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FROM “BARBARITY” TO REGULARITY: A CASE STUDY OF “UNNECESAREAN” MALPRACTICE CLAIMS

Jamie R. Abrams*

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I. INTRODUCTION

Mary Hodges's bladder, womb, and intestines were permanently fused together, rendering her in such a state of pain and suffering that her doctor, Elias Samuel Cooper, thought it best that she die after he performed a cesarean section on her in 1858.¹ Ms. Hodges's cesarean operation was the first documented cesarean section in California,² performed just thirty years after the first documented professional cesarean section in the United States.³ Mary Hodges lost her baby during labor, likely as long as fifteen hours before the cesarean delivery.⁴ After enduring sixty hours of labor—with other medical options, such as forceps and a craniotomy, arguably more prudently available under prevailing medical standards—Dr. Cooper performed a cesarean surgery on her without her or her husband's consent.⁵

The subsequent malpractice trial unleashed deep-rooted tensions. The established medical community had accused Dr. Cooper of quackery and puffery since his arrival in San Francisco at the peak of the California gold rush.⁶ Weeks after the surgery that plaintiffs' lawyers and members of the medical community would describe as "barbarity"⁷ and "butchery,"⁸ Dr. Cooper authored a squib heralding the surgery as a "uniform success" with "favorable results [that] are worthy of note."⁹ Even Mr. and Ms. Hodges initially praised Dr. Cooper, declaring that Ms. Hodges "owed her life to him."¹⁰ The medical community aggressively attacked Dr. Cooper's conduct in the cesarean procedure, accusing him not only of quackery and puffery, but of malpractice, acting for reputational gain, and even manslaughter (had Ms. Hodges not survived).¹¹ Dr. Cooper fiercely believed—indeed, the modern Stanford Medical School biography of

1. Proceedings in the Case for Damages for Alleged Mal-Practice in the Performance of the Caesarian Operation at 10, 28 *Hodges v. Cooper* (4th Dist. Ct., San Francisco 1858) [hereinafter Trial Tr.]. The plaintiffs' lawyers even suggested that Dr. Cooper *wanted* Mary Hodges to die. *See id.*

2. Charles W. Carey, Jr., *Cooper, Elias Samuel*, in 5 *AMERICAN NATIONAL BIOGRAPHY* 434, 435 (John A. Garraty & Mark C. Carnes eds., 1999).

3. *See id.*; Arthur G. King, *John Lambert Richmond, M.D.: "The First Cesarean Section in America,"* 29 *CINCINNATI HIST. SOC'Y BULL.* 59, 59 (1971).

4. Trial Tr., *supra* note 1, at 18.

5. *Id.* at 11, 14.

6. *See Carey, supra* note 2, at 435.

7. Trial Tr., *supra* note 1, at 12.

8. *Id.* at 14. Indeed, Ms. Hodges later aborted a pregnancy due to the risks it posed. *Id.* at 209.

9. *Id.* at 41. Dr. Wooster, the plaintiffs' key witness, was an editor of the journal. *Id.* at 15, 41.

10. *Id.* at 149.

11. *See id.* at 124.

Dr. Cooper concludes—that he was the victim of a grand conspiracy waged by the established medical community.¹²

Dr. Cooper's malpractice trial resulted in a hung jury, representative of the deep divide in the medical community over medicalized childbirth.¹³ Dr. Cooper's reputation itself was indeed on trial, yet he would live for just a few years after the trial and leave an enduring legacy as "the most daring and able surgeon in California."¹⁴ He founded the medical college that became Stanford's Medical School, a medical society, medical journals, and left a well-documented and preserved legacy in California as a true medical pioneer.¹⁵ Ms. Hodges survived only to endure "an indescribable amount of suffering, grief, anguish, and pain."¹⁶ Ms. Hodges could never safely become a mother again.¹⁷ Her incision was inflicted and treated so "bunglingly," alleged her lawyers, that she was permanently disfigured such that urine would pass through her abdomen months after the surgery.¹⁸ Ms. Hodges would be relegated to nothing more than an uncomfortable footnote in Dr. Cooper's biography.¹⁹

This article brings Ms. Hodges's ordeal into modern relevance to the "unnecesarean epidemic"²⁰ and to the role of birthing mothers as patients and putative plaintiffs today. The case occurred in a transformative moment—indeed a war—over how the medical community would regulate itself and its role in childbirth.²¹ Dr. Cooper's trial tested deep, festering, and pervasive

12. John Long Wilson, *Stanford University School of Medicine and the Predecessor Schools: An Historical Perspective*, STANFORD UNIV. SCH. MED., ch. XIII, § 1 (1999), <http://elane.stanford.edu/wilson/html/chap13/chap13-sect1.html>.

13. See Trial Tr., *supra* note 1, at 248.

14. Carey, *supra* note 2, at 435.

15. *Id.*

16. Trial Tr., *supra* note 1, at 10.

17. *Id.*

18. *Id.* at 13 (describing the extent of Ms. Hodges's wounds).

19. See Carey, *supra* note 2, at 435 (downplaying Ms. Hodges's lawsuit).

20. TheUnnecesarean.com defines "unnecesarean" as:

[An advocacy group] that pulls back the curtain on the practice of prophylactic cesarean surgery for suspected fetal macrosomia and illuminates the experiences of women who have been harmed by the aggressive practice of defensive medicine. [The Unnecesarean.com] provides information about preventing an unnecessary cesarean and resources for making fully-informed decisions about childbirth while offering an irreverent take on the maternity care crisis in the United States and beyond.

What is this site about?, THEUNNECESAREAN.COM (2008), <http://www.theunnecesarean.com/about/>.

21. See William H. Spencer, *San Francisco's Ophthalmic Heritage and Antecedent Organizations of the California Pacific Medical Center*, CAL. PACIFIC MED. CTR (2011), <http://www.cpmc.org/services/eye/about/history.html>. One historian described the era as "a plethora of doctors and near doctors, as variegated in quality as Jacob's coat was in colors, [who] glutted the market with their offerings. Within their broken ranks/migration verging on vagrancy, desperate charlatanism and economic strangulation prevailed." *Id.* (alteration in original).

tensions within the San Francisco medical community.²² The trial, positioned against the backdrop of the California gold rush, the pioneering spirit of individuality,²³ and the emerging role of science in the medical profession,²⁴ presents a dynamic and revealing case study on the medicalization of childbirth.

Today, nearly thirty-two percent of all United States births are by cesarean section, reflecting a fifty percent increase between 1996 and 2007.²⁵ Recent scholarship has explored the startling rise in cesarean section rates in relation to malpractice liability and its implications to the complex and ever-threatened world of reproductive rights.²⁶ This paper is a case study from “barbarity” to regularity using the high profile case of Mary Hodges (1859)²⁷ comparatively positioned next to the modern forced cesarean section case of Laura Pemberton (1996)²⁸ to reveal two guidepost moments in the medicalization of childbirth.

This comparison reveals new legal and historical dimensions to our modern unnecessarean epidemic. It reveals that the phalanx-like institutional presence of

22. See Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html>. Stanford University’s biography of Dr. Cooper states that this trial was the first malpractice lawsuit against a medical doctor in San Francisco. *Id.*

23. See Carey, *supra* note 2, at 434–35. See generally John F. Burns, *Taming the Elephant: An Introduction to California’s Statehood and Constitutional Era 1–7*, in *TAMING THE ELEPHANT: POLITICS, GOVERNMENT, AND LAW IN PIONEER CALIFORNIA* (John F. Burns & Richard J. Orsi eds., 2003) (discussing California’s “rapid development” during the gold rush); BRIAN ROBERTS, *AMERICAN ALCHEMY: THE CALIFORNIA GOLD RUSH AND MIDDLE-CLASS CULTURE* (Alan Trachtenberg ed., 2000) (providing a dynamic historical account of the California gold rush).

24. See Spencer, *supra* note 21 (discussing the development of science in medical practice in California).

25. Brady E. Hamilton et al., *Births: Preliminary Data for 2007*, 57 NAT’L VITAL STAT. REP., Mar. 18, 2009, at 3, available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_12.pdf.

26. See generally Kelly F. Bates, Note, *Cesarean Section Epidemic: Defining the Problem—Approaching Solutions*, 4 B.U. PUB. INT. L.J. 389, 404, 406 (1995) (proposing solutions including physician education, patient education, no-fault-liability, voluntary arbitration, and changes in reimbursement rates to address the complexities of unnecessary cesarean sections); Amy Kay Boatright, *State Control over the Bodies of Pregnant Women*, 11 J. CONTEMP. LEGAL ISSUES 903, 911–19 (2001) (discussing several court opinions that analyze the state’s authority to compel the mother to undergo a cesarean section); Beth A. Burkstrand-Reid, *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence*, 81 U. COLO. L. REV. 97 (2010) (examining how courts use the theoretical availability of alternative reproductive health services to find that women’s health will not suffer as a result of a curtailment of rights, and how courts blame women for the lack of available services in ways that undervalue women’s health); V. Chandis & T. Williams, *The Patient, the Doctor, the Fetus, and the Court-Compelled Cesarean: Why Courts Should Address the Question Through a Bioethical Lens*, 25 MED. & L. 729 (2006) (introducing a bioethical lens to forced cesarean section cases); Sarah D. Murphy, Note, *Labor Pains in Feminist Jurisprudence: An Examination of Birthing Rights*, 8 AVE MARIA L. REV. 443, 444 (2010) (concluding that feminist jurisprudence has not adequately considered birthing rights and that “excluding birthing rights from feminist jurisprudence undermines the legitimacy of the subject whose purpose purportedly embraces the experience of women in order to raise awareness in a legal system that ignores the concerns, interests, fears, and harms experienced by women”).

27. Trial Tr., *supra* note 1.

28. *Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

the medical community drives standard of care decisions, distinct from malpractice liability, and is worthy of independent examination. This case study reveals unique consent considerations for the laboring mother, distinct from the fetus–mother considerations. Finally, it reveals the irreconcilable and paradoxical acceptance of medical uncertainty and rejection of maternal uncertainty in the law. Each takeaway from this historical case study yields its own area for further scholarship and development.

II. STAGING THE "AWFUL CASE OF MALPRACTICE" OR THE "FORMIDABLE OPERATION"

Childbirth is "heavily influenced by cultural and economic conditions, the particular time and place in which women lived, and their socioeconomic class or ethnic group."²⁹ The Hodgeses' malpractice case emerged in the wake of the California gold rush,³⁰ the medicalization of childbirth,³¹ and the professionalization of medicine.³² Indeed, the competition and individual pursuits in the case mirrored the California gold rush climate.³³ The medical profession was at a transformative place historically as medical theory was subjected to scientific scrutiny,³⁴ bringing medicine into dynamic tension with regulation, individuality, competition, and innovation.³⁵ Mary Hodges was the victim of this dynamic context.

A. *Mary and Elkanah Hodges*

Ms. Mary Purdy was born in 1820 in New York.³⁶ She was "a very intelligent women [sic], very smart, and a woman of great influence."³⁷ She was

29. JUDITH WALZER LEAVITT, *BROUGHT TO BED: CHILDBEARING IN AMERICA 1750-1950*, at 35 (1986).

30. See Carey, *supra* note 2 at 434–35. Gold was discovered in California in 1848, drawing thousands of people West into the California hills seeking wealth and opportunity. *Id.*

31. See LEAVITT, *supra* note 29, at 49.

32. See Spencer, *supra* note 21 (discussing the progression of regulation of medicine in California).

33. The period from 1800 to 1850 has been described as one of the greatest human migrations as the United States rapidly expanded from the Alleghany Mountains to the Pacific Coast. Wilson, *supra* note 12, at ch. II, § 2, <http://elane.stanford.edu/wilson/html/chap2/chap2-sect2.html>. California's population grew from 165,000 in 1848 to 380,000 in 1858. Spencer, *supra* note 21.

34. Wilson, *supra* note 12, at ch. V, § 1, <http://elane.stanford.edu/wilson/html/chap5/chap5-sect1.html> (citing ERWIN H. ACKERKNECHT, *A SHORT HISTORY OF MEDICINE* 144–156 (1955); FIELDING H. GARRISON, *AN INTRODUCTION TO THE HISTORY OF MEDICINE* 310–406 (4th ed. 1929)).

35. See Spencer, *supra* note 21.

36. 1860 *Federal Census*, ANCESTRY.COM (2011), http://search.ancestry.com/search/group/list.aspx?group=USFEDCEN&o_xid=21837&o_lid=21837&o_sch=Search (reader should type in "Mary EP" in the First name box, "Hodges" in the last name box, "1820" in the birth year box, and "New York" in the birth place box).

a diminutive woman, about five feet tall.³⁸ She was in good health and had a pleasant demeanor before the surgery.³⁹

Ms. Hodges did not marry until her early thirties,⁴⁰ notably late for women of the era.⁴¹ Historical records do not reveal how or when she relocated from New York to California. In California, she worked as a governess before she got married.⁴² Her work as a governess allowed her to deploy her maternal instincts and contribute to the moral growth of the community consistent with prevailing societal expectations.⁴³

She married Elkanah H. Hodges in the mid-1850s.⁴⁴ Elkanah Hodges was born in Torrington, Connecticut on January 12, 1812.⁴⁵ He attended Yale College, although he left in 1830.⁴⁶ He began his career as a merchant and manufacturer in Torrington, but he was not successful in those ventures.⁴⁷ Between 1848 and 1849, Mr. Hodges moved to San Francisco, California where he became a lawyer and ultimately met Mary Purdy.⁴⁸

Elkanah and Mary Hodges were “a very respectable family.”⁴⁹ Even in her mid-thirties, her marriage triggered immediate expectations that she become a mother.⁵⁰ Yet, their marriage was quickly plagued by reproductive and sexual complications, ultimately jeopardizing the marriage and Ms. Hodges’s social

37. Trial Tr., *supra* note 1, at 28.

38. *Id.* at 120.

39. *Id.* at 103. Ms. Hodges’s friends regularly described her as a very chatty woman. *See id.* at 153. One witness explained that Ms. Hodges “had such a propensity to talk, that she battled me completely down, and I often had difficulty in trying to get away.” *Id.*

40. *See supra* text accompanying note 36; *infra* text accompanying note 44.

41. J. David Hacker, *Rethinking the “Early” Decline of Marital Fertility in the United States*, 40 DEMOGRAPHY 605, 609 (2003).

42. *See* Trial Tr., *supra* note 1, at 104. She worked first in the family of Mrs. Elvira Pond’s father for two and a half years. *Id.* at 103–04. She then worked with Margaret Hosmer’s family for more than a year before she married. *See id.* at 116. Margaret Hosmer was a notable figure herself in California history. *See* Deidre Johnson, *Margaret Hosmer*, 19TH-CENTURY GIRLS’ SERIES (2002), <http://www.readseries.com/auth-dm/hos-bio.html>. Ms. Hosmer was the principal of a public school in San Francisco. *Id.* (quoting 3 APPLETON’S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 268 (James Grant Wilson & John Fiske eds., 1990)). She authored numerous books, including about twenty-five books for youth. *Id.* (citing 3 APPLETON’S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 268 (James Grant Wilson & John Fiske eds., 1990)).

43. *See* Margaret Marsh, *Motherhood Denied: Women and Infertility in Historical Perspective*, in MOTHERS AND MOTHERHOOD: READINGS IN AMERICAN HISTORY 222–23 (Rima D. Apple & Janet Golden eds., 1997).

44. *See* Trial Tr., *supra* note 1, at 116 (noting that Mrs. Hosmer had known Ms. Hodges for three years as of the date of her testimony and when they met Ms. Hodges was not married); Carey, *supra* note 2, at 435 (noting that the malpractice suit occurred approximately two years after the 1857 operation).

45. BIOGRAPHICAL MEMORANDA RESPECTING ALL WHO EVER WERE MEMBERS OF THE CLASS OF 1832 IN YALE COLLEGE 141 (Class-Sec’y ed., 1880) [hereinafter YALE COLLEGE].

46. *Id.*

47. *Id.*

48. *Id.*

49. Trial Tr., *supra* note 1, at 28.

50. *See* Marsh, *supra* note 43, at 223.

standing.⁵¹ "[S]ome days" after her marriage, Ms. Hodges believed that she needed a doctor to address what she described as her condition of being "malformed."⁵² She suffered from an occlusion of her vagina⁵³—vaginal stenosis.⁵⁴

This triggered deep-rooted and pervasive concerns for Ms. Hodges. Her concerns illuminated both the increasing social value placed on biological motherhood and the movement toward medicalized motherhood of this era.⁵⁵ Indeed, Ms. Hodges had given up any idea of bearing children because of the malformation.⁵⁶ This revelation for Ms. Hodges might have been "more than a disappointment[,] [i]t could be a tragedy" at this historical time.⁵⁷ She later expressed that absent Dr. Cooper's work, she risked the likelihood of separation from her husband and relocation to New York.⁵⁸ She stated that her husband would "[o]f course . . . not live with me when I am not like other women."⁵⁹

Her fears regarding biological motherhood reflected changing societal constructs in America from the communal living and more elastic family structures that characterized the colonial era to the more individualized and conjugal household ordering that emerged in the late eighteenth century,⁶⁰ a social transformation particularly acute in San Francisco's individualistic pioneer society.⁶¹ Ms. Hodges's fears of childlessness acutely reflected the heightened value placed on biological procreation within the family unit in the mid-1850s.⁶² Childlessness in colonial America was certainly unusual and women preferred biological motherhood, but colonial women could resolve their childlessness on external religious terms as either God's will or the Devil's work.⁶³ To alleviate this burden, they could find other ways to create a family.⁶⁴ Colonial women conceived of family in a more elastic community context, which allowed childless women to take on other mothering responsibilities in the community.⁶⁵

51. Trial Tr., *supra* note 1 at 146, 150.

52. *Id.* at 146.

