Denied Epidurals during Childbirth. Here's Why*, Vice.com (Oct. 2, 2018), https://www.vice.com/en/article/8x7mm4/childbirth-pain-relief-denied; Amelia Hill, *I Asked Three Times for an Epidural': Why Are Women Being Denied Pain Relief during Childbirth?* theguardian.com (Mar. 4, 2020), https://www.theguardian.com/lifeandstyle/2020/mar/04/i-asked-three-times-for-an-epidural-why-are-women-being-denied-pain-relief.

76 See, eg Maressa Brown, *Viral TikTok Shows You the Size of an Epidural Needle, and Moms Could Have Told You, Yes, It's Huge*, Parents.com (Mar. 2, 2021), https://www.parents.com/news/viral-tiktok-shows-you-the-size-of-an-epidural-needle-and-moms-could-have-told-you-its-huge/; David Mayer and Kathleen Smith, *Childbirth, Frequently Asked Questions*, The University of North Carolina School of Medicine, Department of Anesthesiology, https://www.med.unc.edu/anesthesiology/patients/childbirth-1/.

painful headaches as well as bleeding, convulsions, severe blood pressure drop, and in rare cases, permanent nerve damage.[77] Epidurals may also be associated with longer-lasting postpartum pain.[78] Anesthesia may also be withheld, or delivered poorly, and (like maternal mortality) this has been found to be a particular problem for Black and Hispanic pregnant people,[79] likely due to enduring racial stereotypes and incorrect beliefs that Black and Hispanic pregnant people experience less pain.[80] Moreover, epidurals do sometimes fail, and this, too, appears to occur more often and with less acknowledgment in the cases of Black and Hispanic pregnant people.[81]

One study recounts women's descriptions of being refused an epidural:

> '*I wanted an epidural. I spent most of the time screaming, "I want an epidural; I'm not doing this, I'm going home!" I gave birth completely natural with no medication whatsoever, and I was hysterical. I did not want that. I don't like pain, and it hurts very bad, and I don't understand why any woman would want to birth naturally*'.
> Another stated '*I was hoping to get* [the epidural] *right away, but when they told me 30 minutes, I give up . . . so I started to scream*'.

While another described the time before her epidural as '*I was just like almost on the floor, like it [the pain] was really bad . . . you don't want to overreact, but it is so much pain that you do not know what to do*'. [82]

These experiences all contribute to birth trauma, which can lead to postpartum depression and PTSD, as can fear of the epidural itself, inadequate pain relief, use of forceps, or a prolonged labor, among other birthing experiences.[83] Labor may bring about PTSD in up to 9% of women,[84] and as much as a third of women may experience some form of trauma during labor.[85] These experiences can run from being ignored and forced into medical procedures one has not consented to, to a feeling of violation as providers dig inside one's body. Women recall: '"*I was crying and screaming in pain telling her no and to stop and she carried on, my husband shouted at her to leave me alone*

77 NHS Health ATOZ: Epidural Side Effects, https://www.nhs.uk/conditions/epidural/side-effects/; American Pregnancy Association, *What Is an Epidural*?, https://americanpregnancy.org/healthy-pregnancy/labor-and-birth/what-is-an-epidural/.

78 Eugene Declercq, Deborah K. Cunningham, Cynthia Johnson, and Carol Sakala, *Mothers' Reports of Postpartum Pain Associated with Vaginal and Cesarean Deliveries: Results of a National Survey*, 35 Birth 16 (2008).

79 Spitzer, *supra* note 7 at 161; George Rust, Wendy N. Nembhard, Michelle Nichols, Folashade Omole, Patrick Minor, Gerrie Barosso, and Robert Mayberry, *Racial and Ethnic Disparities in the Provision of Epidural Analgesia to Georgia Medicaid Beneficiaries during Labor and Delivery*, 191 Am. J. Obstet. Gynecol.456 (2004); Katherine M. Johnson and Richard M. Simon, *Privilege in the Delivery Room? Race, Class, and the Realization of Natural Birth Preferences*, 2002–2013, 68 Social Problems 552 (2021).

80 Vani A. Mathur, Theresa Morris, and Kelly McNamara, *Cultural Conceptions of Women's Labor Pain and Labor Pain Management: A mixed-method analysis*, 261 Soc. Sci. Med. 113240 (2020).

81 Mathur, *supra* note 80.

82 Gill Thomson, Claire Feeley, Victoria Hall Moran, Soo Downe, and Olufemi T. Oladapo, *Women's Experiences of Pharmacological and Non-Pharmacological Pain Relief Methods for Labour and Childbirth: A Qualitative Systematic Review*, 16 Reproductive health 1 (2019).

83 Cheryl Tatano Beck, *Birth Trauma: In the Eye of the Beholder*, 53 Nursing res. 28 (2004).

84 Cheryl Tatano Beck, Robert K. Gable, Carol Sakala, and Eugene R. Declercq, *Posttraumatic Stress Disorder in New Mothers: Results from a Two-Stage US National Survey*, 38 Birth 216 (2011).

85 Beck, *supra* note 84; Debra K. Creedy, Ian M. Shochet, and Jan Horsfall, *Childbirth and the Development of Acute Trauma Symptoms: Incidence and Contributing Factors*, 27 Birth 104 (2000).

and she carried on . . . " "she grabbed my cervix and pinched it. She would not let go until I consented to letting her break my water. I was in tears from the pain, screaming, begging and sobbing for her to let go and get her hand out of my vagina. She would not let go until I consented, which I finally did . . . " "She proceeded to dig out my uterus without any numbing medication. It was horrifying"".[86]

In sum, whether women request (or are given) an epidural or not, whether any anesthesia works or not, and whether women deliver via assisted or unassisted vaginal delivery or the major surgery that is a cesarean delivery, childbirth is an intensely physical and all-too-often traumatic event.

3. Postpartum

The pain of pregnancy and labor are not over once the laboring is done. In 2008, one study reported that more than 70% of women who delivered vaginally for the first time report perineal pain, with more than 30% describing it as a major problem.[87] Nearly 80% of women who deliver via cesarean birth report experiencing pain due to their incision in the first 2 months postpartum, with close to 45% describing it as a major problem.[88] Eighteen per cent of women who deliver via cesarean section still experienced pain at the site of their incision 6 months after delivery. More recent research suggests that 20% of women who deliver via c-section and 11% of women who deliver naturally experience pain as a major problem 2 months after delivering, while 16% of women who deliver via c-section and 7% of women who deliver naturally still experience pain as a major problem 6 months after delivery.[89] More than three quarters of mothers say pain interferes with their daily routines at least a little bit 2 months after delivering, with 26% of women who deliver via c-section and 9% of women who deliver naturally stating pain interferes 'quite a bit'.[90] A 2008 study found that 36% of women post-cesarean section and 60% of women post vaginal delivery experienced daily or constant pain at 2 months postpartum, possibly affecting over 500,000 women annually.[91]

Women's descriptions of their pain are harder to come by in these areas. These missing data are recognized in medical literature in part as a result of women's lack of descriptive language and embarrassment regarding their pain.[92] However, articles record women describing post-cesarean pain, stating '*"[T]he first three weeks . . . three or four weeks, it was like really painful and sore. I couldn't even bend," . . . "I couldn't lie down at night because there was like a dragging and pulling feeling, which was very, very painful.*

86 Rachel Reed, Rachael Sharman, and Christian Inglis, *Women's Descriptions of Childbirth Trauma Relating to Care Provider Actions and Interactions*, 17 BMC PREGNANCY CHILDBIRTH 1 (2017).

87 Declercq et al., *supra* note 78, at 19.

88 Declercq et al., *supra* note 78, at 19.

89 EUGENE R. DECLERCQ, CAROL SAKALA, MAUREEN P. CORRY, SANDRA APPLEBAUM, AND ARIEL HERRLICH, LISTENING TO MOTHERS III: PREGNANCY AND BIRTH REPORT OF THE THIRD NATIONAL U.S. SURVEY OF WOMEN'S CHILDBEARING EXPERIENCES, XIV (May, 2013), https://www.nationalpartnership.org/our-work/resources/health-care/maternity/listening-to-mothers-iii-pregnancy-and-birth-2013.pdf.

90 Declercq et al., *supra* note 90, at XIV.

91 James C. Eisenach, Peter H. Pan, Richard Smiley, Patricia Lavand'homme, Ruth Landau, and Timothy T. Houle, *Severity of Acute Pain after Childbirth, But Not Type of Delivery, Predicts Persistent Pain and Postpartum Depression*, 140 PAIN 87 (2008): 87–94.

