

# Regulation of Pregnancy and Childbirth

## Establishment of Pregnant Women's Rights

In 1974, the Supreme Court ruled that a state insurance program that denied benefits to pregnant women by excluding pregnancy from a list of “compensable disabilities” did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>1</sup> Applying a “rational basis” level of review, instead of the “intermediate scrutiny” standard normally applied to gender discrimination, the court found that the exclusion of pregnancy was not a “mere pretext designed to effect an invidious discrimination” against women.<sup>2</sup>

- The ruling was effectively overturned by the Pregnancy Discrimination Act (PDA) amendment to Title VII of the 1964 Civil Rights Act, which required insurance providers to cover expenses for pregnancy-related conditions on the same basis as costs for all other medical conditions.<sup>3</sup>
- The PDA also prohibits discrimination against pregnant women in hiring, the availability of pregnancy-related work absences, and offering of fringe benefits.<sup>4</sup>
- An employer’s policy prohibiting women from working with lead-based chemicals was held unconstitutional in *International Union, UAW v. Johnson Controls*.<sup>5</sup> The Court held that the PDA forbids “sex-specific fetal-protection policies”<sup>6</sup> and established that employers cannot discriminate against women based on the “potential for pregnancy”<sup>7</sup> in order to protect possible fetuses.
- The Family Medical Leave Act (FMLA), enacted in 1993, requires covered employers to grant women who have just given birth up to 12 weeks of unpaid, job-protected leave in a 12-month period; the FMLA also requires that health benefits be maintained during this time.<sup>8</sup>

## Coercive Medical Treatment

During the 1980s and early 1990s, the U.S. saw a trend of court decisions and government action attempting to “protect” women by regulating the manner of their pregnancies.<sup>9</sup> Recently, this disturbing trend has seen a resurgence.

- Pregnant women are encountering more pressures, legal and psychological, to have Cesarean sections (C-sections). Hospitals in at least a dozen states have obtained court orders compelling unwilling women to undergo this major abdominal surgery, in some cases despite the pregnant woman’s physical resistance.<sup>10</sup> This is especially egregious given that the vast majority of women forced to undergo court-ordered C-sections are low-income Women of Color, who are some of society’s most vulnerable members.<sup>11</sup>
- A recent study suggesting that premature births are on the rise partly due to a higher incidence of C-sections indicates that there may be pressure from physicians to perform C-sections when there is not a genuine medical need.<sup>12</sup> Premature babies are at increased risk for delayed brain development, breathing and feeding disorders, and various other health disorders and even death.<sup>13</sup>

## Coerced Sterilizations and Eugenics

While coerced sterilization may appear to be a shocking but archaic remnant of discredited eugenic theories, there are still many coercive sterilizations performed today in the U.S. and throughout the world. The victims of coerced sterilization tend to be from traditionally marginalized segments of the population.

- In the United States, despite a continuing consensus that freedom to procreate is a constitutional right,<sup>14</sup> court orders creating procreation penalties have gained some traction in state courts for offenses ranging from child abuse and neglect to drug abuse.<sup>15</sup>
- In *Maria Mamerita Mestanza Chavez v. Peru*,<sup>16</sup> the plaintiff’s family sued the Peruvian government for its policy of forced sterilization, which resulted in the plaintiff’s death. A settlement was reached under the Inter-American Commission on Human Rights which

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indemnified the Peruvian government from liability, despite the plaintiff's assertions that they had engaged in a "massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women."<sup>17</sup>

- In March 2005, the Supreme Court of India ordered Indian state governments to comply with international human rights law in light of unsanitary and substandard conditions in "mass sterilization camps," where many women are sterilized without being informed of the procedure.<sup>18</sup>
- In *A.S. v. Hungary*,<sup>19</sup> a Hungarian Roma woman was asked to sign a statement of consent to a Cesarean section that contained the Latin word for "sterilization." Only after the operation did she discover that she had agreed to a procedure that would make her permanently infertile. In August 2006, the UN Committee that monitors compliance with the Convention on the Elimination of Discrimination against Women (CEDAW) found Hungary in violation of CEDAW for failing to protect A.S.'s rights.<sup>20</sup>

### Drugs and Pregnancy

One trend in the United States involves criminal sanctions against women who use drugs before and during their pregnancies, despite evidence that treatment, rather than penalties, is a more effective policy.<sup>21</sup> Women in at least nine states have been prosecuted for "endangering the fetus" by engaging in drug use during pregnancy.<sup>22</sup>