53. *See id.* She felt that she was "not a natural woman" because her "passage was not large enough to admit her little finger, more than just the end." *Id.*

54. *See* STEDMAN'S MEDICAL DICTIONARY 1832, 2084 (28th ed. 2006).

55. *See* Marsh, *supra* note 43, at 220.

56. Trial Tr., *supra* note 1, at 136–37.

57. Marsh, *supra* note 43, at 223.

58. Trial Tr., *supra* note 1, at 150. Her concerns regarding relocation were linked to intense privacy and embarrassment. *See id.* She feared the social consequences of anyone learning of her "malformity." *See id.*

59. *Id.* at 151 (internal quotation marks omitted). This discussion in the trial prompted laughter and required the judge to silence the courtroom, revealing the emotional trauma of her testimony. *See id.*

60. *See* Marsh, *supra* note 43, at 220.

61. *See generally* Wilson, *supra* note 12, at ch. VIII, § 1, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect1.html> (describing the changes in San Francisco due to the gold rush).

62. Marsh, *supra* note 43, at 220.

63. *Id.* at 216.

64. *Id.*

65. *See id.* at 216, 218.

This religious grounding in childlessness shifted by the end of the nineteenth century to categorize infertility as a medical condition, necessarily requiring women to use medical intervention instead of social means to address infertility.⁶⁶ Ms. Hodges's procreative concerns in the 1850s likely then placed her at the crossroads of these medicalized infertility complications.

The possibility that she might not procreate created particularized pressures for Ms. Hodges because of the declining birth rate,⁶⁷ her urban location,⁶⁸ and changing views of the family unit.⁶⁹ The birth rate had dropped from 7.04 births in 1800 to 5.42 in 1850.⁷⁰ Concerns about the declining birth rate were intertwined with worries about the effects that "the cacophony of city noise, the bustle of travel, . . . [and] the tensions produced by their husbands' ventures and risks in business" were having on women's "'delicate' female nervous systems."⁷¹

Motherhood was also transforming from a form of economic well-being to an ideology of personal fulfillment, a way for women to find personal happiness and stabilize their marriage.⁷² Antebellum women fulfilled public and private functions through procreating.⁷³ As mothers, women molded the moral vision of the country by rearing children.⁷⁴ At home, they made their husbands happy by giving them children who would then strengthen the marriage.⁷⁵ This marked a critical transition from republican motherhood to feminine domesticity.⁷⁶

These historical shifts likely exacerbated Ms. Hodges's fears. Consistent with the increasing shift toward medicalization and her deep-rooted concerns about the implications of childlessness and sexual limitations,⁷⁷ in December of 1856, Ms. Hodges consulted with Dr. Martha Thurston, a member of Boston's New England Female Medical Society, for advice on her condition.⁷⁸

Dr. Thurston advised Ms. Hodges to consult Dr. Cooper because surgery would likely be necessary, and he was quite skillful.⁷⁹ Ms. Hodges described the nature of Dr. Thurston's endorsement in unequivocal phrasing, stating "that there

66. *Id.* at 216.

67. *Id.* at 221.

68. See Wilson, *supra* note 12, at ch. VIII, § 1, <http://elane.stanford.edu/Wilson/html/chap8/chap8-sect1.html>.

69. Marsh, *supra* note 43, at 220.

70. *Id.* at 221.

71. *Id.* (alteration in original) (quoting JAMES H. CASSEDY, *MEDICINE AND AMERICAN GROWTH, 1800-1860*, at 173 (1986)).

72. See *id.* (quoting SYLVIA D. HOFFERT, *PRIVATE MATTERS: AMERICAN ATTITUDES TOWARD CHILDBEARING AND INFANT NURTURE IN THE URBAN NORTH, 1800-1860*, at 2 (1989); LEAVITT, *supra* note 29, at 3).

73. See *id.* (quoting HOFFERT, *supra* note 72, at 2; LEAVITT, *supra* note 29, at 3).

74. *Id.* at 222.

75. *Id.*

76. *Id.* at 223.

77. See *supra* text accompanying notes 55-71.

78. Trial Tr., *supra* note 1, at 134-35.

79. *Id.* at 135.

was not a man on the Pacific [C]oast who was as competent to perform an operation of that kind, as Dr. Cooper."⁸⁰ Dr. Cooper's own professional ambition and zeal positioned him among many doctors of the era anxious to attend to laboring women to give doctors "enduring responsibility and prestige in society."⁸¹

B. Dr. Elias Samuel Cooper

When Ms. Hodges met Dr. Cooper, he was a distinguished surgeon in California, already clouded with notable controversy.⁸² His professional rise was one of extraordinary perseverance, continued Westward migration, and intense professional commitment.⁸³ He was born on November 25, 1820, in Somerville, Ohio⁸⁴ to a Quaker farming family, one of nine children.⁸⁵ His grandparents, early settlers of the then-West, migrated by wagon to Ohio in 1807 with other Quakers protesting slavery in South Carolina.⁸⁶

He began studying medicine at sixteen, under his physician-brother's direction in Ohio.⁸⁷ After a brief stint in medical school in Cincinnati,⁸⁸ he continued his studies and received his medical degree *ad eundem* from the St. Louis University in 1851, likely attending a semester's worth of lectures.⁸⁹ This level of education was typical for the time period.⁹⁰ In the mid-1800s, medical schools ranged from two months to two years, still lagging behind the rigorous European training⁹¹ that led many American men to study medicine overseas.⁹² Those doctors who were formally trained began to distinguish themselves from

80. *Id.* at 146.

81. RICHARD W. WERTZ & DOROTHY C. WERTZ, *LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA* 30 (Expanded ed., 1989).

82. See Wilson, *supra* note 12, at ch. I, § 1, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect1.html>.

83. See *id.*

84. Carey, *supra* note 2, at 434. But see Spencer, *supra* note 21 (placing his birth in 1822).

85. Wilson, *supra* note 12, at ch. II, § 1, <http://elane.stanford.edu/wilson/html/chap2/chap2-sect1.html>.

86. *Id.* They traversed the Cumberland Gap through Daniel Boone's famed Wilderness Trail. *Id.*

87. Spencer, *supra* note 21.

88. *Id.*

89. See Wilson, *supra* note 12, at ch. IV, § 1, <http://elane.stanford.edu/wilson/html/chap4/chap4-sect1.html>. This means that he likely received credit for four years of practice and four and a half months of lectures. *Id.* His brother also graduated from St. Louis University. *Id.*

90. *Id.*

91. BARBARA EHRENREICH & DEIRDRE ENGLISH, *WITCHES, MIDWIVES, & NURSES: A HISTORY OF WOMEN HEALERS* 23 (2d ed. 1973).

92. WERTZ & WERTZ, *supra* note 81, at 29. In the late 1700s and early 1800s very few medical schools existed, indeed "[t]he general public, fresh from a war of national liberation, was hostile to professionalism and 'foreign' elitism of any type." EHRENREICH & ENGLISH, *supra* note 91, at 22.

“lay practitioners” by limiting access to the profession.⁹³ Dr. Cooper’s relatively short and informal studies underscored his determination and accomplishments,⁹⁴ but also positioned him in the crosshairs of the movement to remove “irregular” physicians from the profession.⁹⁵

Dr. Cooper was fascinated by surgery; he “allowed no day to pass without using his scalpel.”⁹⁶ Between 1841 and 1854, Dr. Cooper worked single-mindedly to treat patients, learn his trade, and teach surgery demonstration to students.⁹⁷ He never married.⁹⁸ He rarely slept.⁹⁹ He was “[a] tremendously self-confident and self-reliant individual.”¹⁰⁰

His zeal for surgery allegedly crossed legal and ethical boundaries more than once. In Danville, Ohio, Dr. Cooper was prosecuted on charges of grave-digging to obtain specimens for study.¹⁰¹ He was honorably acquitted of the charges, but the adverse publicity may have led him to relocate to Illinois.¹⁰² In 1844, he founded a surgical infirmary in Peoria, Illinois for eyes, ears, and clubfoot treatments.¹⁰³

Complicating his fierce work ethic, he developed a unique nervous system condition that paralyzed part of his face¹⁰⁴ and required him to turn down cases that might require losing a night’s sleep—a relevant fact to the Hodgeses’ case.¹⁰⁵ He suffered paralysis of his face if he lost a night’s sleep; a “spasm” came over him.¹⁰⁶ Seeking medical relief, he closed his Illinois infirmary in 1854 and toured surgery clinics in London and Paris.¹⁰⁷

His European travels piqued his interest in medical developments on the West Coast,¹⁰⁸ perhaps his family roots as Western pioneers in Ohio inspired his

93. EHRENREICH & ENGLISH, *supra* note 91, at 23. By 1830, thirteen states regulated medicine and banned “irregular” medicine or quackery. *Id.* at 24. While “regular,” educated, elite doctors wanted more regulation, they lacked popular support as many still sought popular traditions of self-help. WERTZ & WERTZ, *supra* note 81, at 49.

94. See Wilson, *supra* note 12, at ch. IV, § 1, <http://elane.stanford.edu/wilson/html/chap4/chap4-sect1.html>. Dr. Cooper published a paper on congestive fever as early as 1849 under “M.D.” credentials, although he did not hold this distinction. *Id.*

95. *Id.* at ch. XIII, § 1, <http://elane.stanford.edu/wilson/html/chap13/chap13-sect1.html>.

96. Spencer, *supra* note 21.

97. See Carey, *supra* note 2, at 434.

98. *Id.*

99. *Id.*

100. *Id.*

101. Spencer, *supra* note 21.

102. *Id.*

103. *Id.* He began the infirmary in Danville, Illinois and later moved it to Peoria, Illinois. See *id.*

104. *Id.*; see Trial Tr., *supra* note 1, at 147.

105. See Trial Tr., *supra* note 1, at 147

106. *Id.*

107. Carey, *supra* note 2, at 434.

108. *Id.*

quest.¹⁰⁹ The unique "breeding grounds" of disease that festered in California mining camps lured many physicians and surgeons of this era to California.¹¹⁰ Dr. Cooper understood that the West was the new frontier and a promising location to set up a medical school: "Great empire to build! Brilliant destiny in future!" wrote Dr. Cooper of his arrival in San Francisco.¹¹¹

Dr. Cooper arrived in San Francisco, California in 1855 to a daunting combination of opportunity, disdain, and rivalry.¹¹² The medical community mirrored the scene in California; a "California cauldron . . . boiling with the elements of both lowly and heroic achievement."¹¹³ One 1850 letter from a physician to a family member explained that "we physicians are at the most ruinous discount, and the ancient and time honored doctorate is in most cases held in so low repute that many a worthy physician studiously conceals his title."¹¹⁴

Dr. Cooper opened the Cooper's Eye, Ear, and Orthopedic Infirmary in a rented house just one month after he arrived.¹¹⁵ Several witnesses in the malpractice case and Dr. Cooper's biography later questioned his ethics.¹¹⁶ He immediately began advertising in newspapers with bold claims that he had "visited all the important Hospitals of Europe for the purpose of extending his knowledge of Medicine and Surgery."¹¹⁷ He circulated thousands of circulars

109. See Wilson, *supra* note 12, at ch. II, § 1, <http://elane.stanford.edu/wilson/html/chap2/chap2-sect1.html>.

110. Carey, *supra* note 2, at 434. Perhaps as many as 1,300–1,500 doctors came West during this period. Wilson, *supra* note 12, at ch. IX, § 2, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect2.html>.

111. Wilson, *supra* note 12, at ch. I, § 1, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect1.html> (citing Correspondence from Elias Samuel Cooper, Box 1, Folder 5 (on file with California Historical Society, North Baker Research Library) [hereinafter Cooper Papers]).

112. See Carey, *supra* note 2, 434–35. At the age of 34, Dr. Cooper arrived in San Francisco on May 26, 1855, on the S.S. Sierra Nevada, via Nicaragua, with 664 other passengers. Wilson, *supra* note 12, at ch. VIII, § 1, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect1.html>.

113. Burns, *supra* note 23, at 1, 3 (noting the "mammoth undertaking" of "bringing discipline and order to the new state's politics and government in its chaotic infancy").

114. Wilson, *supra* note 12, at ch. II, § 6, <http://elane.stanford.edu/wilson/html/chap2/chap2-sect6.html> (quoting J. ROY JONES, MEMORIES, MEN AND MEDICINE 2–3 (1950)) ("It is because many, and among them those who assume without any moral or legal right the title of Doctor, in their grasping cupidity, and impatience to amass in the shortest possible time their 'pile' have, while taking advantage of the necessities of their sick and dependent fellow creatures, drained the poor miner of all his hard-earned dust . . .").

115. *Id.* at ch. VIII, § 2, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect2.html> (quoting Cooper Papers, *supra* note 111, at Box 3, Folder 14).

116. See Carey, *supra* note 2, at 435 (stating that Dr. Cooper "clearly violated the American Medical Association's Code of Ethics and earned the opprobrium of the local medical community by advertising his services in several languages throughout the state, [and] perform[ing] surgical operations on Wednesdays and Saturdays at no charge"); see, e.g., Trial Tr., *supra* note 1, at 239 ("I can tell you: they are quack advertisements."). One witness testified that "he variously advertised himself in an unethical and unprofessional manner." *Id.* at 126.

117. Wilson, *supra* note 12, at ch. VIII, § 2, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect2.html> (quoting Cooper Papers, *supra* note 111, at Box 3, Folder 14).

and cards throughout the city.¹¹⁸ Dr. Cooper wrote a bold autobiographical update of himself, in the third person, proclaiming “[f]ew examples have ever occurred of a young man in a strange city rising so rapidly, taking at a single step the position of first surgeon on this coast from that of comparative obscurity.”¹¹⁹

He also allowed doctors to observe his procedures for free.¹²⁰ In fact, Dr. Wooster—the doctor who Dr. Cooper alleged at trial was really in charge of Ms. Hodges’s care¹²¹—befriended Dr. Cooper after attending one of his advertised lectures.¹²²

Dr. Cooper, in 1855, also keenly sensed that he had many enemies. His autobiography mitigated his professional successes by noting that “this success was not without its opposition; [e]nemies arose and malignant ones too so that it may be truly said that no one had stronger friends or more bitter enemies than he after six months residence in this city.”¹²³ Notwithstanding the “opprobrium of the local medical community,”¹²⁴ Dr. Cooper was regarded as a “gifted” surgeon, as Ms. Hodges’s own introduction to him revealed.¹²⁵

Dr. Cooper sought to advance his career distinctly through professional medical societies.¹²⁶ Sociologist Elliot Friedson explained, “a profession attains and maintains its position by virtue of the protection and patronage of some elite segment of society which has been persuaded that there is some special value in its work.”¹²⁷ Dr. Cooper keenly understood this.¹²⁸ Many local medical societies disbanded during this period of “medical anarchy” in the 1830s and

118. *Id.* (citing Cooper Papers, *supra* note 111, at Box 1, Folders 6–7) (referencing several circulars printed for Cooper including one in July 1855 announcing a “Course on Medical Instruction . . . as soon as a sufficient number of pupils [were] engaged to attend”).

119. *Id.* at ch. VIII, § 4, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect4.html> (quoting Cooper Papers, *supra* note 111, at Box 1, Folder 8). Dr. Cooper also ran an article in Peoria stating that “[w]e know of no one in his profession more worthy than Dr. Cooper of the high reputation he has established for surgical skill We congratulate our friends of Oregon and California upon the prospect of receiving a surgeon of such abilities.” *Id.* at ch. VIII, § 2, <http://elane.stanford.edu/Wilson/html/chap8/chap8-sect2.html> (quoting Cooper Papers, *supra* note 111, at Box 3, Folder 16).

120. *Id.* at ch. VIII, § 2 <http://elane.stanford.edu/Wilson/html/chap8/chap8-sect2.html> (quoting Cooper Papers, *supra* note 111, at Box 1, Folder 7).

121. *See* Trial Tr., *supra* note 1, at 252.

122. Wilson, *supra* note 12, at ch. VIII, § 2, <http://elane.stanford.edu/Wilson/html/chap8/chap8-sect2.html>. Dr. Wooster was an 1849 graduate of the Western Reserve school. ANDREW E. MASICH, *THE CIVIL WAR IN ARIZONA* 174 n.58 (2006).

