

**FROM *EISENSTADT* TO PLAN B: A DISCUSSION OF
CONSCIENTIOUS OBJECTIONS TO EMERGENCY
CONTRACEPTION**

By Lynne Marie Kohm[†]

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I. INTRODUCTION

Birth control has become as important to American women and men as the sale of milk has been to dairy farmers.¹ Contraception became a constitutional concern when the Supreme Court of the United States in 1965 decided in *Griswold v. Connecticut* that married people have constitutionally protected rights to contraceptive use.² The Court again reviewed the matter of birth

[†] John Brown McCarty Professor of Family Law, Regent University School of Law; J.D. Syracuse 1988, B.A. Albany 1980. Many thanks to Amber Dina for her invaluable assistance in researching and editing this essay.

1. Portions of this essay were presented at a symposium entitled “Got Birth Control?” held at and in conjunction with the Vanderbilt University Schools of Law, Medicine, and Divinity Symposium on Access to Birth Control and sponsored by the Women Law Students Association at Vanderbilt University. “Got Birth Control?” is a spin-off of the American Dairy Farmers Marketing campaign “Got Milk?” and was used to attract students to consider this important issue and in no way infringes on any original trademark rights. It nonetheless conveys the familiarity of birth control in American life, law, and culture.

2. 381 U.S. 479 (1965) (holding that marital privacy protects the

control use seven years later in the context of unmarried individuals in *Eisenstadt v. Baird*.³ Contraceptive use thereafter became mainstream, even routine.

More specifically, the use of one of the most popular methods—the birth control pill—as a contraceptive, has led to other medical developments in the arena of women’s health—the newest of which is a drug known in many circles as “the morning after-pill,” but also commonly called Plan B.⁴ Plan B is generally marketed to an unmarried, sexually active population and is similar to the birth control pill in that it contains the key ingredient used in prescription birth control pills, but at a higher dosage and with a different dosing regimen.⁵

Because the mechanism of action for these drugs is scientifically uncertain,⁶ some pharmacists are refusing to dispense certain drugs that are designated as birth control, but may also work as an abortifacient.⁷ This dilemma raises the issue of whether

constitutionality of prescription contraceptive use by married couples).

3. 405 U.S. 438 (1972) (holding that individuals have a constitutionally protected privacy right to contraceptive use).

4. See Press Release, U.S. Food and Drug Administration, FDA Announces Framework for Moving Emergency Contraception Medication to Over-the-Counter Status (July 31, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01421.html> [hereinafter *FDA Statement*] (stating that “Plan B is often referred to as emergency contraception or the ‘morning after pill’”). The Plan B name refers to the concept that this drug is designed for use when the plan A method of birth control either failed or, for some reason, provided no certainty of contraception. Thus, taking this drug within seventy-two hours after unprotected sex to inhibit pregnancy is a fall-back plan B.

5. *Id.* See also U.S. Food and Drug Administration, Plan B: Questions and Answers (Dec. 14, 2006), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm> [hereinafter *FDA Answers*].

These pills contain higher levels of a hormone found in daily oral hormonal contraceptives. . . . Plan B is emergency contraception, a backup method to birth control. It is in the form of two levonorgestrel pills (0.75 mg in each pill) that are taken by mouth after a contraceptive fails or after unprotected sex. Levonorgestrel is a synthetic hormone used in birth control pills for over 35 years.

Id.

6. “Mechanism of action” refers to the actual physical effect of the pill on the ovum or the zygote. See *infra* Part II.

7. See Tom Strode, *Pharmacists Favor Freedom on ‘Morning-After’ Pill*, BAPTIST PRESS, Dec. 12, 2005, <http://www.bpnews.net/bpnews.asp?ID=22260>.

More than two-thirds of pharmacists believe they should be able to refuse to fill prescriptions for the “morning-after” pill, which is considered an abortifacient by many pro-lifers.

A survey conducted Dec. 3–4 found 69 percent of American pharmacists agreed they should have the authority to decline filling prescriptions for emergency contraception. The poll by HCD Research

pharmacists should be able to refuse to dispense emergency contraceptives against their own conscientious objection when they may be required to do so by state law.⁸

This essay sets forth the process, mechanism, and use of the birth control pill and its progeny, the statutory rules and case law currently governing this controversy, and the arguments on both sides of this important issue. It traces the development of contraception as a liberty interest and its connection or disconnection with responsible family planning, and concludes that responsibility in the area of contraceptive use and dispensation will be culturally reflected in our future in one way or another.

Part I explains various birth control pharmaceuticals, and why there are medical and ethical concerns. It also explains the marketing of these drugs. Part II provides current state law on conscience clauses and the dispensing of pharmaceuticals marketed as emergency contraceptive drugs. Part III reviews the arguments on both sides of this debate. It discusses why doctors may object to prescribing and pharmacists may object to distributing a “morning-after pill” such as Plan B.

This essay concludes that this debate is more about the politics of sexual freedom which have grown out of *Eisenstadt* than the

of Flemington, N.J., was conducted less than a week after the Walgreen Co. placed four of its pharmacists on indefinite, unpaid leave for refusing to abide by an Illinois government rule that requires the filling of prescriptions for contraceptives, including the “morning after” pill, even if to do so violates pharmacists’ consciences.

Id.

8. Currently, only Illinois requires a pharmacist to fill contraception prescriptions against his or her conscience. ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005). On April 1, 2005, in response to Illinois pharmacists’ refusal to dispense contraceptives, Governor Rod Blagojevich announced an emergency rule which required “pharmacies in Illinois that sell contraceptives [to] accept and fill prescriptions for contraceptives without delay.” Sarah J. Vokes, *Just Fill the Prescription: Why Illinois’ Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 LAW & INEQ. 399, 408–09 (2006). The Governor’s rule became permanent in August 2005. *Id.* at 410.

