

# Model Curriculum

for courses in

Reproductive  
Rights  
Law &  
Justice

Foster ing  
Legal  
Exper tise  
For  
The  
Futur e  
Of  
Repr oductive  
Justice...

One  
Student  
At  
A  
Time.



LAW STUDENTS  
FOR  
REPRODUCTIVE  
J U S T I C E

# Model Curriculum

for courses in

Reproductive  
Rights  
Law &  
Justice

Law Students for Reproductive Justice  
[www.LSRJ.org](http://www.LSRJ.org)

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## PREFACE

The Model Curriculum was conceived in response to law students' widespread and very real need for more comprehensive learning opportunities in a body of law that fascinated them, motivated them, and yet eluded them each semester during the course selection process. When Law Students for Reproductive Justice (then Law Students for Choice) first published the Model Curriculum in the summer of 2005, we could detect only two law schools that regularly offered comprehensive coursework on reproductive rights law. Our members wanted more.

They began actively seeking opportunities to study the complexities of reproductive rights doctrine in-depth and discuss its implications at-length in a manner that the limited coverage in other courses simply did not allow. They launched campaigns for comprehensive seminars, instructor-led reading groups, and independent studies in reproductive rights law. Our members have pursued their goals with tenacity and persevered against resistance, claiming their educational experiences as theirs for the shaping. We created this tool for them.

Since the first edition of the Model Curriculum, the number of instructor-led courses and reading groups dedicated to reproductive rights has grown to 25. And, according to our ambitious members, this is just the beginning.

LSRJ appreciates the growing number of law school administrators who recognize the richness of this under-covered body of law and realize that it merits dedicated, comprehensive courses. We are grateful to the faculty members and visiting lecturers who have bravely and brilliantly risen to the challenge of teaching reproductive rights in all its complex, overlapping, intersectional splendor. We respect and value the academics who have been writing on these topics, including them in their casebooks, assigning them as reading, and cultivating meaningful discussion around them consistently for years now. We give thanks to the funders and donors who share and make viable LSRJ's vision of raising the purview of reproductive rights law and integrating it into the curricula of law schools throughout the country.

Finally, we recognize the students who are advocating for a greater understanding of reproductive justice inside the classroom, educating their peers outside the classroom, and taking responsibility for their own learning experiences. Our members have persisted when school administrators resisted their requests and told them that *Roe v. Wade* was already being sufficiently covered in Family Law or Constitutional Law. When they were told that there was

no one on the faculty qualified or willing to teach the course, they looked outside the law school and continued to ask until they found someone to teach it. When they were told there was not enough interest for such a niche course, they came back with petitions signed by hundreds of their classmates demonstrating the interest and, moreover, the demand. Many of them spent several semesters lobbying for learning opportunities they knew they would never profit from, because graduation was coming sooner than victory. Nevertheless, they fought for those who would follow in their footsteps. They are the history of the Model Curriculum and the future of reproductive justice legal advocacy. They have inspired their successors, their mentors, and their teachers. This edition is dedicated to them.

## ACKNOWLEDGMENTS

Law Students for Reproductive Justice thanks the following people for their indispensable contributions to the vision and execution of both editions of the Model Curriculum:

### Contributors

- Created in 2005 by Interns Mags Aleks, Erin Cassard, Diana Geseking, Kim Irish, and Jen Smith
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We are also grateful to the following foundations for their generous support, which made possible the creation, publication, and distribution of the Model Curriculum in all its forms:

### Foundation Supporters

- Mary Wohlford Foundation
- Richard and Rhoda Goldman Fund
- Robert Sterling Clark Foundation
- The Moriah Fund
- The Wallace Alexander Gerbode Foundation

## INTRODUCTION

Reproductive justice will be achieved when all people and communities have access to the information, resources, and support they need to attain sexual and reproductive self-determination. People living at the intersection of multiple forms of subordination such as sexism, racism, poverty, homophobia, transphobia, and ableism suffer the greatest reproductive oppressions. Therefore, advocates and activists must learn to place society's most marginalized groups at the center of their legal and policy analyses. Law Students for Reproductive Justice has designed the Model Curriculum with this framework in mind and aims to nurture a similar perspective in students, broadening the discourse beyond the limitations of essentialist notions and the boundaries of pro-choice versus pro-life rhetoric.

Reproductive Rights Law and Justice courses offer students the opportunity to learn about a wide spectrum of related topics, including public funding for reproductive health services; access to contraception; minors' and prisoners' rights; religious restrictions and refusals; and potential implications of new assisted reproductive technologies. Such classes provide an opportunity to highlight dynamic topics in social justice, human rights, and civil liberties as they intersect with reproductive justice, such as racial and environmental justice; LGBTQ liberation; freedoms of speech, religion, and association; freedom from illegal search and seizure or cruel and unusual punishment; rights to privacy, bodily autonomy, and equality; and birthing, parenting, and family formation rights.

### Uses

- Drum up support for a course among students
- Demonstrate to administrators that this rich body of law merits its own course
- Alleviate prospective instructors' concerns about having to construct coursework from scratch
- Use as the syllabus for a seminar, reading group, or independent study

### Structure

The syllabus is divided into 11 modules, covering a range of issues and illuminating the constitutional backbone for the *Roe v. Wade* – *Casey v. Planned Parenthood* – *Gonzales v. Carhart* line of cases. The reading is based on a three-credit course and can be modified for a one- or two-credit course. The number in parentheses after each source reflects its number of pages; a three-unit course is based on approximately 120 pages of reading per week. Each module is broken down into Priority Reading and Secondary Reading. The Priority Reading comprises enough material for a three-credit course. The Secondary Reading provides more in-

depth study for students who have already covered the selected cases in previous coursework. Each module features focus questions to help foster ideas, provide discussion material, and highlight main themes. Keep in mind that independent studies and reading groups generally require the supervision of a professor who works with the students to create projects and written assignments.

Nearly all of the reading material featured in the Model Curriculum can be found online, particularly through Lexis or Westlaw, and the Model Curriculum can also be found online at [www.LSRJ.org](http://www.LSRJ.org).

# Abortion

## Introduction

The groundbreaking 1973 *Roe v. Wade* decision was a tremendous victory for women's rights and reproductive health advocates in the United States. It also energized abortion opponents who have worked to chip away at the rights outlined in *Roe*. In the decades since, state governments and the U.S. Congress have enacted various regulations that restrict access to abortion, especially for young women and poor women. In 2007, abortion opponents secured a major judicial victory in *Gonzales v. Carhart/Gonzales v. Planned Parenthood Federation of America (Carhart II)*, when the US Supreme Court broke precedent to uphold the Partial Birth Abortion Ban Act of 2003 without an exception for the woman's health.

## Focus Questions

Which abortion restrictions have courts upheld under *Casey's* "undue burden" standard? What are the real world impacts of those acceptable burdens, and which communities might they affect the most? After *Carhart II*, what standard of review will courts use to determine whether regulations are facially constitutional? What was the effect of *Carhart II* on the *Casey* holding? Does the Constitution require that all restrictions on abortion include an exception for the life of the mother?

## Priority Reading

This section will provide a brief overview of the present state of abortion law in the United States, including information on surgical and medication abortion. It will also provide information on some of the restrictions that courts have upheld under *Casey's* undue burden standard. Feel free to skim or skip any cases already covered in your other courses, replacing those pages with selections from the "Secondary Reading" section.

## Access and Regulations

- *Roe v. Wade*, 410 U.S. 113-167 (1973) (recognizing abortion as a fundamental privacy right). (30)
- *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833-901 (1992) (upholding *Roe* but changing the standard of review for abortion restrictions from strict scrutiny to the "undue burden" standard). (40)
- Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). (25)

### Abortion Bans

- *Gonzales v. Carhart*, 127 S. Ct. 1610-1639 (2007) (upholding the federal Partial Birth Abortion Ban Act of 2003 and denying the validity of facial challenges to the ban). (25)
- Jack Balkin, *Gonzales v. Carhart—Three Comments* (2007), available at <http://balkin.blogspot.com/2007/04/gonzales-v-carhart-three-comments.html>. (5)

### Secondary Reading

#### Access and Regulations

- *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 912-1002 (1992) (concurring and dissenting opinions). (90)
- Ruth Bader Ginsburg, *Essay, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985). (16)
- Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261-66, 323-347 (1992). (31)
- Rachel D. King, *Comment, A Back Door Solution: Stenberg v. Carhart and the Answers to the Casey/Salerno Dilemma for Facial Challenges to Abortion Statutes*, 50 EMORY L.J. 873 (2001). (20)
- David Brooks, *Editorial: Roe's Birth and Death*, N.Y. TIMES, Apr. 21, 2005, at A4 (LEXIS). (2)
- WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 1-85, (Jack Balkin ed. 2007) (introduction, majority and concurring "opinions" by Balkin and Reva Siegel). (85)
- Cynthia D. Lockett, *Student Note, The Beginning of the End: The Diminished Abortion Right Following Carhart and Planned Parenthood*, 11 J. GENDER RACE & JUST. 337 (2008). (15)

### Abortion Bans

- *Stenberg v. Carhart*, 530 U.S. 914-22, 947-951 (2000) (striking down a Nebraska abortion ban similar to that later upheld in *Gonzales v. Carhart*). (14)
- *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1003-1048 (D. Neb. 2004) (holding the federal Partial Birth Abortion Act of 2003 was an unconstitutional undue burden on a woman's abortion right). (45)
- *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004) (holding that federal abortion ban violated due process). (35)

