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Penalizing Pregnancy: A Feminist Legal Studies Analysis of Purvi Patel's Criminalization

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Penalizing Pregnancy: A Feminist Legal Studies Analysis of Purvi Patel's Criminalization

by

Abby Schneller

A thesis submitted in partial fulfillment
of the requirements for the degree of
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DEDICATION

To my Papa. Thank you for reminding me to breathe.

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ABSTRACT

Purvi Patel is an Indian American woman who, in 2015, was the first U.S. citizen to be convicted under feticide statutes for allegedly attempting her own abortion. Though her 2015 conviction was overturned the same year, the feticide conviction was significant as a legal precedent as well as part of a larger trend criminalizing pregnant women of color. With an eye towards the greater pattern of the criminalization of other pregnant women of color (Boyd, 1999; Faludi, 1991; Humphries, 1999; Mahan, 1996; Roberts, 1997), in this thesis I employ a feminist legal studies methodology and the theoretical frameworks of intersectionality (Crenshaw, 1989, 1991) and Reproductive Justice (Ross and Solinger, 2017; Silliman et al., 2004) to analyze five pro-Patel briefs, two from Patel's appellate lawyers and three from amici curiae. The four themes present are: fetal personhood; racialized gender; medical privacy and trust; and surveillance, knowledge, and legitimacy. I argue these briefs were not always consistent with the tenets of intersectionality and Reproductive Justice, even as the briefs may have been effective in convincing the Court of Appeals to overturn Patel's conviction. I conclude with a discussion of the implications of Patel's case for public health and law. I suggest that criminalization of abortion is harmful to public health and that the feticide mandate as it stands now does not do what it was intended to do, which is to protect the pregnant woman from harm.

INTRODUCTION

In 2013, a first-generation Indian American woman named Purvi Patel was charged by the State of Indiana with feticide and child neglect for allegedly self-aborting her fetus, and in 2015, she was convicted of the same charges. This was the first time in the State of Indiana and in the United States that a pregnant woman was convicted for killing her own fetus. As such, Patel's was a landmark case that garnered national attention. Despite the significance of the case, scholarship on Purvi Patel and her trial has not been forthcoming. This paper addresses that gap. Situating her case historically in the context of prosecuted pregnant women and mothers of color, I analyze documents from Patel's case and appeal. Recognizing Purvi Patel as part of a larger U.S. trend criminalizing pregnant women and mothers of color serves to highlight how her case is both unique and an escalation of an existing pattern. I argue Patel's case reflects a history of discrimination and prosecution of pregnant women and mothers of color for crimes related to their pregnancies, is an improper legal use of statutes meant to protect vulnerable persons, and accords the fetus greater rights of personhood than the woman carrying it. These legal issues reveal the problematic politicization of reproductive rights in the United States in general and the unacknowledged particular consequences for women of color.

To address questions about my positionality, I want to note that I am a cisgender, middle-class white¹ woman within the academy. I also am a reproductive rights advocate. In addition, I

¹ Though APA style calls for a capitalization of races, ethnicities, and nationalities, I do not capitalize white as a political choice and a subversive act because I believe that existing power structures already privilege whiteness. To capitalize white, particularly in a paper about a woman of color, seems inappropriate.

lived in Indiana during Patel’s trial. I have vivid memories of the case; I was just starting to develop my political and feminist consciousness while watching this case unfold. Thus, this paper in some respects is a return to my roots, both to my roots as a feminist and the place I call home.

Word choice matters. I have had to make difficult decisions about terminology, as the language I use can frame the analysis in distinct ways. For clarity’s sake, I use the language of the legal documents in my analysis, which often assumes a live birth, when specifically talking about or summarizing the documents. This includes referring to Purvi Patel’s fetus as “the baby,” and the event in question as “birth” and “death” of that “baby.” However, when making my own claims, I use terminology such as “fetus,” “loss of pregnancy,” and “unborn.” I do this because I argue that there was not enough evidence to show conclusively that the fetus was born alive, and using the terminology of “baby” and the like affords the fetus personhood, which has negative implications for reproductive rights. Similarly, I use the term “pregnant women” instead of “mothers,” unless citing a source or a particular concept (such as “mother blame” or “crack mothers”). I do this in order to prioritize the woman’s identity and also avoid labeling women as “mothers” if they do not identify as such. I have also considered my use of the word “women” instead of “person” and the implications of this language for my thesis. I think that although there are negative implications of criminalized pregnancy for all individuals who can become pregnant, regardless of whether they are women, the criminalization of pregnancy is rooted in racialized misogyny. For the purposes of this thesis, I believe the use of “women” is more appropriate and speaks more to the ways in which pregnancy is a tool used to control the lives of cisgender women, particularly women of color.

Though I try to make the language of this paper accessible to the average person with no legal training, some parts, specifically quotes of legal texts, might be more complex. Some legal clarifications regarding Purvi Patel's case: Class A felonies carry the greatest punishment, followed by Class B, Class C, and Class D. The main difference between Class A and Class D felonies is sentencing; a Class D crime carries far more reduced sentencing than a Class A. In the State of Indiana, Class A felonies carry a sentence of 20-50 years; Class B felonies receive 6-20 years; Class C gets 2-8 years; and Class D can result in between 6 months to 3 years in prison. Fines for felonies can reach \$10,000. In Indiana, misdemeanors can result in up to a year in jail and \$5,000 fines (Indiana Criminal Charges, n.d.).

My thesis starts with presenting the relevant details of the case, mostly acquired from the appeal document (*Purvi Patel v. State of Indiana*, 2015). I then discuss the U.S. political climate toward reproductive rights post-*Roe v. Wade* (1973), some of the ways in which women of color have been criminalized in recent years, legal restrictions on abortion providers and subsequent reduced accessibility of abortion, and, finally, fetal personhood and the repercussions of its use in feticide laws. Next, I explain my theoretical frameworks, including intersectionality (Crenshaw, 1989, 1991) to account for the ways race and gender interacted in Patel's treatment by police, hospital staff, and legal professionals. I also use Reproductive Justice, a theoretical framework that asserts the unique perspectives of women of color are not incorporated into the reproductive laws that directly affect them. "As activist, scholar, and co-author Loretta Ross puts it: 'Our ability to control what happens to our bodies is constantly challenged by poverty, racism, environmental degradation, sexism, homophobia, and injustice in the United States'" (Silliman et al., 2004, p. 11). I approach this thesis with a feminist legal studies methodology to analyze five pro-Patel briefs from her lawyers and amici curiae, or friends of the court. My goal in analyzing

these documents was to determine some of the legal arguments used on behalf of women in cases like Patel's and to determine if these arguments are consistent with Reproductive Justice and intersectionality. I conclude this thesis by asserting that Patel's case codifies the legal mechanisms by which the state can charge a woman with feticide, as well as "distributing drugs to a minor, child abuse and neglect, reckless endangerment, manslaughter, and assault with a deadly weapon" (Roberts, 1997, p. 153), in other words, criminalize her reproductive decisions. Moreover, I argue that these processes affect women of color at greater rates than the general population of women. Going forward, then, I will use the term "criminalizations" in the plural to underscore the multiple ways in which the legal system disproportionately criminalizes women of color for their reproductive choices.

BACKGROUND

It started with a text: “[C]ramps coming n going, my cycle is changing completely due to all the stress I been under lately so not sure when my period is coming but still feeling the pain[.]”² That initial text was sent by Purvi Patel to her friend, Felicia “Fay” Turnbo on April 15, 2013. Over the next couple months, Patel continued to text Turnbo, a medical assistant, about her concerns. Patel mentioned she had been spotting and cramping for two months at this point but thought it was due to stress. About a month later, she was still experiencing cramping but mentioned that her period wouldn’t start. When Turnbo told Patel she should see a doctor, Patel texted back, “[D]on’t like docs lol! I think [the cramping]’s cuz of all the stress my body been goin thru physically n mentally[.]” Two weeks later, Patel texted Turnbo that she thought she might be pregnant but hoped not. Another week passed, and Patel took a pregnancy test that took “less than a minute” to show a positive result. Turnbo again encouraged Patel to go see a doctor, but Patel protested, texting, “I rather not even go to a doc...just wanna get it over with[.]”

While Turnbo continued to tell Patel she should see a doctor, Patel instead was researching solutions online to end her pregnancy. Turnbo suggested she go to a clinic in South Bend that had “the pill for that” for “300-400 [dollars] or something like that.” Patel responded, saying “But it’s only within 60 days...I might be over that[.]” Later that day, she went online and

² This paper references text messages between Purvi Patel and Felicia “Fay” Turnbo; for the full copy of the appeal document that outlines a majority of these texts, visit this webpage: <https://www.in.gov/judiciary/opinions/pdf/07221601tac.pdf> (*Purvi Patel v. State of Indiana*, 2015).

ordered mifepristone and misoprostol³ from a pharmacy in Hong Kong for a total of \$72. Patel texted Turnbo about how she wanted the father of the child as well as the child “outta [her] life[.]” The father was a married employee of the restaurant Patel managed, Moe’s (*Purvi Patel v. State of Indiana*, 2015). On July 1st, Patel texted that her “package came,” but she waited until July 10th to start the process of taking the drugs because of a conference in Chicago she had to attend.

From July 11 to the 13, Patel texted Turnbo saying that she had been experiencing intense cramps and intermittent bleeding. By the 13th, Patel told Turnbo she was trying to go to the hospital “but [couldn’t] get off the bed to get dressed[.]” Turnbo told Patel that Patel needed to get to a hospital and asked if she was going to go. Patel replied, “Want to but can’t drive.” About 30 minutes later, Patel texted Turnbo saying “Just lost the baby” and shortly after, “Imma clean up my bathroom floor n then go to Moes[.]” Patel told Turnbo that the fetus was “starting to form a lil,” but it was in actuality close to a foot long and a little less than a pound and a half (*Purvi Patel v. State of Indiana*, 2015). Patel cut the umbilical cord, which caused the fetus to bleed out⁴, placed it in a plastic bag and left it in the dumpster behind Moe’s, and drove herself to the hospital.

When Patel arrived at the hospital, the doctors found a part of the umbilical cord hanging out of her vagina, the placenta attached to her uterine wall, and her uterus filled with blood.

³ Misoprostol is generally used to decrease the risk of stomach ulcers, but side effects for pregnant women include spontaneous abortion, birth defects, or premature birth (Misoprostol, 2017). Mifepristone is solely used to end a pregnancy. It works by blocking progesterone, which is necessary for pregnancy to continue (Mifepristone, 2017). In order to induce a miscarriage, the pregnant woman is to take the mifepristone first, then 24-48 hours later, take the misoprostol. The whole process may take up to 15 days and bleeding can last up to 3 weeks (Mifepristone and Misoprostol, n.d.).

⁴ The fetus was drained of virtually all blood due to the cutting of the umbilical cord, but this was not necessarily the cause of “death.” The evidence remains inconclusive as to whether the fetus was “born alive,” (*Purvi Patel v. State of Indiana*, 2015).

Based on the size of the umbilical cord and the placenta, doctors estimated there must have been a baby and that it potentially might have been far enough along to still be alive. Patel ended up telling police where the fetus was located. Atypically, her doctor left the hospital to participate in the search along with the police. They eventually found the fetus and arrested Patel for child neglect, later adding the charge of feticide. After facing a jury in court, Patel was convicted on both counts. She spent over a year in jail before she was able to appeal her case, have her conviction overturned, and be released from jail.

The details of Patel's case show a lack of trust in the medical system, which is common among people of color. This lack of trust is not without reason, as her doctor was the person who reported her to the authorities. Patel's case and the language in the pro-Patel legal documents is something I will address extensively in the analysis. First, however, I set up the literature relevant to Patel's case. I give a historical background to the politics of reproduction and the history of criminalization of pregnant women of color, restrictions on reproductive choice, fetal personhood, and feticide statutes, as relevant to Purvi Patel and my analysis of the pro-Patel documents of her case.