There may be constitutional considerations, such as religious freedom, in states that require medical professionals to act against their conscience:

[T]hree of the disciplined Illinois pharmacists have filed religious discrimination complaints against Walgreens with the Equal Employment Opportunity Commission. The American Center for Law and Justice filed the complaints Dec. 7 [2005] on behalf of Richard Quayle, a Baptist, and John Menges and Carol Muzzarelli, both Roman Catholics, according to the St. Louis Post Dispatch.

Strode, *supra* note 7. The constitutional conflict presented by the issue of religious freedom is interesting and meritorious, but beyond the scope of this article.

privacy of contraception, and has trapped pharmacists and doctors in the middle of the conflict. Without a fair review of this important issue, the shroud of a liberty interest may veil the dangers of drugs like Plan B to the women and men it claims to serve, while ensnaring conscientious pharmacists in an ethical conflict that goes to the core of their professional code.

II. HOW THE BIRTH CONTROL PILL AND EMERGENCY CONTRACEPTIVES WORK: DRUG AND MEDICAL FACTS

The common birth control pill is comprised of some combination of hormones⁹ that works in four possible ways: (1) suppressing ovulation; (2) inhibiting fertilization by thickening of the cervical mucus; (3) reducing the possibility of fertilization by movement of the Fallopian tubes; or (4) inhibiting implantation by thinning of the uterine lining.¹⁰ It should be noted that the fourth

9. See John Wilks, Pharmacists For Life International, *The Pill—How it Works and Fails* (Oct. 1998), http://www.pfli.org/faq_oc.html.

The commonly used name of ‘the pill’ [sic] is made up to two ‘styles’ [sic] of formulations; the progesterone-only pill (POP) and the combined oral contraceptive pill (COCP). The COCP contains an oestrogen, most frequently ethinyl oestradiol, and a progesterone, either levonorgestrel or norethisterone. Fixed formulations of the combined pill contain the same levels of oestrogen and progesterone for 21 days, followed by an optional 7 sugar tablet [sic]. Newer versions have hormonal levels which vary two or three times during the month (hence the bi- and tri-phasic names some of these products carry). Within the last few years, the combined pill has been released containing gestodene or desogestrel as the progesterone component. These products are known as third-generation progesterones. They are made as either a fixed dose formulation eg. [sic] Minulet®, or as a triphasic formulation eg. [sic] Tri-Minulet®. They are not very popular because they double the risks of a woman developing a blood clot.

Id.

10. *Id.* (clarifying that none of these ways is completely reliable, and may not always stop sperm or ovum from joining to create a zygote, or “new human person.”). The FDA notes that:

Plan B works like a birth control pill to prevent pregnancy mainly by stopping the release of an egg from the ovary. It is possible that Plan B may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the uterus (womb), which usually occurs beginning 7 days after release of an egg from the ovary. Plan B will not do anything to a fertilized egg already attached to the uterus.

FDA Answers, *supra* note 5. Similarly, the Plan B website claims that it will not work if you are already pregnant, defining pregnancy as implantation. See Duramed Pharmaceuticals, Inc., *How Plan B® Works* (2007), <http://www.go2planb.com/ForConsumers/AboutPlanB/HowItWorks.aspx>. The site specifically refers to the

way does not inhibit fertilization, but rather prevents implantation once the sperm fertilizes the ovum, creating a zygote. It is possible for modern medicine and pharmacology to call this method a form of birth control because the American College of Obstetricians and Gynecologists has ruled that pregnancy begins with implantation,¹¹ rather than with fertilization.¹²

One of the mysteries of the pill is that neither a woman nor her doctor ever knows which of these four ways actually works to inhibit a pregnancy in any given menstrual cycle.¹³ This is also true of its progeny, emergency contraception.

There are various forms of emergency contraception, with one more popularly known as the “morning-after pill” that “is used to prevent a woman from becoming pregnant after she has had unprotected vaginal intercourse.”¹⁴ These drugs contain higher doses of the active ingredients used in birth control pills, and work in a similar manner.

The active ingredients in morning-after pills are similar to those in birth control pills, except in higher doses. Some morning-after pills contain only one hormone, progestin (Plan B), and others contain two, progestin and estrogen. Progestin prevents the sperm from reaching the egg and keeps a fertilized egg from attaching to the wall of the uterus (implantation). Estrogen stops the ovaries from releasing eggs (ovulation) that can be fertilized by sperm.¹⁵

These combinations allow for a concentrated manner of drug delivery in a short period of time, namely within seventy-two hours

above fourth mechanism stating, “Plan B may also work by preventing [a fertilized egg] from attaching to the uterus (womb).” *Id.*

11. See OBSTETRIC-GYNECOLOGIC TERMINOLOGY 299 (Edward C. Hughes, ed. 1972) (stating that “conception” means “implantation of the blastocyte” and “is not synonymous with fertilization”).

12. Fertilization occurs when the sperm fertilizes the ovum, resulting in a human zygote. See *id.* at 300–04. This is also referred to as conception, and the beginning of a human life. See *id.* at 299.