- A study by the Journal of the American Medical Association (JAMA) found that the criminal prosecution of pregnant women generally falls into three categories: 1) child endangerment/abuse, 2) illegal drug delivery to a minor, or 3) fetal murder/manslaughter.<sup>23</sup> Although no state has yet adopted laws that create unique criminal penalties for pregnant women who are drug users, each individual prosecution presents an opportunity for courts to determine if existing statutes can be expanded to cover these behaviors.<sup>24</sup>
- The Supreme Court in *Ferguson v. City of Charleston* declared that a state hospital regulation requiring pregnant women to be tested for drugs and be reported to the police if the test results were positive violated the Fourth Amendment prohibition against searches without probable cause.<sup>25</sup> However, the case only addressed the issue of evidence collection for criminal prosecution of pregnant women, remaining silent on the more general question of whether such prosecutions are permissible.<sup>26</sup>
- Many states now have laws that consider fetuses, embryos, or zygotes "persons" for the purpose of criminal statutes. Please see the LSRJ Fact Sheet "Fetal Rights" for more information on the ongoing attempts to assert "fetal personhood."
- In addition, there are also controversial private programs such as Project Prevention, formerly known as CRACK (Children Requiring a Caring Kommunity), that compensate substance-using women in exchange for agreeing to be sterilized or use long-term birth control.<sup>27</sup>
  - Though programs such as Project Prevention are privately-run, more and more of their referrals are coming from publicly funded jails, hospitals, drug treatment centers, and probation centers.<sup>28</sup>
  - Opponents of these programs argue that they target predominantly poor Women of Color, and that the money funneled into these organizations should instead be used to provide affordable drug treatment programs for pregnant women and mothers.<sup>29</sup>

### Welfare Policies

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),<sup>30</sup> which eliminated the federal guarantee of Aid to Families with Dependent

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Children and created Temporary Assistance for Needy Families (TANF). One of the PRWORA's major goals is to reduce the number of children born "out-of-wedlock."<sup>31</sup>

- One of the provisions of the PRWORA, the "Bonus to Reward Decrease in Illegitimacy," gave a special cash reward to the five states that demonstrated the highest net decrease in out-of-wedlock births while keeping the ratio of abortions to live births below the 1995 level.<sup>32</sup>
- Under "child exclusion" or "family cap" policies, states may refuse to provide additional benefits to a child born to a mother currently receiving TANF benefits.<sup>33</sup>
- Following welfare reform, welfare-eligible women had an increased likelihood of being uninsured pre-pregnancy and a higher probability of delaying enrollment into Medicaid until the prenatal period.<sup>34</sup>

## Birth Rights, Midwives, and Doulas

In light of the coercive medical treatment discussed above and hospitals' increasing tendency to ignore pregnant women's wishes regarding prenatal and birthing care, many women are turning to doulas and midwives, either instead of hospitalization or in conjunction with it.

- Midwives are health care professionals who specialize in pregnancy and childbirth.<sup>35</sup> However, depending on the amount of training the midwife has, he or she can also provide gynecologic exams, birth control, and primary health care.<sup>36</sup>
- Doulas are trained, experienced professionals who provide continuous support to the pregnant woman before, during, and immediately after birth.<sup>37</sup> The main difference between midwives and doulas are that doulas do not perform medical care.<sup>38</sup>
- As pregnancy and childbirth have become increasingly regulated, more and more women are turning to midwives and doulas, who allow women to have much more control over their own pregnancy and childbirth than hospitals do.<sup>39</sup> Further, many pregnant women are opting to use midwives and doulas in conjunction with hospitals to retain control over the birth process while still being assured of prompt hospital attention should any serious complications arise.<sup>40</sup>
- Many clinical studies have found that the presence of a midwife or doula during childbirth tends to lead to: shorter labor, less complications during labor, fewer requests for pain medication, and a reduced need for C-sections, labor-inducing drugs, forceps or vacuum extraction.<sup>41</sup>

<sup>1</sup> *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination*, <http://www.eeoc.gov/types/pregnancy.html> (last visited June 15, 2009).

<sup>4</sup> *Id.*

<sup>5</sup> 499 U.S. 187, 187-89 (1991).

<sup>6</sup> *Id.* at 208.

<sup>7</sup> *Id.* at 199.

<sup>8</sup> U.S. Department of Labor, *The Family Medical Leave Act*, <http://www.dol.gov/esa/whd/regs/compliance/1421.htm> (last visited June 18, 2009).

<sup>9</sup> American Civil Liberties Union, *Coercive and Punitive Governmental Responses to Women's Conduct During Pregnancy*, <http://www.aclu.org/reproductiverights/gen/16529res19970930.html> (last visited June 15, 2009) [hereinafter *ACLU*].

<sup>10</sup> National Advocates for Pregnant Women, *Could You Be Forced To Have A C-Section?*, [http://www.advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/could\\_you\\_be\\_forced\\_to\\_have\\_a\\_csection\\_1.php](http://www.advocatesforpregnantwomen.org/main/publications/articles_and_reports/could_you_be_forced_to_have_a_csection_1.php) (last visited June 18, 2009).

<sup>11</sup> *ACLU*, *supra* note 9.

<sup>12</sup> Denise Grady, *Study Links Caesarians With Births Before Term*, *N.Y. TIMES*, May 28, 2008, available at <http://www.nytimes.com/2008/05/28/health/research/28birth.html>.

