

## From the UMHS ObGyn Program in Sexual Rights and Reproductive Justice



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## SCOTUS to Hear Oklahoma Case?

### Medical abortion: undue burden & state’s purpose

The U.S. Supreme Court may review a 2011 Oklahoma law that restricted the use of the abortifacient medication mifepristone to terminate early pregnancies. The law mandates that physicians prescribing mifepristone follow the FDA protocols for dosage and timing that were issued when the drug was first approved in 2000. Evidence has since emerged showing that mifepristone is best used in lower doses and can be used two weeks later in the pregnancy. Oklahoma’s bill forces physicians to use older, non-evidence-based care, even though off-label use for medications is accepted throughout the medical profession.

In June the Court posed formal questions to the Oklahoma Supreme Court’s on its review of the 2011 law. Once Oklahoma has replied, the Court will either decline to hear the case or schedule oral arguments. A decision would hinge on whether Oklahoma’s limits on medical abortions constitute an “undue burden” on women’s ability to access abortion, as defined in the 1992 *Planned Parenthood v. Casey* decision.

A larger question is how the Court will interpret the *Gonzales v. Carhart* (2007) requirement that a state have a permissible purpose in enacting abortion legislation. Should the Court rule based on the state purpose of protecting public safety, the Oklahoma law is likely to be overturned. If, however, the state purpose is deemed to be protecting unborn life, the law would stand and a precedent would be set that protecting unborn life is a permissible state purpose.

Restrictions on medical abortion are among the latest approaches to limiting abortion availability. Past efforts have included: prohibition of telemedicine abortions; more exacting informed consent conditions (ultrasound viewing, 24-hour waiting period); application of surgical facility building standards to abortion clinics; limits on abortion care beyond 20 weeks or even beyond the first hearing of the fetal heartbeat; and prohibition on the use of late-term surgical abortion techniques (the so-called “partial birth abortion” bans).

Stay current at <http://rhrefactycheck.org/primary-topic/abortion/>

## Michigan Health Insurance Reform News

Please consult UMHS' Medical-Legal Handbook for ObGyn Health Care Professionals for more information about medical-legal issues:

<http://www.med.umich.edu/obgyn/research/ssrj>

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### Medicaid:

On September 3, the Michigan legislature passed its Medicaid expansion proposal, to take effect in Spring 2014. Following the governor's signature, 400,000 Michigan adults will be eligible for Medicaid coverage, using the new criteria of adults under 65 whose income is at or below 133% of the federal poverty line. The expansion is expected to increase access to care for many Michiganders, resulting in greater use of family planning and prenatal care services.

The Affordable Care Act requires private insurers to provide free preventive care, such as well-woman visits, mammograms, and contraception; it also prohibits insurers from denying coverage for pre-existing conditions, such as pregnancy, and from charging higher premiums based only on gender.

### State Exchange:

As in other states, Michigan's state health exchange will begin operating on October 1. To be known as the Michigan Insurance Marketplace, the exchange will provide side-by-side coverage and cost comparisons for insurance buyers in the individual market.

Michigan residents covered by employer-supplied insurance plans will retain those plans, unless they desire a change. But it is individuals without employer-supplied insurance who will reap the most tax advantages through use of the Marketplace: tax credits will be available to those earning up to four times the Federal poverty line.

Access state exchanges through [www.healthcare.gov](http://www.healthcare.gov)

### Abortion Restrictions?

During the Medicaid expansion debate, the state legislature attempted to enact measures to prohibit any health insurance plan listed on the exchange from offering abortion coverage, forcing consumers to purchase optional abortion riders in advance of need.

All such bills in the 2011-12 legislative session expired in committee, except for two bills vetoed by Governor Rick Snyder. Current bills have been referred to the Committee on Insurance.

However, Right to Life of Michigan is now conducting a petition drive to introduce a ballot initiative that, if successful, would forbid the inclusion of abortion coverage in any plan offered on the exchange.

