



National Advocates
for Pregnant Women

N A P W

WRITING CONTEST TO ADVANCE FEMINIST LEGAL SCHOLARSHIP ON THE IMPORTANCE OF BIRTHING RIGHTS IN THE DISCUSSION OF GENDER EQUALITY AND FEMINIST JURISPRUDENCE

National Advocates for Pregnant Women seeks student-written law review style articles discussing the importance of birthing rights in the discussion of gender equality and feminist jurisprudence. The judging panel will include experts and activists in gender equality, reproductive justice, and birthing and human rights. Articles will be judged according to the strength and creativity of the legal analysis, inclusion of race and class considerations, clarity and style of writing, and how well the article answers the specific question at hand. The winner will receive \$1000*. Second prize is \$500*, and third prize is \$250*. The first-prize winner will also have an opportunity to attend a conference in the field.

Please write a law review article addressing the question of why gender discrimination and feminist jurisprudence courses should include discussion of childbirth and birthing rights. This contest seeks a legal and educational argument about what is lost when the discussion of reproductive justice does not include the rights of birthing women, the legal status of midwives, and such things as whether a woman has a right to a home birth, a right to a vaginal birth after a caesarean section, and whether legal principles of informed consent and medical malpractice apply to birthing women. The discussion below will help guide your analysis.

By age 25 years, approximately half of all women in the United States have experienced at least one birth, and approximately 84% of all women in the United States have given birth by age 44 years.¹ However, of the top three casebooks used in law school courses dedicated to gender and the law, none address the issue of childbirth or midwifery.² Gender discrimination courses have a similar pattern: under the reproductive rights section of the curriculum, abortion gets the lion's share of the discussion, with a few adventurous professors moving into the territory of criminalization of pregnancy for drug-using women and fewer still touching on the brave new world of reproductive technologies. Typically the reproductive rights unit ends by segueing into the gendered construction of parenthood. This is a logical progression, but we are concerned that there is a glaring omission: how did a woman manage to transition down the syllabus from "maternal rights vs. fetal rights" to "motherhood" without crossing the threshold of childbirth? Abortion is undeniably a key and contentious legal issue, but 60% of

* Prize amounts may increase. Please check our website, www.advocatesforpregnantwomen.org for periodic updates concerning the contest, cosponsors, additional prompts, and prize awards.

¹ Ctr. for Disease Control & Prevention, *Recommendations to Improve Preconception Health and Health Care – United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 (No. RR06) MORBIDITY & MORTALITY WEEKLY REP., (REPORTS AND RECOMMENDATIONS) 2 (Apr. 21, 2006), available at <http://www.cdc.gov/mmwr/PDF/rr/tr5506.pdf>.

² See KATHERINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (4th ed. 2006); D. KELLY WEISBERG, *FEMINIST LEGAL THEORY* (1996); and HERMA H. KAY & MARTHA S. WEST, *CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* (6th ed. 2005).

women having abortions are already mothers³ and 84% will be mothers by the time they are in their 40s. Moreover, far more women give birth than have abortions each year.⁴

In spite of these realities, discussions concerning childbirth are noticeably absent. This is so despite the fact that, as documented in the film “The Business of Being Born,” many pregnant and birthing women find that they are not being given opportunities for true informed consent. Some are deprived of much more: for example, Laura Pemberton was taken into custody by an armed agent of the state while she was in active labor. Her legs were strapped together and she was forced to go to a hospital where she was required to submit to a cesarean section.⁵ In fact, today hundreds of women who want to have a vaginal birth after having had a previous cesarean section are finding that they are not welcome as patients unless they agree to have a scheduled surgical delivery instead. While recognizing that childbirth is an experience that “men cannot fully comprehend,”⁶ legal academic John Robertson suggests that the choice of birth attendant, location of birth, and agency in what medical procedures are used merely reflect the “woman’s interest in an aesthetically pleasing or emotionally satisfying birth” but do not apparently implicate any constitutional or human rights.⁷ Policies that deny pregnant and birthing women their rights to informed consent and medical decision making and claims like Professor Robertson’s are likely to go unchallenged as long as childbirth is not included in the discussion of gender equality and reproductive justice.