- Planned Parenthood Federation of America v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004) (holding that federal abortion ban posed an undue burden on abortion, was unconstitutionally vague, and lacked a required exception for the woman's health). (45)
- Jack Balkin, The Big News about Gonzales v. Carhart—It's the Informed Consent, Stupid (2007), available at <http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html>. (2)
- Caroline Burnett, Comment, Dismantling Roe Brick By Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003, 42 U.S.F. L. REV. 227 (2007). (41)
- Charles Fried, Supreme Confusion, N.Y. TIMES, Apr. 26, 2007 (editorial by former U.S. Solicitor General criticizing the Supreme Court's decision in Gonzales v. Carhart), available at <http://www.nytimes.com/2007/04/26/opinion/26fried.html?ex=1335240000&en=16b7f794dd80efcf&ei=5090&partner=rssuserland&emc=rss>. (2)
- Martha Plante, Current Events, "Protecting Women's Health": How Gonzales v. Carhart Endangers Women's Health and Women's Equal Personhood Under the Constitution, 16 AM. U. J. GENDER SOC. POL'Y & L. 387 (2008). (21)

### Refusal Clauses

- Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) (upholding refusal clause as constitutional as applied to private hospitals but unconstitutional as applied to public hospitals). (5)
- Kenny v. Ambulatory Centre of Miami, 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981) (ruling that employer must accommodate employee's religious practices except in case of undue hardship to employer). (10)
- Shelton v. University of Medicine & Dentistry, 223 F.3d 220 (3d Cir. 2000) (holding that transfer of a religious objector to equivalent duties was reasonable accommodation). (7)
- Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales, 391 F.Supp.2d 200 (D. D. C. 2005) (upholding Weldon Amendment requirement that Title X grantees not discriminate against providers who refused to refer for abortion). (12)
  - Also listed in Funding, Priority Reading.
- Jason Green, Refusal Clauses and the Weldon Amendment, 26 J. LEGAL MED. 401 (2005) (discussing unconstitutionality of refusal clauses and adverse consequences of Weldon Amendment). (17)
  - Also listed in Funding, Secondary Reading.
- Bernard M. Dickens, Ethical Misconduct by Abuse of Conscientious Objection Laws, 25 MED. & L. 513 (2006). (5)

- Patricia L. Selby, Comment, On Whose Conscience? Patients' Rights Disappear Under Broad Protections for Conscientious Objectors in Health Care, 83 U. DET. MERCY L. REV. 507 (2006). (37)

### Biased Counseling and Waiting Periods

- Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999) (holding that Wisconsin's informed consent requirement was not unconstitutionally vague). (40)
- A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002) (holding that injunction against enforcement of informed consent rule prior to hearing on provision's effects was an abuse of judicial discretion). (18)
- Cincinnati Women's Services, Inc. v. Taft, 468 F.3d 361 (6th Cir. 2006) (striking provision limiting minors to one petition per pregnancy for judicial bypass of parental consent). (17)
- Note: Science, Law and Politics of Fetal Pain Legislation, 115 HARV. L. REV. 2010 (2002) (arguing for informed consent laws to decrease infliction of pain in late-term abortions). (18)
- Linda P. McKenzie, Federally Mandated Informed Consent: Has Government Gone Too Far?, 20 J.L. & HEALTH 267 (2007). (40)
- Harper Jean Tobin, Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws, 17 COLUM. J. GENDER & L. 111 (2008). (42)

### Religious Hospital Mergers

- Bowen v. Kendrick, 487 U.S. 589 (1987) (ruling that federally funded sex education by religious institutions does not violate Establishment Clause). (55)
  - Also listed in Minors' Reproductive Rights and Education, Priority Reading.
- Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal Department of Health and Human Services gag rules for Title X projects). (46)
  - Also listed in Funding, Priority Reading.
- Bradford v. Roberts, 175 U.S. 291 (1999) (holding that federal money compensating religious hospitals for patient care was not a religious appropriation). (8)
- Alison Manolovici Cody, Note, Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic, 57 N.Y.U. ANN. SURV. AM. L. 323 (2000). (45)
- Judith C. Appelbaum and Jill C. Morrison, Hospital Mergers and the Threat to Women's Reproductive Health Services: Applying the Antitrust Laws, 26 N.Y.U. REV. L. & SOC. CHANGE 1 (2000/2001). (46)

### Medication Options

- Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502 (6th Cir. 2006) (upholding preliminary injunction against prohibition of “off-label” mifepristone use for abortion). (18)
- Mande Silverman, Reproductive Rights, RU-486: A Dramatic New Choice or Forum for Continued Abortion Controversy?, 57 N.Y.U. ANN. SURV. AM. L. 247 (2000). (55)
- Denise A. Copelton, Assessing the Social Impact of Mifepristone in the United States – A Pro-Choice Perspective, 11 KAN. J.L. & PUB. POL’Y 333 (2001). (30)
- Rachel K. Jones & Stanley K. Henshaw, Mifepristone for Early Medical Abortion: Experiences in France, Great Britain and Sweden, PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, Vol. 34, No. 3, (2002), available at <http://www.agiusa.org/pubs/journals/3415402.html>. (10)
- Heather A. Smith, Comment, A New Prescription for Abortion, 73 U. COLO. L. REV. 1069 (2002). (36)

# Anti-Choice Clinic Protests and Violence: First Amendment

## Introduction

Tension often arises between protecting access to reproductive rights and ensuring the free speech rights of anti-choice protestors. Since 1994, the U.S. Supreme Court has established guidelines for states and municipalities to follow when drafting legislation to protect the rights of those entering healthcare facilities and those protesting outside clinics. The Court's decision in *Hill v. Colorado* offers the greatest protection to patients, while also honoring the First Amendment rights of protestors.

## Focus Questions

What protection does the First Amendment provide to protestors? What particular actions does the FACE Act prohibit? Distinguish the Supreme Court's rulings in *Madsen*, *Schenck*, and *Hill*. What does the Court uphold as constitutional?

## Priority Reading

Three key Supreme Court cases are included here to provide a solid background in the arguments surrounding the conflict between First Amendment rights of anti-choice protestors and a woman's right to safely access medical care. An article discussing the Supreme Court's decision in *Hill v. Colorado* will shed more light on bubble zone legislation. In addition, reading the FACE Act and information about restrictive state TRAP laws that prevent doctors from providing abortions are essential to understanding continuing developments in this area of law.

## Anti-Choice Violence and the First Amendment

- *Madsen v. Women's Health Care Ctr., Inc.*, 512 U.S. 753-76 (1994) (ruling on constitutionality of buffer zones and no-approach zones outside abortion clinics). (15)
- *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357-85 (1997) (ruling that preliminary injunctions establishing abortion clinic buffer zones were constitutional). (17)
- *Hill v. Colorado*, 530 U.S. 703-35 (2000) (finding that statutes establishing eight-foot no-approach zones were not violations of protestors' First Amendment rights). (20)
- *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition for Life Activists*, 290 F.3d 1058-88 (9th Cir. 2002) (holding that public disclosure of abortion providers' names and addresses via the internet constituted a "real threat"). (30)

- Scheider v. National Organization for Women, 537 U.S. 393 (2003) (holding that organizers of anti-choice protests did not violate RICO Act). (16)
- Freedom of Access to Clinic Entrances (FACE) Act [18 U.S.C.A. § 248] (imposing criminal and civil penalties for use of “force, threat of force or physical obstruction” to prevent a person from providing or receiving reproductive health services). (17)
- Jason Schlosberg, Judgment on ‘Nuremberg’: An Analysis of Free Speech and Anti-Abortion Threats Made on the Internet, 7 B.U. J. SCI. & TECH. L. 52 (2001). (11)
- Targeted Regulation of Abortion Providers (TRAP) (2007), available at [http://www.reproductiverights.org/pub\\_fac\\_trap.html](http://www.reproductiverights.org/pub_fac_trap.html). (3)
  - TRAP laws impose more stringent requirements on physicians and facilities that provide abortions than on those providing other medical services.

## Secondary Reading

### Anti-Choice Violence and the First Amendment

- Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997) (holding "floating buffer zone" ordinance was too broad and violated First Amendment). (7)
- Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998) (holding that fixed buffer zone provisions were narrowly tailored and did not violate First Amendment). (6)
- United States v. Scott, 187 F.3d 282 (2d Cir. 1999) (holding that expansion of "floating buffer zone" did not violate First Amendment). (10)
- McGuire v. Reilly, 260 F.3d 36 (1st Cir. 2001) (holding that state act establishing "floating buffer zones" was narrowly tailored and did not violate First Amendment). (20)
- Kristen G. Cowan, Supreme Court Review, The Tailoring of Statutory Bubble Zones: Balancing Free Speech and Patients’ Rights, 91 J. CRIM. L. & CRIMINOLOGY 385 (2001). (22)
- Christopher P. Keleher, Symposium, Double Standards: The Suppression of Abortion Protestors’ Free Speech Rights, 51 DEPAUL L. REV. 825 (2002). (47)
- Rachel L. Braunstein, Note, A Remedy for Abortion Seekers Under the Invasion of Privacy Tort, 68 BROOKLYN L. REV. 309 (2002). (18)
- Jamie Edwards, Note, McGuire v. Reilly: The First Amendment and Abortion Clinic Buffer Zones in the Wake of Hill v. Colorado, 36 U.C. DAVIS L. REV. 787 (2003). (10)
- Autumn Nero, Note, Where Are We Now? Clinic Protection in the Wake of Scheidler v. National Organization for Women, Inc., 21 WIS. WOMEN'S L.J. 73 (2006). (19)
- Paige Nelson, Note, Let the People Speak: Terrorism, the Abortion Debate, and Reduction of Jury Reward in Columbia/Willamette, Inc. v. American Coalition for Life Activists, 92 IOWA L. REV. 677 (2007). (12)

# Coercive Contraception and Sterilization

## Introduction

The development of new and more effective contraceptive drugs and technologies provides greater freedom for people who want to control their own reproduction. However, a dark aspect of reproductive control has persisted throughout U.S. history to the present day. Legislatures, courts, and physicians have used medical technology in coercive ways to limit procreation within certain populations. Reproductive coercion has occurred by way of uninformed consent practices, court-ordered sterilizations or Norplant implantations, and sterilization statutes aimed at groups seen by lawmakers as "unfit" persons. These efforts have historically targeted people of color and those who are poor, incarcerated, or living with a disability or mental illness. Therefore, while mainstream reproductive rights movements have focused on protecting the right not to reproduce, underrepresented groups recognize that the right to reproduce carries as much or more importance. Many see aggressive promotion of contraception and sterilization to their communities as shadowed by the specter of eugenics, prejudice, and medical abuse.

