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COMMENT: Protection of RU-486 as Contraception, Emergency Contraception and  
as an Abortifacient Under the Law of Contraception

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[\*1121]

I

RU-486 AND THE RIGHT TO PRIVACY

RU-486, or mifepristone, can work as a contraceptive, as an emergency contraceptive, or as an abortifacient. It has the potential to dramatically increase the privacy of procreative choice. For this to happen, RU-486 must fall under the protection of contraception law rather than the law of abortion. Contraception law constitutionally guarantees access to contraception, including emergency contraception. RU-486, because of its many uses, blurs the line between contraception and abortion. Used within the first nine weeks of pregnancy, RU-486 offers a safe and more private alternative to surgical abortion. Although it has received FDA approval, RU-486 has unresolved legal status in this country. The law needs to embrace this new technology and protect women's access to it under the law of contraception. Without such protection, RU-486 may not be available to women, thereby limiting women's privacy and liberty interests regarding procreative choice.

The high value placed on liberty and privacy can be traced back through American history. Modern legal notions of the right of privacy trace their roots to the political theory of English [\*1122] philosopher John Locke. Locke's concept of "liberty" was prevalent in colonial America and significantly influenced the framers of this country's documents, including the United States Constitution. Among other things, this philosophy holds that the laws of nature require that each individual has an inherent property interest in his own person and has the capacity for, and the right of, self-determination, which must be promoted and protected by civil society and political institutions. n1

*A. Unintended Pregnancy*

When considering procreative autonomy, the need for realistic medical choices cannot be overlooked. "About 50 percent of the pregnancies in this country are unintended [and] ... each year a little more than half of [those] result in abortion. Unintended pregnancy ... [substantially] affects [the health of women in this country], infant mortality and low-birthweight rates." n2 Nearly half of the over three million unintended pregnancies each year occur among women who report using a contraceptive method, suggesting that pregnancies resulted from contraceptive failures. n3 No contraceptive method is 100% effective, therefore, emergency contraception will always be needed

by women, especially in cases of sexual assault. n4 Widening the menu of contraceptive choice is desirable, and safe methods of pregnancy prevention after unprotected intercourse or after contraceptive failure are critically needed. n5 The "U.S. abortion rate is higher than that of any Western European country." n6 Access to contraception and abortion is necessary for the health of both women and children in this country.

In the 1990s, there was a significant decrease in pregnancy, births, and abortions due to increasing acceptance of abstinence, increasing economic opportunity for women, and, most importantly, the introduction of new, "easier-to-use effective birth control [\*1123] methods." n7 The distinction between contraception and pre-viability abortion, a term currently defined as abortion occurring within the first two trimesters of pregnancy, grows increasingly slight with every passing year due to technological advances. And while the procreative freedom debate rages on, the majority of us stand on the sidelines, living our daily lives, hearing tidbits about the extremists, and voicing our opinions within the safety of our living rooms. We assume that our reproductive choices are our own, that procreative choice is a private matter.

### *B. The Fundamental Right to Privacy*

The Supreme Court has decided in favor of procreative autonomy many times in the past three decades. Although limits have been placed on this freedom, the fundamental right to privacy, inherent in procreative autonomy, has been repeatedly protected. At the beginning of the twenty-first century, we are now faced with the very real possibility of the privatization of reproductive choice. The use of emergency contraception greatly contributes to the increased privacy women should have regarding procreative choice. While women need physician care, including a follow-up exam, when using an abortifacient, the use of RU-486 as emergency contraception can be self-initiated and private as long as women are well-informed. Due to the development of new drugs such as RU-486, women can procure a medical, rather than a surgical, abortion in their own homes. "RU-486 ... may be able to disperse the physical availability of abortion beyond the highly visible and identifiable, free-standing clinics and to disperse the provision of abortion services among a significantly greater number of doctors." n8 This would privatize the exercise of procreative autonomy. Because RU-486 works effectively at several stages along the reproductive spectrum, from pre-conception through termination of a pregnancy within the first nine weeks, current bright-line rules and timetables used to distinguish contraception and early abortion are becoming obsolete. The timelines used to rationalize state intervention become increasingly less useful.

In contrast to the ambiguity of the state-drawn physiological [\*1124] line between contraception and pre-viability abortion, the rights to contraception and abortion are protected under highly distinct legal standards. Under constitutional analysis, "contraception is protected with strict scrutiny." n9 This means that a woman's choice to use contraception is made free of state interference. Nevertheless, her choice to abort is subject to "reasonable state regulations" or an "undue burden analysis." n10 The state has an interest in potential life. Yet, due to the quickly evolving nature of medical science, the debate regarding procreative freedom must expand to encompass these changes.

This Comment first considers the fundamental right to privacy in the United States and the protection of that right in light of changing reproductive technology. A comparison of abortion and

contraception law is undertaken, including a brief history of the legal right to contraception in contrast to that of abortion, followed by consideration of procreative autonomy in a constitutional law context. This Comment then discusses whether emergency contraception, more specifically RU-486, is truly a form of contraception or abortion. The history and multiple uses of RU-486 are examined at length. The detailed explanations of emergency contraception and abortion are crucial to understanding procreative freedom along the spectrum from contraception to pre-viability abortion. This Comment then briefly explores procreative autonomy from anti-abortion and feminist perspectives. The discussion of the opportunities of individual liberty made available through recognition of new reproductive technology (RU-486) leads to the conclusion that the law must encompass RU-486 under the protection of contraception law rather than abortion law.

## II

### RU-486 IN THE UNITED STATES: A COMPARISON OF CONTRACEPTION AND ABORTION LAW

#### *A. The Recent History of RU-486 and the Political Struggle Surrounding Its Availability in This Country*

Following extensive clinical trials, RU-486 was approved for use as an abortifacient in France, Sweden, the United Kingdom, [\*1125] and China. n11 RU-486 is used for emergency contraception in China where, in many areas, it is the preferred method of emergency contraception. n12

During this time in the United States, an "import alert" on RU-486 was issued by the GHW Bush Administration, based on political considerations rather than concerns for public health or safety. n13 The import alert "allowed Customs officials to seize the drug if a person attempted to bring it into this country for personal use." n14 In the 1990s, the Clinton Administration promoted testing and clinical trials of RU-486 which led to "approvable letters" for the drug issued by the FDA. Final approval has been given. The House has since adopted an amendment barring the FDA from spending funds to test or develop drugs that could cause abortion, regardless of the fact that (1) pre-viability abortion is legal in this country, and (2) many of these drugs, including RU-486, have several other valuable, medical uses. n15 There is "no precedent for Congress inserting itself into the scientific decision-making process of the FDA to deny Americans access to a safe and effective drug." n16

In 1996, the FDA determined that RU-486 was safe as a form of emergency contraception. n17 It took almost two years, due to a hostile political climate, for the FDA to make such an announcement and for the pharmaceutical companies to be willing to label and distribute contraception as emergency contraception. On September 2, 1998, the FDA approved the sale of other forms of emergency contraceptive pills. n18 This decision entailed the re-labeling of oral contraceptives to indicate their potential postcoital use. "Nurse midwives, nurse practitioners, and physician assistants have the authority to prescribe [emergency contraception] in some U.S. settings, although in many cases the prescription must [\*1126] be authorized by a physician." n19 The Yuzpe regimen, named for a Canadian researcher, the most well-known method of emergency contraception, consists of an increased dose of combined oral contraceptives, estrogen, and

progesterone, taken within seventy-two hours of unprotected intercourse, followed by a second dose twelve hours later. n20 "A study of physicians showed that while 85% of obstetrician/gynecologists and 50% of family practitioners considered the method to be safe and effective, very few actually offered it to their patients." n21 For years, doctors have prescribed oral contraceptives for the "off-label" use of emergency contraception. Today, doctors may legally prescribe oral contraceptives for postcoital use. n22 Yet, due to the current political climate, doctors are not prescribing RU-486.