123. Wilson, *supra* note 12, at ch. VIII, § 4, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect4.html> (quoting Cooper Papers, *supra* note 111, at Box 1, Folder 8).

124. Carey, *supra* note 2, at 435.

125. Trial Tr., *supra* note 1, at 146. Perhaps most noteworthy, Dr. Cooper’s patients recovered particularly well because he protected them from infection through sterilization, a medical practice not yet widely adopted. *See* Carey, *supra* note 2, at 435.

126. *See* Wilson, *supra* note 12, at ch. IX, § 1, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect1.html>.

127. EHRENREICH & ENGLISH, *supra* note 91, at 30.

128. *See* Wilson, *supra* note 12, at ch. VIII, § 2, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect2.html>.

1840s.¹²⁹ The early city and county medical societies of California struggled absent state leadership.¹³⁰ In the mid-nineteenth century, few regulating mechanisms existed, creating a range of practice backgrounds.¹³¹

In 1848, the American Medical Association was founded, reflecting a resurgence of the medical community's quest for regulation and professionalization.¹³² Dr. Cooper began to establish a state society in California in 1855, three months after he arrived.¹³³ San Francisco had only recently revived its second formal medical society in November 1853, doing so expressly "to preserve the character of the profession and to prevent the progress of quackery and charlatanism."¹³⁴

Dr. Cooper's aggressive marketing practices and truncated education positioned him in a somewhat tenuous position within this medical community.¹³⁵ Dr. Cooper sensed his potential for prominence within the medical societies of California, but he faced early marginalization and ostracization.¹³⁶ Dr. Cooper secured a leadership position as Corresponding Secretary in 1855 with the new emergence of the San Francisco County Medico-Chirurgical Association.¹³⁷ The purpose of the organization was to advance the surgical sciences, promote harmony and friendship among its members, and support the less fortunate.¹³⁸

Foreshadowing the Hodgeses' litigation, one of Dr. Cooper's first acts of business was to offer a series of resolutions, which poignantly revealed a spirit of unanimity, mutual promotion, and collective vindication of reputational attacks:

1. [U]nanimity of feeling and concurrence of action among the members of the Society are indispensable to its perpetuity.

129. EHRENREICH & ENGLISH, *supra* note 91, at 28.

130. Wilson, *supra* note 12, at ch. X, § 1, <http://elane.stanford.edu/wilson/html/chap10/chap10-sect1.html>.

131. *Id.* at ch. IX, § 2, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect2.html>. There were many practicing physicians in California and elsewhere who had attained their status through apprenticeships. *Id.* at ch. IX, § 3, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect3.html>.

132. See EHRENREICH & ENGLISH, *supra* note 91, at 28.

133. Wilson, *supra* note 12, at ch. IX, § 1, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect1.html>.

134. *Id.* at ch. IX, § 2, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect2.html> (noting that these early medical societies were on the lookout for "irregular" doctors who were practicing without a medical degree). This medical society would be extinct by 1860. *Id.* at ch. IX, § 3, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect3.html>.

135. See Wilson, *supra* note 12, at ch. IX, § 3, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect3.html>.

136. See Carey, *supra* note 2, at 435; see also WERTZ & WERTZ, *supra* note 81, at 48 ("The fundamental objection of regular doctors was to competition from uneducated practitioners.").

137. Wilson, *supra* note 12, at ch. IX, § 3, <http://elane.stanford.edu/Wilson/html/chap9/chap9-sect3.html>.

138. *Id.* (quoting 1 San Francisco County Medico-Chirurgical Association Minutes and Early Meetings (on file with the California Historical Society)). Sacramento established its medical society in 1855, just as the revived San Francisco society was ceasing its functions. *Id.*

....
 [2.] [I]t is the duty of each member to vindicate the character of any other, at all times, when unjustly assailed.

....
 [3.] [I]t shall be the duty of every member to treat all other members as if they were in possession of these qualities, unless found to be otherwise.¹³⁹

His later resolutions outright challenged the early societies who previously scorned him and foreshadowed the anger the Hodgeses' trial would instill in him:

1. That ostracism in our profession, practiced among its members, irrespective of merit, deserves the contempt of all high minded and honorable practitioners, and shall meet with scorn
2. That societies banded together for the purpose of crushing merit, are common enemies of all mankind, and should be treated accordingly.
3. That we recognize only merit as entitled to our regard, and that we will individually and collectively acknowledge on all opportune occasions and encourage it, wherever found.

....
 [4.] That in elevating the profession by promoting unanimity of feelings, and concurrence of action among its members, we pursue the best course to enhance our own individual and collective interests.¹⁴⁰

In 1856, Dr. Cooper helped organize the California State Medical Society,¹⁴¹ a testament to his zeal and his quest for individual prominence using organized medicine to elevate the profession.¹⁴² In 1858, just as the Hodgeses' trial began,

139. *Id.* (quoting 1 San Francisco County Medico-Chirurgical Association Minutes and Early Meetings (on file with the California Historical Society)).

140. *Id.*

141. *Id.* at ch. X, § 1, <http://elane.stanford.edu/wilson/html/chap10/chap10-sect1.html>. Dr. Cooper later served as Acting President of the State Medical Society. *Id.* at ch. XII, § 1, <http://elane.stanford.edu/wilson/html/chap12/chap12-sect1.html>. In this role, he delivered an Annual Presidential Address that discredited a member of the society and a fierce rival, underscoring the extent of Dr. Cooper's polarizing personality. *See id.* (citing Elias S. Cooper, On Ligating the Satellite Veins in Connexion with the Arteries Which They Accompany: Operation of Ligating the External Iliac Artery and Vein: Rapid Recovery of the Patient 29–33 (Feb. 11–13, 1857) (unpublished presentation, Medical Society of the State of California) (on file with California Historical Society)).

142. *See id.* at ch. X, § 1, <http://elane.stanford.edu/wilson/html/chap10/chap10-sect1.html> (quoting Cooper Papers, *supra* note 111, Book 1, Folder 2) (stating in his letter to the Sacramento Medical Society that “[n]othing in my humble opinion would go so far towards elevating Medicine and Surgery and suppressing Quackery as a well organized State Association connected with local

he was also working with six other physicians to form the first medical college on the West Coast through a charter from the University of the Pacific.¹⁴³

C. Ms. Hodges's First Surgery

Ms. Hodges consulted with Dr. Cooper about her condition as Dr. Thurston had suggested.¹⁴⁴ He explained that he would perform an operation, but that it would be painful.¹⁴⁵ Ms. Hodges had the surgery, aware of the physical and social risks of such a procedure.¹⁴⁶ She thought the surgery was necessary to have a "connection" with her husband.¹⁴⁷ She underwent the surgery in December 1856, reflective of the sense of urgency she felt and her perceived need for a medical response.¹⁴⁸ Dr. Cooper cut out cartilage with a knife to open a space approximately one inch in diameter and in depth.¹⁴⁹

Ms. Hodges took great pains to keep her condition private.¹⁵⁰ While she spoke quite openly about her malformation and surgery at the infirmary, that was her only outlet.¹⁵¹ She otherwise feared the social implications of her condition.¹⁵² A friend of the family in which she had boarded threw a party the evening of the surgery.¹⁵³ She attended the party and danced all night "so that they might not know or suspect that she had had an operation performed."¹⁵⁴ She thought that she was going to faint as she danced.¹⁵⁵ Her friends told her that she looked quite pale and weak.¹⁵⁶ She said that "Mr. Hodges had to set up with her the most of the night, and give her stimulants to keep her from having fainting turns."¹⁵⁷ She described it as "excruciating misery."¹⁵⁸

Societies all having unanimity of feeling and concurrence of action and composed of working liberal men who consider no efforts of their own as any sacrifice provided the good of the profession is enhanced thereby").

143. Carey, *supra* note 2, at 435; *id.* at ch. XV, § 1, <http://elane.stanford.edu/wilson/html/chap15/chap15-sect1.html> (citing ROCKWELL D. HUNT, HISTORY OF THE COLLEGE OF THE PACIFIC: 1851-1951, at 13-14 (1951)).

144. See Trial Tr., *supra* note 1, at 146.

145. *Id.*

146. See *id.* (stating how she acted to prevent anyone from knowing about the operation).

147. *Id.* at 158.

148. *Id.* at 135.

149. *Id.*

150. *Id.* at 153. The trial transcript reveals that she had good reason to be concerned; the judge had to regain order after observers snickered at the testimony regarding Ms. Hodges's occlusion. *Id.* at 151; see also *id.* at 158 (Judge having to urge a female witness to reveal intimate details about her knowledge of Ms. Hodges's medical condition on the stand, despite her visible discomfort.).

151. See *id.* at 153.

152. *Id.* at 146.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

Ms. Hodges's search for medical treatment underscores the vulnerability that she faced seeking medical treatment and pursuing litigation.

D. Ms. Hodges's Perilous Pregnancy

The procedure immediately transformed her marriage.¹⁵⁹ She began to express her desire to be a mother just weeks after her surgery.¹⁶⁰ Yet, the risks of her malformation haunted her.¹⁶¹ Indeed, Dr. Thurston advised her not to become pregnant because labor would be too "troublesome."¹⁶²

Ms. Hodges had just recovered from surgery when she became pregnant.¹⁶³ Even when she suspected that she was pregnant, in February of 1857, Ms. Hodges "desired to produce an abortion."¹⁶⁴ She simultaneously sought the guidance of several medical advisors regarding her medical options in delivering a healthy child.¹⁶⁵ Her decision to proceed with the pregnancy was sharply influenced by her confidence in Dr. Cooper.¹⁶⁶ The matron at Dr. Cooper's infirmary testified that Ms. Hodges had "so much confidence in Dr. Cooper, that [she] commenced to think, that if he would attend [her], [she] would go [her] time."¹⁶⁷

In March 1857, Ms. Hodges went to see Dr. Ayres to inquire about a safe delivery.¹⁶⁸ While Ms. Hodges's fears may have been uniquely informed, fears of death or permanent injury often surrounded women's birth experiences in the eighteenth and nineteenth centuries.¹⁶⁹ Further, obstetric practices at the time were complicated by concerns of male exposure to female genitalia.¹⁷⁰ Competent doctors treated pregnancy by "the sense of touch alone."¹⁷¹ This treatment model likely complicated Ms. Hodges's diagnosis and the trial testimony.

Dr. Ayres advised Ms. Hodges that he did not detect any obstacles to a safe delivery.¹⁷² Dr. Ayres conducted a physical exam and concluded that there was nothing obstructive in the vagina and that, although Ms. Hodges had relatively

158. *Id.* at 151.

159. *Id.* at 137.

160. *Id.* (stating that she thought it would be "very pleasant").

161. *See id.* at 151 (stating that she even considered ending the pregnancy due to the medical risks).

162. *Id.* at 137.

163. *Id.* at 147.

164. *Id.* at 139–40.

165. *Id.* at 66, 147 (noting that she consulted Dr. Ayres and Dr. Cooper).

166. *Id.* at 151.

167. *Id.* (internal quotation marks omitted).

168. *Id.* at 66.

169. LEAVITT, *supra* note 29, at 14.

170. WERTZ & WERTZ, *supra* note 81, at 84.

171. *Id.* at 84, 87 (citing Editorial, *Demonstrative Midwifery*, 1 N.Y. MED. GAZETTE 5 (July 6, 1850)) ("The fit doctor was to be essentially a blind man.").

172. Trial Tr., *supra* note 1, at 67.

small "hard parts," her structure would not impede natural passage of a child.¹⁷³ Yet, other medical advisors provided Ms. Hodges with conflicting advice.¹⁷⁴ Dr. Thurston advised her that she should deliver early to overcome any obstructions.¹⁷⁵

Ms. Hodges continued to visit Dr. Cooper's infirmary every few days at the beginning of her pregnancy.¹⁷⁶ She inquired with Dr. Cooper about whether the pregnancy should go full term.¹⁷⁷ Dr. Wooster testified that Dr. Cooper advised her "to trust to fortune and his skill for a safe deliverance."¹⁷⁸ Yet, Dr. Thurston testified that Dr. Cooper advised her that she should deliver early at the end of seven months.¹⁷⁹

Prevailing medical standards did contemplate early labor to mitigate these perceived risks.¹⁸⁰ Dr. Thurston told Ms. Hodges about cases where children were healthy and vigorous after early delivery.¹⁸¹ Thus, even after Ms. Hodges "reconciled to have a child,"¹⁸² she faced a very difficult decision with conflicting medical guidance.¹⁸³ She could either deliver early and risk the vitality of the child or deliver timely and risk her own life and perhaps her child's.¹⁸⁴ She was ultimately unwilling to go through with a premature delivery because she feared for the child's survival.¹⁸⁵

Recognizing these risks, Ms. Hodges was relentless in pursuing Dr. Cooper.¹⁸⁶ She trusted him, as many women increasingly relied on doctors in childbirth at this time.¹⁸⁷ Dr. Cooper said that his health prevented him from attending to her.¹⁸⁸ She was greatly distressed because she trusted Dr. Cooper and thought that no one paralleled his skills.¹⁸⁹ Dr. Cooper insisted that there were many able doctors, yet this discouraged Ms. Hodges.¹⁹⁰ Mr. Hodges proposed that Dr. Cooper agree to not leave the city so that Ms. Hodges could let him know when she was in labor.¹⁹¹ Ms. Hodges said, "[l]et me understand you rightly; if it is necessary that an operation should be performed, you will come

173. *Id.*

174. *Id.* at 138 (discussing the conflicting advice that Dr. Thurston gave Ms. Hodges).

175. *Id.*

176. *See id.* at 151.

177. *Id.* at 28.

178. *Id.* at 29.

179. *Id.* at 139.

180. *Id.* at 29.

181. *Id.* at 139.

182. *Id.* at 144.

183. *See id.* at 28, 138.

184. *See id.* at 139 (stating that she feared a premature delivery because the child may die); LEAVITT, *supra* note 29, at 14.

185. *See* Trial Tr., *supra* note 1, at 139.

186. *Id.* at 147.

187. WERTZ & WERTZ, *supra* note 81, at 96.

188. Trial Tr., *supra* note 1, at 147.

189. *Id.*

190. *Id.*

191. *See id.*

and perform it?"¹⁹² Dr. Cooper consented.¹⁹³ Dr. Cooper alleged at trial that he had an agreement that he would *not* take charge of her, *unless* she required a surgeon.¹⁹⁴

Ms. Hodges visited Dr. Cooper's practice again before delivery.¹⁹⁵ She inquired about referrals to other physicians.¹⁹⁶ Despite the conflicting medical guidance that Ms. Hodges received and the lack of clarity over the treating physician arrangement, Ms. Hodges nonetheless seemed resigned to the need for an operation to deliver the child.¹⁹⁷ She reportedly said, "I am as confident that there will have to be an operation performed, before I am delivered, as I am that I have got to die before I go to heaven."¹⁹⁸

Ms. Hodges had the highest confidence in Dr. Cooper.¹⁹⁹ Dr. Cooper's nephew noted that this was one of his hallmark surgical qualities. His nephew observed, "not only was he self-possessed himself, but his manner was such as to thoroughly inspire his patient with the most perfect confidence that he was wholly secure in his hands . . . I think that no one . . . feared for a moment, that the operation would not end successfully."²⁰⁰

Dr. Cooper's self-assuredness might have comforted Ms. Hodges in an historical era where "[n]ine months of gestation could mean nine months to prepare for death."²⁰¹

Ms. Hodges's actions reflected her sincere beliefs that her condition necessitated medical intervention and that medical intervention would be her savior.²⁰² She displayed strong determination, managing her medical care and pursuing Dr. Cooper's capabilities.²⁰³ Despite the marital importance of children, "birth remained to large extent the province of women,"²⁰⁴ as evidenced by Ms. Hodges's actions and Mr. Hodges's absence.²⁰⁵ Her search for a doctor, rather than a midwife, reflected the entry of doctors in childbirth, allowing middle- and upper-class women to turn to doctors as the perceived "most knowledgeable and able attendants."²⁰⁶ Ms. Hodges's economic status and her geographic location gave her the choice to have a doctor attend her birth,

192. *Id.* (internal quotation marks omitted).

193. *Id.*

194. Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html> (citing Trial Tr., *supra* note 1, at 251–52).

195. Trial Tr., *supra* note 1, at 147.

196. *Id.*

197. *Id.*

198. *Id.* (internal quotation marks omitted).

199. *Id.* at 151.

