

FROM THE PAGE TO THE PILL: WOMEN'S REPRODUCTIVE RIGHTS AND THE LAW*

*Panel 1—The ACA's Other Mandate:
Contraceptive Coverage,
Conscientious Objection, and
Reproductive Rights*

REMARKS OF SANDRA FLUKE**

The topic for the initial panel is the Affordable Care Act,¹ primarily, and women's primary preventive health care regulation. This regulation covers a variety of women's preventive health care services, including domestic violence screenings, breast cancer screenings, sexually transmitted infection counseling, and a variety of other services. The aspect of this regulation that has received the most attention is, of course, the contraception requirement. There has unfortunately been a lot of misinformation about this requirement. One of the most prevalent myths has been that this is a taxpayer funded regulation or that it would require any government money to subsidize coverage of contraception or to provide contraception. This particular regulation does not involve taxpayer funding or government money. It is a requirement that private insurance,

* On October 11, 2012, the Albany Law Journal of Science and Technology presented a symposium on women's reproductive rights and the law. These remarks have been annotated and edited by the Journal staff. The webcast of the event is available at <http://www.totalwebcasting.com/view/?id=albanylaw>.

** Sandra Fluke is a recent graduate of Georgetown Law. Best known for the controversy surrounding her testimony at the House Democratic Steering and Policy Committee in February 2012, Ms. Fluke is an active figure in American politics and a women's rights activist.

¹ Patient Protection and Affordable Care Act, Pub.L. 111-148, 124 Stat. 119 (codified in scattered sections of 26 U.S.C. & 42 U.S.C.).

insurance that women pay for their deductibles with their own cash, cover contraception in addition to other types of prescriptions and health care services. This does not apply to having an abortion. So a church, a mosque, or a synagogue, would not be covered by this regulation unless they provide insurance to their employees.

In regard to this regulation, there has been much discussion and litigation with regard to its application to religiously affiliated organizations, such as Georgetown University, the law school from which I recently graduated. Here the law applies a four-part test to determine whether an organization is exempt from this regulation or not. The test for if they are to be exempt and therefore not required to provide contraception is actually based on the New York State version of this regulation, which has been in place for quite some time. So the four parts of the test are that the institution be non-profit, that its primary purpose be the invocation of religious values, that it primarily employ a person who share the organization's religious tenets, and that it primarily serve those who share those religious tenets.²

The next aspect for the Affordable Care Act that has been discussed quite a bit is the Obama Administration's attempt to meet the concerns raised regarding religious liberty, that no money from the religiously affiliated institution would go the health insurance providing contraception services. Funds for those services must be taken from the individual's own premium payments that would go through the insurance company, not the organization. The exact mechanism for this to happen is still being determined, there has been a regulatory comment period that the final regulations, I believe are expected this coming January. So there are a few proposals on the table for exactly how that will happen, but we don't know which one will be the final choice.³

New York is not alone in having this type of requirement.

² 78 Fed. Reg. 8461 (Feb. 6, 2013) (to be codified at 45 C.F.R pt. 147) (addressing the "Religious Employer Exemption")

³ As of publication, the government has issued a proposed rule that "provides guidance for the large religiously affiliated institutions that self-insure, or pay their own medical costs rather than buy insurance coverage." Editorial, *A Good Compromise on Contraception*, NY TIMES (Feb. 1, 2013), <http://www.nytimes.com/2013/02/02/opinion/a-good-compromise-on-contraception.html>; 78 Fed. Reg. No. 22 (Feb. 1, 2013).

2013]

REMARKS OF SANDRA FLUKE

483

California also has had it for many years, there are many, many states that have similar requirements as well.⁴ Many of them have a religious exemption, such as the four-part test used in New York, but there are eight that have absolutely no exemption whatsoever.

Title VII of the Civil Rights Act of 1964 requires that employers of a certain size, but not necessarily student plans, are required to provide contraception on their employer insurance.⁵ This comes from an EEOC Commission ruling, I believe, from 2000, based on this being sex discrimination and pregnancy discrimination, if specific provisions, contraception, is excluded when other types of prescriptions are covered.⁶ Much of the discussion has been about the First Amendment claims and religious liberty claims, and whether or not this regulation violates the Constitutional law in that area. The most important Supreme Court case for us to look at on this topic is *Employment Division v. Smith*.⁷ In this case, it was found that a regulation that applies equally to a religious or religiously affiliated organization and to a non-religiously affiliated organization does not burden the free-exercise clause. The regulation of the Affordable Care Act that we are discussing here falls within this category because it applies equally to organizations whether they are religiously affiliated or non-religiously affiliated. In response to the decision in *Employment Division v. Smith*, Congress cast a statute that is somewhat more protective of religious freedom, the Religious Freedom Restoration Act,⁸ not to be confused with the very different version that was introduced in 2012. The Religious Freedom Restoration Act says that in order for a regulation of religious institution to not be a violation of religious liberty, there are two requirements.⁹ The first requirement is

⁴ *State Insurance Mandates and the PPACA Essential Benefits Provisions*, NAT'L CONF. ST. LEGIS., <http://www.ncsl.org/issues-research/health/state-ins-mandates-and-aca-essential-benefits.aspx> (last updated Feb. 20, 2013).