## *B. The History of Contraception Law vs. Abortion Law*

### *1. The Legal Right to Contraception*

The constitutional protection of contraception has its foundation in *Griswold v. Connecticut* n23 and *Eisenstadt v. Baird*. n24 The Supreme Court in *Griswold* found a married couple's decision to use contraception to be a private matter, a decision to be made "within a zone of privacy." n25 The Connecticut law at issue in the case, which banned the use of contraception by a married couple, was held unconstitutional because it deprived liberty without due process of law. The Supreme Court has recognized the privacy interest inherent in using contraception and "the interest in independence in making certain kinds of important [personal] decisions." n26 Concerning contraception, Justice Douglas wrote that the Court was faced "with a right of privacy older than the Bill of Rights." n27 Douglas wrote of personal decisions regarding marriage [\*1127] and reproduction as "intimate to the point of being sacred." n28

Seven years later in *Eisenstadt v. Baird*, Justice Brennan wrote that privacy and procreative freedom were fundamental rights. The Court struck down a Massachusetts statute forbidding the distribution of contraceptives to unmarried individuals, stating that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child." n29 In *Eisenstadt*, under the Equal Protection Clause of the Fourteenth Amendment, the right to contraception was extended to unmarried people. As a result of these Supreme Court decisions, contraception received the highest level of constitutional protection.

### *2. The Legal Right to Abortion*

A legal right to abortion is much more narrowly protected than contraception. At the time *Roe v. Wade* was decided, there were several constitutional challenges to state anti-abortion laws in the U.S. courts. n30 In *Roe*, the Supreme Court held that a state cannot prohibit abortion for the sake of preserving fetal life before the seventh month of pregnancy. "A fetus is not a constitutional person until 'viability' (at about 26 weeks or the third trimester)." n31 Therefore, any infringement on a woman's right to an abortion within the first two trimesters of pregnancy was found to be unconstitutional.

Nineteen years after the *Roe* decision, the Court reexamined the abortion issue in *Planned Parenthood v. Casey*. n32 Liberty was discussed in *Casey* as privacy had been discussed in *Griswold* and *Roe*. The Court in *Casey* explained:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and ... our precedents have "respected the private realm of family life which the state cannot enter" .... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the [\*1128] liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. n33

Many view the Casey decision as a setback for procreative choice. Post-viability abortions are not protected from prohibition by state law. Regulation of all abortions is acceptable under the Casey decision as long as the regulation is rationally related to reasonable state interests and the regulation is not unduly burdensome on a woman's right to abortion. Under Casey, waiting periods, parental notification, and state encouragement to choose childbirth are acceptable regulations. "The incidental effect of making it more difficult [to] ... procure [a pre-viability] abortion" does not invalidate a regulation. n34

But there is another viewpoint from which to interpret Casey. The Supreme Court in Casey reaffirmed the central holding in Roe. There is no doubt that a woman's right to choose to have an abortion before fetal viability and to obtain it without having to overcome a "substantial obstacle" or "undue burden" created by state regulation is protected under the Federal Constitution. n35 Remarkably enough, in Casey, the Court recognized that requiring a twenty-four hour waiting period before obtaining an abortion would "impose a significant obstacle" in the way of a woman's decision to obtain an abortion, and yet the Court allowed for such state requirements to be held constitutional. n36 In contrast, abortion proponents must focus on the Court's recognition of liberty and freedom as central to the abortion issue.

In the future, the Supreme Court will need to decide which regulations constitute undue burden on a woman's right to an abortion. The "substantial obstacle" test will have to be clarified. In the meantime, the Court has made it clear that the right to procreative self-determination is based on personal liberty, the foundation of our Constitution.

### *C. Case Law*

There is little case law regarding emergency contraception in this country, and none to date regarding RU-486. While constitutional [\*1129] protection extends to emergency contraception, current jurisprudence in this area focuses on "peripheral" abortion issues, such as partial birth abortions. Cases concerning procreative freedom have traditionally centered on the issue of the fundamental right to individual privacy. In October of 1999, the Montana Supreme Court warned of an often overlooked danger:

Implicit in [the] right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation. Moreover, the State has no more compelling

interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term. Recognition of this point is important - especially for those who reject abortion. For if the State has the power to infringe the right of procreative autonomy in favor of birth, then, necessarily, it also has the power to require abortion under some circumstances. If one accepts the former, then imposition of the latter is no more remote than a change in prevailing political ideology. n37

If women's choices are subject to political whims and current prevailing ideologies, then women are denied legal protection of privacy and personhood. Classifying RU-486 solely as an abortifacient, regardless of its safe and practical use as contraception and emergency contraception, will result in abortion opponents pushing the current Casey timeline back to nine weeks. Therefore, reasonable state regulation of all uses of RU-486 would be allowed as long as an "undue burden" were not placed on a woman's right to choice. The practical result is that use of RU-486 for any purpose would fall under state regulation. It would be a giant step backward for women to have their right to use contraception and emergency contraception limited according to guidelines established by the state. To deny protection to all the uses of RU-486 under the law of contraception opens the door for state regulation of the currently constitutionally guaranteed right to procreative autonomy. Allowing RU-486 to fall under the law of abortion denies women their constitutional right to privacy.

**[\*1130]**

### III

#### BLURRING THE PHYSIOLOGICAL LINE BETWEEN ABORTION AND CONTRACEPTION

The immense impact of RU-486 on procreative autonomy in this country is perhaps best understood by momentarily adopting the anti-abortion viewpoint. From this perspective, the use of RU-486 to terminate a pregnancy in the first seven to nine weeks of pregnancy is clearly working as an abortifacient because a fertilized, implanted egg is being expelled from the body as a result of chemical inducement. Moreover, the use of RU-486 as a postcoital, or emergency contraceptive, interrupts the egg's development after fertilization and prevents implantation. This is the equivalent of abortion under the anti-abortion viewpoint.

The contradictions within the abortion opponents' argument first appear at this point. Many currently used and widely accepted forms of birth control work by preventing implantation of a fertilized egg in the uterine wall. The IUD, or intrauterine device, is a copper coil inserted into the uterus for the purpose of preventing implantation of a fertilized egg. n38 Many forms of hormonal contraceptives, such as progesterone, or more commonly, "the pill," are used to prevent pregnancy by preventing ovulation or by creating an inhospitable environment for a fertilized egg, resulting in expulsion. n39 RU-486 acts as a contraceptive when it delays ovulation. Here, no egg is released, so no fertilization can occur or be interrupted.

It is sometimes argued that a drug preventing ovulation is the equivalent of contraception and, therefore, is acceptable under anti-abortion definitions. The same drug may also prevent implantation just hours or days later, which under anti-abortion definitions, is abortion. Basing the legality of such an ultimately private and currently legal act on a difference of hours or days is

illogical. Given this country's emphasis on equal treatment under the law, how would a court explain its different treatment of two women who are taking the same drug, with the same intentions of avoiding child-bearing, just days apart? Some women using RU-486 will not be certain whether it is acting as a contraceptive, emergency contraceptive, or as an abortifacient. Their [\*1131] intention will be to avoid creating an unwanted child for an infinite variety of reasons.

Abortion opponents might argue that a fetus' life begins at the moment of implantation, and at that moment a fetus has rights and interests. But the process of implantation, which lasts anywhere between six or seven days following fertilization, is indeterminable. Would a woman potentially be guilty of involuntary manslaughter if she used RU-486 as a postcoital contraceptive without knowing that a fertilized egg had achieved implantation in her womb? The use of RU-486 governed by abortion law would require a woman to know whether or not a fertilized egg in her womb had achieved implantation. This is an incredibly invasive and unworkable process. Emergency contraceptive pills are "ineffective if a woman is already pregnant." n40 The IUD, like RU-486, which primarily interferes with implantation and can be inserted up to seven days after intercourse, "can [also] be used as an ongoing method of contraception." n41 Would women using these forms of birth control face the possibility of criminal charges were a future, more conservative Supreme Court to decide that emergency contraception, especially RU-486, should be regulated under abortion law?

"Pregnancy [is] measured either from the date of the woman's last menstrual period or from conception, which is generally considered to occur two weeks after the woman's last menstrual period." n42 This is a very imprecise measurement given that legal definitions of abortion and emergency contraception differ merely by a number of days or hours.

## IV

### THE HISTORY AND USES OF RU-486

#### *A. Relevant Definitions*

As defined by the American College of Obstetricians and Gynecologists, [\*1132] pregnancy "begins with the completed implantation of [a] fertilized egg in the womb. Implantation also involves multiple steps, occurring over six to seven days." n43 Contraception is "a procedure that terminates the development of a fertilized egg prior to completed implantation." n44 Abortion is "any procedure that terminates the development of [that] fertilized egg [once implantation is complete]." n45

Given these medical definitions, it is important to note that not all interested parties define these terms in the same way. Abortion opponents would argue that life begins upon conception. Conception is the beginning of the formation of a viable zygote. n46 Barrier forms of contraception, such as condoms, are deemed unacceptable by some contraception and abortion opponents. As a legal issue, the contraception debate has been largely decided. Yet, in this country, the approval of RU-486 has the potential to significantly alter current limitations on procreative autonomy.