200. Wilson, *supra* note 12, at ch. XVIII, § 1, <http://elane.stanford.edu/wilson/html/chap18/chap18-sect1.html>.

201. LEAVITT, *supra* note 29, at 20.

202. See Trial Tr., *supra* note 1, at 147.

203. See *supra* text accompanying notes 170–193.

204. WERTZ & WERTZ, *supra* note 81, at 6.

205. See *supra* text accompanying notes 180–193.

206. WERTZ & WERTZ, *supra* note 81, at 30.

while other rural or lower-class women might have been more limited.²⁰⁷ Her selection of a surgeon to attend to her confinement certainly increased the likelihood of an interventionist childbirth, but the cesarean nonetheless remained an exceedingly disfavored intervention.²⁰⁸

III. MS. HODGES’S HISTORIC CESAREAN OR THE FIRST “UNNECESAREAN?”

A. *Ms. Hodges’s Extended Labor*

Ms. Hodges went into labor on November 6, 1857.²⁰⁹ As a middle- or upper-class married woman, she delivered at home consistent with the traditions of the times to preserve her privacy, virtue, and female kinship.²¹⁰ She had medical care and social support from a female neighbor and a servant.²¹¹ The presence of women reflected the social nature of childbirth as an expression of women’s love and support for each other.²¹² Even though the Hodgeses’ social and economic status allowed them to afford a doctor to perform the delivery, the social aspects of childbirth persisted whereby friends and servants assisted in birthing and housekeeping.²¹³ Richard and Dorothy Wertz explain that “[s]ocial childbirth continued as a divided affair: the body in the hands of men, the spirit in the company of women.”²¹⁴

She labored for about twelve hours under Dr. Cooper’s care.²¹⁵ Dr. Wooster then arrived during the evening of Ms. Hodges’s first day of labor.²¹⁶ Critical to the case was the question of legal accountability.²¹⁷ Dr. Wooster alleged that he was brought in as the “substitute or watcher” for Dr. Cooper, but Dr. Cooper alleged that Dr. Wooster was the attending physician.²¹⁸ The defense lawyers pressed Dr. Wooster heavily on this relationship.²¹⁹ One witness mockingly wondered why a mere umbrella or hat would not be left with the birthing mother

207. *Id.* at 54. Only economically advantaged women in large geographic areas would be able to afford a doctor attending to them in their home. LEAVITT, *supra* note 29, at 49. Rural and frontier women were very limited in options, many having only midwives. See WERTZ & WERTZ, *supra* note 81, at 54.

208. See LEAVITT, *supra* note 29, at 43.

209. Trial Tr., *supra* note 1, at 15–16. She was thirty-six years old. See *supra* text accompanying note 25 (noting that she was born in 1820).

210. WERTZ & WERTZ, *supra* note 81, at 87.

211. Trial Tr., *supra* note 1, at 118, 167.

212. See WERTZ & WERTZ, *supra* note 81, at 6.

213. *Id.*

214. *Id.* at 26.

215. Trial Tr., *supra* note 1, at 16.

216. *Id.* at 15–16.

217. See *id.* at 14. Much of the trial focused on this issue. See *id.* Interestingly, Dr. Cooper had recently performed a questionable emergency tracheotomy on Dr. Wooster’s child. See *id.* at 42–44.

218. *Id.* at 16, 251.

219. See *id.* at 29–30 (noting that Dr. Wooster obtained payment and continued to treat Ms. Hodges for several weeks after the surgery).

were the attending physician to have no duty or authority to take proactive measures to ensure a safe delivery.²²⁰

Labor progressed slowly for Ms. Hodges.²²¹ No medical interventions comforted her during this period.²²² During the forty-eight hours that Dr. Wooster attended to Ms. Hodges without Dr. Cooper, neither Ms. Hodges's bladder nor her rectum were emptied to provide her comfort or to clear any potential obstructions.²²³ Dr. Wooster was later indicted for perjury based on his testimony regarding these facts.²²⁴ By the evening of November 10, the baby was presenting backwards.²²⁵ The child had passed through Ms. Hodges's superior strait successfully and was entirely presenting at the inferior strait, against the pubis and the perineum.²²⁶ The child had been in this lower position for approximately ten to twelve hours, dead for a portion of that time.²²⁷

Dr. Wooster then sent for Dr. Cooper with a note indicating that Ms. Hodges had been in a long labor and needed to deliver, advising Dr. Cooper to bring his instruments with him, including forceps and obstetrical equipment.²²⁸

The question of when to intervene in childbirth was "truly a dilemma" for nineteenth-century doctors.²²⁹ Dr. Wooster and all of the plaintiffs' medical witnesses testified that there were at least two options available to Dr. Cooper that were preferable to the cesarean section.²³⁰ Dr. Wooster testified that forceps would have "undoubtedly" delivered the baby given its positioning so far down the strait.²³¹ Alternatively, Dr. Cooper could have performed an embryotomy or craniotomy, involving the piecemeal removal of the fetus.²³² If the presentation of the child presented the largest obstacle, an additional option would have been

220. *Id.* at 81.

221. *Id.* at 16. Labor in this time period typically lasted for twenty-four hours. *Id.* at 129.

222. *See id.* at 16–20 (discussing the difficulties of the medical interventions during labor).

223. *Id.* at 18. *But see* Wilson, *supra* note 12, at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html> (stating that Dr. Wooster assured Dr. Cooper that Ms. Hodges had been catheterized).

224. *See Indicted for Perjury*, S.F. DAILY EVENING BULL., June 6, 1859, at 2. The grand jury indicted Dr. Wooster for perjury in the testimony that he provided in Ms. Hodges's case. *Id.* The squib stated that another witness was also indicted but did not identify the witness. *Id.* Dr. Cooper insisted that Dr. Wooster told him that she had been catheterized. Wilson, *supra* note 12, at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html>.

225. Trial Tr., *supra* note 1, at 17 (explaining that the baby was facing forward, rather than the more common presentment where the baby is facing the back of the mother).

226. *Id.* at 17–18.

227. *See id.* at 73. Although some witnesses questioned whether the child was in fact dead at this time. *Id.* at 207, 209, 214.

228. *Id.* at 19. Mr. Hodges delivered the note and called on Dr. Cooper himself. *Id.* at 157.

229. LEAVITT, *supra* note 29, at 55.

230. *See* Trial Tr., *supra* note 1, at 19–20; *see, e.g., id.* at 55, 57 (suggesting the use of forceps or piecemeal extraction as two alternatives).

231. *Id.* at 19. Other experts agreed with Dr. Wooster, but were less certain of success. *See, e.g., id.* at 55, 57 (noting that using forceps was a viable alternative).

232. *Id.* at 19.

to "lacerate the soft parts."²³³ Further, to counter the risks of the fetus's presentation, the early stages of labor might also have allowed for a forced shift in presentation.²³⁴ To the extent a physical malformity necessitated the cesarean, plaintiffs' witnesses testified that premature inducement of labor at seven months was the more prudent option.²³⁵ Instead of these options, Dr. Cooper performed a historic cesarean section on Ms. Hodges.²³⁶

B. The Historic Surgery

Dr. Cooper's cesarean section on Ms. Hodges is hailed as "the first successful [c]esarean section in California's history."²³⁷ The cesarean procedure dates back centuries,²³⁸ but it was historically used either after the death of the mother to save the baby, or for religious reasons.²³⁹

Up until the nineteenth century, "the profession was very sceptical as to the success of the operation."²⁴⁰ The first documented cesarean section in the United States was Dr. John Lambert Richmond's procedure in Newton, Ohio, on

233. *See id.* at 72.

234. *Id.* at 129.

235. *See, e.g., id.* at 79 (noting that in this situation, inducing labor has been successful).

236. *Id.* at 9.

237. Carey, *supra* note 2, at 435.

238. J.P. Boley, *The History of Caesarean Section*, 32 CANADIAN MED. ASS'N J. 557 (1935), reprinted in 145 CANADIAN MED. ASS'N J. 319, 319 (1991) (noting that the earliest account of the procedure was in a medical book from about 1350). Jane Sharp's *The Midwives Book* of 1671 advised that this practice could be used to remove the child from its mother's womb whether the child was alive or dead. JANE SHARP, *THE MIDWIVES BOOK* 150–51 (Elaine Hobby ed., Oxford Univ. Press 1999) (1671) ("The *Cesarian Birth* is the drawing forth of the child either dead or alive, by cutting open the Mothers womb, it was so called because *Julius Caesar* the first *Roman* Emperor was so brought into the world. Physicians and Chirurgeons say it may be safely done without killing the Mother, by cutting in the *Abdomen* to take out the child; but I shall wish no man to do it whilst the Mother is alive; but if the Mother dye in child-bearing, and the child be alive, then you must keep the womans [sic] Mouth and Privities open that the child may receive air to breath, or it will be presently stifled, then turn the woman on her left side, and there cut her open and take out the Infant. This is also a *Cesarian Birth*, but it is not like that which is used whilst the Mother is alive. It is used three ways. 1. The Mother living and the Child dead. 2. The Child living and the Mother dead. 3. When both are living.") (footnotes omitted).

239. Trial Tr., *supra* note 1, at 107. Franciscan monks performed cesareans to extract the fetus for religious recognition. *See* Rosemary Keupper Valle, *The Cesarean Operation in Alta California During the Franciscan Mission Period (1769-1833)*, 48 BULL. HIST. MED. 265, 269 (1974) (resulting from religious "concern for the fate of the soul of the unborn infant in the womb of the dead pregnant woman"). There is at least one highly publicized account of the first cesarean occurring in 1794 rather than in 1827. *See* Arthur G. King, *The Legend of Jesse Bennet's 1794 Caesarian Section*, 50 BULL. HIST. MED. 242, 242 (1976) (citing King, *supra* note 3, at 59; Ephraim McDowell, *Three Cases of Extirpation of Diseased Ovaria*, 7 ECLECTIC REPORTORY & ANALYTIC REV. 242, 242–44 (1817)).

240. Boley, *supra* note 238, at 319.

April 22, 1827.²⁴¹ The procedure was thus still extremely risky and experimental when Dr. Cooper performed it in 1857.²⁴²

Dr. Cooper performed a cesarean section on Ms. Hodges on the evening of November 10, 1857.²⁴³ According to Dr. Wooster, the two men consulted on the advisability of the surgery.²⁴⁴ Dr. Wooster testified that the men believed that there may have been twins and that a cesarean operation might save the second baby.²⁴⁵ However, no steps were taken to ascertain a second fetal heartbeat.²⁴⁶ Dr. Cooper later spoke at a medical convention and explained that he performed the operation because of a malformation.²⁴⁷

Dr. Cooper did not consult other physicians except Dr. Wooster or discuss the procedure with Mr. or Ms. Hodges.²⁴⁸ Dr. Wooster sedated Ms. Hodges with chloroform.²⁴⁹ Thirty minutes later, Dr. Cooper asked for her consent to do the surgery, although she would have had “no rational consciousness” due to the chloroform.²⁵⁰ Notwithstanding the power dynamics of doctors and patients, a woman’s solicitation of a physician’s care in the 1850s was not a wholesale consent to all medical procedures.²⁵¹

Dr. Cooper cut open Ms. Hodges with “somewhat of a zig-zag” approximately fifteen inches in length, from “ten or eleven inches below the navel, and four or five above.”²⁵² He did not use a marker to assure a straight cut and a cleaner stitching, nor did he use a guide to steady his hand during the incision.²⁵³ He inadvertently nicked the tissue under Ms. Hodges’s abdomen, causing a forceful release of fluid extending approximately eight to ten feet across the room.²⁵⁴ Dr. Cooper then made a second incision to empty her

241. King, *supra* note 3, at 59. King heralded the surgery as courageous “under the most difficult circumstances imaginable in the field of obstetrics” and noted the mother’s survival. *Id.* at 63.

242. *See* Trial Tr., *supra* note 1, at 92.

243. *Id.* at 9.

244. *Id.* at 31–32.

245. *See id.* at 32. The *American Journal of Obstetrics and Diseases of Women and Children* chronicled this case in 1872, noting that as necessitated by “[a] twin birth being diagnosed, and at the investigation of Dr. Cooper who was confident there were two children, . . . the Caesarean operation [was] less dangerous than their instrumental delivery.” Robert P. Harris, *The Caesarean Operation in the United States*, 29 AM. J. OBSTETRICS 622, 643 (1872) (citing PAC. MED. & SURGICAL J. 89 (1858)).

246. Trial Tr., *supra* note 1, at 50.

247. *Id.* at 48.

248. *See id.* at 14, 31–32. Plaintiffs’ expert testified that he would consult with several other physicians and advise family members before performing this surgery. *Id.* at 89.

249. *Id.* at 21.

250. *Id.* at 22.

251. *See, e.g.,* LEAVITT, *supra* note 29, at 60–61 (“Women’s ideas about acceptable procedures often set the limits under which physicians’ interventions had to be planned and executed.”).

252. Trial Tr., *supra* note 1, at 23.

253. *Id.* at 23, 26.

254. *Id.* at 23.

bladder.²⁵⁵ Ms. Hodges's intestines "ran out," requiring Dr. Wooster to attend to her intestines and occupying him such that he "could not attend to the breathing."²⁵⁶ Ms. Hodges stopped breathing.²⁵⁷ Dr. Cooper suspended the operation and resuscitated Ms. Hodges by throwing water at her to restore breathing.²⁵⁸ The servant who had been in the room fainted at "the sight of the operation."²⁵⁹

Ms. Hodges nearly died in the final stages of the surgery.²⁶⁰ Dr. Cooper cut into Ms. Hodges's womb with an incision measuring eight to ten inches.²⁶¹ Her blood flowed so profusely that she stopped breathing again.²⁶² This time Dr. Cooper resuscitated her by "pulling out the tongue, slapping [her] in the face, [and] throwing water in [her] face."²⁶³ When Ms. Hodges's womb did not contract, the men realized that she was "nearly dead."²⁶⁴ Dr. Cooper struggled to remove the fetus from Ms. Hodges because it had passed through the superior strait.²⁶⁵ He had to use "considerable force—two or three jerks" to pull the baby out.²⁶⁶ He stopped to resuscitate Ms. Hodges again.²⁶⁷ After the resuscitation proved successful, a catheter was inserted.²⁶⁸ Dr. Cooper then sewed up the wounds, but the edges did not line up, leaving "puckering" and gaps.²⁶⁹ The stitching of her wounds displaced her navel approximately two inches to the side.²⁷⁰

Her recovery was gruesome and grave.²⁷¹ Dr. Wooster described that she faced "imminent danger of death" in the first few days following the surgery.²⁷² Dr. Wooster testified that Dr. Cooper "knew that she must die."²⁷³ Further, the catheter backed up at times such that urine passed out of the wound itself,²⁷⁴ and a "peculiar and intense" odor emerged from the wounds.²⁷⁵ The wound scarred

255. *Id.*

256. *Id.* at 24.

257. *Id.*

258. *Id.*

259. *Id.* at 118.

260. *See id.* at 24–25.

261. *Id.* at 24.

262. *Id.*

263. *Id.*

264. *Id.*

265. *See id.*

266. *Id.*

267. *Id.* at 25.

268. *Id.*

269. *Id.* at 26.

270. *Id.*

271. *See id.* at 28.

272. *Id.*

273. *Id.*

274. *Id.* at 25.

275. *Id.* at 28.

in a “rough zigzag appearance” approximately three fingers wide.²⁷⁶ Two fist-size lumps protruded from each side of the scar.²⁷⁷

Dr. Wooster testified that Ms. Hodges endured “adhesion” or the fusing together of her belly, womb, and bladder in the healing process.²⁷⁸ Ms. Hodges’s resulting mental state was also a concern.²⁷⁹ Dr. Wooster explained that she suffered from a state of “hysteria” following the surgery.²⁸⁰

Yet, there were notably conflicting accounts of the recovery at trial. Dr. Cooper’s infirmary matron saw the wound and reported that it looked “red, but perfectly healthy and well.”²⁸¹ Another witness described it as “nice and perfect” and “smooth like a little cut on my hand.”²⁸²

There were also conflicting reports regarding the longstanding impacts of the surgery.²⁸³ It took about a month after the operation before she could move around.²⁸⁴ A witness recounted that she suffered in nearly all life activities following the surgery.²⁸⁵ She could not get out of bed to have breakfast most days; was not able to attend to domestic chores; often had “to be taken from the table by her husband, in convulsions of pain and agony”; and was in bad spirits and disagreeable at most times.²⁸⁶

Yet, others reported that she “*appeared* to be very comfortable” by as early as February and was walking ably.²⁸⁷ Dr. Cooper’s infirmary matron testified that four to six weeks after the surgery, Ms. Hodges was in “good spirits[;] [s]he laughed, she talked, she drank some porter, she jested, and seemed to be in a good condition altogether.”²⁸⁸ Witnesses also said that she gained considerable weight since her operation, a sign of her health.²⁸⁹

The doctors understood that she faced grave risks if she conceived again, but Doctors Cooper and Wooster did not medically prevent this.²⁹⁰ Dr. Wooster testified that failure to cut Ms. Hodges’s fallopian tubes allowed for the possibility of future pregnancy, which would be dangerous to her life.²⁹¹

276. *Id.* at 27.

277. *Id.*

278. *See id.*

279. *See id.* at 36.

280. *Id.*

281. *Id.* at 149.

