

# BIRTH CONTROL AS A LABOR LAW ISSUE

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## I. INTRODUCTION

The latest challenge to choice is at the local drugstore. The century-long battle to give women the right to control their bodies and their working lives is far from over. The most recent guardians of public morals are the local druggist, who may refuse to fill a prescription for contraceptives, and state legislators, who wish to reverse the long-standing and hard-won privilege to plan a family. In a democracy with majority rule and a plethora of rights and prohibitions, choices must always be weighed. But those choices are too infrequently made by women. Sounding like an early champion of choice, Justice Harlan wrote a separate opinion to *Poe v. Ullman*, an early birth-control decision, in which he argued:

[T]he States . . . should be allowed broad scope in experimenting with various means of promoting [a wide variety of] policies, [but] “[t]here are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality” of the individual.<sup>1</sup>

Justice Harlan thus dissented from a case in which the Court refused to recognize that anti-obscenity laws should not infringe upon women’s rights to choose when and if they have children.

It would be almost a decade after Justice Harlan’s dissent before the Court legalized birth control. But long before and after the Court did so, laws were passed to guarantee that certain majoritarian rights were protected at the expense of women’s dignity and personality. Because contraception was considered by many to be “obscene” and contrary to the morals of a free nation, it took women a century to get the lawful right to employ artificial methods of contraception. Almost a half-century later, women are still trying to fully realize that right.<sup>2</sup> In the way of that right are laws that allow doctors and hospitals to

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1. *Poe v. Ullman*, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)) (second ellipsis in original).

2. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a Massachusetts statute that permitted married couples to use contraceptives, but prohibiting their use by unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a Connecticut statute that prohibited the use of birth control). *See also Ashcroft v. ACLU*, 542 U.S. 656 (2004) (The Court upheld a preliminary injunction against enforcement of the federal Child Online Protection Act, which criminalized commercial Internet postings that were harmful to minors unless the age of the recipient was verified. Justice Breyer, Rehnquist and O’Connor dissented, voting that discussion about birth

refuse family-planning care; that give pharmacists the right to make moral choices to refuse to fill a prescription for emergency contraception; that permit employers to hire women at minimum wage without benefits, or, if there are benefits, to exclude coverage for contraceptives; that mandate family medical leaves but require women to foot the bill, since such leaves are without pay or benefits; that prohibit gender discrimination in employment but make private enforcement of such laws excessively difficult and prohibitively expensive; that prefer laissez-faire capitalism and allow workplaces to refuse to accommodate the needs of working mothers and allow women across the board to earn less than men; that fund, through outrageous tax breaks, corporate empires like Wal-Mart that force their female workers to subsidize their low wages with food stamps and Medicaid. Women in America deserve the right to compete in the marketplace without impediment. Family planning is critical to the enjoyment of that right.

Whatever progress women have made since the Supreme Court recognized their right to plan their own families is still threatened by an advancing assertion of the right to refuse birth control—by pharmacists, employers, Free-Speech anti-choice activists, and anyone else whose moral views stand in the way of women's family planning rights. Additional impediments emanate from women's historic and pervasive subordination. The workplace, where women ought to be able to earn what they are worth to support themselves and their families, is still a battleground. Women have not attained pay equity with men. They are less likely to be insured against health risks. They work, or attempt to work, in a male normative workplace. Women of color in the United States are least likely to have the ability to "execute their choices" because they are disproportionately impoverished, uninsured, and dependent upon public sources for their healthcare, which "ha[s] been systematically underfunded at the state and federal level."<sup>3</sup> To many, it is incomprehensible that "[g]uaranteeing the exercise of the right to reproductive health and family planning for all individuals and couples"<sup>4</sup> is still a problem in the United States in this post-modern twenty-first century.

Contraception is a multi-faceted issue. Public health is clearly implicated. Preventing pregnancies improves the health and longevity of mothers while improving the lives and health of their children. Such family planning more

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control falls outside the reach of the statute.); *Steinberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a Nebraska statute that criminalized partial birth abortions because the statute unduly burdened a woman's right to choose); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding the two-day notice requirement of Montana's Parental Notification of Abortion Act because the statute's "judicial bypass" provisions allow an unemancipated minor to petition the state youth court to waive the notification requirement, satisfied constitutional requirements); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1976) (upholding an Arkansas constitutional amendment that prohibited the use of state funds for any abortion, except to save the life of a mother).

3. Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U.J. GENDER SOC. POL'Y & L. 59, 66 (2005).

4. *Reproductive Rights, Family Planning: A Cornerstone of Control*, UN CHRONICLE, Sept. 1994, at 46, 46. In 1994, the United Nations adopted the goal of expanding reproductive and family-planning rights as the major focus of the 1994 International Conference on Population and Development, noting that available and safe birth control has resulted in improved health for mothers and children. *Id.*

humanely and efficiently fulfills the mandate to increase and multiply. Contraception is an ethical issue that surrounds the question of when human life begins. According to the doctrine of some organized religions, birth control is a sin, and contraception is tantamount to abortion. However, gender discrimination against women is implicit in government-endorsed attempts to deny access to birth control. It was a man who first made contraception illegal in this country: A male Supreme Court ignored its necessity for so long. The denial of contraception is an earmark of certain sexist cultures that relegate women to the hearth, the bedroom and the cradle, and is rooted in a desire to maintain the status quo of male hegemony. But it is, at bottom, a labor law issue.

Labor is the only variable that women control. It is not within their power to change how other people think about and react to them. It is the single sphere in which their competence, intelligence and industry actually make a difference. Labor is the thing to which women can cling in order to maintain and advance as a class, while social norms, practices and codification change—whether through revolution or evolution. Doubly-employed as homemakers and wage earners, women cannot compete or advance in the marketplace without the ability to plan a family. Nor can they afford to bear the expense of contraception when they earn so much less than men.

It is interesting to begin with a look at the tortuous legal battle to recognize the constitutional right to contraception. In juxtaposition—and perhaps inapposite—to that right is the legislated guarantee of freedom of conscience that has been interpreted to mean a person or corporation has the right to make moral refusals to serve a woman's family-planning health needs.<sup>5</sup> To examine women as consumers and paid employees requires a look at the jobs, salaries, benefits and working habits of women as a class. A foray into a particular workplace, Wal-Mart, where women constitute an overwhelming majority of the workers, will exemplify the critical financial and employment disadvantage visited upon women by legal obstructions to birth control. Finally, parsing the theoretical and constitutional bases for successful lawsuits challenging the exclusion of birth control from health insurance coverage reifies the legal deficits suffered by women whose right to plan a family is thwarted. As one court found, excluding birth control from the risks against which companies chose to insure their employees defeats the purpose of civil rights law, which was “to end years of discrimination in employment and to place all men and women,

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5. See, e.g., Church Amendment to the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91 (current version at 42 U.S.C. § 300a-7 (2000) (allowing individuals and medical facilities the right to decline the right to provide abortion and sterilization services based on moral or ethical grounds). See generally, R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471 (2005) (“Finally, there is the awesome scale and scope of the abortion wars. In the absence of legislative options for outright prohibition, abortion opponents search for proxy wars, using debates on research involving human embryos, the donation of organs from anencephalic neonates, and the right of persons in a persistent vegetative state to die as opportunities to rehearse arguments on the value of biologic but nonsentient human existence. Conscience clauses represent but another battle in these so-called culture wars.”). See also GUTTMACHER INST., STATE POLICIES IN BRIEF, REFUSING TO PROVIDE HEALTH SERVICES (2006), [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf).

regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”<sup>6</sup>

## II. LEGALIZING AND PROTECTING CONTRACEPTION AS A FUNDAMENTAL RIGHT

Some forms of artificial contraceptives have been legal since 1936. However, family planning has never been easy for women. Modern history illustrates the criminal prohibitions, social and moral disapprobation, physical inaccessibility, and the complete absence of legal mandates for the provision of contraceptives. Even despite their constitutional protections, women have found the pragmatics of birth control overwhelming at worst and daunting at best. As the Supreme Court once observed: “Deeply embedded traditional ways of carrying out state policy . . .”—or not carrying it out—“are often tougher and truer law than the dead words of the written text.”<sup>7</sup>

Birth control of any type was legal in the United States until 1873. Historians contend that the drive to legalize all forms of birth control—which had always included abortion—was “spurred by a backlash against the women’s rights movements that reflected anxieties about women deserting their conventional positions as mothers.”<sup>8</sup> Apparently, the driving force behind the original anti-birth control statutes was a New Yorker named Anthony Comstock.<sup>9</sup> Born in 1844 in Connecticut, the state that proved to be the battleground for one of the most important struggles over access to birth control, Comstock moved to New York City after his service in the Civil War. A self-proclaimed Christian, the denizens of the country’s largest city caused him great consternation. He became a type of one-man posse in the fight against what he perceived to be blatant immorality. Among those matters that most enraged him and other strident members of anti-obscenity groups was the contraceptive industry. Comstock was certain that the availability of contraceptives alone fostered and encouraged immorality. Comstock authored his own anti-obscenity bill, including a ban on contraceptives, which he managed to convince a majority of the United States Congress to adopt. It bore his name, and emerged as the Comstock Act.<sup>10</sup> The Act made it a misdemeanor to distribute contraceptive devices or drugs.<sup>11</sup>

This and similar legislation adopted by several states remained unchallenged for decades until family-planning women’s rights activist Margaret Sanger forced judicial consideration of New York’s copycat law. In

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6. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

7. *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940), *cited in* *Poe v. Ullman*, 367 U.S. 497, 502 (1961).

8. See LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 69 (rev. ed. 1990).

9. Public Broadcasting Service, *People & Events: Anthony Comstock’s “Chastity” Laws*, [http://www.pbs.org/wgbh/amex/pill/peopleevents/e\\_comstock.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html) (last visited Nov. 10, 2005).

10. *Id.*; see Comstock Act, ch. 258, § 2, 17 Stat. 599 (1873) (current version at 18 U.S.C. § 1461 (2000)). The statute defined contraceptives as obscene and illicit, making it a federal offense to disseminate birth control through the mail. As Justice Harlan noted in *Poe*, the Comstock Law in its original form “started a fashion” and many states enacted similar legislation. *Poe*, 367 U.S. at 547 n.12 (Harlan, J., dissenting).

11. Comstock Act, ch. 258, § 2, 17 Stat. 599 (1873) (current version at 18 U.S.C. § 1461 (2000)).

1916, Sanger was arrested for opening what some call the first birth control clinic in America. She was convicted of violating the New York statute that made it a “misdemeanor for a person to sell, or give away, or to advertise or offer for sale, any instrument or article, drug or medicine, for the prevention of conception, or to give information orally, stating when, where, or how such an instrument, article, or medicine can be purchased or obtained.”<sup>12</sup> Her conviction and sentence to thirty days in the city workhouse was affirmed, but in dicta, the court opined that licensed physicians were exempt from the law:

This exception in behalf of physicians does not permit advertisements regarding such matters, nor promiscuous advice to patients irrespective of their condition, but it is broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease . . . .

The protection thus afforded the physician would also extend to the druggist, or vendor, acting upon the physician’s prescription or order.<sup>13</sup>

The New York Court of Appeals thus gave its imprimatur upon a reading of the law that allowed married women to use birth control for therapeutic purposes.

The Second Circuit Court of Appeals relied on *Sanger* in 1936 in concluding that New York law exempted doctors from its law forbidding the distribution of contraceptives in *United States v. One Package*.<sup>14</sup> The district court had dismissed the government’s prosecution of a long-practicing female gynecologist for receiving:

[a] package containing pessaries [diaphragms] . . . sent to her by a physician in Japan for the purpose of trying them in her practice and giving her opinion as to their usefulness for contraceptive purposes. She testified that she prescribes the use of pessaries in cases where it would not be desirable for a patient to undertake a pregnancy. The accuracy and good faith of this testimony [was] not questioned.<sup>15</sup>

Hardly strict constructionists, the appellate panel read the plain language of the tariff statute “prohibiting the importing or transporting in interstate commerce of articles ‘designed, adapted, or intended for preventing conception, or producing abortion,’” as incorporating the New York state court’s earlier interpretation of the Comstock Act, its progenitor, as removing physicians who operate lawfully from its strictures.<sup>16</sup> Obviously more wed to originalism than his brethren, Judge Learned Hand chose not to dissent but wrote a short, separate opinion:

There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated. Many people have changed their minds about such matters in sixty years, but the act forbids the same conduct now as then; a

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12. *People v. Sanger*, 118 N.E. 637, 637 (N.Y. 1918).

13. *Id.* at 637-38.

14. 86 F.2d 737, 738 (2d Cir. 1936).

15. *Id.* at 738.

16. *Id.* at 739 (quoting then-current 18 U.S.C. § 396, current version at 18 U.S.C. § 1462 (2000)).

statute stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it, if a poll were taken.<sup>17</sup>

Seven years later, in *Tileston v. Ullman*,<sup>18</sup> the United States Supreme Court passed up an opportunity to consider the constitutionality of these Comstock laws. It dismissed the appeal of a decision denying relief to a physician who sought to have the Connecticut statute “prohibiting the use of drugs or instruments to prevent conception, and the giving of assistance or counsel in their use” declared unconstitutional.<sup>19</sup> The doctor argued that the statute would prevent his giving professional advice concerning the use of contraceptives “to three patients whose condition of health was such that their lives would be endangered by child-bearing.”<sup>20</sup> He alleged that law enforcement officers of the state intended to prosecute him if he undertook to perform medically-necessary acts. The Court rejected the physician’s right to challenge the law because he made:

[n]o allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights. . . .