#### *B. The Processes and Multiple Uses of RU-486*

RU-486, or mifepristone, is "a drug that blocks the activity of the hormone progesterone in the body." n47 It was first synthesized in 1980 by Dr. Etienne-Emile Baulieu, a French scientist. n48 The first clinical tests were run in Switzerland. n49 RU-486 is a contragestive, a drug that interrupts fetal gestation. It acts as an anti-hormone, prohibiting progesterone activity so that the uterus cannot accept or retain a fertilized egg. RU-486 can "stop ovulation, prevent implantation or terminate pregnancy after implantation," allowing it to be classified as contraception, emergency contraception, and as an abortifacient. n50

### *1. The Development of RU-486*

Dr. Etienne-Emile Baulieu is credited with developing the first non-surgical method of abortion. Early on, RU-486 was administered [\*1133] in combination with prostaglandin, a chemical naturally secreted by the uterus, which causes contractions leading to expulsion of a fertilized egg. n51 Under a doctor's guidance, a woman seeking an abortion would ingest 600 milligrams of RU-486 within the first seven to nine weeks of her pregnancy. n52 Within thirty-six to forty-eight hours, she would return to the doctor's office to receive a dose of prostaglandin administered intravaginally or by high dose injection. n53 Today, dosages have been dramatically reduced and drugs are administered orally. "Taken with the prostaglandin follow-up, RU-486 is ninety-six percent effective" as an abortifacient. n54

In comparison, surgical abortion is over ninety-seven percent effective but is not recommended before the eighth week of pregnancy and, as with any surgery, the procedure poses significant risks. n55 These risks include infection, injury, and negative reactions to anesthesia.

### *2. RU-486 As an Abortifacient*

Alternatively, RU-486 is expensive, time-consuming, and requires a lengthy recuperation period. Most side effects of an RU-486 abortion are much like those of a miscarriage and are generally "caused by the prostaglandin follow-up rather than by RU-486 itself." n56 As emergency contraception, RU-486 causes fewer side effects than the traditional contraception pill used as emergency contraception, also known as the Yuzpe regimen. n57 One of the benefits of RU-486 is that it induces an abortion under a doctor's supervision without surgery or hospitalization. Therefore, it can be done within "the privacy of one's home." n58 This form of medical abortion offers women a more private, safe alternative to surgical abortion during the first seven to nine weeks of pregnancy.

A recent study in a British hospital revealed that a regimen of [\*1134] RU-486 and misoprostol proved highly effective in terminating pregnancies up to eighty-three days in gestation, that is, up to twelve weeks or just short of three months. n59 Ninety-five percent of the 253 women seeking abortion had a complete abortion. n60 Medical abortion, carried out under this regimen, is found to be effective up to eighty-three days rather than the before believed sixty-three days. n61 Currently, doctors prescribe RU-486 only up until the ninth week of pregnancy. Testing continues to determine its safety and efficacy beyond the first nine weeks.



### *3. RU-486 As Emergency Contraception*

RU-486 can also be used as a safe and highly effective form of emergency contraception. "Emergency contraception is used to prevent pregnancy after unprotected mid-cycle sexual intercourse .... [regardless of whether the] unplanned pregnancy results from unexpected mid-cycle intercourse, from failure to use a regular method of contraception, or from method failure, such as condom breakage." n62 Emergency contraceptive pills do not cause abortion. Emergency contraceptive pills prevent ovulation, prevent sperm from fertilizing the egg, and prevent implantation. Once a woman is pregnant under the medical definition of pregnancy, meaning completed implantation of the fertilized egg in the uterine wall, emergency contraceptive pills (containing the hormones estrogen and progesterone) are useless and harmless to both the mother and fetus. n63

Emergency contraception is ineffective once a fertilized egg is implanted in the uterine wall. If a woman unknowingly uses emergency contraceptive pills during an ongoing pregnancy, no harm will result. n64 The IUD, or intrauterine device, "primarily interferes with ... implantation" as well. n65 "If taken within seventy-two hours of unprotected intercourse, [RU-486] is more effective than ... [other] postcoital contraceptives." n66 By [\*1135] preventing implantation of the fertilized egg into the uterine wall, RU-486 does not fit "into the medical definition of abortion." n67 This is because a fertilized egg that is not yet implanted in the uterine wall does not meet the medical definition of pregnancy. Courts have specifically held that the definition of abortion "does not include the IUD, morning after pill, or oral contraceptives." n68 Compared to other forms of emergency contraception, RU-486 causes fewer side effects and is safer, more effective and easier to use. RU-486 can interrupt a pregnancy where emergency contraceptive pills cannot. It requires only one dose and has been proven virtually 100% effective in clinical trials as an emergency contraceptive. n69

By making emergency contraception more widely available, family planning and reproductive health care providers can help reduce unplanned pregnancies, many of which result in unsafe abortion, thereby taking a large toll on women's health. Currently, a prescription is required to obtain emergency contraception, unless a woman decides to use current contraceptive pills off-label. Until now, no emergency contraceptives were marketed as such in the United States.

For years, clinics have repackaged regular oral contraceptive pills for use as emergency contraception. Pharmacies associated with certain clinics repackaged the pills in dosages needed for emergency contraception and labeled them for emergency contraception use. n70 Planned Parenthood and student health centers across the country have been punching the pills out of their regular everyday contraception use packaging by hand and then dividing and repackaging pills for students to take when they need emergency contraception. Some private providers tell their patients to take four pills instead of one of their regular birth control [\*1136] pills and then another follow-up dose twelve hours later as an emergency contraception regimen.

Having emergency contraception available over-the-counter has been repeatedly suggested by certain groups of healthcare providers, such as nurse practitioners. There are several good reasons for doing so. Women already diagnose their own need for emergency contraception. This is how they end up in doctors' offices. Using emergency contraceptive pills is safe and simple, especially if

emergency contraceptive pills are packaged and labeled as such. The use of emergency contraceptive pills involves swallowing a set of pills "within 72 hours after unprotected intercourse, and the second dose twelve hours later." n71 There are no risks associated with an accidental overdose, and dosages are the same for every woman, regardless of varied characteristics. n72 Furthermore, these drugs are not addictive. Oral contraceptives are among the safest and best studied drugs in medicine. n73 A physical exam is not necessary for emergency contraceptive use and no long-term side effects have been observed.

Over-the-counter access to emergency contraceptive pills is already in practice in Washington state, "where a pharmacist may prescribe [emergency contraceptive pills] directly to women in accordance with an approved protocol established in advance between the pharmacist and a physician." n74 This Washington state program has 111 participating pharmacies. n75 Benefits of such a program include enhanced patient care by "increasing access to primary health care in a cost-effective manner, reducing drug-related problems and improving therapeutic outcomes." n76 These physician-pharmacist teams are known as collaborative drug therapy agreements, and such agreements have worked successfully in the past for public health programs such as immunizations. "Twenty-two states currently allow pharmacists to directly prescribe or adjust medications through collaborative drug therapy agreements.... The safety of [emergency contraception pills] [\*1137] combined with the need to initiate use within 72 hours of unprotected intercourse makes them well suited to pharmacist prescribing." n77 Potential drawbacks include decreased patient follow-up and the potential for overuse of emergency contraception pills. n78

Having access to emergency contraceptive information can be particularly important for adolescents who often are inexperienced contraceptive users and are at high risk of pregnancy. n79 There is no evidence to suggest that knowledge of emergency contraception increases sexual activity among young people. What is clear is that the need for emergency contraception often brings sexually active young people into family planning clinics where they can receive other services and counseling, including help in learning how to say no when they choose to be abstinent. The savings to the health care system of averting unwanted pregnancy or unsafe abortion more than covers the cost of emergency contraception supplies and services.

Another issue in the struggle for procreative autonomy is whether providers will eventually give emergency contraception prospectively. This would enable women to have emergency contraception in their medicine chests to use whenever the need might arise. If their regular method of birth control fails, if they are the victim of a sex crime, or if they have unprotected sex, the current seventy-two hour deadline for using oral contraception requires that women be prepared. Marketing RU-486 for personal use as emergency contraception would also remove the [\*1138] panic of meeting the seventy-two hour deadline. However, having emergency contraception prospectively available, meaning available for home use and storage before it is needed, would entail overcoming the societal fear that women cannot handle this level of responsibility. Opponents argue that immorality would be encouraged by having emergency contraception prospectively available. Some politicians, particularly Christian conservatives, argue that a woman needs a doctor to tell her what to do with her body. This is a very paternalistic and subordinate view, the antithesis of equality and respect for the personhood of women.

