

CURRENT EVENT

WINNING THE BATTLE, BUT PERHAPS LOSING THE WAR: ENDORSING DEREGULATION OF EMERGENCY CONTRACEPTION AT THE EXPENSE OF DEROGATING ABORTION

Melissa Bond

I. INTRODUCTION

“In the United States, almost 50% of pregnancies are unwanted.”¹ “The United States has a higher rate of unwanted pregnancies than any other developed country.”² The United States has lagged behind its counterparts throughout the world in providing women with meaningful access to reproductive options that could ameliorate such daunting figures. Emergency contraception (EC) is currently available without a prescription in more than forty countries and in much of Western Europe. In many such European nations, abortion and contraception are available and fully covered by insurance.³ Yet it took the United States, a global leader in so many other respects, until August of 2006 to make EC available over-the-counter (OTC) to women eighteen-years-old and over.⁴ As Susan F. Wood, former Assistant Commissioner of Women’s Health at the Food and Drug Administration ponders, “Over 98 percent of adult women have used some form of contraception. So what is the objection?”⁵ “When did access to contra-

¹ D.N.P. Haggai, *Emergency Contraception: The Journey So Far*, 110 BJOG: INT’L J. OBSTETRICS & GYNAECOLOGY 339, 339 (2003).

² Caroline Wellbery, *Emergency Contraception: An Ongoing Debate*, AM. FAM. PHYSICIAN (2004), available at http://www.findarticles.com/p/articles/mi_m3225?is_4_70/ain6171331/print.

³ Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAG., May 7, 2006, at 6:1.

⁴ FOOD AND DRUG ADMINISTRATION, FDA NEWS: FDA APPROVES OVER-THE-COUNTER ACCESS FOR PLAN B FOR WOMEN 18 AND OLDER, PRESCRIPTION REMAINS REQUIRED FOR THOSE 17 AND UNDER, Aug. 24, 2006, available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.htm>.

⁵ Susan F. Wood, Editorial, *When Politics Defeats Science*, WASH. POST, Mar. 1, 2006, at A17.

ception become controversial? And why have we allowed it to happen?"⁶

Wood asks compelling questions with uncertain answers. In addressing such inquiries, both opponents and proponents of over-the-counter EC have looked predominantly to Western Europe for answers. American opponents argue that EC is a social ill, a gateway to greater social promiscuity, and point out that greater access to EC has in general not lead to a decrease in abortion in Europe.⁷ Some go so far as to argue that EC is a form of abortion.⁸ American proponents also look to Europe, arguing that greater access to EC is desirable as a possible means of reducing abortion.⁹ These proponents bolster their argument for EC deregulation by stressing that EC is definitively not abortion, and therefore socially desirable.¹⁰ No matter what side American policymakers fall in this debate, they seem to directly and indirectly support their claims by comparing or contrasting Plan B to abortion.

Although the FDA's approval of Plan B is apparently a short-term victory for reproductive rights in the United States, it may counter-intuitively threaten the future of *Roe v. Wade*.¹¹ Although American policymakers have come to the right conclusion in largely deregulating EC, they have used undesirable reasoning in doing so. They have followed a Western European trend of supporting greater EC availability by derogating abortion.

This note argues that although such reasoning may be desirable in Western Europe, where many countries take a more social welfare approach to reproductive rights and where both abortion and EC are secure reproductive rights, it is undesirable in the United States, where reproductive rights are uncertain and where

⁶ *Id.*

⁷ *Ivanhoe Newswire, Abortion Rates Not Falling From Morning After Pill*, HealthScout, Sept. 15, 2006, available at <http://www.healthscout.com/news/416/8014500/main.html>; see also *infra* Part III.

⁸ See United States Conference of Catholic Bishops, Office Of the General Counsel, Comments on FDA Proposal to Change Emergency Contraception From Prescription to Over-The-Counter (Dec. 5, 2003), <http://www.nccbuscc.org/ec-fda.shtml>; Susan E. Wills, *Emergency Contraception—Boon or Bane?* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2001), <http://www.usccb.org/prolife/programs/rlp.01wil.htm>; Elizabeth Bossom, *Concerned Women for America, Contraception or Deception?*, CONCERNED WOMEN FOR AMERICA, Mar. 8, 2006, <http://www.cwfa.org>.

⁹ See *infra* Part III.

¹⁰ See *infra* Part III.

¹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

women largely bear the expense of reproduction on their own.¹² Part II discusses background history on the unsteady state of U.S. reproductive rights as contrasted with liberal reproductive choices in much of Western Europe, specifically (a) the precarious future of abortion rights in the United States, (b) the slow emergence of deregulated EC in the United States, and (c) in contrast, liberal reproductive health policies in Western Europe. Part III explores the way in which the United States has looked to Western Europe, specifically the ways in which (a) American opponents to Plan B deregulation have argued against greater access to EC by citing European studies and examples, and (b) American proponents to Plan B deregulation have similarly argued for greater access to EC by citing European studies and examples. Finally, Part IV discusses (a) why American policymakers should not apply Western Europe's reasoning in supporting deregulation of EC, (b) the possible dangers to future abortion rights if Western Europe's approach were to hold in the United States, and (c) possible ways in which U.S. policymakers can support Plan B deregulation without threatening the future of abortion rights.