13. See Sandhya Pruthi, Morning-After Pill: Emergency Birth Control (Aug. 28, 2006), <http://www.mayoclinic.com/health/morning-after-pill/AN00592>. This article explains that fertilization may occur at different points depending on the ovulation cycle. *Id.* “Human conception rarely occurs immediately after intercourse. Instead, it occurs as long as several days later, after ovulation. During the time between intercourse and conception, sperm continue to travel through the [F]allopian tube until the egg appears.” *Id.*

14. *Id.*

15. *Id.*

of unprotected sexual activity.¹⁶ The Food and Drug Administration has approved two emergency contraceptive products, Preven in 1998 (no longer being marketed), and Plan B in 1999.¹⁷ It also approved Mifepristone, the abortion pill, in 2000.¹⁸ Each of these drugs has been available by prescription, and the FDA has recently approved Plan B for over-the-counter distribution.¹⁹

The differences between emergency contraception pills and medical abortion, or the abortion pill, are important. Emergency contraception does not work if a fertilized egg (the human embryo) has already implanted.²⁰ By contrast, medication abortion “is the use of medications that can induce an abortion.”²¹ The abortion pill is actually several drugs used in combination. A high dose of mifepristone works to block the creation of progesterone, a hormone that is necessary to create and sustain pregnancy.²² Then, methotrexate “stops the further development of the pregnancy in the uterus, and misoprostol causes the uterus to contract and empty,” expelling the embryo and creating an abortion.²³ It can be

16. *Id.*

17. *FDA Answers*, *supra* note 5.

18. Margaret M. Gary & Donna J. Harrison, *Analysis of Severe Adverse Events Related to the Use of Mifepristone as an Abortifacient*, 40 ANNALS PHARMACOTHERAPY 1, 1 (2006).

19. *See FDA Statement*, *supra* note 4; Press Release, U.S. Food and Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html> [hereinafter *FDA Plan B Over-the-Counter*].

20. Jennifer Johnsen & Deborah Golub, Planned Parenthood Federation of America, Inc., *The Difference Between Emergency Contraception and Medication Abortion* (Dec. 2006), <http://www.plannedparenthood.org/files/PPFA/fact-EC-mabortion.pdf>, at 1.

Because of the committee decisions of the American College of Obstetricians and Gynecologists that pregnancy does not occur until implantation rather than fertilization, pro-choice language tends to state that no abortion occurs without implantation because there hasn't been a pregnancy even if fertilization has occurred, and pro-life language tends to state that an abortion occurs anytime a fertilized ovum is thwarted from implanting because an embryo has been terminated. *See supra* note 11 and accompanying text. In fact, use of the pro-choice terminology allows Planned Parenthood sources to state, “Emergency contraception helps *prevent* pregnancy; medication abortion *terminates* pregnancy.” Johnsen & Golub, at 1.

21. Johnsen & Golub, *supra* note 20, at 1.

22. *Id.* at 2 (citing Michelle Creinin & Elizabeth Aubeny, *Medical Abortion in Early Pregnancy*, in A CLINICIAN'S GUIDE TO MEDICAL AND SURGICAL ABORTION (Maureen Paul et al., eds., 1999)).

23. *Id.* at 1.

used within forty-nine days of the last menstrual period to cause a medical abortion.²⁴ There are numerous dangers associated with medication abortion.²⁵

At the heart of this controversy is whether the mechanism of the morning-after pill works as a contraceptive or as an abortifacient. “One of the main barriers to widespread use [of emergency contraception] is concern about the mechanism of action. . . . [T]he knowledge of the mechanism of action of mifepristone and levonorgestrel in humans, when used for contraceptive purposes and especially for emergency contraception, remains incomplete.”²⁶

The scholarly research and literature on this subject matter

24. Mifepristone, formerly known as RU-486, is an antiprogestosterone drug that blocks receptors of progesterone, a key hormone in the establishment and maintenance of human pregnancy. See U.S. Food and Drug Administration, Mifeprex® (mifepristone) Tablets, 200 mg (July 19, 2005), <http://www.fda.gov/cder/foi/label/2005/020687s013lbl.pdf>. Used in combination with a prostaglandin such as misoprostol, mifepristone induces abortion when administered in early pregnancy, providing women with a medical alternative to aspiration (suction) abortion. See *id.* Mifepristone was approved by the U.S. Food and Drug Administration (FDA) on September 28, 2000, for use as an abortifacient despite anti-choice lobbying efforts to prevent its approval. See Press Release, U.S. Food and Drug Administration, FDA Approves Mifepristone for the Termination of Early Pregnancy (Sept. 28, 2000), available at <http://www.fda.gov/bbs/topics/news/NEW00737.html>. In the United States, the brand name for mifepristone is Mifeprex™, which is manufactured by Danco Laboratories, LLC (Danco, 2000). *Id.*

In the United States, the approved FDA regimen involves three steps: 1) a visit to a clinician for counseling and to receive a 600 mg dose of mifepristone, 2) a second visit two days later for an oral dose of misoprostol, and 3) a third visit on day fourteen for a follow up visit. *Id.* The FDA approved mifepristone for use up to forty-nine days after the first day of the last menstrual period. *Id.* Thus, this is used in the early stages of pregnancy—when a woman knows that she wants to abort a pregnancy. This would not be considered “emergency contraception” since a woman knows that she is pregnant.

25. See Gary & Harrison, *supra* note 18, at 2 (noting that 607 unique mifepristone adverse-event reports were submitted to the FDA over a four-year period, with adverse effects ranging from mild to causing death). Planned Parenthood literature also admits the possibility of harm to women from medication abortion. Johnsen & Golub, *supra* note 20, at 2.