The processes of emergency contraception must become common knowledge. Emergency contraception is less effective and more expensive than most forms of regular contraception, two incentives against its regular use. However, information about the different methods of emergency

contraception, including RU-486, needs to be available through doctors and pharmacists. This will make it possible for women to make timely decisions according to their own beliefs in light of their own definitions of pregnancy and abortion.

#### *4. RU-486 As Contraception*

RU-486 is also a potentially safe alternative to daily birth control pills. By blocking the production of progesterone in the uterus, RU-486 may prevent ovulation. A woman could potentially take an RU-486 pill for only three days of her cycle rather than taking a traditional birth control pill every day. Using this method, a woman would suffer fewer side effects, and a new form of birth control would be available to women unable to tolerate current hormonal contraceptive methods, such as estrogen and progesterone. n80 However, questions remain about the long-term impact RU-486 may have on women's health as a result of shortening the menstrual cycle.

**[\*1139]**

#### *5. Other Medical Uses of RU-486*

RU-486 has many other valuable medical applications. It stimulates lactation and can be used to induce labor. n81 It is currently being used in the treatment of cancerous tumors in breast tissue and benign tumors of the brain and spinal cord which often grow in reaction to progesterone. n82 RU-486 blocks progesterone receptors, slowing or stopping cancerous growth. It facilitates healing of skin wounds, glaucoma, and the treatment of Cushing's Syndrome which results from tumors in the adrenal cortex. n83 It can be used to treat medical problems such as infertility, endometriosis, and may even prove to be useful in the treatment of AIDS. n84 However, as discussed at greater length below, the GHW Bush Administration placed a ban on RU-486 because of its potential as an abortifacient in spite of its many other medically valuable uses.

## V

### THE ROLE OF RU-486 IN THE BATTLE FOR EQUALITY AND PROCREATIVE AUTONOMY

RU-486 has the potential to significantly increase privacy crucial to procreative freedom. The distinction between contraception and abortion grows less discernible with RU-486 and other scientific advancements. RU-486 "is the first [of these technologies] to operate before and after fertilization, as well as after implantation. [It is] the first contragestive technology to be both a contraceptive and an abortifacient under the medical definition of pregnancy." n85

Since RU-486 can work at any stage in the reproductive process within the first nine weeks, from preconception stage until well after implantation, this technology has a potentially profound impact on our understanding of procreative autonomy. The multiple uses of RU-486 suggest that the abortion decision is not necessarily different from the decision not to conceive in the first place. n86 For example, a woman using RU-486 as emergency contraception might be doing so because of a suspicion that her **[\*1140]** primary form of birth control, such as a diaphragm, has failed. Her choice to use RU-486 as emergency contraception is no different in nature than her choice to use a

diaphragm. She is simply insuring that she is not pregnant after a contraceptive failure. Another example is one in which a woman might unknowingly be pregnant due to a diaphragm failure three weeks earlier. Were she to unknowingly use RU-486 three weeks later following a second diaphragm failure, implantation would have already occurred and RU-486 would be working as an abortifacient, rather than as emergency contraception. Only if she were to perform a pregnancy test and knowingly use RU-486 as an abortifacient would she be making a choice to abort. In all of these examples the woman would be making a personal choice. She needs to have the information to make the right choice for herself, depending on her definition of pregnancy and her conscience. Arbitrary timetables can no longer be comfortably relied upon.

The use of RU-486 as a contraceptive three days each month is clearly protected from state interference by *Griswold* and *Eisenstadt*. The use of it as postcoital contraception is also protected, given Justice O'Connor's statement that "the use of post fertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny." n87 After the eighth week of pregnancy, the use of RU-486 might be subject to state interference similar to Casey's regulation of a surgical abortion. But, RU-486 has resulted in blurring the arbitrary distinction between choosing to avoid pregnancy either before or just after intercourse and making the highly personal decision to terminate pregnancy days or weeks down the road after much consideration.

Some would argue that the next step for the Court is to address the period of time between fertilization, occurring seventy-two hours after intercourse, and implantation, which occurs over the subsequent six to seven days. But it logically follows that the more difficult it is to draw fine physiological lines between contraceptives and abortifacients, the more difficult it is to treat them as morally distinguishable. n88 If the Court creates a bright line rule, its enforcement would require knowledge of a highly personal nature (i.e., dates of intercourse and timing of menstrual [\*1141] cycles). Is this what we want happening in the courts? Would this not detrimentally effect the legitimacy of our legal system?

#### *A. Choice and Women's Health in the United States*

Women in the United States will soon have a new option available to them. In fact, RU-486 is just one of many new technologies being created to expand and more truly privatize procreative choices. The growing range of procreative options includes mifepristone (RU-486), methotrexate, and combinations of oral contraceptives which are already in use.

Methotrexate, when used in combination with misoprostol, may be used in early pregnancy to induce pre-term labor resulting in expulsion of the fetus. n89 It also can be combined with prostaglandin, much like RU-486, and is a drug with many other beneficial uses. Methotrexate is used successfully in the treatment of cancer and may be used as a contraceptive or as an abortifacient. n90 It is currently being used in the United States to perform medical abortions to terminate ectopic pregnancies.

[Ectopic pregnancies are those] located outside the uterus (such as in the fallopian tube) during the first six to seven weeks of pregnancy. [The medical procedure] involves the performance of a routine blood test to measure the patient's hormone levels, followed by [an] injection of ... [methotrexate].... There is no recovery time

after the injection, and only mild vaginal bleeding. Follow-up care consists of rechecking the patient's hormone levels several days after the injection, and rechecks thereafter at seven day intervals. Although currently limited in use to the termination of ectopic pregnancies, methotrexate and ... RU-486 are currently being used in research protocols for use in terminating intrauterine pregnancies. n91

Medical scientific advances have dramatically altered everyday life in this country. With improvements in healthcare, such as the discovery of new drugs, many new choices have become available. Major advances have been made in the understanding of women's health. The health of women, the bearers of children, is central to the health of our society as a whole. The dramatic expansion [\*1142] of women's roles in the marketplace has resulted in a more substantial portion of this country's medical resources being allocated to the study and improvement of women's health.

Just as with contraception, emergency contraception and abortion fall within the realm of that which is ultimately private. The use of RU-486 must be protected and valued for its ability to remove much of the risks inherent in surgical abortion. RU-486 must enjoy widespread medical and legal acceptance as it is one key to true procreative freedom. It is not a panacea. A doctor should still be involved to oversee the process to protect the health of women. However, the state has no role here. This drug allows for very early term abortion, within the first nine weeks, which is the safest stage for women's health. Instead of regarding the issue as one of contraception versus abortion, it is time to view the debate from a new perspective: one of tolerance and respect where women can make their own choices about their bodies.

As a society, we are invested in supporting procreation and morality. When abortion occurs, we are all indirectly affected, and we all want such decisions made with much consideration. Ideally, abortion would rarely occur. RU-486 and other new technologies provide new options for procreative autonomy. The struggle for that autonomy continues. Procreation has often been referred to as a continuum from pre-sex through birth, or as a path for individuals to walk along according to their own conscience. Life is sacred. However, it is important to underscore the need to recognize the sanctity of a woman's life, both physical and spiritual. To deny her self-actualization robs all of us as a larger community. If a woman is denied personhood and self-determination, she is denied liberty in its most basic form. If the state can take such a highly personal liberty decision out of her hands, then it may choose to do so to others in much the same way, should changing dominant views shift about a different issue. If her freedom is in danger, then so is everyone else's. If she is not free, then no one is.

Past medical scientific advances, such as the birth control pill, have had a dramatic impact on gender roles and equality. Contraception is crucial to women's self-determination. Due to the introduction of contraceptives, early term abortion and contraception have become remarkably indistinct. Choice is unavoidably central to women's bodily integrity. RU-486 offers women [\*1143] an opportunity to privately claim full control of their bodies and their lives at any point during their reproductive cycle prior to the end of the ninth week of pregnancy.