HISTORICAL CONTEXT AND CHRONOLOGY OF LEGAL CONCEPTS

My argument analyzes Patel's case from legal and historical perspectives, investigating how women of color have historically been criminalized for their actions during pregnancy. This literature review begins by introducing the New Right in the Reagan era, which sets the background for crack mothers as criminalized pregnant women of color. In response to the feminist gains achieved in the 1960s and 1970s, the United States saw a new conservative resurgence in the form of the New Right, a group whose goals were systematically to roll back women's reproductive rights, specifically to reverse *Roe v. Wade* (1973). I continue by discussing *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), hereafter referred to as *Casey*, which in 1992, changed *Roe v. Wade*'s trimester framework for restricting abortion to the "undue burden" model (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992; *Roe v. Wade*, 1973), upon which all TRAP laws are founded. TRAP laws, or targeted regulation of abortion providers, have been the conservative political tool of choice for testing the court's tolerance for "undue burden" at the state level since *Casey*. Of particular interest in the present study are TRAP laws that establish the fetus as having the same rights as a person, also known as fetal personhood. If conservative anti-abortion activists, including elected state legislators, can argue that a fetus is a person, then it is a small step to charging a woman who aborts with feticide. Indeed, the 2004 Federal Unborn Victims of Violence Act, enacted under the George W. Bush administration, served to afford personhood to fetuses even at the moment of conception, all under the guise of protecting pregnant women. This idea of protecting the

health of pregnant women has also been an anti-abortion strategy for enacting TRAP laws that restrict access to reproductive healthcare beyond abortion. Any restriction to healthcare disproportionately affects women in poverty, who are overrepresented by women of color. Viewed from a Reproductive Justice framework, then, Purvi Patel's case exemplifies the intersection of women of color's bodies with the state's intervention into women's reproductive freedoms.

The New Right and Reagan Reproductive Politics

As women began to gain ground with more progressive policies, primarily the approval by Congress of the Equal Rights Amendment in 1972 as well as the 1973 Supreme Court decision to legalize abortion, the United States faced a resurgence of regressive ideology put forth by the so-called neo-conservatives or New Right (Faludi, 1991). This was a group of religious individuals, many of whom were "rural fundamentalist ministers" with decreasing congregations who saw themselves not as defenders of a current way of life but as reviving a past one (Faludi, 1991, p. 230-231). The New Right saw the "feminist agenda" as a direct threat to their sense of power in society and attributed various social ills, including a struggling economy and falling international reputation, to the "liberal-progressive moral decay" (Golombisky, 2006, p. 104). The New Right then framed their political aims and strategies as a response to the perceived successes of feminists (Faludi, 1991). A main result of their impact on the Republican Party during the 1980 election was transforming their platform to include opposition to the ERA and legal abortion. Ronald Reagan, the chosen Republican candidate, was the first president to oppose the ERA since its passing by Congress and the first to support a total abortion ban, which even included some types of birth control (Faludi, 1991, p. 236).

The New Right's rhetorical strategy cloaked its discomfort and distrust of women's movements and feminists in a language that romanticized an idealized white patriarchal past and nuclear family that never existed. With a slight linguistic change, the New Right purported to be pro-life, pro-family, pro-chastity, and pro-motherhood, instead of anti-women's liberation (Faludi, 1991). Changing the language was a successful marketing technique that painted conservatives as more than a "backlash." As Faludi (1991) wrote, "Now [they were] in charge—and the feminists would have to react to [their] program," (p. 238). However, during that period, their real agenda became apparent as supporters of the New Right "torched inhabited family-planning clinics," and neo-conservative politicians opposed nearly every federal assistance program that was meant to serve mothers, "from prenatal services to infant feeding programs," (Faludi, 1991, p. 239).

A major reason for the opposition to federal assistance programs was the trope of the "welfare queen," an image in the mainstream white American imagination of a Black mother on welfare who intentionally reproduces over and over in order to increase her monthly allotment from the federal government (Hill Collins, 2000). This cultural image is a powerful one: Roberts (1997) notes, "A 1990 study found that 78 percent of white Americans thought that Blacks preferred to live on welfare" (p. 17). The image of the welfare queen is synonymous with an image of Black hyperfertility and a "culture of poverty" (Roberts, 1997, p. 18). In the white political narrative, the children so-called welfare queen births do not inherit a work ethic and thus do not become productive members of society. Poverty, drug use, unemployment, and other social ills that impact Black families at disproportionate rates, are all her fault, rather than the fault of policies that systematically oppress Black people (Roberts, 1997). This "controlling

image” (Hill Collins, 2000) is closely tied to and interconnected with crack mothers, another stereotype of Black women that blames them for the social ills that plague their communities.

Crack Mothers

In the years of the Reagan presidency and neo-conservatism, mainstream news outlets began focusing on a “new drug epidemic” sweeping the nation: crack cocaine. This drug was an easy way to “legally” target and persecute Black Americans, as its use was primarily restricted to inner cities (Roberts, 1997). It was also particularly suited to the criminalization of Black women, as “approximately half of the nation’s crack smokers are female,” (Roberts, 1997, p. 155). Many of these women addicted to crack were pregnant or of childbearing age (Roberts, 1997). It is noteworthy, then, that crack and powder cocaine (more known for use among wealthier white people) had a 100-to-1 sentencing disparity until 2010’s Fair Sentencing Act, which reduced the disparity to 18-to-1 (“The Fair Sentencing Act corrects a long-time wrong in cocaine cases,” 2010, Fair Sentencing Act, 2010). In other words, prior to 2010, five grams of crack carried the same 5-year federally mandated obligatory sentence as 500 grams of powder cocaine (Vagins & McCurdy, 2006). Additionally, some laws specifically targeted pregnant women: “[I]n the early 1990s the justice system stepped in and attempted to criminalize drug use during pregnancy...A drug-using pregnant woman faced arrest and potential incarceration for delivering drugs to a minor,” (Murphy & Rosenbaum, 1999, p. 11). Using drug transportation laws against pregnant women was a legal way to punish them, mainly women of color who were addicted to crack, for exercising their reproductive freedom to become pregnant.

By 1999, Boyd wrote that “regulation focusing on cocaine use emerged in the 1980s,” and that “legal sanctions against maternal drug use [in the United States] have been initiated by

thirty states since the mid-1980s” (p. 25). Of the women arrested for violations of these statutes, most of them were taken in “based on ‘allegations’ of illicit drug use during pregnancy” (Boyd, 1999, p. 26). Moreover, these women were prosecuted under statutes not meant to be used for pregnant women using drugs, such as “distributing drugs to a minor, child abuse and neglect, reckless endangerment, manslaughter, and assault with a deadly weapon,” (Roberts, 1997, p. 153). Much like Purvi Patel, “many of these cases involve doctors who contacted legal authorities about the mothers’ suspected illicit drug use” (Boyd, 1999, p. 26). Though individual intentions of the doctors cannot be known, it is noteworthy that women of color are disproportionately reported to authorities by their doctors. Today, documentary director Tamarkin (2017) suggests the rise of faith-based hospitals increases a woman’s risk of being reported to police for being suspected of harming their fetus, without the woman’s knowledge or consent. This practice results in not only another form of social control in the lives and reproduction of women of color in the United States, but also draws in legal issues of privacy, particularly with regard to doctor-patient confidentiality. Purvi Patel drove herself to a faith-based hospital, but most of the hospitals in her area were faith-based, as she worked five minutes away from a major Catholic university, Notre Dame.

Humphries (1999) writes that the statistics suggesting Black women’s use of drugs/cocaine during pregnancy are higher than white women’s might be inaccurate due to the fact that “private physicians would have hesitated to alienate their patients—who were disproportionately white—by reporting their drug use to health authorities” (Humphries, 1999, p. 51). This is very different from Patel’s case and other cases regarding women of color being reported by their doctors for their alleged mistreatment of their fetuses (Boyd, 1999). Later, I argue that the practice of reporting patients to authorities constitutes a violation of privacy,

particularly in Patel's case, as the doctors freely offered information to law enforcement without Patel's consent or a subpoena.

Surveillance, Mother Blame, and the “Bad Mother”

The violation of Patel's right to medical privacy is directly related to the surveillance women of color face in their everyday lives. Women of color and impoverished women are more likely to experience more surveillance in their lives in the form of social systems, like the healthcare system and the criminal legal system, as well as by empowered individual actors, like doctors, social workers, and parole officers. This effect is compounded when women are pregnant. Johnson (2000) explains that for pregnant women, anyone, including friends, family, and strangers, is permitted to surveil the pregnant woman's everyday behaviors and actions. This surveillance creates a system of social control in the pregnant woman's life: “As medicine and psychology document the importance of prenatal experience, a pregnant woman's actions come under closer and closer scrutiny; as these scientific discourses become widely known, they adhere to efforts by the state to control women's actions” (p. 174).

One result of this surveillance is the creation and promotion of an ideal picture of a “Good Mother,” as directly contrasted with the idea of what makes a “Bad Mother” (Hughes Miller, Hager, & Jaremko Bromwich, 2017). The Good Mother always puts her children before herself, is endlessly supportive and caring, and as a cultural motif, is not really ever achievable. The Bad Mother can be many things, but generally serves the purpose of shaming and controlling women's reproductive decisions. The authors argue, however, that both tropes are used for surveillance and social control of women. A related tactic of control is blaming mothers for virtually anything that goes wrong with their children. Mother blame is a theme in Patel's

case as well, which I will discuss in more detail later in my analysis. In Patel's case, mother blame manifests itself in arguments that Patel had a responsibility to save her fetus, even as Patel's own health at the time was severe enough to seek emergency medical attention leading to emergency surgery. Hughes Miller, Hager, and Jaremko Bromwich (2017) explain the intersection of mother blame, the Bad Mother, and surveillance: "Mother blame is frequently the mechanism by which the Bad Mother trope is applied...which requires a surveillance culture within which such assessments [of harm/risk] can arise along with individual 'experts' willing to designate such behaviors as risky or harmful" (p. 8). This culture of surveilling women contributes to a culture in which women, and primarily women who are already seen as "Bad Mothers," can be criminalized for their reproductive actions.

Criminalizations of Pregnant Women and Mothers, Pre-Patel

Though Patel was the first to be convicted under a feticide mandate in the United States, there are many other women who were targeted and prosecuted for actions related to their pregnancies under different statutes. A report by Amnesty International about criminalized pregnancy noted there are two forms of criminalization: direct and indirect. Direct criminalization refers to laws that explicitly criminalize pregnancy, such as Tennessee's 2014 amendment to its fetal assault law, where legislators explicitly made women vulnerable to prosecution for "any unlawful act" with regards to their own fetuses (Amnesty International, 2017, p. 7). Indirect criminalization refers to laws that do not explicitly criminalize pregnancy but are nevertheless used against pregnant women to regulate their reproductive decisions, such as Indiana's feticide law (Amnesty International, 2017). A study conducted by Paltrow and Flavin (2013) reported on 413 cases of criminalized pregnancy between the years of 1973 and

2005, which they noted was likely an undercount due to the difficulty of searching criminal databases for criminalized pregnancy, confidentiality in cases of minors, lack of records about Native American tribal courts, and lack of media coverage of some cases. They detail several cases that they claim to be illustrative of the variety of ways in which women are criminalized.

In the first case that they name, a 21-year-old African American woman in South Carolina, Regina McKnight, suffered a stillbirth as a result of an infection. Prosecutors alleged that she caused the infection from her cocaine use and she was charged with homicide by child abuse. After 15 minutes of deliberation, the jury returned with a guilty verdict, though her conviction was eventually overturned in 2008 after she had served eight years of her 12-year sentence (Paltrow & Flavin, 2013). In another case, a Native American woman, Martina Greywind, was only 12 weeks pregnant when she was arrested in 1992 for reckless endangerment on the basis of subjecting her fetus to danger by inhaling paint fumes. Greywind, a 28-year-old homeless woman in North Dakota, was able to be released from jail in order to attend a medical appointment, where she obtained an abortion and subsequently filed for dismissal. The case was dismissed as requested, with the prosecutor reportedly stating it was “no longer worth the time or expense to prosecute her” (Paltrow & Flavin, 2013, p. 308). These are two examples of the types of cases Paltrow and Flavin analyzed in their 2013 study of criminalized pregnancies that demonstrate the varieties of ways in which women are forced, coerced, or otherwise stripped of their reproductive agency. In McKnight’s case, she spent 8 years in prison for an infection based on the assumption that the infection was as a result of drug use. In Greywind’s case, the prosecution threatened her with criminal charges and caused her to obtain an abortion in order to avoid prison.