II. BACKGROUND ON THE UNSTEADY STATE OF U.S.
REPRODUCTIVE RIGHTS IN CONTRAST
TO THAT IN WESTERN EUROPE

A. *The Precarious State of Reproductive Rights in the United States Today: The Shrinking Force of Roe v. Wade*

In the landmark *Roe v. Wade* decision, the United States Supreme Court made way for an emerging reproductive rights movement in the United States.¹³ The Court held that abortion was legal and that reproductive choice was a fundamental right that mandated the highest standard of constitutional protection under strict scrutiny review.¹⁴ For the first time, the Court regarded reproductive rights as fundamental rights like freedom of religion and freedom of speech.¹⁵ The *Roe* decision was

both informed and was informed by a larger global movement to recognize reproductive health and self-determination as inte-

¹² See *infra* Part IV.A.

¹³ Julia L. Ernst, Laura Katzive, & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 753 (2004).

¹⁴ *Id.*

¹⁵ *Id.*

gral components of women's equality. . . . [T]his movement had led to the collaboration in United Nations conferences and other fora toward the development of international standards for the protection of women's rights, including their reproductive rights.¹⁶

Yet subsequent state and Supreme Court decisions curtailed the momentum of this movement¹⁷ despite enlarged reproductive rights in other areas of the world.¹⁸ Courts sought to limit reproductive rights by cutting off funding for abortion services, instituting waiting periods, requiring parental consent for adolescents, and introducing spousal consent requirements.¹⁹ In *Planned Parenthood v. Casey*,²⁰ the Court replaced the strict scrutiny standard espoused in *Roe*, replacing it with "a weaker, ill-defined 'undue burden' standard"²¹ which deemed that regulations limiting abortion would be constitutional unless they had the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²² Legislatures were able to enact policies promoting pro-life agendas by creating barriers to abortion access "as long as the vaguely defined line of 'undue burden' was not crossed."²³ Similarly in *Stenberg v. Carhart*,²⁴ the Court used the *Casey* "undue burden standard" for a second time in striking down a ban on "partial birth abortion" in only a 5-4 decision, showing a split-opinion Court.²⁵ Many concede that the *Stenberg* decision may be the first step in overturning *Roe*, especially with the recent shift in the composition of the Supreme Court

¹⁶ *Id.*

¹⁷ "[C]onservative forces began to chip away at women's reproductive rights both in the federal and state governments and in the courts. Their anti-choice strategy has been multifaceted, including attempts to carve out exceptions to *Roe*, marginalize certain groups of women, and impose barriers to exercising reproductive privacy rights." *Id.* at 765-66.

¹⁸ See *infra* Part II.C., IV.A.

¹⁹ Ernst et al., *supra* note 13, at 765-77.

²⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²¹ Ernst et al., *supra* note 13, at 771.

²² Ernst et al., *supra* note 13, at 771-72 (citing *Casey*, 505 U.S. at 877). The Court in *Casey* allowed state pro-life interests to eclipse a woman's right to choose; the Court replaced *Roe*'s trimester framework by extending the state's interests in protecting potential life and maternal health throughout pregnancy. *Id.*

²³ Ernst et al., *supra* note 13, at 772.

²⁴ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

²⁵ The Court struck down a ban on "partial-birth abortion," holding that the ban imposed an "undue burden" on a woman's ability to choose the safest means of abortion before viability in the second trimester. The decision is alarming, as it affirmed the *Casey* standard and shows the extent to which the Court is only one vote away from overturning *Roe*. Ernst et al., *supra* note 13, at 773.

R

R

R

R

R

which may fully “tip the Court against *Roe v. Wade*.”²⁶ As Ernst et al. note:

Ironically, as the international community has generally moved toward greater respect for women’s equality and self-determination through increased recognition of reproductive rights, the United States has swung on a counterpendulum. Since *Roe* was decided in 1973, the anti-choice movement in the United States has engaged in a coordinated and well-financed campaign to chip away at the right to individual autonomy and privacy recognized by that landmark Supreme Court decision.²⁷

The extent to which the U.S. government has stalled in deregulating emergency contraception is a testament to this anti-choice movement. Ironically, the means by which U.S. policymakers have prevailed in making some EC over-the-counter, discussed *infra*, may even further this anti-choice movement.

B. *A History of Limited EC Availability in the United States*

EC pills are simply elevated doses of the hormones in ordinary oral contraceptives,²⁸ and yet they are controversial. The mechanism by which they work mirrors that of regular oral contraception. If a woman takes the pill within seventy-two hours of intercourse, it is likely to avert unwanted pregnancy by preventing ovulation or the implantation of a fertilized egg to the uterine wall.²⁹ The pill is time-sensitive, more likely to prevent pregnancy the sooner it is taken within the seventy-two hour period.³⁰ But once implantation has occurred, EC pills are ineffective, as they cannot interfere with an existing pregnancy.³¹ According to the International Federation of Gynecology and Obstetrics, as well as the World Health Federation, EC is not an abortifacient because it has its effect prior to implantation.³² Both organizations classify EC as contraception.³³

²⁶ Kelley J. Johnson, Note, *New Thinking About an Old Issue: The Abortion Controversy Continues in Russia and Ireland—Could Roe v. Wade Have Been the Better Solution?* 15 *IND. INT’L & COMP. L. REV.* 183, 194 (2004).