## Focus Questions

What arguments have courts, lawmakers, and special interest groups used to justify coercive conception and forced sterilization? What attitudes and assumptions underlie those arguments? Considering the demographics of incarceration in the U.S., does reproductive control of prisoners have an equal impact on all racial and ethnic groups? Who decides who is "fit" to reproduce? How might the sterilization of a person with cognitive disabilities benefit them, and how might it benefit their guardians and caretakers? Are those interests compatible or do they conflict? Is it ever appropriate to deny someone the fundamental right to reproduce?

## Priority Reading

This reading will provide an overview of the legal and social history of coercive reproductive control in the U.S., touching on some of the methods by which state and medical establishments have used contraception and sterilization to restrict the reproductive freedom of people of color, prisoners, and people living with disabilities. Completing the priority reading will satisfy the requirements for this module.

## Coercive Contraception

- *People v. Pointer*, 151 Cal. App. 3d 1128 (Cal. Ct. App. 1984) (ruling that the sentence for child endangerment specifying that woman not conceive during probation was overbroad).

(7)

- Vaughn v. Ruoff, 253 F.3d 1124 (8th Cir. 2001) (ruling that coercive sterilization violated due process and that decision to have tubal ligation was protected liberty interest). (10)
- Pamela D. Bridgewater, Reproductive Freedom as Civil Freedom The Thirteenth Amendment's Role in the Struggle for Reproductive Rights, 3 J. GENDER RACE & JUST. 401 (2000) (discussing mandated use of Norplant). (12)
- Renee Chelian, Remarks on the "CRACK" Program: Coercing Women's Reproductive Choices, 5 J.L. SOC'Y 187 (2003). (9)

### Forced Sterilization

- Buck v. Bell, 274 U.S. 200 (1927) (holding state law permitting sterilization of the "feeble-minded" constitutional). (2)
  - Also listed in Underrepresented Groups, Priority Reading.
- Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding sterilization of habitual criminals violated Equal Protection Clause). (8)
- In re Sterilization of Moore, 221 S.E.2d 307 (1976) (holding constitutional laws providing for sterilization of mentally ill or disabled people). (15)
  - Also listed in Underrepresented Groups, Secondary Reading.
- Conservatorship of Valerie N., 40 Cal. 3d 143 (1985) (holding that laws against sterilization of persons deemed incompetent denied them constitutionally protected procreative choice). (19)
  - Also listed in Underrepresented Groups, Secondary Reading.
- Conservatorship of Angela D., 70 Cal. App. 4th 1410 (Cal. Ct. App. 1999) (upholding approval of petition for sterilization of developmentally disabled woman). (16)
  - Also listed in Underrepresented Groups, Secondary Reading.
- Judith A. M. Scully, Maternal Mortality, Population Control, and the War in Women's Wombs: A Bioethical Analysis of Quinacrine Sterilizations, 19 WIS. INT'L L.J. 103 (2001). (22)

### Secondary Reading

#### Coercive Contraception

- Stacey L. Arthur, The Norplant Prescription: Birth Control, Woman Control, or Crime Control?, 40 UCLA L. REV. 1 (1992). (47)
- Karin E. Wilinski, Note, Involuntary Contraceptive Measures: Controlling Women at the

Expense of Human Rights, 10 B.U. INT'L L.J. 351 (1992). (17; focus on sections III and IV.)

- Suzanne Sangree, Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Policies, 41 BUFF. L. REV. 309 (1993). (55)
- Catherine Albiston, The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class and Gender, 9 BERKELEY WOMEN'S L.J. 9 (1994). (30)
- Christie M. Love, Not in Our Country? A Critique of the United States Welfare System through the Lens of China's One-Child Law, 14 COLUM. J. GENDER & L. 142 (2005). (14)
- Janet Simmonds, Note, Coercion in California: Eugenics Reconstituted in Welfare Reform, the Contracting of Reproductive Capacity, and Terms of Probation, 17 HASTINGS WOMEN'S L.J. 269 (2006). (13)

### Forced Sterilization

- Peter Irons, Commentary: Forced Sterilization: a Stain on California, L.A. TIMES, Feb. 16, 2003, at M5 (LEXIS). (2)
- Michael G. Silver, Note, Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History, 72 GEO. WASH. L. REV. 862 (2004). (19)
- Vanessa Volz, Note, A Matter of Choice: Women with Disabilities, Sterilization, and Reproductive Autonomy in the Twenty-First Century, 27 WOMEN'S RTS. L. REP. 203 (2006). (23)
  - Also listed in Underrepresented Groups, Secondary Reading.

# Contraception

## Introduction

In 1965 the U.S. Supreme Court held that states cannot interfere with a married couple's right to privacy in the use of contraception. In 1972 this ruling was extended to unmarried individuals when the Supreme Court held that it is a violation of the Equal Protection Clause to extend the right to use contraception to married couples but not to unmarried individuals. Finally, in 1977 the Supreme Court recognized the privacy rights of minors in relation to contraception, striking down a New York statute prohibiting distribution of contraception to minors. Though contraceptives are legal, barriers to access – especially access to emergency contraception (EC) – still exist for many women. For instance, many states protect pharmacists who refuse to stock or dispense contraception because of religious or moral beliefs, and some do not require objectors to refer customers to another pharmacy. Even when the law requires referral, forcing a woman to go elsewhere for contraception may constitute a significant burden, especially in the case of emergency contraception, which is more effective if used shortly after intercourse.

## Focus Questions

What standard must courts use when determining whether statutory restrictions on contraceptive access are constitutional? How should the interests of minors and their parents be weighed against one another in the case of contraception access? What non-legal barriers still exist for women seeking prescription contraceptives, and are some women more affected by such barriers than others? What are the main arguments against full coverage of contraception by prescription insurance plans? What interests and fundamental rights are at issue in pharmacist refusals? Is it appropriate to protect pharmacists who refuse to distribute certain medications?

## Priority Reading

This reading will cover access to contraception, coverage of contraception by prescription drug plans (contraceptive equity), pharmacist refusals, and emergency contraception.

## Access

- Griswold v. Connecticut, 381 U.S. 479-507 (1965) (recognizing a privacy interest in the right of married couples to information about and access to contraception). (16)
- Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending Griswold to single individuals). (18)

- Carey v. Population Services Int'l, 431 U.S. 678-702 (1977) (extending right to contraceptives to minors under sixteen). (16)
  - Also listed in Minor's Reproductive Rights and Education, Secondary Reading.

### Contraceptive Equity

- Erickson v. Bartell, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (ruling that exclusion of prescription contraceptives from employer insurance plan constituted sex discrimination and violated the Pregnancy Discrimination Act). (10)
- In re Union Pacific Railroad Employment Practices Litigation, 479 F.3d 936-45 (8th Cir. 2007) (ruling that exclusion of all contraception from employee health insurance plan did not violate the PDA). (7)

### Pharmacist Refusals

- Mary K. Collins, Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?, 15 ANNALS HEALTH L. 37 (2006). (14)
- Robin F. Wilson, Essay: The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures, 34 AM. J.L. & MED. 41 (2008) (asking whether refusal clauses are good public policy). (14)

### Emergency Contraception

- Yuliya Schaper, Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in Bipartisan Abortion Politics in the United States, 29 RUTGERS L. REC. 1 (2005). (11)
- Barbara Chevalier, The Constitutionality of the FDA's Age-Based Plan B Regulations: Why the FDA Made the Wrong Decision, 22 WIS. WOMEN'S L.J. 235 (2007). (16)

### Secondary Reading

#### Contraceptive Equity

- E. Renee Backmeyer, Note, Lack Of Insurance Coverage For Prescription Contraception By an Otherwise Comprehensive Plan as a Violation of Title VII as Amended by the Pregnancy Discrimination Act—Stretching the Statute Too Far, 37 IND. L. REV. 437 (2004). (19)
- Susan J. Stabile, State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers, 28 HARV. J.L. & PUB. POL'Y 741 (2005) (criticizing narrow statutory definitions of what constitutes a religious employer for exception from contraceptive coverage mandates). (17)

- Sheila Bapat, Comment: Fighting Collectively for Contraceptive Equity: Class Action Litigation and Emerging Labor Union Support for Contraceptive Coverage, 9 U. PA. J. LAB. & EMP. L. 951 (2007). (11)

### Pharmacist Refusals

- Holly Teliska, Recent Development: Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women, 20 BERKELEY J. GENDER L. & JUST. 229 (2005). (12)
- Claire A. Smearman, Drawing the Line: The Legal, Ethical, and Policy Implications of Refusal Clauses for Pharmacists, 48 Ariz. L. Rev. 469 (2006) (arguing that pharmacist refusals should be allowed only in narrowly defined circumstances). (37)
- Charu A. Chandrasekhar, Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives under State Accommodation Laws, 70 ALB. L. REV. 55 (2006). (21)

### Emergency Contraception

- Emergency Contraception (EC): A Safe and Effective Way to Prevent Unplanned Pregnancy, Center for Reproductive Rights Briefing Paper (April 2006), available at [http://www.reproductiverights.org/pub\\_fac\\_ecdomestic.html](http://www.reproductiverights.org/pub_fac_ecdomestic.html). (10)
- Samantha Harper, Note, "The Morning After": How Far Can States Go to Restrict Access to Emergency Contraception?, 38 COLUM. HUM. RTS. L. REV. 221 (2006). (19)
- Sydney Kokjohn, Note, The Imposition of an Age Restriction on Over-the-Counter Access to Plan B Emergency Contraception: Violating Constitutional Rights to Privacy and Exceeding Statutory Authority, 9 MINN. J.L. SCI. & TECH. 369 (2008). (14)

# Criminal Law and Reproductive Justice

## Introduction

Although *Roe v. Wade* decriminalized abortion, reproductive justice remains elusive within the realm of criminal law, especially for the thousands of women in federal and state prisons and jails. The majority of women in prison are single mothers convicted of non-violent drug offenses; two-thirds are women of color. Many prisons continue the inhumane practice of restraining female prisoners with metal restraint belts or waist chains during pregnancy and shackling them during labor and delivery. Some state departments of correction and prison wardens deny wards access to abortion services and regularly fail to provide adequate reproductive health care. Since the enactment of the federal Adoption and Safe Families Act (ASFA), mothers in prison face termination of their parental rights. The push to criminalize drug use during pregnancy acts to further separate women from their families and restrict reproductive autonomy, disproportionately affecting African-American women and Latinas.