Not explicitly mentioned in Paltrow and Flavin's study, Jennifer Johnson was another noteworthy case of the criminalization of pregnancy. Johnson, a Black woman, was charged with delivering drugs to a minor after "pass[ing] cocaine to her newborn child through the umbilical cord after the baby was delivered, but before the cord was cut" (Feinman, 1992, p. 204). She was convicted and sentenced to "fifteen to twenty-four years probation, mandatory drug rehabilitation, drug and alcohol prohibitions, [and required to] report subsequent pregnancies to her probation officer and to enter a court-approved prenatal care program" (Feinman, 1992, p. 204). Johnson's case is significant as it demonstrates how pregnancy is used to criminalize a woman's actions. It also highlights the racist propensity to target women of color and restrict their ability to have children as they choose. Johnson's case also demonstrates how non-law enforcement sometimes is complicit in the criminalization of pregnant women. Humphries (1999) notes that "a social worker had violated patient confidentiality and turned over Johnson's medical file to Seminole County prosecutors" (p. 76). All this shows how various actors surveil pregnant bodies and contribute to their criminalizations. The fact that Johnson was also required to report future pregnancies to her probation officer represents a prime example of the surveillance involved in managing pregnant bodies.

Bei Bei Shuai's criminalization is perhaps the most relevant to Patel's case as Shuai's case directly preceded Patel's and also took place in Indiana. Shuai was 33 weeks pregnant when she ingested rat poison in an attempted suicide (*B.S. v. State of Indiana*, 2012). Her suicide was not successful, and she was taken to the hospital by a friend, where she underwent an emergency caesarian section. The infant was transferred to the neonatal intensive care unit where it later perished. Shuai was charged with murder and attempted feticide on March 14, 2011 (*B.S. v. State of Indiana*, 2012). However, she was offered and accepted a plea deal for criminal recklessness

in 2013 (Penner, 2013). Because Shuai's case was widely publicized, it is not a stretch to suggest Patel might have been aware of Shuai's case. Regardless, Patel's criminalization in Indiana must be interpreted against the backdrop of Shuai's criminalization.

Abortion Rights, Undue Burden, and TRAP Laws

While the conservative movement was arguing for "family values" for white families and rolling back public assistance for "welfare queens," they were also systematically enacting state laws to test the courts' willingness to define "undue burden" in terms of access to abortion. In *Roe v. Wade* in 1973, the Supreme Court justices established a three-trimester approach to regulating abortion, with the third trimester allowing the most state regulation and the first trimester allowing no state intervention in access to abortion (Medoff, 2010). However, in a 1992 decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court adjusted its previous decision, rejecting the trimester framework and instead adopting a "no undue burden" policy on abortion restrictions (Medoff, 2010). Undue burden refers to a "substantial obstacle" placed in a woman's path to obtaining an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992). Though *Casey* made it national law that no "undue burdens" could be placed on the accessibility of abortion, this Supreme Court decision, as well as *Roe v. Wade*, had varying impacts on communities of color than on white communities. Meanwhile, in 1977, the Hyde Amendment that banned, and later restricted, federal funds for abortion went into effect, as a result of early anti-abortion conservative politics. In practice, this Amendment meant that working class women who depended on Medicaid were unable to access abortion without paying out of pocket. TRAP laws, then, under the pretense of concern "for the health of the mother," purposively and systematically function to restrict access to abortion in

order to test the courts' willingness to draw a line defining "undue burden" on those seeking abortion.

Prior to *Roe v. Wade*, women without means to legal abortion often would attempt to self-abort if they chose not to proceed with the pregnancy. Nelson (2003) lists some methods women used to self-abort, including intentionally falling down flights of stairs, hitting oneself in the stomach, consuming poisonous substances, or inserting objects into the uterus that were toxic or piercing (p.9). She notes, "Some of these women arrived at the hospital emergency room bleeding profusely hoping that a physician would complete the procedure" (Nelson, 2003, p. 9). While *Roe v. Wade* improved these conditions by making legal abortion more accessible, women of color and women in poverty are still often in a position where they do not have access to safe abortions due to TRAP (targeted regulation of abortion providers) laws.

Since *Roe v. Wade*, conservative lawmakers and special interest groups have organized to systematically roll back access to abortion until it is virtually inaccessible by proposing extreme and often irrelevant restrictions on abortion and those who provide it. These restrictions are referred to as TRAP laws and can mean anything from dictating the width of the hallways in abortion clinics and requiring doctors have privileges at a local hospital to mandating waiting periods of several days for women who wish to have abortions. The most common TRAP laws are those that: refuse to fund abortion for working class women on Medicaid, require minors (under 18) to involve their parents in their pregnancy decision, demand a waiting period of 24 hours or longer to have an abortion, and compel doctors to "counsel" their patients about the risks of abortion (often using knowingly inaccurate information) (Medoff, 2009).

TRAP laws often appear to be unimportant or mundane but are, in actuality, closing the doors of abortion providers at shocking rates. Medoff (2009) studied the effects of TRAP laws on abortion providers and found that states with TRAP laws saw a statistically significant increase in closures of abortion providers as opposed to those without TRAP laws. As more abortion providers have to close their doors, fewer people have access to abortion, as they can end up having to travel significant distances, even across state lines, to access a clinic, something many women, particularly women with limited means, cannot afford to do. This is especially problematic where mandatory waiting periods are law because women might have to take off multiple days of work, creating even greater barriers to accessing a safe and legal abortion (Porter, 2016).

Agostinone-Wilson (2014) lists some examples of laws, some passed and some not, that utilize this restrictive strategy, including, for example, laws that require women: to view ultrasound images of their wombs before an abortion, receive transvaginal ultrasounds, and listen to doctors give inaccurate information about the so-called dangers of abortion, among others. Bills that outlaw contraception as well as abortion have also been proposed claiming that fertilized eggs are people, thus awarding complete personhood to these beings yet to become, often at the expense of the pregnant woman rather than protecting her. These laws are unnecessarily restrictive, as none of these are medically necessary and the cost of following these rules can be prohibitive for lower-income women to obtain an abortion. The laws can also be traumatic for some women, as it is not medically necessary to require women to have ultrasounds, particularly invasive transvaginal ultrasounds, which can be distressing for women who have been victims of sexual assault (Agostinone-Wilson, 2014).

In Indiana, legislators proposed and passed particularly troublesome, and I would argue punitive, restrictions to abortion, for example: “an...ultrasound bill that would require women to receive two trans-vaginal probes (before and after) in order to receive the RU-486 pill⁵... The use of probes is medically irrelevant since a blood test could verify that a pregnancy had been ended” (Agostinone-Wilson, 2014, p. 21). Since Patel’s case, Indiana senators proposed and passed HEA 1337 in March of 2016. This law included many unreasonable restrictions, including (but not limited to): requiring fetuses lost as a result of abortion or miscarriage to be buried or cremated; prohibiting abortion based on race, sex, national origin, etc., of the fetus; and mandating an 18-hour waiting period between initial consultation (in which the doctor is required to inform the patient of alternative options to abortion as well as to offer the patient the option to see an ultrasound or hear the fetus’s heartbeat) and actual appointment for the abortion (House Bill 1337, 2016). Despite its passing, HEA 1337 was halted by a federal judge before it could take effect (Wang, 2016). On January 9th, 2017, an Indiana legislator, Republican Rep. Curt Nisly, proposed a total abortion ban, including in cases of rape, incest, and maternal health risk, though it failed to pass because Republican Rep. Ben Smaltz, the chair of the House Committee of Public Policy, turned it down for a hearing (Indiana 'Protection of Life' Bill, 2017; Cox, 2017). Even after Patel’s exoneration, Indiana’s legislators continue to test “undue burden.”

Previously a Ku Klux Klan hub, Indiana has never been a very progressive state. Indiana’s laws, courts, and constitution placed people of color in a “separate but unequal place” (Bodenhamer & Shepard, 2006, p. 40). Governor Mitch Daniels was Indiana’s predecessor to Governor Mike Pence, who was the governor in Indiana at the time of Patel’s criminalization. As governor, Daniels mostly promoted “budget cuts,” including slashing federal funding for

⁵ The RU-486 pill is mifepristone.

Planned Parenthood and privatizing welfare (LoBianco, 2013). Daniels' cuts, often against the interests of financially insecure Indiana citizens, set the stage for an even more socially conservative governor who would go on to pass a host of mandates that negatively impacted the lives of Indiana residents. Pence passed a religious freedom mandate that allowed companies to refuse service based on "religious beliefs" (Phillips, 2016). He blocked needle exchange programs that could have ameliorated an HIV outbreak in 2014 due to a "moral opposition" to such programs (Twohey, 2016). He also signed eight anti-abortion bills into law in his four years as governor (Berg, 2016). His actions as governor certainly also affected the political climate during Patel's case.

Medical Abuse of Women of Color

Patel mentioned to Turnbo multiple times in their text conversation that Patel did not like doctors and did not want to go to the doctor. This attitude is consistent with many people of color, who have a long history of abuse by the medical community. Perhaps most notorious, the Tuskegee Syphilis experiment was a 40-year study that "involved the intentional deception and denial of treatment of the research subjects" who were all Black men (Brandon, Isaac, and LaVeist, 2005, p. 951). Impoverished Black sharecroppers in Alabama were infected with syphilis and told they were being treated when actually the doctors were not treating them; instead they were watching the disease progress and performing autopsies when the men died (Washington, 2008). This experiment is the most infamous, but it is important to note that racial discrimination in medical care continues today, and the Tuskegee Syphilis Experiment is not the only reason people of color do not trust medical professionals. Washington writes in *Medical Apartheid*: "[I]t is a mistake to attribute African Americans' medical reluctance to simple fear

generated by the Tuskegee Syphilis Study, because this study is not an aberration that single-handedly transformed African American perceptions of the health-care system. The study is part of a pattern of experimental abuse...” (2008).

Included in that pattern of abuse is the story of Henrietta Lacks, a working-class Black woman who was diagnosed with cervical cancer in 1951. She had a tumor on her cervix that grew exponentially in the last months of her life. Lacks’ cells, called HeLa cells, were unique in that, provided they had food and warmth, they could survive and reproduce at high rates, as opposed to other cells that would frequently die hours or days after taking a sample. Doctors took a sample of the cancerous tissue without her knowledge and these cells continue to be used for scientific research today. HeLa cells have transformed science and medicine; Skloot’s (2010) book about Lacks explains: “The reason Henrietta’s cells were so precious was because they allowed scientists to perform experiments that would have been impossible with a living human. They cut HeLa cells apart and exposed them to endless toxins, radiation, and infections” (p. 58) The scientists’ supplies of HeLa cells were unlimited and generated an “incalculable amount of money” (Axelrod, 2010). And they continue to make money; as Skloot (2010) notes, “If the cells died in the process, it didn’t matter—scientists could just go back to their eternally growing HeLa stock and start over again” (p. 58).

Despite the revolutionary scientific progress using HeLa cells and the amount of money generated from her cells, her family still has not seen any profits and cannot afford health insurance. Lacks’ story epitomizes the power imbalances and betrayals of trust women of color experience in their encounters with the medical system. Additionally, while there is no literature explicitly about Indian American women and their experiences with doctors, brown women certainly experience racial discrimination, and it is not a stretch to suggest that Purvi Patel’s

racialization contributed to her resistance to going to a doctor. In fact, a 2017 report from the National Asian Pacific American Women's Forum concludes that Asian American and Pacific Islander (AAPI) populations lack trust for medical providers: "Moreover, increased criminalization, detention, and deportation of immigrants over the past decade have created fear and distrust within AAPI immigrant communities, resulting in reduced access to health care" (p. 16).

