

2016

## The Pursuit of Equitable Access to Reproductive Healthcare in the United States

Alexandra Lehr

Follow this and additional works at: <https://lawcommons.luc.edu/pilr>



Part of the [Civil Rights and Discrimination Commons](#), [Criminal Procedure Commons](#), [Environmental Law Commons](#), and the [Human Rights Law Commons](#)

---

### Recommended Citation

Alexandra Lehr, *The Pursuit of Equitable Access to Reproductive Healthcare in the United States*, 22 Pub. Interest L. Rptr. 14 (2016).

Available at: <https://lawcommons.luc.edu/pilr/vol22/iss1/5>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized editor of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

## The Pursuit of Equitable Access to Reproductive Healthcare in the United States

Alexandra Lehr

Reproductive healthcare is a significant concern for all people in the United States. However, many peoples' concerns begin before they step into a doctor's office. Many people in the United States struggle to find and access reproductive healthcare as a result of factors including gender, race, geographic location, sexual orientation, and socioeconomic status. The intersectional issues surrounding reproductive healthcare are significant and reach every American, and in some situations the federal government has intervened, but in others it has allowed the individual states, or even individual citizens, to act without guidance.

Reproductive rights are the rights of individuals to make decisions about their personal reproductive health.<sup>1</sup> Reproductive rights include a discussion of abortion, but are much broader. In addition to termination of pregnancy, reproductive rights include family planning, sex education in public schools, contraceptive use and fertility regulation, and access to appropriate reproductive health services.<sup>2</sup> The moral, ethical, and religious concerns connected to these rights make discussions and public decisions about them controversial.

### WHAT CONSTITUTES AN UNDUE BURDEN?

In the recent controversial Supreme Court decision of *Whole Woman's Health v. Hellerstedt*, the Supreme Court built on its holdings in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* to reiterate that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>3</sup> The Court held that Texas could not place restrictions on abortion policies that create an undue burden for women seeking an abortion.<sup>4</sup> One of the restrictions "required all clinics in the state to meet the standards for ambulatory surgical centers, including regulations concerning buildings,

---

<sup>1</sup> *Reproductive health*, WORLD HEALTH ORGANIZATION, [http://www.who.int/topics/reproductive\\_health/en/](http://www.who.int/topics/reproductive_health/en/).

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

<sup>3</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

<sup>4</sup> *Id.* at 2318.

equipment and staffing.”<sup>5</sup> The other restriction “required doctors performing abortions to have admitting privileges at a nearby hospital.”<sup>6</sup>

The restrictions, at the time they were struck down by the Supreme Court, had “already caused about half the state’s 41 abortion clinics to close” and if it had not been struck down “the number of clinics would again be cut in half.”<sup>7</sup> Drastically reducing the number of abortion clinics in the state would have affected how, and even if, women in Texas could receive abortions. Some women in states that restrict abortion access must travel across state lines, some across multiple states, to obtain an abortion.<sup>8</sup> The prospect of travel expenses, potential hotel rates, and possible time off of work could have deterred, or even prevented, low-income women from travelling far distances to obtain an abortion, especially if they need to make more than one appointment or stay for more than one day.<sup>9</sup> Women who cannot handle the travel costs must carry the unwanted pregnancy to term.<sup>10</sup>

#### ACCESS TO MEDICAID

There are other financial burdens that accompany access to abortion services. The Hyde Amendment bans the use of federal money for abortion coverage for women insured by Medicaid, “the main public health insurance program for low-income Americans.”<sup>11</sup> The only exceptions are in the case of life endangerment, rape, or incest.<sup>12</sup> States can fund abortion with state money, but only about one-third of the states do so, some voluntarily and others by court order.<sup>13</sup> In 2014, Medicaid was the second-most-common method of payment for abortions, and the majority of those women lived in

<sup>5</sup> Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES, (June 27, 2016), <http://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html>.