## Focus Questions:

How might legal precedents established through criminalization of drug use during pregnancy affect other reproductive rights jurisprudence? How do current U.S. policing, prosecution, and sentencing policies (e.g. the “war on drugs,” being “tough on crime”) affect women of color, their families, and their communities? Applying a reproductive justice lens, what attitudes about women of color as mothers do the current policies reflect? To what degree do these policies accomplish their ostensive ends and to what degree do they perpetuate systemic oppression? What alternative policies might effectively promote the legitimate state interests used to justify ASFA and fetal protection laws without interfering with women’s fundamental rights?

## Priority Reading:

These readings provide an introduction to the reproductive health and rights issues affecting women in prison, including access to abortion services, inhumane treatment during pregnancy and labor, and potential loss of parental rights under ASFA. In addition, it addresses the prosecution of women who use drugs during pregnancy, the legal implications of such policies, and effects on vulnerable populations.

## Criminalization of Drug Use During Pregnancy

- *Ferguson v. Charleston*, 532 U.S. 67 (2001) (ruling that testing and reporting obstetric patients for cocaine use was an unreasonable search under the Fourth Amendment). (25)

- Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419 (1991). (25)

### Women in Prison

- Rachel Roth, "No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems, 12 AM. U.J. GENDER SOC. POL'Y & L. 391 (2004). (14)

### Prisoners' Access to Abortion

- Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2004) (ruling that prison policy requiring court order for inmate's elective abortion was reasonably related to legitimate interest). (17)
- Doe v. Arpaio, 150 P.3d 1258 (Ariz. Ct. App. 2007) (ruling that policy requiring court order to transport prisoner for elective abortion was unconstitutional). (10)
- Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (ruling that elective abortion does not constitute "serious medical need," and that denying access does not violate Eighth Amendment). (15)

### Pregnancy and Labor in Prison

- Doe v. Gustavus, 294 F.Supp.2d 1003 (E.D. Wis. 2003) (denying motion for summary judgment based on genuine question of material fact on whether prisoner's segregated confinement during labor and delivery violated Eighth Amendment). (9)
- Kelly Parker, Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvement in Their Treatment, 19 J. L. & HEALTH 259 (2006). (22)

### Secondary Reading

#### Criminalization of Drug Use During Pregnancy

- Johnson v. Florida, 578 So. 2d 419 (Fla. Ct. App. 1991) (holding that cocaine passing through umbilical cord after birth violated law against adult delivery of drugs to minor). (11)
- Georgia v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (affirming judgment that transmission of cocaine metabolites to fetus did not constitute delivery of controlled substance). (7)
- Marcia Chambers, Dead Baby's Mother Faces Criminal Charge on Acts in Pregnancy, N.Y. TIMES, Oct. 9, 1986, at A1 (LEXIS). (5)
- Lynn M. Paltrow, The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects, 28 S. U. L. REV. 201 (2001). (22)
- Sue Thomas, Lisa Rickert & Carol Cannon, The Meaning, Status, and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy, 15 UCLA WOMEN'S L.

J. 1 (2006). (46)

- Elizabeth E. Coleman & Monica Miller, Assessing Legal Responses to Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes Than Punitive Resources?, 20 J. L. & HEALTH 35 (2007). (20)
- Ellen M. Weber, Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response, 75 UMKC L. Rev. 789 (2007). (23)

### Women in Prison

- April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 COLUM. J. GENDER & L. 147 (2007). (25)
  - Also listed in Pregnancy, Secondary Reading.
- Brenda V. Smith, Reforming, Reclaiming, or Reframing Womanhood: Reflections on Advocacy for Women in Custody, 29 WOMEN'S RTS. L. REP. 1 (2007). (5)
- Jenni Gainsborough, Women in Prison: International Problems and Human Rights Based Approaches to Reform, 14 WM. & MARY J. WOMEN & L. 271 (2008). (17)

### Prisoners' Access to Abortion

- Elizabeth Budnitz, Note, Not a Part of Her Sentence: Applying the Supreme Court's Johnson v. California to Prison Abortion Policies, 71 BROOK. L. REV. 1291 (2006). (20)
- Femi S. Austin, Note, Limits on State Inmates' Access to Abortion: A Discussion of the Fifth Circuit's Decision in Victoria v. Larpenfer, 27 WOMEN'S RTS. L. REP. 87 (2006). (14)
- Mark Egerman, Student Article, Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?, 31 HARV. J. L. & GENDER 423 (2008). (13)

### Pregnancy and Labor in Prison

- Dana L. Sichel, Giving Birth in Shackles: A Constitutional and Human Rights Violation, 16 AM. U. J. GENDER SOC. POL'Y & L. 223 (2007). (19)
- Geraldine Doetzer, Note, Hard Labor: The Legal Implications of Shackling Female Inmates during Pregnancy and Birth, 14 WM. & MARY J. WOMEN & L. 363 (2007). (14)

### Access to Children and Family Reunification

- Sally Day, Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights, 20 WIS. WOMEN'S L. J. 217 (2005). (15)
- Nekima Levy-Pounds, From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums, 47 SANTA CLARA L. REV. 285 (2007). (19)

# Fetal Rights

## Introduction

Fetal rights have developed over the past twenty-five years through judicial interpretation and legislation. Although often couched as a mechanism to protect pregnant women, statutes are generally constructed in such a way as to chip away at legal precedent established in Roe by creating a separate legal status for fetuses. State laws providing protections for fetuses include fetal homicide laws, wrongful death statutes, and mandatory abortion counseling regarding fetal pain. Recent federal actions include an amendment to the State Children's Health Insurance Program (S-CHIP), which expands the definition of a "child" to include an "unborn child" from conception to birth, and the Unborn Victims of Violence Act, which creates a separate offense for harming a fetus during the commission of a federal crime.

## Focus Questions

Can the law recognize the unwanted loss of a pregnancy without undermining a woman's constitutional right to terminate a pregnancy? What legal issues arise when a woman survives an assault but the fetus, embryo, or zygote she was carrying does not? How might the framing of fetal death as homicide for the purposes of the Unborn Victims of Violence Act affect reproductive rights and freedoms? Is it appropriate for the federal government to protect the interests of an unborn fetus separately from those of the pregnant woman through legislation like UVVA and S-CHIP? How have advances in medical knowledge and technology affected legal and societal ideas about fetal personhood?

## Priority Reading

This reading will provide a broad overview of how fetal rights have developed in various areas of the law. Completing the priority reading will satisfy the requirements for this module.

## Wrongful Death

- *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985) (holding that a right of recovery existed on behalf of a stillborn child who died as a result of injuries received in utero). (22)

## Fetal Homicide

- *People v. Davis*, 872 P.2d 591-604 (Cal. 1994) (holding that viability of fetus past seven-eight weeks of gestation is not an element in the crime of fetal murder). (18)

- Carolyn B. Ramsey, Restructuring the Debate over Fetal Homicide Laws, 67 OHIO ST. L.J. 721 (2006) (reconciling legal abortion with murder liability for the third-party killer of a fetus through a contextual view of life-taking). (26)

#### Women's Rights in Relation to Fetus

- Caroline Morris, Technology and the Legal Discourse of Fetal Autonomy, 8 UCLA WOMEN'S L.J. 47 (1997) (examining U.S. and Commonwealth constructions of fetal personhood). (18)
- Amy J. Sepinwall, Defense of Others and Defenseless "Others," 17 YALE J.L. & FEMINISM 327 (2005) (critiquing current fetal protection policies but advocating liberal recognition of harm to fetuses). (24)

#### Unborn Victims of Violence Act

- Tara Kole & Laura Kadetsky, The Unborn Victims of Violence Act, 39 HARV. J. ON LEGIS. 215 (2002). (10)

#### Secondary Reading

##### Fetal Homicide

- State v. Merrill, 450 N.W.2d 318 (Minn. 1990) (holding that fetal homicide laws do not deny equal protection and are not unconstitutionally vague). (10)
- Laura E. Beck, Note, Improperly Performed Abortion as Fetal Homicide: An Uneasy Coexistence Becomes More Difficult, 18 HASTINGS WOMEN'S L.J. 117 (2006) (exploring constitutional bases for challenging a ruling that abortion is fetal homicide). (18)

#### Women's Rights in Relation to Fetus

- Janet Gallagher, Prenatal Invasions & Interventions: What's Wrong with Fetal Rights, 10 HARV. WOMEN'S L.J. 9 (1987) (critiquing concept of a state interest in fetal rights). (20)
- Lynn M. Paltrow, Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade, 62 ALB. L. REV. 999 (1999). (19)
- Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, Women's Rights and Fetal Personhood in Criminal Law, 7 DUKE J. GENDER L. & POL'Y 89 (2000). (47)
- Lisa M. Brown, Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization, 13 AM. U.J. GENDER SOC. POL'Y & L. 87-96 (2005). (10)

- April L. Cherry, The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health, 16 COLUM. J. GENDER & L. 147 (2007) (examining the rights at stake when states incarcerate women to discourage abortion). (25)
  - Also listed in Criminal Law and Reproductive Rights, Secondary Reading.