282. *Id.* at 166.

283. *See id.* at 103–04 (describing Ms. Hodges’s pain and agony approximately six months prior to trial). *But see id.* at 141 (explaining that two or three months after the operation, Ms. Hodges “appeared to be very comfortable”).

284. *Id.* at 165.

285. *See id.* at 104.

286. *Id.*

287. *Id.* at 141.

288. *Id.* at 149.

289. *Id.* at 163, 233. One witness testified that “[s]he was not then as fat and hearty as she is now. Now she is perfect [sic] well. She looks fatter since her confinement.” *Id.* at 163.

290. *See id.* at 27.

291. *Id.*

Doctors feared that the scar would likely break were her womb to expand in a future pregnancy.²⁹²

Importantly, at some point while Doctors Cooper and Wooster were attending to Ms. Hodges in the months leading up to her labor, they strategized the founding of a medical journal for which Cooper offered to put up funds.²⁹³ This journal would become one critical forum in the bitter *Hodges v. Cooper* litigation.²⁹⁴

C. *The Polarized Medical Community Catalyzes the Hodgeses' Lawsuit*

A California historical bibliography described the *Hodges v. Cooper* case as one of the most notable cases in surgery.²⁹⁵ The case received national coverage ranging from fiercely critical to objective.²⁹⁶ Notably, Dr. Wooster, not the Hodgeses, was the initiating force behind the malpractice litigation.²⁹⁷

Despite Ms. Hodges's pain and suffering, she initially expressed satisfaction with the surgery.²⁹⁸ This about-face was historically memorialized to Dr. Cooper's credit.²⁹⁹ One biography of Dr. Cooper briefly noted the surgery, and stated that "[t]wo years later the woman, who seemingly had made a complete recovery, sued Dr. Cooper for malpractice."³⁰⁰ Another account of the trial explains that "Mrs. Hodges had completely recovered from the cesarean operation. She was enjoying good health and had a cordial relationship with Dr. Cooper to whom she was effusively grateful."³⁰¹

Dr. Thurston's—the physician who first referred Ms. Hodges to Dr. Cooper—and Mrs. Roper's—the infirmiry matron at Dr. Cooper's office—testimonies were the most colorful in their account of Ms. Hodges's satisfaction with the surgery.³⁰² Dr. Thurston explained that Ms. Hodges "spoke of her wonderful escape from death; how happy she felt, and how gratified she was on account of her operation . . . [S]he spoke highly of the operation and highly of

292. *Id.*

293. Wilson, *supra* note 12, at ch. XIII, § 1, <http://elane.stanford.edu/wilson/html/chap13/chap13-sect1.html>.

294. See Trial Tr., *supra* note 1, at 37–42.

295. ROBERT ERNEST COWAN, A BIBLIOGRAPHY OF THE HISTORY OF CALIFORNIA AND THE PACIFIC WEST 1510-1906, at 183 (Long's Coll. Book Co. 1952) (1914).

296. See, e.g., *Correspondence*, 2 CINCINNATI LANCET & OBSERVER 109, 113 (1859) (describing the case as a "novel prosecution" currently on trial and positioning Ms. Hodges as having "survived, but . . . hopelessly injured").

297. See Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html> (indicating that Dr. Wooster led Ms. Hodges to sue Dr. Cooper).

298. Trial Tr., *supra* note 1, at 140.

299. See *id.* at 41 (quoting *Surgery in San Francisco*, 1 PAC. MED. & SURGICAL J. 43, 43 (1858)).

300. Carey, *supra* note 2, at 435 (emphasis added).

301. Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html>.

302. See Trial Tr., *supra* note 1, at 140.

him.”³⁰³ Mrs. Roper explained that Ms. Hodges told Dr. Cooper that “she owed her life to him.”³⁰⁴ Ms. Hodges reportedly told Dr. Cooper that she “had such a *propensity* to come [visit him] that I think I could have walked twice the distance.”³⁰⁵ She said, “Oh! [Y]ou dear man! How I do love you! You saved my life.”³⁰⁶ She further stated, “I don[’]t know of a man on the coast to whom I am so much indebted, or in whom I have so much confidence. Why, Doctor, . . . I am indebted to you for my life. I am so grateful that I don’t know how to express myself.”³⁰⁷

Rather, Ms. Hodges’s litigation was catalyzed by the brewing and contentious medical politics festering in San Francisco.³⁰⁸ Dr. Wooster initially spoke proudly of the surgery and aligned himself with Dr. Cooper as a prominent medical pioneer.³⁰⁹ Dr. Wooster described Ms. Hodges as “my patient.”³¹⁰ He explained that he performed the surgery with Dr. Cooper and that it was “necessary and justifiable.”³¹¹

In January of 1858, the inaugural issue of the *Pacific Medical and Surgical Journal* was published, making it the only medical periodical in California.³¹² Doctors Cooper and Wooster co-wrote a squib stating that Dr. E.S. Cooper had performed a successful cesarean section (among other notable procedures).³¹³ It boasted that “[t]his embraces a list of formidable operations, which being attended with favorable results, are worthy of note.”³¹⁴ The article showed the tight alignment of Dr. Cooper and Dr. Wooster in early January, as Ms. Hodges

303. *Id.*

304. *Id.* at 149.

305. *Id.* (internal quotation marks omitted).

306. *Id.* (internal quotation marks omitted).

307. *Id.* at 150 (internal quotation marks omitted).

308. *See infra* text accompanying notes 318–342.

309. Trial Tr., *supra* note 1, at 193–94.

310. *Id.* at 193 (internal quotation marks omitted).

311. *Id.* at 216.

312. Wilson, *supra* note 12, at ch. XIII, § 1, <http://elane.stanford.edu/wilson/html/chap13/chap13-sect1.html> (citing HENRY HARRIS, CALIFORNIA’S MEDICAL STORY 144–47 (1932); Frances Tomlinson Gardner, *Early California Medical Journals*, 1 ANNALS MED. HIST. 325, 325–42 (1939); Emmet Rixford, *Early California Medical Journals*, 23 CAL. W. MED. 604, 604–07, (1925)). Two prior medical journals had been previously published, but they both dissolved after one issue and ten months, respectively. *Id.* (citing HARRIS, *supra*; Gardner, *supra*; Rixford, *supra*). With the exception of one sporadic journal, the *Pacific Medical and Surgical Journal* was the sole publisher of “scientific papers and editorial commentary on medical affairs” from 1858 to 1860. *Id.* (citing HARRIS, *supra*; Gardner, *supra*; Rixford, *supra*).

313. Trial Tr., *supra* note 1, at 41–42 (quoting *Surgery in San Francisco*, *supra* note 299, at 43). Dr. Cooper offered to put up funds to sustain the journal. *See* Wilson, *supra* note 12, at ch. VIII, § 2, <http://elane.stanford.edu/wilson/html/chap8/chap8-sect2.html> (citing *Wooster, David, in BIOGRAPHY OF EMINENT AMERICAN PHYSICIANS AND SURGEONS* 705 (R. French Stone ed., 1894)) (“Following an incredibly acrimonious disagreement between them . . . Wooster spitefully disclaimed Cooper’s generous offer of financial assistance and went on to found the Journal under other auspices and to use its pages for virulent attacks on Cooper.”).

314. Trial Tr., *supra* note 1 at 41 (quoting *Surgery in San Francisco*, *supra* note 299, at 43) (internal quotation marks omitted).

was recovering, and the ways in which Dr. Cooper used the medical journals and societies for promotion.³¹⁵ Dr. Cooper's self-promotion again caused great controversy.³¹⁶ His biography published by the Stanford Medical School admits that "[s]ingling out Cooper, in the first issue of the *Journal*, for a laudatory editorial that listed his operations and characterized them as 'formidable' and 'worthy of note' was bound to strike the charitable reader as bordering on puffery."³¹⁷

Indeed, the professional fissure occurred sometime after this article ran.³¹⁸ On January 23, 1858, Dr. Cooper received a letter from Dr. Wooster and his co-editor informing him that if he "wish[ed] to avail [himself] of the pages of the *Pacific Medical and Surgical Journal* for the publication of [his] cases, [he would be required] to free [himself] of complicity in that species of Quackery" within two days.³¹⁹ The quackery allegations stemmed from a separate article run in the *Daily Times* allegedly "puffing" an ankle surgery.³²⁰ Dr. Cooper immediately took the accusation to the *Pacific Medical and Surgical Association* where he was promptly "acquitted of 'complicity in quackery' by a unanimous vote" the following day.³²¹ The journal nonetheless published an editorial stating that Dr. Cooper's publications will no longer appear:

[W]e have long been on terms of friendship with [Dr. Cooper], have repeatedly defended him, against even just censure, in reference to his allowing himself to be puffed to repletion in the newspapers. On 22 January 1858 an article ran in one of the dailies of this city, purporting to be editorial, redolent with the noisome flattery, such as no wise man could tolerate to be said concerning himself without disgust. It was not the matter so much as the manner and the medium (both notoriously unprofessional) and the author.³²²

In the same issue, an ominous editorial commented on the status of medical professionalism and launched the second challenge to Dr. Cooper:

We are all liable to commit some discourtesy which we shall have to regret, and which our brethren are ever ready, like true gentlemen to forget and forgive; but those who wantonly, and defiantly, persist in

315. See Wilson, *supra* note 12, at ch. XIII, § 1, <http://elane.stanford.edu/wilson/html/chap13/chap13-sect1.html> (quoting Trial Tr., *supra* note 1, at 41–42).

316. See *id.* (quoting Trial Tr., *supra* note 1, at 41–42).

317. *Id.* (quoting Trial Tr., *supra* note 1, at 41–42).

318. See *id.* (quoting Trial Tr., *supra* note 1, at 39).

319. *Id.* (quoting Trial Tr., *supra* note 1, at 39).

320. See *id.* (citing Cooper Papers, *supra* note 111, at Box 1, Folder 7).

321. See *id.* (quoting Editors' Table, 1 PAC. MED. & SURGICAL J., at 42).

322. *Id.* (quoting Editors' Table, 1 PAC. MED. & SURGICAL J., 83, 83 (1858)). Because the type was set up for one last publication of Dr. Cooper's in the *Pacific Medical and Surgical Journal* before the feud began, Dr. Cooper published one last paper in the journal. See *id.*

notorious professional impropriety, without manifesting either regret, or a disposition to amend, should be cut off from all intercourse with that profession whose dignity they insult, and whose honor they would sully by their pen, their words and their daily actions.³²³

In February of 1858, Dr. Cooper delivered a paper at a medical convention proclaiming the surgery a “great achievement in the surgical art.”³²⁴ Dr. Wooster also delivered a paper referring to the operation and mocking Dr. Cooper.³²⁵ Dr. Wooster’s paper used words of censure toward Dr. Cooper.³²⁶ The rivalry between these two doctors led Dr. Wooster to proclaim in advance of this conference that he would “shoot [Dr. Cooper] down like a dog” if Dr. Cooper bothered him.³²⁷

A movement to expel Dr. Cooper from the convention followed.³²⁸ In furtherance of Dr. Cooper’s troubles at the convention, a procedural motion reconsidered the acceptance of Dr. Cooper’s paper from the prior day.³²⁹ The society rejected the paper “as discreditable to the profession” by formal motion and a unanimous vote.³³⁰ In addition, the society also withdrew Dr. Wooster’s paper.³³¹ Thus, while the dueling papers were conflicting and controversial, ultimately, the society found the controversy itself “discreditable to the profession in California, and not desirable.”³³² Dr. Cooper apologized to the convention.³³³ Another doctor at the convention, Dr. Maxwell, portrayed this affair as a display of “disgraceful and vulgar language.”³³⁴

As the medical controversy hit its apex, Ms. Hodges began to speak of her discontentment with the surgery.³³⁵ She spoke with Dr. Wooster and others who told her that she had been “made a dupe of by Dr. Cooper.”³³⁶ Later, she went riding with Dr. Cooper and “bec[a]me satisfied that he was right by what he had told her.”³³⁷ She then talked to Dr. R. Beverly Cole, President of the San Francisco Medical Society, shortly after a meeting of the San Francisco Medical Society.³³⁸ Ms. Hodges wanted to know the nature of the report that Dr. Cooper

323. *Id.* (quoting *Editors’ Table*, 1 PAC. MED. & SURGICAL J. 75, 75 (1858)).

324. Trial Tr., *supra* note 1, at 127.

325. *See id.* at 44–45.

326. *Id.* at 45 (Dr. Wooster testified that his paper was similar to the article he published in the *Journal*).

327. *See id.* at 46.

328. *Id.*

329. *Id.*

330. *Id.* at 127.

331. *Id.* at 128 (“Dr. Wooster’s paper could be withdrawn as it was a volunteer contribution.”).

332. *Id.*

333. *Id.* at 98.

334. *See id.*

335. *See id.* at 167–68.

336. *Id.*

337. *Id.* at 169.

338. *Id.* at 186–87.

presented at the meeting.³³⁹ Another witness mentioned that she expressed much exasperation around this same time.³⁴⁰ She never visited Dr. Cooper's infirmary for conversation or treatment again after the February medical convention.³⁴¹

Dr. Cooper's notes recorded the following account of her shift, reinforcing his views of a medical conspiracy to which Ms. Hodges was a pawn:

(It was about at this time) that Wooster went to her and represented that his conscience troubled him because of the great injury he had been accessory to inflicting upon her (by the cesarean operation), and said he could not rest satisfied until he had confessed to her. This is her story. She was loathe to believe his confession . . . All of which astonished the lady and her husband beyond measure as they had never heard anything like it before.

At this juncture some parties gave money to (support) the Pacific Medical and Surgical Journal conducted by Trask and Wooster which had been sustained alone up to that time through the liberality of Drs. Cooper and Rowell, and that Journal was at once prostituted to the purpose of publishing false and defamatory accusations against Dr. Cooper. Likewise at the same period a report of the caesarian section case teeming with falsehoods was published by Dr. Wooster in the same Journal.³⁴²

Ms. Hodges told Dr. Thurston in February that she believed that "Dr. Cooper could have used instruments and delivered the child, without resorting to the [c]esarean operation."³⁴³ Dr. Thurston reassured Ms. Hodges that she was in better condition than others who had had the procedure and that he had "done the very best possible for her."³⁴⁴ She advised Ms. Hodges "not to say anything against the [doctor]."³⁴⁵ Yet, Ms. Hodges declared "she would do all she could to injure [Dr. Cooper]" and that "she meant to do him all the harm that she could; she meant to stop his practice if possible."³⁴⁶

339. *See id.* at 187.

340. *Id.* at 140.

341. *Id.* at 155.

342. Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html> (citing Cooper Papers, *supra* note 111, at Box 2, Folder 13).

343. Trial Tr., *supra* note 1, at 140.

344. *Id.*

345. *Id.*

346. *Id.*

D. Hodges v. Cooper Litigation

In March 1858, the Hodgeses sued Dr. Cooper for malpractice in the Fourth District Court in California, seeking \$25,000 in damages.³⁴⁷ The trial began on November 22, 1858.³⁴⁸ Judge Hager presided.³⁴⁹

The plaintiffs framed the case as an unnecessary procedure,³⁵⁰ making it the first unnecesarean litigation.³⁵¹ The key plaintiffs' witness was Dr. Wooster, followed by a parade of medical experts validating Dr. Wooster's assessment that the cesarean section was not medically necessary and that it was done to enhance Dr. Cooper's reputation.³⁵² Dr. Wooster described himself as merely a "watcher," "substitute," or "locum tenens" for Dr. Cooper.³⁵³ Dr. Cooper described with great contempt the experience of watching Dr. Wooster testify, ultimately rendering Dr. Wooster so uncomfortable that he sat backwards:

We shall never forget the convulsive tremor which several times shook him, while, transfixed at his overwhelming falsehoods, we gazed upon him in utter astonishment. Never can we forget his cadaverous appearance, during one of these periods, when, in a fit of desperation, endeavoring to relieve himself from our look, he thrust out his arm, and holding up a finger, exclaimed: "If Dr. Cooper wants to look at anything, let him look at my finger," while he continued pointing at us for some time to the no little amusement of the spectators, and chagrin of his counsel, until finally he was permitted to take a seat with his back towards us, in which position he afterwards gave his evidence, whenever his sensibilities required it.³⁵⁴

Plaintiffs' witnesses testified that other medical techniques, such as forceps or a craniotomy, would have been successful and less harmful to Ms. Hodges.³⁵⁵

347. *The Alleged Malpractice Case*, S.F. DAILY EVENING BULL., Nov. 22, 1858, at 3. See also Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html>.

348. *The Alleged Malpractice Case*, *supra* note 347, at 3.

349. *The Malpractice Case*, S.F. DAILY EVENING BULL., Dec. 2, 1858, at 3.

350. *Alleged Professional Misconduct—Suit of Damages Commenced*, S.F. DAILY EVENING BULL., Oct. 6, 1858, at 3.