Fetal Personhood

Patel, in addition to being charged with feticide, was also convicted of child abuse, a record that was not overturned in her appeal. I will deal with the contradiction of abusing a child that died of feticide in my analysis. At present, however, the possibility that Patel could be charged with child abuse of a fetus segues to the concept of fetal personhood, which refers to the idea that fetuses are individual human entities, separate from the pregnant woman. Fetal imagery technology has strengthened this idea. Anti-abortion activists made use of fetal sonograms to shift abortion rhetoric much like the linguistic tactic of using "pro" in pro-life used by the New Right to alter public opinion. By using the developing technology to capture these fetal images, anti-abortion activists were able to shift the way in which people talked about abortion from an abstract medical condition to "a baby." As Sasson and Law (2009) write, "Imaging (and subsequently imagining) the fetus in this context leads to very strong, easily manipulated emotive responses" (p. 5). Petchesky (1987) emphasizes that the United States is a visually-oriented culture, and as such, with the use of fetal sonograms and often graphic images of aborted or miscarried tissue, anti-choice activists switched their focus from legal discourses to a "more long-term ideological struggle" over the symbolism and meaning of a fetus.

Before fetal sonograms became commonplace, the fetus was located in the imagination, unable to be seen. Fetal sonograms created a picture in which the uterus, the home of the fetus, was imagined as separate from the pregnant woman: “So long as the fetus is not “seen” or visually emphasized, it remains a liminal, transient, and obscure entity,” as an incomplete being. (Sasson & Law, 2009, p.5) This separation often made it possible to visualize the interests of the pregnant woman as separate from the “interests” of the fetus. Oaks (2000) argues: “Images of the fetus as autonomous threaten to overshadow the significance of pregnant women's bodies in the reproductive process, devalue the relationship between pregnant women and their fetuses, and represent women as adversaries of their babies-to-be” (p. 63-64). When women are represented as an “adversary” to their fetus, one result is the personification of the fetus, often at the expense of the pregnant woman’s interests. As Sasson and Law (2009) write:

By visually imaging the fetus, however, be it in vivid color on the cover of *Life* magazine, in a hazy grayscale sonography printout fawned over by expectant parents, or in manipulated images produced by antiabortion activists, one easily concludes that it exists independently, as a being already become. (p. 5)

Personifying the fetus in this visual manner has legal implications. As previously noted, anti-choice activists used these images to pass new restrictions on reproductive laws. These include anti-abortion laws and restrictions, as well as laws regarding drug use while pregnant and feticide laws. In these cases, the fetus is usually legally regarded as a child. Some note this practice is a legal “slippery slope,” as it sets a precedent for fetuses to be regarded as a child under the law in other cases, perhaps even abortion statutes (Mahan, 1996, p. 38). Mahan (1996) goes on to describe fetal abuse laws intended to criminalize the woman carrying the fetus. These laws, in addition to affording the fetus personhood, are problematic because they paint the

pregnant woman as a danger to her fetus. This idea of “mothering” as dangerous, risky, or against the interests of a fetus plays into the “Bad Mother” trope, which serves to constrain women’s freedom to make parental choices (Hughes Miller, Hager, & Bromwich, 2017). The “Bad Mother” trope, such as the myth of “crack mothers,” justifies state intervention for the protection of the “child.” In Patel’s case, that intervention led to a charge of child abuse on a fetus.

While individual states are legislating fetal personhood, the courts have not been as persuaded in litigation. But, for feminist legal scholars, the legal flaw is that fetal personhood laws grant more rights to the fetus than the pregnant woman (Mahan, 1996, p. 39). The issue of whose rights are given more legal weight and privilege when fetuses are afforded personhood in general and in Patel’s case specifically is something I will address in more detail in my analysis and discussion.

Feticide

Feticide laws were originally intended for pregnant women as an additional legal protection against violence. There are records of maternal protection laws as early as the Babylonian Code of Hammurabi⁶, throughout the 18th century BCE, that offer retribution for causing the loss of a pregnancy (Murphy, 2014). Throughout Western history, these laws have used the “born alive” rule, in which causing the loss of a pregnancy was sometimes punished but not generally considered homicide unless the child was “born alive.” With medical advances, however, some state legislators have argued that the “born alive” rule did not adequately punish violence against unborn fetuses. As more state legislators passed their own bills into laws

⁶ The code of Hammurabi is popularly understood as the oldest surviving law code, though some note it is closer to a penal code because most offenses have some form of penalty attached (Lyon, 1904).

prosecuting injury/death of a viable (able to live on its own, regardless of whether it was “born alive”) fetus as homicide, U.S. federal legislation proposed and passed the Unborn Victims of Violence Act in 2004 (Murphy, 2014).

This law states that anyone causing the death of, or bodily injury to, “a child in utero” is guilty of a separate offense, in addition to the violence done to the “mother” of the “child” (Unborn Victims of Violence Act, 2004). This landmark Act created a federal mandate for feticide, as it established guidelines for dealing with violence that causes harm to a fetus, intentionally or unintentionally. Although it “officially” provides exemptions for abortion providers and other medical personnel as well as for the “mother” of the “child,” the language of the law is controversial. Specifically, the part that defines the term “unborn child” is troubling; the Act uses the term “unborn child” to refer to fetuses and notes that this includes fetuses “at any stage of development” (Unborn Victims of Violence Act, 2004). This language, like the visualization of the “baby” in the sonogram, is significant because it provides legislated legal precedent for personhood discourse from conception. In addition to referring to a fetus as a child, which, as mentioned previously, opens a legal avenue to characterize a fetus as a child under the law, it also affords the fetus the same right to bodily autonomy as the woman carrying it. The law states: “the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child’s mother” (Unborn Victims of Violence Act, 2004). This language sets precedent for other laws to place the legal rights of a fetus—again, at any stage of development—on par with the woman’s, thus affording the fetus total personhood.

Addressing the history of legal mandates and politics that restrict women’s freedom to choose if and when to have children is important for my analysis of the criminalizations of

women of color and of Purvi Patel. This historical context provides a necessary background for how fetal personhood became prevalent in abortion and feticide policies. Next, I introduce the frameworks that I use in my analysis of Patel's case: feminist legal studies, intersectionality, and Reproductive Justice.

FEMINIST LEGAL STUDIES, INTERSECTIONALITY, AND REPRODUCTIVE JUSTICE

Working from a feminist legal studies methodology, I employ intersectionality (Crenshaw, 1989, 1991) and Reproductive Justice (Ross & Solinger, 2017; Silliman et al., 2004) as critical frameworks of analysis. Feminist legal studies allows me to approach the legal aspects of Patel's case as well as the language used in her legal documents. Intersectionality allows me to look at the ways in which Patel's interactions with institutional systems of power are racialized and gendered simultaneously. Reproductive Justice provides a framework for analyzing the ways in which Patel's right to choose was constrained and encourages an approach that is historical as well as legal in my analysis of the criminalizations of women of color in general.

Feminist legal studies (FLS) critically analyzes the law and the implementation of the law through feminist perspectives. FLS particularly focuses on women and other marginalized groups and how the law affects them. Seeking to reform the law, FLS is as much academic as activist pursuit. Rooted in feminist theory, critical legal theory, and feminist jurisprudence, FLS as a field originated in the early 1970s. But because of the low number of women in the legal profession and the idea that sex discrimination was not a viable field of study, it did not become popular until the 1980s (Bartlett, 2012). One of the foundational scholars of feminist legal studies is Kimberlé Crenshaw, who is notable because she introduced an intersectional lens to FLS. Intersectionality is an important factor in my research as much of my analysis/discussion

will revolve around Patel's racialized gender, both in the decisions that Patel made and her treatment by those with institutional and state power involved in her case.

In FLS, intersectionality as a framework asserts that individuals are treated differently based on their interlocking oppressions and identities. Specifically, women of color experience unique oppressions that are more than just racism and sexism added together. Their gender cannot be separated from their race, and their race cannot be separated from their gender. Crenshaw (1989) argues that these interlocking oppressions result in women of color being treated unfairly under the law (Crenshaw, 1989). Crenshaw's work, while built from the specific cases of Black women, has been extended and applied to women of color who are not Black (Thornton Dill & Kohlman, 2012).

I argue that Patel's racialized gender is part of what made her vulnerable to charges and ultimately a conviction for attempting her own abortion. It is noteworthy that the only other person to be charged for attempted feticide in the State of Indiana was also a woman of color. This case was the 2011-2013 case of Bei Bei Shuai, who was charged with murder and attempted feticide when she caused the death of her fetus while she was attempting her own suicide by ingesting rat poison. However, she was not convicted (Penner, 2013). Crenshaw, in 1991, extended her intersectional framework to other intersections of identity, such as class and sexuality (Crenshaw, 1991). Other intersections of identity can impact women's treatment within the medical field, as well as under the law. For example, in terms of treatment in the medical field, a study about trans and gender nonconforming individuals and their experience with medical care reported 22% of transwomen said a doctor or other medical provider had refused them service due to their trans identity (Grant, et al., 2010). An example of improper treatment under the law is the New Jersey 4, a case in which four Black queer women were charged and

convicted for defending themselves against a man who was sexually harassing and intimidating them in Greenwich Village (Doroshwalther, 2014). Thus, Crenshaw's intersectional analysis highlights the violence that the legal system perpetrates against women of color when they seek legal remedy for the violence they experience in society.

In the present study, feminist legal studies is useful because it allows me to look at laws regarding fetal harm in general and the consequences of these laws for women, and intersectionality is useful because it allows me to focus specifically on women of color. FLS also focuses on legal reform that provides space for a discussion on changes that can be made to address future cases of criminalized abortion or to avoid humanizing fetuses in the law altogether. Feminist legal scholars have given much attention to sex discrimination under the law: Lindgren and Taub (1993) note that women have historically been "severely restricted" by the law based on their sex (p. 47). Smith (1989) details three main ways that feminist legal studies can be conducted. The first approach seeks to eliminate gender differences in the law and enactments of the law. The second approach seeks to identify laws that appear gender neutral but affect women differently than men and then make special accommodations for that difference. The third approach, the approach I take in my analysis, disagrees with the notion that the law can ever be neutral or universal. It argues that the laws, and how they are formed, do not take women's multiple perspectives into account (Smith, 1989). Attention to the ways in which the laws do or do not take discrimination against women into consideration is important in my research.

The Reproductive Justice Framework also argues that women's multiple perspectives are not considered when creating policies that disproportionately affect women of color. Ross and Solinger (2017) define Reproductive Justice as "a contemporary framework for activism and for

thinking about the experience of reproduction” (p. 9). Reproductive Justice as a framework originated in 1983, following the first National Conference on Black Women’s Health Issues (Silliman et al., 2004). The conference led to the first organization specifically focused on reproductive justice for women of color, the National Black Women’s Health Project, which then spurred the creation of other organizations with a similar aim, such as the Native American Women’s Health Education Resource Center, Asians and Pacific Islanders for Reproductive Health, the National Latina Health Organization, and others (Silliman et al., 2004). These organizations are evidence of women of color leading a fight for their reproductive health. Recognizing their contributions is important as it resists pathologizing these women as helpless, which is a common problem when discussing the ways in which systems of patriarchy and racism constrict their choices.

Reproductive Justice is about more than just abortion and contraception. The Reproductive Justice Framework analyzes the various ways people of color are forced, coerced, and otherwise stripped of choice when it comes to the decision to have or not have a child, as well as how to be a parent (Ross & Solinger, 2017). These pressures often affect women of color in opposite ways from white women, as women of color more often have to fight structures of power and institutional practices such as forced sterilization in order to exercise their right to have children, while white women are often more interested in preserving the right to choose not to have children. This is not to say women of color are not interested in maintaining access to abortion and contraception, however. The Reproductive Justice Framework analyzes all the ways in which choice is constricted, particularly in the lives of women of color. Like feminist legal studies, Reproductive Justice is both an academic endeavor and an activist pursuit focused on analysis and effecting change. Ross and Solinger (2017) also note the importance of analysis in a

historical and legal context when analyzing the choices women make, a practice I strive to maintain here.