### Unborn Victims of Violence Act

- Amanda K. Bruchs, Note, Clash of Competing Interests: Can the Unborn Victims of Violence Act and Over Thirty Years of Settled Abortion Law Co-Exist Peacefully?, 55 SYRACUSE L. REV. 133 (2004). (12)
- Deborah Tuerkheimer, Conceptualizing Violence against Pregnant Women, 81 IND. L.J. 667 (2006) (advancing a feminist critique of current policy including the UVVA and arguing for a legal focus on redress for battered women). (17)
- Megan Fitzpatrick, Note, Fetal Personhood After the Unborn Victims of Violence Act, 58 RUTGERS L. REV. 553 (2006) (tracing history of fetal protection laws and advancing alternatives to the UVVA). (28)

### Fetal Pain

- Note, The Science, Law, and Politics of Fetal Pain Legislation, 115 HARV. L. REV. 2010 (2002) (arguing for constitutionality of fetal pain legislation). (22)
- Hannah Stahle, Fetal Pain Legislation: An Undue Burden, 10 QUINNIPIAC HEALTH L.J. 251 (2007) (arguing against the constitutionality of fetal pain legislation). (25)

### Appointment of Legal Counsel to Fetuses

- In the Matter of D.K., 497 A.2d 1298 (N.J. Super. Ct. Ch. Div. 1985) (holding that appointment of guardian for schizophrenic woman's fetus at eight to ten weeks was unconstitutional and void). (12)
- Susan Goldberg, Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem For Fetuses and Embryos, 66 WASH. L. REV. 503 (1991). (15)
- Helena Silverstein, In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for a Minor, 11 CORNELL J.L. & PUB. POL'Y 69 (2001) (arguing that appointing guardians for the unborn fetus creates a burden on minors based on a moral regulation but is constitutional and consistent with government precedent). (23)
- Catherine M. French, Note: Protecting the "Right" to Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments against Fetal Representation, 56 CASE W. RES. L. REV. 511 (2005). (20)

### State Children's Health Insurance Program (S-CHIP)

- Cynthia Dailard, New S-CHIP Prenatal Care Rule Advances Fetal Rights At Low-Income Women's Expense, 5 GUTTMACHER REP. ON PUB. POL'Y 3 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/5/gr050503.pdf>. (4)
- Elisabeth H. Sperow, Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results, 12 AM. U.J. GENDER SOC. POL'Y & L. 137 (2003). (11)
- Beth A. Mandel, Comment and Casenote, Fighting for Fetal Rights at the Expense of Women's Health: The Redefinition of "Child" Under the State Children's Health Insurance Program, 73 U. CIN. L. REV. 319 (2004). (25)
- Linda C. Fentiman, The New Fetal "Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children, 84 DENV. U. L. REV. 537 (2006). (18)

### Legislation

- Unborn Victims of Violence Act, 10 U.S.C.A § 919(a) (2004), 18 U.S.C.A § 1841 (2004). (11)

# Funding

## Introduction

Abortion: Although Roe established a constitutionally protected right to abortion, subsequent legislation and Supreme Court cases have relieved the federal government of an obligation to fund this type of healthcare. Under the Hyde Amendment, renewed each year since 1977, federal Medicaid funds cannot be used to fund abortions for low-income women, except in cases of rape, incest, or when a woman's life is endangered. Most state policies follow federal guidelines and bar public funding for abortion at the state level as well.

Title X: Congress enacted Title X of the Public Health Service Act in 1970. The only federal program devoted exclusively to family planning, Title X provides essential funding to public family planning services such as Planned Parenthood that serve four million poor, uninsured, and underinsured women every year. Department of Health and Human Services regulations stipulate that programs that treat abortion as a family planning method may not receive Title X funding. However, Title X programs must provide pregnant women with nondirective counseling about all of their options, including termination of her pregnancy.

Prenatal and Postnatal Care: Medicaid is the largest source of health insurance for low-income parents and allows low-income women to access prenatal and postnatal health care. Historically, legal immigrants were generally eligible for Medicaid and other public benefit programs. However, since the enactment of the "Welfare Reform Act" of 1996 and the State Children's Health Insurance Program (S-CHIP), poor immigrants and non-citizens have limited Medicaid eligibility. Medicaid does cover non-citizen women's labor and delivery, but not prenatal or postnatal care.

## Focus Questions

How do the concepts of "negative" and "positive" rights affect Supreme Court decisions on funding for family planning and abortion? How does the Supreme Court scrutinize the Hyde Amendment in its equal protection analysis in *McRae*? How do restrictions on funding affect low-income women and non-citizens? Is there a true right to reproductive choice if it can only be exercised by those who can afford it? What are the arguments for and against the constitutionality of regulations restricting the kinds of counseling Title X programs can provide? How does the Weldon Amendment affect the operation of family planning clinics? Is there an Establishment Clause argument against the constitutionality of the Weldon Amendment?

### Priority Reading

This reading will cover the power of states to limit public funding for abortions and prenatal care, the constitutionality of the Hyde Amendment and similar state regulations, and the imposition of gag rules as a condition of Title X funding.

### Public Funding for Abortion

- *Maier v. Roe*, 432 U.S. 464-90 (1977) (holding that equal protection clause does not require Medicaid programs to pay for non-therapeutic abortion and making it much easier for state governments to deny funding for abortions.). (18)
- *Harris v. McCrae*, 448 U.S. 297-327 (1980) (upholding funding restrictions of the Hyde Amendment and holding Medicaid not required to fund medically necessary abortions). (20)
- *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (holding that states did not have to fund all medically necessary abortions so long as Medicaid funded abortions in cases of rape, incest, serious risk of substantial impairment to the pregnant woman's bodily functions, or a risk to her life). (23)
- Marie Cocco, Hyde Amendment's Deadly Impact, ALBANY TIMES UNION, Apr. 23, 2005 (LEXIS). (2)

### Public Funding for Prenatal Care

- *Lewis v. Thompson*, 252 F.3d 567 (2d Cir.2001) (upholding denial of Medicaid funding for prenatal care to undocumented immigrants under rational basis standard). (24)

### Public Funding for Family Planning (Title X)

- *Rust v. Sullivan*, 500 U.S. 173-203 (1991) (upholding constitutionality of HHS regulations prohibiting abortion counseling and referral by Title X programs). (21)
- *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 391 F.Supp.2d 200 (D. D. C. 2005) (upholding Weldon Amendment requirement that Title X grantees not discriminate against providers who refused to refer patients for abortion). (12)
  - Also listed in Abortion, Secondary Reading.
- Rachel Benson Gold, Title X: Three Decades of Accomplishment, 4 GUTTMACHER REP. ON PUB. POL'Y 5 (2001), available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040105.pdf>. (4)

## Secondary Reading

### Public Funding for Abortion

- Julie F. Kay, Note, If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion under a National Health Care Plan, 60 BROOK. L. REV. 349 (1994). (20)
- Monica Maio, Statute Note, Labor Pains: The Undue Burden of Forcing a Woman to Carry a Non-Viable Fetus to Term, 7 J. L. & FAM. STUD. 459 (2005). (7)
- Bridgette Baldwin, In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy, 23 WIS. J.L. GENDER & SOC'Y 1 (2008) (discussing the Hyde Amendment and abortion funding decisions in the context of U.S. welfare policy and the intersections of race, class, and gender). (19)

### Public Funding for Prenatal Care

- Michele E. Kenney, Note, A Pitfall of Judicial Deference: Equal Protection of the Laws Fails Women in Lewis v. Thompson, 68 BROOK. L. REV. 525 (2002). (13)
- National Women's Law Center, Poor Parents on Medicaid Targeted for Cuts (2005), available at <http://www.nwlc.org/pdf/6-2005MedicaidParents.pdf>. (3)

### Public Funding for Family Planning (Title X)

- Rust v. Sullivan, 500 U.S. 173, 204-25 (1991) (dissenting opinions). (14)
- Linda Maher, Government Funding in Title X Projects: Circumscribing the Constitutional Rights of the Indigent: Rust v. Sullivan, 29 CAL. W. L. REV. 143 (1993). (20)
- Jason Green, Refusal Clauses and the Weldon Amendment, 26 J. LEGAL MED. 401 (2005) (discussing unconstitutionality of refusal clauses and adverse consequences of Weldon Amendment). (17)
  - Also listed in Abortion, Secondary Reading.

# International Women's Reproductive Rights

## Introduction

Although reproductive rights continue to expand in many parts of the world, U.S. policies have become more restrictive, thereby decreasing access to and availability of reproductive health services both domestically and internationally. The U.S. is one of just a few nations that have not ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), leaving U.S. women vulnerable without the important protections CEDAW would provide. Meanwhile, as U.S. domestic policy continues to disregard international legal norms on human rights issues within our borders, U.S. foreign policy hegemonically imposes the so-called "culture of life" abroad. The Global Gag Rule ("Mexico City Policy"), which prevents U.S. federal aid to organizations and clinics that provide abortion, deprives organizations around the world of the financial support they need for comprehensive family planning services, HIV/AIDS treatment and education, and general health programs. Until 2008, the President's Emergency Plan for AIDS Relief (PEPFAR) required that one-third of funding for international HIV/AIDS education went to promote the "ABC rule" ("Abstinence, Be faithful, use Condoms,"), treating safe sex as a last resort and putting millions of people at risk for infection. Congress also passed legislation in 2003 requiring that foreign NGOs and U.S.-based organizations sign an "anti-prostitution loyalty oath" and adopt policies condemning prostitution in order to receive federal funding. These funding conditions hamper health professionals' ability to reach out to and establish trust with sex workers, a population particularly vulnerable to STI transmission, unwanted pregnancy, and most in need of basic health care access.

## Focus Questions

How might U.S. ratification of CEDAW affect reproductive justice efforts in America? Do restrictions like the Global Gag Rule illegally impair or impede organizations' free speech? How might the Global Gag Rule affect reproductive health outcomes internationally by forcing organizations not to provide important services? What economic and political impact might poor reproductive health outcomes have upon developing countries served by these organizations? What is the status of women's reproductive autonomy in various developing countries? Does condemning prostitution fulfill government interests in protecting women and preventing human trafficking?