[T]here is no allegation or proof that appellant’s life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients’ constitutional right to life, which they do not assert in their own behalf.<sup>21</sup>

Waiting an inexplicable twenty years, in *Poe v. Ullman*,<sup>22</sup> another set of litigants attempted to have the Supreme Court consider that same Connecticut law. The Court dismissed the plaintiffs’ cases, concluding that the cases did not present controversies justifying the adjudication of a constitutional issue.<sup>23</sup> The complaints alleged that two plaintiffs, married women whose prior unsuccessful pregnancies rendered them in need of medical advice on the use of birth control for the protection of their health, were unable to get the care they needed from their physician, the third plaintiff, who was deterred from giving such advice. Once again, they averred the State’s intention to prosecute. The Court did not address the standing issue, apparently because the plaintiffs included women whose lives were arguably at risk. Instead, the Court dismissed on a ripeness issue. It observed that the statutes in question had been enacted in 1879, that no one ever had been prosecuted thereunder except two doctors and a nurse—who were charged with operating a birth-control clinic—and that the information against them had been ultimately dismissed.<sup>24</sup> Consequently, the Court found that the plaintiffs had not yet suffered a justiciable wrong.<sup>25</sup>

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17. *Id.* at 740 (Hand, J., concurring).

18. 318 U.S. 44 (1943).

19. *Id.* at 45.

20. *Id.*

21. *Id.* at 45-46.

22. *Poe v. Ullman*, 367 U.S. 497 (1961).

23. *Id.* at 508.

24. *Id.* at 501-02.

25. *Id.* at 509-10 (Douglas, J., dissenting).

Justice Douglas was one of the dissenters. He argued that his brethren should have decided the constitutionality of a state law that, even though rarely if ever enforced, denied birth control information to medically needy married couples.<sup>26</sup> His comment about the law's continued existence and tacit non-enforcement rings true well into the twenty-first century, when some of the neediest have yet to be granted full and unhindered access to contraception:

It may be, as some suggest, that these bizarre laws are kept on the books solely to insure that traffic in contraceptives will be furtive, or will be limited to those who, by the accident of their education, travels, or wealth, need not rely on local public clinics for instruction and supply. Yet these laws—as the decision below shows—are not limited to such situations.<sup>27</sup>

Although Justice Douglas agreed that states must reflect the views of their citizens, he feared that such anti-contraception laws interfered with a family's privacy rights, as earlier recognized in cases like *Meyer v. Nebraska* and *Pierce v. Society of the Sisters*.<sup>28</sup> Thus, he seemed to agree with Justice Harlan's recognition that these laws "reached and passed" the limits to which the majority could regulate the individual.<sup>29</sup>

Perhaps one of the last of the Comstock laws was finally declared unconstitutional in 1965 in *Griswold v. Connecticut*, in which a terse Justice Douglas wrote that emanations from the First, Fourth, and Fifth Amendments to the United States Constitution, and the penumbral guarantee of the Ninth Amendment, demanded such a result:

[I]t concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon [a married] relationship. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.<sup>30</sup>

In a paean to matrimony he continued:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for

26. *Id.* at 510 (Douglas, J., dissenting).

27. *Id.* at 511 n.2 (Douglas, J., dissenting).

28. Repeating the descriptions of the cases as presented by dissenter Justice Douglas in *Poe*, 367 U.S. at 517, the concurring justices in *Griswold v. Connecticut*, 381 U.S. 479 (1965) stated:

This Court recognized in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that the right 'to marry, establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U.S. at 399. In *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act 'unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.' 268 U.S. at 534-35. As this Court said in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), the *Meyer* and *Pierce* decisions 'have respected the private realm of family life which the state cannot enter.'

*Griswold*, 381 U.S. at 495 (Goldberg, J., concurring) (citations added).

29. *Poe*, 367 U.S. at 555 (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)) (ellipsis in original).

30. *Griswold*, 381 U.S. at 485-86 (emphasis added).

better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>31</sup>

Seven years later in *Eisenstadt v. Baird*, a Massachusetts law was challenged by a family planning lecturer who gave contraceptive foam to an unmarried woman after speaking to a group of students about birth control.<sup>32</sup> The defendant, Baird, invited arrest from the podium. He was eventually convicted of a felony under a law that allowed only doctors and pharmacists to dispense contraceptives, and even then, only to married people. The Supreme Judicial Court of Massachusetts had found the state acted lawfully in pursuit of its interest in protecting the health of its citizens: The court had declared that the prohibition in the Massachusetts law in question was directly related to the State's goal of "prevent[ing] the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences."<sup>33</sup> In a subsequent decision in the same court, *Sturgis v. Attorney General*,<sup>34</sup> a judge found "a second and more compelling ground for upholding the same statute"—namely, to protect morals through "regulating the private sexual lives of single persons," concluding that "the discouraging of extramarital relations is 'admittedly a legitimate subject of state concern.'"<sup>35</sup> The court found a rational basis for the statutory prohibitions.<sup>36</sup>

Examining the Massachusetts statute on certiorari, the Supreme Court disagreed, concluding that even a lenient reading of the Equal Protection Clause invalidated the law, since it gleaned no reason to distinguish between single and married people.<sup>37</sup> It also remarked, in a prescient recognition of the pragmatic result, that "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under [Massachusetts law]."<sup>38</sup> Taking judicial notice of widely-known empirical data, the Court rejected another argument as nonsensical:

Appellants suggest that the purpose of the Massachusetts statute is to promote marital fidelity as well as to discourage premarital sex. Under [the statute], however, contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly the legislation has no deterrent effect on extramarital sexual relations.<sup>39</sup>

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31. *Id.* at 486.

32. *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972).

33. *Commonwealth v. Baird*, 247 N.E.2d 574, 578 (Mass. 1969).

34. 260 N.E.2d 687 (Mass. 1970).

35. *Id.* at 690 (quoting *Griswold*, 381 U.S. at 489).

36. *Id.* at 690-91. The court also took note of the legislature's concern over "long range mutagenic and carcinogenic side effects" of contraceptives. *Id.* at 689.

37. *Eisenstadt*, 405 U.S. at 443.

38. *Id.* at 448.

39. *Id.* at 442 n.3.



Citing *Eisenstadt v. Baird* for the proposition that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,”<sup>40</sup> the Court decided in *Carey v. Population Services International* that contraceptive devices could legally be distributed by persons other than pharmacists—even to minors.<sup>41</sup> The Court found fallacious the state’s argument that the Supreme Court “ha[d] not accorded a ‘right of access to contraceptives’ the status of a fundamental aspect of personal liberty.”<sup>42</sup> It explained that:

*Griswold* may no longer be read as holding only that a State may not prohibit a married couple’s use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.

Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against the sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception.<sup>43</sup>

The Court continued to refine its definition of the right to make personal decisions about childbearing. It decided that access to family planning includes the right of persons to send and receive information about contraception. In *Bolger v. Youngs Drug Prods. Corp.*,<sup>44</sup> the Court invalidated a federal law which prohibited the mailing of unsolicited advertisements for contraceptives. Petitioner sought a declaratory judgment when it was informed by the United States Postal Service that its mass mailings to members of the public violated the law.

Youngs presented two examples of its mailings. The first, entitled *Condoms and Human Sexuality*, was a twelve-page pamphlet describing the use, manufacture, desirability, and availability of condoms, and providing detailed descriptions of various condoms manufactured by the petitioner. The second, entitled *Plain Talk about Venereal Disease*, was a shorter pamphlet about the use and advantages of condoms in aiding the prevention of venereal disease. At the bottom of the last page was a statement that the pamphlet was distributed “as a public service by Youngs, the distributor of Trojan-brand prophylactics.”<sup>45</sup> The government argued that Youngs’ mailings were unprotected commercial speech. The Court held, to the contrary, “advertising for contraceptives not only implicates ‘substantial individual and societal interests’ in the free flow of commercial information, but also relates to activity which is protected from

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40. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (quoting *Eisenstadt*, 405 U.S. at 453).

41. *Id.* at 690-91, 693.

42. *Id.* at 686.

43. *Id.* at 687-88.

44. 463 U.S. 60 (1983).

45. *Id.* at 62 n.4.

unwarranted state interference."<sup>46</sup> Citing its decision in *Carey*, the Court concluded that "where—as in this case—a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease, we have previously found the First Amendment interest served by such speech paramount."<sup>47</sup> Beyond that, the Court reiterated its commitment to the rights of parents to discuss and provide contraceptives to their children.<sup>48</sup> As had an earlier Court, this bench became practical about birth control:

Yet it cannot go without notice that adolescent children apparently have a pressing need for information about contraception. Available data indicate that, in 1978, over one-third of all females aged 13-19 (approximately five million people) were sexually active. . . . Approximately 30% of these sexually active teenage females became pregnant during 1978; over 70% of these pregnancies (roughly 1.2 million) were unintended. Almost half a million teenagers had abortions during 1978.<sup>49</sup>

The right to an abortion was constitutionally recognized in *Roe v. Wade* in 1973.<sup>50</sup> Since then, there have been scores more abortion cases heard by the Supreme Court. *Roe* invalidated a nineteenth century Texas criminal statute prohibiting abortion except in cases where necessary to preserve maternal life, on the basis that the right of privacy secured by the Due Process clause of the Fourteenth Amendment includes a fundamental right to decide whether to bring a pregnancy to term.<sup>51</sup> The decision has been challenged since its publication, and some fear that it will be reversed. Only forty-seven percent of surveyed Americans think that most abortion will still be legal by the end of George W. Bush's second term in office.<sup>52</sup>

Abortion remains controversial; the issue has made and broken political aspirations. And it is one of the most litigated of the so-called fundamental rights.<sup>53</sup> It is possible that the multiple challenges to a woman's right to

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46. *Id.* at 69 (quoting *Carey*, 431 U.S. at 700).

47. *Id.* (citing *Carey*, 431 U.S. at 700-01).

48. *See Carey*, 431 U.S. at 708 (stating that a provision prohibiting parents from distributing contraceptives to children constitutes "direct interference with . . . parental guidance"); *cf. Bolger*, 463 U.S. at 75 ("Because the proscribed information 'may bear on one of the most important decisions' parents have a right to make, the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest.") (quoting *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95-96 (1977)).

49. *Bolger*, 463 U.S. at 74 n.30.

50. *Roe v. Wade*, 410 U.S. 113 (1973).

51. *See id.*

52. PollingReport.com, Abortion and Birth Control, CBS News/New York Times Poll (Jan. 14-18, 2005), <http://www.pollingreport.com/abortion.htm>.

53. *See Scheidler v. National Organization for Women, Inc.*, Nos. 04-1244 and 04-1352, 2006 U.S. LEXIS 2022 (U.S. Feb. 28, 2006) (deciding after remand that anti-abortion protesters are not precluded by the Hobbs Act from engaging even in physical violence). For a discussion of the recent attempt by several state legislature to ban abortions, see Sarah Baxter, *US States Join Abortion Revolt To Bring Back Ban*, SUNDAY TIMES (London), Mar. 5, 2006, at 29 ("Inspired by President George W. Bush's appointment of two conservative justices, John Roberts and Samuel Alito, to the Supreme Court, several states have seized the opportunity to overturn their local laws."). South Dakota's legislature passed a bill banning most abortions, making no exception for even rape and incest

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victims; Mississippi is considering a ban with exceptions if the mother's life is in danger or if she is a victim of rape or incest; and there is a move for legislation in Missouri, Ohio, Indiana, Tennessee, West Virginia and Kentucky. *Id.*

In refusing for a second time to hear a challenge to South Carolina's abortion clinic regulations, *Greenville Women's Clinic v. Commissioner*, 538 U.S. 1008 (2003), the U.S. Supreme Court let stand a lower court ruling that the regulations are constitutional.

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court upheld a Colorado law placing restrictions on abortion clinic demonstrations. The "bubble" law creates an eight-foot buffer around persons entering abortion facilities.

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court overturned a Nebraska law banning partial birth abortions. The decision altered their decision in *Casey*, 505 U.S. 833 (1992), and expanded the health exception. Those dissenting included Justices Rehnquist, Scalia, Kennedy, and Thomas.

In *Lambert v. Wicklund*, 520 U.S. 292 (1997), the Court upheld Montana's parental notification statute that included a judicial bypass.

In *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Supreme Court upheld a Montana statute that specifically disqualified physician assistants from performing abortions.

In *Schenk v. Pro-Choice Network*, 519 U.S. 357 (1997), the Supreme Court ruled that "floating buffer zones" around abortion clinics limit free speech, and are therefore unconstitutional. However, the Court ruled that a fixed buffer zone is constitutional. An area of fifteen feet from the clinic entrance may remain "off grounds" to demonstrators.

In *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996), part of Arkansas' constitutional amendment prohibiting the use of State funds to pay for any abortion except to save the mother's life, had to be enjoined insofar as it conflicted with federal law allowing abortion funding for rape and incest victims.

In *Leavitt v. Jane*, 518 U.S. 137 (1996), the Supreme Court held that part of an Idaho statute limiting circumstances for abortions after twenty weeks was constitutional.

In *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), an injunction prohibiting pro-lifers from entering a thirty-six foot buffer zone around the entrance of an abortion facility was upheld by the Court. The Court found that the injunction was directed at the protestors' conduct, not their speech content, and did not violate the First Amendment.

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Court ruled five to four that the anti-Ku Klux Klan Act of 1872 could not be applied to pro-life protestors since opposition to abortion is not a form of discrimination against a class of persons.

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court upheld Pennsylvania abortion regulations on informed consent requirements, parental consent, twenty-four-hour waiting periods, and abortion reporting. In a five-to-four split, the Court struck down the spousal notification law and reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court stated that federal guidelines prohibiting the use of federal monies for counseling and referrals for abortions were constitutional.

In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the Court held that the Fourteenth Amendment to the Constitution requires that a law mandating that both parents of an underage girl be notified before an abortion is performed on her is permissible only if it includes a provision that a judge may make exceptions on various grounds. The law may require a forty-eight-hour waiting period between notification and the performance of the abortion to give the parents a realistic opportunity to talk to the daughter.