<sup>13</sup> *Id.*

<sup>14</sup> See e.g. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>15</sup> Advocates for Pregnant Women, *Pregnancy and Reproductive Rights Related Sentencing and Probation Conditions*, [http://advocatesforpregnantwomen.org/issues/procreation\\_penalties/pregnancy\\_and\\_reproductive\\_rights\\_related.php](http://advocatesforpregnantwomen.org/issues/procreation_penalties/pregnancy_and_reproductive_rights_related.php) (last visited June 15, 2009).

<sup>16</sup> Inter-American Commission on Human Rights, Report No. 71/03, Petition 12.191, Friendly Settlement, *Mamerita Mestanza Chavez v. Peru* (Oct. 22, 2003), available at <http://www.cidh.org/annualrep/2003eng/Peru.12191.htm>.

<sup>17</sup> *Id.*

<sup>18</sup> Human Rights Law Network, *Ramakant Rai & U.P. and Bihar Healthwatch vs. Union of India*, [http://www.hrln.org/hrln/index.php?option=com\\_content&view=article&id=226:ramakant-rai-a-up-and-bihar-healthwatch-vs-union-of-india-&catid=150:pils-a-cases-&Itemid=177](http://www.hrln.org/hrln/index.php?option=com_content&view=article&id=226:ramakant-rai-a-up-and-bihar-healthwatch-vs-union-of-india-&catid=150:pils-a-cases-&Itemid=177) (last visited June 18, 2009).

<sup>19</sup> Comm. on the Elimination of Discrimination Against Women, Communication No. 4/2004, U.N. Doc. CEDAW/C/36/D/4/2004 (Aug. 29, 2006), available at [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/ww\\_CEDAW\\_Hungary\\_2006.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/ww_CEDAW_Hungary_2006.pdf).

<sup>20</sup> Center for Reproductive Rights, *Coercive Sterilization/Violence Against Women*, <http://reproductiverights.org/en/press-room/as-v-hungary-committee-on-the-elimination-of-discrimination-against-women> (last visited June 15, 2009).

<sup>21</sup> Reuters, *Substance Abuse Care in Pregnancy Helps Mom, Baby*, July 7, 2008, available at <http://www.reuters.com/article/healthNews/idUSCOL75504820080707?feedType=RSS&feedName=healthNews&pageNumber=1&virtualBrandChannel=0>. See also Women's E-News, *Jailing Pregnant Women Raises Health Risks*, Sept. 20, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2894> [hereinafter Women's E-News].

<sup>22</sup> Women's E-News, *supra* note 21.

<sup>23</sup> Lisa H. Harris & Lynn Paltrow, *The Status of Pregnant Women and Fetuses in U.S. Law*, 289 JAMA 1697, 1697-1699 (2003), available at <http://jama.ama-assn.org/cgi/content/full/289/13/1697>.

<sup>24</sup> *Id.*

<sup>25</sup> 532 U.S. 67, 68 (2001).

<sup>26</sup> *Id.*

<sup>27</sup> Project Prevention, <http://projectprevention.org/> (last visited June 17, 2009).

<sup>28</sup> Daniel Costell, *Is CRACK Wack?*, SALON.COM, Apr. 8, 2003, <http://dir.salon.com/story/mwt/feature/2003/04/08/crack/>.

<sup>29</sup> Committee on Women, Population, and the Environment, *Fact Sheet on Positive Prevention/CRACK*, <http://www.cwpe.org/resources/healthrepro/cara-crackfacts> (last visited June 29, 2009).

<sup>30</sup> H.R. 3734, 104th Cong. (1996), available at <http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3734.ENR:htm>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; Jane Lawler Dye & Harriet B. Presser, *The State Bonus to Reward a Decrease in "Illegitimacy," Flawed Methods and Questionable Effects*, GUTTMACHER INST. FAM. PLAN. PERSP., Vol. 31 No. 3 May/June 1999, available at <http://www.guttmacher.org/pubs/journals/3114299.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Findings Brief, *Health Care Financing and Organization, Pregnant and Poor: Did Medicaid and Welfare Policy Changes Improve Care For These Women As Intended?*, <http://www.hcfo.net/pdf/findings0304.pdf> (last visited June 29, 2009).

<sup>35</sup> Midwives Alliance of North America, *What is MANA?*, <http://mana.org/about.html> (last visited June 18, 2009) [hereinafter MANA Website].

<sup>36</sup> MyMidwife.org, *Midwifery 101*, [http://www.mymidwife.org/Midwifery\\_101.cfm](http://www.mymidwife.org/Midwifery_101.cfm) (last visited June 18, 2009).

<sup>37</sup> Doulas of North America, <http://www.dona.org/mothers/index.php> (last visited June 29, 2009).

<sup>38</sup> AllNurses.com, <http://allnurses.com/ob-gyn-nursing/doula-vs-midwife-203295.html> (last visited June 18, 2009).

<sup>39</sup> MANA Website, *supra* note 35.

<sup>40</sup> See *id.*

<sup>41</sup> Doulas of North America International, *Why Use a Doula?*, [http://www.dona.org/mothers/why\\_use\\_a\\_doula.php](http://www.dona.org/mothers/why_use_a_doula.php) (last visited June 18, 2009); MANA Website, *supra* note 35.