## Same-Sex Marriage and Adoption

### Michigan Legislation

Rep. Sam Singh (D-East Lansing) introduced a house joint resolution on July 18, 2013 to repeal the provision of the Michigan constitution (the Michigan Marriage Amendment) that explicitly prohibits the recognition of same-sex marriage. The resolution was referred to the Committee on Judiciary. Should it be passed back to the full chamber, it will require a two-thirds vote in both houses to pass.

The resolution follows the U.S. Supreme Court's decision in *United States v. Windsor* that declared Section 3 of the Defense of Marriage Act (DOMA) to be a constitutional violation of Equal Protection. This decision, however, applies only to the withholding of rights or benefits by the federal government. Short of a SCOTUS decision declaring state same-sex marriage prohibitions unconstitutional, legislation or judicial decisions by individual states will be necessary before blanket protections are available.

### Michigan Federal District Court

On October 1, Judge Bernard Friedman of the U.S. District Court for the Eastern District of Michigan will hear arguments in the case of *DeBoer v. Snyder*. April DeBoer and Jayne Rowse are a same-sex couple who wish to mutually adopt their three children, but are prevented from doing so by the Michigan Adoption Code, which permits adoption only by a married couple or a single person. Under the Michigan Marriage Amendment (MMA), DeBoer and Rowse are not permitted to marry. Currently, if DeBoer become incapacitated, Rowse would be considered a legal stranger to DeBoer's adopted three-year-old daughter and would not be entitled to any parental rights or benefits, including insurance, tax and security benefits and rights of survivorship. The same is true of DeBoer's position in relation to Rowse's two adopted sons.

DeBoer and Rowse's initial suit against Governor Rick Snyder and Michigan Attorney General Bill Schuette sought only to secure adoption rights. However, at Judge Friedman's suggestion, the plaintiffs altered their suit to include a challenge to the MMA. The *Windsor* decision was almost certainly a factor in the broadening of the suit. Judge Friedman wrote in his opinion refusing a

motion to dismiss by the Governor and Attorney General:

*The Supreme Court has just invalidated a federal statute on equal protection grounds because it "place[d] same-sex couples in an unstable position of being in a second-tier marriage." [...] Moreover, and of particular importance to this case, the justices expressed concern that the natural consequence of such discriminatory legislation would not only lead to the relegation of same-sex relationships to a form of second-tier status, but impair the rights of "tens of thousands of children now being raised by same-sex couples" as well. ...] This is exactly the type of harm plaintiffs seek to remedy in this case.*

At oral argument in October, should DeBoer and Rowse continue to present an Equal Protection challenge based on the fundamental right to marry, it seems likely that the MMA will ultimately be declared unconstitutional and as a result establish a persuasive legal theory that could be applied to prohibitions against same-sex marriage in other states.

## More from the courts...

### **Pregnancy and employment law**

On September 30, the U.S. Supreme Court will decide whether to hear the case of *Young v. United Parcel Service*. Young, a UPS driver, was not permitted to retain her job during her pregnancy because of lifting restrictions imposed by her care providers, nor was she given the opportunity for an alternate work assignment. She brought suit under the Pregnancy Discrimination Act of 1978, which prohibits discrimination in employment based on pregnancy. Normal pregnancy is not considered a disability under the law and, unlike the Americans With Disabilities Act, the PDA does not require employers to make reasonable accommodations to enable employees to continue their employment. Young is represented by Samuel Bagenstos of U-M Law School.

### **Criminalization of pregnancy**

Bei Bei Shuai, the Indiana woman charged with murder and attempted feticide following her suicide attempt while pregnant and the subsequent death of her baby, pleaded guilty to criminal recklessness and was sentenced to time served. Shuai spent 435 days in custody on the murder charge. While the plea bargain is a vindication for Shuai, much lauded by her supporters, including the National Advocates for Pregnant Women (NAPW), it allows the Indiana courts to elude the question of whether feticide laws can be applied to pregnant women who attempt suicide or commit other actions which lead to the death of their fetuses. NAPW has long contested that "passing laws that treat fertilized eggs, embryos and fetuses as completely legally separate from the pregnant woman is part of a long term strategy to overturn *Roe v. Wade*."

