

The Dark Side of Childbirth: A Failure of Both Law and Medicine

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Elizabeth Kukura, [Obstetric Violence](#), 106 **Georgetown L. J.** 721 (2018).

[Recent reporting](#) has drawn public attention to a [crisis in U.S. maternity care](#). Concerns include the extensive use of C-sections and other [medical interventions](#) in hospital births, [high rates](#) of maternal mortality and morbidity, [racial disparities](#) in maternal and fetal outcomes, and the increase in [planned home births](#). While many factors contribute to these problems, one rarely acknowledged factor that Professor [Elizabeth Kukura](#) highlights in her 2018 article of the same name is the phenomenon of obstetric violence. Examples of obstetric violence include performing interventions (such as C-sections, episiotomies, and artificial rupture of membranes) on birthing patients against their express refusal; coercing patients to accept such interventions by threatening them with withdrawal of care or legal action; physically restraining birthing patients with no medical justification; verbally disrespecting patients in labor; and questioning competent patients' medical decisions.

The phenomenon of obstetric violence raises a host of questions about law, policy, and medical ethics—but to date, it has received limited attention from U.S. legal scholars. Kukura's *Obstetric Violence* is the type of foundational article that clearly and effectively lays the groundwork for continued scholarship in this area. Anyone interested in health law, tort law, reproductive privacy, feminist jurisprudence, or the intersection of law and medical ethics would be well-advised to read this piece and cite it extensively.

Those who have experienced obstetric violence during childbirth have long pushed for increased public awareness, publishing [books](#) and reporting their experiences in [online forums](#). Unfortunately—as with many issues relating to reproductive health care—those with no first-hand experience of obstetric conflict are generally less inclined to view it as a pressing problem that needs immediate attention.

In the past decade, however, several legal scholars—among them, [Jamie Abrams](#), [Farah Diaz-Tello](#), [Linda Fentiman](#), [Michele Goodwin](#), [Margo Kaplan](#), and [Sylvia Law](#)—have focused on legal issues that directly or indirectly relate to obstetric violence. Their scholarship addresses the trope of maternal-fetal conflict, state interests in fetal protection, the criminalization of mothers and pregnant women, women's rights to informed choice, and the challenges in securing tort recovery when a patient's autonomous medical decisions have been overridden.

Kukura's *Obstetric Violence* is a natural and necessary continuation of this line of scholarship. Although there is a substantial body of international scholarship about obstetric violence (a term that was originally coined in Latin America), Kukura is one of the first to recognize its prevalence in the U.S., and to explicitly use the term as a foundation for legal scholarship.

For those unfamiliar with the various forms of obstetric violence many experience during childbirth Part I of her article examines them in (sometimes shocking) detail. Kukura offers real-world examples like that of Kimberly Turbin, a laboring woman who vocally and repeatedly refused an episiotomy. In response to her refusals, her physician verbally berated her, and made twelve incisions in her perineum while she shouted “No! No! No!”

Although there are many anecdotal examples of experiences like Ms. Turbin's, empirical data quantifying the prevalence of obstetric mistreatment in the U.S. have ([until recently](#)) been scarce. However, Kukura astutely recognizes that this research gap "does not mean the problem is nonexistent or can simply be attributed to isolated rogue health care providers"—rather, "it reflects the extent to which it has been obscured from public awareness." (P. 768.)

In this article, Kukura makes two extremely important contributions to the literature on reproductive autonomy and legal mechanisms for protecting it. First, she enumerates the various structural problems within the U.S. medical system that contribute to mistreatment during childbirth. Second, she offers a thorough analysis of why traditional legal approaches—in particular, tort claims for malpractice or lack of informed consent—are powerless to prevent or remedy these harms.

Kukura enumerates numerous challenges that victims face in bringing tort suits, including the fact that the harms they suffer are often intangible and/or difficult to monetize, making it almost impossible to find attorneys willing to take their cases; the difficulty of satisfying each of the elements of an informed consent claim, even if a victim alleges that her consent was coerced; and the bias exhibited by many legal decisionmakers who conclude that the birth of a healthy child outweighs any dignitary harm a mother may suffer, effectively concluding that those who have experienced obstetric violence have no legally cognizable injury.

Kukura identifies various other sources of law, beyond tort, that might be helpful in preventing or remedying these harms, but she concludes that they too are likely to be inadequate. Her conclusion is that active public advocacy is the best way to address both law and medicine's inability thus far to address the phenomenon of obstetric violence.

In presenting the "lay of the land" of obstetric violence, Kukura has set up future scholars brilliantly for further inquiries into this problem. Social scientists will certainly be prompted to quantify the prevalence of obstetric violence and report on its real-world impact on women (such as the recently published [Giving Voice to Mothers](#) study). Tort and regulatory scholars may be drawn to explore other legal solutions that Kukura might not have considered fully, including the question of whether birth plans might be treated as advance directives (a question that is [already under exploration](#)). Questions about coerced consent might be guided by criminal law scholarship about the meaning of coercion in sexual assault cases. I very much look forward to reading the work that is inspired by Kukura's foundational article on this important issue.

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