26. K. Gemzell-Danielsson & L. Marions, *Mechanisms of Action of Mifepristone and Levonorgestrel When Used for Emergency Contraception*, 10 HUM. REPROD. UPDATE 341 (2004), (purposing to summarize available data that indicate that the contraceptive effects of those drugs, when used in single low doses, do not inhibit implantation but either blockade or delay ovulation). But there is also medical scholarly research that finds hormonal contraceptives abortifacient. See William Colliton, Jr., Birth Control Pill: Abortifacient and Contraceptive (Jan. 8, 2005), <http://www.epm.org/articles/26doctor.html>. See generally RANDY ALCORN, DOES THE BIRTH CONTROL PILL CAUSE ABORTIONS? (2001).

also reveal that the key dispute of fact is the uncertainty of the mechanism of action.²⁷ On one hand, the drug mechanism is thought to work to prevent ovulation or inhibit fertilization.²⁸ But research also shows that the drug works to create a hostile endometrial environment that rejects a fertilized egg.²⁹ Plan B literature clearly states that the morning-after pill works to prevent *implantation*, or pregnancy.³⁰ If the drug fails to inhibit ovulation or fertilization and instead inhibits implantation of an embryo, it is disingenuous to call the morning-after pill “emergency contraception,” as the conception of human life has already occurred.³¹ The conflicting research concerning whether the morning-after pill prevents or terminates life, and the controversy over when life begins (either at fertilization or implantation), fuels this debate. There is no agreement in the medical community or in the legal community on this fact.

Despite this factual dispute, there has been a great campaign to make emergency contraception readily accessible. For example, Plan B has been available online for some time,³² and it is often

27. See, e.g., Cristina Arana Lumpkin, *Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?*, 60 U. MIAMI L. REV. 105 (2005) (discussing the disagreement over abortifacient qualities of birth control pills in general); Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37 (2006) (discussing the arguments surrounding the uncertainty of the mechanism of action for emergency contraception and summarizing conscience legislation); Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2004). Herbe's article generally discusses the ethical concerns surrounding emergency contraception drugs and how they present the pharmacist with a serious dilemma. *Id.* He states, “This labeling as emergency contraception is a bit conclusory, as the definition of whether use of such drugs is contraception or abortion lies at the heart of the controversy over them.” *Id.* at 79; Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993) (summarizing the inadequacy of various conscience clauses in terms of abortion, rather than understanding the conscientious objection to drugs that may be abortifacients).

28. See Wilks, *supra* note 9 and accompanying text.

29. Both pro-abortion and pro-life researchers agree on this; they merely use different terms to label that rejection. Compare Pruthi, *supra* note 13 and Johnsen & Golub, *supra* note 20 (both admittedly pro-choice perspectives), with Wilks, *supra* note 9 and Colliton, *supra* note 26 (both admittedly pro-life perspectives).

30. See *FDA Answers*, *supra* note 5 (emphasis added). See also Duramed Pharmaceuticals, Inc., *What Is Plan B®?* (2007), <http://www.go2planb.com/ForConsumers/AboutPlanB/WhatIsPlanB.aspx> (stating that Plan B reduces the risk of pregnancy by 89 percent).

31. See Colliton, *supra* note 26 (listing research finding hormonal contraceptives abortifacient).

32. See Morning-After-Pill.com, *Plan B Pill*, <http://www.morning-after->

marketed as a “second chance” drug.³³ And in a press release dated July 31, 2006, the FDA announced it was meeting with Duramed, Plan B’s producer, to discuss moving Plan B from prescription only usage to over-the-counter availability.³⁴ On August 24, 2006, the FDA approved over-the-counter access for Plan B.³⁵

The marketing literature uses the term “contraceptive” to describe hormonal birth control, while others argue that this is artificial phraseology that ignores “the biological potential and intrinsic value of the human zygote, and the fact that it interacts chemically with the mother even prior to implantation.”³⁶ All hormonal birth control agents, including Plan B, “have at least some interceptive (abortifacient) potential,” and confusion of terms like “conception” with “contraception,” or “preventing pregnancy” with “abortion” “serves to enhance the marketability of hormonal birth control.”³⁷

A combination of public confusion and cavalier market

pill.com (last visited Feb. 27, 2007).

Buy the morning after pill online for \$85. All orders are reviewed by US doctors and processed by US pharmacies. If you are in urgent need of Plan B, then you can get it shipped express via UPS. When taken as instructed, the Plan B morning after pill helps women not to get pregnant after engaging in unprotected intercourse or when the contraceptive fails.

Id.

33. See Duramed Pharmaceuticals, Inc., What Is Plan B®, *supra* note 30, which also gives clear directions on how to obtain Plan B. Yet some of this marketing literature seems to suggest to have Plan B on hand just in case it is needed, which could lead some to surmise that Plan B is really a plan A.

34. *FDA Statement*, *supra* note 4. “This decision is the result of a thoughtful and comprehensive scientific and public policy process undertaken by the Agency to resolve the novel and significant issues presented by the Sponsor’s amended application.” *Id.*

35. *FDA Plan B Over-the-Counter*, *supra* note 19 (“The U.S. Food and Drug Administration (FDA) today announced approval of Plan B, a contraceptive drug, as an over-the-counter (OTC) option for women aged 18 and older. . . . Plan B will remain available as a prescription-only product for women age 17 and under.”).

36. Karen L. Brauer, Pharmacists for Life, Selling the Pill, http://www.pfli.org/brauer_sellingthepill.html (last visited Mar. 1, 2007).

If you asked a birth control pill user or a medical professional how the “pill” works, the most common answer would be that it prevents ovulation. That answer is only partially correct. But to those who sell the “pill” or other hormonal contraceptives, it is important that this impression is maintained. This is done through artful use of the word “contraceptive.”

Id.