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

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

<sup>8</sup> Molly Hennessy-Fiske, *Crossing the ‘abortion desert’: Women increasingly travel out of their states for the procedure*, L.A. TIMES, (June 2, 2016), <http://www.latimes.com/nation/la-na-adv-abortion-traveler-20160530-snap-story.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Ann M. Startt, *40 Years Is Enough: Let’s End the Harmful And Unjust Hyde Amendment*, HUFFINGTON POST, (Sept. 28, 2016), [http://www.huffingtonpost.com/ann-m-startt/40-years-is-enough-lets-e\\_b\\_12195904.html](http://www.huffingtonpost.com/ann-m-startt/40-years-is-enough-lets-e_b_12195904.html).

<sup>12</sup> *Abortion Patients More Likely to be Poor in 2014 than in 2008*, GUTTMACHER INSTITUTE, (May 10, 2016), <https://www.guttmacher.org/news-release/2016/abortion-patients-more-likely-be-poor-2014-2008>.

<sup>13</sup> *Induced Abortion in the United States*, GUTTMACHER INSTITUTE, (September 2016), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

the few states that allowed use of state funds for abortion services.<sup>14</sup> Women whose Medicaid does not cover abortions “often experience delays obtaining an abortion or have to divert money from other urgent needs, like paying rent and utilities or even feeding their family.”<sup>15</sup> These women may then be “forced to carry their unwanted pregnancy to term.”<sup>16</sup>

Sixty percent of women “of reproductive age who are enrolled in Medicaid live in states that cover abortion only in very limited circumstances,” which means “seven million women ages 15-44 – including 3.4 million women living below the federal poverty level – are unable to use their Medicaid coverage for abortion services.”<sup>17</sup> Of those seven million women, “slightly more than half” are women of color.<sup>18</sup> Between 2008 and 2014, the proportion of abortion patients living below the federal poverty level in the United States increased from 42 percent to 49 percent.<sup>19</sup>

#### THE “UNIVERSAL RIGHT” TO USE CONTRACEPTIVES

Similar to a woman’s right to obtain an abortion, the Supreme Court has protected the right of access to contraceptives.<sup>20</sup> In *Eisenstadt v. Baird*, the Supreme Court held that the right of privacy encompasses “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>21</sup> However, some women in the United States still find it difficult to access contraceptives. According to Leah Bruno, an attorney with experience litigating First Amendment issues and member of the Board of Directors for the Illinois Chapter of the American Civil Liberties Union, “education and cost are the two greatest obstacles.”<sup>22</sup> She notes, “many healthcare providers want to get contraceptives into the hands of teens and the underprivileged, [but] finding ways to do that can be difficult.”<sup>23</sup>

<sup>14</sup> *Id.*

<sup>15</sup> Starrs, *supra* note 8.

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.*

<sup>19</sup> *Abortion Patients*, *supra* note 9.

<sup>20</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>21</sup> *Id.*

<sup>22</sup> Interview with Leah Bruno, Board of Directors Member, Illinois Chapter of the American Civil Liberties Union (November 8, 2016).

<sup>23</sup> *Id.*

Federal regulations under the Affordable Care Act require employers to “cover certain contraceptives as part of their health care plans, unless [they] submit a form either to their insurer or to the Federal Government, stating that they object on religious grounds to providing contraceptive coverage.”<sup>24</sup> Recently, a group of non-profit organizations that provided health coverage to their employees brought a lawsuit alleging that the mandate to provide coverage for contraception, and the form requirement if they object “substantially burdens the exercise of their religion.”<sup>25</sup>

In *Zubick v. Burwell*, the Supreme Court granted certiorari, but did not rule on the merits of the case.<sup>26</sup> The Court did not issue a ruling on whether the employers’ religious exercise had been “substantially burdened,” nor whether the current regulations concerning the mandate were too restrictive.<sup>27</sup> The Court vacated and remanded the decisions of the individual Courts of Appeals that decided the cases that were consolidated under the suit that went in front of the Supreme Court.<sup>28</sup> The decision issued by the Supreme Court was less of a decision and more of a demand to the contending parties that they “go back and work it out themselves.”<sup>29</sup>

The concept of universal access to contraceptives has been recognized in the United States for more than four decades, but the parameters of that right are still being established in terms of access. While religious employers object to providing their employees with contraceptives, a sharp decline in teenage pregnancy in the United States in the last ten years has been solely attributed to increased contraception use and improvements in contraceptive technology.<sup>30</sup> While sex education and the intersection of age and reproductive rights can be a contentious area, the intersection of reproductive rights and religious rights represented in *Zubick v. Burwell* exemplifies a situation where the federal government, specifically the Supreme Court, is reticent to step in and impose additional regulations.