## Priority Readings

This module will cover the U.S. government's role in limiting reproductive rights within its borders and throughout the world. The following readings provide an understanding of international reproductive rights and the present challenges.

### U.S. Policy and International Reproductive Rights

- DKT Memorial Fund, Ltd., v. Agency for Int'l Dev., 691 F. Supp. 394 (D.D.C. 1988) (ruling that President could restrict funding to international family planning organizations that provided abortions). (16)
- Planned Parenthood Federation, Inc. v. Agency for Int'l Dev., 915 F.2d 59 (2d Cir. 1990) (holding that clause precluding funding to foreign non-governmental organizations that perform or promote abortions did not violate rights to free speech or privacy). (7)
- Center for Reprod. Law & Policy v. Bush, 304 F.3d 183 (2d Cir. 2002) (ruling that policy requiring foreign non-governmental organizations to agree not to promote or perform abortions as a condition for funding was constitutional). (12)
- E. Dana Neacsu, Imposing Sexual Restraint Abroad, 2002 L. REV. MICH. ST. U. DET. C.L. 885 (2002). (6)
- Tamera Fillinger, Enhancing Human Security: U.S. Policies and Their Health Impact on Women in Sub-Saharan Africa, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 337 (2006). (7)
- Fact Sheet, The Anti-Prostitution Loyalty Oath: Undermining HIV/AIDS Prevention and U.S. Foreign Policy (2006), available at <http://www.pathfind.org/site/DocServer/HIV-AIDS3.pdf?docID=5981>. (2)
- Nina J. Crimm, The Global Gag Rule: Undermining National Interests by Doing Unto Foreign Women and NGOs What Cannot Be Done at Home, 40 CORNELL INT'L L.J. 587 (2007). (22)

### International Legal Precedent for Reproductive Rights

- Tatyana A. Margolin, Abortion as a Human Right, 29 WOMEN'S RTS. L. REP. 77 (2008). (19)
- Eleanor D. Kinney, Recognition of the International Human Right to Health and Health Care in the United States, 60 RUTGERS L. REV. 335 (2008). (25)

## Secondary Reading

### U.S. Policy and International Reproductive Rights

- Yvette Aguilar, Comment, Gagging on a Bad Rule: The Mexico City Policy and its Effect on

Women in Developing Countries, 5 SCHOLAR 37 (2002). (18)

- Julia L. Ernst, Symposium, The Legacy of Roe: The Constitution, Reproductive Rights, and Feminism: The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-choice Mosaic, 6 U. PA. J. CONST. L. 752 (2004). (21)
- Rachael E. Seevers, Note, The Politics of Gagging: The Effects of the Global Gag Rule on Democratic Participation and Political Advocacy in Peru, 31 BROOK. J. INT'L L. 899 (2006). (14)

### CEDAW

- HUMAN RIGHTS FOR ALL: CEDAW (Leila Rassekh Milani ed., Working Group on Ratification of the U.S. Convention on the Elimination of All Forms of Discrimination against Women 2001) available at <http://www.abanet.org/irr/cedaw/cedaw.pdf>. (50)
- Testimony on Ratification of CEDAW; Senate Foreign Relations Committee (June 2002), available at [http://www.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_senate\\_hearings&docid=f:80461.wais](http://www.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:80461.wais) (105)
- History of CEDAW (2004), available at <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=8295>. (3)
- Letter from LaShawn A. Jefferson, Executive Director, Women's Rights Division, Human Rights Watch, to Senate Foreign Relations Committee (urging that CEDAW Move to the Full Senate), available at <http://www.hrw.org/press/2002/07/uscedawltr0730.htm>. (1)
- Rebecca J. Cook & Susannah Howard, Accommodating Women's Differences under the Women's Anti-Discrimination Convention, 56 EMORY L.J. 1039 (2007). (26)

### UNFPA Funding/History

- Rachel Farkas, Recent Developments, The Bush Administration's Decision to Defund the United Nations Population Fund and Its Implications for Women in Developing Nations, 18 BERKELEY WOMEN'S L.J. 237 (2003). (10)

### International Legal Precedent for Reproductive Rights

- Martha F. Davis, The Spirit of Our Times: State Constitutions and International Human Rights, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006) (case study of abstinence-only education in New York to show how to implement transnational law domestically). (24)

# Minors' Reproductive Rights and Education

## Introduction

Minors seeking abortion in nearly all U.S. states face more restrictions on their individual choices than their adult counterparts. Parental involvement laws, which require that parents of a pregnant minor are notified or furnish consent before the minor may receive an abortion, must provide for a judicial bypass option. However, this leaves minors at the mercy of a local judicial system and judges who may harbor anti-choice beliefs.

Under the Adolescent Family Life Act (AFLA), the Marriage and Healthy Family Development Initiative (MHFDI), the Administration on Children and Families' Community Based Abstinence Education program (CBAE), and the Title V of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Congress granted over 1.7 billion dollars in federal funds to abstinence-based education programs between 1996 and 2007. Programs funded through the Title V funding stream must follow an eight-point statutory definition of abstinence-only education, which includes telling students that sex outside marriage may cause psychological and physical harm to themselves or to their families. Some of the federally funded abstinence-only curricula discourage students from using condoms by giving them medically inaccurate information about the ability of condoms to prevent unwanted pregnancy and sexually transmitted infections. Many assume a heterosexual model and rely on antiquated gender stereotypes, placing the onus of abstinence, or chastity, solely on girls.

## Focus Questions

If a minor in a parental involvement state needs an abortion but cannot notify her parents of her condition, what challenges does she face? What are the arguments for and against the constitutionality of the Parent's Right to Know Act? What legal arguments have been used to challenge the constitutionality of federally funded abstinence-only education programs? Have these arguments succeeded in the courts? How might abstinence-only funding initiatives disproportionately impact poor communities and students who identify as gay, lesbian, bisexual, transgender, or queer?

## Priority Reading

This reading will cover various barriers to minors' ability to make fully informed, autonomous decisions about their reproductive health and lives. It will address parental notification/consent requirements for minors seeking contraception and abortion, as well as a lack of comprehensive,

medically accurate sex and sexuality education. Note: students who are not electing to complete the Abortion Module will find it helpful to start with *Carey v. Population Services International*, 431 U.S. 678 (1977) (included in this module's Secondary Reading) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

### Parental Involvement and Judicial Bypass for Abortion

- *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) (holding that parental notification requirement for minor's abortion was unconstitutional burden). (19)
- *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502 (1990) (holding that judicial bypass clause provided due process; thus, parental notice requirement was constitutional). (25)
- *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding judicial bypass provision for waiver of parental notice if notice is not in best interest of minor). (4)
- *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) (holding that enforcement of parental notification law without exception for the minor's health should be enjoined if no narrower remedy could be arrived at on remand). (8)

### Parental Notification/Consent for Contraception

- *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) (holding that family planning clinics' distribution of contraceptives to minors without notice to parents did not violate parental right). (8)
- *Alfonso v. Fernandez*, 606 N.Y.S.2d 259-68 (N.Y. App. Div. 1993) (finding that mandatory condom distribution to minors without parental consent violated parental rights). (19)

### Sex and Sexuality Education

- *Bowen v. Kendrick*, 487 U.S. 589-622 (1988). (20)
  - Also listed in Abortion, Secondary Reading.
- *Coleman v. Caddo Parish Bd. of Educ.*, 635 So.2d 1238 (La. Ct. App. 1994). (15)
  - Skip the "Contempt Matters" section.
- The Responsible Education About Life (REAL) Act (S. 972, H. R. 1653), available at <http://www.advocatesforyouth.org/real.htm>). (3)
  - The Responsible Education About Life (REAL) Act, sponsored by Senator Frank Lautenberg (D-NJ) and Representatives Barbara Lee (D-CA) and Christopher Shays (R-CT), would provide federal money to support responsible sex education in schools. This education would include science-based, medically accurate, and age appropriate public health information about abstinence and contraception.
- Maternal & Child Health Services Block Grant, 42 U.S.C. § 710 (West 2008) (providing

eight-point requirements to be followed by abstinence-only education programs). (1)

## Secondary Reading

### Generally

- Michelle Fine & Sarah I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993 (2007). (25)
- Helen L. Gilbert, *Comment, Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375 (2007). (17)

### Parental Involvement

- *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (holding blanket parental consent requirement unconstitutional). (23)
- *H. L. v. Matheson*, 450 U.S. 398 (1980) (holding parental notification constitutional). (29)
- *Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307-60 (1997) (striking down law requiring parental consent or judicial bypass for minors' abortions as unconstitutional). (41)
- *Planned Parenthood v. Camblos*, 155 F.3d 352 (4th Cir. 1998) (upholding parental notice statute with exceptions for parental abuse, absence, or neglect). (30)
- *Planned Parenthood of the Rocky Mts. Servs. Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002) (striking down parental notice and waiting period requirements that did not provide exceptions for the minors' health). (20)
- Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002) (focusing on Supreme Court decisions in *Danforth* and *Bellotti*). (28)
- J. Ehrlich, *Grounded in the Reality of their Lives: Listening to Teens Who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003). (83)

### Parental Notification/Consent for Contraception

- *Carey v. Population Services Int'l*, 431 U.S. 678-702 (1977) (extending right to contraceptives to minors under sixteen). (16)
  - Also listed in *Contraception, Priority Reading*
- *Parents United for Better Sch. v. Sch. Dist. of Philadelphia Bd. of Educ.* 148 F.3d 260 (3d Cir. 1998) (holding that voluntary condom distribution program with opt-out provision did not violate parental rights). (23)
- Stephanie Bornstein, *The Undue Burden: Parental Notification Requirements for Publicly Funded Contraception*, 15 BERKELEY WOMEN'S L.J. 40 (2000). (20)

- Joshua A. Douglas, When Is a “Minor” Also Like an “Adult”? An Adolescent’s Liberty Interest in Accessing Contraceptives from Public School Distribution Programs, 43 WILLAMETTE L. REV. 545 (2007). (16)