351. See Wilson, *supra* note 12, at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html>.

352. See, e.g., Trial Tr., *supra* note 1, at 15, 20, 54, 57 (discussing plaintiffs' experts agreeing with Dr. Wooster's theory on the operation).

353. *Id.* at 16, 30.

354. Wilson, *supra* note 12, at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html> (citing Elias S. Cooper, Editorial, *Editor's Table*, 1 S.F. MED. PRESS 114, 114 (1860)).

355. See, e.g., Trial Tr., *supra* note 1, at 20 (Dr. Wooster said, "I don't think there would have been any failure with the forceps, but in the possible case of their failure, I certainly think that the other operation would have been successful."). See also *id.* at 54, 71 (one witness testified that

Doctors testified to the added risks in conducting a cesarean with the fetus so far down the strait.³⁵⁶ The plaintiffs' witnesses testified that, were a cesarean advisable under the circumstances, it should have been performed as soon as the need for it arose, thus, preserving the strength of the mother.³⁵⁷ However, the baby should not have remained in the lower strait for ten to twelve hours—dead or alive.³⁵⁸ One doctor testified that "[i]f the physician is morally certain that the child is dead, then there are no circumstances which will justify the section, except the utter impossibility of getting the mutilated portions of the foetus through the natural passage of the vagina."³⁵⁹

Two female friends of Ms. Hodges testified, along with sixteen prominent doctors mostly from San Francisco.³⁶⁰ The tone and substance of the plaintiffs' case was every bit as much about Dr. Cooper's operation as it was about the medical community's standards of conduct.³⁶¹ The opening statement revealed:

[This operation] was performed for the purpose of making a reputation, or in the hope of so doing. It was unnecessary, improper, inhuman, brutal. It was the intention of the defendant to build up a reputation upon it, after the life of Mrs. Hodges had passed away. Dr. Cooper expected, as I believe, that Mrs. Hodges would die, and his object was to make capital out of having performed the Caesarean Operation.³⁶²

The defense's underlying theory portrayed Dr. Wooster as "the ringleader in a conspiracy to destroy Cooper by fair means or foul."³⁶³ Dr. Cooper argued that Dr. Wooster was the attending physician, and that Dr. Cooper was simply the

there were no circumstances justifying the operation, and another testified that he did not think the operation was necessary in this case).

356. See, e.g., *id.* at 58 (stating that when the child is past the superior straight, a cesarean operation would be infinitely more dangerous than delivering the child through the natural passage).

357. *Id.* at 53. See also *id.* at 132 ("Q. Do they not largely assign the delay in its performance, as a cause of the great mortality in the Caesarian operation? A. I believe they do. It is allowed on all hands, to be a most formidable operation.").

358. *Id.* at 73.

359. *Id.* at 78.

360. Wilson, *supra* note 12, at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html>.

361. See Trial Tr., *supra* note 1, at 15 (opening statement by plaintiffs' attorney, Mr. Heslep).

362. *Id.*

363. See Wilson, *supra* note 12, at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html>.

Cooper claimed, and not without grounds, that Mrs. Hodges was henceforth the pawn of a conspiratorial faction of older San Francisco physicians united by their dislike for him and by their determination to drive him out of practice. He was certain they recruited Wooster to their cause by convincing him that the cesarean section, in which he had initially flaunted his role, was a gross error, and that his publishing enterprise would be better supported under other auspices than Cooper's.

Id. at ch. XIV, § 1, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect1.html>.

surgeon.³⁶⁴ Where defense witnesses defended the operation, it was limited to discrediting the certainty of plaintiffs' witnesses' engagement in medical hypotheticals,³⁶⁵ and highlighting that the other suggested procedures, such as the craniotomy, also presented risks to the mother.³⁶⁶

One can only imagine the sensitivity, vulnerability, or anger that Ms. Hodges might have felt throughout the trial. The descriptions of Ms. Hodges's occultation provoked outright laughter in the courtroom, requiring the judge to demand silence.³⁶⁷ Newspaper accounts did not even describe the nature of the case because editors concluded that it was too invasive.³⁶⁸ One surgical publication chastised Dr. Cooper particularly because of his role working with Ms. Hodges's "sacred" parts: "The chamber of the parturient woman is as sacred as the grave of a dead mother, and every act there performed by the surgeon, should be weighed in his conscience as though the spirit of that mother looked down upon him."³⁶⁹

The jury was charged and deliberated from 5:00 p.m. on December 1, 1858, until 10:00 a.m. on December 2, at which point the jury foreman informed the court that it could not reach a resolution and there was no possibility of doing so.³⁷⁰ There had been no movement in the jury votes since the prior evening.³⁷¹ Judge Hager ordered the plaintiffs to pay the jury fees and then discharged the jury.³⁷² The case ended with a hung jury.³⁷³

E. Dr. Cooper's Medical Acclaim and Ms. Hodges's Historical Footnote

Dr. Cooper cleared his reputation to great medical acclaim and recognition.³⁷⁴ Stanford Medical School memorialized the trial as a testament to the enduring principles of medicine that Dr. Cooper represented:

364. See Trial Tr., *supra* note 1, at 241.

365. See, e.g., *id.* at 170 ("I do not think that from that statement [of the facts], or from any other statement made relative to the case, any person absent at the time of the operation, could tell what ought to be done . . .").

366. See, e.g., *id.* at 171 (noting that a craniotomy presents "a good many dangers" to the mother).

367. *Id.* at 151.

368. See, e.g., Wilson, *supra* note 12, at ch. XVI, § 2, <http://elane.stanford.edu/wilson/html/chap16/chap16-sect2.html> ("Horrible, however, as the operation was, (and we do not propose to repeat the sickening details,)" (quoting Edward H. Dixon, *An Awful Case of Mal-practice*, 11 THE SCALPEL 123, 124 (1859))).

369. *Id.* (quoting Dixon, *supra* note 368, at 125).

370. *The Malpractice Case*, *supra* note 349, at 3.

371. *Id.* The jury was comprised of twelve members, including E.E. Cook, C.L. Kellogg, H. Brickwadel, N.F. Fossett, John C. Ayres, L. Teese, M. Heller, W. Elliott, D.W. Betts, J.F. O'Conner, G.W. Prescott, and R. Inches. *The Alleged Malpractice Case*, *supra* note 347, at 3.

372. *The Malpractice Case*, *supra* note 349, at 3.

373. See *id.*; see also Trial Tr., *supra* note 1, at 248.

374. See Wilson, *supra* note 12, at ch. I, § 1, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect1.html>.

This self-anointed elite among the city's physicians had exhibited no interest in raising the standards of the profession by promoting scientific observations and continuing education, yet they were determined to extinguish the efforts of anyone outside their circle who endeavored to do so. The aggressive methods of the intruder from Peoria had offended their sensibilities and this malpractice trial was to be the final solution to his "bold and assuming" presence in their midst.³⁷⁵

Dr. Cooper's medical school opened in 1858,³⁷⁶ and the first classes were held in 1859.³⁷⁷ To gain experience, students worked in Dr. Cooper's infirmary.³⁷⁸ Many defense witnesses from the Hodgeses' trial were tightly connected to the school.³⁷⁹ Dr. Cooper also served as President of the medical faculty and taught courses in surgery and anatomy at the school until 1862.³⁸⁰

After the trial, Dr. Wooster continued a relentless campaign against Dr. Cooper³⁸¹ until 1861 when he enrolled as a surgeon in the Union Army.³⁸² Dr. Cooper was so outraged by Dr. Wooster's *Pacific Medical and Surgical Journal* attacks, that in 1860, he founded and edited his own journal—the San Francisco Medical Press.³⁸³ By 1865, cost constraints ultimately merged the rival publications.³⁸⁴

The surgery haunted Ms. Hodges's marital relations.³⁸⁵ She struggled to reconcile her marital obligations and desires with her medical risks. She consulted family and friends and received conflicting advice.³⁸⁶ Ms. Hodges

375. *Id.* at ch. XIV, § 2, <http://elane.stanford.edu/wilson/html/chap14/chap14-sect2.html>.

376. *See* Carey, *supra* note 2, at 435.

377. *Id.*

378. Spencer, *supra* note 21 (noting that Cooper renamed his infirmary "The Pacific Clinical Infirmary").

379. *See, e.g.,* Trial Tr., *supra* note 1, at 201–02, 203 (acknowledging two witnesses' affiliation with the school).

380. Carey, *supra* note 2, at 435.

381. *See* Wilson, *supra* note 12, at ch. XVIII, § 1, <http://elane.stanford.edu/wilson/html/chap18/chap18-sect1.html> ("The American Medical Times must have an intense desire to gratify its readers with original matter from remote sources. We are led to give this hint at seeing a California communication in the number of May 25th 1861, and also one in that of June 1st. The status of the author is so low here, socially and professionally, that we cannot imagine how the editor of the Times will lend himself to bolster up such an advertising pretender. Medical journals cannot ignore this allusion, for we definitely proved it to the profession some two years since." (quoting *Editors' Table*, 4 PAC. MED. AND SURGICAL J. 230 (1861))).

382. MASICH, *supra* note 122, at 174 n.58 (noting that Dr. Wooster enlisted in "the Fifth California Infantry at Camp Union in California").

383. Carey, *supra* note 2, at 435.

384. *Id.*

385. *See* Trial Tr., *supra* note 1, at 160. Five to six weeks after the surgery she expressed that she preferred that her husband sleep in another room. *Id.* While she wanted to be with him, she "was afraid something might burst if she did." *Id.* at 160.

386. *Id.* at 160, 162. Mrs. Kriemer told her that she should not have sexual intercourse with her husband again because of the risks. *Id.* at 160. The Kriemers ran the local grocery store and

resumed intercourse with her husband about three months after the operation, although fear lingered.³⁸⁷ Her fears manifested. Nine months after Ms. Hodges's cesarean section, she became pregnant again.³⁸⁸ In fear of what would happen if she carried the child full term, she terminated the pregnancy.³⁸⁹

Ms. Hodges was virtually erased from the history books forever.³⁹⁰ She gave lessons in reading and writing to poor married women in California.³⁹¹ Stanford Medical School summarized obscurely the surgery as "professional misadventures."³⁹² Another account explained that Dr. Cooper "had the dubious distinction of being the defendant in the first malpractice suit in California history" after he "performed the first successful caesarean delivery in the [W]est."³⁹³ This historical account explained that Ms. Hodges sued at the urging of a "disgruntled surgical assistant (Dr. David Wooster) who felt he should have received equal credit for the success of the surgery."³⁹⁴

Dr. Cooper's medical condition left him bed-ridden in 1862.³⁹⁵ His sight and hearing deteriorated rapidly.³⁹⁶ He took an extended vacation in the Sacramento Valley to improve his health,³⁹⁷ but he ultimately died on October 13, 1862, at the age of 41.³⁹⁸ Fittingly, Dr. Cooper requested his own post-mortem autopsy to be performed under his detailed instruction to diagnose his unique medical condition.³⁹⁹

Historical accounts eulogize Dr. Cooper as an "exceptional individual" with a legacy of "vision and determination."⁴⁰⁰ Dr. Cooper published 139 articles and commentaries in widely recognized journals nationwide.⁴⁰¹ His biography

lived near the Hodgeses. *See id.* at 158. Her mother advised her that there were ways that her husband could keep her from getting pregnant. *Id.* at 162.

387. *Id.* at 162.

388. *See id.* at 161.

389. *Id.* at 161, 167.

390. Ms. Hodges's date, manner, and location of death are unknown. Elkanah Hodges died in 1861. YALE COLLEGE, *supra* note 45, at 141. Although he had been a successful lawyer, he died a poor man. *Id.*

391. Trial Tr., *supra* note 1, at 149.

392. Wilson, *supra* note 12, at ch. I, § 1, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect1.html>.

393. Spencer, *supra* note 21.

394. *Id.*

395. *See Carey, supra* note 2, at 435.

396. *Id.*

397. *Id.*

398. Wilson, *supra* note 12, at ch. XIX, § 2, <http://elane.stanford.edu/wilson/html/chap19/chap19-sect2.html> (citing A Martyr to Science, Cal. Farmer, Oct. 17, 1862, at 44; A Physician's Funeral, Daily Alta Cal., Oct. 16, 1862, at 1).

399. *Id.* at ch. XIX, § 1, <http://elane.stanford.edu/wilson/html/chap19/chap19-sect1.html> (citing Levi C. Lane, *Obituary of Dr. E. S. Cooper*, S.F. MED. PRESS 238, 238-43 (1862); James Morison, *Obituary of Dr. E. S. Cooper*, 5 PAC. MED. SURGICAL J. 307, 307-09 (1862)).

400. *Id.* at ch. I, § 1, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect1.html>.

401. *Id.* at ch. XVIII, § 1, <http://elane.stanford.edu/wilson/html/chap18/chap18-sect1.html>. Much of his writing was from 1859-1862, after the Hodges trial. *Id.* at app. 2a, <http://elane.stanford.edu/wilson/html/appendix2a.html>.

explained that "every energy of his genius was given to it with an enthusiasm which nothing save the chilling hand of death could cool."⁴⁰²

Even after his death, his rivals continued to attack. In 1864, his most notable rival briefly opened a competing medical school.⁴⁰³ When Dr. Cooper's faculty moved to teach at the rival's new school, the University of the Pacific suspended its operations from 1864 to 1869.⁴⁰⁴ However, these faculty members left the rival school in 1870 and returned to the University of the Pacific.⁴⁰⁵ Thereafter, Dr. Cooper's medical school legacy was kept alive through Quaker kinship and ideals.⁴⁰⁶ His nephew, Dr. Levi Cooper Lane, funded a new medical building in 1882 and dedicated it to his uncle, renamed Cooper Medical College.⁴⁰⁷ In 1908, Stanford University acquired the medical college.⁴⁰⁸

IV. FROM BARBARITY TO REGULARITY: A COMPARATIVE ANALYSIS OF A MODERN UNNECESAREAN LAWSUIT

While Dr. Cooper's biography has relegated Ms. Hodges to a mere historical footnote in the wake of Dr. Cooper's professional successes,⁴⁰⁹ over a century later, Ms. Laura Pemberton's case came alive in the footnotes.⁴¹⁰ Examining Ms. Pemberton's unnecesarean litigation next to the Hodgeses' litigation reveals the modern power of the organized medical profession, fulfilling Dr. Cooper's vision of medical unanimity and collective professional vindication; issues of laboring mothers' consent; and paradoxes of accepting medical uncertainty and rejecting maternal uncertainty.

A. *Medical Interventions Characterize Modern Childbirth*

Medicalized childbirth changed dramatically in the decades after the Hodgeses' litigation. The movement to professionalize the medical profession that was gaining traction in the Hodgeses' case indeed occurred. Professional licensing pushed out lay practitioners in the late 1800s.⁴¹¹ Medicine transitioned from an occupation to a profession.⁴¹² The "regular" doctors enacted regulations, empowered regulating bodies, and marginalized or squashed non-

402. *Id.* at ch. XIX, § 1, <http://elane.stanford.edu/wilson/html/chap19/chap19-sect1.html> (citing Lane, *supra* note 399, at 238–43; Morison, *supra* note 399, at 307–09).

403. *Id.* at ch. I, § 2, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect2.html>.

404. *Id.*

405. *Id.*

406. *See id.* at ch. III, § 1, <http://elane.stanford.edu/wilson/html/chap3/chap3-sect1.html>.

407. *Id.* at ch. I, § 3, <http://elane.stanford.edu/wilson/html/chap1/chap1-sect3.html>.

408. *Id.*

409. *See* Carey, *supra* note 2, at 435 (downplaying Ms. Hodges's lawsuit).

410. *See* Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1250–56 nn.1–23 (N.D. Fla. 1999).

411. *See* EHRENREICH & ENGLISH, *supra* note 91, at 33.

412. *Id.*

traditional services.⁴¹³ In the early 1900s, the “irregular” doctor movement brewing in Dr. Cooper’s time challenged midwives—“the last holdouts of the old people’s medicine.”⁴¹⁴ Physicians challenged midwives as ignorant and incompetent by revering science over traditional practices,⁴¹⁵ and by exalting the safety of the medical profession.⁴¹⁶

The 1900s, accordingly, marked a dramatic migration of births from homes to hospitals.⁴¹⁷ Home births like Ms. Hodges’s were a cooperative experience, actively engaging the mother and her female support.⁴¹⁸ In 1900, less than 5% of women delivered in the hospital,⁴¹⁹ as Ms. Hodges’s experience supported. By 1939, 50% of all births and 75% of births in urban areas took place in hospitals.⁴²⁰ Hospital births were cleaner; offered more resources; softened the moral tensions of doctors attending at home; and worked more efficiently.⁴²¹ Technological improvements such as antibiotics, pain control, and fetal monitoring also dramatically transformed medical care in childbirth.⁴²²

Hospital births and professionalized medicine shifted the balance of power.⁴²³ Institutional births pushed out women’s domestic support system.⁴²⁴ It risked women feeling overpowered by doctors in an institutional setting.⁴²⁵ The feminist movement later responded directly to this imbalance of power.⁴²⁶ Women challenged hospital deliveries as rendering women powerless in birth and isolated from friends and family.⁴²⁷ Grassroots natural childbirth movements sought to restore autonomy and control over birth.⁴²⁸

The emotional bonds of maternal love combined with the advances in medical technology also transformed modern childbirth. As maternal and fetal mortality rates dropped, prevention approaches emerged.⁴²⁹ In the mid-1900s, medicine emphasized “prevention in labor and delivery and therefore treated

413. *See id.*

414. *Id.*

415. *Id.* at 34. *See generally* Katherine Beckett & Bruce Hoffman, *Challenging Medicine: Law, Resistance, and the Cultural Politics of Childbirth*, 39 *LAW & SOC’Y REV.* 125, 139–64 (2005) (chronicling the medical professions’ challenge to the alternative birth movement and the destabilizing of the cultural and legal hegemony of modern medicine).

