From *Eisenstadt* to Plan B

A Discussion of Conscientious Objections to Emergency Contraception

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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 heard and decided in *Griswold v. Connecticut* that married people have constitutionally protected rights to contraceptive use.2 The Court again reviewed the matter of birth 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

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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 constitutionality of prescription contraceptive use by married couples).

3 405 U.S. 438 (1972) (holding that privacy of individuals to contraceptive use is also constitutionally protected).

to the birth control pill in that it contains a higher dosage of the key ingredient used in prescription birth control pills, with a different dosing regimen.\textsuperscript{5}

Because the mechanism of action for these drugs is scientifically uncertain,\textsuperscript{6} some pharmacists are refusing to dispense certain drugs that are designated birth control, but may also work as an abortifacient.\textsuperscript{7} Should doctors and pharmacists be able to refuse to give out emergency contraceptives based on conscientious objections? This dilemma raises the issue of whether 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.\textsuperscript{8}

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\textsuperscript{5} \textit{Id.} See also U.S. Food and Drug Administration, \textit{Plan B: Questions and Answers}, August 24, 2006, \url{http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm} \[hereinafter FDA Answers\] (stating that “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.”).

\textsuperscript{6} “Mechanism of action” refers to the actual physical effect of the pill on the ovum or the zygote. \textit{See} Section I infra.


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 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.

\textit{Id.}

\textsuperscript{8} Currently, only Illinois requires a pharmacist to fill contraception prescriptions against his or her conscience. 29 Ill. Reg. 13639 (Aug. 26, 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.” \textit{Sarah J. Vokes, Just Fill the
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 that 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 one way or the other.

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

It concludes that this debate is more about the politics of sexual freedom which has grown out of Eisenstadt than the 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


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

. . . [T]hree of the disciplined Illinois pharmacists have filed religious discrimination complaints against Walgreen’s 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.
serve while ensnaring conscientious pharmacists in an ethical conflict that goes to the core of their professional code.

I. How the Birth Control Pill and Emergency Contraceptives Work: Drug and Medical Facts

The common birth control pill is comprised of some combination of hormones that work 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. Note that the fourth 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


The commonly used name of ‘the pill’ is made up to two ‘styles’ 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. 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 e.g. Minulet, or as a triphasic formulation e.g. Tri-Minulet. They are not very popular because they double the risks of a woman developing a blood clot.

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.” See also FDA Answers, supra note 5 (stating 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.”). Similarly, the Plan B website claims that it will not work if you are already pregnant, defining pregnancy as implantation. How Plan B Works, Plan B, http://www.go2planb.com/ForConsumers/AboutPlanB/HowItWorks.aspx (last visited Oct. 31, 2006). The site specifically refers to the above fourth mechanism stating: “Plan B may also work by preventing [a fertilized egg] from attaching to the uterus (womb).” Id.
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 also 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

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¹² Fertilization occurs when the sperm fertilizes the ovum, resulting in a human zygote. This is also referred to as conception, and the beginning of a human life. That zygote continues to grow once implanted in the uterine lining. Id.

¹³ See Sandhya Pruthi, M.D., Morning-after Pill: Emergency birth control, http://www.mayoclinic.com/health/morning-after-pill/AN00592 (last visited Oct. 31, 2006). This article explains that fertilization may occur at different points depending on the ovulation cycle. “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 fallopian tube until the egg appears.” Id. at 1.

¹⁴ Id.

¹⁵ Id.
These combinations allow for a concentrated manner of drug delivery in a short period of time, namely within seventy-two hours of unprotected sexual activity.\textsuperscript{16} The Food and Drug Administration has approved two emergency contraceptive products, Preven in 1998 (no longer being marketed), and Plan B in 1999.\textsuperscript{17} It also approved Mifepristone, the abortion pill, in 2000.\textsuperscript{18} Each of these drugs has been available by prescription and the FDA has recently approved Plan B for over-the-counter distribution.\textsuperscript{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.\textsuperscript{20} By contrast, medication abortion “is the use of medications that can induce an abortion.”\textsuperscript{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.\textsuperscript{22} Then methotrexate “stops the further development of the pregnancy in