The Court held in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990), that a state may require a doctor to notify the parents of an underage girl before performing an abortion on her, provided that the law allows a judge to make exceptions and authorize an abortion without informing the parents whenever the judge believes that it would be in the girl's best interests.

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court upheld a Missouri statute regulating abortion requirements for viability tests after twenty weeks. The Court provided the state with new authority to limit abortions in the areas of public funding and post-viability abortions.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court upheld the constitutionality of the Adolescent Family Life Act (AFLA), which prohibits funding to programs that perform, counsel or

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(with narrow exceptions) refer for abortions. The Act also requires promotion of adoption as an alternative to abortion.

In *Bower v. American Hospital Ass'n*, 476 U.S. 610 (1986), the Court struck down Reagan Administration regulations (based upon the 1973 Rehabilitation Act known as the Baby Doe Regulations) which were intended to prevent discriminatory non-treatment of handicapped newborn infants. The Court relied heavily upon the right of parents to refuse treatment for their children.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the Supreme Court invalidated the provisions of the Pennsylvania Abortion Control Act concerning informed consent, informational reporting, and protection of viable unborn children.

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Supreme Court ruled unconstitutional the requirement that abortions after twelve weeks (or the first trimester) of pregnancy be performed in a hospital. The invalidated law also required consent of parents for all abortions performed on minors under the age of fifteen; mandated that detailed information on medical risks of abortion, fetal development and abortion alternatives be given to women prior to abortions; and required a twenty-four hour waiting period between receipt of the required information and performance of the abortion. It also provided that the remains of the aborted baby be disposed of "in a humane and sanitary manner." *Id.* at 424.

In *Planned Parenthood Assoc. v. Ashcroft*, 462 U.S. 476 (1983), the Supreme Court upheld the following requirements: a pathology report for each abortion, the presence of a second physician at post-viability abortions, and parental or juvenile court consent for minors seeking an abortion.

In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah statute requiring that the parents of an unemancipated minor be informed by a physician, if possible, before the physician performs an abortion on such minor.

*Harris v. McRae*, 448 U.S. 297 (1980) and *Williams v. Zbaraz*, 448 U.S. 358 (1980) upheld the Hyde Amendment, restricting the use of federal funds for abortion to those necessary to preserve the life of the mother. The amendment was challenged as a denial of due process, equal protection and freedom of religion, and as an establishment of Roman Catholic dogma in violation of the First Amendment. The federal government may refuse to pay for abortions for welfare women. In addition, states are under no obligation to pay for such abortions if federal funds for reimbursement are withdrawn.

*Bellotti v. Baird*, 443 U.S. 622 (1979) invalidated a Massachusetts statute requiring parental consent. The states requiring the consent of parents to abortions upon a minor must afford such minor an alternative opportunity for authorization of the abortion where the minor may attempt to demonstrate that either she is mature enough to make her own decision, or that the abortion would be in her best interests.

*Colautti v. Franklin*, 439 U.S. 379 (1979) invalidated a Pennsylvania statute that created standards for determination of viability of the unborn child. A state may not require doctors performing abortions to protect the life of the fetus even if such doctors have reason to believe the fetus might survive the abortion.

*Beal v. Doe*, 432 U.S. 438 (1977) held that a Pennsylvania statute allowing the use of Medicaid funds only for abortions that are "medically necessary" does not violate Title XIX of the Social Security Act.

In *Maher v. Roe*, 432 U.S. 464 (1977), the Court considered a Connecticut regulation restricting the use of Medicaid funds to those abortions that are "medically necessary." The Court held the law does not deny due process and equal protection, since the State is free to use its power of funding to encourage childbirth over abortion.

*Poelker v. Doe*, 432 U.S. 519 (1977) upheld a St. Louis policy against the performance of abortion in public hospitals. A city may choose to provide publicly financed hospital services for childbirth, while choosing to bar abortions in its public hospitals.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Supreme Court held that a wife may obtain an abortion without her husband's consent and, in most instances, even without his knowledge. The Court also held that all state laws requiring the parents' consent before an abortion is performed on their minor daughter are invalid.

In *Singleton v. Wulff*, 428 U.S. 106 (1976), the Court held that physicians may challenge abortion funding restrictions on behalf of their female patients seeking abortions.

abortion, or to laws that in some way limit that right, have detracted from a consistent legal approach to securing and protecting other, more basic rights for a much larger number of women, such as the right to equal pay for equal work.<sup>54</sup>

Law professor Catharine MacKinnon shocked some sensibilities when she argued that men's need to dominate, and society's approval of that domination, explains why women make, and mean, less.<sup>55</sup> Accordingly, women must meet men's standards, rather than be measured against a unique female standard. The standards are arbitrary and probably wrong.<sup>56</sup> Standards and principles that appear to be gender neutral, are in fact, according to MacKinnon, designed to create and maintain male advantage:

Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.<sup>57</sup>

The debate about women, their differences, and the best approach to equality in all aspects of life will continue. Resolution of such antecedent and perhaps immortal issues will take the rest of all our lives. But the irrefutable evidence of discrimination cannot be ignored simply because the rhetorical questions remain. A myriad of lawsuits and centuries of litigation have led to some victories for women. The theoretical bases for the complaints range from Equal Protection under the United States Constitution, written by men and specifically excluding women and blacks from important rights of citizenship—and even full existence—to statutory claims that protect against specific types of discrimination, for example, against pregnant women. There is a host of

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court invalidated a state ban on advertising for abortion.

In *Connecticut v. Menillo*, 423 U.S. 9 (1975), the Court upheld a Connecticut anti-abortion statute as it applied to non-physicians.

*Doe v. Bolton*, 410 U.S. 179 (1973) invalidated a Georgia "reform" abortion statute that permitted abortion where continued pregnancy would endanger the woman's life or health, where the fetus would likely be born with a serious defect, or where pregnancy resulted from rape. The statute also required that abortion be performed in an accredited hospital, and that two physicians confirm the performing physician's judgment of necessity for the abortion.

54. See Hooton, *supra* note 3, at 61 ("[O]n a practical level, the [white feminist] movement has dedicated most of its energy and resources toward keeping abortion legal.").

55. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 36 (1987).

56. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002) (stating that legal conclusions that gender differences justify different treatment are not only wrong, but are also based on some arbitrary and oversimplified understanding of what gender means); Peggie R. Smith, *Elder Care, Gender and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351 (2004); see also ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

57. MACKINNON, *supra* note 55, at 36.

benefits, remedies, statutory and constitutional rights, and even affirmative action that women have enjoyed since achieving full citizenship. But as a class, assuming and accepting that biological females do not possess identical and immutable characteristics,<sup>58</sup> women have not arrived.

Legal advocacy has spurred most, if not all, changes in contraceptive accessibility. But, like Shakespeare's Portia, who had to dress like a man to save her father's skin in a court of law, women were late in being allowed to do their own litigating. In 1872, the Supreme Court decided that Illinois could lawfully deny admission to the state bar to Myra Bradwell because the right to practice law was not a privilege and immunity guaranteed by the Constitution.<sup>59</sup> Consequently, the state law prohibiting women from entering or making legal contracts, which obviated the ability to practice law, was not unconstitutional. Eschewing less opaque and more politically correct jurisprudential language, the Illinois Supreme Court wrote:

[W]hile we are constrained to refuse this application, we respect the motive which prompts it, and we entertain a profound sympathy with those whose efforts which are being so widely made to reasonably enlarge the field for the exercise of woman's industry and talent. While those theories, which are popularly known as "woman's rights" can not be expected to meet with a very cordial acceptance among the members of a profession, which, more than any other, inclines its followers, if not to stand immovable upon the ancient ways, at least to make no hot haste in measures of reform, still, all right minded men must gladly see new spheres of action opened to woman, and greater inducements offered her to seek the highest and widest culture.<sup>60</sup>

### III. ONE MAN'S CONSCIENCE AND ANOTHER MAN'S PREGNANT WIFE

On June 8, 2005, Fitzgerald Pharmacy, which operates two small independent drug stores in central Illinois,<sup>61</sup> filed a lawsuit alleging that the governor of Illinois and the directors of two departments of professional regulation violated the statutory and constitutional rights of conscientiously objecting pharmacists by issuing an emergency rule requiring all pharmacists to fill prescriptions for contraceptives, including those considered emergency contraception.<sup>62</sup> Governor Rod Blagojevich, after being told that a Chicago pharmacist refused to fill an order because of moral opposition to contraception,

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58. See, e.g., Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 275 (1992) (stating that, to be considered a suspect class under the law, a social group generally must possess identical and immutable characteristics).

59. *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872).

60. *In re Bradwell*, 55 Ill. 535, 541-42 (1876).

61. Prophetstown, Illinois, has a population of 2023 and more than half the households have income of less than \$45,000 per year. AreaGuides.net, Prophetstown Demographics, <http://prophetstownil.areaguides.net/census.html> (last visited Nov. 20, 2005). Morrison, Illinois, has a total population of 4447. Almost two-thirds of the households have income of less than \$45,000. AreaGuides.net, Morrison Demographics, <http://morrisonil.areaguides.net/census.html> (last visited Nov. 20, 2005).

62. See Complaint, *Morr-Fitz, Inc. v. Blagojevich* (Cir. Ct. of Sangamon County, Ill., Sept. 14, 2005), available at <http://www.aul.org/ilroc/complaint-2005.9.14.pdf>.

had reacted quickly with the new rule: “Our regulation says that if a woman goes to a pharmacy with a prescription for birth control, the pharmacy or the pharmacist is not allowed to discriminate or to choose who he sells it to,” Blagojevich said, “[n]o delays. No hassles. No lectures.”<sup>63</sup> Under the new rule, if a pharmacist does not fill the prescription because of a moral objection, another pharmacist must be available to do so. The jury is still out on whether that regulation, an obviously critical one, will be allowed to continue to exist. Illinois is not the first state to mandate that a doctor’s prescriptions be filled.<sup>64</sup> But this latest challenge to women’s access involves unbearably heavy transaction costs.<sup>65</sup>

The American Medical Association favors such laws,<sup>66</sup> and its members have written their own statement in favor, particularly, of access to emergency contraception.<sup>67</sup> But a group touted as the nation’s largest faith-based

63. Abdon M. Pallasch, *Sell Contraceptives, Gov Orders Druggists*, CHICAGO SUN-TIMES, Apr. 2, 2005, at A1. The April 1, 2005 “Emergency Rule” is codified at ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).

64. According to the Alan Guttmacher Institute, Nevada already has a law and at least a half dozen states have bills pending. See Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies that Won’t Sell Emergency Contraception*, GUTTMACHER REP. ON PUB. POL’Y, Aug. 2005, at 10, available at <http://www.guttmacher.org/pubs/tgr/08/3/gr080310.pdf>.

65. See Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. § 2 (1997) (congressional findings). In 1999, contraceptive prescription coverage was made mandatory under the Federal Employees Health Benefits Program, 105 Cong. Rec. S9193 (1998) (enacted).

66. AM. MED. ASS’N HOUSE OF DELEGATES, AMA-YPS DELEGATE’S REPORT 2 (2005), available at <http://www.ama-assn.org/ama1/pub/upload/mm/17/a2005delegatesreport.pdf>.

(“Whereas, Recent news reports have stated that both pharmacy chains and individual pharmacists have begun refusing to fill prescriptions for oral contraceptives (either for use as emergency contraception or for use as ongoing contraception) based on their religious and/or ethical beliefs; and

Whereas, Reports have included stories of pharmacists confiscating the prescriptions, thus preventing the patient from filling the prescription at another pharmacy in a timely manner; and

Whereas, This approach by pharmacists may jeopardize a patient’s health, may compromise the patient-physician relationship, and could be construed to be a form of discrimination and/or a change in the pharmacist’s scope of practice; and

Whereas, Several states have passed or are trying to pass legislation in this regard; therefore be it

RESOLVED, That our American Medical Association work with the American Pharmaceutical Association to ensure that pharmacies and pharmacists set up systems which guarantee patient access to legal pharmaceuticals without unnecessary delay or interference (Directive to Take Action); and be it further

RESOLVED, That our AMA support legislation which requires individual pharmacists or pharmacy chains to fill legally written prescriptions or to provide immediate alternative access without interference.”)

67. AM. MED. ASS’N, AMERICAN MEDICAL ASSOCIATION POLICY COMPENDIUM H-75.985 ACCESS TO EMERGENCY CONTRACEPTION (2005), available at <http://www.ama-assn.org/ama1/pub/upload/mm/19/policycompendium2005.pdf> (“It is the policy of our AMA: (1) that physicians and other health care professionals should be encouraged to play a more active role in providing education about emergency contraception, including access and informed consent issues, by discussing it as part of routine family planning and contraceptive counseling; (2) to enhance efforts to expand access to emergency contraception, including making emergency contraception pills more readily available through pharmacies, hospitals, clinics, emergency rooms, acute care centers, and physicians’ offices; (3) to recognize that information about emergency contraception is part of the comprehensive

organization of physicians disagrees with the AMA. The Christian Medical Association's Associate Executive Director, Dr. Gene Rudd, an obstetrician-gynecologist, believes druggists ought to be able to refuse to fill such prescriptions. He argues: "The key issue here is not even the important question of the ethics of birth control, but the fundamental freedom to follow the dictates of one's conscience and the teachings of one's religious faith."<sup>68</sup>

We are still, as Justice Harlan noted, "experimenting with various means of promoting [a wide variety of] policies."<sup>69</sup> Currently, under federal and state conscience clause legislation, individuals and institutions are protected from performing medical procedures to which they object, or filling prescriptions where doing so would violate their corporate or personal consciences. Even where states have passed insurance laws that require general health policies to cover birth control, their legislative strictures are not absolute. Thirteen states include an exemption for employers who object to such coverage for religious reasons.<sup>70</sup> Three states include coverage exemptions for insurers affiliated with religious organizations in their policies.<sup>71</sup> Four states have laws that permit pharmacists to refuse to fill prescriptions based on their personal beliefs, and representatives in ten states have introduced similar bills.<sup>72</sup>

During the debates preceding the passage of certain anti-abortion legislation that allowed federally-funded health care professionals and institutions to refuse to perform abortions or sterilizations contrary to their religious or moral beliefs, Senator Frank Church introduced an amendment that would bear his name, the Church Amendment.<sup>73</sup> The Church Amendment created a positive right of religious hospitals to follow their corporate consciences and refuse, through their staff, to provide care. That has come to mean that a religious hospital or clinic can deny services that are contrary to the tenets of its sponsoring religious health care organization, or contrary to the "religious beliefs or moral convictions"<sup>74</sup> of any staff member.