In this thesis, I use feminist legal studies, intersectionality, and Reproductive Justice to analyze the case of Purvi Patel. The criminalizations of other women of color contextualize and converge on the case of Purvi Patel. Next, I detail my process of analysis, which includes looking through the legal documents associated with Patel's case and using the intersectional feminist legal studies method of "asking the woman question" (Bartlett, 2012, p. 405).

METHOD

For the present purpose, I analyzed legal briefs speaking in support of Patel's exoneration. These include briefs from Patel's lawyers (appellant's briefs) and special interest groups (amicus/amici curiae briefs). I had access to five briefs in support of Patel:

- The appellant's brief from October 2, 2015;
- The brief of amici curiae from the National Asian Pacific American Women's Forum and Center on Reproductive Rights and Justice at the University of California, Berkeley, School of Law also from October 2, 2015;
- The amended brief of amicus curiae from the National Advocates for Pregnant Women and Experts in Public Health, Health Advocacy, and Bioethics from October 14, 2015;
- The brief of amici curiae from the International Women's Human Rights Clinic, Amnesty International, and the Center for Reproductive Rights from November 20, 2015;
- The appellant's reply brief from January 12, 2016.

These briefs come from political groups with particular political interests. As a result, these are not "neutral" court documents; these groups have political aims and these documents are political as well. The October 2nd amici curiae brief stated a vested interest in safeguarding and supporting "reproductive health, rights, and justice" (*Patel v. State*, 2015, p. 5). The October 14th brief was most interested in public health concerns (*Patel v. State*, 2015, pp. 4-5). The November 20th brief noted a particular concern for human rights issues (*Patel v. State*, 2015, p. 7). Each brief had several pages of contributing organizations, too numerous to list here, so going forward, I will refer to each brief by the date of release.

I focused primarily on language present in these documents with an eye for legal and social implications. One strategy FLS uses is “asking the woman question” (Bartlett, 2012, p. 405), which requires recognizing and contesting laws that erase or disadvantage women and their intersecting identities. This is a strategy I take in my analysis, asking how women, and particularly women of color (who may or may not be economically disadvantaged) and economically disadvantaged women (who may or may not be non-white women of color), are targeted by certain policies and how cases like Patel’s set a dangerous precedent for the persecution of women. Highlighting the experiences of women of color and economically disadvantaged women is critical to an intersectional analysis through a Reproductive Justice framework. It is important to note as well that there is a connection between women of color and disproportionate rates of poverty, which can affect the accessibility of healthcare services, insurance, and information (Roberts, 1997, p. 111). This connection leaves women of color with often constrained reproductive choices.

Patel’s case is one battle in a war for reproductive rights nationwide. Analyzing the arguments of her proponents gives a glimpse into the legal tactics used to support women and counter threats to their reproductive rights. I chose to analyze the strategies used by Patel’s lawyers and political groups in support of Patel to determine how consistent these approaches are with FLS, Reproductive Justice, and intersectionality. Since these briefs have the potential to influence court decisions, I think it is important to note whether the language used reproduces or challenges systems of oppression. With that in mind, my process of analysis was to look for common or main themes within and between the briefs and particularly those that reinforce or challenge reproductive rights. I looked for words or phrases that were recurring or emphasized in the documents and made note of those common themes. I coded the themes that appeared as:

fetal personhood; racialized gender; medical privacy and trust; surveillance, knowledge, and legitimacy.

Below, I analyze these briefs based on the first four themes listed above. I continue by discussing implications for human rights, public health, and the law. I argue that the briefs often reinforced systems of control that constrict reproductive choices, even as the Court of Appeals may have been swayed by their arguments to rule on behalf of Patel and release her.

ANALYSIS

This case was significant not just because Patel was charged and convicted with feticide, but also because Patel was convicted of contradictory charges: child neglect, which requires a live child, and feticide, which by definition is the killing of a fetus prior to birth. In prosecuting Patel for feticide, the State essentially made the victim out to be her fetus, granting it personhood. In the following section, I outline four themes from the briefs: fetal personhood; racialized gender; medical privacy and trust; and surveillance, knowledge, and legitimacy. I argue that the pro-Patel briefs often adopted language which personified Patel's fetus, even while they assert the use of the feticide statute is improper. I show how the briefs sometimes acknowledged and sometimes ignored Patel's racialized gender. I emphasize the problematic practice of medical professionals, and particularly Catholic healthcare systems, reporting their patients to authorities, as happened in Patel's case, and the lack of attention this issue received in the briefs. Finally, I address the wider issue of the medical system and legal system intertwining to manage and surveil pregnant bodies and the reluctance of pro-Patel briefs to acknowledge this practice.

I also argue that pro-Patel briefs were not always consistent with intersectionality and Reproductive Justice, even while they may have been effective in convincing the Court of Appeals to release Patel. For example, the November brief stated, "the vast majority of states in the US have refused to criminalize women for poor pregnancy outcomes," which is, according to Paltrow and Flavin's (2013) study, not true. Paltrow and Flavin's study includes cases of criminalized pregnancy from 44 states. Oversimplifying these issues to frame Patel's as a

completely unique case is problematic because it erases the many criminalizations of pregnant women of color in the United States. In the same brief, they state “laws regulating abortion historically sought to protect pregnant women from unsafe abortions,” which is another oversimplification of criminalized pregnancy and may benefit Patel’s case but undermines a long history of prosecuting and legislating pregnancy in order to control certain people. Next, in my discussion, I outline implications for human rights, public health, and legal precedence.

Fetal Personhood

A core component of Patel’s case is the personification of her fetus. Feticide mandates, as previously discussed, were originally intended as an additional protection for pregnant women who suffered violence at the hands of a third party. The use of a feticide statute against a pregnant woman who is suspected of terminating her own pregnancy inherently prioritizes the potential life of the fetus over the decision of the woman and affords the fetus personhood that trumps the personhood of the woman. The pro-Patel briefs sometimes highlighted the language that afforded Patel’s fetus personhood in State documents and the courtroom, but often reinforced the same kind of language in their discussions of her case.

A positive aspect of the briefs was the acknowledgement of language surrounding Patel’s fetus in the excerpts from the courtroom and State documents that afforded personhood to the fetus. As an example, the October 14th amici brief cited Dr. Prahlow’s⁷ testimony in which he said that “extreme prematurity” was the cause of death but that it was an “act of homicidal violence” that caused the extreme prematurity (*Patel v. State*, 2015, p. 8). The brief authors argue this testimony was inappropriate not only because actions prior to birth cannot be considered in neglect/abuse cases, as established in *Herron v. State* (2000), but also because the term

⁷ The State’s expert who performed an autopsy and decided that the fetus had taken at least one breath

“homicidal violence” portrays Patel as a villain. More importantly, such a characterization of Patel’s actions portrays the fetus as a person. The brief mainly notes that this language reinforces stigma about abortion but also mentions that it conflates abortion with homicide. Homicide is a term reserved for one person killing another person. The brief argues it is not and should not be synonymous with ending a pregnancy. Feticide similarly should not be used for abortion cases. The decision in *Baird v. State* (1992) asserted the Indiana feticide statute should not be used as an abortion law, and instead expanded the homicide law to include the “situation in which the victim is not a ‘human being...but a fetus’” (*Patel v. State*, 2015, p. 17). The language of “the victim is not a ‘human being...but a fetus’” is noteworthy because the judges seem to reject the idea of the fetus as a human being, thus intentionally electing *not* to afford personhood to fetuses under Indiana law. The judges’ reluctance to grant personhood to the fetus in *Baird v. State* (1992) became a touch stone for the briefs and Patel’s lawyers. *Baird v. State* (1992) is referenced 18 times.

Conversely, the legal briefs in support of Patel also used the strategy of personifying the fetus and emphasizing fetal health, or at the very least neglecting to discuss the implications of feticide statutes. For example, in the first appellant brief, under the “statement of facts” section, Patel’s lawyers write, “Dr. McGuire opened the bag and found the body of a dead infant” (*Patel v. State*, 2015, p. 7). Later in the same brief, they write, “Hence, with heartbroken resignation to that deferential standard of review, the defendant is not asking this Court to review what she knows to be the profoundly mistaken finding of live birth” (*Patel v. State*, 2015, p. 12). Patel’s defense contradicts its own argument by taking up the rhetoric of the State in referring to Patel’s fetus as a “dead infant” (*Patel v. State*, 2015, p. 7). In doing so, Patel’s lawyers undermine their argument that Patel’s fetus was not born alive and effectively afford Patel’s fetus personhood.

The use of fetal personhood in these briefs is likely strategic: Indiana, as mentioned previously, has a record of prioritizing fetal life over maternal life. This record was downplayed in the October 14th brief, which argued that Indiana has historically not prosecuted women for their abortions, even when abortion was a misdemeanor in the State of Indiana in 1881 (*Patel v. State*, 2015, p. 20). As noted by Paltrow and Flavin (2013), however, searching through court files to find evidence of criminalizations of pregnancies is difficult and likely not comprehensive, due to the challenges of searching through unindexed criminal databases, protecting minors' identities, inaccessible records in cases of Native American tribal courts, and lack of media coverage. Thus, it is within the realm of possibility that finding no evidence of criminalizations of pregnancy is actually evidence of a deeper history of criminalizing pregnancy in the State of Indiana. While Indiana's record for prioritizing fetal life was downplayed in one brief, the January appellant brief highlighted it: "The point is that Indiana has decided not to prosecute women for their abortions and this decision is entirely consistent with Indiana's steadfast commitment to protecting fetal life" (*Patel v. State*, 2015, p. 9). Patel's lawyers, rather than underscoring the legal right to abortion if women so choose, stress fetal life again, which is likely strategic as they know fetal life is historically prioritized over women's rights.

In the briefs, the emphasis on fetal life had an impact on the (lack of) emphasis on maternal life. As fetal life was underlined, maternal life was downplayed. For example, in the January appellant brief, Patel's lawyers discuss the implications of criminalizing pregnancy by noting "women will for fear of being wrongly or rightly accused of self-abortion, avoid seeking treatment that might well save the fetus and/or the woman's life" (*Patel v. State*, 2015, p. 9). This language of "fetus and/or woman" separates the fetus from the woman, which is problematic as it reinforces the idea that a fetus is its own person able to live on its own separate from the

pregnant woman. This excerpt implies the fetus and the pregnant woman are two separate entities, but also listing the fetus's life first literally makes the woman's life an afterthought, rather than the main concern for public health, as some briefs argue it should be. As the November brief notes, "Any regulation or restriction to protect a fetus will inevitably interfere with a pregnant woman's ability to control her body and health and to make autonomous decisions about her life" (*Patel v. State*, 2015, p. 7). When fetal life is protected as a separate entity apart from the woman's personhood in abortion and feticide statutes, then women will be seen as nothing more than life support systems for their fetuses rather than as people who happen to be pregnant. As a result, maternal life will be subordinated to fetal life, and women will be blamed for any perceived harm to their fetuses.

Mother blame plays into fetal personhood. If a woman is a danger to her fetus and the fetus needs protection, that implies the fetus is a person to protect. There were a few instances of mother blame in Patel's case, mainly in the question of whether she could have done anything to save her fetus, assuming a live birth, in the moments after delivery. These instances of mother blame were addressed in some briefs, but not named as mother blame explicitly. For example, in the October 2nd appellant brief, Patel's lawyers describe the legal and rhetorical trick State attorneys played to get a child abuse conviction: "[The prosecution] diverted focus from the relevant question of whether the baby would have had a chance had Purvi done something to the irrelevant question of whether the baby had a chance with Purvi doing nothing" (*Patel v. State*, 2015, p. 15). The Indiana child neglect statute requires that there be some form of intervention a person could have taken to save a child and knowingly chose not to. By emphasizing Patel's inaction rather than the fact that the fetus could have only had a chance of surviving with a

neonatologist intervention in the first minute after delivery⁸, the State essentially blames Patel for an unavoidable result of an early and likely unexpected delivery. Some briefs detail the State’s faulty logic in blaming Patel for not having the expertise of a neonatologist, i.e. mother blame, but the word “blame” is not used once in any of the briefs, despite the prevalence of mother blame in the State’s rhetoric.

