

Reproductive Rights

Hard-won protections for reproductive freedom are increasingly under attack, says this advocate for pregnant women. She fights back in the courts.

*Thirty years after Roe v. Wade, **Lynn Paltrow**—Executive director of National Advocates for Pregnant Women (NAPW) in New York City—believes that women still face an array of limitations on their reproductive decision-making, including health and welfare policies that can undermine motherhood, especially for low-income and minority women.*

Her work focuses on how efforts to expand fetal rights and the war on drugs intersect as well as on dangerous legal precedents for the health and well-being of women and families in general. Fetal rights advocates, Paltrow says, have fought hard to convince police, prosecutors, and judges that applying child abuse laws to fetuses deters drug use by pregnant women. She strongly advocates treating drug use during pregnancy as a public health issue rather than a crime, arguing that the threat of criminal prosecution only serves to scare pregnant women away from necessary health care.

In this interview with TRIAL Associate Editor Christian Harlan Moen, Paltrow discusses some of the legal issues that she has encountered in the ongoing fight to protect reproductive rights.

Is the main focus of your work today protecting the rights of drug-addicted pregnant women?

We are really interested in expanding reproductive rights and achieving drug-policy reform. It is often in the defense of drug-using pregnant women that we are best able to address a confluence of assaults on women's and children's rights and human dignity.

The prosecution of pregnant, drug-using women reflects an intersection of the war on drugs and the war on abortion—and often very clear racial discrimination. And it is by attacking women who are particularly unpopular and particularly defenseless that drug-war proponents and anti-choice activists can simultaneously undermine women's reproductive rights and family well-being, advance the war on drugs to women's wombs, and put into place vague laws open to racially discriminatory application.

In March 2001, the U.S. Supreme Court decided *Ferguson v. City of Charleston*, which held that when hospital staff tested pregnant women for evidence of cocaine use, they had been acting as an arm of law enforcement, conducting searches for criminal justice purposes in violation of the Fourth Amendment prohibition against unwarranted searches and seizures. (121 S. Ct. 1281 (2001).) Could you explain the background of the case?

In 1989, a doctor and a nurse at the Medical University of South Carolina (MUSC) started selective urine screening of pregnant women for drugs—possibly reacting to claims of a serious problem with cocaine use and harm to children, although there was virtually no research at the time to determine whether in fact prenatal exposure to cocaine was particularly harmful. Then the nurse heard a news story about police in Greenville, North Carolina, arresting cocaine-using pregnant women on the theory that a pregnant woman's drug use constituted child abuse, and she discussed the story with the hospital's general counsel.

The counsel, instead of asking whether any drug treatment was available for these women or suggesting research to find out why some pregnant women use cocaine and to what extent, if

any, harm was resulting, he called a meeting with the local prosecutor and police department. All three then established a joint policy whereby the hospital would secretly search selected pregnant women for evidence of cocaine use, and if they tested positive, the hospital would convey their confidential medical information directly to the police and help arrange for their arrest right out of their hospital beds.

I expected that one of the women would get arrested and that we would be able to defend her and challenge this practice, which violated 10 or 20 different statutory and constitutional rights. For years, I never got a call, and we found out later that whenever a woman seriously challenged the legality of the prosecution, the prosecutors would drop the charges. They did not want to risk losing in court.

It wasn't until 1992 that I got the call I had been waiting for. Ted Phillips, a local public defender, said two women, Crystal Ferguson and Teresa Joseph, were being charged with drug delivery to a minor because while they were receiving health care at the MUSC, it was discovered they were pregnant and had been using cocaine. I filed a motion to dismiss, with amicus support from the American Public Health Association, and on the day of the hearing the prosecution voluntarily dismissed the charges. The local solicitor told reporters he dismissed because he did not want a precedent set against these prosecutions.

I told the two women, "We were able to stop your prosecution, but it didn't really do anything to prevent the hospital from doing this to your neighbors, your sisters, your friends, or even you again, should you ever become pregnant. Do you want to do something about it?" They said yes and agreed to bring the first affirmative federal civil rights action against the policy of treating pregnant hospital patients as criminal suspects.

In developing the case, which I brought with Charleston lawyer Susan Dunn, we came up with nine different causes of action, all addressing the violation of fundamental constitutional rights and statutory law.

But the hospital was also, in effect, doing an experiment on these patients. As an article it published admitted, it was trying to see if threatening patients with arrest would somehow deter their drug use. We also filed a complaint with the National Institutes of Health arguing that the hospital was doing illegal research on human subjects. As a result of press coverage of this complaint, the Justice Department's Office of Civil Rights (OCR) began an investigation and discovered that of the 30 women arrested out of that hospital, 29 were African-American. In the medical record of the only white woman, the nurse who started the policy wrote, "Patient lives with her boyfriend, who is a Negro."