### *B. In Other Countries*

In Europe, women have had access to emergency contraception for many years. n92 Emergency contraception is dispersed by pharmacists in England because there the need for immediate information and access to emergency contraception is recognized. Pharmacists can prescribe emergency contraception due in large part to the more practical European approach to procreative issues. In Europe, the "use of [a Yuzpe product] seems to be on the rise, and knowledge is high." n93 Since emergency contraception has become widely available, abortion rates have fallen. n94 In Africa, several countries have emergency contraception regimens available; these include, South Africa, Kenya, and Nigeria. Tanzania, Malawi, and Ethiopia are working on emergency contraception regimens as well. n95 The "visiting pill," as emergency contraception is commonly called in China, has been available there for two decades. It was originally designed for couples who live apart and, therefore, have "infrequent need for contraception." n96 Other countries in Asia are somewhat less receptive to the dissemination of emergency contraception even though it is generally available. In Australia and New Zealand, emergency contraceptive pills are widely used. Information is slowly becoming available in Latin America. n97 In places in the Far East and Eastern Europe, emergency contraception is available over the counter. n98 And while opponents of emergency contraception like to warn of the risks of these drugs, any risks associated with them are substantially lower than those of pregnancy. n99

It is argued that emergency contraception will not become widely used or accepted in the United States until dedicated products, made and marketed for emergency contraception purposes, [\*1144] become widely available. In the United States, the PREVEN Emergency Contraceptive Kit was recently placed on the market as a form of emergency contraception based on the Yuzpe regimen. n100 "In July 1999, [the FDA approved] the first progestin-only emergency contraceptive, Plan B." n101 Progestin is a form of the hormone progesterone. It is currently the emergency contraceptive method of choice in some countries. n102 "International experience suggests that approval of specially packaged and labeled emergency contraceptive pills with clear instructions for providers and clients helps legitimize the method; makes existing regimens much easier to administer and use; and promotes safe, effective and appropriate use." n103

The laws of other countries, such as Germany, Finland, New Zealand, the United Kingdom, and Thailand, draw a distinction between emergency contraception and abortion in order to protect women's access to postcoital contraception. n104 In countries that are far from legalizing abortion, the struggle for procreative autonomy centers on postcoital contraception. In this country, the right to postcoital contraception is protected, as is pre-viability abortion. There is no scientific basis for the United States to draw an arbitrary line between procreative choices in the face of new medical technology. In a land where government is of, by, and for the people, reproductive choices must be individual and private. Those who exercise these rights must have the benefit of all available medical technology along the entire reproductive spectrum. This is crucial for women's health and social equality in this country:

The Supreme Court, in denying the state the specific power to make contraception criminal, presupposed the more general principle of procreative autonomy .... The law's integrity demands that the principles necessary to support an authoritative set of judicial decisions must be accepted in other contexts as well. It might seem an appealing political compromise to apply the principle of procreative autonomy to contraception, which almost no one now thinks states can forbid, but not to abortion, which powerful constituencies violently oppose. But the point of integrity - the point

of the law itself - is exactly to rule out political compromises of that [\*1145] kind.  
n105

Around the world, laws concerning women's reproductive freedom vary greatly. The United States should lead the way as a country founded on liberty and egalitarian principles.

## VI

### ANTI-ABORTION PERSPECTIVES

#### *A. The Textualists & Originalists*

One argument against procreative freedom is that such freedom was never expressly reserved to the people in the United States Constitution, nor in the Bill of Rights. Textualists argue that only rights enumerated in the Bill of Rights are guaranteed or protected in this country. Justice Scalia has taken this stance against what he perceives as liberal change, rather than healthy cultural evolution. Upon closer examination, one must concede that the Constitution, and the Bill of Rights in particular, is not a detailed list of rights. It is, rather, a proclamation of intentionally vague concepts that create a foundation for ordered liberty. The Framers were educated men, most of whom were great thinkers, who knew better than to use tight definitions and precise phrases that would become obsolete in an ever-changing world that had so swiftly and dramatically changed in their own time. Protecting individual liberty, privacy, and freedom, and placing limits on what a centralized government could do, were the basic known objectives of the founders. Originalists and textualists, in attempts to avoid what they interpret as judicial activism, use short-sighted, fear-based methods of interpretation that insult the ideals and goals of this country. This radically conservative, inflexible thinking supports the continuing subordination of women and thwarts the natural evolution of American culture and society.

Contraception and pre-viability abortion are constitutionally protected. Justice O'Connor stated this in *Webster v. Reproductive Health Services*. n106 With the final approval from the FDA for RU-486, the Supreme Court may decide whether there is a line to be drawn between RU-486 used as a postcoital contraceptive and as an abortifacient.

[\*1146]

#### *B. Derivative vs. Detached Reasoning*

Abortion opponents fiercely oppose allowing abortion to be a private matter. According to Ronald Dworkin, a Professor of Law at New York University and a University Professor of Jurisprudence at Oxford University, abortion opponents fall into one of two ideological camps. These are the derivative reasoning camp and the detached reasoning camp.

##### *1. Derivative Reasoning*

The first camp raises a "derivative" objection to abortion that is based on the idea that human life begins at conception and that a fetus is a person with rights and interests from that moment. The derivative label originated because the objection to abortion is derived from rights and interests that it assumes all human beings, including fetuses, have. n107 Thus, the government has a "derivative responsibility to protect the rights and interests of a fetus." n108 Therefore, the life of a fetus is entitled to constitutional protection, and abortion must be murder. However, abortion opponents admit that exceptions should be made. For example, all but the most staunch abortion opponents would allow for abortion in instances of rape, incest, severe fetal abnormality, or cases where the mother's life is in jeopardy. These exceptions indicate that the issue is not really about whether or not a fetus is a person.

The argument that a fetus is a person is entirely inconsistent with the idea that in some instances, abortion must be tolerated. Regardless of the extreme circumstances for terminating a fetus' life, abortion would not be an option if a fetus truly had rights and interests upon conception. Termination would be tantamount to murder, even in cases where the child stood no chance of living through the birth process. The mother would have no discretion. Yet, this is not the legal reality. The Court made it very clear in Roe that a fetus is not a person under the law. In the 1996 Thornburgh decision, Justice Stevens wrote: "There is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be [\*1147] left to the will of the ... legislatures." n109

The derivative reasoning stance is that a fetus has an interest in its own survival. To assign such an interest, however, presupposes that the fetus has been born, lives, and looks back upon its life. "Whether abortion is against the interests of a fetus must depend on whether the fetus itself has interests at the time the abortion is performed, not whether interests will develop if no abortion takes place." n110 To assume that a fetus has interests would be logically similar to assuming that humans as a species had an interest in the Big Bang that created our universe. If that event had not occurred, none of us ever would have existed and the occurrence of that event would not be against our interests. Assigning this interest presupposes that a fetus survives and is born to live its life long enough to appreciate the fact that it was born. Its interest in survival cannot exist at the time an abortion takes place. Some would argue that barrier methods of birth control or forms of hormone contraception prevent ovulation, therefore preventing pregnancy and denying the interests of the unborn in being conceived. As discussed, this line of argument is illogical.

Given the Roe decision it is obvious why abortion opponents attempt to use derivative reasoning and arguments. If, under the law, a fetus were declared to be a human being from the time of conception, then equal protection under the law would be its due and abortion would be definitively illegal. But, how would one know when conception occurred? Would a woman's knowledge of this be required so that she could be prosecuted for using RU-486 or some other form of emergency contraception, had she known she were pregnant? If she were unknowingly pregnant, and she used RU-486 as contraception or emergency contraception, would she then be guilty of murder or manslaughter? This is an unworkable premise. More importantly, these are extremely private matters. However, personhood upon conception is not the real foundation for most anti-abortion sentiment. The Court has made its decision about the non-person legal status of fetuses in Roe, and this precedent has been reaffirmed in Casey.

[\*1148]



## *2. Detached Reasoning*

In contrast, the second camp of abortion opponents makes a "detached" objection to abortion. This view does not depend on or presuppose any particular rights or interests. n111 Here, proponents argue that abortion is wrong because it denies "the sacred nature of human life" at any stage. n112 They argue that government is responsible for "protecting the intrinsic value of life." n113 This view does not presume that a fetus is a person with rights or interests. Under this belief system, it is logically consistent to believe that life is sacred from the moment of conception, that abortion is morally reprehensible, and also believe that abortion is an option. It is a commonly held belief that "abortion becomes more morally problematic as a fetus develops because the insult to the sanctity of human life is greater when the life ended is further advanced." n114 However, the detached view allows for consideration of the physical and mental health of the mother as well as the fetus. It allows for the unavoidable complexity of difficult major life decisions. This view provides the desperately needed room for individual choice.