92 Eisenach et al., *supra* note 92.

I couldn't move at one point, I had to get my husband to help"'.[93] The same study notes 'One woman normalised the extreme pain she had experienced (pain caused by an undiagnosed haematoma), stating that she "just thought everybody" who underwent CSs had similarly "excruciating pain."'[94] Another study records women stating '*You can't laugh or move or cough you would be in much pain*', '*I shouldn't sneeze without a pillow on my belly, I can't bend . . . My back hurt for three months . . . no one told me that I needed to cope with this much pain afterwards*', '*I was very happy but my pain was stronger than my happiness*'.[95] It is also worth remembering that the pain of PGP, described in Section II.C.1, was identified in 33% of women 12 weeks after delivery, and 5% of women may experience PGP pain years after delivery.[96]

The vaginal tearing experienced by 80% of women must heal, and while estimates of the rates of the most severe (third and fourth degrees) tearing vary between 0.5% and 10% of laboring women, even mild tearing (second degree) can result in lasting pain during sexual intercourse (3 or 6 months later) as well as fecal incontinence.[97] In fact, these problems are found frequently 4–8 *years* after giving birth even among women who never experienced a tear.[98] Women are less likely to experience tearing if they deliver via cesarean section, which accounts for nearly one-third of all deliveries in the USA.[99] However, these deliveries bring their own post-labor complications.[100] In addition to major pain at the incision site, which can continue for 6 months,[101] infections, which are potentially fatal, occur after more than 6% of cesarean deliveries.[102] 6–18% of women who deliver via c-section will develop chronic pain at the site of their incision.[103] Both vaginal delivery with tears and delivery by cesarean section are associated with incontinence 5–10 years after delivery.[104]

93 Annalise Weckesser, Nicola Farmer, Rinita Dam, Amie Wilson, Victoria Hodgetts Morton, and R. Katie Morris, *Women's Perspectives on Caesarean Section Recovery, Infection and the PREPS Trial: A Qualitative Pilot Study*, 19 BMC PREGNANCY CHILDBIRTH 1 (2019).

94 Weckesser et al., *supra* note 94.

95 Tamar Kabakian-Khasholian, *'My Pain Was Stronger Than My Happiness': Experiences of Caesarean Births from Lebanon*, 29 MIDWIFERY 1251 (2013).

96 Gutke et al., supra note 46 at 511.

97 Vasileios Pergialiotis, Dimitrios Vlachos, Athanasios Protopapas, Kaliopi Pappa, and Georgios Vlachos, *Risk Factors for Severe Perineal Lacerations during Childbirth*, 125 INT. J. GYNECOL. OBSTET. 6 (2014); Hillary McBride and Janelle Kwee, *Sex After Baby: Women's Sexual Function in the Postpartum Period*, 9 Curr. Sex Health Rep. 142, 149 (2017); Declercq et al., *supra* note 78.

98 Inger Lindberg, Margareta Persson, Margareta Nilsson, Eva Uustal, and Maria Lindqvist, *'Taken by Surprise'—Women's Experiences of the First Eight Weeks after a Second Degree Perineal Tear at Childbirth*, 87 MIDWIFERY 102748 (2020).

99 CENTERS FOR DISEASE CONTROL AND PREVENTION BIRTHS: FINAL DATA FOR 2019 (Mar. 23, 2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf.

100 Francis Denny, *What People Don't Tell You About Childbirth: The Realities of Vaginal Tearing*, HARPER'S BAZAAR (July 16 2018), https://www.harpersbazaar.com/culture/features/a22119382/what-is-vaginal-tearing-childbirth/.;

101 See notes 89 and 90, *supra*, and accompanying text.

102 Raj Shree, Seo Young Park, Richard H. Beigi, Shannon L. Dunn, and Elizabeth E. Krans, *Surgical Site Infection Following Cesarean Delivery: Patient, Provider and Procedure Specific Risk Factors*, 32 AM. J. PERINATOL. 157 (2016).

103 Lauren Bavis, *'4th Trimester' Problems Can Have Long-Term Effects on a Mom's Health*, NPR.ORG (Jan. 24, 2019), https://www.npr.org/sections/health-shots/2019/01/24/686790727/fourth-trimester-problems-can-have-long-term-effects-on-a-moms-health.

These effects interfere with sexual activity and make anxiety and postpartum depression more likely,[105] as does the persistent pain that affects so many postpartum women.[106] Estimates of postpartum depression itself range from affecting as low as 10% of postpartum women[107] up to more than one-third of postpartum women.[108] Metaphors women use to describe their experiences with postpartum depression include 'being hit by a ton of bricks . . . living in a nightmare, feeling trapped, being in the middle of the sea, feeling like an alien, . . . feeling like garbage, and hitting rock bottom'.[109] *'It's like the end of the world, really. You've got nothing to live for . . . it's a bit like you're just stuck in this room and you can't get out, and there's nothing for you . . . it's just like you've died inside'*.[110]

Even the threat to a woman's life does not end with delivery. Deep vein thrombosis, infection, and postpartum hemorrhage can occur after a woman has gone home from the hospital.[111] In fact, the CDC states that one-third of pregnancy-related deaths occur between 1 week and 1 year after delivery.[112] Seventeen per cent of these deaths are from suicide by women suffering from postpartum depression.[113]

The above details are just a sampling of the physical and mental ramifications of carrying a child to term. Throughout the entire process of pregnancy, birth, and for years after, these effects can be constant, fundamentally altering women's lives by causing them actual pain. Given the tangible and bodily requirements on women in order to birth a child, one might expect that this suffering factor in the consideration of women's rights to terminate their pregnancies. Yet, as is discussed below, acknowledgment of these burdens is almost wholly ignored by judges. Instead, courts shy from descriptions of the actual physical burden on mothers, and the failure to recognize the burden then condones it.[114]

III. DATA AND ANALYSIS

This article is less an examination of rhetoric than an examination of a lack of rhetoric. It is an examination of the absence of women's pain and physical burdens from the abortion discussion in judicial opinions. Legal opinions in the areas of search and seizure, bodily integrity, and substantive due process have acknowledged the relevance

104 Emily C. Evers, Joan L. Blomquist, Kelly C. McDermott, and Victoria L. Handa, *Obstetrical Anal Sphincter Laceration and Anal Incontinence 5–10 Years after Childbirth*, 207 Am. J. Obstet. Gynecol. 425 (2012).

105 McBride and Kwee, *supra* note 98.

106 Eisenach et al., *supra* note 92.

107 Reindolf Anokye, Enoch Acheampong, Amy Budu-Ainooson, Edmund Isaac Obeng, and Adjei Gyimah Akwasi, *Prevalence of Postpartum Depression and Interventions Utilized for Its Management*, 17 Ann. Gen. Psychiatry 18 (2018)

108 Declercq et al., *supra* note 90 at XIV

109 Cheryl Tatano Beck, *Postpartum Depression: A Metaphorical Analysis*, 2020 J. Am. Psychiatr. Nurses Assoc. 1078390320959448 (2020).

110 Natasha Mathner, The Darkest Days of My Life: Stories of postpartum depression, 104 (2002).

111 Debra Bingham, Nan Strauss, and Francine Coeytaux, *Maternal mortality in the United States: A human rights failure*, 83 Contraception, 189, 190 (2011).

112 Centers for Disease Control and Prevention, Vital Signs Pregnancy Related Deaths (2019) https://www.cdc.gov/vitalsigns/maternal-deaths/pdf/vs-0507-maternaldeaths-H.pdf.

113 Eisenach, *supra* note 86.

114 Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Virginia L. Rev. 2181 (1995).

of pain and physical intrusion to individuals' rights. These cases have suggested a primary, personal, and individual interest in avoiding pain, which is to be respected (in the cases where the issues are acknowledged). Rights have increased in response, in part, to that acknowledgement.