### Judicial Bypass

- Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding provision requiring notice to both parents of minor's abortion if judicial bypass option was provided). (27)
- Teresa S. Collitt, Seeking Solomon’s Wisdom: Judicial Bypass of Parental Involvement in a Minor’s Abortion Decision, 52 BAYLOR L. REV. 513 (2000) (arguing for stringent judicial review of minors' bypass applications; includes five pages of questions to be asked in judicial bypass hearings). (37)
- Joanna S. Liebman, The Underage, the “Unborn,” and the Unconstitutional: An Analysis of the Child Custody Protection Act, 11 COLUM. J. GENDER & L. 407 (2002). (19)
- Helena Silverstein & Kathryn L. Alessi, Religious Establishment in Hearings to Waive Parental Consent for Abortion, 7 U. PA. J. CONST. L. 473 (2004). (30)
- Abby Goodnough, State Judge Allows Teenager in Florida to Get an Abortion, N.Y. TIMES, May 3, 2005, at A1 (LEXIS). (3)

### Sex and Sexuality Education

- Julie Jones, Money, Sex, and the Religious Right: A Constitutional Analysis of Federally Funded Abstinence-Only-Until-Marriage Sexuality Education, 35 CREIGHTON L. REV. 1075 (2002). (20)
- Naomi K. Seiler, Abstinence-Only Education and Privacy, 24 WOMEN’S RTS. L. REP. 27 (2002). (11)
- James McGarth, Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional, 38 U.S.F. L. REV. 665 (2004). (16)
- Hazel Glenn Beh & Milton Diamond, Children and Education: The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex, 15 COLUM. J. GENDER & L. 12 (2006). (47)
- Abstinence-Only Programs: Ideology Over Science, (2007), available at <http://www.prochoiceamerica.org/assets/files/Sex-Ed-Ab-Only-Ideology.pdf>. (10)
- Risha K. Foulks, Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3 (2008). (28)

# Pregnancy

## Introduction

In the early 20<sup>th</sup> century, the law took a stance of paternalistic concern for pregnant women, viewing them as fragile, weak, and of lesser ability. Statutes prohibited women from taking on certain kinds of work and from working long hours for their own protection at a time when most laws restricting labor contracts were treated as unconstitutional. As the sexual revolution and growing feminist movements changed societal attitudes in the 1960s and 1970s, lawmakers and courts accordingly afforded women greater autonomy and rights. However, efforts also increased to protect fetuses against the women who carried them, particularly women stereotyped as "bad mothers" based on racial or class prejudice. In cases of court-ordered cesarean sections, courts have juxtaposed the rights of the woman with those of the fetus she carries. The selective prosecution of poor, pregnant women who allegedly harm their fetuses through drug or alcohol consumption also continues in many jurisdictions. In addition, pregnant women and mothers often still face employment discrimination like that found permissible in *Geduldig v. Aiello*, despite the passage of the Pregnancy Discrimination Act.

## Focus Questions

How have the rights of pregnant women changed over the years? What role have the courts played in shaping pregnant women's rights? How have laws directed at pregnancy and fetal rights affected women of color and women living in poverty? How does the recognized state interest in the well-being of a fetus impact the woman's interest in bodily autonomy? Do the Pregnancy Discrimination Act and the Family Medical Leave Act protect all women, and if not, what groups may get left out?

## Priority Readings

The following reading material outlines pregnant women's struggle to be recognized by courts, legislatures, and the medical profession as autonomous beings. It will lay out the basic groundwork for understanding the battles women have won and those they are still fighting with regard to their rights during pregnancy.

## General Pregnancy Rights

- *Geduldig v. Aiello*, 417 U.S. 484 (1974) (ruling that denial of benefits for work loss during normal pregnancy did not violate Equal Protection Clause). (12)

- Int'l Union, UAW v. Johnson Controls, 499 U.S. 187 (1991) (holding facially discriminatory policy barring fertile women from jobs involving excessive lead exposure). (24)

### Forced Caesarean Sections

- Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Sup. Ct. Ga. 1981) (denying parents' motion to stay order requiring mother to submit to caesarian section for purpose of saving life of unborn child, despite religious objections). (3)
- In Re A.C., 573 A.2d 1235-53 (D.C. Cir. 1990) (holding that patient pregnant with viable fetus and near death has right to decide on treatment unless incapable of doing so). (17)
- In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that physicians must honor competent woman's refusal of caesarian section even if fetus may suffer harm). (9)

### Family Leave and Pregnancy Discrimination Legislation

- Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721-40 (2003) (upholding FMLA as congruent and proportional to gender discrimination it sought to address). (13)
- Pregnancy Discrimination Act of 1978 (PDA), 92 Stat. 2076, 42 U.S.C. § 2000e (2008). (1)
- Family Medical Leave Act 29 U.S.C. § 2601 (2008). (9)
- Reva B. Siegel, You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs, 58 STAN. L. REV. 1871 (2006). (15)
- Keri Palazzari, The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels, 16 COLUM. J. GENDER & L. 429 (2007). (21)

### Secondary Reading

#### General Pregnancy Rights

- John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 VA. L. REV. 405 (1983). (25)
- Nora Christie Sandstad, Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy, 26 LAW & INEQ. 171 (2008). (13)

#### Forced Caesarean Sections

- Nancy K. Rhoden, The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans, 74 CAL. L. REV. 1951 (1986). (24)

- James M. Jordan III, Note, Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women, 22 GA. L. REV. 1103 (1988). (16)
- Leslie G. Espinoza, Dissecting Women, Dissecting Law: The Court-Ordering of Cesarean Section Operations and the Failure of Informed Consent to Protect Women of Color, 13 NAT'L BLACK L.J. 211 (1994). (30)
  - Also listed in Criminal Law and Reproductive Justice, Secondary Reading.

#### Family Leave and Pregnancy Discrimination Legislation

- Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) (holding that employer insurance is not required to provide infertility treatment under the PDA or ADA). (5)
- Lisa B. Feinstein, Note, The Forgotten Public Policies Behind the Family and Medical Leave Act: Burden of Proof Structures Placing Unnecessary Burdens on Employees' Statutory Entitlement, 73 FORDHAM L. REV. 2561 (2005). (17)
- Ann O'Leary, How Family Leave Laws Left Out Low-Income Workers, 28 BERKELEY J. EMP. & LAB. L. 1 (2007). (34)

#### Wrongful Life Claims

- Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (holding that infant plaintiff born with congenital rubella had a claim for negligence against physicians who deprived mother's choice of whether to terminate pregnancy). (19)
- Darpana M. Sheth, Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims under the Americans with Disabilities Act, 73 TENN. L. REV. 641 (2006) (arguing that the tort claims of wrongful birth and wrongful life discriminate against people with disabilities under the ADA). (27)

# Technology & Assisted Reproduction

## Introduction

New reproductive technology helps individuals and couples conceive children, detect fetal anomalies, and select some fetal characteristics. These technological advancements are accompanied by ethical questions regarding which reproductive technologies should be utilized by scientists, doctors, and the general public.

“Assisted” or “Alternative Reproductive Technology” (ART) refers to procedures that enable fertilization by means other than sexual intercourse. These include assisted or alternative insemination, in vitro fertilization, the practice of sperm/ova donation, and surrogacy. These technologies challenge traditional notions of family and raise a host of new legal issues regarding parental status, contract enforceability, and equal access.

## Focus Questions:

What are the key arguments on each side of the stem cell research debate? How should fetal sex determination (or sex selection) be regulated? What are arguments for and against the detection of fetal anomalies prior to birth? Does the right to procreate include the right to utilize assisted reproductive technology? How do courts weigh competing interests in a frozen embryo dispute between parents? What are the public policy justifications for the enforceability or non-enforceability of surrogacy contracts? What legal barriers do same-sex couples and unmarried people face in seeking ART? How might increased use of reproductive technology such as egg donation, surrogacy, and pre-implantation genetic diagnosis affect marginalized groups? Consider access, exploitation, informed consent, health risks and eugenics concerns.

## Priority Reading:

The cases and articles below will provide you with a background in the legal and ethical issues surrounding various types of reproductive technology. It is important to keep in mind that this emerging area of law is continually changing and that the journal articles will give you an especially broad foundation in both the scientific and the legal questions central to this debate.

## ART Generally

- Jessica Arons, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 12 (Center for American Progress, Dec. 2007). (40)

### Selective Termination and Pre-implantation Genetic Diagnosis (PGD)

- Judith F. Daar, ART and the Search for Perfectionism: On Selecting Gender, Genes, and Gametes, 9 J. GENDER RACE & JUST. 241 (2005). (17)

### Alternative Insemination

- In re Adoption of Anonymous, 345 N.Y.S.2d 430 (Sur. Ct. Kings County 1973) (affirming parental rights in husband of woman who conceived via third-party sperm donation). (3)
- Benitez v. North Coast Women's Care Medical Group, Inc., 106 Cal. App. 4th 978-991 (Cal. Ct. App. 2003) (holding that plaintiff had claim against defendant medical group for refusing to provide fertility treatments based on her sexual orientation). (8)

### In Vitro Fertilization

- J.B. v. M.B., 783 A.2d 707-20 (N.J. 2001) (ruling in post-divorce proceedings on disposition of frozen pre-embryos). (13)

### Surrogacy

- Johnson v. Calvert, 851 P.2d 776-87 (Cal. 1993) (holding that intended parents in gestational surrogacy agreement had full parental rights vis a vis resulting child). (13)

### Stem Cell Research

- Doe v. Shalala, 122 Fed. Appx. 600, C.A. 4 (Md.) (2004) (ruling that action on behalf of frozen pre-embryos was rendered moot by new federal policy limiting stem-cell research to existing stem cell lines; unpublished opinion). (3)
- Russell Korobkin, Embryonic Histronics: A Critical Evaluation of the Bush Stem Cell Funding Policy and the Congressional Alternative, 47 JURIMETRICS J. 1 (2006). (25)