Most people would agree that human life is sacred. As a society, we all have an interest in protecting life. But, there is little to be gained from stating that a fetus is a person. This argument lacks a logical or legal foundation. In the face of the sacred character of life, we can hold our different views of abortion and yet allow for the exceptions, the lack of clear cut answers that are so inherent in every human controversy. For an everyday example, consider the politicians who take a hard line anti-abortion stance but who admit in personal interviews that they would support a daughter's or granddaughter's decision to have an abortion. The extreme political views and war cries do not hold true on a personal level for most.

In *Roe*, Justice Blackmun declared that a fetus is not a person within a constitutional context. n115 Under the Fourteenth Amendment no "state shall ... deny ... any person ... equal protection of the laws." n116 Blackmun reasoned that whether a [\*1149] fetus has a rational soul and a moral right to live are separate issues that have no place in constitutional interpretation. Historically, fetuses have not been treated as persons under the law. Most critics today agree that Blackmun made the right decision on this point. n117

While some abortion proponents view *Casey* as a setback, it is a gain from another perspective. Now, abortion opponents must fight the peripheral issues, such as partial birth abortions. Abortion proponents must be prepared to fight the somewhat successful efforts of pro-lifers, like required waiting periods, to chip away at the Court's protection of procreative autonomy. Deservedly, the frontal attack on the right to abortion with arguments based on derivative reasoning has failed twice. *Casey* was a decision co-written by three Justices. There is strong affirmation of the fundamental right to abortion.

Under the "detached" view of abortion, the debate involves personal moral choices and privacy. Many Americans feel that abortion is wrong both morally and spiritually. But, many also recognize that it is an issue that should remain outside legal and political arenas.

## VII

### FEMINIST PERSPECTIVES

### A. Personhood

Feminists argue sexual equality cannot exist without procreative freedom. "Unwanted or mistimed childbearing can curtail a woman's educational and work opportunities, constrict her social role, and exclude her from full participation in 'the marketplace and the world of ideas.'" n118 When looking at women's health issues, it is crucial to recognize the importance of self-determination. In a recent law review article by Annette Clark, an Associate Professor of Law at the University of Puget Sound, the autonomy offered by the use of RU-486 is described as a "double-edged sword." Clark wrote that "[a] woman who chooses [to use] RU-486 [as an abortifacient] effectively performs the abortion herself." n119 The article quoted one woman who had "experienced both [the medical and surgical abortion] [\*1150] methods [and] described [medical] abortion with RU-486 as an 'intensely solitary act.'" n120 The woman preferred RU-486 over the surgical abortion because it invested her with greater autonomy. But the personal responsibility she felt after abortion by pill also made her "determined to do everything to avoid ever having to have an abortion again." n121 Abortion opponents worry that RU-486 will make abortion too quick and easy. Once RU-486 is taken, however, the abortive process is irreversible and takes two or three days to be completed. "The potential emotional and psychological burden of this wait should not be underestimated." n122

Women are in a unique position in that their bodies serve as vessels for childbearing. In discussing the sanctity of all life, it must be recognized that the sense of sacredness of life includes the life of every woman: her body, her life, and her health. According to some abortion opponents, a woman considering abortion is "nothing but a dangerous container for a threatened fetus." n123 Her unplanned pregnancy is made into a public issue. "Why she is having a ... procedure, why she is in this circumstance to begin with, why ... [one choice] may be better for her than others; these questions not only do not get answered, they never even get asked." n124

Liberty and recognition of the sanctity of life collectively lies within equality and universal respect for bodily integrity of both sexes. The line between pre-viability abortion and contraception in reality has not been clear since the introduction of IUD's and oral contraceptives which can be used as postcoital contraception. RU-486 is the next step in the foreseeable evolution of procreative procedures. This newest technology provides women with new options, allowing for personal choice at all stages of procreation. Procreative freedom means that women are able to make personally the choices available to them. Personal choice is central to the concept of liberty.

[Liberty and personhood require] autonomy in making procreative decisions. Such decisions are fundamental to one's identity in terms of one's willingness to be responsible for creating [\*1151] new human life, one's determination to form families and other intimate associations, and one's ability to otherwise participate in life's opportunities.... Bodily integrity [is about] permitting and respecting an individual's own moral decisions. Though constrained by circumstance, to be one's own, decisions of this depth require both privacy, that is, isolation from state persuasion, and neutrality in terms of government resources.... Though there are tremendous difficulties in setting out the content or contours of the personhood interest and the basis for its protection in the Constitution, it seems to entail "those attributes of an individual which are irreducible in his [or her] selfhood." The ability

to make procreative decisions means the ability to define oneself in a terribly profound way. n125

While there are feminists who argue that defending procreative freedom under the rubric of privacy is highly dangerous to women, it is the constitutional foundation upon which the Roe decision was built. Feminists such as Catharine MacKinnon, a Professor of Law at the University of Michigan Law School, would argue that the privacy rubric damages women because while it "has been a refuge for some, it has been a hellhole for others at the same time." n126 She fears that privacy will cause women to suffer at the hands of the men in their lives, and women will remain hidden behind a legally protected wall of silence. MacKinnon refers to the isolation and powerlessness created and supported in our culture in efforts to keep women subservient. However, privacy is the most legally recognized fundamental right supporting procreative autonomy. n127 Privacy can be respected while options to women are made readily available.

An argument in favor of using the Fourteenth Amendment and its recognition of personhood as a basis for procreative autonomy, rather than notions of privacy, has been made by Peggy Cooper Davis, a Professor of Law at New York University School of Law. She contends that the Fourteenth Amendment was intended to guarantee personhood by putting an end to slavery. n128 The recognition of protection bestowed upon personhood [\*1152] under a constitutional amendment would make a denial of procreative freedom difficult to uphold in any court.

Procreative decisions should be left to "individual conscience" because "beliefs about such matters cannot define the attributes of personhood [if they are] formed under the compulsion of the State." n129 Dworkin's assertion in favor of reproductive freedom has its foundation in that notion of personhood which can be found in the Fourteenth Amendment. One therefore need not depend on an oft-criticized substantive due process analysis or notions of privacy. n130 Or perhaps a multi-faceted argument could be used, combining personhood of the Fourteenth Amendment with privacy at the heart of the Bill of Rights and gender equality under the Equal Protection Clause. These arguments are made in an effort to find a workable system that combines state protection for the benefit of women in abusive situations and yet makes it possible for women to be insulated from state intervention concerning matters of self-determination.

Drucilla Cornell, a Professor of Law at Benjamin N. Cardozo School of Law of Yeshiva University, argues that "central to self-hood is the ability to internalize the protection of bodily integrity so that one experiences oneself as whole." n131 She writes that one's sense of projected unity (the future self's anticipated continuity and bodily integrity) can be undermined by physical assault, by illness, and by other conditions that interfere with the idea one has of one's body as "one's own." n132 To burden a woman with the moral restrictions that a society places upon her while she is in the turmoil of resolving the incredibly difficult and highly personal dilemma of whether to have a child certainly meets any rational standard of what constitutes an undue burden. Perhaps here the opponents of the Casey decision are right since the Supreme Court has placed every possible burden upon women during a time when women need most to listen to their own consciences without interruption or interference.

Personhood also involves the exercise of "moral responsibility." "[In decisions] concerning abortion ... the exercise of moral judgment is close to making a religious determination as to [\*1153] when human life begins." n133 Therefore, the procreative freedom debate has been described as "closely akin to arguments for religious freedom." n134 To date, this argument has

received the most heated responses from Christian conservatives. This is ironic in light of the fact that the very reasons for which people came to America was in search of religious freedom and true personal liberty. The basic premise of the First Amendment is freedom of belief.

[A] state has no business prescribing what people should think about the ultimate point and value of human life, about why life has intrinsic importance, and about how that value is respected or dishonored in different circumstances .... Any government that prohibits abortion commits itself to a controversial interpretation of the sanctity of life and therefore limits liberty by commanding one essentially religious position over others, which the First Amendment forbids. n135

Religious freedom is a central piece of the foundation upon which this country was built, not to mention the value Americans place on the separation of church and state.