This Church Amendment was one of a myriad of laws introduced, and one of the several passed, by Congress shortly after the Supreme Court decided *Roe*

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information to be provided as part of the emergency treatment of sexual assault victims; (4) to support educational programs for physicians and patients regarding treatment options for the emergency treatment of sexual assault victims, including information about emergency contraception; and (5) to encourage writing advance prescriptions for these pills as requested by their patients until the pills are available over-the-counter.").

68. News Release, Christian Med. and Dental Ass'n, CMA Doctors Counter AMA Position on Abortion and Conscience (June 27, 2005), <http://cmdahome.org/index.cgi?BISKIT=590475168&CONTEXT=art&art=3025>.

69. *Poe v. Ullman*, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting).

70. Including Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Missouri, New Mexico, New York, North Carolina, and Rhode Island. See NAT'L WOMEN'S LAW CTR., *CONTRACEPTIVE EQUITY LAW IN YOUR STATE: KNOW YOUR RIGHTS—USE YOUR RIGHTS 2-34* (2003), available at <http://www.nwlc.org/pdf/concovstateguide2003.pdf>.

71. *Id.* (Missouri, Nevada, and Texas).

72. See NAT'L WOMEN'S LAW CTR., *DON'T TAKE "NO" FOR AN ANSWER* (2005), available at [http://www.nwlc.org/pdf/8-2005\\_DontTakeNo1.pdf](http://www.nwlc.org/pdf/8-2005_DontTakeNo1.pdf).

73. Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 144-45 (2003).

74. 42 U.S.C. § 300a-7(e) (2000).



*v. Wade*.<sup>75</sup> The practical result of such corporate conscience following is that “access to abortions and other legal and often essential health care services is severely restricted for thousands of women.”<sup>76</sup> The conscience clause survived constitutional scrutiny and challenges that the law unconstitutionally “established” religion.<sup>77</sup> Protecting the religious freedom of those with moral objections to medical procedures such as sterilization, according to the court, actually preserved the “government[’s] neutrality in the face of religious differences” since it did not “affirmatively prefer[] one religion over another.”<sup>78</sup> The Supreme Court has noted the national “commitment to individual freedom of conscience in matters of religious belief.”<sup>79</sup> Although the amendment may not violate the Establishment Clause, it has not yet been measured against the judicially-recognized fundamental right of a woman to make personal family decisions.

In 1997, Congress expanded conscience clause protection, so that Medicaid-managed care organizations could refuse to provide services or referrals for services they objected to on moral and religious grounds.<sup>80</sup> However, like all First Amendment issues, religious objections and preferences are never absolute. Courts always have to do some balancing.<sup>81</sup> Ironically, the Constitution does not require religious exemptions or conscience clauses. Such clauses exist because state legislatures created them.<sup>82</sup> No one would argue with the assertion that the Constitution allows everyone to hold different beliefs, but serving or not serving another citizen based on those beliefs implicates more than the pure belief/speech rights protected by the First Amendment. While some pharmacists and other medical professionals currently have the right to refuse to provide their personal services, following one’s conscience in other contexts has been found to violate the law. For example, in *Smith v. Fair Employment and*

75. See Eisenstadt, *supra* note 73, at 146.

76. *Id.* at 138 (noting that hospital mergers over the last few decades have led to sectarian, and often Catholic, health care “mega systems”).

77. See *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974) (holding that religious hospitals that receive federal funds can refuse to perform sterilizations without violating the Establishment Clause of the Constitution).

78. *Id.* at 311.

79. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (The Court held that religious institutions are exempt from the nondiscrimination provisions of § 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2000) with respect to hiring their own employees.).

80. 42 U.S.C. § 1396u-2(b)(3)(B) (2000). In 1996, Congress passed the Coats Amendment, legislation that prohibits the government from discriminating against medical residency programs that lose accreditation because they fail to provide abortion training. 42 U.S.C. § 238n(b)(1) (2000).

81. More recent jurisprudence replaces the traditional balancing test with one that determines whether the law in question targets religion or simply affects it as a consequence of being generally applicable to a broad set of actors. See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that the First Amendment does not require religious exemptions to laws of general applicability and it is permissible to impose penalties on Native Americans who use peyote as part of their religious practices).

82. See Iniami M. Chettiar, Comment, *Contraceptive Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867 (2002) (observing that the Supreme Court has found laws that do not provide a religious exemption constitutional).

*Housing Commission*,<sup>83</sup> the California Supreme Court upheld a state law that prohibited housing discrimination against unmarried persons, despite a strong protest by a landlord who refused to rent to couples “living in sin.”<sup>84</sup> The landlord argued that renting to a non-married cohabiting couple violated her religious beliefs.<sup>85</sup> The court found that the landlord’s practice of religion was not substantially burdened, since, in theory, she could sell the property and earn income through other means.<sup>86</sup> Even more relevant to the current debate about the religious and moral clash between the pharmacist who will not dispense contraceptives and women who want and need them, the court took special note that “the parties have not brought to our attention a single case in which the Supreme Court exempted a religious objector from the operation of a general law when the exemption would detrimentally affect the rights of third parties.”<sup>87</sup> As the California Supreme Court found, the statute in question was “both generally applicable and neutral towards religion.”<sup>88</sup> To date, no one has challenged conscience clauses on such grounds.

If there is a workable test for challenging conscience clauses—or their antitheses, pharmacist mandates—it is one where such laws, when they are neither neutral nor of general application, must survive strict scrutiny.<sup>89</sup> In cases where strict scrutiny is the standard of review, proponents of the law must both demonstrate a compelling interest and that interest must be narrowly tailored. Arguably, the court would find the need for emergency birth control compelling, because the rights to contraception and abortion are constitutionally protected. As with all constitutional language, the precise parameters continue to evolve. The relationship between adherence to one’s faith, and the division between belief, which is absolute, and practice, which is not absolute, has long vexed federal courts. Two cases involving bald eagles, where the operational definitions of a state’s compelling interests survived strict scrutiny, are instructive to determining whether pharmacist mandates are constitutional. In each case, a federal court allowed an intrusion on the practice of religion where the government had a compelling interest in so doing.<sup>90</sup>

In the first case, *U.S. v. Lundquist*, the defendant, a non-Indian who practiced Native American religions as part of “his deeply and sincerely held religious beliefs,”<sup>91</sup> was charged with criminal possession of protected bird feathers. Lundquist’s conviction was upheld. In the second case, *U.S. v. Hugs*, two Native Americans were convicted of violating 16 U.S.C. § 668(a), which protects bald and golden eagles as endangered species.<sup>92</sup> The defendants asserted that they trapped, shot at, and killed eagles because “they were seeking

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83. 913 P.2d 909 (Cal. 1996).

84. *Id.*

85. *Id.* at 912.

86. *Id.* at 925.

87. *Id.* at 928.

88. *Id.* at 919.

89. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

90. *U.S. v. Hugs*, 109 F.3d 1375 (9th Cir. 1997); *U.S. v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996).

91. *Lundquist*, 932 F. Supp. at 1238.

92. *Hugs*, 109 F.3d at 1377.

eagle feathers and parts for their own religious practices . . . .”<sup>93</sup> The Bald and Golden Eagle Protection Act allowed Native Americans the opportunity to apply for a permit to kill eagles.<sup>94</sup> Neither defendant ever applied for the permit, claiming that the procedures for legal permission were onerous and so untimely that the season to hunt the eagles would already have passed by the time the permit was granted.<sup>95</sup> The court decided that, although the believers were burdened in their religious practices, the bird-protection statute reflected “the importance” of protecting eagles “because of their [religious] significance to Native Americans.”<sup>96</sup> Similarly, practical rules, such as the one formulated by the governor of Illinois, requiring pharmacists to dispense emergency contraceptives, should pass constitutional muster, although such rules could somewhat burden pharmacists’ religious practices.<sup>97</sup>

The right to refuse to dispense contraceptives, especially emergency contraceptives, is analogous to the protection afforded to the rights of pro-life activists. As one author notes: “In the context of abortion clinics, the right of anti-abortion protest to express dissent comes into direct conflict with the right of women and men to freely enter the clinics, seek counsel, or report for work.”<sup>98</sup> As with conscientiously objecting pharmacists, “[m]any forms of abortion protest are underscored by a religious timbre, as many people believe themselves called to such action to fulfill their religious obligations.”<sup>99</sup>

The First Amendment stipulates that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>100</sup> However, the Establishment Clause is comprised of two conceptually different notions: the freedom to believe, and the freedom to act on those beliefs. The first notion is absolute, while the second can never be absolute due to important competing considerations. The Court itself has characterized the First Amendment as “opaque.”<sup>101</sup> It has never been easy to parse the two parts of religious adherence—faith and action—the Court has always had to choose one value over another. For example, the Court decided over a century ago that the government may prohibit polygamy even if indulgence in it is based upon a religious belief.<sup>102</sup> The Court found that conservative right-minded men, while possibly finding polygamy salacious, were deviant if they practiced

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93. *Id.*

94. 16 U.S.C. § 668(a) (2000).

95. *Hugs*, 109 F.3d at 1378.

96. *Id.*

97. *See supra* notes 61-63 and accompanying text.

98. Richard Albert, *Protest, Proportionality, and the Politics of Privacy: Mediating the Tension Between the Right of Access to Abortion Clinics and Free Religious Expression in Canada and The United States*, 27 LOY. L.A. INT’L & COMP. L. REV. 1, 7 (2005).

99. *Id.* at 8. *See also* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding but modifying a state court injunction that did not provide a protective buffer zone at an abortion clinic).

100. U.S. CONST. amend. I.

101. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

102. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890); *Reynolds v. U.S.*, 98 U.S. 145 (1878).

it. It also held that “the state has a right to prohibit polygamy and all other open offenses against the enlightened sentiment of mankind.”<sup>103</sup>

Recently, in *Catholic Charities of Sacramento, Inc. v. Superior Court*,<sup>104</sup> the California Supreme Court rejected First Amendment challenges to the state’s compulsory contraceptive health insurance coverage law. Catholic Charities, as a religious employer whose tenets of faith oppose birth control, claimed a constitutional right to refuse such insurance.<sup>105</sup> The Women’s Equity in Contraception Act was, according to the court, “enacted in 1999 to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives.”<sup>106</sup> Evidence before the legislature revealed that women during their reproductive years spent as much as sixty-eight percent more than men in out-of-pocket health care costs, due in large part to the cost of prescription contraceptives and the various costs of unintended pregnancies, including health risks, premature deliveries and increased neonatal care.<sup>107</sup> The statute required employers who provided any type of health insurance to cover contraceptive services, but relieved from such obligation all tax-exempt religious employers who have as their purpose “the inculcation of religious values” and primarily employ and serve persons sharing those tenets.<sup>108</sup> Catholic Charities had to concede that it did not fit the law’s definition of a religious employer, since it served primarily as a non-denominational social service agency with a religiously-diverse workforce.<sup>109</sup> As a freedom of religion challenge, the Court found that neither an Establishment, nor Free Exercise concern existed.<sup>110</sup> At least in California, and at least for the time being, a Roman Catholic-sponsored entity must insure its own employees against the cost of birth control, despite religious doctrine that forbids birth control and abortion.<sup>111</sup>

Debates about conscience clauses, or refusals to provide care on ethical and moral grounds, are not new. States have had mandates for care and coverage for years, and both state and federal courts have heard a myriad of cases attempting to balance and accommodate. What makes the current controversy so important is that there are now more impediments than ever to women’s relatively newly-recognized rights to privacy, which give them the constitutional right to make family choices. Opponents of laws mandating that pharmacists fill prescriptions, like Luke Vander Bleek, argue that an “individual’s interest in getting this prescription is not greater than my interest

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103. *Church of Jesus Christ*, 136 U.S. at 50.

104. 85 P.3d 67 (Cal. 2004).

105. *Id.* at 76.

106. *Id.* at 74.

107. *Id.* at 73; see Ann Kurth et al., *Guttmacher Inst., Women’s Health Care Costs and Experiences*, FAM. PLANNING PERSP., July-Aug. 2001, at 153, 153, available at <http://www.guttmacher.org/pubs/journals/3315301.pdf>.

108. See CAL. HEALTH & SAFETY CODE § 1367.25 (West 2004); see also *Catholic Charities*, 85 P.3d at 76 (explaining that an employer could avoid providing contraceptives by not offering prescription coverage at all).

109. *Catholic Charities*, 85 P.3d at 76.

110. *Id.* at 94.

111. *Id.* at 95.

in preserving my right to conscientious objection.”<sup>112</sup> Only a constitutional challenge to the particular operation of a conscience clause at a drugstore can prove that statement to be false.