Social artifacts, such as legal opinions, 'may convey[] meaning by its latent and manifest content, as well as by its silences or omissions'.[115] Legal opinions are strategic communications, purposefully written in order to shape the behavior of other actors, constrained by institutional conventions, norms, and procedural rules.[116] Therefore, legal opinions do not necessarily represent cultural understandings in the way conversation or archives may; instead, they demonstrate what actors believe will work in order to mobilize support or win in a given circumstance. Emotional writing in particular may be used in order to mobilize popular support and opposition to established doctrine,[117] although there is some disagreement about whether or not this works.[118] Black et al. found that excessive reliance on affective language (including discussing pain) seemed to signal to judges that one's case was weak, while Austin Sarat and Mona Lynch have suggested that obfuscation of pain is necessary to protect the continued use of the death penalty.[119] Still, it is clear that judges and legal actors use affective language in order to mobilize and affect readers and listeners and that legal language affects the direction of social movements as well as individuals' understandings of their own circumstances.[120]

This research does not ask whether language of pain is compelling or successful, it is not a comparative study of the discussion of pain in one region of the USA versus another, nor does it differentiate between dissenting and majority opinions. Rather, I suggest that the very acknowledgment of women's existence is in question. As Luker has shown, the language used in social movements is influenced by activists' understandings of what language may be successful; and it also influences women's own understandings of the burdens and difficulties they experience or see their loved ones experience.[121] Therefore, it matters whether and how these burdens and risks of pregnancy are discussed, when and if they are discussed. The central question in this exploratory research is—what is the role of pain in judicial opinions on abortion, as opposed to other areas? To what extent are the physical ramifications of pregnancy and labor acknowledged; and how does that acknowledgment compare to the role of physical ramifications of abortion to the fetus or the pregnant person? The research therefore focused in on two specific research questions:

115 Mona Lynch, *Penal Artifacts: Mining Documents to Advance Punishment and Society Theory*, in Qualitative Research in Criminology, 271, 276 (Jody Miller & Wilson Palacios eds., 2015).

116 Lynch, *supra* note 118 at 276; Jeffrey Budziak, Matthew P. Hitt, and Daniel Lempert. *Determinants of Writing Style on the United States Circuit Courts of Appeals*, 7 J. L. Courts 1 (2019).

117 Christopher Krewson, *Strategic Sensationalism: Why Justices Use Emotional Appeals in Supreme Court Opinions*, 40 Just. Sys. J. 319 (2019).

118 Ryan C. Black, Matthew E.K. Hall, Ryan J. Owens, and Eve M. Ringsmuth, *The Role of Emotional Language in Briefs Before the US Supreme Court*, 4 *J. Law. Courts* 377 (2016).

119 Black, *supra* note 121; Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, in Pain, Death, and the Law 43, 47–48 (Austin Sarat ed., 2004); Mona Lynch, *On-line Executions: The Symbolic Use of the Electric Chair in Cyberspace*, Pol. Legal Anthropology Rev., Nov. 2000, at 1, 7–8.

120 Krewson, *supra* note 120; See also notes 19–23, *supra*, and accompanying text.

121 Luker, *supra* note 16 at 100–108.

(1) To what extent is the pain of pregnancy acknowledged in these discussions?
(2) What do judges talk about when they talk about pain and abortion?

A. Search Strategy

A search was performed using Weslaw's database. The search included federal and state judicial opinions, published and unpublished, from January 1, 1974 to August 16, 2021. Out of a desire to limit the search to discussions of the constitutional protection of abortion access and the treatment of pain in these discussions, the search was structured in an effort to retrieve opinions that discussed abortion as a significant portion of the opinion. Therefore, search terms were applied as follows (ATLEAST5Abortion) AND (pain). This retrieved all opinions wherein abortion is mentioned at least five times and pain is mentioned at least once. These mentions may happen anywhere in the opinion and need not be close to each other.

The search was limited to opinions mentioning abortion at least five times in order to make some effort to avoid running too far afield of the abortion issue. Even with such limitations, the vast majority of opinions returned only mentioned abortion and were not primarily concerned with the legality or constitutional protection of abortion access (as described in the inclusion criteria below). In order to verify that limiting the search to opinions using the word 'abortion' five times had not excluded an abundance of relevant material, a second search was run to find cases mentioning abortion three times or more (search terms (ATLEAST3Abortion) AND (pain)), and cases appearing in the second search were skimmed to determine how many would be included under the inclusion and exclusion criteria below. Of the 334 additional opinions found in the new search, only one document, an order related to discovery requests in a case found in the smaller search, would arguably have met the inclusion criteria, and its discussion of pain was limited to statements that the plaintiff was suing for pain and suffering.[122] While it is possible that relevant opinions mention the word 'abortion' only one or two times, these results suggest limiting the search to opinions mentioning abortion at least five times is reasonable.

The search was not otherwise limited. It returned a total of 814 judicial opinions.

B. Inclusion and Exclusion Criteria

Inclusion criteria entailed judicial opinions containing a discussion of a right to access to abortion. These opinions included cases related to medical access of incarcerated women (eight opinions), state or federal funding for abortion services (25 opinions), and suits brought by abortion providers to declare statutory limitations on the right to abortion unconstitutional (190 opinions). Suits against abortion providers for wrongful death, murder prosecutions, wrongful birth suits, criminal prosecutions discussing pregnancy as serious physical injury, and immigration suits for asylum appeared in the search but were excluded. Suits for public funding of non-abortion services and for insurance funding for religious family planning services were also excluded.

C. Data Extraction

All retrieved opinions were stored in NVIVO 12 Plus software. NVIVO software was used to automatically code references to 'pain', 'health', 'risk', and 'life'. The author

122 *Victoria v. Larpenter*, 2001 WL 674156 June 14, 2001.

then evaluated each instance to extract substantive data regarding the subject of the language. Extracted data included whether health referred to the pregnant person or the fetus, excluding references that did not fit in either category (such as references to 'health care' or 'department of health'); whether life referred to the pregnant person's life or the fetus's life; whether pain referred to fetal pain, the pregnant person's pain in relation to abortion, or the pregnant person's pain in relation to pregnancy or childbirth, excluding rhetorical (eg 'it is painfully obvious' or 'the defense is at pains to explain'); and whether tearing referred to tearing of the pregnant person's body or of the fetus's body. The author also extracted and coded instances of discussion of the health risks that accompany pregnancy, childbirth, postpartum, and abortion. After preliminary analysis, automatic text search was used as well to code 'tear', 'torn', and 'perforation'. The author extracted information as to whether the dispute was in state or federal court, and separate codes for each aspect were created in order to be able to perform comparative analysis in the future.

Cases were coded using NVIVO software. Coding that had been assigned to data in case syllabi and headnotes sections were removed. All extraction and coding was performed by the author.

This analysis is limited to the rhetoric of these judicial opinions. Rhetoric and argument made in briefs submitted in connection to these cases, as well as in law reviews and advocacy documents, are currently under analysis and will be the subject of future research. However, this exploratory article is confined to the question of judicial rhetoric, which has been found to influence future advocacy and future judicial opinions.

IV. FINDINGS

A. When Pain Matters

The first, most easily quantified finding is that the pain of pregnancy is articulated far less often than the (still hypothetical and vigorously debated) pain of the fetus. This echoes the findings of Mary Ziegler who shows that the anti-abortion movement has specifically focused on the concept of fetal 'pain', successfully moving the abortion debate toward the interests of the fetus and away from acknowledgment of the interests of the pregnant person.[123]

In all, out of 223 judicial opinions ruling on constitutional challenges to abortion regulations, only 28 opinions mention the pain of labor or pains from pregnancy. This pain is mentioned 46 times over those 28 opinions, with 16 opinions mentioning it only once and another seven mentioning it twice (see Table 1). By contrast, the comparative pain of various abortion procedures is mentioned 150 times over 51 judicial opinions (see Table 2), while fetal 'pain' is mentioned 410 times over 60 of the 223 judicial opinions (see Table 3). Of those opinions, 22% (13 opinions) mention fetal 'pain' 10 times or more, which is more than twice the maximum number of mentions of the pain of labor or pregnancy, including four opinions that mention fetal 'pain'

123 Mary Ziegler, *The Conservative Magna Carta*, 94 North Carolina L. Rev. 1653, 1661 (2016). See also Lynne Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 Albany L. Rev. 999, 1000, 1012 (1999); Reva Siegel, *The New Politics of Abortion: An Quality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991, 1021 (2007) (discussing the prioritization of rhetoric on the personhood of the fetus in the 1970s–90s).

Table 1. Discussion of pain of pregnancy and childbirth.

Mentions	Opinions	Total mentions
1	16	16
2	7	14
3	4	12
4	1	4
	28	46

Table 2. Discussion of pain of abortion.

Mentions	Opinions	Total mentions
1	24	24
2	11	22
3	4	12
4	4	16
5	1	6
6	2	12
7	1	7
8	1	8
9	1	9
11	1	11
23	1	23
	51	150

20–30 times, one opinion where it is mentioned 38 times, and one opinion where it is mentioned 67 times (see Table 3).