### *B. Equal Protection*

Men and women, under equal protection of the law, are entitled to equal reproductive control. n136 Laws that restrict abortion violate equal protection. The Supreme Court implicitly recognized this argument in its Thornburgh decision:

The Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government .... That promise extends to women as well as men .... A woman's right to make [the abortion] choice freely is fundamental. Any other result ... would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all. n137

However, the Supreme Court has been inconsistent with the application of this equality premise. This has often occurred when the Court has been faced with the argument that men and women are not "similarly situated," meaning they have major biological [\*1154] differences, regarding reproduction. n138 The Supreme Court's focus on physiological differences is a smoke screen that ignores the "gender-based injuries" caused by denying women equal protection under the law. n139 The law requires equal treatment and privacy as well as self determination in the name of personhood and liberty. This is no less true with regard to biological differences. It is argued that the denial of equal protection based on biological differences is merely a way to control women's behavior, often hidden under the guise of fetal protection. Biology is a pretext and a rather transparent one. For women to receive full and equal protection of the law, there can only be an anti-discrimination and anti-subordination approach to reproductive autonomy.

Sylvia A. Law, a Professor of Law, Medicine, and Psychiatry at New York University Law School, argues that laws governing reproductive technology should be strictly scrutinized to see whether they contribute to the continuous oppression of women. She states in her analysis that laws affecting procreative choices could undergo the following three step constitutional analysis:

(1) ... whether state action that seems to classify on the basis of biological differences does in fact classify on the basis of biology rather than sex-based assumptions incorporating social judgments about those differences; (2) determining whether the law has a substantial impact on perpetuating the inequality of women; and (3) if so, determining whether the law is justified by a compelling state interest. n140

Opponents of this approach argue that inequality is not based in biology, but rather in society. Some feminists, such as MacKinnon, fear that the Supreme Court will open the door further to different treatment of the sexes rationalized by biological differences, something feminists abhor because it is treatment based on gender, not on notions of equality and personhood. The "equality principle," according to MacKinnon, "is properly comprised of the practical necessities for ending inequality in each of its real forms," not in a need to treat the like alike or focus on biological differences. n141 "State mandated restrictions on abortions disadvantage women for a reason specific to sex. Such laws [\*1155] hurt women, not men, and amount to facial discrimination." n142

Not only is one's bodily integrity, that is, security in and control over one's body, an individual interest, but it is also a social one because the health and wellness it entails are essential to functioning as a responsible community member. n143 To deny women freedom also relieves them of responsibility for themselves, their families, and the larger community, an outcome that no one supports, and perhaps is evidenced by the common dissolution of American families today. Imposing values and legal constraints stunts the emotional growth of women in this country. "Given women's greater bodily involvement [in procreation] and child-rearing roles, shouldn't they have a stronger voice than men's?" n144 Women need to be making informed personal health choices for themselves and their children. Otherwise, we are a society of children having children.

## CONCLUSION

RU-486 holds much promise due to its potential uses at several early stages in the reproductive process. In light of the high rates of unintended pregnancy and abortion, women in this country need access to this new technology. Every woman must have access to all the information regarding her reproductive choices. Women need to understand the ways in which drugs like RU-486 work: as contraception, emergency contraception and as abortifacients. Availability of information regarding procreative choices, including the processes and outcomes, is necessary for women to decide what choice is best according to their own definitions and their own consciences.

RU-486, and other drugs like it, can serve as a catalyst to push us toward true equality, liberty, and recognition of personhood in the form of procreative autonomy. RU-486 needs to be protected under contraceptive law. Any law challenging a woman's right to access information, or to RU-486 itself, should be subject to strict scrutiny under constitutional law analysis.

There is a great tradition in this country of embracing new technology. Protection of RU-486 under the law of contraception [\*1156] will insure women's privacy and liberty to determine their biological futures, as well as equal protection under the law. The application of contraception law to all of the uses of RU-486 is a crucial step toward the legal recognition of the personhood and equality of women.

## FOOTNOTES:

\* Third-year law student, University of Oregon School of Law. Associate Editor, Oregon Law Review, 2000-2001. The author would like to thank Jeff Frederick, Leslie Harris, and S. Marie Harvey for their support and insight during the writing of this article.

n1. See Jeffrey S. Koehlinger, Substantive Due Process Analysis and The Lockean Liberal Tradition: Rethinking the Modern Privacy Cases, 65 Ind. L.J. 723 (1990).

n2. Contraception: An Urgent Public Health Need (Ctr. for Reprod. L. & Pol'y, Wash., D.C), Mar. 1999, at 2-3.

n3. S. Marie Harvey et al., Women's Experience and Satisfaction with Emergency Contraception, 31 Fam. Plan. Persp. 237 (1999).

n4. Id. at 240.

n5. Id. at 237.

n6. Sylvia A. Law, Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363, 367 (1998).

n7. Trends in Pregnancies and Pregnancy Rates by Outcome: Estimates for the United States, 1976-1996 (CDC/Nat'l Ctr. for Health Stat., Wash., D.C.), Jan. 2000, at 3.

n8. David J. Garrow, Abortion Before and After Roe v. Wade: An Historical Perspective, 62 Alb. L. Rev. 833, 852 (1999).

n9. Gwendolyn Prothro, RU-486 Examined: Impact of a New Technology on an Old Controversy, 30 U. Mich. J.L. Reform 715, 723 (1997).

n10. See Planned Parenthood v. Casey, 505 U.S. 833 (1992).

n11. Anna Glasier, Safety of Emergency Contraception, 53 J. Am. Med. Women's Ass'n 219 (Supp. II 1998).

n12. Id. at 219-20.

n13. NARAL Factsheets: Mifepristone and the Impact of Abortion Politics on Scientific Research (NARAL, Wash., D.C.), Jan. 1999, at 1 [hereinafter NARAL] (citing Benton v. Kessler, No. CV-92-3161, slip op. at 12 (E.D.N.Y. 1992)).

n14. Annette E. Clark, Abortion and the Pied Piper of Compromise, 68 N.Y.U. L. Rev. 265, 304 n.185 (1993).

n15. NARAL, supra note 13, at 3.

n16. Id. at 4.

n17. Id.

n18. The Center for Reproductive Law and Policy Celebrates FDA Approval of Emergency Contraception Pill (Ctr. for Reprod. L. & Pol'y, Wash., D.C.), Sept. 1998.

n19. Kelly Blanchard, Improving Women's Access to Emergency Contraception: Innovative Information and Service Delivery Strategies, 53 J. Am. Med. Women's Ass'n 238, 240 (Supp. II 1998).

n20. Allan Rosenfield, Emergency Contraception: A Modality Whose Time Has Come, 53 J. Am. Med. Women's Ass'n 212 (Supp. II 1998).

n21. Id.

n22. Emergency Contraceptive Pills: Common Legal Questions About Prescribing, Dispensing, Repackaging, and Advertising (Ctr. for Reprod. L. & Pol'y, Wash., D.C.), Apr. 2000, at 3.

n23. 381 U.S. 479 (1965).

n24. 405 U.S. 438 (1972).

n25. Griswold, 381 U.S. at 484.

n26. Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (citing Griswold, 381 U.S. at 483).

n27. Griswold, 381 U.S. at 486.

n28. Id.

n29. Eisenstadt, 405 U.S. at 453.

n30. Garrow, *supra* note 8, at 836-37.

n31. Roe v. Wade, 410 U.S. 113, 160 (1973).

n32. 505 U.S. 833 (1992).

n33. Id. at 851.

n34. Id. at 874.

n35. Id. at 846.

n36. Barry Bostrom, *NOTA BENE: Karlin v. Foust*; United States District Court Western District of Wisconsin; 14 Issues L. & Med. 377, 383 (1999).

n37. *Armstrong v. State*, 989 P.2d 364, 379-80 (Mont. 1999).

n38. Elizabeth Westley, Emergency Contraception: A Global Overview, 52 J. Amer. Med. Women's Ass'n 215, 216 (Supp. II 1998).

n39. Id.

n40. Id.

n41. Id. The use of only progesterone as a form of emergency contraception is called the levonorgestrel method. Glasier, *supra* note 11, at 219. The three most common methods of emergency contraception are (1) ordinary oral contraceptive pills containing estrogen and progesterone, (2) minipills containing only progesterone, and (3) the Copper-T IUD, which can be inserted up to five days after unprotected intercourse. Emergency Contraception: An Important Component of Women's Rights (Ctr. for Reprod. L. & Pol'y, Wash., D.C.), Feb. 1999, at 2.