416. WERTZ & WERTZ, *supra* note 81, at 56.

417. *Id.* at 133.

418. *See* LEAVITT, *supra* note 29, at 87.

419. WERTZ & WERTZ, *supra* note 81, at 133.

420. *Id.*

421. *See* LEAVITT, *supra* note 29, at 177.

422. *See* WERTZ & WERTZ, *supra* note 81, at 164–65.

423. *See* LEAVITT, *supra* note 29, at 191.

424. *See id.*

425. *See id.*

426. *See* EHRENREICH & ENGLISH, *supra* note 91, at 42 (“We are mystified by science, taught to believe that it is hopelessly beyond our grasp . . . Professionalism in medicine is nothing more than the institutionalization of a male upper class monopoly.”).

427. *See* WERTZ & WERTZ, *supra* note 81, at 173.

428. *Id.* at 179.

429. *Id.* at 165.

each woman as though some freak occurrence might happen in her case."⁴³⁰ In the volumes of historical records about the Hodgeses' litigation, for example, there are scant references to the deceased child.⁴³¹ While perhaps Dr. Wooster convinced Ms. Hodges on an emotional level that the baby might have been born alive and empowered her to sue,⁴³² there is no *medical* discussion or *liability* discussion of the child's death.⁴³³ This stands in stark contrast to the modern demand for a "perfect child," including a child free of birth trauma.⁴³⁴

This historical change creates a difficult medical challenge for modern childbirth. Women still seek births as natural and humane as possible and actively manage birthing strategies.⁴³⁵ Yet, most women simultaneously accept technological pregnancies and technological births, even operative births if necessary, "in the name of quality control to make the perfect child."⁴³⁶ This yields a complex patient–physician dynamic such that "throughout pregnancy the natural and the technological are juxtaposed in an ironic set of dance movements in which the partners—woman and doctor—bow to each other in turn, each trying not to get in the other's way."⁴³⁷ This dynamic, combined with the ballooning tort system in the late twentieth century, changed medical risk aversions.⁴³⁸ Medical texts in the 1970s revealed that 90-95% of childbirth is "normal . . . without obstetric intervention," whereas today such risks would be intolerable,⁴³⁹ as *Pemberton* reveals.

One particularized example of the power of professionalized and institutionalized medicine is the issue of vaginal births after cesarean sections (VBACs). The 1980s and 1990s marked a dramatic increase in the United States cesarean section rate. While 5% to 10% of all births were cesarean births between 1965 and 1975, 24.4% of all births were cesarean by 1987.⁴⁴⁰ Today, 32% of modern births are by cesarean,⁴⁴¹ reflecting a concerning trend. The World Health Organization finds no medical justification for the rate exceeding 10-15%,⁴⁴² suggesting that the United States has an "unnecessarean epidemic." Part of the rise is explained by sequential births.⁴⁴³ Doctors fear the risks of

430. *Id.*

431. *See, e.g.,* Trial Tr., *supra* note 1 (rarely discussing Ms. Hodges's child).

432. *See supra* text accompanying notes 336.

433. *See generally* Trial Tr., *supra* note 1 (focusing on Dr. Cooper's care of Ms. Hodges, not her child).

434. WERTZ & WERTZ, *supra* note 81, at 234.

435. *See id.* at 234.

436. *Id.* at 243.

437. *Id.*

438. *Id.* at 261.

439. *Id.* at 244.

440. *Id.* at 260.

441. Hamilton et al., *supra* note 25, at 3.

442. Elizabeth Kukura, *Choice in Birth: Preserving Access to VBAC*, 114 PENN ST. L. REV 955, 961 (2010) (citing Sora Song, *Too Posh to Push?*, TIME, Apr. 19, 2004, at 60.).

443. WERTZ & WERTZ, *supra* note 81, at 260.

uterine rupture to mothers and babies, and impose strong preferences and policies discouraging or banning VBACs.⁴⁴⁴

Ms. Pemberton is one mother swept up in these complexities. The professional medical community concluded that the VBAC risks were too great and forced her to have a cesarean section.⁴⁴⁵ She then sued the hospital under tort and constitutional law theories.⁴⁴⁶ Reading the court's analysis of Ms. Pemberton's case in comparative historical context to the *Hodges* litigation reveals insights about medicalized childbirth and unnecesarean malpractice claims.

B. *Laura Pemberton's Unnecesarean Litigation*

Ms. Pemberton was forced by a court to undergo a cesarean section to deliver her second child, although she was nine centimeters dilated and showed no fetal distress.⁴⁴⁷ She had three subsequent vaginal births after the forced cesarean section that is the subject of this case study.⁴⁴⁸

Ms. Pemberton had her first cesarean birth by consent in 1995.⁴⁴⁹ She believed strongly in natural childbirth and was not pleased about the cesarean section, but she consented based on her doctor's articulation of the risks and conclusion that it was necessary.⁴⁵⁰ The doctor used a vertical and horizontal incision (an inverted T), rather than the more common horizontal incision, presenting additional risks of uterine rupture in subsequent vaginal deliveries.⁴⁵¹

When she became pregnant again in 1996, she immediately sought a proactive birthing plan, just as Ms. Hodges had done.⁴⁵² Ms. Pemberton, like many modern mothers, expressed anxiety and disfavor with cesarean delivery.⁴⁵³ As with Ms. Hodges, Ms. Pemberton's choices were dictated largely by her prior medical history and her perceptions of risk, understood in consultation with doctors.⁴⁵⁴ Her prior doctor had already advised her of the strong likelihood of future cesarean births given her inverted T incision.⁴⁵⁵ At twenty-five weeks

444. Kukara, *supra* note 442, at 960.

445. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1248–49 (N.D. Fla. 1999).

446. *Id.* at 1249.

447. *Laura Pemberton: Speaking on Her Experience of a Court-Ordered Cesarean Surgery* at 11:57, 17:25, NAT'L ADVOCATES FOR PREGNANT WOMEN (Sept. 10, 2009), http://advocatesforpregnantwomen.org/issues/court_ordered_interventions/laura_pemberton_speaking_on_her_experience_of_a_courtordered_cesarian_surgery.php [hereinafter *Pemberton Speech*].

448. *Id.* at 18:04.

449. *Id.* at 00:07.

450. *Id.* at 00:14.

451. *Pemberton*, 66 F. Supp. 2d at 1249; *id.* at 00:38.

452. *Pemberton Speech*, *supra* note 447, at 01:55; see also *supra* Part II.D.

453. See *Pemberton Speech*, *supra* note 447, at 00:22.

454. See *id.* at 01:30.

455. *Id.* at 01:45.

gestation, she began researching fully her options.⁴⁵⁶ Her prior doctor immediately told her that she would need a cesarean and that it would be scheduled two weeks before her due date.⁴⁵⁷ She believed that she had other options.⁴⁵⁸ She researched her options through midwives, doctors, books, phone calls, personal accounts, and other sources.⁴⁵⁹ She described that she was "amazed and thrilled" by what she found.⁴⁶⁰ She found doctors who supported her decision, but could not commit to treat her because they were "fearful of what the repercussions would be if they were found out."⁴⁶¹

After "months of research," Ms. Pemberton decided to give birth at home, with the support of her friends and family.⁴⁶² While Ms. Hodges was in the rare minority in 1858 turning to a surgeon to assist in her birth, Ms. Pemberton was in the rare minority in 1996 turning to midwives for guidance.⁴⁶³ Ms. Pemberton's use of a midwife was the beginning and the end of the legal analysis in her forced cesarean section case.⁴⁶⁴ The court cursorily summarized that Ms. Pemberton was unable to find a physician who would "allow her" to deliver vaginally because the vertical incision posed unacceptable risks.⁴⁶⁵ The court also pejoratively explained that she was "undeterred" by prevailing medical guidance.⁴⁶⁶ Instead, she "made arrangements" to have the baby with a midwife "without any physician attending or standing by and without any backup arrangement with a hospital."⁴⁶⁷

Ms. Pemberton faced a prolonged, difficult labor that required some medical intervention.⁴⁶⁸ The case centered on the question of how much intervention was necessary, just as Ms. Hodges's case had.⁴⁶⁹ Ms. Pemberton went into labor on January 11, 1996.⁴⁷⁰ After a full day of labor, the court explained that "Ms. Pemberton determined she needed . . . fluids . . . and was becoming

456. *Id.* at 01:31.

457. *Id.* at 02:10.

458. *Id.* at 02:38.

459. *Id.* at 02:47.

460. *Id.* at 02:56.

461. *Id.* at 03:52.

462. *Id.* at 03:02, 04:17.

463. See Joan J. Matthews & Kathleen Zadak, *The Alternative Birth Movement in the United States*, in *MOTHERS & MOTHERHOOD: READINGS IN AMERICAN HISTORY* 279 (Rima D. Apple & Janet Golden eds., 1997); Sally C. Curtin & Melissa M. Park, *Trends in the Attendant, Place, and Timing of Births, and in the Use of Obstetric Interventions: United States, 1989–97*, 47 NAT'L VITAL STAT. REP., Dec. 2, 1999, at 2, available at http://www.cdc.gov/nchs/data/nvsr/nvsr47/nvs47_27.pdf.

464. See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1257 (N.D. Fla. 1999).

465. *Id.* at 1249.

466. *Id.*

467. *Id.*

468. See *Pemberton Speech*, *supra* note 447, at 04:30.

469. See *Pemberton*, 66 F. Supp. 2d at 1249; Trial Tr., *supra* note 1, at 9.

470. See *Pemberton*, 66 F. Supp. 2d at 1249.

dehydrated.”⁴⁷¹ Notably, the court’s language here erases the presence of the midwife assisting the birth.⁴⁷² The court portrays her as a unilateral actor defying medical guidance entirely.⁴⁷³ Mr. and Ms. Pemberton went to the Tallahassee Memorial Regional Medical Center to request fluids.⁴⁷⁴

Like Ms. Hodges, while Ms. Pemberton needed some medical intervention, simply soliciting the intervention resulted in an unlimited submission to birthing intervention.⁴⁷⁵ A resident on-call was the first practitioner to examine Ms. Pemberton.⁴⁷⁶ The court explained that the resident then brought Ms. Pemberton to Dr. Wendy Thompson who advised Ms. Pemberton that she needed a cesarean section.⁴⁷⁷ Yet, Ms. Pemberton’s subsequent account provided much more context.⁴⁷⁸ Ms. Pemberton explained that she was put on a fetal monitor and examined.⁴⁷⁹ The nurse told the resident that Ms. Pemberton’s ketones were high, but “everything else was normal.”⁴⁸⁰ The doctor wrote the request for an IV of fluids.⁴⁸¹ Ms. Pemberton was taken to a room to wait for the fluids.⁴⁸² When the attending physician realized that Ms. Pemberton was “attempting a VBAC,” she presented her with a conditional consent form.⁴⁸³ To get the fluids, Ms. Pemberton had to consent to a cesarean.⁴⁸⁴ She refused to sign, which triggered a parade of doctors challenging her decision.⁴⁸⁵

The physician refused to provide the fluids and informed the hospital administration of the case.⁴⁸⁶ The hospital administrators began securing concurring opinions from its obstetrics personnel that a cesarean section was medically necessary, as Dr. Thompson had already advised.⁴⁸⁷ Just as in the Hodgeses’ litigation, the ultimate question of major birthing interventions subsumed—indeed ignored—the patient’s wellbeing.⁴⁸⁸ Just as Ms. Hodges received no comfort to her bladder or rectum, Ms. Pemberton received no fluids.⁴⁸⁹

471. *Id.*

472. *See id.* (mentioning only Ms. Pemberton’s self-diagnosis rather than any medical opinions made by a midwife).

473. *See id.*

474. *Id.*

475. *See id.* at 1249; Trial Tr., *supra* note 1, at 9.

476. *Pemberton*, 66 F. Supp. 2d at 1249.

477. *Id.*

478. *See Pemberton Speech*, *supra* note 447, at 05:06.

479. *Id.* at 05:11.

480. *Id.* at 05:26.

481. *Id.* at 05:35.

482. *Id.* at 05:37.

483. *Id.* at 05:43.

484. *Id.* at 05:56.

485. *Id.* at 06:14.

486. *Id.* at 05:43. *But see Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

487. *Pemberton*, 66 F. Supp. 2d at 1249.

488. *See id.* at 1254; *supra* text accompanying notes 355–362.

489. *Pemberton*, 66 F. Supp. 2d at 1249; Trial Tr., *supra* note 1, at 18.

The Pembertons refused the cesarean section and left the hospital.⁴⁹⁰ The court opinion describes this event provocatively: "Meanwhile, the Pembertons left the hospital against medical advice, apparently surreptitiously."⁴⁹¹ Ms. Pemberton's personal account of the incident reveals that "supportive" nurses informed her that a court order was underway, checked her fetal vitals one last time, and advised her to exit through the stairwell and out the back door.⁴⁹² The hospital invoked its emergency legal procedures to compel medical procedures without the patient's consent.⁴⁹³ The hospital's attorney then contacted Judge Phillip Padovano to request a court order requiring Ms. Pemberton to receive the medical treatment.⁴⁹⁴

The hearing was conducted in the office of the hospital's Senior Vice President and Chief Medical Officer.⁴⁹⁵ Three doctors, all affiliated with the hospital, testified that Ms. Pemberton's desire to deliver vaginally created a "substantial risk of uterine rupture and resulting death of the baby."⁴⁹⁶ Although relegated to a footnote in the opinion, the *Pemberton* court noted that the formal order that was entered documenting this testimony exaggerated, if not misrepresented, the testimony that the hospital doctors had provided to Judge Padovano.⁴⁹⁷ The formal order prepared by the hospital distorted the medical testimony from "a substantial and unacceptable risk of death" to a finding that "if a C-Section is not done, then this viable fetus at term would die based upon competent medical testimony."⁴⁹⁸ Notably, no one was present on behalf of Ms. Pemberton at the initial hearing.⁴⁹⁹

The judge ordered Ms. Pemberton back to the hospital for the procedure.⁵⁰⁰ The opinion cursorily noted that "[the state attorney for the district] and a law enforcement officer went to Ms. Pemberton's home and advised her she had been ordered to return to the hospital," and that "[s]he returned to the hospital by ambulance against her will."⁵⁰¹ Ms. Pemberton has since presented a more detailed version of the facts. The deputy sheriff and state's attorney came into her home, causing Ms. Pemberton's labor to slow.⁵⁰² They first promised her that she could continue delivering and that the emergency medical technicians would be outside ready to assist.⁵⁰³ They then told her that they needed to

490. *Pemberton*, 66 F. Supp. 2d at 1249.

491. *Id.*

492. *Pemberton Speech*, *supra* note 447, at 07:45.

493. *Pemberton*, 66 F. Supp. 2d at 1249.

494. *Id.* at 1249–50.

495. *Id.* at 1250.

496. *Id.*

497. *Id.* at n.2.

498. *Id.*

499. *See id.* at 1250.

500. *Id.*

501. *Id.*

502. *Pemberton Speech*, *supra* note 447, at 10:02.

503. *Id.* at 10:40.

examine her progress and see if she was far enough along that she had to stay home.⁵⁰⁴ The state's attorney then concluded that "their hands were tied" and ordered her to come in the ambulance.⁵⁰⁵ She was squatting and desperately trying to move birth along.⁵⁰⁶ She was taken to the ambulance and strapped down to a stretcher.⁵⁰⁷ She "felt total humiliation."⁵⁰⁸ Her neighbors were watching as the sirens ran.⁵⁰⁹ She "knew in [her] heart that what was happening to [her] was wrong."⁵¹⁰

Judge Padovano solicited Ms. and Mr. Pemberton's testimony, but no medical testimony other than the hospital's witnesses.⁵¹¹ He continued the hearing in Ms. Pemberton's hospital room.⁵¹² The court's opinion merely stated that "she and Mr. Pemberton were allowed to express their views," but says nothing of what those views were, their comprehension of the risks, or the basis for their views.⁵¹³ In fact, six men came into her room while she was in active labor: two attorneys, the sheriff, a judge, and two doctors.⁵¹⁴ Ms. Pemberton explained to the judge that her decision was an informed one, and she attempted to articulate the basis for it; the judge allowed her to discontinue her testimony during contractions.⁵¹⁵ The judge said "we are going to do the c-section and we are going to do it tonight."⁵¹⁶ The judge ordered the cesarean.⁵¹⁷ Two doctors performed the operation.⁵¹⁸ The court explained that the surgery "result[ed] in delivery of a healthy baby boy. Ms. Pemberton suffered no complications."⁵¹⁹

After the surgery, consistent with court rules, the hospital's lawyer formalized the petition for relief and submitted a formal order, which Judge Padovano entered on February 2, 1996.⁵²⁰ The court noted that Ms. Pemberton did not appeal the order itself.⁵²¹ Instead, Ms. Pemberton sued the hospital in the Northern District of Florida, alleging violations of her substantive constitutional

504. *Id.* at 11:08.