37. *Id.* (“Unfortunately, this means that countless women are receiving this type of medical treatment without the benefit of informed consent.”).

availability can serve to create more ethical concerns. This is particularly true in the current climate of minimal regulation of these drugs. Some have argued that such minimal regulation may serve to chill lawful, efficient, necessary, and patient-friendly services that apply standard medical care practices.³⁸ States are approaching this area of law from very different perspectives—from protecting patients' rights to preferring medical professionals' ethical concerns.

III. FACTS AND CURRENT STATUS OF THE LAW: CONSCIENCE CLAUSES AND EMERGENCY CONTRACEPTIVES

In August 2005, Illinois made permanent an administrative state rule that requires any pharmacy that distributes contraceptives to distribute emergency contraception, or the morning-after pill.³⁹ Four Walgreens pharmacists disagreed with this policy and were suspended from their positions and placed on unpaid leave.⁴⁰ This administrative rule is enforceable by law and requires penalties to be imposed against the pharmacy for violation of the rule ranging from a fine to revocation of its license.⁴¹ Of course, a pharmacy may choose to not dispense contraceptives at all, in which case pharmacists would not be required to dispense emergency contraceptives. Though Illinois is the only state where such a rule

38. See generally Nicolas P. Terry, *Prescriptions Sans Frontières (Or How I Stopped Worrying About Viagra on the Web but Grew Concerned About the Future of Healthcare Delivery)*, 4 YALE J. HEALTH POL'Y, L., & ETHICS 183 (2004) (discussing the delivery of health care over the World Wide Web).

39. See sources cited *supra* note 8.

40. Danya Brown, *'Plan B' Complaint Filed with State; Drugstore Accused of Violating Rule on Morning-After Pill*, SPRINGFIELD ST. J.-REG. (Ill.), Jan. 12, 2006, at 1, available at 2006 WLNR 739347.

State law requires any Illinois pharmacy that sells contraceptives to fill prescriptions for emergency contraception. If it is not in stock, a pharmacist can offer to order it, provide a medically acceptable alternative or direct customers to another pharmacy.

Penalties for failing to dispense these drugs can include a fine, license suspension or even license revocation.

The rule has spawned state and federal lawsuits. Four Walgreens pharmacists have been placed on unpaid suspensions for refusing to adhere to the rule, and one Walgreens pharmacist was fired for refusing to fill a prescription for emergency contraception.

Two state lawmakers recently filed legislation allowing pharmacists to refuse to dispense contraceptives because for their religious beliefs.

Id.

41. See sources cited *supra* note 8.

is in effect,⁴² the dilemma it presents nonetheless sets a trap for the pharmacist who understands and believes that the drug may act as an abortifacient. Some states are silent on this issue, but other states are split on whether pharmacists and other medical professionals should be able to refuse to dispense emergency contraceptives against their own conscientious objection.

Forty-six states have a “conscience clause” that protects medical practitioners (not necessarily pharmacists) from having to perform medical procedures (like abortions) that they find objectionable.⁴³ Four states currently have conscience clauses that are specific to pharmacists and their right to refuse prescriptions: Arkansas, Mississippi, South Dakota, and Georgia.⁴⁴ Several other states are considering legislation that would allow for a refusal to fill a prescription based on conscience.⁴⁵

On the other hand, several states are evaluating laws that would require pharmacies to fill *all* legally prescribed medications: Arizona, Minnesota, Wisconsin, Missouri, Michigan, West Virginia, New Jersey, Pennsylvania, New York, and Maryland.⁴⁶ Some states have an internal dilemma with their own laws and proposals,⁴⁷ and

42. See sources cited *supra* note 8.

43. See Collins, *supra* note 27, at 48. See also Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 97 n.172 (2002) (listing states with conscience clauses that protect a right to refuse to participate in an abortion).

44. Rogene Fisher, *Access to Birth Control Under Threat?: 'The Pill' Is Now Caught Up in Abortion Battle*, ABC NEWS, Aug. 18, 2005, <http://abcnews.go.com/Health/print?id=1046952>. See also Rob Stein, *A Medical Crisis of Conscience: Faith Drives Some to Refuse Patients Medication or Care*, THE WASH. POST, July 16, 2006, at A6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/15/AR2006071500846.html>.

45. These states include Illinois, Indiana, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Tennessee, Wisconsin, and West Virginia. See Stein, *supra* note 44 (chart depicting conscience legislation by state).

46. See Stein, *supra* note 44 (chart depicting conscience legislation by state).

47. For example, the Tennessee Code currently states that a health care professional shall not be “prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection, and no such institution, employee, agent, or physician shall be held liable for such refusal.” TENN. CODE ANN. § 68-34-104(5) (West 2006). On the other hand, the Tennessee Code’s official policy statement on contraceptives supports the elimination of “inhibitions and restrictions” in relation to contraceptives “so that all persons desiring and needing contraceptive[s] . . . shall have ready and practicable access thereto.” *Id.* § 68-34-103(2), (3). The code and the policy seem to conflict as to when a health care professional must carry out the policy against his or her conscience.