### **Anticipated emergency contraception ruling in effect**

Following twelve years of litigation, during which U.S. District Court Judge Edward R. Korman repeatedly ordered that emergency contraception (EC) medication be permitted to be sold without a prescription, the Food and Drug Administration and the Department of Health and Human Services finally offered their compliance on June 10. The medication has already begun to appear on drugstore shelves. This resolution represents a successful use of constitutional checks and balances, in which the judiciary reigned in the excess discretion of executive agencies.

## ...and the legislature

### **EC in ERs, sex ed, breastfeeding**

Sen. Rebekah Warren (D-Ann Arbor) and Sen. Bert Johnson (D-Detroit) have introduced bills requiring that the public receive accurate information about emergency contraception and that it be available in hospital emergency rooms (S.B. 369 and 370). Sen. Warren has re-introduced S.B. 464, which would add breastfeeding as a protected category to the state's civil rights act. If passed, this legislation would prevent discrimination in public accommodation based on breastfeeding, similar to discrimination prohibited on the basis of race. Currently, Michigan law protects breastfeeding only to the extent that it prevents breastfeeding women from being arrested under public indecency or nudity laws. Sen. Hoon-Yung Hopgood (D-Taylor) has introduced S.B. 371, which requires that material included in school sex education courses consist of "factual information" that is "medically accurate."

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## Not Merely Historical

### Pattern of forced sterilization in California

Mention of forced sterilization evokes images of “Mississippi appendectomies” of the early to mid-20<sup>th</sup> century South, where women of color were targeted for sterilization without their consent or often without their knowledge. But in July, the Center for Investigative Reporting revealed that between 2006 and 2010, doctors under contract with the California Department of Corrections and Rehabilitation sterilized nearly 150 female inmates, in violation of prison rules.

Prisoners are said to have agreed to sterilization during their pregnancies, but allegations of coercion have been made. In addition, with African-American and Latina women making up 59 percent of the California prison population in 2010, critics charge that race-based eugenics is at the root of the practice. The ObGyn at one California state prison is quoted as defending the public funds used to pay for sterilization by saying, ““Over a 10-year period, that isn't a huge amount of money, compared to what you save in welfare paying for these unwanted children – as they [the prisoners] procreated more.”

Michigan was one of the earliest states to adopt legislation for compulsory sterilization, carrying out 1,465 such sterilizations by 1935 and 3,786 by 1983. Michigan law included provision for compulsorily sterilizing “idiots, imbeciles, and feebleminded” and eventually also “insane and epileptic persons, ... moral degenerates, and sexual perverts likely to become a menace to society ...,” the last referring to homosexuality. Targets for sterilization were African-Americans, Native Americans, the poor, and – overwhelmingly – women.

## Infant Mortality

### U.S. rate high; Michigan rate higher, with disparities

Since the 1980s, the U.S. infant mortality rate has remained higher than those of many other developed countries, although the U.S. rate improved markedly from 2005 to 2011. Nevertheless, with a current rate of 5.9 deaths per 1000 live births, the U.S. ranks higher in infant mortality than 43 other countries.

Michigan's infant mortality rate has ranked higher than the national average for two decades. In 2010, its rating of 7.1/1000 ranked it 37<sup>th</sup> among the states. However, the most glaring disparity in rates occurs within Michigan between white infants, with a rate of 5.5/1000, and African American infants, with a rate of 14.2/1000. The cause of the higher mortality rate is a combination of preterm birth, low-birthweight babies, and inadequate access to prenatal care, according to the Michigan League for Public Policy.

At the recent International Black Midwives and Healers Conference, Oya Kali, MPH, cited research by U-M School of Public Health Professor Arline T. Geronimus on “weathering”: the theory that African Americans' health is subject to early deterioration as a consequence of social exclusion. Scientists have theorized that the stigma and stress of racism can cause hormonal changes in mothers that lead to preterm labor.

Michigan Governor Rick Snyder has made reducing infant mortality a key goal of his administration. For more information, see [http://www.michigan.gov/documents/mdch/MichiganIMReductionPlan\\_3937](http://www.michigan.gov/documents/mdch/MichiganIMReductionPlan_3937)

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