The American Pharmacists Association has tried to create its own balance. Its publications recommend that pharmacists should be allowed to excuse themselves from dispensing drugs in situations that they find morally objectionable, but that such a decision must be accompanied by responsibility to the patient and performance of certain professional duties.<sup>113</sup> The Association suggests that the patient be referred to another pharmacist or be channeled into another available health system.<sup>114</sup> The official policy of the Association “supports the ability of pharmacists to step away from participating in an activity to which they have personal objections, but not [to] step in the way.”<sup>115</sup>

Approximately eighty percent of Americans feel that a pharmacist should be forced to fill birth control prescriptions, notwithstanding their own personal or religious beliefs.<sup>116</sup> The other twenty percent support the view that pharmacists should not be required to fill prescriptions to which they object. Illustrating the range of reasons for disagreement with contraception, professional pharmacists have acted upon sexist, moral, social, or purely antisocial motives. Not only have pharmacists refused to fill prescriptions, they have also refused to transfer prescriptions or provide referrals.<sup>117</sup> Furthermore, pharmacists have also displayed aggressive behavior in order to dissuade women from obtaining birth control prescriptions. These actions constitute conduct that conflicts with the ethical guidelines governing health care professionals.<sup>118</sup>

A significant part of this continuing conflict of rights would be moot, had the government followed its own recommendation that emergency contraception be available without a prescription. For longer than a decade, the FDA had been considering the safety and desirability of emergency contraception<sup>119</sup>—essentially just a cocktail of regular birth control pills taken in heavier doses.<sup>120</sup> In a notice published in the Federal Register on February 25, 1997, the FDA announced the results of its research that post-coital drugs were safe and effective methods of contraception, explaining further that it hoped “to

112. See Gretchen Ruethling, *Pharmacist Sues Over Contraceptive Rule*, N.Y. TIMES, June 10, 2005, at A1.

113. News Release, John A. Gans, Executive Vice-President & CEO, Am. Pharmacists Ass'n, Pharmacists & Physicians: Not Just a Matter of Conscience (June 5, 2005), available at <http://www.aphanet.org/AM/Template.cfm?Section=Home&CONTENTID=3687&TEMPLATE=/CM/ContentDisplay.cfm>.

114. *Id.*

115. *Id.*

116. News Release, Rebecca Wind, Guttmacher Inst., Health Care Providers Cross the Line When They Obstruct Women's Access to Legal Medication (Aug. 3, 2005), <http://www.agi-usa.org/media/nr/2005/08/02/index.html>.

117. *Id.*

118. *Id.*

119. Marian Lee, When Plan A Fails, We Need Plan B: Over-the-Counter Access to Emergency Contraceptive Pills 5 (Apr. 2004) (unpublished law school paper, Harvard University, on file at <http://leda.law.harvard.edu/leda/data/677/Lee.rtf>).

120. *Id.* at 2.

encourage manufacturers to make this additional contraceptive option available.”<sup>121</sup> By late 2003, emergency contraception was expected to be approved as a non-prescription contingency technique for preventing pregnancy after unprotected sex or the failure of regular contraception. However, by Spring 2004, the acting director of the FDA, Steven Galson, had refused to approve the application by Barr-Pharmaceuticals to produce just such an over-the-counter emergency contraception, called Plan B.<sup>122</sup> The FDA’s rejection was directly contrary to the recommendations of its own, prestigious, physician-packed advisory panel, that voted “overwhelmingly in favor of making emergency contraceptives easily available.”<sup>123</sup> There were allegations by abortion rights proponents that the FDA’s reversal of position reflected a deferral to partisan supporters of the Bush Administration who strongly oppose emergency contraception in any form.<sup>124</sup>

In explaining why Plan B was rejected, an FDA official stated that the pill could not be approved because the manufacturer had failed to consider the effects of using over-the-counter contraception on teenage girls, specifically those eleven to fourteen years of age.<sup>125</sup> Leading FDA scientists publicly criticized this rationale on two grounds: (1) that this concern for a particular class of fertile women, the younger teens, had never arisen in the agency’s considerations of any other birth control drugs, and (2) that advisory panelists had already concluded there was no reason to assume that the drugs would actually be any less safe for that age group.<sup>126</sup> The American Public Health Association joined the professional community’s outcry against the federal agency’s action. The organization strongly advocated education about, and easy access to, emergency contraception.<sup>127</sup> The Association’s findings included data that fifty percent of all pregnancies are unintended and approximately half of those unintended pregnancies are aborted.<sup>128</sup> Importantly, especially for anti-abortion activists who may also oppose birth control, “50% of unintended pregnancies could be avoided if women had the information and timely-access to emergency contraception.”<sup>129</sup> Although the Bush Administration promised timely reconsideration of the possibility of changing the distribution status of the “morning-after” pill from a prescription drug to an over-the-counter drug, the Administration has so far failed to act.<sup>130</sup> Senators and many FDA staff were

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121. Prescription Drug Products; Certain Combined Oral Contraceptives for Use as Postcoital Emergency Contraception, 62 Fed. Reg. 8609, 8610 (Feb. 25, 1997).

122. Liza Mundy, *Dubious Conceptions*, SLATE, June 1, 2004, <http://www.slate.com/id/2101525>.

123. *Id.*

124. See, e.g., Marc Kaufman, *Abortion Foe to Be Reappointed to FDA Panel; Four Lawmakers Tell Bush That Doctor Has ‘Allowed His Personal Views to Overshadow His Duty,’* WASH. POST, June 29, 2004, at A6.

125. Marc Kaufman, *Staff Scientists Reject FDA’s Plan B Reasoning*, WASH. POST, June 18, 2004, at A2.

126. *Id.*

127. Press Release, Am. Pub. Health Ass’n, American Public Health Association Renews Call for Improving Access to Emergency Contraception (May 11, 2004), [http://apha.org/news/press/2004/womens\\_health\\_week.htm](http://apha.org/news/press/2004/womens_health_week.htm).

128. *Id.*

129. *Id.*

130. *Regulating the Drug Industry: The Merry Go-Round*, ECONOMIST, Oct. 1, 2005, at Business 1.

dismayed and worried “that politics had trumped scientific evidence.”<sup>131</sup> In response to the Administration’s inaction, a high-ranking FDA director resigned, explaining that she refused to work at the FDA “when scientific and clinical evidence . . . has been overruled.”<sup>132</sup>

Despite the protests of certain pharmacists, most medical professionals and the FDA believe that emergency contraception is not abortion. The American College of Obstetricians and Gynecologists defines the beginning of pregnancy as the “completed implantation of fertilized egg in the womb.”<sup>133</sup> Interestingly, the FDA’s policy has also been that pregnancy begins with implantation.<sup>134</sup> Even Carolyn Gerster, physician and past president of the National Right to Life Committee, did not oppose the FDA’s approval of emergency contraception as a prescribed drug.<sup>135</sup> She explained that, “emergency contraception . . . prevents, but does not end pregnancy. Nobody dies with contraception.”<sup>136</sup> Furthermore, a Kaiser Family Foundation survey conducted in 1995 found that eighty-four percent of doctors who opposed abortion on moral or religious grounds did not oppose emergency contraception.<sup>137</sup> In fact, within this same group of doctors, forty-eight percent of them had prescribed emergency contraceptives at least once in the past year.<sup>138</sup> Even among religious or ethnic groups with strong moral opposition to abortion, accurate information about emergency contraception obviated opposition to their use.<sup>139</sup>

In *Brownfield v. Daniel Freeman Marina Hospital*, a California court held that a state law exempting religious institutions from participating in abortions did not give a Catholic hospital the right to refuse to provide emergency contraception information to a rape victim.<sup>140</sup> There, the plaintiff’s mother had specifically requested, on her daughter’s behalf, information about emergency contraception from the hospital emergency room staff and the staff had refused to provide such information.<sup>141</sup> The court agreed with the plaintiff that because

131. *Id.*

132. *Id.*

133. Renee C. Wyser-Pratte, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception*, 79 OR. L. REV. 1121, 1131-32 (2000).

134. Gina Kolata, *Debate on Selling Morning-After Pill Over the Counter*, N.Y. TIMES, Dec. 12, 2003, at A1. See U.S. FOOD AND DRUG ADMIN., FDA’S DECISION REGARDING PLAN B: QUESTIONS AND ANSWERS (2004) (“Plan B works like other birth control pills to prevent pregnancy by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation). If a fertilized egg is implanted prior to taking Plan B, Plan B will not work.”).

135. Sandra G. Boodman, *The ‘Morning-After’ Kit: New Emergency Contraceptive Gives Women a Second Chance to Prevent Pregnancy*, WASH. POST, Sept. 22, 1995, at Z12.

136. *Id.*

137. Sandra G. Boodman, *Emergency Contraception: ‘Morning-After’ Pill Has Long Been Available but Many Women Don’t Know About It*, WASH. POST, Apr. 4, 1995, at Z07.

138. *Id.*

139. See Laura F. Romo et al., *The Role of Misconceptions on Latino Women’s Acceptance of Emergency Contraceptive Pills*, 69 CONTRACEPTION 227, 233 (2004) (finding, for instance, that low-income Hispanic women who were uninformed about the chemistry and mechanism of emergency contraception were more likely to have moral qualms about its use).

140. 256 Cal. Rptr. 240, 244 (Cal. Ct. App. 1989).

141. *Id.* at 242.

emergency contraception does not constitute abortion, the hospital was obligated to provide information about the morning-after pill.<sup>142</sup> The court decided that withholding such information could ultimately violate the victim's constitutional right to choice, stating that the duty to disclose such information arises from the fact that an adult of sound mind has "the right, in the exercise of control over [her] own body, to determine whether or not to submit to lawful medical treatment."<sup>143</sup>

#### IV. HOW WOMEN WORK AND WHAT THEY EARN

Ostensibly, fair or equal opportunity for women in the workplace is a national priority.<sup>144</sup> Nonetheless, the workplace is the most startling example of hierarchy and gender discrimination. The female workforce has yet to achieve pay equity. A typical woman earns no more than four-fifths of what an average man makes for doing the same work and having the same qualifications.<sup>145</sup> Women aged thirty-five and older earn about three-fourths as much as their male peers.<sup>146</sup> The average weekly difference in salaries of men and women with college and post-graduate degrees is approximately \$300.<sup>147</sup> Measurable and harmful differences persist across occupations: Women doctors average \$989 a week, while men are paid \$1677 for the same number of hours, and male post-secondary teachers earn \$1111 a week, compared to women's weekly pay of \$878 for their college teaching.<sup>148</sup> Female computer programmers earn an average of \$973 a week, compared with an average of \$1115 for men.<sup>149</sup> Even where salaries are established by local, state or federal law, there are gendered differences, albeit smaller ones.<sup>150</sup> It has been estimated that "taking into account women's lower work hours and their years with zero earnings due to family care . . . the average prime age working woman earned only \$273,592 while the average man earned \$722,693, a difference of 62%.<sup>151</sup>

In 2003, 29.4% of women earned poverty-level wages or less, compared with 19.6% of men.<sup>152</sup> Median incomes in 1999 based upon household type were

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142. *Id.* at 244.

143. *Id.*

144. Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 563 n.16 (2005).

145. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2003, REPORT NO. 978, at 1 (2004), available at <http://www.bls.gov/cps/cpswom2003.pdf>.

146. *Id.* at 1-2.

147. *Id.*; see also Am. Ass'n of Univ. Women, *Gains in Learning, Gaps in Earnings: A Guide to State and National Data*, <http://www.aauw.org/research/statedata/index.cfm> (last visited Nov. 18, 2005) (finding that a typical female college-graduate, working full-time, annually earns \$17,600 less than the average male college-graduate).

148. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, *supra* note 145, at 12 tbl.2.

149. *Id.*

150. *Id.* at 13-15 tbl.2. For instance, mail carriers average only a 2.2% wage difference between genders; police officers approximately 5%; and public school teachers slightly less than 10%. *Id.*

151. STEPHEN ROSE & HEIDI HARTMANN, INST. FOR WOMEN'S POLICY RESEARCH, *STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS Gap*, at iii (2004), <http://www.iwpr.org/pdf/C355>.

152. ECON. POLICY INST., *STATE OF WORKING AMERICA 2004/2005, FACTS & FIGURES: WOMEN 2* (2005), available at [http://www.epinet.org/books/swa2004/news/swafacts\\_women.pdf](http://www.epinet.org/books/swa2004/news/swafacts_women.pdf).



much more meager for “female-headed” households.<sup>153</sup> The median income for married couples was \$57,345.<sup>154</sup> Male householders with children and an absent wife had a median income of \$30,472.<sup>155</sup> Female householders with children and an absent husband had a median income of \$25,458.<sup>156</sup> Families maintained by women tend to be poorer during the woman’s working life, and this situation is exacerbated as the woman ages.<sup>157</sup> Although this is more common among minority populations, it is generally fairly predictable across races, counting for gender alone. Furthermore, while never-married women are poor, surprisingly, divorced and widowed women are even poorer.<sup>158</sup> The National Center on Women and Family Law in New York reports that in the first year of divorce, women generally suffer a 73% reduction in their standard of living, while their ex-husbands enjoy a 42% increase, on average.<sup>159</sup> Older housewives and women who are married for long periods of time experience the greatest downward mobility and the greatest relative deprivation after divorce.<sup>160</sup> Income, by itself, is not the sole predictor of poverty for women. Healthcare expenses, for which many women have no private insurance, also force women into poverty.<sup>161</sup>

Women’s poverty is perhaps one of the most intractable elements of the American workplace. Although the Equal Pay Act was passed in 1963, in 1979 women earned approximately 63% of what men earned.<sup>162</sup> In 1999, according to the Department of Labor, women earned 76.5% of their male counterparts in full-time jobs.<sup>163</sup> Note, again, that these are averages. College-educated women with high salaries and some white males with low salaries, contributed to that

153. See U.S. Bureau of the Census, U.S. Dept. of Commerce, QT-P32 Income Distribution in 1999 of Households and Families: 2000, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP32&-ds\\_name=DEC\\_2000\\_SF3\\_U&-lang=en&-sse=on](http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF3_U_QTP32&-ds_name=DEC_2000_SF3_U&-lang=en&-sse=on) (last visited Mar. 1, 2006).

