



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.¹ Applying a “rational basis” level of review instead of the “intermediate scrutiny” standard normally applied to gender discrimination, the court found that pregnancy, in this instance, was not a “mere pretext designed to effect an invidious discrimination” against women.²

- 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.³
- The PDA also prohibits discrimination against pregnant women in hiring, availability of pregnancy-related work absences, and offering of fringe benefits.⁴
- An employer’s policy prohibiting women from working with lead-based chemicals was held unconstitutional in *International Union, UAW v. Johnson Controls*. The Court held that the PDA forbids “sex-specific fetal-protection policies” and established that employers cannot discriminate against women based on the “potential for pregnancy” in order to protect possible fetuses.⁵
- In 1993, the Family Medical Leave Act was enacted, allowing women who had just given birth up to 12 weeks paid, job-protected leave for one year, and requires that health benefits be maintained during this time.⁶

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.⁷ Recently, this disturbing trend has seen a resurgence.

- Pregnant women are encountering more pressures, legal and psychological, to have Cesarean sections. Hospitals in at least a dozen states have obtained court orders compelling unwilling women to undergo this major abdominal surgery.⁸
- A study linking an increase of premature births to the incidence of C-sections suggests that there may be pressure from the physicians to perform C-sections when there is not a genuine medical need. Premature babies are at increased risk for breathing and feeding disorders, delayed development, and other health disorders.⁹

¹ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

² *Id.*

³ US Equal Employment Opportunity Commission, Pregnancy Discrimination, <http://www.eeoc.gov/types/pregnancy.html>.

⁴ *Id.*

⁵ 494 U.S. 1055 (1991).

⁶ US Department of Labor, The Family Medical Leave Act, <http://www.dol.gov/esa/whd/regs/compliance/1421.htm>.

⁷ American Civil Liberties Union, Coercive and Punitive Governmental Responses to Women's Conduct During Pregnancy, <http://www.aclu.org/reproductiverights/gen/16529res19970930.html>.

⁸ 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.

⁹ Denise Grady, Study Links Caesarians With Births Before Term, N.Y. Times, May 28, 2008.

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Forced 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 being performed today in the U.S. and throughout the world. Unsurprisingly, the victims of coerced sterilization tend to be from traditionally marginalized segments of the population.

- In *A.S. v. Hungary*, 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.¹⁰
- In *Maria Mamerita Mestanza Chavez v. Peru*, the plaintiff’s family sued the Peruvian government for its policy of forced sterilization, resulting in the plaintiff’s death. A settlement was reached under the Inter-American Commission on Human Rights which 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.”¹¹
- The Supreme Court of India, in March 2005, 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.¹²
- In the United States, despite a continuing consensus that freedom to procreate is a Constitutional right, court orders creating procreation penalties have gained some traction in state courts for offenses ranging from child abuse and neglect to drug abuse.¹³

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.¹⁴ Women in at least nine states have been prosecuted for “endangering the fetus” by engaging in drug use during pregnancy.¹⁵

- A study by the Journal of the American Medical Association (JAMA) found that the criminal prosecution of pregnant women generally fell into three categories: 1) child

¹⁰ Center for Reproductive Rights, Coercive Sterilization/Violence Against Women, http://www.reproductiverights.org/crt_violence.html.

¹¹ Inter-American Commission on Human Rights, Report No. 71/03, Petition 12.191, Friendly Settlement, *Maria Mamerita Mestanza Chavez v. Peru* (Oct. 22, 2003), available at <http://www.cidh.org/annualrep/2003eng/Peru.12191.htm>.

¹² Human Rights Law Network, A petition against abusive and negligent sterilizations of women, <http://www.hrln.org/issue.php?id=13&pil=1&pilid=13>.

¹³ 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.