n42. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 695 n.2 (D.S.C. 1999), *rev'd*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001).

n43. Prothro, *supra* note 9, at 717.

n44. *Id.* at 718.

n45. *Id.*

n46. Webster's Third New International Dictionary 469 (3d ed. 1986); see also Webster's Ninth New Collegiate Dictionary 271 (9th ed. 1988) (stating to conceive is "to cause to begin").

n47. Prothro, *supra* note 9, at 716.

n48. *Id.* at 725.

n49. *Id.*

n50. *Id.* at 716.

n51. *Id.* at 725.

n52. See Louise Silvestre et al., Voluntary Interruption of Pregnancy with Mifepristone (RU-486) and a Prostaglandin Analogue: A Large Scale French Experience, 322 *New Eng. J. Med.* 645 (1990).

n53. Prothro, *supra* note 9, at 725.

n54. *Id.* at 726.

n55. Silvestre et al., *supra* note 52, at 645.

n56. Prothro, *supra* note 9, at 726. Without prostaglandin, RU-486 is only 80% effective in terminating pregnancies. *Id.*

n57. Glasier, *supra* note 11, at 219.

n58. *Benten v. Kessler*, 799 F. Supp. 281, 284 (E.D.N.Y. 1992).

n59. Gouk EV et al., Medical Termination of Pregnancy at 63 to 83 Days Gestation, 106 *Brit. J. of Obstetrics & Gynecology* 535, 535-39 (1999).

n60. *Id.*

n61. *Id.*

n62. Rosenfield, *supra* note 20, at 212.

n63. Emergency Contraceptive Pills, Questions and Answers for Decision-Makers (Consortium for Emergency Contraception), 1999, at 1.

n64. *Id.*

n65. Rosenfield, *supra* note 20, at 212.

n66. Prothro, *supra* note 9, at 728. High dose off-label use of hormones is what has up until now been used in this country as the "morning after pill." Recently, the FDA approved the labeled emergency contraceptive use of these drugs. FDA Approval of Emergency Contraception (Ctr. for Reprod. L. & Pol'y, Wash., D.C.), Sept. 1999, at 1.

n67. Prothro, *supra* note 9, at 729 n.92.



n68. Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 *Stan. L. Rev.* 1703, 1717 (1999) (citing *Margaret S. v. Edwards*, 488 F. Supp. 181, 191 (E.D. La. 1980)).

n69. NARAL, *supra* note 13, at 2.

n70. Kaiser Permanente in California is at the forefront of this field. They currently have agreements with thirteen clinics in Southern California as well as several pharmacies who are repackaging and re-labeling oral contraceptives. Harvey et al., *supra* note 3, at 237, 240.

n71. Charlotte Ellertson et al., *Should Emergency Contraceptive Pills be Available Without Prescription?* 53 *J. Am. Med. Women's Ass'n* 226 (Supp. II 1998).

n72. *Id.*

n73. *Id.*

n74. *Id.* at 229.

n75. Jane Hutchings, *When the Morning After is Sunday: Pharmacists Prescribing of Emergency Contraceptive Pills*, 53 *J. Am. Med. Women's Ass'n* 230, 231 (Supp. II 1998).

n76. *Id.* at 230.

n77. *Id.* On a practical note, pharmacies are open nights and weekends and are conveniently located, making emergency contraception much more accessible in much less time. In user surveys following the initial two months of the Washington program, more than half the women had experienced contraceptive failures and half the respondents obtained emergency contraceptive pills on a weekend or after 6 o'clock on a weeknight. *Id.* at 232.

n78. According to one report:

Oregon's medical association has approved a resolution to allow pharmacists in seven communities to provide emergency contraception without a prescription. Under the proposed program, pharmacists would be required to recommend that women obtaining emergency contraception see their physician and to inform doctors when they have provided the method. A sponsor of the resolution estimates that in one year, the program could avert nearly 600 pregnancies, of which more than 200 would end in abortion.

Kaiser Daily Reproductive Health Report, (The Henry J. Kaiser Family Foundation, New York, N.Y), Apr. 1999.

n79. Alwyn T. Cohall et al., *Inner-City Adolescents' Awareness of Emergency Contraception*, 53 *J. Am. Med. Women's Ass'n* 258 (Supp. II 1998).

n80. Experts believe that emergency contraception pills may still have some effect in preventing pregnancy for up to five days after unprotected intercourse, when the process of implantation begins. The benefit of treatment within five days may outweigh any disadvantages. However, the woman must understand that her chances of pregnancy may be increased, compared with a woman who takes emergency contraception pills within three days (72 hours). *Emergency Contraception: Contraception, Not Abortion: An Analysis of Laws and Policy Around the World*, (Ctr. for Reprod. L. & Pol'y, Wash., D.C.), 1999, at 2.

- n81. Prothro, *supra* note 9, at 729.
- n82. *Id.* at 730.
- n83. *Id.* at 731.
- n84. *Id.*
- n85. *Id.* at 722 n.121.
- n86. Prothro, *supra* note 9, at 732.
- n87. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring in part and in the judgment).
- n88. *See id.*
- n89. Richard Hausknecht, *Methotrexate and Misoprostol to Terminate Early Pregnancy*, 333 *New Eng. J. Med.* 537, 537-40 (1995).
- n90. *Hope Clinic v. Ryan*, 195 F.3d 857 (7th Cir. 1999).
- n91. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 705 (D.S.C. 1999), *rev'd*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001).
- n92. *Westley*, *supra* note 38, at 217.
- n93. *Id.* at 205.
- n94. *Id.*
- n95. *Id.*
- n96. *Id.* at 217.
- n97. *Id.* at 218.
- n98. *Id.*
- n99. *Glasier*, *supra* note 11, at 220.
- n100. *Harvey*, *supra* note 3, at 238.
- n101. *Id.* at 221.
- n102. *Glasier*, *supra* note 11, at 219. The use of only progesterone as emergency contraception is called the *levenorgestrel* method. *Id.*
- n103. *Glasier*, *supra* note 11, at 219.
- n104. *Id.*
- n105. Ronald Dworkin, *Life's Dominion* 158 (1993).
- n106. 492 U.S. 490, 523 (1989) (O'Connor, J., concurring).
- n107. *See Dworkin*, *supra* note 105, at 109-17.
- n108. *Id.* at 116.
- n109. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986).

- n110. Dworkin, *supra* note 105, at 19.
- n111. *Id.* at 12.
- n112. *Id.*
- n113. *Id.* at 108.
- n114. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 *U. Chi. L. Rev.* 381, 429-30 (1992).
- n115. *Roe v. Wade*, 410 U.S. 113 (1973).
- n116. U.S. Const. amend. XIV, 1.
- n117. Dworkin, *supra* note 105, at 110.
- n118. *Contraception: An Urgent Public Health Need*, *supra* note 2, at 1.
- n119. Clark, *supra* note 14, at 306.
- n120. *Id.*
- n121. *Id.*
- n122. *Id.* at 306 n.195.
- n123. Symposium, *A Celebration of Reproductive Rights: Twenty-Five Years of Roe v. Wade*, 19 *Women's Rights L. Rep.* 247, 254 (1998).
- n124. *Id.*
- n125. Betty Taylor et al., *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography, Reproductive and Sexual Health* 451-52 (1999).
- n126. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *Yale L.J.* 1281, 1311 (1991).
- n127. *Id.*
- n128. Peggy C. Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 *Harv. C.R.-C.L. L. Rev.* 299, 318-23 (1993).
- n129. Dworkin, *supra* note 105, at 171.
- n130. *Id.* at 171-72.
- n131. Drucilla Cornell, *The Imaginary Domain* 43 (1995).
- n132. *Id.*
- n133. Taylor et al., *supra* note 125, at 457.
- n134. *Id.*
- n135. Dworkin, *supra*, note 105, at 164-65.
- n136. Taylor et al., *supra* note 125, at 458-63.
- n137. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).
- n138. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

n139. Id.

n140. Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1012-14 (1984).

n141. MacKinnon, *supra* note 126, at 1323.

n142. Id. at 1316.

n143. Taylor et al., *supra* note 125, at 464.

n144. Sonia Correa & Rosalind Petchesky, Reproductive and Sexual Rights: A Feminist Perspective, in *Population Policies Reconsidered: Health, Empowerment and Rights* 107 (Gita Sen et al. eds., 1994).