154. *Id.*

155. *Id.*

156. *Id.*

157. See generally Regina Gallindo Carter, *Pro Bono Legal Services: A Focus on the Elderly and Disabled*, 60 TEX. B.J. 270 (1997) (describing free legal services available to help elderly women in these positions); see also U.S. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, *supra* note 145, at 27-29 tbl.11-12.

158. Jacqueline DeWarr, Annotated Bibliography: Women and Aging, <http://www.neln.org/bibs/geerken.html> (last visited Nov. 18, 2005). In 1995, approximately 47% of all older women were widows. In addition, there were 5 times as many widows (8.6 million) as widowers (1.7 million). Since 1990, the number of divorced women has increased approximately 4 times faster than the number of divorcees among the older population as a whole. *Id.*

159. Joan Pennington, *The Economic Implications of Divorce for Older Women*, 23 CLEARINGHOUSE REV. 488, 489 (1989).

160. *Id.*

161. 80% of retirement age women have no access to pensions, 60% of women over sixty-five living alone have social security as their only income, and 4 million mid-life women have no health insurance. DeWarr, *supra* note 158.

162. U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR., *supra* note 145, at 1.

163. Jewel E. Partridge et al., *Similar Education Doesn’t Mean Equal Pay for Women*, FLA. ST. U. WIRE, Dec. 7, 2000. The average for all women is 77 cents for every dollar that men earn; for African American and Hispanic women the gap is even greater: 66 cents and 56 cents, respectively. *Id.* However, these numbers do not suggest that women of color earn more; the fact that men of color earn less accounts for the difference.

average.<sup>164</sup> In truth, most women earned significantly less than 75% of what most men earn and women of unique (and overlapping) subsets present an even starker contrast.

Today, 57% of all enrolled undergraduates are women, 66% of black undergraduates are women, and 60% of the Latino undergrads are women.<sup>165</sup> Despite their disproportionate educational qualifications, women earn less. Half of all women work in traditionally female, low-paying jobs without pensions.<sup>166</sup> In fact, “[w]omen hold the majority (59%) of low-wage jobs and are much more likely to be paid lower wages than male workers.”<sup>167</sup> Not all women who are paid low wages work part-time, nor are they all young: 31% of women of prime working ages (between the ages of 25 and 45) worked full-time and were paid low wages.<sup>168</sup>

The Women’s Institute for a Secure Retirement summarizes working women’s positions with these facts: 2 out of 3 working women earn less than \$30,000.<sup>169</sup> That is less than \$15 per hour—an amount considered a touchstone in predicting whether workers receive health benefits; better paid employees have better benefits.<sup>170</sup> Assuming women earn \$0.76 for every \$1 earned by men, they experience a lifetime loss of over \$300,000.<sup>171</sup>

Low-wage jobs (at which many of our mothers work) include: bank tellers, receptionists, clerks, household workers, nurses’ aids, certified nursing assistants, duplicating machine operators, retail sales clerks, food service workers, cleaning ladies and building services. Part-time workers constitute 33% of all low-wage workers; 54% of part-time workers are likely to receive low

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164. More women than men graduate from college. Nat’l Ctr. for Educ., Statistics, Degrees Conferred by Sex and Race, <http://nces.ed.gov/fastfacts/display.asp?id=72> (last visited Mar. 1, 2006). Since 1994, women have earned more than 50% of all associate, bachelor and master degrees awarded; Women accounted for 39% of all PhD’s. *Id.* In 1994, minorities comprised 31% of the U.S. population, but earned only 19.4% of the bachelor degrees, 14.6% of the master degrees, and 12.1% of the doctorate degrees. *Id.* Hispanic students earned 5.5% of the bachelor degrees, 4.1% of the master degrees, and 3.2% of the doctorate degrees. *Id.* Relative figures for students denominated Asian or Pacific Islander are 6.0%, 8.0%, and 7.7%. *Id.* Each set of figures suggests that, if education matters, the wage gap between white men and all other groups should be smaller than it is in reality.

165. CATHERINE FREEMAN, NAT’L CTR. FOR EDUC. STATISTICS, TRENDS IN EDUCATIONAL EQUITY OF GIRLS AND WOMEN 2004, at 80 (2004).

166. See No Turning Back: The Feminist Resource Website, Women and Work in the U.S., <http://ntb.stanford.edu/data.html#WomenWelfare> (last visited Nov. 20, 2005).

167. Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, MONTHLY LAB. REV., Sept. 2000, at 26. The current population survey defines low wage workers as “those workers who could not support a family of four above the government’s official poverty level while working fifty-two weeks per year, forty hours per week for a total of 2080 hours per year.” For workers paid on an hourly basis, this means that low wage workers are defined as those who were paid no more than \$7.91 per hour or \$16,450 for 2080 hours of work in 1998.

168. *Id.* at 27 tbl.1.

169. Welcome to the WISER Website, <http://www.wiser.heinz.org/> (last visited Mar. 1, 2006).

170. Lorraine Schmall, *Women and Pension Reform: Economic Insecurity and Old Age*, 35 J. MARSHALL L. REV. 673 (2002).

171. Press Release, Heinz Family Philanthropies/Women’s Inst. for a Secure Retirement, 2005 National Women’s Retirement Survey Results (May 4, 2005), available at <http://www.wiser.heinz.org/pollpressrelease0505.pdf> (statistics calculated using National Women’s Retirement Survey Results findings).

wages, compared with 24% of all full-time workers.<sup>172</sup> 68% of women who received low wages were not covered by employer-provided health insurance during 1997,<sup>173</sup> and, starkly, “one-third of women who are paid low-wages live below 150% of the poverty level.”<sup>174</sup>

Job segregation by sex appears to be changing glacially, if at all. The U.S. Equal Employment Opportunity Commission (EEOC) has a mandate to collect data from public and private employers about the composition of their work forces by sex, race, and ethnicity. More white men than any other group work in jobs most commonly associated with higher wages and employee benefits. For example, in 1998, 87.4% of all “craft workers” were male; 79.3% of all craft workers were white.<sup>175</sup> In 2003, the percentages were barely changed; 87.1% of craft workers were male, and 76.1% of all craft workers were white.<sup>176</sup> Even within categories, there is gender segregation. The Department of Labor observes that women were “much less likely than men to be employed in some of the highest paying fields . . . .”<sup>177</sup>

A study conducted in 1991 by the Economic Policy Institute and the Institute for Women’s Policy Research showed that 59.7% of the 8.4 million workers who would receive a pay increase as the result of a higher minimum wage were women.<sup>178</sup> Simply increasing the minimum wage to \$12,300 per year for full-time workers “would help to reduce the overall pay gap between women and men,” because so many women earn wages at that level.<sup>179</sup> Even more current data shows that 15.3% of married females with children, and 9.2% of single working mothers would benefit from an increase in the minimum wage.<sup>180</sup> Almost half (48%) of all minimum wage workers are full-time workers.<sup>181</sup>

The relative poverty remains throughout a woman’s life. One study in 1999 found that “the typical married couple looks forward to around one-half

172. *Id.* at 29.

173. *Id.*

174. *Id.*

175. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, OCCUPATIONAL EMPLOYMENT IN PRIVATE INDUSTRY BY RACE/ETHNIC GROUP/SEX AND BY INDUSTRY tbl.1 (1998), <http://www.eeoc.gov/stats/jobpat/1998/tables-1.html>.

176. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, OCCUPATIONAL EMPLOYMENT IN PRIVATE INDUSTRY BY RACE/ETHNIC GROUP/SEX AND BY INDUSTRY tbl.1 (2003), <http://www.eeoc.gov/stats/jobpat/2003/national.html>.

177. U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, *supra* note 145, at 2.

178. JARED BERNSTEIN & JOHN SCHMITT, ECON. POLICY INST., THE IMPACT OF THE MINIMUM WAGE: POLICY LIFTS WAGES, MAINTAINS FLOOR FOR LOW-WAGE LABOR MARKET 6 tbl.1 (2000), *available at* [http://www.epi.org/briefingpapers/minwage-0627/min\\_wage\\_bp.pdf](http://www.epi.org/briefingpapers/minwage-0627/min_wage_bp.pdf).

179. JARED BERNSTEIN & JOHN SCHMITT, ECON. POLICY INST., THE MINIMUM WAGE INCREASE: A WORKING WOMAN’S ISSUE 1 (1999), *available at* <http://www.epinet.org/issuebriefs/ib133.pdf>.

180. *Id.* at 9 tbl.3. As of 1998, almost 7 million women would benefit from a proposed minimum wage increase. *Id.* at 3 tbl.2. Of those women, 96.1% would be nonunion employees, as opposed to 3.9% of union workers for whom a minimum wage increase would help. *Id.* In addition, updated findings suggest that “while African-Americans represent 11.7% of the overall workforce, they represent 15.7% of those affected by an increase; similarly, 10.8% of the total workforce is Hispanic, compared to 19.2% of those who would be affected by an increase.” *Id.* at 7.

181. *Id.* at 1.

million dollars in retirement assets . . . and the median non-married woman about \$160,000.”<sup>182</sup> According to a more recent survey sponsored by the Heinz Family Philanthropies, nearly 40% of all women between the ages of 30 and 55 are worried they will live at or near the poverty level in their “golden” years, because current income does not allow them to save for retirement. The figures increase dramatically to 53% for women of color. A summary of the report concludes: “Retirement is a myth for the majority of women in this country.”<sup>183</sup>

The added tragedy of the less than equal wage is that women head an overwhelming majority of single-parent families.<sup>184</sup> Almost 40% of minimum wage workers are the sole source of income for their households.<sup>185</sup> If women received the same pay as men who have the same education, union status and age, and live in the same region of the country, their household income would rise by \$4000.<sup>186</sup>

Researchers have repeatedly found that wage differentials exist even after controlling for “differences in characteristics likely to be related to worker productivity, such as age, education, and labor market experience.”<sup>187</sup> Although gender discrimination is illegal—and dramatically less pervasive than it once was—it remains the only explanation for at least part of the wage gap, which illustrates “the fallacy that merit alone determines employment success.”<sup>188</sup>

Discrimination, far from disappearing, actually seems to be on the rise. EEOC Chair Cari Dominguez responded to recent statistics, concluding that “discrimination continues to be a problem in too many of today’s workplaces.”<sup>189</sup> In 2003, there were 81,293 private sector charges of discrimination filed with the Commission. 30% of the charges alleged gender discrimination, and 1167 charges were based upon an employer violation of the 1963 Equal Pay Act.<sup>190</sup> Although it is not clear why these data were gathered separately, there were 13,566 sexual harassment charges and 4,649 pregnancy discrimination charges

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182. Phillip B. Levine, Olivia S. Mitchell & John W. Philips, *Worklife Determinants of Retirement Income Differentials Between Men and Women* 21 (Nat’l Bureau of Econ. Research, Working Paper No. 7243, 1999), available at <http://www.nber.org/papers/w7243>.

183. See Press Release, Heinz Family Philanthropies/Women’s Inst. for a Secure Retirement, *supra* note 171, at 2.

184. Jacqueline Kirby, *Single Parent Families in Poverty*, HUM. DEV. & FAM. LIFE BULL., Spring 1995, at 1, available at <http://www.hec.ohio-state.edu/famlife/bulletin/volume.1/bulletin.htm> (90% of single families headed by women).

185. CTR. FOR POLICY ALTERNATIVES & LIFETIME TELEVISION, *WOMEN’S VOICES 2000: ANALYSIS OF FINDINGS FROM A NATIONWIDE SURVEY AND FOCUS GROUP* 33 (2001), available at [http://paidleave.org/docs/108\\_WomensVoices2000.pdf](http://paidleave.org/docs/108_WomensVoices2000.pdf) (discussing analysis by Lake, Small, Perry & Associates, American Viewpoint, and Linda Faye Williams, University of Maryland at College Park and Insight Research).

186. Nat’l Org. for Women, *Facts About Pay Equality*, available at <http://www.now.org/issues/economic/factsheet.html> (last visited Dec. 6, 2005).

187. Levine et al., *supra* note 182, at 2.

188. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 587 (2000).

189. Press Release, U.S. Equal Employment Opportunity Comm’n, *EEOC Issues: Fiscal Year 2003 Enforcement Data* (Mar. 8, 2004), available at <http://www.eeoc.gov/press/3-8-04.html>.

190. *Id.*

filed.<sup>191</sup> These numbers remain fairly constant. In the fiscal year 2000, 79,896 charges were filed at the Commission: 36.2% of these were based on allegations of race discrimination; 31.5% on gender; 9.8% on national origin. Separate charges filed, alleging that employers retaliated against their workers for complaining about discrimination, include 1270 complaints based upon protections women demanded under the Equal Pay Act.<sup>192</sup>

In addition, the accoutrements of motherhood place unique demands upon workers with children. Conservative economists note that work data illustrates the agency of women to choose part-time and temporary work and to eschew better-paying jobs that require more hours or travel in order to accommodate their child-care needs and desires. Such theorists find lower wages to be symptomatic of such choices.<sup>193</sup> Even assuming that a woman's choice to stay home with her children is among the causes of her lower wages, creating additional obstacles that make it difficult or impossible for her to plan a family only worsens her economic plight.