¹⁴ Substance abuse care in pregnancy helps mom, baby, Reuters (Jul. 7, 2008), <http://www.reuters.com/article/healthNews/idUSCOL75504820080707?feedType=RSS&feedName=healthNews&pageNumber=1&virtualBrandChannel=0>, see also *Jailing Pregnant Women Raises Health Risks*, Women’s E-News (Sept. 20, 2006), <http://www.womensenews.org/article.cfm/dyn/aid/2894>.

¹⁵ *Jailing Pregnant Women Raises Health Risks*, <http://www.womensenews.org/article.cfm/dyn/aid/2894>.

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endangerment/abuse, 2) illegal drug delivery to a minor, or 3) fetal murder/manslaughter.¹⁶ Although no state has yet to adopt a law that creates unique criminal penalties for pregnant women who are abusing drugs, each individual prosecution presents an opportunity to courts to determine if existing statutes can be expanded to cover these behaviors.¹⁷

- The Supreme Court in *Ferguson v. City of Charleston* declared that a state hospital regulation requiring pregnant women to be tested for drugs and reported to the police violated the Fourth Amendment prohibition on searching without probable cause. 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.¹⁸
- Fortunately, neither state courts nor legislatures have determined that a viable fetus should be considered a person for the purposes of criminal statutes.¹⁹ However, attempts to assert a notion of “fetal personhood” are ongoing. In July 2008, an antiabortion group going by the name “Colorado for Equal Rights” successfully funded a proposed amendment to the Colorado State Constitution that would expand the definition of “person” to include the moment of conception. If voters agree in November, it would give fertilized eggs the same rights and protections to which people are legally entitled.²⁰
- There are also controversial private programs, such as CRACK (Children Requiring a Caring Kommunity), and Project Prevention, which pay substance-using women to get sterilized or use long-term birth control.²¹
 - 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.²²

Welfare Policies

In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),²³ which eliminated the federal guarantee of Aid to Families with Dependent 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.”²⁴

- Congress created the “Bonus to Reward Decrease in Illegitimacy,” a special cash reward for the five states that demonstrated the highest net decrease in out-of-wedlock births while keeping abortion rates below the 1995 level.²⁵
- 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.²⁶

¹⁶ Lisa H. Harris & Lynn Paltrow, The Status of Pregnant Women and Fetuses in U.S. Law, *Journal of the American Medical Ass'n*, 2003;289:1697-1699, available at <http://jama.ama-assn.org/cgi/content/full/289/13/1697>.

¹⁷ *Id.*

¹⁸ 532 U.S. 67 (2001).

¹⁹ Center for Reproductive Rights, The Legal Status of the Fetus: Implications for Medical Personnel, http://www.reproductiverights.org/pub_art_fetalrights.html.

²⁰ Ashley Surden, Colorado Voters Will Be Asked When ‘Personhood’ Beings, *Wash. Post*, July 13, 2008, at A4.

²¹ Committee on Women, Population, and the Environment, Fact Sheet on Positive Prevention/CRACK, <http://www.cwpe.org/resources/healthrepro/cara-crackfacts>.

²² Daniel Costell, Is CRACK Wack? *Salon.com*, Apr. 8, 2003, <http://dir.salon.com/story/mwt/feature/2003/04/08/crack/>.

²³ Library of Congress H.R. 3734.

²⁴ National Conference of State Legislatures, Analysis of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, <http://www.ncsl.org/statedfed/hr3734.htm>.

²⁵ Jane Lawler Dye & Harriet B. Presser, The State Bonus to Reward a Decrease in “Illegitimacy”, Flawed Methods and Questionable Effects, *Guttmacher Institute Family Planning Perspectives*, Vol. 31 No. 3 May/June 1999, available at <http://www.guttmacher.org/pubs/journals/3114299.html>.



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- 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.²⁷

²⁶ Terry Solom, State Actions on Reproductive Health Issues in 1994, *Guttmacher Institute Family Planning Perspectives*, Vol. 27 No. 2, March/April 1995, available at <http://www.guttmacher.org/pubs/journals/2708395.html>.

²⁷ 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>.