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Introduction: Issues of Reproductive Rights: Life, Liberty & the Pursuit of Policy

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ISSUES OF REPRODUCTIVE RIGHTS: LIFE, LIBERTY & THE PURSUIT OF POLICY

LAUREN ORRICO* AND GORDON GANTT, JR.**

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I. INTRODUCTION

On March 7, 2014, the *Journal of Law and Health* of Cleveland-Marshall College of Law hosted a symposium entitled “Issues of Reproductive Rights: Life, Liberty, and the Pursuit of Policy” in response to recent developments in the regulation of women’s reproductive rights. The discussion about women’s reproductive rights has expanded far beyond the morality of abortion and right to privacy, established by the United States Supreme Court in *Roe v. Wade*,¹ and has been complicated by new technology, statutory developments, and case law discussing the nature of a corporation. The symposium presenters addressed key legal developments in each stage of reproductive health: contraceptive rights, decision-making during gestation, and legal consequences during pregnancy after a pregnancy has been terminated.

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** Symposium Editor, *Journal of Law & Health*, 2013–2014; Gordon R. Gantt, Jr. graduated from the Cleveland-Marshall College of Law in May 2014.

¹ *Roe v. Wade*, 410 U.S. 113 (1973).

II. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT'S "CONTRACEPTIVE MANDATE"

A. Employer Mandated Coverage

The Patient Protection and Affordable Care Act of 2012 ("ACA") requires employers with fifty or more full-time employees to offer health plans with minimum essential coverage to their employees, including preventative care and screenings for women.² The Health Resources and Services Administration ("HRSA"), a component of the Department of Health and Human Services ("HHS"), was charged with promulgating rules detailing the type of preventative care and screenings employers were required to provide.³ HRSA's "Women's Preventive Services Guidelines" require employers to provide coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling."⁴ The ACA's "contraceptive mandate" contains an exemption for religious employers and certain eligible nonprofit organizations; an "eligible non-profit organization" "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections."⁵ The ACA also contains exemptions for healthcare plans which existed prior to March 23, 2010 if no specified changes have been made ("grandfathered health plans").⁶

B. The Religious Freedom Restoration Act

Potential challenges to the contraceptive mandate may be made pursuant to the Religious Freedom Restoration Act ("RFRA").⁷ RFRA was passed to ensure broad protection for religious liberty, in direct response to the Supreme Court's ruling in *Employment Division v. Smith*.⁸ *Smith* held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."⁹ Congress responded by including a provision in RFRA which provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability"¹⁰ unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Recently, the Supreme Court ruled on a challenge to the

² 26 U. S. C. §5000A(f)(2); §§4980H(a), (c)(2).

³ 42 U. S. C. §300gg-13(a)(4).

⁴ 77 Fed. Reg. 8725.

⁵ 45 CFR §147.131(b).

⁶ 42 U. S. C. §§18011(a), (e).

⁷ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

⁸ See *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990).

⁹ See *id.* at 872.

¹⁰ *Id.* at §2000bb-1(b).

contraceptive mandate as a substantial burden on religious exercise under RFRA in *Burwell v. Hobby Lobby Stores*.¹¹

C. Burwell v. Hobby Lobby Stores

On June 30, 2014, the Supreme Court ruled on the constitutionality of the ACA's contraceptive mandate in *Burwell v. Hobby Lobby Stores*.¹² In *Hobby Lobby*, the Court reviewed challenges to the contraceptive mandate brought by two families on behalf of three for-profit, closely-held corporations: national arts and crafts chain, Hobby Lobby Stores; Christian bookstore, Mardel; and manufacturing company, Conestoga Wood Specialties. The companies' owners claimed to have organized their business around the principles of the Christian faith, which prohibit the use of contraception, although their companies did not qualify for a religious exemption under the ACA. The companies challenged the ACA's contraceptive mandate under RFRA and the Free Exercise Clause of the First Amendment. The HHS argued that RFRA did not apply to corporations because corporations were not "persons" who can exercise a religious belief and that the companies' owners could not bring suit because the ACA regulations apply only to companies. They further argued that the ACA did not substantially burden the exercise of religion.

The Court ruled for the Plaintiffs and held that RFRA did apply to closely-held corporations. The Court further held that the contraceptive mandate substantially burdened the free exercise of religion. Writing for the Court, Justice Alito found that corporations were included in the definition of person to protect the free exercise rights of the humans associated with the corporation. The Court further opined that requiring employers to provide their employees with contraceptive coverage seriously violated the owner's religious beliefs and that the economic consequences of refusing to comply would be severe.¹³ This ruling effectively created an additional exemption to the contraceptive mandate for closely held, for-profit corporations who are morally opposed to providing contraceptives. The implications of this ruling will be explored in this issue by Professor Michael DeBoer.