### Secondary Reading

#### ART Generally

- Developments in the Law—The Law of Marriage and Family, Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies, 116 HARV. L. REV. 2052-74 (2003). (5)
- MODEL ACT GOVERNING ASSISTED REPROD, TECH. (Proposed Draft for Discussion 2003), available at [http://www.abanet.org/family/committees/ART\\_moddraft405.pdf](http://www.abanet.org/family/committees/ART_moddraft405.pdf). (41)
- Michael A. Malinowski, Choosing the Genetic Makeup of Children: Our Eugenics Past-Present, & Future?, 36 CT. L. REV. 125 (2003). (42)

- Margaret Foster Riley & Richard A. Merrill, Regulating Reproductive Genetics: A Review of American Bioethics Commissions and Comparison to the British Human Fertilisation and Embryology Authority, 6 COLUM. SCI. & TECH. L. REV. 1 (2005). (38)
- Richard Hayes, Our Biopolitical Future: Four Scenarios, WORLD WATCH Vol. 20 Numb. 2 (2007), available at [http://geneticsandsociety.org/downloads/200703\\_worldwatch\\_hayes.pdf](http://geneticsandsociety.org/downloads/200703_worldwatch_hayes.pdf). (18)

### Selective Termination and PGD

- Jodi Danis, Sexism and “The Superfluous Female”: Arguments for Regulating Pre-Implantation Sex Selection, 18 HARV. WOMEN’S L. J. 219 (1995). (22)
- Adrienne Asch, Disability Equality and Prenatal Testing: Contradictory or Compatible?, 30 FLA. ST. U. L. REV. 315 (2003). (17)
  - Also listed in Underrepresented Groups, Secondary Reading.
- Brooke McConnell, Quality Control: The Implications of Negative Genetic Selection and Pre-Birth Genetic Enhancement, 15 UCLA WOMEN’S L.J. 47 (2006). (11)
- Louis Paonessa, Note, Straightening Your Heir: On the Constitutionality of Regulating the Preimplantation Technology to Select Preembryos or Modify the Genetic Profile Thereof Based on Sexual Orientation, 33 RUTGERS COMPUTER & TECH. L.J. 331 (2007). (11)

### In Vitro Fertilization

- Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding that ex-husband wishing to destroy frozen pre-embryos had greater interest than ex-wife and giving him custody). (6)
- Ellen Waldman, The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes, 53 AM. U. L. REV. 1021 (2004). (16)
- Bratislav Stankovic, “It’s a Designer Baby!”: Opinions on Regulation of Preimplantation Genetic Diagnosis, 2005 UCLA J. L. TECH. 3 (2005). (12)

### Surrogacy

- In re Baby M., 537 A.2d 1227-1263 (N.J. 1988) (holding that best interests of child should determine custody in dispute between intended parents and traditional surrogate). (37)
- J.R. v. Utah, 261 F.Supp.2d 1268 (D. Utah 2002) (ruling unconstitutional state law automatically granting gestational carrier status of legal mother). (32)
- Alayna Ohs, Note, The Power of Pregnancy: Examining the Constitutional Rights in a Gestational Surrogacy Contract, 29 HASTINGS CONST. L. Q. 339 (2002). (16)
- Jessica H. Munyon, Note, Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions, 36 SUFFOLK U. L. REV. 717 (2003). (32)

- Jennifer L. Watson, Note and Comment, Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?, 6 WHITTIER J. CHILD & FAM. ADVOC. 529 (2007). (22)

### Stem Cell Research

- Senator Bill Frist, M.D., The Promise and Peril of Embryonic Stem Cell Research: A Call for Vigilant Oversight, 2 YALE J. HEALTH POL'Y LAW & ETHICS 167 (2001). (7)
- Arthur C. D'Andrea, Note, Federalizing Bioethics, 83 TEXAS L. REV. 1663 (2005) . (40)
- Angela Campbell, Ethos and Economics: Examining the Rationale Underlying Stem Cell and Cloning Research Policies in the United States, Germany, and Japan, 31 AM. J. L. & MED. 47 (2005). (25)

# Underrepresented Groups

## Introduction

Neither reproductive rights nor the restrictions placed on them affect people uniformly. One's location, income level, gender identity, sexual orientation, age, ethnicity, and mental and physical ability determine the meaningfulness of a right or the magnitude of a restriction. For example, poor women and rural women are disproportionately affected by barriers to abortion, such as waiting periods, lack of public funding, and provider shortages. A comparatively high percentage of Latinos/-as and African Americans live in neighborhoods lacking reproductive healthcare providers, making prenatal care and abortion services difficult to obtain in practice. Healthcare providers, lawmakers, and the general public often underestimate and ignore the health concerns of Asian and Pacific Islander (API) women, leading to higher rates of preventable and treatable diseases than non-API women. People with disabilities continually struggle to assert their sexual and reproductive autonomy in the face of institutional and societal discrimination. LGBTQQI couples and single parents struggle to assert their rights of reproduction, family formation, and child rearing outside the approved bounds of heterosexual marriage.

## Focus Questions

How do multiple oppressions obstruct reproductive justice for women of color, LGBTQQI people, and women with disabilities? Consider the different ways in which a queer, transgender woman of color living with a disability might experience reproductive oppression. Will the legal right to marry her female partner eliminate those oppressions? How have traditional gay rights, feminist, and choice movements included or excluded underrepresented groups?

## Priority Reading

These readings touch on reproductive control of African-American mothers, health issues and discrimination faced by people with disabilities, the disproportionate lack of access to general and reproductive health care for Latinas, poor health outcomes for API and Native-American women, and the ways in which the law interprets families with same-sex and single parents.

## In General

- Lisa C. Ikemoto, *In the Shadow of Race: Women of Color in Health Disparities Policy*, 39 U.C. DAVIS L. REV. 1023 (2006). (20)

### African Americans

- Melanie M. Lee, Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 87 (2000). (7)

### Asian Pacific Islander Americans

- Reproductive Health Care and APA Women: A Fact Sheet, (2005), available at [http://www.napawf.org/file/issues/factsheet\\_reprohealth\\_updated.pdf](http://www.napawf.org/file/issues/factsheet_reprohealth_updated.pdf). (2)
- Issue Brief: The Nail Salon Industry and the Impact of Cosmetic Toxins on API Women's Health (2008), available at [http://www.napawf.org/file/issues/issuebrief\\_nailsalon\\_updated.pdf](http://www.napawf.org/file/issues/issuebrief_nailsalon_updated.pdf). (6)

### Latinas

- National Latina Agenda for Reproductive Justice (2005), available at <http://www.latinainstitute.org/pdf/FinalAgenda-2Fc.pdf>. (20)

### Native Americans

- The Failing State of Native American Women's Health: An Interview with Charon Asetoyer, CENTER FOR AMERICAN PROGRESS, May 16, 2007, available at [http://www.americanprogress.org/issues/2007/05/charon\\_asetoyer.html](http://www.americanprogress.org/issues/2007/05/charon_asetoyer.html). (8)

### LGBTQQI People

- Lawrence v. Texas, 539 U.S. 558-585 (2003). (16)
- David B. Cruz, Heterosexual Reproductive Imperatives, 56 EMORY L.J. 1157 (2007). (9)

### People with Disabilities

- Buck v. Bell, 274 U.S. 200 (1927). (2)
- CENTER FOR REPRODUCTIVE RIGHTS, BRIEFING PAPER: REPRODUCTIVE RIGHTS AND WOMEN WITH DISABILITIES: A HUMAN RIGHTS FRAMEWORK (2002), available at [http://www.reproductiverights.org/pdf/pub\\_bp\\_disabilities.pdf](http://www.reproductiverights.org/pdf/pub_bp_disabilities.pdf). (15)

### Access to ART

- Nanette R. Elster, ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies, 9 DEPAUL J. HEALTH CARE L. 719 (2005). (8)

## Secondary Reading

### In General

- Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993). (45)
- Leslie G. Espinoza, *Dissecting Women, Dissecting Law: The Court-Ordering of Cesarean Section Operations and the Failure of Informed Consent to Protect Women of Color*, 13 NAT'L BLACK L.J. 211 (1994). (30)
  - Also listed in *Pregnancy, Secondary Reading*.
- Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339 (1996). (22)
- Karen Rothenberg & Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 69-SPG LAW & CONTEMP. PROBS. 343 (2006). (16)
- Elaine M. Chiu, *The Cultural Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773 (2008). (29)

### African Americans

- Darci Elaine Burrell, *Essay, The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA WOMEN'S L.J. 401 (1995). (40)
- Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89 (2005). (32)
- Camille A. Nelson, *American Husbandry: Legal Norms Impacting the Production of (Re)Productivity*, 19 YALE J.L. & FEMINISM 1 (2007). (27)

### Asian Pacific Islander Americans

- Leti Volp, *Divesting Citizenship: On Asian American History and the Stripping of Citizenship by Marriage*, 53 UCLA L. REV. 405 (2005). (29)

### Latinas

- Angela Hooton, *Symposium: The Feminism and Legal Theory Project: Celebrating Twenty Years of Feminist Pedagogy, Praxis and Prisms: A Broader Vision on the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U.J. GENDER SOC. POL'Y & L. 59 (2005). (14)

### Native Americans

- *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). (25)
- Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008). (17)

### LGBTQQI People

- Regalado v. Texas, 872 S.W.2d 7 (Tex. App. 1994). (6)
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### **Mission:**

Law Students for Reproductive Justice is a national nonprofit network of law students and lawyers. Our organization educates, organizes, and supports law students to ensure that a new generation of advocates will be prepared to protect and expand reproductive rights as basic civil and human rights.

### **Goal:**

To integrate reproductive rights doctrine and discourse into law school curricula, delivering in-depth learning opportunities to students interested in the study and practice of this under-covered body of law.

### **Strategy:**

LSRJ is working closely with law students and academics to inspire fresh thinking, encourage new scholarship, provide educational materials, and expand course offerings in reproductive rights law and justice.



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