Tennessee also has legislative proposals extending protection to all

some are simultaneously considering conflicting legislative proposals, demonstrating the very viable public dispute over this dilemma.⁴⁸

Pending Federal legislation ranges from proposals that claim to protect consumers,⁴⁹ to others that claim to protect medical professionals of faith,⁵⁰ to bills that require assistance to protect rape victims.⁵¹ A conscience right in health care is not necessarily a

pharmacists regarding refusal of any prescription to which the pharmacists is morally or religiously opposed, including all forms of contraceptives. See H.R. 1383, 104th Gen. Assem., Reg. Sess. (Tenn. 2005), available at http://www.legislature.state.tn.us/Info/Leg_Archives/104GA/Bills/BillText/HB1383.pdf; S. 76, 104th Gen. Assem., Reg. Sess. (Tenn. 2005), available at http://www.legislature.state.tn.us/Info/Leg_Archives/104GA/Bills/BillText/SB0076.pdf. House Bill 1383 and Senate Bill 76, the "Pharmacist's Freedom of Conscience Act," would specifically allow a pharmacist to refuse to fill prescriptions based upon "conscientious objection," but the bill would also prevent pharmacy owners and operators from taking disciplinary action against the pharmacist refusing prescription, and would provide the pharmacists with immunity from liability related to that refusal. *Id.* But the bill also requires a pharmacist to notify the employer of his or her objections, and the pharmacy owner must notify customers that the pharmacy may refuse to fill certain prescriptions as a result of conscientious objection. *Id.*

48. For example, Missouri is considering a law that allows a pharmacy or pharmacist to refuse to provide prescriptions, as well as a law that would require a pharmacy to provide prescriptions. Missouri may be responding to the new rules in its neighboring state of Illinois. See Jo Mannies, *Abortion Becoming a State-by-State Fight*, ST. LOUIS POST-DISPATCH, Jan. 22, 2006, at B1, available at 2006 WLNR 1214842.

[A]bortion opponents in Missouri are concerned about the effect of Illinois' order mandating that any pharmacy carrying birth-control pills also fill prescriptions for Plan B, emergency contraception commonly known as the "morning-after pill."

....

Edward Martin, a St. Louis lawyer, is one of the attorneys defending Illinois pharmacists who have sued to overturn the order.

With Missouri Gov. Matt Blunt's support, abortion opponents expect to press for a new Missouri law allowing pharmacists to refuse to fill such prescriptions. Planned Parenthood is among the groups pushing for a countermeasure that would guarantee women's access to all forms of contraception, including Plan B.

Id.

49. Internet Pharmacy Consumer Protection Act, H.R. 3880, 108th Cong. (2004) (regulating internet pharmacies). See also Stein, *supra* note 44.

50. Workplace Religious Freedom Act, S. 1124, 105th Cong. (1997) (providing protections to religious health care workers). See also Stein, *supra* note 44.

51. Compassionate Assistance for Rape Emergencies Act, S. 1564, 108th Cong. (2003). This Act requires hospitals to provide the morning-after pill to rape victims. Actually, this was likely the original objective of the morning-after pill, yet others see the rape victim access argument as diverting from the central focus for

new debate, but this issue has erupted over Plan B distribution.⁵²

There is some case law on point in this discussion.⁵³ In January of 2001, an Ohio pharmacist, fired for refusing to fill a prescription for the emergency “contraceptive” pill known as Micronor, was allowed to continue with her lawsuit after a federal judge refused to dismiss the case.⁵⁴ U.S. District Judge Herman Weber ruled that an Ohio law designed to protect people who refuse to perform or participate in medical procedures resulting in an abortion applies to pharmacists.⁵⁵

supplying Plan B.

Many will point to victims of rape and incest as those who could benefit immensely from Plan B being made readily available. As usual, though, this is a red herring argument intended to distract from the real issue: that Plan B will be used in many cases resulting from blatantly irresponsible behavior. By holding victims of rape and incest over the American conscience, countless thousands of other women are given a shoo-in, leaving very little in the way of consequences for a careless lifestyle.

Furthermore, if women's groups really were so concerned with the health and reproductive rights of a rape victim, they would insist on a physical examination by a licensed doctor. Not requiring a doctor's examination, even if it is an unforeseen or unintended consequence, is one major misstep in making Plan B available over the counter to persons 18 or older. But then of course, this isn't really about rape victims. Plan B manufacturers advertise its product in two widely read and popular magazines, *Cosmopolitan* and *Lucky*. Surely, reducing regulation of Plan B is not intended to ensure that rape victims have easier access to contraception.

Christa Byker, *Moral Abandonment*, CAVALIER DAILY, Sept. 1, 2006, <http://www.cavalierdaily.com/CVarticle.asp?ID=27390&pid=1465>.

52. Stein, *supra* note 44.

The debate over the right of conscience in health care is far from new. After the 1973 *Roe v. Wade* decision, many states passed laws protecting doctors and nurses who did not want to perform abortions. Oregon's 1994 legalization of physician-assisted suicide lets doctors and nurses decline to participate.

The clash resurfaced with anti-abortion pharmacists refusing to fill prescriptions for the morning-after pill.

Id.

53. For a thorough review of the case law (through 1993) on rights of conscience for health care workers, see Wardle, *supra* note 27, at 178. Professor Wardle argues that “hostile judicial interpretations have seriously diminished the scope of effectiveness of the limited protections afforded by conscience clauses.”

Id.

54. Lumpkin, *supra* note 27, at 106; Dennis M. Mahoney, *Prescription for Dispute: Can Pharmacist Refuse Service for Reasons for Conscience?*, COLUMBUS DISPATCH (Ohio), Dec. 14, 2001, at 1E, available at 2001 WLNR 11910250. Lumpkin details lawsuits in Texas and Georgia as well. Lumpkin, *supra* note 27, at 106–07.