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964) (prohibiting discrimination against employees based on sex). See *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (2001) (holding that an employer discriminated against female employees and violated Title VII by excluding prescription contraceptives from an employer-based drug plan).

⁶ EEOC on Coverage of Contraception, (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

⁷ *Emp't Div. Dep't of Human Res. of St. of Or. v. Smith*, 485 U.S. 660 (1988).

⁸ Religious Freedom Restoration Act, 42 U.S.C. § 2000(bb) to §2000(bb-4)(1993).

⁹ *Id.*

that the regulation furthers a compelling government interest. The second requirement is an age restriction. For precedent showing that a contraception regulation requirement does further a compelling government interest, you can look to *Roberts v. U.S. Jaycees*,¹⁰ in which the Supreme Court found that there is compelling government interest in working to eradicate discrimination. Here the California Supreme Court, which was a primarily Republican court at the time, has ruled in this case on what was the California version of this policy, and found that because of the disparities in how much women would pay for health insurance treatment without this regulation, there is a compelling government interest. We also saw a similar positive decision from the Eastern District in Missouri just a few days ago, I think October 3rd, so quite recent, saying this was not – the Affordable Care Act’s regulation is not inactive, not too burdensome to meet the test.¹¹

Having discussed the legal case about why the Affordable Care Act should stand, the question becomes what’s the public policy case for why it is a good and helpful policy to require that women have affordable access to contraception? We can see this on several levels. First is that women having access to contraception promotes their own health. We know that many women have health concerns aside from preventing unintended pregnancies for which contraception is important such as pain associated with periods, periods that need to be controlled, or the treatment of thyroids or polycystic ovarian syndrome. Additionally, for women who want to control the timing of their pregnancy, having contraception leads to healthier subsequent pregnancies because the use of contraception allows for adequate timing in between pregnancies which is healthier both for the expectant mother and for any child that she was carrying in the future. In addition, studies have shown that allowing women to control the timing of their reproduction and having affordable access to contraception promotes equality of opportunity for women.¹² I probably don’t

¹⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S.Ct. 3244 (1984).

¹¹ *O’Brien v. U.S. Dep’t of Health & Human Serv.*, 894 F.Supp.2d (E.D. Mo. 2012) (holding that the Affordable Care Act regulations did not “substantially burden” the exercise of religion for the plaintiffs here).

¹² Caren Grown et al., *Taking Action to Empower Women: Un Millennium Project Report on Education and Gender Equality*, 2 GLOBAL URBAN DEVELOPMENT 1, 4 (2006), available at <http://www.globalurban.org/GUDMag06Vol2Iss1/Grown,%20Gupta,%20&%20Kes%20PDF.pdf> (“A large body of evidence shows that sexual and reproductive health and rights are

2013]

REMARKS OF SANDRA FLUKE

485

need to poll the students in this room and ask how many of you feel that you're really equipped to be pregnant and parenting right now during law school. Many of you I'm sure are, and my hat goes off to you, you're incredible students and parents to be able to pull that off, but it can be quite difficult and it can necessitate choices in terms of your educational path and your career. For many women, including myself, access to contraception is essential to be able to plan our education and our career in conjunction with our family planning so that we have the full range of opportunities to achieve our career goals.

Furthermore, the University of Washington recently released research showing that providing free access to contraception actually lowers the rate of teenage pregnancy, as well as the rate of abortion.¹³ These are both arguments that would appeal to many conservative voices who are opposed to abortion or would like to see fewer abortions in this country, and we can all agree that fewer teenage pregnancies are both good for our teenage citizens and for their own opportunities in life, as well as good for us as a society in terms of public funding. We know that \$1 invested in contraception actually prevents within the next year \$4 spent on the results of unintended pregnancies, costs which can be an economic burden on a family such that it necessitate reliance on the social safety net.¹⁴

There has also been some discussion about if we should we be promoting the free use of contraception outside of marriage and in general, sex in situations where the individuals are not equipped to raise a child. I think that could be a lengthy and broad moral discussion, but for my own purposes, my view is that when we legislate, when we regulate, when we create law, we need to base that on the reality of folks' lives, and not necessarily on the ideology on how they should make their decisions or should not. The reality in this country is that the vast majority of folks are having sex outside of marriage and in circumstances

central to women's ability to build their capabilities, take advantage of economic and political opportunities, and control their destinies.")

¹³ Cole Petrochko, *Free Birth Control Slashes Abortion Rates*, MEDPAGE TODAY (Dec. 2012), <http://www.medpagetoday.com/OBGYN/Pregnancy/36579> (discussing the study that was initially published in *Obstetrics & Gynecology*). Washington University School of Medicine in St. Louis

¹⁴ Jennifer J. Frost, Lawrence B. Finer & Athena Tapales, *The Impact of Publicly Funded Family Planning Clinic Services on Unintended Pregnancies and Government Cost Savings*, 19 J. HEALTH CARE FOR POOR & UNDESERVED 778, 778 (2008).

where they might not be ready and equipped to raise a child. Given that reality and given the several points that I laid out about why it's important for those folks to have contraception, those are the primary reasons that I believe this regulation is a positive step for a public policy.