505. *Id.* at 11:50.

506. *Id.* at 12:05.

507. *Id.* at 12:58.

508. *Id.* at 13:01.

509. *Id.* at 13:05.

510. *Id.* at 13:07.

511. *See Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999).

512. *Id.*

513. *See id.*

514. *Pemberton Speech*, *supra* note 447, at 14:30.

515. *Id.* at 14:55.

516. *Id.* at 16:58.

517. *Pemberton*, 66 F. Supp. 2d at 1250.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

rights and her procedural constitutional right to due process.⁵²² She also pleaded negligence and false imprisonment claims under state law.⁵²³

Her substantive constitutional rights arguments focused on her "right[s] to bodily integrity, . . . to refuse unwanted medical treatment, . . . to make important personal and family decisions regarding the bearing of children without undue governmental interference," and "to religious freedom."⁵²⁴ The court recognized that there were constitutional interests implicated here, but held that those interests "clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child."⁵²⁵ Importantly, the court cited *Roe v. Wade*,⁵²⁶ for this holding, explaining that *Roe* validated the "state's increasing interest in preserving a fetus as it progresses toward viability" and that the interests in preserving the fetus outweigh the mother's interests after the point of viability.⁵²⁷ The court explained that the *Roe* balancing test tipped even stronger here in favor of the state and against Ms. Pemberton because Ms. Pemberton *wanted* to give birth; she "sought only to avoid a particular procedure for giving birth."⁵²⁸ Therefore, the intrusion of the *method* of delivery was far less than being forced to have a child.⁵²⁹

Ms. Pemberton argued that the fetus's interest was not the proper inquiry because "vaginal delivery did not pose an appreciable risk of the baby's death as the doctors claimed."⁵³⁰ The court understood Ms. Pemberton to be arguing that the baby would have been delivered without harm.⁵³¹ In telling language, the court dismissed this argument swiftly and proceeded to analyze the evidence: "The medical evidence belies Ms. Pemberton's bravado. The evidence is this."⁵³² The court focused on the hospital's testimony that while Ms. Pemberton could have delivered without complications, "there [was] a very substantial risk of uterine rupture and resulting death of the baby."⁵³³ Five doctors agreed to this, with one placing the risk between four to six percent.⁵³⁴

Ms. Pemberton also alleged that "the physicians were negligent in rendering their opinions [on] the risks of vaginal birth."⁵³⁵ The court positioned the state

522. *Id.* (basing her claims under 42 U.S.C. §§ 1983, 1985 (2006)).

523. *Id.* (limiting her claim to the hospital because the hospital agreed that the physicians were its agents for this procedure).

524. *Id.* at 1251 (invoking the First, Fourth, Eighth, and Fourteenth Amendments of the Constitution).

525. *Id.*

526. 410 U.S. 113 (1973).

527. *Pemberton*, 66 F. Supp. 2d at 1251.

528. *Id.*

529. *Id.*

530. *Id.* at 1252.

531. *Id.*

532. *Id.*

533. *Id.* at 1253.

534. *Id.*

535. *Id.* at 1255.

court as the recipient of the medical advice on Ms. Pemberton's behalf.⁵³⁶ In reasoning that the state is the decision maker in this situation, the court said, "[t]here is no apparent reason why this should not be so [T]he judge relies on the physician's advice just as surely as does a consenting patient in an ordinary case."⁵³⁷ The court granted the hospital's motion for summary judgment definitively, explaining that "[the] hospital was not negligent."⁵³⁸ The court focused on the result of the procedure going off without a hitch, chronicling the qualifications of the doctors.⁵³⁹ This analysis seemed to suggest that medical qualifications immunized negligence. The court swiftly concluded that "[t]he uncontradicted evidence in this record is that the physicians' advice was correct in all material respects [I]n any event[,] it is not negligent for a physician to classify as 'unacceptable' an avoidable one percent risk of fetal death."⁵⁴⁰

V. UNNECESAREAN MALPRACTICE CLAIMS FROM BARBARITY TO REGULARITY

A. *Reputational Interests Shape Patient Care*

This comparative case study reveals an important takeaway undervalued in existing scholarship on the cesarean section epidemic—the role of the medical profession's reputational interests in shaping patient care, independent of medical malpractice risks. Dr. Cooper structured his medical society to play a distinct, and telling, professional role—valuing unanimity, collegial vindication to challenges of outsiders, and collective duty to each other.⁵⁴¹ Yet, his case arose in the fledgling re-births of medical societies and central professional management.⁵⁴² The trial witnesses best reflected the historical dynamic in the Hodgeses' case—a virtual showdown of doctors challenging and defending Dr. Cooper's *reputation*, not the medical care standards.⁵⁴³ Dr. Cooper's medical rivals fiercely accused him of performing the surgery to advance his

536. *See id.*

537. *Id.* at 1255 n.22.

538. *Id.* at 1256–57.

539. *Id.* at 1256.

540. *Id.* at 1256–57.

541. *See* Wilson, *supra* note 12, at ch. IX, § 3, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect3.html> (quoting 1 San Francisco County Medico-Chirurgical Association Minutes and Early Meetings (on file with California Historical Society)).

542. *See id.* at ch. IX, § 1, <http://elane.stanford.edu/wilson/html/chap9/chap9-sect1.html>.

543. *See, e.g.,* Trial Tr., *supra* note 1, at 97 (stating that Dr. Cooper's attorneys intended to prove that this case was part of a conspiracy to destroy his reputation).

reputation.⁵⁴⁴ The doctors constructed their reputations on an individual basis and factored that into their testimony.⁵⁴⁵

The *Pemberton* case keenly relies on the medical community and its *collective consensus* to vindicate the hospital.⁵⁴⁶ The medical community functions as a phalanx, not as the testimony of individual doctors.⁵⁴⁷ Tellingly, on the other side of the phalanx was a single expert doctor, portrayed as an advocate, not a witness.⁵⁴⁸ The plaintiff had one witness, Dr. Wagner, who positioned the risk of uterine rupture lower than the hospital's witnesses "at between 2 and 2.2 percent."⁵⁴⁹ Although the court accepted the witness as an expert, it responded with distrust toward Dr. Wagner's testimony, explicitly positioning him as a medical "outsider" to discredit him, a marginalization that seems largely unnecessary to the court's analysis.⁵⁵⁰ In footnote fifteen, the court stated:

Dr. Wagner has impressive credentials but was based in Denmark, not the United States, from the 1980s until 1997, after the events at issue. For all this record indicates, in recent years he has lectured, consulted or attended rounds but apparently has not practiced. The tenor of his testimony is that of an advocate, not a witness. I nonetheless accept his testimony (though not all his rhetoric and legal conclusions) as true.⁵⁵¹

The court emphasized the medical consensus and marginalized outsider testimony.⁵⁵² This analysis is problematic in the context of the court reviewing a

544. Wilson, *supra* note 12, at ch. XVI, § 2, <http://elane.stanford.edu/wilson/html/chap16/chap16-sect2.html> ("[W]e have been forced, in a fair analysis of the evidence, to the melancholy conviction that the operation was not ignorantly, but wantonly performed, and for reputation alone." (quoting Dixon, *supra* note 368, at 124)).

545. *See, e.g.*, Trial Tr., *supra* note 1, at 211 ("I should want to see the case before I would risk my reputation.").

546. *See Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1253 (N.D. Fla. 1999).

547. *See id.* & n.15 (analyzing the testimony of the six doctors as a whole rather than individually).

548. *See id.*

549. *Id.* at 1253.

550. *Id.* at 1253 n.15.

551. *Id.*

552. *See id.* at 1256.

The uncontradicted evidence in this record is that the physicians' advice was correct in all material respects.

...

Had Dr. Wagner been available to attend an attempted vaginal delivery in a hospital where he had privileges, the state court almost surely would have allowed him to do so Ms. Pemberton had found neither Dr. Wagner nor any other physician who believed vaginal delivery could be attempted safely [The] hospital sought opinions of three qualified physicians on its medical staff; they rendered unassailable opinions that there was a substantial risk the baby would die if a vaginal delivery was attempted. . . .

lower court emergency order. Four of the five witnesses who testified on behalf of the hospital were all affiliated with the hospital through their admitting privileges.⁵⁵³ It is not necessarily surprising or dispositive that affiliated doctors all shared the same views on the medical risks of Ms. Pemberton's case. Because Ms. Pemberton had no time to compile medical witnesses in the emergency hearing, discrediting Dr. Wagner because he did not have privileges and did not agree to deliver Ms. Pemberton's baby, distorts the procedural analysis and prophesizes the result.

In stark contrast, the lawyers in *Hodges* regaled "outsider" medical testimony because it was perceived as unencumbered by personal gains and quarrels.⁵⁵⁴ The defense in particular exalted the one witness who sat "entirely free from interminglings with these [d]octors' quarrels."⁵⁵⁵

The role of collective medical consensus doubly binds mothers in their birthing decisions. It makes it harder to find doctors to follow a preferred course of action and then harder to win if you are going against the grain of the medical community and need testifying witnesses.⁵⁵⁶ Consider the tone and content of the *Pemberton* court's repeated references to consensus, suggesting it was dispositive of liability:

- "Prior to attempting to deliver vaginally at home, Ms. Pemberton was unable to locate a single physician willing to attend the birth; this shows just how widely held was the view that this could not be done safely."⁵⁵⁷
- "There may have been practicing physicians in the United States who believed Ms. Pemberton could have delivered vaginally (even though Ms. Pemberton failed to locate any such physician)."⁵⁵⁸
- "In any event, the physicians all have testified, without contradiction, that they reached their medical opinions independently and that they did not act jointly in rendering their opinions."⁵⁵⁹

This analysis suggests the need for further examination of the impact of medical consensus and professional community shaping medical standards of care.

Id. at 1256–57.

553. *See id.* at 1249–50, 1253 n.13.

554. *See* Trial Tr., *supra* note 1, at 226.

555. *Id.*

556. Perhaps the troubling role of collective consensus is what Ms. Pemberton was suggesting by filing a conspiracy claim. *Pemberton*, 66 F. Supp. 2d at 1250.

557. *Id.* at 1253.

558. *Id.* at 1253 n.17.

559. *Id.* at 1254 n.19.

B. The "Laboring Mother" and Monolithic Patient Consent

Comparing the *Pemberton* case to the Hodgeses' litigation also reveals troubling conceptions of monolithic patient consent in the laboring mother. Margaret Marsh explained that the medicalization of motherhood created a power structure of physicians over patients "fraught with ambiguity."⁵⁶⁰ In both the *Hodges* and *Pemberton* cases, the courts subsumed the consent question within the medical outcome, suggesting that any ambiguities distinctly benefit doctors.

In *Pemberton*, for example, the district judge described Ms. Pemberton as "attempting vaginal delivery at home" and then one sentence later explained that the physicians "performed the cesarean section, resulting in the birth of a healthy baby. Ms. Pemberton suffered no complications."⁵⁶¹ Ms. Pemberton also, in the court's words, "attempted to find a physician who would allow her to deliver vaginally."⁵⁶² This judicial narrative positioned Ms. Pemberton in virtual failure and the court and the doctors as her rescuers.

Ms. Pemberton's speaking engagements since the litigation reveal the full extent of her research and planning.⁵⁶³ It is hard to conceive of a mother *more* informed about the extent of risk and the options available to her.⁵⁶⁴ The court subsumed the nature of her consent within the laboring process and the perceived favorable outcomes. The court erased her research leading up to the forced cesarean section as irrelevant and omitted the basis for her objections from the opinion, a shocking omission.⁵⁶⁵ The court explained that "both she and Mr. Pemberton were allowed to express their views."⁵⁶⁶ Yet, neither the opinion nor the formal order articulated their views or the Pembertons' basis for them.⁵⁶⁷ The issue of maternal consent seems particularly problematic in the *Pemberton* case, where the court admitted that the hospital had distorted the medical advice in finalizing the formal order.⁵⁶⁸ If the court acknowledged that the formal order distorted medical risks to a court of law, should not the analysis be more probing in understanding how the hospital may have inadequately framed Ms. Pemberton's options? This analysis reveals a "consequentialist ethical theory" by which judges conclude that the "right action" is the one that "produces the best consequences."⁵⁶⁹ This is problematic for mothers.

⁵⁶⁰ Marsh, *supra* note 43, at 231.

⁵⁶¹ *Pemberton*, 66 F. Supp. 2d at 1249.

⁵⁶² *Id.*

⁵⁶³ See *Pemberton Speech*, *supra* note 447.

⁵⁶⁴ See *id.*

⁵⁶⁵ See *Pemberton*, 66 F. Supp. 2d at 1250 (omitting Ms. Pemberton's specific views).

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.* at 1250 & n.2.

⁵⁶⁸ *Id.* at 1250 n.2.

⁵⁶⁹ Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951, 1995 (1986) (citing Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 77, 85–86 (1973)).

Similar themes emerge from the *Hodges* litigation. Ms. Hodges was also uniquely informed of her medical options and risks.⁵⁷⁰ She consulted no fewer than three medical experts before her labor.⁵⁷¹ While the plaintiffs noted that the cesarean was performed without her consent, it was not part of the plaintiffs' litigation themes, even though it seems to square perfectly with the theme of Dr. Cooper's reputational ambitions.⁵⁷² The *Hodges* litigation also revealed a very telling rhetorical shift. The plaintiff and defense lawyers routinely refer to Ms. Hodges as "Mrs. Hodges" throughout the trial transcript.⁵⁷³ The moment both sides start describing the birthing process and the cesarean, both lawyers revert to calling her "the woman."⁵⁷⁴ This rhetorical shift coupled with plaintiffs disregarding the lack of consent, suggest troubling fracturing of the laboring mother as somehow different than the pregnant mother or the mother after birth.

C. Reconciling the Acceptance of Medical Uncertainty and Rejection of Maternal Uncertainty

This case study also reveals a troubling acceptance of medical uncertainty and a rejection of maternal uncertainty. This reality is concerning for mothers and risks distorting the tort framework.

Both the *Pemberton* opinion and the *Hodges* jury charge emphasized that medicine is uncertain. "Medicine is not an exact science," said the *Pemberton* opinion.⁵⁷⁵ Judge Hager advised the *Hodges* jury that "it may be a matter of regret that there is so much uncertainty in matters of science, and that there should be such a want of harmony among the members of a learned profession claimed to be scientific."⁵⁷⁶ *Pemberton* takes the medical uncertainty and weaves a colorful narrative of heroic medicine that distorts the case's complexities:

[T]he physicians who, on the night at issue, rendered opinions regarding the risk Ms. Pemberton faced from vaginal delivery did not and could not know with certainty whether that risk would be realized in her case. Similarly, the hospital, state attorney and state court who relied on the physicians' opinions could not know with certainty the outcome Ms. Pemberton would encounter.⁵⁷⁷

570. See *supra* text accompanying notes at 165–201.

571. See *supra* text accompanying notes at 165–201.

572. See Trial Tr., *supra* note 1, at 14–15.

573. See, e.g., Trial Tr., *supra* note 1, at 14 (referring to her as Mrs. Hodges).

574. See, e.g., *id.* at 59 (referring to Ms. Hodges as "the woman").

575. *Pemberton*, 66 F. Supp. 2d at 1254.

576. Trial Tr., *supra* note 1, at 241–42.

577. *Pemberton*, 66 F. Supp. 2d at 1254.

As Ms. Pemberton queried, "Who decides which risks to take?"⁵⁷⁸ Birthing women face the exact same uncertainty, but it is problematized for mothers and valorized for doctors.

VI. CONCLUSION

Ms. Hodges and Ms. Pemberton both litigated questions of interventionist childbirth at transformative moments in the history of childbirth—from barbarity to regularity. Looking at the two cases together reveals telling historical and legal implications worthy of further research. It is a paradoxical story of progress and entrenchment. It reveals the vindicating power of organized medicine that Dr. Cooper so candidly sought; lingering patient–physician relationships just as fraught with ambiguity as Ms. Hodges faced; and a startling lack of clarity regarding the effective resolution of medical uncertainty within the law.

578. *Pemberton Speech*, *supra* note 447, at 13:30.