Not only do women suffer a pay gap, but nearly half of them do not even have health insurance. Over a recent 5-year period, "[t]he number of women in the United States who do not have insurance has grown 3 times faster than the number of men without health insurance."<sup>194</sup> In particular, minority women are woefully un- and under insured.<sup>195</sup> The estimates on private health insurance coverage range from 53% for all women to 64% for adult, non-elderly women.<sup>196</sup> Nearly one-third of all women are insured as dependents by another primary insured.<sup>197</sup>

191. *Id.*

192. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS: FISCAL YEAR 1992-FISCAL YEAR 2004, <http://www.eeoc.gov/stats/charges.html> (last visited Nov. 16, 2005). Some of the major employment discrimination cases brought under either Title VII or the Equal Pay Act demonstrate that discrimination continues to exist. For example, Eastman Kodak agreed to pay \$13 million in present or *retroactive* wages to employees who were underpaid on the basis of either race or gender. In addition, since 1997 the Office of Federal Contract Compliance Programs has collected \$10 million in equal pay settlements from such corporations as Texaco, U.S. Airways, Pepsi-Cola, Gateway, and Health Insure Highmark Inc. Home Depot and Publix Supermarkets agreed to pay more than \$80 million each to settle lawsuits based upon sex discrimination. The Service Employees International Union Local 715 in Santa Clara, California won nearly \$30 million on a claim for 4500 county employees from secretaries to mental health counselors based on findings that some 150 job titles, performed by a consulting firm chosen jointly by the county and the union resulted in underpayment in job classes with more than 50% minorities such as licensed vocational nurses and beginning social workers; and that 70% of those positions were filled by women. *Id.*

193. Manuelita Ureta, *Women, Work and Family: Recent Economic Trends*, 19 N. ILL. U. L. REV. 57 (1998).

194. JEANNA M. LAMBREW, THE COMMONWEALTH FUND, DIAGNOSING DISPARITIES IN HEALTH INSURANCE FOR WOMEN: A PRESCRIPTION FOR CHANGE 4 (2001).

195. See, e.g., J. Lee Hargraves, Ctr. for Studying Health System Change, *The Insurance Gap and Minority Health Care: 1997-2001*, TRACKING REP., June 2002, at 1, available at <http://www.hschange.org/CONTENT/443/443.pdf>.

196. KAISER FAMILY FOUND., WOMEN AND HEALTH CARE: A NATIONAL PROFILE 14 (2005), <http://www.kff.org/womenshealth/upload/Women-and-Health-Care-A-National-Profile-Key-Findings-from-the-Kaiser-Women-s-Health-Survey.pdf>.

197. *Id.*

In 2005, the Kaiser Family Foundation issued a comprehensive report on women and healthcare. Among its findings: 37% of poor women (family incomes below the poverty level) and 27% of near-poor women (100% to 199% of the poverty level) are uninsured.<sup>198</sup> 16% of women with incomes of 200-299% of the poverty level have no insurance.<sup>199</sup> Medicaid covers only one-third of poor women. 38% of Latinas have no health insurance, compared to 13% of white women. Only 39% of them have employer-sponsored health insurance, versus 70% of white women. “Low-wage workers are less likely to be offered coverage by their employers and even when they are offered coverage, it is more difficult for them to afford the cost of premiums.”<sup>200</sup> Women who are young, single and working part-time are the least likely to be insured. From ages 18 to 24, 17% have no insurance, while 21% of workers ages 25 to 34 and 26% of those ages 35 to 44 are insured.<sup>201</sup> Interestingly, although not broken down by specific types of care denied, 23% of all women whose insurance denied coverage never received the prescribed medical care.<sup>202</sup> 30% of women aged 18 to 44 surveyed chose to forego medical care due to the prohibitive cost of that care.<sup>203</sup> More women (8%) than men (5%) reported that they had to spend less on basic needs of the family in order to pay for prescription medicines.<sup>204</sup> 8 out of 10 women pay for prescriptions at least partially out-of-pocket every month; one-quarter pay at least \$100 per month and 10% pay more than \$200.<sup>205</sup> Upon recent inquiry at a large chain pharmacy, registered pharmacist Yvonne Mei reported that the current prices of popular contraceptives are: \$42.99 for Ortho Tri-Cyclen, \$47.99 for Ortho-Evra, and \$67.69 for one bi-annual injection of Depo-Provera.<sup>206</sup>

Despite the numbers of women who, in fact, have health insurance—approximately half—it is necessary to focus upon those who do not. These women are lower-paid, have no access to savings or retirement benefits, and may be in the greatest need of contraception. “Half of uninsured women have dependent children and notably . . . 54% are employed.”<sup>207</sup>

#### V. WORKING FOR THE LARGEST PRIVATE EMPLOYER IN THE WORLD

Wal-Mart, the global leader in retail and employment, exemplifies how women fare in many workplaces. Few of its more than a million employees<sup>208</sup> opt for the company health insurance plan, which requires large self-paid premiums, or work in the types of positions that provide health care. For

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198. *Id.* at 15.

199. *Id.*

200. *Id.* at 16.

201. *Id.*

202. *Id.* at 24.

203. *Id.* at 28.

204. *Id.* at 29.

205. *Id.* at 30.

206. Interview with Yvonne Mei, Registered Pharmacist at Jewel/Osco, in Chicago, Ill. (July 19, 2005).

207. KAISER FAMILY FOUND., *supra* note 196, at 17.

208. Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WK., Oct. 6, 2003, at 100. Wal-Mart boasted a global workforce of 1.4 million and \$245 billion in sales in 2002. *Id.*

example, Wal-Mart reports that only 52% of the 80% of Wal-Mart employees in Maryland who are eligible for health insurance benefits—which require some employee contribution—have enrolled, leaving most Wal-Mart workers in the state uninsured.<sup>209</sup>

Only recently did Wal-Mart's in-store pharmacies begin to stock Plan B emergency contraceptives. Ron Chumiuk, Vice President of Pharmacy for Wal-Mart, said in a statement that Wal-Mart changed its longstanding policy because “[w]e expected more states to require us to sell emergency contraceptives in the months ahead . . . [and since Plan B] is an FDA-approved product, we feel it is difficult to justify being the country's only major pharmacy chain not selling it.”<sup>210</sup> However, the company maintains its conscientious objection policy, which permits employees who do not feel comfortable dispensing a prescription to refer customers to another pharmacist or pharmacy.<sup>211</sup>

Wal-Mart's pay is low enough to qualify many for welfare. In 2001, the average Wal-Mart worker earned \$8.23 an hour, or \$13,831 a year, below the \$14,630 federal poverty level for a family of three. Unions, legislators, and some media target Wal-Mart for directing employees to get public assistance for health insurance to reduce the company's own expenditures. For example, Maryland lawmakers drafted a mandate for any employers with more than ten thousand employees to either spend at least eight percent of their payroll on health benefits or put the money directly into the state's health program for the poor.<sup>212</sup>

The National Organization for Women (NOW) named Wal-Mart a “Merchant of Shame” because of the myriad of lawsuits filed and cases won against them, including *inter alia* sex discrimination, child labor law violations, overtime claims, anti-union animus, and its exclusion of contraception coverage from health plans.<sup>213</sup> The two largest public school teachers unions joined a “back-to-school” boycott against Wal-Mart Stores and demanded “that the company boost its wages, expand health benefits and adhere to child-labor and discrimination laws.”<sup>214</sup>

209. John Wagner & Michael Barbaro, *Md. Passes Rules on Wal-Mart Insurance: Bill Obligates Firms on Health Spending*, WASH. POST, Apr. 6, 2005, at A1; see also AFL-CIO Working Families, Take the Wal-Mart Back-to-School Pledge, [http://www.unionvoice.org/wa/alert-description.tcl?alert\\_id=1475014](http://www.unionvoice.org/wa/alert-description.tcl?alert_id=1475014) (last visited Mar. 1, 2006).

210. News Release, Wal-Mart, Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006), <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=512&contId=6075>.

211. *Id.*

212. Wagner & Barbaro, *supra* note 209, A1. “Wal-Mart's image problems have had no measurable impact on consumers' willingness to shop at the chain, analysts said. Sales grew eleven percent last year and Wal-Mart estimates that ninety percent of Americans, or 270 million people, shopped at one of the company divisions in 2004.” *Id.*

213. NAT'L ORG. FOR WOMEN, WAL-MART: MERCHANT OF SHAME (2005), available at <http://www.now.org/issues/wfw/brochure.pdf>; Wal-Mart Litigation Project, Tracking Litigation Against the World's Largest Retailer, <http://www.wal-martlitigation.com> (last visited Nov. 20, 2005); see also Corrie Pikul, *Women vs. Wal-Mart*, SALON, Nov. 22, 2004, (“American taxpayers chip in to pay for many full-time Wal-Mart employees because they usually require incremental health insurance, public housing, food stamps . . .”); see generally LIZA FEATHERSTONE, *SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART* (2004).

214. *Teachers Unions Join Boycott of Wal-Mart*, L.A. TIMES, Aug. 11, 2005, at C4.

Wal-Mart is defending the largest class action case since the civil rights law banning sex discrimination was passed in 1964. The certified class “covers at least 1.5 million women who have been employed over the past five years.”<sup>215</sup> Wal-Mart unsuccessfully attempted to have the case—“the country’s biggest lawsuit claiming men were favored over women on the job”—and class certification, dismissed.<sup>216</sup>

Brought in 2001, the suit claims that women earn an average of five to fifteen percent less than men holding the same jobs, arguing that “Wal-Mart cultivates and maintains a strong corporate culture which includes gender stereotyping,”<sup>217</sup> that resulted directly in economic and professional disadvantage. In addition, it alleges sex discrimination in the company-wide process of promotion: while women comprise two-thirds of the Wal-Mart workforce, men grossly outnumber women in management positions.<sup>218</sup> According to the court that approved the class:

[L]argely uncontested descriptive statistics . . . show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower percentage of women.<sup>219</sup>

Not only are women underpaid and relegated to the bottom of the corporate heap, Wal-Mart’s health plan, which is voluntary, specifically excludes family planning expenses. Wal-Mart’s women are among the pioneers who will force courts to decide whether exclusion from health coverage is legally-prohibited sex discrimination. Today, most health plans except for Wal-Mart’s do offer family-planning coverage,<sup>220</sup> but only twenty-eight percent did so in 1993.<sup>221</sup>

Inspired by a recent lawsuit, a female employee of Wal-Mart sought certification for a class of women who “used” or “wished to use” contraceptives and were denied reimbursement by Wal-Mart’s health plan.<sup>222</sup> The court granted in part her motion to certify, excluding as too speculative the group of women who “wished to use” birth control. In doing so, the court relied upon the first and perhaps most famous case alleging gender discrimination by an

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215. *Dukes v. Wal-Mart*, 222 F.R.D. 137, 142 (N.D. Cal. 2004).

216. Joseph Menn, *Wal-Mart Faces Tough Questioning for Judges; A Federal Appeals Panel Points Out Weaknesses in the Retailer’s Defense in a Sex Discrimination Suit*, L.A. TIMES, Aug. 9, 2005, at C1.

217. *Dukes*, 222 F.R.D. at 144.

218. *Id.* at 141.

219. *Id.*

220. Susan Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL’Y 741, 748-49 (2005).

221. Marc Kaufman, *More Health Plans Cover Birth Control*, WASH. POST, June 14, 2004, at A2.

222. *Mauldin v. Wal-Mart*, No. 1:01-CV-2755-JEC, 2002 U.S. Dist. LEXIS 21024, at \*19 (N.D. Ga. Aug. 23, 2002).



employer whose insurance coverage excluded contraceptive costs, *Erickson v. Bartell Drug Co.*<sup>223</sup>

The *Erickson* case raised “an issue of first impression in the federal courts whether the selective exclusion of prescription contraceptives from defendant’s generally comprehensive prescription plan constitutes discrimination on the basis of sex.”<sup>224</sup> Benefits have long been recognized as one of the emoluments of labor.<sup>225</sup> The *Erickson* court characterized insurance coverage not as gratuitous, but rather as an earned entitlement, and found that a coverage exclusion that disparately affected women was illegal.<sup>226</sup> Calling Title VII less than a model of clarity,<sup>227</sup> the court perused the history of unfair and incorrect interpretations of the anti-discrimination laws, which have been slowly corrected by clarifying legislation and judicial decisions.<sup>228</sup> Holding for the plaintiffs, Judge Lasnik wrote:

What is clear from the law itself, its legislative history, and Congress’ subsequent actions, is that the goal of Title VII was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.<sup>229</sup>

*Erickson*’s lawyers claimed that denial of contraceptives which are needed because of a woman’s capacity to become pregnant violates the Pregnancy Discrimination Act (PDA),<sup>230</sup> and that the insurance plan was proof of disparate treatment. The district court ruled in favor of *Erickson*, following the reasoning of the Supreme Court in *UAW v. Johnson Controls*,<sup>231</sup> where the Court recognized that the capacity to become pregnant is a medical condition related to pregnancy.<sup>232</sup> In that case, the UAW sued Johnson Controls over a company rule that prohibited fertile (potentially pregnant) women from working in certain jobs. Without the ability to apply for and work in these jobs, women were denied the opportunity to advance within the firm. The company said that it was concerned about high lead levels endemic to the proscribed jobs and that it was worried that fetuses could be exposed and harmed.<sup>233</sup> The court countered that the firm failed to have similar concerns about the debilitating effect of lead exposure on the male reproductive system.<sup>234</sup> The *Erickson* court relied on this

223. 141 F. Supp. 2d 1266 (W.D. Wash. 2001). The plaintiffs argued that Bartell’s decision not to cover prescription contraceptives such as birth control pills, Norplant, Depo-Provera, intra-uterine devices, and diaphragms under its Prescription Benefit Plan for non-union employees violates Title VII, 42 U.S.C. § 2000e, as amended by the Pregnancy Discrimination Act of 1978. *See id.*

224. *Erickson*, 141 F. Supp. 2d at 1268.

225. *Inland Steel v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948).

226. *Erickson*, 141 F. Supp. 2d at 1268, n.3.

227. *Id.* at 1269.

228. *Id.* at 1269-71.

229. *Id.* at 1269.

230. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

231. 499 U.S. 187 (1991).

232. *Id.* at 199; *see* 42 U.S.C. § 2000e(k).