Clearly, the number of mentions varies widely and is heavily influenced by outliers. Moreover, as stated above, a true quantitative analysis is not appropriate for this data. However, it is striking that the pain of abortion is mentioned three times as often as the pain of pregnancy and childbirth in fewer than twice as many opinions, and fetal 'pain' is mentioned nearly nine times as often in just over twice as many opinions. Additionally, *no* opinion mentions the pain of pregnancy or childbirth more often than four times, while nearly a third of the opinions mentioning fetal 'pain' mention it more than four times, and 20% of the opinions mentioning fetal 'pain' mention it nine times or more.

This stark contrast is reflected in substantive analysis of the opinions as well. Of the 46 references to woman's non-abortion pain in these cases, four references are to the psychological pain of carrying a child (with physical pain not mentioned at all) (see Table 4). Ten references are to the pain that accompanies only specific types of aggravating conditions rather than the pain of pregnancy or childbirth itself (see Table 4). Seven are specifically in the context of delay of an abortion that will happen

Table 3. Discussion of fetal 'pain'.

Mentions	Opinions	Total mentions
1	29	29
2	5	10
3	4	12
4	1	4
5	3	15
6	1	6
7	1	7
8	1	8
9	2	18
10	2	20
12	2	24
14	1	14
15	2	30
23	1	23
27	1	27
29	2	58
38	1	38
67	1	67
	60	410

Table 4. Types of pain experienced by women, discussed in abortion opinions.

Type		Mentions
Associated with abortion		150
Women's non-abortion pain		
	Caused by an aggravating condition	10
	Abortion will happen eventually	7
	Psychological	4
	Remaining mentions	**25**

"Remaining mentions" in bold describe the only mentions of pain that might address normal pain of pregnancy and childbirth.

eventually (see Table 4). In other words, the actual pain of pregnancy and childbirth 'itself' (shown in bold in Table 4) are almost never acknowledged in these opinions.

In all, fetal 'pain' is mentioned twice as often as women's pain. When women's pain is mentioned, it is almost exclusively in relation to an abortion that will absolutely occur and there is almost no (25 times, as opposed to the 410 mentions of fetal 'pain') reference to the physical pain that naturally occurs over the course of any normally progressing pregnancy or labor.

1. The Natural Pain of Pregnancy and Labor

In the 28 opinions that do discuss the pain that naturally accompanies pregnancy and childbirth, that pain is discussed using euphemisms and vague language most often as a single sentence and is then quickly abandoned. Indeed, seven such mentions are a quote of a single line offered in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 'The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear'.[124]

This section of the *Casey* opinion (the only phrase to acknowledge the pain of pregnancy and labor) is worth highlighting. The majority opinion begins this section by addressing the liberty interest in deciding for oneself when life begins—not the liberty interest in controlling one's own body, or avoiding intense pain or bodily damage. It states 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State'.

In the paragraph containing the reference to pain itself, the majority begins and thereby frames the paragraph with the 'consequences [of abortion] for others'; those being the fetus, the pregnant person's family, and the rest of society. Only after that framing does the opinion move into the 'anxieties, physical constraints, and pain that only she must bear'; and only for a moment. The opinion directly adopts a view of these burdens as the sacrifices of motherhood, which 'have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love'. It then quickly moves away from the pain and burden of pregnancy and labor, never having actually described or addressed them in full, referring to it as 'suffering' that is 'intimate and personal', and then removing to the vague topics of a woman's destiny, role, and 'conception of her spiritual imperatives and her place in society'.[125]

The majority's opinion echoes a dissenting opinion, predating *Roe v. Wade* by several years, yet describing the repercussions of forced childbirth in a manner similar to *Casey*.

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124 505 U.S. 833, 852 (1992).

125 *These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act.* **It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist**, *procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.* **The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.** *The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.* 505 U.S. 833, 852 (1992)

> '*It is difficult to overstate the importance of what the mother has at stake. In physical terms alone the thought of making a mother carry and bear a child against her will is not a pleasant one. But the matter cuts much deeper than mere physical pain. Carrying and bearing a child may involve anxiety and trauma and great psychic pain . . . . Infrequently it results in suicide. In some cases the child may be born deformed, or the birth may in this or other respects impair the physical and mental health of the mother. Poor families, with little ability to take advantage of means of self-protection that are of easy access to the rich . . . , often suffer physical, and therefore possibly other kinds of deprivation by the constant birth of children. But perhaps most important, the birth of a child unalterably affects the emotional lives of both mother and child. At its best, it makes possible a relationship of love; at its worst, it creates an unwanted child. When the State seeks to touch the very core of a person's being in such a fashion, and to thrust upon mother and (potential) child such a relationship by force, 'it violates "those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"'"*?[126].

There, the pain of pregnancy and labor is avoided; first indirectly touched upon ('the thought . . . is not a pleasant one') and then acknowledged but only as a minor point ('the matter cuts much deeper than mere physical pain'). The pain itself is neither directly addressed nor described.

In another dissenting opinion, Justice Marshall briefly touched on the physical dangers and pains of childbirth only to immediately progress to discuss the cycle of poverty and effects on the woman's family:

> '*An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects . . ., a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come[discussion of financial effects continues] . . . '*.[127]

This was also quoted by Judge Pashman, concurring in *Right to Choose v. Byrne*.[128]

Justice Douglas argued similarly in *Roe v. Wade* itself, suggesting,

> '*rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships*'.[129]

In *Victoria W. v. Larpenter*, the issue of 'substantial physical pain and discomfort' through delivery was brought by an incarcerated woman, as an Eighth Amendment claim for denial of medically necessary treatment.[130] The court dismissed the claim as unpersuasive, with no discussion of the actual pain or discomfort involved in labor

126 *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F.Supp. 1217, 1235 (1970) (citations omitted).
127 *Beal v. Doe*, 432 U.S. 454, 458–9 (1977).
128 91 N.J. 287, 325 (1982).
129 *Roe v. Wade*, 410 U.S. 179, 214–15 (1973)
130 205 F.Supp.2d 580 (2002).

and delivery, nor of the risks of maternal mortality. In *A Woman's Choice-East Side Women's Clinic v. Newman*, the court acknowledged, briefly, that pregnancy itself can be dangerous, although that inherent danger is hidden, sandwiched between more specific special conditions.[131] Moreover, the only references to pain are to the pain of continued pregnancy while awaiting a delayed abortion—the pain of pregnancy and labor itself is not acknowledged.

The closest any judicial opinion comes to giving any real weight to the question of the pain of childbirth itself comes in *McRae v. Califano*, although even here the issue is couched in concern for the delivery of the child.[132] The court noted,

> '*The long tasks of pregnancy require prenatal care on the woman's part that the woman whose pregnancy is unwanted has neither the will nor the resources of patience to carry out effectively. If the pregnancy is complicated and requires extraordinary medical attention and patient response and cooperation, the woman whose pregnancy is unwanted fails in response and cooperation, and every risk of the pregnancy is enhanced. Drs. Romney and Sloan pointed out that the woman whose pregnancy is unwanted will tend to have prolonged and difficult labor, dysfunctional uterine labor, and to require resort to Caesarian section or forceps delivery because of the protraction of the painful labor. Dr. Romney testified that the pregnant woman must be motivated to carry out the physical responsibilities of pregnancy, that the prognoses for wanted and unwanted pregnancies are different, and that the woman's failure in attitude, cooperation and motivation can result in the evolution of potential complications into reality . . .*'
> And, in describing testimony regarding a Jewish view on abortion,
> '*A very young bride who might be harmed by a pregnancy may be commanded to make use of either contraception or abortion, the two being viewed in the same light. There is a principle that has recognition permitting women whose birth pains would be extreme to seek sterilization or abortion in order to avoid the pain. Mental anguish that is life-threatening may be a ground of abortion*'.

Even in *McRae*, the pain of childbirth is simply that—a word, pain, mentioned and then quickly abandoned. To put this in context, it is valuable to look at the way the courts describe fetal 'pain'.

2. Fetal 'Pain'

Discussions of the possibility of fetal 'pain' are far more widespread and are far more in depth as the number of references to fetal 'pain' itself suggests, even while its very existence is in question. For instance, in *Carhart v. Ashcroft*,[133] the court devotes three pages to the recitation of testimony on fetal 'pain' alone and two more on its legal conclusions regarding fetal 'pain', and these are not the only sections where the issue comes up. In this case alone, fetal 'pain' is mentioned 67 times, while the pain of pregnancy and childbirth is mentioned three times; and the mentions of the pain of childbirth are not actually discussion (or even mention) of that pain itself but are rather reference to a testifying doctor's concern that laboring women might forgo pain medication out of fear that the medication would damage their child.

131 904 F.Supp. 1434 (1995).
132 491 F.Supp. 630, 672, 696 (1980).
133 287 F. Supp. 2d 1015 (2003).