---

<sup>24</sup> *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1560.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1561.

<sup>29</sup> Linda Greenhouse, *Birth Control Continues to Bedevil the Supreme Court*, N.Y. TIMES, (Sept. 15, 2016), [http://www.nytimes.com/2016/09/15/opinion/birth-control-continues-to-be-devil-the-supreme-court.html?\\_r=0](http://www.nytimes.com/2016/09/15/opinion/birth-control-continues-to-be-devil-the-supreme-court.html?_r=0).

<sup>30</sup> Nicholas Bakalar, *Contraceptives Drive Teenage Pregnancy Down*, N.Y. TIMES, (Sept. 1, 2016), <http://www.nytimes.com/2016/09/01/well/family/contraceptives-drive-teenage-pregnancy-down.html>.

## UNIQUE STRUGGLES OF THE LGBTQ COMMUNITY

The question for some Americans may not be about the cost or distance of reproductive healthcare, but whether it is available to them at all because they are part of the LGBTQ community. The law concerning reproductive rights as it pertains to fertility treatment is currently developing, and in most cases health insurance does not cover fertility treatment. If it does, it is usually for people in heterosexual marriages.<sup>31</sup>

Fertility treatments are typically considered elective procedures, “viewed not as essential to one’s life but as enhancement of it.”<sup>32</sup> A lawsuit out of New Jersey may lead to changes across the United States concerning this view of fertility treatments. Two lesbian couples are suing the New Jersey commissioner of the Department of Banking and Insurance, seeking to recoup the cost of past fertility treatments.<sup>33</sup> New Jersey has a mandate that “requires most major insurance companies to cover medically necessary treatments for infertile clients.”<sup>34</sup> The mandate defines infertility “as the inability to impregnate another person, the inability to carry a pregnancy to live birth or the inability to conceive after one or two years of unprotected sex, depending on the woman’s age.”<sup>35</sup> Fourteen other states require insurance coverage for fertility treatment.<sup>36</sup> Eight of those states actually require coverage, while the rest “require only that insurers offer plans that include it.”<sup>37</sup> Only two states have language to require coverage irrespective of sexual orientation.<sup>38</sup>

The federal government has moved to eradicate discrimination on the basis of gender in the Affordable Care Act, so transgender patients have easier access to reproductive healthcare.<sup>39</sup> Transgender people, however, still say they face ignorance and prejudice from healthcare professionals, especially trans-

<sup>31</sup> Kimberly Leonard, *Who Has the Right to Build a Family?* U.S. NEWS, (Aug. 15, 2016), <http://www.usnews.com/news/articles/2016-08-15/same-sex-infertility-case-exposes-lack-of-access-to-reproductive-treatment>.

<sup>32</sup> *Id.*

<sup>33</sup> Megan Julia, *4 Lesbians Sue Over New Jersey Rules on Fertility Treatment*, N.Y. TIMES, (Aug. 8, 2016), <http://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Leonard, *supra* note 21.

<sup>38</sup> Julia, *supra* note 23.

<sup>39</sup> *Trans? Good Luck Accessing Reproductive Health Care*, REWIRE, (May 17, 2016), <https://rewire.news/article/2016/05/17/trans-reproductive-health-care/>.

gender people of color.<sup>40</sup> In seeking sexually transmitted disease testing, cancer testing, pregnancy and abortion care, and contraception access, transgender people run the risk of misunderstandings about their bodies and lives, or even being denied healthcare outright.<sup>41</sup> Coverage of hormones and transition-related surgeries may be out of reach for transgender people if they are not covered by insurance, and in many states coverage is denied by labeling treatment as “elective” or “aesthetic.”<sup>42</sup>

### CONCLUSION

Reproductive rights are an intersectional issue, and affect every American. Access to reproductive healthcare may be limited due to socioeconomic status, gender, sexual orientation, or even geographic location. The federal government is intervening in a few ways, but access is not equal for all Americans, and in cases the government is hesitant to step in.

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*