Fetal personhood was sometimes emphasized in briefs in support of Patel, which may have been strategic in order to play on conservative Indiana court sympathies, but nonetheless reinforced systems of control for women, and particularly women of color, in the United States. Fetal personhood has increasingly been used to blame and prosecute women for their pregnancy outcomes. So adopting this language that prioritizes fetal life in the pro-Patel briefs has the effect of supporting possible future criminalizations of pregnancy.

Patel’s Racialized Gender

Purvi Patel’s identity as an Indian American woman was a critical component of her case, but some briefs tended to ignore her intersectionality. This hesitancy manifested in the way the briefs discussed or did not discuss racial and/or sex discrimination, the jury’s positionality, and Patel’s Hindu faith. In this section, I argue the discussion of Patel’s racialized gender in the pro-Patel briefs was, for the most part, incomplete.

Throughout all the briefs, there seemed to be a hesitancy to talk about racial and/or sex discrimination. Patel’s lawyers did not use the word “discrimination” once in either appellant brief. The October 2nd amici brief was entirely about discrimination, as it detailed ways that women of color and impoverished women are specifically targeted by particular laws; yet the

⁸ Based on the defense’s review of 594 studies of non-hospital premature births, none of which suggested Patel’s fetus at its developmental stage could have survived for the time it took to get to a NICU (*Patel v. State*, 2015, p. 5).

word “discrimination” was never employed. The October 2nd authors note: “If the Court upholds this conviction, and allows prosecutors to link self-induced abortions with feticide, it will have cascading repercussions for all pregnant people, particularly those from marginalized communities” (*Patel v. State*, 2015, p. 5). In this quote, “marginalized” becomes code for impoverished pregnant women, and particularly impoverished women of color. The brief authors argue these women will be discriminated against if Patel’s conviction is not overturned. The authors also say that “pregnant people often seek abortion because they cannot afford to have a child” (*Patel v. State*, 2015, p. 11). The authors go on to argue that abortion needs to be accessible in order to avoid driving these people further into poverty. Raising concerns about affordability of abortion is a strong point, but the authors do not say anything about how poverty forces people who cannot afford a child to abort when the woman otherwise might have wanted a child. Poverty as constricting to women’s right to choose to have a child, then, is not mentioned at all, which is where a Reproductive Justice approach would take the discussion.

Even those briefs that did mention discrimination in some capacity usually did not discuss discrimination based on multiple identities, a lapse that neglects the specific experiences of women of color. As an example, some briefs elaborated on the effects of sex discrimination but left it there without mentioning the unique discrimination women of color face, even though criminalization of pregnancy is something that women of color in particular are disproportionately targeted for. In the October 14th brief, the authors note, “Expecting [women to sacrifice their right to bodily autonomy and medical decisions free from intervention]...pregnant women, under threat of criminal prosecution, creates a gender-based discrimination that cannot withstand constitutional scrutiny” (brackets added) (*Patel v. State*, 2015, p. 14). This brief mentions only sex discrimination and does not investigate the multiple effects of sex, racial, and class

discrimination. In the October 14th brief, the authors repeatedly reference gender-based discrimination but are relatively quiet about race. For example, when talking about the State's use of the feticide mandate in Patel's case, the authors note: "Because such an interpretation of the law would uniquely burden women, it violates their constitutional right to equal protection" (*Patel v. State*, 2015, p. 12). This claim, while true, neglects to mention how women of color are particularly vulnerable to criminalized pregnancies. Such an oversimplification of the issue of criminalized pregnancy ignores the intersectionality of the women who usually face the threat of criminalization for their pregnancy outcomes.

Some briefs did discuss discrimination against multiple identities, however. The November 20th brief mentioned discrimination against intersecting identities more than any of the briefs. The authors argue that laws criminalizing abortion "discriminate against women and are applied in a discriminatory manner" (*Patel v. State*, 2015, p. 13). The authors also highlight the fact that women of color and impoverished women are more likely to have poor birth outcomes and higher infant mortality rates. Then they go on to say these laws will "make all women who do not deliver a healthy baby a suspect," and as a result, "it is poor and marginalized women who are prosecuted for miscarriages, obstetric emergencies and abortions" (*Patel v. State*, 2015, p. 12). The authors go on to detail how impoverished women of color in particular are targeted by abortion regulations because these women are subjected to higher levels of surveillance and held to unreasonable expectations: "[G]iving prosecutors the ability to choose whether to prosecute women following fetal demise can result in the targeting of poor women of color, whose behavior does not conform to the white, middle-class expectations about how a pregnant woman should behave" (*Patel v. State*, 2015, p. 14). The idea of a "standard" for behavior while pregnant was also mentioned in the October 14th brief. The authors mentioned an

Illinois case in which the court ruled that mothers could not be held liable for what happens to the fetus prenatally. The judges argued that if this were allowed, then the judges would have to define a standard for what a good mother is, down to every detail, and the jury's interpretations of these standards would undoubtedly be racist, classist, and sexist.

Patel's jury was likely also influenced by racist and sexist standards of motherhood. Two briefs touched upon how the jury might see Patel and interpret her actions: the appellant brief from January and the October 14th amicus brief. These mentions, however, were fleeting and neglected how Patel's positionality as a woman of color might have affected the jury's opinions about the case. For example, the October 14th brief asked, "In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?" The January brief argued that the State's dependence on the jurors' beliefs about what they would do in Patel's situation was misguided at best: "No juror's 'own life experiences' could provide a basis for determining what signs of life a profusely bleeding mother, a minute after delivery, would observe in a newborn weighing less than one-and-a-half pounds" (*Patel v. State*, 2015, p. 8; *Patel v. State*, 2015, p. 4). Neither of these briefs unpacked Patel's racialized gender and how her racialized gender might impact the way jurors interpreted her case. According to the co-president of the Indiana Religious Coalition for Reproductive Justice, who was in the courtroom for Patel's trial, Patel's jury included no people of color (S.E. Braunlin, personal communication, February 5, 2018). Patel's entirely white jury might not have understood the circumstances that led Patel to make the decisions she did, such as not going to the doctor.

Patel's identity as a Hindu woman and her Indian culture are present in two briefs. Her Hindu religion is prominent in only one legal brief, the appellant's brief from October 2nd. Her Hinduism is discussed in relation to her father's testimony about the unacceptability of pre-marital sex in the Hindu religion. The brief does not specify the role her Hindu faith played in her life or how it might have shaped the way Patel was viewed and discussed by the jury. Patel's identity as an Indian woman was alluded to in the October 2nd amici brief when the authors discuss poverty rates and birth outcomes among Asian American and Pacific Islander populations. The document they used for these statistics is a report by Josh Ishimatsu, the Director of Capacity Building and Research National Coalition for Asian Pacific American Community Development (National CAPACD) called "Spotlight on Asian American and Pacific Islander Poverty: A Demographic Profile." The report separates Asian American and Pacific Islander populations based on country of origin. Indian Americans were the second most likely of Asian American populations to live in poverty (Ishimatsu, 2013, p. 11). The amici curiae briefs, by addressing these broad demographic categories, deemphasized the specificity of Patel's life and circumstances, specifically with regard to her race/ethnicity as an Indian American woman. Yet her ethnicity likely impacted her interactions with various actors in her case, including the jury.⁹ For example, reporter Amy Gastelum, of *Guernica*, wrote about the detective who interviewed Patel, Galen Pelletier of the South Bend Police Department. This detective seemed particularly preoccupied with Patel's Indian heritage, asking repeatedly whether the father of her fetus was Indian, too, and whether her friend with whom she was texting (Turnbo) was Indian (Gastelum, 2015). These questions show how central her identity as an Indian American woman was to her treatment. However, Patel's race comes up in

⁹ One jury member reportedly commented that she decided Patel's guilt after seeing how hairy the fetus was, a very racialized remark (S. E. Braunlin, personal communication, February 5, 2018).

inappropriate and prejudicial ways to harm her case and is simultaneously ignored in ways in which race is relevant, such as in jury selection.

Patel's racialized gender was a critical component of her case. While some briefs did mention her intersectional positionality as a woman of color, for the most part these discussions were incomplete. The briefs often excluded discussions about discrimination in general, and discrimination based on multiple identities in particular. The briefs also favored simplifications of the case, either in neglecting how her identity as an Indian American woman might have impacted the jury, or overgeneralizing to the point of ignoring the fact that women of color are more impacted by criminalizations of pregnancy.

Medical Privacy and Trust

In this section, I discuss the tendency of the briefs to overstate the importance of the doctor-patient relationship. I argue the briefs did not acknowledge the ways in which the medical system and the legal system interlock to manage and surveil pregnant bodies. Framing the two as separate systems or framing the doctor-patient relationship as unproblematic ignores the history of doctors reporting their pregnant patients to authorities. In addition, there was a lack of attention paid to the role of faith-based Catholic healthcare systems in Patel's case.

Purvi Patel's doctor seemed to be invested in the case to an unusual degree in that he went past his duty of "mandatory reporting" regarding his personal suspicions of child abuse: The day Patel arrived at the emergency room seeking treatment, this doctor actually left the hospital to go with the police to the "scene of the crime" (*Patel v. State*, 2015). This was not protocol or necessary; in fact, the doctor stated in an interview: "It was actually a very surreal moment. I decided there was nothing more for me to do at the hospital, so I would actually go

over to the Target store myself as well. Maybe I could help in some way” (Conrad, 2015). Tellingly, Dr. McGuire is listed as a member of the American Association of Pro-Life Obstetricians and Gynecologists (Conrad, 2015). Though McGuire was a mandatory reporter of suspected child abuse, it should be noted that the only piece of evidence the hospital’s doctors had to go off of was an umbilical cord that might have been developed enough to indicate a premature fetus (*Patel v. State*, 2015). If that fetus had not been granted personhood and considered a child, the doctor making that report to the police would have been a HIPAA violation because he breached Patel’s right to confidential treatment.

HIPAA— Health Insurance Portability and Accountability Act— is a federal regulation regarding the release of medical data and doctor-patient confidentiality (“Summary of the HIPAA privacy rule: HIPAA compliance assistance,” 2003). The clause that specifically mandates criminal investigations in healthcare environments states that healthcare providers may provide confidential patient information to police under six conditions: (1) the information is legally required, “including court orders, court-ordered warrants, subpoenas” (“Summary of the HIPAA privacy rule: HIPAA compliance assistance,” 2003, p. 7); (2) the information is needed to find “a suspect, fugitive, material witness, or missing person” (“Summary of the HIPAA privacy rule: HIPAA compliance assistance,” 2003, p. 7); (3) if a police officer requests information about a victim or suspected victim of a crime; (4) to inform police about a patient death if the healthcare provider suspects a crime may have caused the patient to die; and (5) if a healthcare provider suspects that a crime has occurred on the provider’s premises and believes the information is necessary for the investigation of that crime. The sixth circumstance in which a doctor can disclose private medical records to law enforcement is if a medical provider determines “in a medical emergency not occurring on its premises, when necessary to inform law

enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime” (“Summary of the HIPAA privacy rule: HIPAA compliance assistance,” 2003, p. 7). None of these scenarios apply to Patel’s case because Patel arrived saying she had miscarried, which is not a crime.

The day Patel went to the hospital, law enforcement had not requested or subpoenaed any information from the hospital or the doctors. Patel’s hospital doctors freely reported the information to the police because they believed that Patel’s fetus was a child. Patel called it a miscarriage and not an attempted abortion, so by Patel’s accounts to the hospital, there was no criminal activity to report (*Patel v. State*, 2015). This demonstrates the concomitant nature of the healthcare and law enforcement systems, in that Patel’s body was simultaneously managed and surveilled by the hospital doctors and the police. The October 14th and November 20th briefs emphasized the importance of the doctor-patient relationship and blamed law enforcement agencies and legislators for interfering in that relationship. The November brief, for example, stated “human rights violations [occur] when health care professionals and facilities are treated as a source of evidence for potential prosecutions” (*Patel v. State*, 2015, p. 16). This is a valid critique; interfering in the doctor-patient relationship and requiring doctors to make decisions based on the law rather than on their best judgement as a medical professional is problematic, as it undermines the care of the individual patient in favor of generalized legal mandates. However, framing law enforcement and legislation as “the bad guy” in situations like these is equally problematic because it erases the complicity of healthcare professionals in promoting and sustaining that discriminatory agenda, as demonstrated by Patel’s doctors reporting her to the police. In Patel’s case, the doctors’ agenda seems to have been faith-based, or at least guided by a politics of Christian faith.