However all of that is not why you guys came here to hear me today. I think you actually came to hear me because I have some personal experiences in this area.¹⁵ I recently graduated from Georgetown Law, and while I was there, this was a frequent topic of discussion on our campus. On our campus the situation was that faculty and staff had access to contraception on their insurance, which was subsidized by the university, meaning that university money was going to provide faculty and staff with contraception. For students, there was actually no university money involved, the insurance plan was paid for primarily by student premiums, and contraception was not provided on the insurance. This was difficult for many students who felt that there was an unfair distinction between faculty and staff and, furthermore, given that the students were paying 100% of our student insurance premiums and that 94% of our student body wanted contraception covered, we should be able to have access to that. Beyond that, there are women in the school community who needed affordable access to contraception because they had those health concerns that required a doctor to prescribe contraception. One woman wrote to me because she recently had a child, and her doctor prescribed contraception so that she didn't become pregnant again too soon, because it would be dangerous for her and any subsequent child that she would carry. Unfortunately, our insurance did not cover contraception for her. Another case was a close friend of mine who suffered some very dire medical consequences due to not having access to affordable contraception. She had polycystic ovarian syndrome, and her doctor prescribed for her a very expensive oral contraception, and she applied to the insurance because given that it was for this medical purpose, it should have been covered on our insurance. Unfortunately, because the insurance company frequently believed that students were falsifying medical records or were

¹⁵ Sandra Fluke became known for speaking out about the importance of healthcare coverage of contraceptives. Her comments led to attacks from Rush Limbaugh, who called Fluke a "slut" and "prostitute" on his show. Grace Wyler, *Who Is Sandra Fluke?*, BUSINESS INSIDER (Mar. 2, 2012 4:18 PM), <http://www.businessinsider.com/who-is-sandra-fluke-2012-3>

2013]

REMARKS OF SANDRA FLUKE

487

lying to their doctors, or that the doctors were falsifying the records, there was an extensive investigation and questioning process for anyone who tried to gain access to the medication through their insurance. In her case, that process went on for months and she never gained access to the contraception. She paid out of pocket for several months but eventually couldn't afford to do so any longer, at which point she made the choice to stop taking the medication. After a few months without the medication, she awoke in terrible pain one night. She was rushed to the emergency room during finals of the fall semester, and in the emergency room they discovered that a cyst had formed on one of her ovaries. It was about the size of a softball. As a result, she had to have emergency surgery to have the entire ovary removed. The ovary could not be saved, because the cyst was so prevalent. For her, this will have very long-term consequences. In addition to the pain and the surgery and all of the immediate ramifications, she'll also have reproductive challenges for the rest of her life because she has that only one ovary. There has also been concern about whether or not she will slip into early menopause at the age of 32 years old.

This is perhaps the most extreme consequence, but it is not all that unusual, given that 30% of women need access to contraception, not just for their unintended pregnancies, but for these types of medical reasons. This actually is why I went before the members of Congress to testify.¹⁶ Not about my sluttiness.¹⁷ When I went there to share this information and to share the stories of the women on my campus, I had initially hoped and thought that I would not be the only voice and that we would have a broader discussion not just about students, but about the many other women who have affordability barriers for contraception. We know that 55% of women ages 18 to 34 do have

¹⁶ See Sarah Kliff, *Meet Sandra Fluke: The Woman You Didn't Hear at Congress' Contraceptives Hearing*, WASH. POST (Feb. 16, 2012), http://www.washingtonpost.com/blogs/wonkblog/post/meet-sandra-fluke-the-woman-you-didnt-hear-at-congress-contraceptives-hearing/2012/02/16/gIQAJh57HR_blog.html.

¹⁷ After Fluke's testimonial about access to contraceptives and birth control coverage, Rush Limbaugh reacted on his show by saying, "It makes her a slut, right? It makes her a prostitute." Maggie Fazeli Fard, *Sandra Fluke, Georgetown Student Called a 'Slut' by Rush Limbaugh, Speaks Out*, WASH. POST (Mar. 2, 2012), http://www.washingtonpost.com/blogs/the-buzz/post/rush-limbaugh-calls-georgetown-student-sandra-fluke-a-slut-for-advocating-contraception/2012/03/02/gIQAjvfSmR_blog.html

trouble affording contraception, and that's not surprising when you realize that some contraception and the doctor's visit required to get the prescription can cost \$1,200 a year, according to the Center for America Progress.¹⁸ Yes, there are less expensive means, but those are not medically appropriate for every woman. So it can be quite a barrier for many women. Students certainly have limited means, but there are women in our communities who are much, much more dire circumstances and do not have the privilege that we have as students who do have incredible barriers to accessing this medication.

¹⁸ Maura Calsyn & Lindsay Rosenthal, *How the Affordable Care Act Helps Young Adults*, CTR. FOR AM. PROGRESS 6 (May 20, 2013), <http://www.americanprogress.org/wp-content/uploads/2013/05/YoungAdultPremiums1.pdf>