While *Carhart v. Ashcroft* is an extreme case in terms of mentions of fetal 'pain', the content is not in any way unusual. As an example, while *Isaacson v. Horne* only specifically mentions fetal 'pain' eight times, several of those mentions are contained in three substantive paragraphs discussing needles, pain sensors, and sensory responses.[134] *Planned Parenthood Federation of America v. Ashcroft* (2004) devotes two pages solely to the scientific questions of the existence of fetal 'pain', as well as including other mentions, such as whether a fetus 'visibly showed signs of pain'.[135] *Women's Medical Professional Corp. v. Voinovich* offers over a full page to a discussion of the existence, or nonexistence, of fetal 'pain',[136] as does *EMW Women's Surgical Center, P.S.C. v. Meier* (2019).[137]

Often, these extensive descriptions on the arguments over fetal 'pain' are a judicial summary of evidence (expert testimony) that was presented at the trial level, or evidence that may be presented in the future. As far as can be seen from the judicial opinions, there is no comparable testimony on the pain of the pregnant person in pregnancy or in labor.

3. Surrounding Context: The Details of the Procedure

Adding to the affective nature of the mention of fetal 'pain', and the comparative absence of the pain of labor, is the attention given to the process of abortion itself. When fetal 'pain' is discussed in *Carhart v. Ashcroft*, *Isaacson v. Thorne*, *Women's Medical Professional v. Taft*, and over a dozen other cases, it is discussed in the context of an excruciatingly detailed description of the process of abortion itself. A brief excerpt from *Isaacson v. Thorne* is,

> *'After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed . . . '*

This is only a portion of one paragraph out of four paragraphs that make up the page directly preceding the discussion of fetal 'pain'. No comparable description of labor is available in these cases. The rhetoric surrounding the fetus is graphic—the language above regarding the fetus being 'torn apart' exemplifies the treatment of the fetus's potential pain, appearing 50 times over 16 opinions. Reference to tearing a pregnant person's body during an abortion, in contrast, occurs only 23 times in eight opinions. It is not that this tearing is irrelevant—to the contrary, a main reason the intact D&E[138]

134 884 F.Supp.2d 961 (2012).
135 320 F.Supp.2d 957 (2004).
136 911 F.Supp. 1051 (1995).
137 373 F.Supp.3d 807.
138 The D&E method of abortion is the most commonly used method to perform a second trimester abortion. It involves dilating the cervix and then using suction to evacuate the contents of the uterus, including the fetus. It is most commonly used because it results in the fewest complications for women. Intact D&E, or D&X, is the procedure sometimes referred to as 'partial birth abortion', wherein the fetus is removed

method of abortion is used is in order to protect the pregnant person from unnecessary damage to internal organs by limiting the number of times dangerous instruments are forced into their bodies. The issue itself arises often, appearing as a reference 191 times over 52 of the 223 judicial opinions on abortion. But it is discussed as a 'perforation' that 'is a risk' and seemingly occurs by itself. For instance, *'D & X may reduce the risk of uterine perforation and embolism of cerebral tissue into the woman's blood stream'*;[139] *'As its "elements are part of established obstetric techniques," id., the procedure may be presumed to pose similar risks of cervical laceration and uterine perforation'*;[140] and *'Requiring transection prior to a D & E increases procedure time, makes the procedure more complex, and increases risks of pain, infection, uterine perforation, and bleeding'*.[141] *Here, the uterus and cervix merely exist and perforation is a thing that happens, somehow, sometimes. Similarly, 'D & Es are associated with a number of potential complications, including uterine perforation, infection, retained products of conception, and tearing of the cervix'*;[142] *'cervical lacerations or tears are "observed frequently as part of the natural physiologic process of labor"'*;[143] and

> *'The risks of performing a D & E are trauma to the uterus and cervix, such as laceration and tearing caused by dilation or "pushing an instrument through . . . the wall of the uterus," resulting in injury to the bowel, bladder, or other nearby organs; extensive blood loss in situations where the uterus "does not contract well"; and "rare, very serious complications" like amniotic fluid embolism, disseminated intravascular coagulopathy, and infection caused by retained pregnancy tissue'*.[144]

While perforations and tearing of the cervix are a thing that can happen to depersonalized body parts over the course of an abortion, the fetus is alive and is actively 'torn apart'. The imagery of tearing is used repeatedly, eg *'The policy embodied in S.B. 95—that living babies not be "torn limb from limb"'*;[145] *'as the abortion doctor "cut[s] or rip[s] the piece from the body" . . . The fetus dies just as an adult experiencing corporal dismemberment would—by bleeding to death as his or her body is torn apart'*.[146] Alternately, see *West Alabama Women's Center v. Williamson*.[147] The first sentences in the opinion set the tone (at 1314)

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fully intact from the uterus. It is preferred by some doctors because it involves fewer instances of pushing medical instruments into a woman's uterus, thereby further reducing risks. See Megan Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, Gutmacher Institute Feb. 21, 2017, https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure; Julie Rovner, *'Partial-Birth Abortion': Separating Fact From Spin*, NPR.org, Feb. 21, 2006, https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin.

139 *National Abortion Federation v. Ashcroft*, 330 F.Supp.2d 436, 44 (2004).
140 *Planned Parenthood of Cent. New Jersey v. Verniero*, 41 F.Supp.2d 478, 485 (1998).
141 *Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan.App.2d 274, 280 (2016).
142 *Evans v. Kelley*, 977 F.Supp. 1283, 1295 (1997).
143 *Carhart v. Ashcroft*, 331 F.Supp.2d 805, 948 (2004).
144 *Carhart v. Stenberg*, 11 F.Supp.2d 1099, 1110 (1998).
145 *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 709 (2019).
146 *Whole Woman's Health v. Paxton*, 2020 WL 6218657 at 11 (dissenting opinion) (2020).
147 900 F.3d 1310 (2018).

> '*This case involves a method of abortion that is clinically referred to as Dilation and Evacuation (D & E). Or dismemberment abortion, as the State less clinically calls it. That name is more accurate because the method involves tearing apart and extracting piece-by-piece from the uterus what was until then a living unborn child . . .*'

And later:

> '*The district court did not decide whether the State had a legitimate interest in requiring that the unborn child be humanely killed before it is torn apart. It only assumed the State did. But, to borrow Holmes' words from another setting, "[t]his is not a matter for polite assumptions; we must look facts in the face." . . .*
> *In this type of abortion the unborn child dies the way anyone else would if dismembered alive. "It bleeds to death as it is torn limb from limb." It can, however, "survive for a time while its limbs are being torn off." The plaintiff practitioner in the Stenberg case testified that using ultrasound he had observed a heartbeat even with "extensive parts of the fetus removed." But the heartbeat cannot last. At the end of the abortion—after the larger pieces of the unborn child have been torn off with forceps and the remaining pieces sucked out with a vacuum—the "abortionist is left with 'a tray full of pieces.'" It is no wonder that Justice Ginsburg has described this method of abortion as "gruesome" and "brutal." (Ginsburg, J., dissenting) . . .*'.[148]

Much as the court in *West Alabama Women's Center v. Williamson* claims to desire to 'look the facts in the face', one should compare the above description of fetal dismemberment to its description of the risks posed to women by the replacement abortion methods the state has suggested.

> '*The district court rejected that position and concluded that each of the fetal demise methods carry "significant health risks." It found that potassium chloride injections can cause uterine perforation and infection and cardiac arrest if introduced into the bloodstream. That umbilical cord transection raises the risk of hemorrhage and uterine infection and injury. And that digoxin injections increase the risk of hemorrhage, infection, and extramural delivery*'.

The fetus is torn apart and bleeds to death. By contrast, the pregnant person is at risk of hemorrhage (ie bleeding, possibly to death), cardiac arrest (not heart attack, nor death), and unspecified 'injury'. Indeed, in this entire opinion, only the fetus can die (the word 'death' appears only in reference to the fetus) except for in that rare circumstance where an abortion is justified by risk to the pregnant person's life (and such occurrences are brief and minor, see discussion below). By this language, the fetus is killed by an abortion, but the pregnant person is certainly not at risk of being killed. The death that stands at the other side of hemorrhaging is unspoken and neither purposeful nor directed (as is killing the fetus). It is merely a disembodied and vaguely mentioned risk despite the fact that it, too, occurs due to the performance of a procedure performed for the purposes for protecting another being from pain (a pain that is still medically debated).