\begin{itemize}
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} FDA Answers, \textit{supra} note 5;
  \item \textsuperscript{18} Margaret M. Gary and Donna J. Harrison, \textit{Analysis of Severe Adverse Events Related to the Use of Mifepristone as an Abortifacient}, Women’s Health, 40 \textit{THE ANNALS OF PHARMACOTHERAPY} at 1 (Feb. 2006).
  \item 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 \textit{OBSTETRIC-GYNECOLOGIC TERMINOLOGY}, \textit{supra} note 11. In fact, use of the pro-choice terminology allows Planned Parenthood sources to state, “Emergency contraception helps \textit{prevent} pregnancy; medication abortion \textit{terminates} pregnancy.” \textit{Id.} at 1.
  \item \textsuperscript{21} \textit{Id.} at 1.
\end{itemize}
the uterus, and misoprostol cause the uterus to contract and empty,” expelling the embryo and creating an abortion.\textsuperscript{23} It can be used within forty-nine days of the last menstrual period to cause a medical abortion.\textsuperscript{24} There are numerous dangers associated with medication abortion.\textsuperscript{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. . . .The knowledge of the mechanism of action of mifepristone and levonorgestrel in humans, when used for contraceptive purposes and especially for emergency contraception, remains incomplete.”\textsuperscript{26}

\textsuperscript{22} Id. (citing Creinin & Aubeny (1999)).

\textsuperscript{23} Id.

\textsuperscript{24} Mifepristone, formerly known as RU-486, is an antiprogesterone drug that blocks receptors of progesterone, a key hormone in the establishment and maintenance of human pregnancy. 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. 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. In the United States, the brand name for mifepristone is Mifeprex\textsuperscript{TM}, which is manufactured by Danco Laboratories, LLC (Danco, 2000). See generally id.

In the U.S., 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. The FDA approved mifepristone for use up to forty-nine days after the first day of the last menstrual period. Thus, this is used in the early stages of pregnancy—you know you want to abort a pregnancy. This would not be considered “emergency contraception” since you know you are pregnant. See generally id.

\textsuperscript{25} See Gary, supra note 18, noting six hundred seven unique mifepristone adverse event reports that were submitted to the FDA over a four year period, with adverse effects ranging from mild to moderate to sever to life threatening or disabling to death. Planned Parenthood literature also admits the possibility of harm to women from medication abortion. Johnsen, supra note 21, at 2.

\textsuperscript{26} K. Gemzell-Danielsson and L. Marions, Mechanisms of action of mifepristone and levonorgestrel when used for emergency contraception, 10 HUM. REPROD. UPDATE 341 (Jul-Aug 2004), available at www.pubmed.gov. (purposing to summarize available data that indicate the contraceptive effects of those drugs, when used in single low doses, do not inhibit implantation but either blockade or delay ovulation). However, there is also medical scholarly research that finds hormonal contraceptives abortifacient. William Colliton, Jr., M.D., Birth Control Pill: Abortifacient and Contraceptive, George Washington University Medical Center, manuscript on file with author (Jan. 8, 2005), available at http://www.epm.org/articles/26doctor.html. See generally RANDY ALCORN, DOES THE BIRTH CONTROL PILL CAUSE ABORTIONS? (2001).
The scholarly research and literature on this subject matter also reveals that the key dispute of fact is the uncertainty of the mechanism of action. On one hand, the drug mechanism is thought to work to prevent ovulation or inhibit fertilization. However, research also shows that the drug works to create a hostile endometrial environment that rejects a fertilized egg. Plan B literature clearly states that the morning-after pill works to prevent implantation, or pregnancy. 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. 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.

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 (Oct. 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 (Winter 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) (generally discussing the ethical concerns surrounding emergency contraception drugs and how these present the pharmacist with a serious dilemma, stating “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); and Lynn D. Wardle, Protecting the Rights of Conscience of Health Care Providers, 14 J. LEGAL MED. 177 (June, 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 supra note 10 and accompanying text.

29 Both pro-abortion and pro-life researchers agree on this, they merely use different terms to label that rejection. See Pruhti, supra note 13, Johnsen, supra note 20 (both admittedly pro-choice perspectives), and The Pill – How it Works, supra note 9 and William Colliton, infra note 27 (both admittedly pro-life perspectives).

30 See FDA Answers, supra note 5 (emphasis added); See also What is Plan B?, Plan B, http://www.go2planb.com/For Consumers/AboutPlanB/WhatsPlanB.aspx (last visited Oct. 31, 2006) (stating that Plan B reduces the risk of pregnancy by 89%, or can prevent a pregnancy).