55. CSNNews.com, *Court Rules Pharmacist May Object to Abortion Pill*, Jan. 26, 2001, available at <http://www.newsmax.com/archives/articles/2001/1/25/184722>

Lawsuits in the United States over contraception are not new. But analyzing this issue a bit deeper in light of the constitutional parameters is instructive. Contraceptive bans were considered in the context of marriage in a case brought by a doctor for the right to prescribe contraceptives on behalf of his married female patient in *Griswold v. Connecticut*.⁵⁶ Citing previous family law cases based on parental rights, the United States Supreme Court expounded that it has “respected the private realm of family life which the state cannot enter,”⁵⁷ and determined that marriage and its intimacy are founded in a “right of privacy older than the Bill of Rights.”⁵⁸ The Court related its holding to notions of privacy surrounding the marriage relationship. Interestingly, this was the first time the Supreme Court gave explicit recognition to a constitutional right to privacy, namely, marital privacy.

In 1972, the Court was faced with the task of determining the constitutionality of a Massachusetts contraceptive distribution ban for unmarried people in *Eisenstadt v. Baird*.⁵⁹ The Court took advantage of the same reasoning used in *Griswold*, but took it out of the context of marriage by applying it to any individual who desired to use contraception—affording the use of contraceptives and the right of privacy to unmarried individuals.⁶⁰ The Court could find no difference between married persons and unmarried persons on equal protection grounds.⁶¹ Individual rights reigned. Contraception was taken out of the context of marriage, and so was sex. Thus, the United States Supreme Court created a great conundrum in understanding contraception—it began the myth that sex is about individuals.

This individualist approach has led to a proliferation of contraceptive use, from birth control requested in *Eisenstadt* to emergency contraception and Plan B required to be dispensed in Illinois. What the Supreme Court likely could not foresee was how this road to contraceptive proliferation would result in such a state-by-state conundrum, pitting pharmaceutical providers against women and men who are scared of pregnancies that could result from the consequences of the freedom offered constitutionally

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56. 381 U.S. 479 (1965).

57. *Id.* at 488.

58. *Id.* at 495.

59. 405 U.S. 438 (1972).

60. *Id.* at 453–54.

61. *Id.*

under *Eisenstadt*.

It is very clear now, however, that pharmacists and other health care providers can be, and have been, ethically trapped in the middle. Understanding the arguments surrounding this dilemma is critical to the legal analysis of this issue.

IV. A REVIEW OF THE ARGUMENTS

Now that Plan B has been made available over the counter, a review of the arguments on requiring its distribution versus allowing conscientious objection is important.

A. *Why Doctors May Object to Prescribing and Pharmacists Object to Distributing the "Morning-After Pill"*

The duty to do good to the patient is the most important aspect of any objection. The health and welfare of the patient is always a pharmacist's chief concern. The state should not put physicians or pharmacists in a situation where they are forced to dispense medication, even if they feel it could harm the patient. This violates the essence of pharmacology. It makes no sense to require a pharmacist by law to dispense a drug that he or she would never advise a patient to use.⁶²

Secondly, the duty to not take life is also of chief importance to many pharmacists. Scientifically speaking, the "morning-after pill" is potentially an abortifacient and may violate the doctor's or pharmacist's moral and religious convictions through enabling another to take a human life. There is no question that the abortion pill is an abortifacient.⁶³

Pharmacists may have religious and moral objections, in addition to scientific ethical reasons, for not desiring to participate

62. *Public Hearing on Proposed Amendment to Illinois Pharmacy Practice Act*, (statement of Peggy Pace, Pharmacists for Life, June 2, 2005), available at http://www.pfli.org/peggypacetestimony_june05.html. Pharmacists for Life further argue that a conscience clause is needed immediately in light of the developments this article traces. See Pharmacists for Life, *Why a Conscience Clause is a Must . . . NOW!*, <http://www.pfli.org/main.php?pfli=conscienceclausefaq> (last visited March 4, 2007). A model conscience clause is also available from Pharmacists for Life at <http://www.pfli.org/main.php?pfli=modelpharmacistcc> (last visited March 4, 2007).

63. Even Planned Parenthood literature and Plan B marketing hedges on this point, claiming that the drug may or may not work to terminate the embryo by inhibiting implantation. See Pruthi, *supra* note 13; Duramed, *How Plan B® Works*, *supra* note 10.

in taking life. The pharmacists fired from the Illinois Walgreens cited religious or moral objections to filling prescriptions for the morning-after pill.⁶⁴

Finally, an objecting pharmacist might argue that the patient can (generally) easily go to another pharmacist, or another pharmacy. This allows for continued autonomy for both the health care provider and for the patient.

B. Why Doctors Cannot Object to Prescribing and Pharmacists Object to Distributing the "Morning-After Pill"

Of chief importance on this side of the debate is patient autonomy—a patient has a right to her own body. This position requires the pharmacist or doctor to sacrifice his or her moral and religious (and even medical) convictions for the patient's autonomy.⁶⁵

Secondly, patient privacy is a motivating factor. A patient ought to be able to choose the least invasive method for controlling reproduction and family planning. Proponents also argue that the pharmacist has a duty to the patient to provide the emergency contraceptives.⁶⁶

Patient convenience is another key factor. Should not women be able to have emergency contraceptive drugs on hand "just in case?" Yet, planning for "an emergency" seems to defeat the purpose of family planning in the first place.

Finally, proponents of these drugs argue that the pharmacist ought to seek employment that lines up with his or her conscience.

This debate may be more about personal freedoms in sexuality than about contraception. Its arguments and underpinnings stem from *Eisenstadt*, cutting to the core of our cultural perceptions of

64. See *supra* authorities cited in note 8.

65. See generally Stephanie E. Harvey et al., Do Pharmacists Have the Right to Refuse to Dispense a Prescription Based on Personal Beliefs?, http://www.nm-pharmacy.com/body_rights.htm (last visited March 4, 2007).