There is no case that describes in such detail how a woman's insides may be ripped apart by the repeated insertion of medical instruments into her body. No case asserts that a doctor, in trying to protect a fetus, may tear into a woman's internal organs or kill

148 *West Alabama Women's Center v. Williamson*, 900 F.3d 1310 (2018) 1318, 1319–20 (citations omitted).

her by causing her body to bleed uncontrollably. And even this medical, dry description of the comparative risks of various abortion procedures is greater acknowledgement than is granted to the risks and pain of pregnancy and childbirth.

Of the discussion of 'tearing', only one abortion case refers to the possibility of tearing that accompanies 80% of vaginal deliveries. That case mentions it twice in response to a law mandating that only physicians perform abortions as a way of contextualizing the comparative abilities of clinicians to physicians. Clinicians, the opinion notes, are capable of suturing vaginal tears that occur during childbirth. This is the entire extent of the discussion.

B. Comparative Health Risks

This pattern plays out again in the debates over pregnant people's interest in their own health. The comparative health risks of various types of abortion are a running theme throughout these cases. The risks involved in carrying a child to term are mentioned often—230 times over 67 of the 223 judicial opinions. The health risks of carrying a child, and of various methods of abortion, are a central area of discussion in large part because the law has made them as centrally relevant. Judicial doctrine has established that a woman must be allowed to have an abortion if her own life and health are at risk, and many informed consent statutes (and therefore descriptions of those statutes) include references to informing a pregnant person of the potential risks of pregnancy and labor. Statutes regulating or prohibiting abortion must include exceptions for the circumstance where a pregnant person's life or health is threatened by the pregnancy, although cases disagree as to how immediate that threat must be. Judicial opinions therefore regularly reference these arguments, and some explore them, at least to some extent.[149]

But the extent of this exploration is precisely the issue. The descriptions of the health risks to pregnant people are nearly as vague as the descriptions of their pain. Nearly half of these opinions (30 opinions) mention the health risks of bearing a child only once, while another 12 mention it twice. In these circumstances, the discussion is limited to a simple acknowledgment (each of the following quotes is the sole acknowledgement from a separate case):

'The physician was required to describe the "probable gestational age of the unborn child at the time [of] the abortion" and the "medical risks associated with carrying her child to term"';[150]

'More recently, in Harris v. McRae, the Court upheld "the most restrictive version of the Hyde Amendment," which withheld from States federal funds under the Medicaid program to reimburse the costs of abortions, "except where the life of the mother would be endangered if the fetus were carried to term"';[151]

'According to the studies with which Carhart is familiar, abortion at the earliest stage is 35 times safer than childbirth as far as complications are concerned. By the 20th week, the risk of complications from abortion approximately equals that of childbirth';[152]

149 See also Spitzer, *supra* note 7, outlining centrality of the health exception.

150 *American Medical Association v. Stenehjem*, 412 F.Supp.3d 1134, 1150 (2019).

151 *Webster v. Reproductive Health Services*, 492 U.S. 490, 508 (1989) (citations omitted).

152 *Carhart v. Stenberg*, 11 F.Supp.2d 1099, 1117 (1998).

'Abortion generally has a low risk of fatal and nonfatal complications. The risk of death is lower than that from a penicillin injection, as well as that from childbirth'. [153].

What exactly is that risk from childbirth? The cases do not say. There is broad acknowledgement that the risk of death is greater in childbirth than in abortion, and the mortality rates of each are often recited. There is often acknowledgment, in a single isolated sentence, that abortion is 'safer' than childbirth. There are some few discussions of the fact that carrying a pregnancy to term may involve risks of eclampsia, HELLP syndrome, hyperemesis, and other exceptional conditions. In *Planned Parenthood of Cent. New Jersey v. Verniero*, the court acknowledged that pregnancy can 'exacerbate' already existing exceptional conditions, such as 'certain neurological and immunological diseases, liver or kidney disease, severe hypertension, cardiac conditions, and diabetes'.[154] But the specific risks and damage to a woman's body from perfectly normal pregnancy and childbirth are never detailed, certainly not in any language that approaches the depth or breadth given to the abortion procedure.

Postpartum complications are almost never mentioned. The phrase 'postpartum' or 'post-partum' occurs in eight abortion opinions of which five are only referencing the existence of postpartum care. Of the three remaining opinions, two mention postpartum hemorrhage, one as a risk that can be increased by certain abortion procedures,[155] and the other in a single sentence in a footnote referring to a petitioner's prior experience with postpartum hemorrhaging as a reason the petitioner and petitioner's doctor feel abortion is necessary for her health.[156] The last opinion provides a statute, in a footnote, requiring that, prior to an abortion, a physician informs the pregnant person of opportunities for psychological care for 'post-partum psychological damage'.[157]

It is not that the pain, demands, or risks from pregnancy and labor are never acknowledged at all, but it is that references to them are fleeting and vague. This fact stands out particularly in examinations of the induction method of abortion (where labor of a nonviable fetus is induced). Efforts to prohibit D&X abortions naturally lead to discussions of whether acceptable alternatives are available. In these cases, the induction method is often found to be lacking as a replacement for D&X or D&E, because, for instance, '[since] labor is induced before term, an induction abortion involves the same physiological stress, emotional stress, medical complications, and risks as does labor and delivery at term'.[158] Similarly, hysterotomy is rejected as a viable alternative because 'it involves even more blood loss and other damage than does a cesarean section'.[159] But how much blood loss does a cesarean section involve? What is this physiological stress and emotional stress that accompanies labor, justifying a different method of abortion? What are the possible medical complications of labor? *These factors are not articulated* and are not even mentioned in the discussions of the risks and dangers of carrying a pregnancy to term.

153 *Whole Woman's Health Alliance v. Hill*, 388 F.Supp.3d 1010, 1015 (2019).

154 41 F.Supp.2d 478, 502 (1998). This quote is also referenced in *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 151 (2000).

155 *Bernard v. Individual Members of Indiana Medical Licensing Board*, 392 F.Supp.3d 935, 950 (2019).

156 *Fischer v. Com., Dept. of Public Welfare*, 66 Pa.Cmwlth. 70, n.1 (1982).

157 *Margaret S. v. Edwards*, 488 F.Supp. 181, 205 n.76 (1980).

158 *Richmond Medical Center for Women v. Gilmore*, 11 F.Supp.2d 795, 803 (1998).

159 *Richmond Medical Center for Women v. Gilmore*, 11 F.Supp.2d 795, 803 (1998).

One single opinion, *McRae v. Califano*,[160] offers an in-depth list of conditions and situations that may turn pregnancy into a mortal or psychiatric threat for women. The case was brought as a challenge to the Hyde Amendment, which prohibited federal Medicaid funding for abortions except when 'the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service'.[161] The question of the health implications of forbidding funding for first trimester abortion was therefore central (as one would assume it to be in any of the Medicaid or state funding cases, although this case is the only one to discuss these issues in such depth). The opinion devotes over 14 pages, out of a 110-page opinion, to these issues. It does not detail the pain of labor (its discussion of pain is outlined above), but it does offer a substantial investigation into various conditions, many potentially fatal or permanently disabling, that can be exacerbated or caused by pregnancy.

The opinion was reversed by the Supreme Court, with no discussion of these health issues. While the Court acknowledged that the question of women's health was central to the right to abortion, and even outweighed a state's compelling interest in fetal life, Congress need not fund that abortion. Determining that some abortions may be 'medically necessary', but that Congress could still choose not to subsidize them, the Court omitted any reference to any of the conditions discussed in McRae, essentially erasing the issues from the conversation.[162] Three justices dissented from the ruling. Of those, only Justice Marshall's dissent (which was not joined by the other dissenting justices) even discusses the threat pregnancy may pose to the health of a pregnant person. That discussion is limited to mention (three sentences) of certain existing and exceptional conditions which pregnancy may aggravate and 'cases in which severe mental disturbances will be created by unwanted pregnancies. The result of such psychological disturbances may be suicide, attempts at self-abortion, or child abuse'.[163] Having summarized these health risks in a few sparse sentences, Justice Marshall mentions in three other places that carrying a pregnancy to term can threaten the health or life of the mother with no more detail.

V. DISCUSSION

There are several explanations that might be offered as to why so much more detail and attention is paid to fleshing out the interests of the fetus, while the pregnant person is disembodied, their pain is vague and remote, and their risks are presented in abstract and clinical terms. One is relevance. Legal opinions are constrained by the norms and structures of the law. As *Roe* and *Casey* established a right to abortion prior to viability, and most cases have continued to support that right, the interests of women in having abortions prior to viability may seem irrelevant because the issue is resolved by the state's presumed lack of a compelling interest in the fetus. By contrast, the question of fetal 'pain' has spurred a great deal of anti-abortion legislation which in turn has spurred

160 491 F.Supp. 630 (1980).
161 Pub.L. 96–123, 109, 93 Stat. 926. See also Pub.L. 96–86, § 118, 93 Stat. 662.
162 *Harris v. McRae*, 448 U.S. 297, 316–17 (1980).
163 *Harris v. McRae*, 448 U.S. 297, 339–40 (1980).

these cases. Therefore, long, detailed descriptions of fetal 'pain' may be offered by proponents of anti-abortion legislation in order to support their argument and motivate their supporters and by opponents in order to show that they understand the issues involved.