31 See supra note 26 (listing research finding hormonal contraceptives abortifacient).
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, and it is often marketed as a “second chance” drug. Additionally, 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 (OTC) availability. On August 24, 2006, the FDA approved over-the-counter access for Plan B.

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 that fact that it interacts chemically with the mother even prior to implantation.” All hormonal birth control agents, including Plan B “have at least some interceptive (abortifacient) potential,” and confusion of terms like conception with

32 See Buy Plan B Morning After Pill (Emergency Contraception), http://www.morning-after-pill.com (last visited Oct. 31, 2006). “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 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 on Plan B, 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, Selling the Pill, Pharmacists for Life, http://www.pfli.org/brauer_sellingthepill.html (last visited Oct. 31, 2006). “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.
contraception, or preventing pregnancy with abortion “serves to enhance the marketability of hormonal birth control.”

A combination of the public confusion and the cavalier market availability can serve to create more ethical concerns, and 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. From protecting patients’ rights to preferring medical professionals’ ethical concerns, states are approaching this area of law from very different perspectives.

II. Facts & Current Status of the Law: Conscience Clauses and Emergency Contraceptives

Last August Illinois made permanent an administrative state rule that requires any pharmacy that distributes contraceptives to distribute emergency contraception, or the morning-after pill. Three Walgreen’s pharmacists failed to agree with this policy and were suspended from their positions and placed on unpaid leave. This administrative rule is enforceable by law

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

38 See generally Nicolas P. Terry, Prescriptions sans Frontieres, IV YALE J. HEALTH POL’Y, L, & ETHICS 183 (Summer 2004) (discussing the delivery of health care over the World Wide Web).

39 Supra note 8.


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 Walgreen’s pharmacists have been placed on unpaid suspensions for refusing to adhere to the rule, and one Walgreen’s pharmacist was fired for refusing to fill a prescription for emergency contraception.
and requires penalties against the pharmacy for violation of the rule from a fine to revocation of its license.\textsuperscript{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 is in effect,\textsuperscript{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 state laws are split on whether pharmacists and other medical professionals should be able to refuse to dispense emergency contraceptives against their own conscientious objection when they are required to do so by state law.

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.\textsuperscript{43} Four states currently have conscience clauses that are specific to pharmacists and their right to refuse prescriptions: Arkansas, Mississippi, South Dakota, and Georgia.\textsuperscript{44} Several other states are considering legislation that would allow for a refusal to fill a prescription based on conscience.\textsuperscript{45}

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

\textsuperscript{41} Supra note 8.

\textsuperscript{42} Id.


\textsuperscript{45} These states include New Hampshire, New York, Minnesota, Wisconsin, Illinois, Indiana, Oklahoma, West Virginia, Tennessee and New Jersey. Id. 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
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 some are simultaneously considering conflicting legislative proposals, demonstrating the very viable public dispute over this dilemma.48

when such refusal is based upon religious or conscientious object, and no such institution, employee, agent, or physician shall be held liable for such refusal.” TENN. CODE ANN. § 68-34-104(5)(2005). See also Appendix infra.

46 Id. at A6.

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 object, and no such institution, employee, agent, or physician shall be held liable for such refusal.” TENN. CODE ANN. § 68-34-104(5)(2005). On the other hand, the Tennessee Code’s official policy statement regarding contraceptives indicates that contraceptive supplies, which include general birth control, which 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.” TENN. CODE ANN. § 68-34-103(2)-(3)(2005). But Tennessee also has legislative proposals extending protection to all pharmacists regarding refusal of any prescription to which the pharmacists is morally or religiously opposed, including all forms of contraceptives. HB 1383 and SB 0076, 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. However, the bill also requires a pharmacists 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. See Bill Companion Info, Tennessee Legislature, http://www.legislature.state.tn.us/bills/currentga/BillCompanionInfo.aspx?BillNumber=HB1383 (last visited Oct. 31, 2006).

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. See also Stein, supra note 44, at A6. 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 206 WLNR 1214842.