Although the hospital insisted on claiming that it was simply following state law, MUSC—which has an African-American patient base of 70 percent—was the only hospital in Charleston that would secretly search patients and turn the results over to the police. OCR believed it had found enough evidence of racial discrimination to launch a full-blown investigation, and the hospital, apparently attempting to avoid this, agreed to stop the arrest portion of its policy. Throughout this period, MUSC never agreed that its patients might have been damaged in any way by the policy or that it might have violated any law or right to any kind of settlement negotiation.

What relief did the lawsuit seek?

This was an action for injunctive and declaratory relief and damages for violating a variety of civil rights, one of which was the women's Fourth Amendment right to be free of unreasonable search and seizure. Because the hospital never said it was going to stop selectively searching pregnant patients for drug use and never agreed that what it did was wrong, the case proceeded through

the court system, and eventually a group of us took the case to the Supreme Court exclusively on these Fourth Amendment grounds.

This was a true coalition effort with scores of leading medical groups, and even the conservative Rutherford Institute, filing amicus briefs in support of the plaintiffs on public health and constitutional grounds. The Supreme Court ruled that urine tests were “searches” within the meaning of the Fourth Amendment, and that without patients’ fully informed consent the tests—and the reporting of positive test results to police for law enforcement purposes—were unreasonable searches.

Fortunately, on remand, the Fourth Circuit rejected the argument that a consent to a medical test is somehow a consent to a search for evidence of a crime, and while the defendants sought Supreme Court review of this decision, the Court refused, opening the door to trials for damages for each of the 10 women who eventually joined the case.

Is South Carolina the only state that has attempted such a program?

It is the only state in which the judiciary has rewritten state law to permit such arrests and to uphold and permit such prosecutions. The policy at MUSC began at a time when no state, including South Carolina, had ever held that a pregnant woman could be viewed as a child abuser because she had become addicted to drugs during her pregnancy. In fact, the state legislature, on 11 separate occasions, rejected proposals to expand child abuse laws to include the fetus.

It was not until 1997, in a different case that I worked on, *Whitner v. State*, that the South Carolina Supreme Court, in an act of blatant judicial activism, rewrote the state’s child abuse law to include the words “and viable fetus.” (492 S.E.2d 777 (S.C. 1997), *cert. denied*, 118 S. CT 1857 (1998).) As a result, in South Carolina, a pregnant woman who uses an illegal drug or in any other way even risks harm to her fetus can be prosecuted as a child abuser.

No other state or state court permits such prosecutions. The Florida Supreme Court—in a case I argued involving Jennifer Johnson, the first woman to be prosecuted for drug delivery to a minor on the theory that the drug traveled through the umbilical cord—reversed the appeals court, ruling that cocaine passing through the umbilical cord after birth but before the cord was cut did not violate the statutory prohibition against adult delivery of a controlled substance to a minor. (*Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992).)

The Kentucky Supreme Court, the Nevada Supreme Court, and the Ohio Supreme Court all said that prosecutors could not twist existing child abuse and similar laws into mechanisms for punishing pregnant women. Many other trial and mid-level appellate courts around the country said you can’t do this because, first, the state legislatures have not adopted this law, and second, it has all kinds of due process, privacy, and public health implications.

Twelve years ago, in *United Auto Workers v. Johnson Controls*, the Supreme Court ruled that prohibiting fertile women from working in potentially hazardous conditions is gender discrimination. (110 S. CT 1522 (1991).) Are there still employers that limit women’s employment opportunities in the name of “fetal protection”?

Historically, legislators could be quite direct: They passed laws that said, “No women need apply” or that provided that women could work only a certain number of hours a week. When those laws were finally successfully undone by the notion that discrimination on the basis of sex was a violation of the Fourteenth Amendment, those people who still believe that women ought not have equal access to work opportunities, but should raise the next generation of taxpayers for free, had to find more creative solutions.

The way to do that is to claim that you are not doing anything to women, but that you are protecting fetuses. You have places like Johnson Controls that manufacture products that use lead, where instead of saying, “No women need apply to high-paying, unionized jobs that provide decent health benefits,” management said, “We’re instituting a fetal protection policy to ensure that if you ever become pregnant you will not expose your fetus to these harmful chemicals and then sue us.”

The irony is that, according to research, no women had ever sued one of these companies, but men had, claiming that their reproductive capacity had been harmed by lead exposure. Similarly, for years some drug treatment programs used fear of liability as an excuse for categorically excluding pregnant women. Yet to my knowledge, to this day there is not a single lawsuit against a drug treatment program arising from health care it provided to pregnant women.

The Supreme Court held that fetal protection policies violated the Pregnancy Discrimination Act. But that act and other statutory protections prohibiting workplace discrimination against pregnant women are limited and, according to our estimates, leave up to 23 million women without protection against pregnancy discrimination in the workplace.