Additionally, there is the question of strategy. Both pro- and anti-choice lawyers and activists have reason to downplay the actual physical implications of pregnancy. On the part of anti-choice activists, this stems from the desire to highlight the implications for the fetus and portrays the fetus's interests as vastly overwhelming the interests of the pregnant person. Reducing the pregnant person to a dehumanized and depersonalized collection of supportive organs facilitates this deprioritization of their interests. On the part of pro-choice activists and lawyers, it is likely that the personal implications of pregnancy are avoided in an effort to avoid a battle between the interests of the fetus and the interests of the pregnant person. To this point, activists have argued for an almost absolute right to abortion at least in the context of previability abortions. To focus on women's particular physical interests might be seen as opening the door to a balancing of interests, almost accepting the notion that a previable fetus might rise to the level of a protectable person whose interests could compete with the pregnant person.

It must also be acknowledged that the reluctance to describe this pain is not only legal, or judicial. Pain, in general, resists description, and women resist describing this pain.[164] Even consciously feminist arguments in favor of the right to choose to abort rarely offer more than a sentence or two to describe the physical burdens of pregnancy, only briefly mentioning nausea, swelling, labor pain, and the risk of mortality and morbidity.[165] While it is clear that there exist doctors and scholars who find these issues to be real and relevant, it is unclear that the risks have ever been fully described to the judiciary.

However, the continual avoidance of the physical implications of pregnancy seems to go farther than the simple strategic decisions or institutional constraints. The very cases that make fetal 'pain' a question are a challenge to the protection of previability abortions, necessarily implicating the interests at issue for women. Perhaps more importantly, the question of pain itself does arise, often, in the context of the relative pain of various methods of abortion. The question of the health risks to women that are implicated by various methods of abortion is explored in detail. The question of the health risks of pregnancy is often mentioned, and in the case of special conditions in pregnancy (such as pre-eclampsia), this health risk is explored in some depth.

It is only the normal, everyday risks of pregnancy and childbirth where the issue is almost completely avoided. While the health risks of bearing a child are mentioned, and even mentioned often, like the pain of labor and pregnancy they are mentioned in a sentence, touched upon briefly as if touching a hot pot on the stove, and then quickly dropped. The discussion reaches as far as comparative mortality rates of labor

164 See notes 40, 49–51, *supra*, and accompanying text.

165 See, eg Robin West *Concurring in the Judgment*, in What Roe v. Wade Should Have Said, 129, 130 (Jack Balkin ed., 2005); Kimberly Mutcherson, *Roe v. Wade 410 U.S. 113 (1973)*, in Feminist Judgements: Rewritten Supreme Court Opinions (Stanchi, Berger, and Crawford eds. 2016), 154 ('It is her heart, her blood, and her body that must experience the wear and tear that comes from pregnancy . . . Swollen feet, expanded girth, heartburn, thinning hair, nausea, and vomiting . . . Women can experience temporary or permanent disability and even death as a consequence of pregnancy . . . ').

as opposed to abortion, or a mention of the pain of labor as a reason to avoid induction abortion, and then it retreats. Morbidity (severe physical damage outside of death) is almost wholly ignored. Even where other burdens of having children are explored, such as the expense and emotional weight of caring for a child, the actual 9 months and possibly days of the most intense pain that may ever occur in a woman's life remain unspoken, as do the months or years of pain that may well follow. There is no stirring description of childbirth, as there is of abortion's implications for the fetus. There is not even the clinical description that is given in descriptions of the implications of abortion for the pregnant person.

A. The Erasure of Women in Motherhood

Many scholars have examined the rhetoric of judicial opinions in order to expose its marginalization of women. These scholars have found that women's perspectives are rarely affirmed,[166] women's subjugation is protected by paternalistic narratives,[167] and that where it has been threatened, it has been in large part by co-opting a narrative of women as victims.[168] Women's invisible labor and burdens on women in the home are routinely ignored, or at least acknowledgement of those burdens is avoided.[169] While not all women are mothers, the role of woman as mother, or potential mother, particularly encourages this subjugation.

A steady theme of scholars of gender and law is that of the subjugation of women into the role of mothers.[170] Rhetoric of 'mothers' consistently reinforces the notion that women should sacrifice all for their children, and the ideal mother is willing to do so—if a woman develops interests that in some way conflict with their child's, those interests are rhetorically dismissed, generally ignored in the portrayal of the woman as mother, who must have no interest outside of her child.[171] Sacrifice is assumed to be an essential aspect of motherhood, and there is no interest or cost so great that it can be prioritized over a child's interest.[172] This assumption carries with it moral ramifications—women who are not willing to sacrifice for their children are 'bad' and 'selfish', while good women naturally prioritize motherhood and mothering over any non-child interests they may have.[173] It can be seen in pro-choice as well as anti-abortion arguments

166 Katie Gibson, *The Women Take Over: Oral Argument, Rhetorical Skepticism, and the Performance of Feminist Jurisprudence in Whole Women's Health v. Hellerstedt.* 105 Quarterly J. Speech 319, 322–23 (2019); Finley, *supra* note 16.

167 Carrie Crenshaw, *The 'Protection' of 'Women': A History of Legal Attitudes Toward Women's Workplace Freedom*, 81Quarterly J. Speech 63 (1995); Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Argument*, 57 Duke L. J. 1690 (2008).

168 Condit, *supra* note 10 at 25–26.

169 Fineman, *supra* note 117.

170 Abrams, *supra* note 10 at 297; Condit, *supra* note 10 at 61–63; Susan Bordo, Unbearable Weight, 71–98 (1993).

171 Linda Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 Southern California Interdisciplinary L. J. 259, 270, 272–3 (2009); Pam Lowe and Sarah-Jane Page, *On the Wet Side of the Womb: The Construction of 'Mothers' in Anti-Abortion Activism in England and Wales,* 26 European J. Women's Studies 165 (2019); Pam Lowe, Reproductive Health and Maternal Sacrifice: Women, Choice and Responsibility (2016); Sharon Hays, the Cultural Contradictions of Motherhood (1996).

172 Lowe and Page, *supra* note 171; Faye Ginsburg, Contested Lives: The Abortion Debate in an American Community (1989); Lowe, *supra* note 171; Bordo, *supra* note 170.

in arguments, justifying abortion based on women's responsibilities to their other children, husbands, or families, and arguments that some women must have abortions because they cannot be good mothers 'now', but abortion can help them be better mothers to other 'future' children.[174] It is likely that this moral judgement is associated with long-standing cultural acceptance of the idea that a woman's role is, first and foremost, to bear children.[175] As Luker argued, abortion rights are fundamentally linked to the idea that women even have any interests at all outside of the primary function of bearing children.[176] Any such interests are seen as unnatural and are rarely acknowledged unless as selfish, immoral, irresponsible desires.[177]

In the case of abortion arguments, the prioritization of childbearing often moves well beyond moral judgement, all the way into complete erasure of the body of the woman from the discussion. 'The woman often is missing from decisions diluting the right to choose; if she appears it will be in the role of passive patient, mother, or mere body part'.[178] Even the presence of the woman as a bodypart is rare, however—Lupton (2013) demonstrates that pro-abortion messaging often presents images of the fetus as if in a void, with no reference to the woman who will carry the fetus to term and endure labor in order to bring it into the world.[179] In these circumstances, women's pure physical burdens and interests are not only unimportant or evidence of selfishness, they are entirely without representation, as if they do not exist at all.

The data above show that, in the case of abortion, the graphic and bodily details of the implications for the fetus have been outlined in depth; but the graphic and bodily details of the implications of pregnancy for a pregnant person are seemingly not only absent but actively avoided. This supports the suggestion that judges, whether consciously or unconsciously, purposefully circumvent acknowledgement that pregnancy and childbirth itself may harm a woman's personal interests, or that such interests even exist. These judges maintain the presumption that all women should 'want' children and motherhood and that the only time when a woman might reasonably choose not to be a mother is in the sad situation where social difficulties interfere with perfect parenthood. That she might have reasons to simply *not want to have a child* is not acceptable and therefore cannot be acknowledged. The actual, physical realities of pregnancy and childbirth are personal to the pregnant person—mothers are simply not supposed to have such personal interests. Indeed, women are not supposed to have any interests that they prioritize above motherhood even before they are mothers. Therefore, the courts cannot recognize these burdens in the way they recognize and

173 Lowe and Page, *supra* note 174; Lowe, *supra* note 174; Sally Sheldon, Beyond Control: Medical Power and Abortion Law (1997); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 301–303 (1992).