Midwives, the people who historically attended births, are also noticeably absent from gender discrimination and feminist jurisprudence courses and texts. These omissions are especially noteworthy given that the roots of feminism, reproductive self-determination, and woman-centered healthcare are inextricably intertwined with the history of pregnancy, childbirth, and midwifery. Legal historians argue that the genesis of the American Medical Association’s crusade against abortion was, in large part, a crusade against midwives,⁸ yet there is little or no discussion in gender equality texts of the laws and regulations targeting midwives. The connection between abortion access and the regulation of midwifery is made clear by cases such as *Bowland*.⁹ Indeed, restrictions on abortion, like those on midwifery, privilege physicians and arguably rob pregnant women of agency.

³ Allan Guttmacher Inst., *In Brief: Facts about Induced Abortion*, July 2008, http://www.guttmacher.org/pubs/fb_induced_abortion.html.

⁴ *Id.* (Only 22% of pregnancies, excluding miscarriages, end in abortion.)

⁵ *Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999); Laura Pemberton, Address at National Advocates for Pregnant Women’s National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women (January 18-21, 2007) (audio recording on file with NAPW).

⁶ John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth* 69 VA. L. REV. 405, 451 (1983).

⁷ *Id.*

⁸ See e.g., Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STANFORD L. REV. 261, 300-1 (1992). See also JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 161-163, (1978). For a midwifery perspective, see Am. Coll. of Nurse Midwives, *Quick Info: Midwives and Abortion Services*, Dec. 19, 2006, http://www.midwife.org/siteFiles/education/Abortion_Services_12.06.pdf.

⁹ *Bowland v. Municipal Court*, 556 P.2d 1081, 1089 (Cal. 1976). In this case, the California Supreme Court ruled that the practice of midwifery by lay midwives was illegal under the state Business and Professions Code. The court reasoned, *inter alia*, that the privacy right called upon by the landmark reproductive rights cases did not reach delivery, analogizing that if the state’s interest in the life of the fetus could outweigh the mother’s right to terminate at the point of viability, *Roe v. Wade*, 410 U.S. 113, 164-165 (1973), then the interest in the life of the fetus could also justify state regulation of whom a woman could choose to attend her birth.

In addition, both the issue of access to abortion and the issue of access to midwifery care remain very much alive today. For example, the Missouri Supreme Court recently addressed the issue of midwifery, reversing the decision of a lower court that eliminated certification for professional midwives and which had left them susceptible to criminal prosecution.¹⁰ Furthermore, within months of the release of the documentary film “The Business of Being Born,”¹¹ which portrays home birth and midwifery care as healthy and empowering alternatives to what the movie asserts is an increasingly dangerous, costly and over-medicalized system of doctor-managed obstetrical care, both the American Medical Association (AMA) and the American College of Obstetrics and Gynecology (ACOG) issued statements decrying home births, the vast majority of which are attended by midwives.¹² The AMA’s resolution goes beyond professional guidelines. It resolves to draft model legislation, which, if adopted by states, would likely curtail women’s right to choose to deliver outside of hospitals and could empower the state to punish women who do not comply with doctors’ advice regarding childbirth.¹³ These resolutions are but the most recent incarnation of a battle over the right to control pregnant women that has raged since long before women had any measure of legal personhood.

Articles should be no less than 25 double-spaced typewritten pages in length, including footnotes. Textual material should be in 12-point Courier or Times New Roman font; footnotes may be in 10-point Courier or Times New Roman font and should be in Bluebook format. Please use 8.5”x 11” paper with one-inch margins on all sides.

See www.advocatesforpregnantwomen.org for submission guidelines.

¹⁰ Missouri State Medical Ass’n v. State, No. SC88783, 2008 WL 2501838 (Mo. June 24, 2008).

¹¹ THE BUSINESS OF BEING BORN (Barranca Productions 2007). For more information, see <http://www.thebusinessofbeingborn.com>.

¹² Am. Med. Ass’n, *Resolution 205 Home Deliveries*, June 16, 2008, <http://www.ama-assn.org/ama1/pub/upload/mm/471/205.doc> (The initial draft of the AMA resolution targeted Ricki Lake and the film specifically.); Press Release, Am. Coll. Obstetricians & Gynecologists, ACOG Statement on Home Births (Feb. 8, 2008), available at http://www.acog.org/from_home/publications/press_releases/nr02-06-08-2.cfm.

¹³ See, e.g., Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., 66 F. Supp. 2d 1247 (N.D. Fla. 1999); Howard Minkoff & Lynn M. Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTETRICS & GYNECOLOGY 1234 (2004).