III. DECISION MAKING DURING GESTATION

Since the Supreme Court's 1973 decision, *Roe v. Wade*, the Court has consistently upheld a woman's constitutional right to terminate her pregnancy before viability, while allowing states to regulate the mode and manner of abortions so long as such regulations do not constitute an undue burden. Recently, several states have begun enacting legislation which has the effect of making termination more burdensome on women. Such legislation may strip funding from abortion providers, put limits on which physicians can perform abortions and which drugs they can use, and limit when abortions can be performed.¹⁴

¹¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2758 (2014)

¹² *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

¹³ The penalty for failing to offer contraceptives is \$100 per employee per day, potentially costing the companies hundreds of millions of dollars annually. 26

U. S. C. §4980D.

¹⁴ See e.g. S.B. 2305, 63d Legis. Assemb., Reg. Sess. (N.D. 2013), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0796-01000.pdf?20140813210437>; H.B. 1297, 62d

Increased use of prenatal diagnostic testing has led to a new wave of proposed legislation which could change the current legal framework regarding decision making during gestation. Prenatal diagnostic testing can disclose gene mutations associated with mental and physical disabilities and heritable traits.¹⁵ These conditions are almost always incurable and give potential parents a difficult choice—terminate the pregnancy or have a child with a disability.¹⁶ Currently, eight states have some prohibition on abortion for the purpose of sex selection. With more women taking advantage of advances in prenatal testing, more states will likely consider passing legislation banning abortions resulting from the knowledge that the child will be born with a disability. Professor Carole Petersen will discuss these efforts by states to limit abortion rights and will look particularly at laws which prohibit abortions based on the genetic characteristics of the fetus.

IV. CRIMINALIZATION OF PREGNANCY DECISIONS

Currently, the vast majority of jurisdictions provide protection for two types of legal “persons”—natural persons and jurisdictional persons.¹⁷ Natural persons are individuals who have come into existence through human birth.¹⁸ Jurisdictional person are entities who are given limited rights of personhood, such as corporations.¹⁹ The United States Supreme Court has declared that fetuses are not persons under the Fourteenth Amendment, but some states have given fetuses personhood status under tort or criminal statutes.²⁰

In states where fetuses are given personhood rights, there is the potential to punish pregnant women for “maternal deviance”—behavior which has the potential to, or does, negatively impact a fetus. Several states have criminalized drug or alcohol use by pregnant women or allowed for civil penalties which could lead to the loss of the child after birth.²¹ Professor April Cherry will explore the subjects of fetal personhood and maternal deviance, and discuss the ethics of legislation penalizing women for their behavior during and after pregnancy.

Legis. Assemb., Reg. Sess. (N.D. 2011), <http://legis.nd.gov/assembly/62-2011/documents/11-0506-04000.pdf?20141002201500>.

¹⁵ Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 1009 UTAH L. REV. 845, 850–51 (2009).

¹⁶ *Id.* at 851.

¹⁷ Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 372 (2007).

¹⁸ *Id.* at 373.

¹⁹ *Id.*

²⁰ *Id.*; see also *Roe v. Wade*, 410 U.S. 113 (1973).

²¹ GUTTMACHER INST., STATE POLICES IN BRIEF AS OF OCTOBER 1, 2014: SUBSTANCE ABUSE DURING PREGNANCY (2014), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf; LYNN M. PALTROW, DAVID S. COHEN, & CORINNE A. CAREY, YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS (2000) (Available at NAPW.org).

V. OVERVIEW OF THE ARTICLES IN THIS SYMPOSIUM

The *Journal of Law and Health* invited three scholars to address key legal developments in each stage of reproductive health: contraception, decision-making during gestation, and legal consequences after a pregnancy has been terminated. Those scholars agreed to provide this publication with insightful articles in the wake of the *Astrue* opinion.

A. Professor Michael DeBoer

Michael J. DeBoer, Associate Professor of Law at the Thomas Goode Jones School of Law at Faulkner University, analyzes the contraceptive mandate as a public health initiative that requires for-profit and non-profit employers to cover certain preventive services in the interest of promoting public health. In performing this analysis, he focuses on the assessment and the balancing of benefits and harms in the public policy underlying the mandate, noting especially the contrasting appraisals of benefits and harms offered by the proponents and the opponents of the mandate. Professor DeBoer argues that the mandate is premised upon a public policy that fails in the assessment of harms, the assignment of too much weight to purported benefits, and the balancing of benefits and harms. He also contends that the mandate fails properly to regard the autonomy of individuals, for-profit business, and nonprofit organizations and imposes a substantial burden on their religious freedom and conscience.

B. Professor Carole Petersen

Carole J. Petersen, Professor of Law in the William S. Richardson School of Law, will exam abortion and fetal impairment through the lens of a recent North Dakota statute that would prohibit abortion if the provider knows that the woman is seeking it for purposes of sex selection or because the fetus has been diagnosed with a genetic abnormality. Professor Petersen will examine not only domestic law and policy but also international human rights norms, paying special attention to the United Nations Convention on the Rights of Persons with Disabilities' treatment of the unborn. Professor Petersen proposes public policy responses that would continue to respect reproductive freedom while fulfilling our obligation to redress the history of eugenics and discrimination against persons with disabilities.

C. Professor April Cherry

April Cherry, Professor of Law at the Cleveland-Marshall College of Law at Cleveland State University, examines the concept of "maternal deviance" and its influence on civil and criminal penalties imposed on expectant mothers in the interest of protecting the fetus. Her article explores the connection between the "compelling state interest in the fetus" rhetoric, feticide statutes, and the image of maternal orthodoxy that leads us to criminalize the behavior of pregnant women.