“…abortion opponents in Missouri are concerned about the effect of Illinois’ order mandating that any pharmacy carrying birth-control pills 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.
Pending Federal legislation ranges from proposals that claim to protect consumers,\footnote{49} to others that claim to protect medical professionals of faith,\footnote{50} to bills that require assistance to protect rape victims.\footnote{51} A conscience right in health care is not necessarily a new debate, but this issue has erupted over Plan B distribution.\footnote{52}

There is some case law on point in this discussion.\footnote{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.\footnote{54} U.S. District Judge Herman Weber ruled that an Ohio law (one of the forty-six states


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

\footnote{51} Compassionate Assistance for Rape Emergencies Act, S. 1564, 108th Cong. (2003) (requiring hospitals to provide the morning-after pill to rape victims). \textit{See also} Stein, \textit{supra} note 46. Actually, this was the original objective of the morning after pill.

The morning after pill was originally created in the 1960s as treatment for rape victims. In the early 1990s nearly one-third of emergency contraception prescriptions were being written for rape victims. Since that time there has been a great effort to bring awareness to emergency contraception and make it available to women in a more timely fashion. \textit{Morning After Pill – Emergency Contraception – Offered Over the Counter, Apply Now, Your Guide to Women’s Issues, http://womensissues.about.com/od/reproductivehealthissues/i/isorningafter_p/htm. (last visited Jan. 25, 2006).}

\footnote{52} See Stein, \textit{supra} note 44, at A6. The debate over the right of conscience in health care is far from new. After the 1973 \textit{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. \textit{Id.}

\footnote{53} For a thorough review of the case law on rights of conscience for health workers examining all the existing conscience laws in the United States in 1993 \textit{see} Wardle, \textit{supra} note 27, at 178, where Professor Wardle argues that “hostile judicial interpretations have seriously diminished the scope of effectiveness of the limited protections afforded by conscience clauses.”

that has the conscience law for physicians), designed to protect people who refuse to perform or participate in medical procedures resulting in an abortion, applies to pharmacists. 55

Law suits in the United States over contraception are not new, as we have noted. Analyzing this issue a bit deeper in light of the constitutional parameters, however, 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,” and determined that marriage and its intimacy are founded in a “right of privacy older than the Bill of Rights.” 57 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, that traditional notion of privacy as the interest in keeping intimate affairs from public view – marital privacy.

In 1972, the Court was faced with determining the constitutionality of a Massachusetts contraceptive distribution ban to unmarried people in *Eisentadt v. Baird.* 58 The Court took advantage of the same reasoning used in *Griswold,* but taking it out of the context of marriage by applying to any individual who desired to use contraception, affording its use and privacy to unmarried individuals. The Court could find no difference between married persons and unmarried persons (on equal protection grounds). Individual rights reigned, contraception was

55 See *id.* at 106-07.
56 381 U.S. 479 (1965).
57 *Id.* at 484.
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 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.

**III. 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.

*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/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. 59

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/pharmacists moral and religious convictions through enabling another to take a human life. There is no question that the abortion pill is an abortifacient. 60

Pharmacists may have religious and moral objections, in addition to scientific ethical reasons, for not desiring to participate in taking life. The Illinois pharmacists cited religious or moral objections to filling prescriptions for the morning-after pill.

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.


60 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 Pruhti, supra note 13; How Plan B Works, supra note 10.
Why doctors cannot object to prescribing and pharmacists object to filling “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.61

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.62

Patient convenience is another key factor. Shouldn’t 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 sexuality, and how it ought to be separated from reproduction, and from marriage.

61 See generally Stephanie E. Harvey, Ei-Lun Lu, Oscar Rivas & Julie Rodgers, 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 Oct. 31, 2006).

62 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 give 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.
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 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*. *Eisenstadt*’s application of contraceptive privacy rights to unmarried individuals, however, 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.

**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.
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 contraceptive use of 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. There likely won’t be until women who use the drug suffer negative side effects. Although these drugs have been approved since 1998, and were used prior to 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 “a significant risk of severe, life-threatening, or even lethal adverse events.”

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.

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. Laws that

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63 Gary, supra note 1, at 1, 5.

64 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.”

65 Peggy Pace, supra note 59, at 1. “Everything I do as a pharmacist is an act of conscience.” Id.
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 the patient wants even if it harms him or her, just because the patient’s autonomy allows a patient to live a risky life?66 Family planning deserves a principled approach carried out with integrity that protects the parties, and that approach should be reflected in legal policy and any law making.

So should doctors and pharmacists be able to refuse to give out emergency contraceptives based on conscientious objections? Sexual freedom protected by the Supreme Court emancipating 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 who 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.

66 Id. at 2.
Appendix – State by State Comparison on Conscience Legislation