Do you see a correlation between *Johnson Controls* and cases like *Ferguson*?

Absolutely. The anti-abortion movement has advanced the notion of fetal rights as a way of creating a precedent that would ultimately be used to overturn *Roe v. Wade*. Not every local prosecutor who brings one of these cases is a secret member of the National Right to Life Committee; however, in every state brief I have read, the prosecutors have lifted wholesale the arguments from the antiabortion page stating that fetuses are persons under the law.

People do—based on religion, ethics, or personal history—value fetuses highly, and there should be a social and cultural acknowledgment of the moral value of fetuses. But the minute you treat fetuses as separate legal persons, it is a guarantee that pregnant women will not be viewed as legal persons. It’s not just cases like *Whitner* and *Johnson Controls*; it’s also the Angela Carder case, in which a woman who was critically ill was forced to have a cesarean section in the name of fetal rights, resulting in her and her fetus’s death.

The D.C. Court of Appeals vacated the court-ordered cesarean in the that case, although Angela had already died. (*In re A.C.*, 573 A.2d 1235, 1252 (DC 1990).) Did this decision affect the policy of other hospitals?

Following *AC*, there seems to be much more consensus among medical organizations, and somewhat better education in the medical community, that women don’t give up all their legal rights upon becoming pregnant. And, in a number of subsequent cases, particularly in Illinois, courts have refused to force women to have involuntary surgery in the name of fetal rights. In those cases the women who refused the surgery turned out to be right in their judgments that the sought-after medical intervention was unnecessary. Yet there are still cases of forced cesarean sections.

On some level there has been a sea change, recognizing that the decision-maker is the pregnant woman. One of NAPW’s goals is to make clear that it is not really about a conflict between pregnant women and fetuses, it is a conflict between pregnant women and the state. Who gets to make a medical decision that could be wrong? Who gets to make the mistake?

It does feel as if despite our victories, there is an avalanche of fetal rights arguments. This is in part because the administration is once again pushing for the Unborn Victims of Violence Act and because we have the change in the State Children’s Health Insurance Program now defining a child entitled to health care coverage as including the unborn child from the moment of

conception. It seems that even when we win, even when we defeat legislation or get a court to say that you can't prosecute a pregnant woman as if she is a stranger to her own body, there is an increase in the cultural message that it is OK to see a pregnant woman as subordinate to both the state and the fetus inside of her.

The reason we have had as much success as we've had is in part because the public health and medical community has been unanimous in its opposition to addressing these kinds of issues through the criminal justice system. They recognize that if you threaten women with arrest, you frighten them away from health care that will protect their children.

Last fall, offspring conceived posthumously by in-vitro fertilization were denied Social Security survivor benefits in Arizona. There are similar cases in Louisiana, Massachusetts, and New Jersey. New Jersey and Massachusetts granted benefits, and Louisiana did so after a settlement. Do you foresee more of these novel legal issues arising as assisted reproduction techniques become both more common and more complicated?

We are a very creative society, and the courtroom is often where people seek to work out problems that arise with new technologies. One example is a Tennessee case, in which a divorced couple were fighting over the disposition of frozen embryos; she wanted to try again for a pregnancy, and he wanted not to have them implanted.

Her lawyers made it into a case of personhood for frozen embryos. The Supreme Court of Tennessee said, "They're not persons, and when they're outside of somebody's body, you can't force somebody else to become a parent." We defended that position and opposed certiorari. The U.S. Supreme Court didn't take the case, letting the state supreme court ruling stand. (*Davis v. Davis*, 842 S.W.2d 588 (1992).)

Every time there is a new technology, you have the possibility of new litigation. Some of it comes from the same old reasons, though. With each new technology, people are so excited that they often fail to do the standard legal and ethical things that can help people avoid unnecessary litigation: make sure they are really giving informed consent, that they've thought through what happens if they get divorced or if they disagree or if somebody changes their mind. Many cases that have come up as cutting-edge, reproductive rights cases are really just failures of communication and planning.

Some women's health advocates have said insurance plans discriminate against women by declining to cover prescription contraception while paying for men's prescriptions for Viagra. What kind of legal recourse do women have to ensure equal insurance coverage for contraception?

New York University Law Professor Sylvia Law has developed an excellent equality-based argument that has been successful in Washington state and provides a precedent for challenging these policies. The more important thing is, until Ruth Bader Ginsberg began bringing the lawsuits she did in the 1970s, sex discrimination was not recognized as a violation of the U.S. Constitution.

So whether precedent exists or not, the principles of equality, equal access, and social responsibility can provide the basis for creative advocacy in both legislative and judicial forums. That is what the struggle for human rights has always been about.