Catholic healthcare systems in particular are an example of healthcare professionals promoting and sustaining discriminatory agendas. From 2001 to 2011, the number of Catholic hospitals grew over 16% while the number of public hospitals shrank by 31% (Uttley, et al., 2013). The growth of Catholic facilities is not itself necessarily concerning; the issue comes from the fact that Catholic hospitals do not provide life-saving women’s reproductive healthcare, like tubal ligations in cases where a pregnancy would be dangerous for the woman, abortion, treatment for miscarriages that would prevent infection, and any form of contraceptive. The ACLU comments on this rapid growth of religion-driven healthcare and its subsequent consequences for women’s health: “Catholic hospitals...have organized into large systems that behave like businesses — aggressively expanding to capture greater market share — but rely on public funding and use religious doctrine to compromise women’s health care” (Uttley, et al., 2013, p. 1). Any medical procedure that conflicts with Catholic teachings is prohibited in these facilities, which is problematic for women whose only healthcare option is Catholic hospitals. As of 2011, there were 30 Catholic healthcare systems across 18 states that were designated as “sole community hospitals,” meaning people living in those geographic areas have little choice but to go to those hospitals in an emergency (Uttley, et al., 2013, p. 25). Patel did go to a Catholic hospital. This fact was not mentioned or highlighted in any of the briefs, despite the hospital’s obvious Catholic name, “St. Joseph’s.” Catholic hospitals can be a barrier to women’s access to reproductive healthcare, so not mentioning this aspect of Patel’s case is not consistent with a Reproductive Justice approach.

The briefs in general read as reluctant to highlight the problematic and discriminatory actions of the healthcare system, let alone to investigate how the healthcare system and law enforcement might be co-functioning as systems of control. The November 20th brief, for

example, discusses the “violation of women’s right to confidential health information and extracting confessions in health care settings” and how such a violation “can constitute cruel, inhuman, and degrading treatment” (*Patel v. State*, 2015, p. 17). The brief again frames the violation as an issue with police interfering in an otherwise healthy interaction between a doctor and a patient. That is not the case because according to Reproductive Justice philosophy and other empirical measures, women of color, with good reasons, can distrust their medical providers; hence, these relationships are not always healthy. The October 14th brief mentions “colluding with law enforcement” in passing, but almost seems to attribute this action to a legal obligation to follow statutory law instead of thinking about how this “colluding” could be a complicity on the part of the healthcare system with the police state under which women of color live (*Patel v. State*, 2015, p. 10). As Jaremko Bromwich (2015) states, “law is not separate from but enmeshed within broader social discourses and processes” (p. 43).

One example of law and healthcare being mutually constitutive in Patel’s case points to the circumstances of her questioning by police. The October 2nd appellant brief explained: “Detective Galen Pelletier questioned Purvi at 3:30 AM when she awoke from anesthesia” (*Patel v. State*, 2015, p. 7). However, this was the only mention in the briefs about Patel being questioned by police; there is no discussion of how this interrogation might have been improper. What the briefs missed is when women are investigated for criminal violations in healthcare settings, it makes the hospital or clinic a contentious place that women might choose to avoid rather than face the threat of prosecution. This effect is multiplied when healthcare workers are actively complicit in the criminalization of women seeking care. Such is the case for Purvi Patel, as her doctors freely reported her to authorities, which could be construed as a HIPAA violation.

The briefs did note that criminal prosecution of women of color like Purvi Patel for attempting their own abortions is not only legally inadmissible, but also morally wrong and a human rights violation. There were many troubling facts in Patel's case that led some briefs to question directly whether her case was a violation of human rights, and what this meant for international human rights law if it were. The October 2nd appellant brief noted that "laboratory tests showed Purvi had by [at least an hour after arriving at the hospital] lost about 20% of her total blood volume" (*Patel v. State*, 2015, p. 6-7). Despite this substantial blood loss, rather than immediately take Patel to have the surgery to remove the placenta, the doctors concerned themselves with investigating the possibility of a "baby." Even as they prepared Patel for surgery, Dr. Byrne continued to press Patel about a "baby" and took the time to contact police. To continue to question Patel before her surgery after she had lost so much blood might be construed as making her treatment dependent on her admission of a "baby." The November brief noted this as well, stating, "medical care should not be contingent on a woman's cooperation...or used as evidence in any proceeding against her" (*Patel v. State*, 2015, p. 16-17).

Patel's criminalization did not happen because law enforcement interfered in a healthy doctor/patient relationship. Patel's criminalization happened because she is a woman of color living in a society in which healthcare systems and law enforcement work together to surveil and control certain bodies. The tendency of the briefs to overlook or neglect to mention this intersection is problematic because it frames the doctors who treated Patel as also victims of the law, rather than giving a more complex but accurate picture of the doctors as complicit in her criminalization. The fact that Catholic healthcare institutions were also not analyzed in the briefs again oversimplifies key aspects of Patel's case.

Surveillance, Knowledge, and Legitimacy

Questions of legitimacy, knowledge, and surveillance permeated the briefs. Under what circumstances is abortion considered legitimate? Whose voices, whose expertise is considered legitimate? How does surveillance impact what is regarded as legitimate? Though pro-Patel briefs were arguing in defense of Patel and sometimes offered views compatible with Reproductive Justice and intersectionality, for the most part, the briefs left discussions about legitimacy, knowledge, and surveillance incomplete.

The legitimacy of abortion was a topic of discussion in a couple briefs. The legitimacy of abortion is particularly diminished in cases of “self-directed care,” like in Patel’s case. Patel’s own lawyers say in their January brief, “reasonable people may condemn Purvi’s (or anyone else’s) decision to choose an abortion—particularly in the manner that Purvi did” (*Patel v. State*, 2015, p. 12). This statement questions the legitimacy of self-abortion and also stigmatizes abortion in general. Alternatively, the October 2nd amici brief frames the choice to self-abort as an “expression of autonomy and a form of empowerment” (*Patel v. State*, 2015, p. 8). I argue that self-abortion can be a form of resistance, but self-abortion also can be a necessity due to the barriers to access imposed by state legislatures, TRAP laws, law enforcement officials, and healthcare providers, not to mention faith-based hospitals.

The October 2nd amici brief, citing public vs. private spheres, implied that self-induced abortions by impoverished women are seen as less legitimate. The brief mentions that impoverished women may have to have abortions in more “public spaces,” which, for impoverished women and particularly impoverished women of color, can include homes where there is the presence of police, parole officers, social workers, and other governmental officials whose job it is to surveil these women, a fact only mentioned by the October 2nd amici brief. Surveillance is omnipresent in the lives of women of color, particularly working class women of

color. Only one brief discussed surveillance, the October 2nd amici curiae brief. This brief discussed surveillance as disparately impacting communities of color, and particularly pregnant women of color.

This surveillance is true for Patel's case as well. The theme of Patel's surveillance by police and hospital staff was ubiquitous throughout the briefs. In the October 2nd appellant brief, for example, Patel's lawyers state, "As Dr. Byrne prepared Purvi for surgery to remove the placenta stuck to her uterine wall, Dr. McGuire contacted the police. When Purvi questioned why police would be there, Dr. Byrne continued to press that 'there should be a baby'" (*Patel v. State*, 2015, p. 7). This excerpt shows how Patel was monitored and surveilled by the hospital employees. Then once Patel's case was forwarded by hospital staff to police, the brief explains that a "large team of police" (as well as Dr. McGuire) went to search the area around Patel's workplace, where she said she left the fetus, while other officers went to Patel's house in search of evidence (*Patel v. State*, 2015, p. 7). At this point, Patel was claiming she had a miscarriage, a claim the hospital staff chose to treat as untrue. Because she was not trusted, the physicians involved the authorities. I will go so far as to suggest that because of Patel's racialized gender, the police treated her case as a serious crime, sending out multiple police officers to multiple locations to investigate what would have been a misdemeanor at most if they had found evidence of an illegal abortion. There is a sad irony that the racism involved in criminalizing Patel's reproductive decisions had the effect of elevating the missing brown fetus to the status of a missing person's hunt. However, it is easier to promote the importance of the life of a "person" of color who is not yet a "person" than to support the life of a living woman of color who is also a citizen.

The theme of trust and authority is also prevalent in these texts. Patel was the only one who will ever know what happened on the day in question, yet her authority was regarded as suspect from the moment she arrived at the hospital. The October appellant brief mentions that even when expert witnesses' (e.g. the doctors called to the stand) testimony conflicts with one another, the courts do not and cannot question the validity of "expert" testimony. Thus, we are forced to question who is considered an expert in this case. Certainly, the briefs outline the ways Patel is not trusted. Patel's knowledge of what happened that day was continuously discredited in favor of "expert testimony" from two doctors who contradicted each other. Patel's lawyers note in January, "The defense by no means concedes there was a live birth, but understands this Court must accept the State's expert on that point—despite the many flaws in his conclusion" (*Patel v. State*, 2015, p. 12). This underscores the legal authorities' agreement regarding a legitimate source of knowledge. Patel does not fit the description, even though she was the only witness to the event upon which the proceedings hinge. As another example, Patel's friend Fay is described as an "informal medical advisor" (*Patel v. State*, 2015, p. 5). However, that title is not seen as valid by the State of Indiana because "informal medical advisors" are not within the medical system and thus cannot be *surveilled* by "official" channels of the medical establishment.

Patel was simultaneously discredited as a legitimate source of knowledge and also expected to be an expert. In the January brief, Patel's lawyers note, "Dr. McGuire himself (having delivered over 2,000 babies) testified only a neonatologist could answer questions about newborns of that age and size" (*Patel v. State*, 2015, p. 4). Yet Patel was expected to know exactly what to do in order to save the fetus's life in the less than a minute it would have taken for the fetus to bleed out. Women are often required to be experts but then their knowledge is delegitimized by "experts." For example, women are expected to have a natural "maternal

instinct,” and they simultaneously are dismissed as “just a woman,” “hormonal,” “emotional,” etc. These contradicting expectations are compounded for women of color. Patel’s case also highlighted the simultaneous expectation of both more and less from women of color. The disproportionate surveillance of Patel in this case and women of color in general shows how women of color are assumed to be “less” than white women and men in every sense. Yet, all the so-called “experts” involved in Patel’s case expected Patel to have the knowledge and skill miraculously to save a fetus that would likely never have survived. These expectations underscore the expectation of “more.”

The briefs in general could have had more effective conversations about legitimacy, knowledge, and surveillance. Problems with their rhetoric included incomplete or inconsistent analyses of abortion, surveillance, and expertise. Self-abortion is only acknowledged as legitimate in one brief. Patel’s lawyers undermine the legitimacy of abortion in general, but particularly self-abortion, by characterizing such a choice as unreasonable. The briefs also continuously deferred to “experts” in order to determine what happened, rather than trust Patel’s account of what happened. At the same time, Patel was expected to know as much as a neonatologist in the moments following her miscarriage. The briefs, save for one, avoided the topic of surveillance, which directly impacts what is deemed legitimate in Patel’s case. Actions that cannot be surveilled are considered less legally legitimate, which impacts women of color at a disproportionate rate.