233. *Id.* at 190.

234. *Id.* at 198.

precedent and concluded that the employer's health plan discriminated by excluding essential medication that controlled the "capacity to become pregnant."<sup>235</sup> The Supreme Court's adoption of capacity to bear children (or not) as a proxy for sex helped the *Erickson* court rule in favor of the plaintiffs.

*Erickson*'s second argument was a straightforward Title VII claim that the exclusion of contraceptives from an employer's health plan has a disparate impact on women, because only women can become pregnant and only women bear the physical, emotional, and other consequences of an unintended pregnancy—or the financial burden of paying out of pocket for contraceptives.<sup>236</sup> The court did not reach the disparate impact issue, but it has since emerged in other cases. A federal judge ruled in favor of Brandi Standridge, a twenty-five-year-old engineer for Union Pacific from Pocatello, Idaho, and Kenya Phillips, a thirty-two-year-old engineer who lives near Kansas City, Missouri, who both brought Title VII claims about the railroad's exclusion of birth control from its union-negotiated health insurance plan. According to Judge Laurie Smith Camp, the health plan is discriminatory "because it treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employees' health than is pregnancy."<sup>237</sup>

Plaintiffs have tried other legal approaches to obtain contraceptive coverage. In *Glaubach v. Regence Blueshield*,<sup>238</sup> the court considered whether a particular interpretation of the state's general state insurance law required coverage of contraception. Specifically, plaintiffs contended that "the statutes impose a substantive obligation on those health carriers that provide a general prescription benefit to also specifically include all FDA approved contraceptive drugs and devices."<sup>239</sup> The court rejected the argument out of concern that its logical extension would mean that insurance carriers could not exclude any drug, for any reason—a nonsensical and impractical result.<sup>240</sup> However, the judge discussed *Erickson* with approval and implied that federal and state sex discrimination prohibitions could mandate contraception coverage.<sup>241</sup> Empirical data and observations by the parties in previous lawsuits explain that there are few litigated cases because most companies were "inspired" by *Erickson*.<sup>242</sup>

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235. For an early, comprehensive treatment of the contraception exclusion as discrimination and hierarchy, see Sylvia A. Law, *Sex-Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998); for a more recent discussion, see Sharona Hoffman, *AIDS Caps, Contraceptive Coverage, and The Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315 (2002).

236. Colleen E. Medill, et al., *Proceeding: Coverage of Reproductive Technologies Under Employer-Sponsored Health Care Plans: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employee Benefits and Employment Discrimination*, 8 EMPL. RTS. & EMPLOY. POL'Y J. 523, 532 (2004).

237. *Judge: Railroad Must Cover Birth Control*, USA TODAY, July 25, 2005, [http://www.usatoday.com/news/health/2005-07-25-railroad-ruling-birth-control-coverage\\_x.htm](http://www.usatoday.com/news/health/2005-07-25-railroad-ruling-birth-control-coverage_x.htm).

238. 74 P.3d 115, 117 (Wash. 2003).

239. *Id.* at 117.

240. *Id.* at 118.

241. *Id.* at 119.

242. Medill, *supra* note 236, at 534 (Planned Parenthood has negotiated with Dow Jones, Publix, and Albertson's, *inter alia*).

Although it seems intuitive that employer health plans should not exclude benefits that only protect women, this conclusion was reached only after painfully long, and circuitous, litigation and legal amendment. The Supreme Court considered a 1974 precursor cause of action in *Geduldig v. Aiello*.<sup>243</sup> In this case, the Court made its infamous—and absurd—distinction in upholding a California law against equal protection challenges because it precluded disability payments for any condition related to pregnancy:

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.<sup>244</sup>

It did not matter that forty-nine percent of the “non-pregnant persons” were biologically incapable of becoming pregnant. The Court continued to allow pregnancy exclusions, which led to the passage of the Pregnancy Discrimination Act of 1978.<sup>245</sup> Congressional debates before its passage highlight Congress’ concern.<sup>246</sup> Legislative correction became the only way for women to climb to equal treatment.

The Court’s 1976 decision in *General Electric Co. v. Gilbert* upheld against Title VII challenges an employer’s disability insurance policy that provided wage replacement for time lost due to almost any medical condition except pregnancy.<sup>247</sup> The Court held that the exclusion was not sex discrimination because not all women are or will become pregnant. There was no more showing here as there was in *Geduldig* that the exclusion of pregnancy disability benefits from petitioner’s plan was a pretext for discriminating against women, since pregnancy, though confined to women, “is in other ways significantly different from the typical covered disease or disability.”<sup>248</sup> Moreover, there was no condition for which men received coverage but women did not. The Pregnancy Discrimination Act clarifies the meaning of Title VII’s prohibition against sex discrimination:

[T]he terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .<sup>249</sup>

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243. 417 U.S. 484 (1974).

244. *Id.* at 497.

245. 42 U.S.C. § 2000e(k) (2000).

246. H.R. Rep. No. 95-948, at 3 (1978), as reprinted in 1978 U.S.C.A.N. 4749, 4751 (“The assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.”).

247. 429 U.S. 125 (1976).

248. 429 U.S. at 136.

249. 42 U.S.C. § 2000e(k) (2000).

Just prior to *Erickson*, the EEOC issued a decision, in response to complaints from female employees at the United Parcel Service (UPS), concluding that Title VII is violated by any employer health plan that does not provide FDA approved prescription contraceptive methods for employees.<sup>250</sup> In reaching this conclusion, the EEOC cited Congressional Hearings in which Senator Olympia Snowe remarked: "There is nothing 'optional' about contraception. It is a medical necessity for women during 30 years of their lifespan. To ignore the health benefits of contraception is to say that the alternative of 12 to 15 pregnancies during a woman's lifetime is medically acceptable."<sup>251</sup>

The EEOC agreed, extending the protection of the Pregnancy Discrimination Act, an amendment to the original prohibition against sex discrimination, to cover contraception. The EEOC concluded it was the only way "Congress could ensure that women would not be disadvantaged in the workplace, either because of their pregnancies or their ability to bear children."<sup>252</sup> By late Spring of 2005, at least twenty-four states had laws relating to insurance coverage for contraceptives.<sup>253</sup> Most of these states require health insurance policies that cover prescription drugs to also cover prescription contraceptives. Some laws prohibit such plans from excluding contraceptive services or supplies. Thirteen states include an exemption for employers who object to such coverage for religious reasons.<sup>254</sup> Three states include coverage exemptions for insurers affiliated with religious organizations in their policies.<sup>255</sup> Eleven states require employers to notify employees of their refusal to provide contraceptive coverage. Federal legislation has been introduced covering the same matters.<sup>256</sup>

Following one's conscience can have an immediate and detrimental impact upon patients, customers and employees. As the Supreme Court observed in its contraception cases, a refusal to provide contraception can lead to an unwanted pregnancy. This observation may cause one to wonder whether the pharmacists' moral objections are directed at other people's behavior, or

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250. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, DECISION ON COVERAGE OF CONTRACEPTION (2004), <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

251. *Id.* at n.13.

252. *Id.*; see U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, OFFICE OF GENERAL COUNSEL, ANNUAL REPORT: FISCAL YEAR 2002, <http://www.eeoc.gov/litigation/02annrpt.html> (last visited Nov. 20, 2005) ("UPS agreed to change the Plan to provide coverage for oral contraceptives prescribed for birth control or for other medical reasons on the same terms as other prescription drugs. The company also agreed to pay the cost of oral contraceptives for three years to thirty-six employees affected by the policy."); see also U.S. Equal Employment Opportunity Comm'n, Pregnancy Discrimination, <http://www.eeoc.gov/types/pregnancy.html> (explanation of PDA violations) (last visited Nov. 20, 2005).

253. These states are: Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Rhode Island, Texas, Vermont, Virginia, Washington and West Virginia. Nat'l Conference of State Legislatures, 50 State Summary of Contraceptive Laws, <http://www.ncsl.org/programs/health/50states.htm> (last visited Aug. 3, 2005).

254. *Id.* (Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Missouri, New Mexico, New York, North Carolina, and Rhode Island).

255. *Id.* (Missouri, Nevada, and Texas).

256. The Equity in Prescription Insurance and Contraceptive Coverage Act of 2005, S. 1214, 109th Cong. (2005) (introduced).

whether their objections stem from having to perform an act that violates their own ethical or religious codes. In the words of Judie Brown, the President of American Life League in Stafford, “I just absolutely do not believe that any company in the USA should be in the position of having to pay for birth control because females don’t want to accept responsibility for the possibility of being with child after they have sexual relations.”<sup>257</sup>

## VI. CONCLUSION

Birth control is considered by most Americans to be essential.<sup>258</sup> A woman cannot opt out of the need to control her fertility during the three decades prior to menopause without risking multiple pregnancies. For some women with serious medical conditions, controlling their fertility is a matter of life or death.<sup>259</sup> Even without maternal disabilities, family planning is considered essential to the well-being of not only one family, but to general public health. And it is desirable. Attempts to control and prevent reproduction have characterized virtually every society of which we have records.<sup>260</sup>

Beyond health considerations, reproductive self-determination has had not only the imprimatur of the Supreme Court, but continues to be an economic necessity for women who continue to work in a male model of employment.<sup>261</sup> The chief sponsor of the Senate bill that led to the PDA testified in Congress that “[b]ecause of their capacity to become pregnant, women have been viewed as marginal workers not deserving of the full benefits of compensation and advancement. . . .”<sup>262</sup>

What mid-nineteenth century libertarians advocated and what jurisprudential statements seem to reflect—that birth control and family planning is a private issue from which government ought to withdraw—is not the reality of the late twentieth and early twenty-first centuries.<sup>263</sup> Although neither statutes nor judicial decisions addressed this issue before 1873, the ensuing centuries following its illegalization were marked by both. What began as proactive litigation to secure the rights to privacy in family decision-making, bodily autonomy, and self-determination, evolved into lawmaking and law suits to limit those rights. What became illegal in 1873 never became an absolute

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257. *Id.*; see also Wagner & Barbaro, *supra* note 209; see also AFL-CIO WORKING FAMILIES, *supra* note 209.

258. A CBS/New York Times poll found that eighty percent of those surveyed believe a pharmacist should fill prescriptions for contraceptives, even if she or he has religious or moral objections. Adam Sonfield, *Rights v. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER REP. ON PUB. POL’Y, Aug. 2005, at 7, 9, available at <http://www.guttmacher.org/pubs/tgr/08/3/gr080307.pdf>.

259. Letter from Ralph W. Hale, M.D., Executive Vice President, American College of Obstetricians and Gynecologists, to Ida L. Castro, Chairwoman, Equal Employment Opportunity Commission, (Jan. 27, 2000), available at [http://lobby.la.psu.edu/013\\_Contraceptive\\_Coverage/organizational\\_statements/American\\_College\\_of\\_Obstetricians\\_and\\_Gynecologists/ACOG\\_Letter\\_to\\_the\\_Equal\\_Employment\\_Opportunity\\_Commission.htm](http://lobby.la.psu.edu/013_Contraceptive_Coverage/organizational_statements/American_College_of_Obstetricians_and_Gynecologists/ACOG_Letter_to_the_Equal_Employment_Opportunity_Commission.htm).

260. See GORDON, *supra* note 8.

261. See Schmall, *supra* note 170, at 673.

262. 123 Cong. Rec. 29,385 (1977) (statement of Senator Williams).

263. See generally GORDON, *supra* note 8.

right thereafter. The latest lawsuit-spawning controversy over ethical refusals to dispense birth control is the empirical result.

It is not surprising, since the issue of contraception overlaps with the more complex issue of abortion. Nearly one-third of the population considers the Supreme Court's decision in *Roe v. Wade* "a bad thing."<sup>264</sup> Readily available birth control should, under ideal circumstances, obviate abortion—at least in all but the most dire circumstances.<sup>265</sup> The obstacles to legal and safe birth control went from its being criminal to being a constitutionally recognized right. Insurance coverage for most women took over thirty years to catch up, even for those women, fewer than half, who have insurance. Even for that small group, some pharmacies now refuse to fill prescriptions for contraceptives. Many more refuse to provide emergency contraception, maintaining that such drugs are abortifacients.<sup>266</sup> When economic self-determination has become a global priority, it is inexcusable that working women in America are still fighting for that very right, both at pharmacies and at the workplace.

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264. Sonfield, *supra* note 258, at 8.

265. An overwhelming majority of Americans support abortions when a woman's life is endangered (eighty-five percent); when a woman's physical health is at risk (seventy-seven percent); and, when the pregnancy results from rape and incest (seventy-six percent). See PollingReport.com, Abortion and Birth Control,

CNN/USA Today /Gallup Poll (Jan. 10-12, 2003) <http://www.pollingreport.com/abortion.htm>.

266. The U.S. Food and Drug Administration disagrees, explaining that it "works like other birth control pills to prevent pregnancy. . . . [but] [i]f a fertilized egg is implanted prior to taking" the pills, it will not terminate the pregnancy. U.S. FOOD & DRUG ADMIN., FDA'S DECISION REGARDING PLAN B: QUESTIONS AND ANSWERS (2004). It seems incongruous that federal and state governments allow such refusals, considering that part of their national policy on welfare is to discourage births. Under the nomenclature of welfare reform, Congress passed the Temporary Assistance for Needy Families Act (TANF) in 1996. The purpose of the Act is described in 42 U.S.C. § 601(a) (2000): to, *inter alia*, "prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies." *Id.* The law grants flexibility to the states to achieve those goals, and allowed for the Mississippi policy that "penalizes welfare mothers with additional children." Pearson Liddell, Stevie Watson & William D. Eshee, *Welfare Reform in Mississippi: TANF Policy and Its Implications*, 11 AM. U.J. GENDER SOC. POL'Y & L. 1107, 1124 (2003).