66. See Lumpkin, *supra* note 27, at 125–29. Requiring a professional ethical duty of a pharmacist to protect the patient's best interest may actually be better carried out by not filling the prescription, if that drug could potentially harm the patient, rather than simply giving the patient what he or she wants. Indeed, one might speculate that upholding life, rather than supporting a patient's convenient termination of her own offspring, is actually more accurately upholding the patient's best interests. On the other hand, Lumpkin argues that this shows a clear disrespect for a patient's autonomy and allows the pharmacist who refuses to dispense the contraceptive to place his or her concerns for their own ethical autonomy above the autonomy of the patient. *Id.* at 125.

sexuality, and how it ought to be separated from reproduction, and from marriage. Logically, the fallibility and potential flaws of birth control defy that premise and require that sex remain in the context of reproduction, thus the need for Plan B to prohibit that result.

Evoking strong emotions on both sides, health care providers express concern for patient health, life issues, and faith and moral objections that result. Emergency contraceptive drugs present a pharmacist with a crisis circumstance that he or she may or may not be prepared for, yet may be required to respond to.

This discussion may be served by placing it in the context of a discussion on sex being about two individuals communicating about their family planning. This generally occurs in the planning for, and context of, marriage. Remember that contraception was originally looked at by the Supreme Court in the context of marriage in *Griswold*. But *Eisenstadt's* application of contraceptive privacy rights to unmarried individuals has brought this debate out of marriage and to the need for drugs like Plan B. Marital family planning is generally pursued intelligently and thoughtfully by communication between the partners, with the highest consideration of the health of the partners. An "emergency" causes individuals to disregard these factors and pursue a solution with a merely emotional decision-making process. Plan B seems to have been designed for just such a situation, yet making legal policy on emergency emotional concerns is never wise.

V. CONCLUSION

Extreme individuality has brought Americans to need drugs like Plan B to avoid the difficult issues surrounding family planning, contraception, and contraceptive health. This in turn leads to handling the issue emotionally, rather than intelligently and wisely. In fact, a recent study considered the effect of increased access to emergency contraceptive pills. After a systemic review of the data, it was apparent that "[i]ncreased access to emergency contraceptive pills enhances use but has not been shown to reduce unintended pregnancy rates."⁶⁷

67. Elizabeth G. Raymond, James Trussell & Chelsea B. Polis, *Population Effect of Increased Access to Emergency Contraceptive Pills: A Systematic Review*, 109 *OBSTETRICS & GYNECOLOGY* 181 (2007). "Further research is needed to explain this finding and to define the best ways to use emergency contraception to produce a public health benefit." *Id.*

The matter of life and health involved in this debate cannot be ignored. The mechanism of action uncertainty is a legitimate dispute. This article shows how proponents of emergency contraception use euphemisms to win the debate, despite the lack of scientific agreement on Plan B's mechanism of action. A proponent's use of the term "fertilized egg" rather than "embryo" patently exposes the concern over mistreatment of life.

Patient welfare cannot be ignored in this discussion either. The harm caused by emergency contraceptive drugs is unclear, and there is no ongoing research or studies to determine the effects of emergency contraceptives. And there is not likely to be research until women who use the drug suffer negative side effects. Although these drugs have been approved since 1998, and were used before that time for treatment of rape victims, no current study is being conducted to test its adverse effects on women. It is worth noting that the abortion pill was approved despite evidence that "hemorrhage and infection are the leading causes of mifepristone-related morbidity and mortality," and there is "a significant risk of severe, life-threatening, or even lethal adverse events."⁶⁸

Finally, women and the providers of Plan B are not facing the very real circumstance that Plan B's availability over the counter is quite likely to be exploited as one more tool to serve male sexual freedom.⁶⁹

Medical ethics and the practice of medicine as an act of conscience have become integral to this scientifically unsettled debate. Before medication is prescribed or dispensed, a prudent practitioner weighs carefully the risks of the medication with the potential benefits.⁷⁰ Laws that require a medical professional to perform an act against his or her best judgment violate the code of ethics of that profession to do no harm in the professional's highest and best medical judgment. It ought to be alarming that a patient's expectations may become the standard for professional action. Ought medical professionals prescribe and dispense what

68. Gary & Harrison, *supra* note 18, at 1, 5.

69. Anecdotal evidence of this was apparent on the morning after the FDA approved over the counter sales of Plan B. A morning radio news show in Hampton Road on WNIS took a call from a male voice who exclaimed: "Plan B—Yeeaaahhh." *Tony Macrini Morning Show* (Newsradio AM WNIS, Norfolk, VA broadcast Aug. 24, 2006).

70. Peggy Pace, *supra* note 62 ("Everything I do as a pharmacist is an act of moral conscience.").

the patient wants even if it harms him or her, just because the patient's autonomy allows a patient to live a risky life?⁷¹ Family planning deserves a principled approach carried out with integrity that protects the parties, and that approach should be reflected in legal policy and lawmaking.

Should doctors and pharmacists be able to refuse to give out emergency contraceptives based on conscientious objections? Sexual freedom that was protected by the Supreme Court's emancipation of sexuality from reproduction has allowed emergency contraceptives to be used for any purpose an individual desires, rather than for the best and most responsible medical purposes. Therefore, when a medical professional has concerns that an emergency contraceptive may harm the health of his or her patients or customers or their offspring, a conscientious objection provided by law seems more appropriate than a legal requirement to dispense despite objections, at least until a medical and legal consensus can be reached.

71. *Id.*