174 Lowe and Page, *supra* note 174; Lowe, *supra* note 174; Sheldon, supra note 176. See also Ronald Dworkin Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom, 58–59 (1993) (discussing a survey of women suggesting that many choose abortion *because* of their feelings of responsibility to others in their lives).

175 Lowe and Page, *supra* note 174; Lowe, *supra* note 174; Luker, *supra* note 16 at 7–8; Reva Siegel, *Siegel J., Concurring*, in What Roe v. Wade Should Have Said (Jack Balkin, ed., 2005); Mutcherson, *supra* note 168.

176 Luker, *supra* note 16, at 7–8.

177 Lowe, *supra* note 174.

178 Abrams, *supra* note 10 at 294.

179 Deborah Lupton, the Social Worlds of the Unborn (2013).

articulate the invasion of a search of the body involving surgery or catheterization. But until these interests are fully recognized, women will remain less than full persons.[180]

VI. CONCLUSION—LIMITATIONS AND AREAS FOR FUTURE STUDY

Judicial opinions must be written in 'a certain way', and the 'rules' of legal relevance constrain a great deal of their content; yet, still, judges are 'free to innovate' and introduce themes and narratives in order to change the legal story.[181] We see that they have in fact introduced narratives prioritizing avoidance of invasion and pain in the area of bodily integrity, substantive due process, and law enforcement searches that penetrate the skin. Yet, in the case of abortion, certain topics, such as the actual bodily nature of pregnancy and childbirth, have not appeared in the opinions. As Lynne Paltrow states, such cases illustrate the fact that women still are not recognized as full citizens, with equal rights regarding bodily integrity, personal autonomy, and medical decision-making.[182]

This exploratory research offers strong evidence that women still are not recognized as individuals independent of their potential motherhood. This carries obvious ramifications for the debate over abortion. Pregnancy is a high-risk state, bringing extreme medical hazards.[183] But even discussion of disease and mortality ignores important aspects of women's interests—namely, the physical experience and ramifications of pregnancy itself. As Jeanne Flavin has highlighted, anti-abortion activists regularly turn to adoption as an alternative to abortion, but this can only be done if the experience of pregnancy, labor, and the physical ramifications that so often follow are entirely discounted in the conversation.[184]

It is likely that the failure of judges to acknowledge the individual interests of pregnant women is both influenced by social rejection of that idea and influences that rejection. Indeed, medical research suggests that women themselves refuse to acknowledge these interests, going so far as to erase and leave unnamed the extent of the pain involved in labor. One study suggested that, while 'only patients with acute pain from the amputation of a digit or those with causalgia reported greater pain on average than women in labor . . . some women who rated their pain at 4 or 5 on the PPI numerical scale were unwilling to use the accompanying descriptors of "horrible" or "excruciating" because "the positive experience of giving birth prevented them from using words with such negative connotations."'[185] Many, or most, women consider their labor to be 'worth it' or a positive experience overall; but continued refusal to acknowledge the level of pain and intrusion involved with pregnancy and labor enables the continued imposition of horrible and excruciating pain (in the absolute, medical sense of the terms).

180 Paltrow, *supra* note 126, at 1052.

181 Huang Hoon Chng Separate and Unequal: Judicial Rhetoric and Women's Rights, 33 (2002); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 999 (1984).

182 Paltrow, *supra* note 126, at 1052.

183 Spitzer, *supra* note 7.

184 Jeanne Flavin our Bodies, our Crimes: The Policing of Women's Reproduction in America, 67 (2009).

185 Lowe, *supra* note 6.

Additionally, the plight of incarcerated pregnant people should be particularly highlighted. Many states place hurdles in front of so-called 'nontherapeutic' abortions for incarcerated pregnant people. As Spitzer has suggested, however, in very fundamental ways all abortions are therapeutic.[186] The relevance of the pain and ramifications of delivery itself are even more compelling in the cases of women who may be shackled while delivering, or may have more difficulty in receiving medical assistance for the pains and illnesses associated with pregnancy.[187] The lack of empathy, and the lack of detail in description is most stunning in these cases, and returns to Sarat and Lynch's argument that conditions of incarceration may be maintained, perhaps, only by avoiding description of the ramifications of that treatment.[188] This erasure of a woman's very body exemplifies a refusal to acknowledge women's interests that goes well beyond the stigmatization and moral judgement that is often discussed in abortion literature. It is particularly shocking, given the extremely bodily nature of pregnancy and labor.

It would be a mistake, however, to assume that the answer to this issue is to simply thrust women's pain and burdens into the center of the conversation without careful analysis. To the contrary, the persistent avoidance of recognition of women's physical personhood might be evidence of such a level of social rejection of this idea that any such discussion would simply cause backlash and rejection. After all, in order to achieve the right to abortion, activists had to 'use rather than confront the beliefs and social conditions [such as the nuclear family and woman's primary role as mother] in the existing American repertoire . . . respecting the crucial values and characterizations of the culture while redefining the act of abortion itself'.[189]

Clearly, there is much work still to be done. This beginning research has not separated majority and dissenting opinions. It looks only to those cases where pain is addressed at all and largely ignores opinions that do not mention pain. Such opinions may offer very different views on the burdens and implications of pregnancy and childbirth, although, clearly, without directly addressing the actual physical implications. Future research should explore this rhetoric. To what extent do courts address the purely individual ramification of pregnancy and childbirth, 'without' addressing pain at all? Additionally, judicial opinions offer only one area of legal rhetoric surrounding abortion. While these judicial opinions alone offer a significant dataset that must be explored further, future research will address law review articles, advocacy, and popular press. Relevant questions include the influence of gender on judicial acknowledgment

186 *Supra*, note 6; note Justice White's tacit endorsement of this view in his fear that 'Surely it cannot be argued that any abortion that is safer than delivery is medically necessary, **since under such a definition an abortion would be medically necessary in all pregnancies**'. (emphasis added) *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 810 note 7 (1986) (White, dissenting).

187 Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy, Just Reproduction: Reimagining Autonomy in Reproductive Medicine, Special Report*, 47 Hastings Cent. Rep. S19 (2017); Kelsey, C. M., Nickole Medel, Carson Mullins, Danielle Dallaire, and Catherine Forestell, *An Examination of Care Practices of Pregnant Women Incarcerated in Jail Facilities in the United States,* 21 Maternal child health j. 1260 (2017) (over 50% of incarcerated women may be restrained while delivering).

188 See note 122, *supra*, and accompanying text.

189 Condit, *supra* note 10, at 25.

of these issues, geographical distribution, and the impact of the level of the court (trial or appellate).

A separate but extremely important area of research is the influence of racism on this lack of empathy. The questions of the health risks to women have clear racial implications, as maternal mortality and maternal morbidity affect Black women so much more severely than other women. Additionally, research has already shown that the pain of Black patients, and particularly Black women, is routinely dismissed and ignored.[190] Most of the challenges to legislation restricting abortion access are brought by clinics that serve large numbers of minoritized populations. To what extent does the refusal to acknowledge pregnant women's pain relate to this racism?

'Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority'; it also 'limit[s] the stories we can tell'.[191] In 1984, Kristen Luker noted that it was the legal framing of the abortion debate which enabled women to recognize their own personhood independent of lives as wives or mothers. The legal and social refusal to acknowledge the full depth and breadth of the experience of pregnancy and childbirth stunts this recognition, maintaining women as always essentially potential mothers and refusing to face the fact that women may have reason to choose not to be. By simply ignoring any reference to the extent of the duration, pain, invasion, and indignity of pregnancy and childbirth, the courts avoid inviting any empathy for pregnant women, and activists and the public follow suit. If women are ever to achieve full personhood, their physical persons will have to be recognized as worthy of protection even in the face of motherhood.

190 Jamila K. Taylor, *Structural Racism and Maternal Health among Black Women*, 48 J. Law Med. Ethics: a journal of the American Society of Law, Medicine & Ethics 506 (2020); Kelly M. Hoffman, Sophie Trawalter, Jordan R. Axt, and M. Norman Oliver, *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences between Blacks and Whites*, 113 PNAS 4296 (2016).

191 Dalton, *supra* note 184 at 999.