In this analysis, I have detailed four themes from the briefs: fetal personhood; racialized gender; medical privacy and trust; and surveillance, knowledge, and legitimacy. I showed that Patel’s fetus was personified in the briefs, even by her proponents who argued for her release. I argued the briefs sometimes highlighted and sometimes disregarded Patel’s identity as an Indian

American woman, which mostly worked to her disadvantage. In addition, the briefs overlooked the fact of the doctors' complicity in criminalizing their patients, particularly in Catholic healthcare systems, as was the case for Patel. Finally, in the ways the briefs talked about surveillance, knowledge, and legitimacy, I found the authors often undermined Patel's authority and knowledge and simultaneously expected her to be an expert. All of these factors lead me to conclude that the briefs' arguments, while perhaps effective in convincing the Court of Appeals to overturn her conviction, often played into systems of control that exist to subjugate women and particularly women of color. In the final section, I conclude with implications of Patel's case, including public health issues and legal precedent. As feminist legal studies is an approach concerned with reform in addition to analysis, I discuss the use of the feticide law against Patel and offer some suggestions for a change to the feticide law to prevent future criminalizations using this mandate.

CONCLUSION

My analysis attempts to shed light on how the pro-Patel briefs discussed the various elements of Patel's case, including: surveillance, legitimacy, discrimination, racialized gender, medical trust, privacy, and fetal personhood. I believe that pro-Patel briefs, even while arguing on behalf of or in support of Patel, often reinforced systems of control, such as the medical system and legal system. I showed how the documents sometimes afforded personhood to Patel's fetus, ignored important issues like discrimination and surveillance, and oversimplified histories of criminalizations of pregnant women. My goal in analyzing these documents and highlighting the problems with their arguments has not been to dismiss or criticize the important work that these organizations did for Patel's case and continue to do for other cases. My goal has been to underline ways in which the arguments could have been more effective and consistent with intersectionality and Reproductive Justice in order to place Patel's case in conversation with other criminalizations of pregnant women of color. I believe doing so is important because Patel's case, although unique in some ways, also echoes the long history of prosecuting women of color for their reproductive actions. Recognizing these connections can help feminist legal scholars determine what strategies are best for stopping criminalizations like Patel's.

In prosecuting Patel, the State of Indiana claims to be protecting fetuses. Though the intention of the State of Indiana may be to protect "fetal life," the implications for pregnant women and mothers are noteworthy. In this conclusion, I highlight the potential for Patel's case to spur negative repercussions for public health, as it may make women avoid life-saving

medical care for fear of criminalization. I also argue Patel’s case sets a legal precedent for the criminalization of pregnancy.

Patel’s case has dangerous implications for women’s health nationwide as it has the potential to dissuade women who have attempted their own abortion from seeking medical attention. As the October 14th brief notes, “every major medical and public health association [including those that are opposed to abortion] in the U.S. agrees that women should not be prosecuted for their actions, inactions, or circumstances during pregnancy” (*Patel v. State*, 2015, p. 5). This is because criminalizing women for their pregnancy outcomes has dangerous repercussions for public health, as it deters women from seeking needed medical care in order to save their lives. Doing so essentially criminalizes seeking healthcare for certain issues like substance abuse and self-abortion and places countless women who might already be in vulnerable situations in further danger.

The October 14th amici brief uses examples from several countries that have criminalized abortion to show how prosecution for self-aborting does not deter abortions, but instead causes a public health issue. It references El Salvador, a country where abortion is illegal in all cases and women are criminalized for abortion and suspected abortion. In El Salvador, the authors note, women and especially women in poverty often avoid medical care for pregnancy complications for fear of criminalization, even when their complications are not related to abortion at all. In Nicaragua, women have not yet been criminalized under a statute that was enacted in 2008 that provides for “lengthy” sentences for women and girls who have abortions, but the mandate has still prevented some from seeking emergency services (*Patel v. State*, 2015, p. 9). When women avoid emergency services for complications related to self-abortion or miscarriage for fear of police action, this fear can cause avoidable deaths. This is true especially for impoverished

women and women of color. If the purpose of criminalizing abortion is to save lives, under the guise of preventing illegal and presumably unsafe abortions, then this begs the question of whose life is being saved. Evidence in the pro-Patel briefs points to the inadequacy and impropriety of criminalization for desired health outcomes. In other words, those passing laws that criminalize abortion intend to save lives, but in doing so, they are causing more deaths than if abortion was safe, legal, and accessible.

Another factor that may have negative implications for public health aside from criminalizing abortion is stigmatizing and stereotyping abortion. When abortion is stigmatized, women might be more reluctant to obtain one and end up having children they otherwise would not have wanted. Or women might proceed with pregnancies that put their own health at risk. It is this stigmatization of abortion that allows prosecutors to misuse statutes such as feticide to criminalize women who try to end their own pregnancies because jurors and judges alike take their prejudices against abortion into the courtroom and convict women for charges that do not fit, as in Patel's case. Abortion remains a legal procedure in the United States, although it is increasingly inaccessible and criminalized.

Patel's positionality as a middle-class woman of color likely impacted her decision to purchase the miscarriage-inducing drugs online rather than go to a doctor. Turnbo noted that the cost of an abortion would likely be around \$300-400, whereas the misoprostol and mifepristone cost only \$72. Turnbo was referring to a specific abortion provider in South Bend. Across Indiana, the cost is higher. According to the website for Indiana University Health, one of the major medical providers in Indiana, "Depending on the method, the charges will be between \$450-\$500. Health insurance sometimes will pay for an abortion," but only in certain cases. In 2015, a little over 10 percent of American women were still uninsured (Women's Health

Insurance Coverage, 2016). Even if women are able to access insurance, “Indiana also has restrictions on private insurance coverage of abortion—prohibiting companies from covering abortion except in cases of rape, incest, or severe risk to life,” according to the October 2nd amici brief (*Patel v. State*, 2015, p. 8). This means that abortion is legal in Indiana, but only for women who can afford to pay for it out of pocket. The decision to have a child is a life-altering choice; women should not be forced to follow through with unwanted pregnancies.

The cost of a legal abortion poses a real material barrier for women who are not in a position to spend hundreds of dollars. As the October 2nd amici brief notes, “The average cost of a first trimester abortion is equivalent to nearly a quarter of the monthly average per capita income in Indiana. Second trimester abortions can cost two or three times as much” (*Patel v. State*, 2015, p. 7). Saving money to obtain an abortion is generally not possible either, as waiting longer to save up the money makes it cost more because it becomes a later term abortion, “further entrenching pregnant people and their families in poverty” (*Patel v. State*, 2015, p. 8). Many women cannot even afford to make the trip to an abortion clinic, as some women do not have an abortion clinic nearby nor the financial resources to get there. In fact, “[i]n Indiana...93 percent of counties had no abortion clinic, and 61 percent of Indiana women lived in counties without an abortion clinic” (*Patel v. State*, 2015, p. 7). Many women cannot afford to take off work for that much travel if their jobs offer no paid time off or pay employees an hourly wage. Additionally, many women, if they already have children, cannot afford childcare for their trip to the clinic. This problem with accessibility is further compounded for women who do not have access to safe, reliable, affordable, and/or prompt transportation. Restrictions that require a waiting period between initial appointment and actual abortion further restrict these women, as they must take off work and make the trip twice. These are the effects of TRAP laws and they

impact impoverished women and women of color more than white women or upper-class women. Those who can afford abortions, therefore, are not prosecuted because they have enough resources to fit within the increasingly narrowly constructed bounds of legal abortion.

Another barrier to women's reproductive rights is the expectation for women to know and understand the "intricacies of state abortion statutes" (*McCormack v. Hiedeman*, 2012). Expecting women to explore the ins and outs of complicated abortion and feticide laws amounts to an undue burden, especially for women who might not speak English as a first language or at all, women who might not have as much as a high school diploma let alone a law degree, and women who do not have access to legal documents, the internet, or legal guidance. Even the news coverage of Patel's case could have imposed an undue burden on women's right to choose as it showed women that a woman can and has been sentenced for a felony to 20 years in prison for attempting to end a pregnancy outside of legal bounds. If "any woman knows that choosing to have an abortion puts her in jeopardy of prosecution, regardless of her complete good faith—and knows that the only way to avoid that risk is to forgo the abortion," women's right to choose whether to continue or terminate a pregnancy is impeded (*Patel v. State*, 2015, p. 23). Regardless, according to case law, statutory law, advocacy organizations, and even anti-abortion organizations, women should not be prosecuted for their own abortions.

This case was significant not just because Patel was charged with and convicted of feticide, but also because Patel was charged with and convicted for contradictory charges: child neglect, which requires a live child, and feticide, which by definition is the killing of a fetus prior to birth, or as the statute phrases it, the termination of a pregnancy. The State of Indiana got away with this contradiction by arguing that "a live birth undeniably constitutes the termination of a pregnancy" (*Patel v. State*, 2015, p. 9). Patel's lawyers refer to this as a "gerrymandered

definition,” and they have a point: The feticide statute was not meant to cover a live birth. If it did, every single person who gave birth would be guilty of feticide. The October 14th brief argues that using the feticide statute in the way that the State proposes, by allowing a woman to be prosecuted for feticide for her pregnancy outcomes, would render the statute unconstitutionally vague because it would create an endless number of behaviors that could be interpreted as a violation of the law. That the law could be misused in Patel’s case and produce a conviction suggests the law is already unconstitutionally vague. The October 14th brief states, “A statute is void for vagueness if it ‘fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits’” (*Patel v. State*, 2015, p. 11). That Patel could be convicted by a jury under the feticide statute for allegedly having a live birth suggests that ordinary people might not understand what the feticide statute prohibits, which renders the feticide statute unconstitutionally vague.

Due to the vagueness of the feticide statute and the fact that it provides personhood and thus victim status to the fetus, I believe feticide statutes should be revised to adequately address the problem they were designed to solve: harm to the pregnant woman. The October 2nd appellant brief argues, “A proper construction of the Feticide Statute, therefore, requires that it be viewed...as an extension of the laws of homicide to cover the situation in which the victim is not a ‘human being’...but a fetus” (*Patel v. State*, 2015, p. 17). It is a step in the right direction to specify that a fetus is not a human being. But this language of “a fetus is not a human being” does not stop the personification of the fetus, as feticide statutes are still used in ways that personify the fetus, such as Patel’s case. A more effective tactic, in my opinion, would be to impose stricter punishments for violent acts against pregnant women. In doing so, the fetus would not be personified as it would remain a part of the pregnant woman rather than its own

entity, and the pregnant woman would be less likely to be harmed or criminalized for actions regarding her own pregnancy. Another option would be making the termination of a woman's pregnancy without her consent a violation of the law; that way it would be impossible to prosecute a woman for her own pregnancy loss. France has established a similar standard in which the fetus is "protected indirectly through the woman's body of which it [is] an extension" (*Patel v. State*, 2015, p. 11). I believe these approaches offer a potential solution that addresses the problem of affording personhood to fetuses under the law and that is consistent with Reproductive Justice.

The main weakness of my research is the limited scope. Though focusing on the pro-Patel arguments was useful for the purposes of this thesis, a more comprehensive analysis of Patel's case that includes arguments against Patel would be a beneficial next step for future research. As previously mentioned, Patel's case is not entirely unique. An analysis or even a cross-analysis of other cases of criminalized pregnancy, such as the cases of Bei Bei Shuai, Jennifer Johnson, and others, would be useful.

There is relatively little recent literature about the criminalizations of women of color for their pregnancies. Most of what I found was either non-academic (Amnesty International, 2017; Gastelum, 2015) or 15 or more years old (Boyd, 1999; Humphries, 1999; Roberts, 1997). With cases like Patel's and in our current political climate, this area of research becomes politically critical. Patel's case is unique because it was the first time a woman was convicted in the United States under the feticide statute for attempting her own abortion. However, her case is also part of a wider pattern of criminalized pregnancies that should be investigated in depth in order to discover ways of combating these injustices. In addition, though this case is mainly concerned with the right to say "no" to having a child, we should not lose sight of the fact that many

women, particularly women of color and working class women, have lost the ability to say “yes” to having children. As Briggs (2017) so aptly puts it, “We have been debating abortion, birth control, and the means of preventing unwanted pregnancies vigorously and at length for two generations, but while we were looking there, many people lost the ability to have the children they wanted” (p. 148). Fighting for both the right to say “yes” and the right to say “no” to having children is the only way to be truly intersectional and Reproductive Justice-minded, and both are essential when discussing women’s reproductive rights.

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