²⁷ Ernst et al., *supra* note 13, at 765.

²⁸ CENTER FOR REPRODUCTIVE RIGHTS, *GOVERNMENTS WORLDWIDE PUT EMERGENCY CONTRACEPTION INTO WOMEN’S HANDS 2* (Sept. 2004), <http://reproductiverights.org>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

“Plan B,” a brand of EC commonly known as “the morning after pill” has been available in the United States via prescription since 1999,³⁴ even though “drugs potentially more dangerous than contraceptives are already available over the counter and have been for a number of years.”³⁵

Despite EC pills’ similarity to regular birth control pills and the deregulation of EC in many Western nations, the U.S. government only recently deregulated the contraception. On August 24, 2006, the U.S. Food and Drug Administration (FDA) announced approval of “Plan B” as an over-the-counter drug available to women aged eighteen years or older.³⁶ Yet women under the age of eighteen still require a prescription in order to obtain the drug.³⁷ Although late-arriving and limited, greater access to Plan B is apparently a victory in the reproductive rights movement amidst a backdrop of shrinking reproductive rights in the United States. Yet this victory may be only short-lived.

C. A Liberal Stance on EC and Abortion Rights in Many European Nations

The United Kingdom, France, Sweden and the Netherlands exemplify the growing trend in Europe towards greater acceptance and availability of EC.³⁸ In such countries, and in much of Western Europe, liberal stances on EC go hand-in-hand with liberal policies on abortion.³⁹ In such countries, EC and abortion alike are two

³⁴ THE HENRY J. FORD KAISER FAMILY FOUNDATION, WOMEN’S FACT SHEET: EMERGENCY CONTRACEPTION (Nov. 2005), <http://www.kff.org>.

³⁵ Melanie Latham, *Deregulation and Emergency Contraception: A Way Forward for Women’s Health Care?*, 9 FEMINIST LEGAL STUD. 221, 232 (2001). For example, aspirin and paracetamol are available in supermarkets as well as pharmacies although they carry with them high risks of stomach bleeds, liver failure, and death from overdose. *Id.*

³⁶ FOOD AND DRUG ADMINISTRATION, *supra* note 4.

³⁷ As the FDA cautioned, the pharmaceutical company responsible for the creation and distribution of the drug would make Plan B available “with a rigorous labeling, packaging, education, distribution, and monitoring program,” including stocking the drug behind pharmacy counters in order to enforce age requirements. FOOD AND DRUG ADMINISTRATION, *supra* note 4.

³⁸ In fact, EC is available in numerous countries throughout the world without a prescription. Europe does not stand alone in its greater liberalization of EC availability. CENTER FOR REPRODUCTIVE RIGHTS, *supra* note 28, at 7.

³⁹ “In all European countries except for three (the Irish Republic, Northern Ireland, and Malta), induced abortion is legally available at least for some reasons.” CHILDBIRTH BY CHOICE TRUST, ABORTION LAW, HISTORY & RELIGION, http://www.cbctrust.com/history_law_religion.php.

2007]

PLAN B DEREGULATION

265

affordable, largely state-funded or subsidized reproductive options.⁴⁰

“Great Britain was the first country in Western Europe to liberalize its abortion legislation.”⁴¹ Although English common law historically recognized abortion, since the 1938 landmark decision *Rex v. Bourne*,⁴² abortion has been officially legal in England, Scotland, and Wales.⁴³ Further, the National Health Service makes abortion free of charge in England.⁴⁴ In the U.K., all contraception, including EC, is free to the patient without a prescription.⁴⁵

Similarly, in France, abortion has been legal since 1975.⁴⁶ In 1988, France became a trailblazer in the realm of reproductive freedom as the first country to legalize “RU 486,” an abortifacient pill.⁴⁷ The French Health Minister deemed RU 486 “the moral property of women.”⁴⁸ In that same vein EC has been available without a prescription from French pharmacies since June 1999.⁴⁹ There is no age requirement or parental consent requirement to obtain EC without a prescription in France.⁵⁰

⁴⁰ See *infra* Parts II.C., IV.A.

⁴¹ Ernst et al., *supra* note 13, at 758.

⁴² *Rex v. Bourne*, 1 K.B. 687 (1939).

⁴³ This policy has remained largely stable since that time, with the exception of the House of Commons' 1990 rejection of pro-life attempts to reduce the cutoff at which a woman could receive an abortion to twenty-two weeks, holding instead that the cutoff should be twenty-four weeks (allowing for exceptions whereby abortion is legal at any time the mother's physical or mental health is in peril). *CHILDBIRTH BY CHOICE TRUST: ABORTION LAW, HISTORY & RELIGION*, *supra* note 39, at 16.

⁴⁴ *Childbirth by Choice Trust*, *supra* note 39, at 16.

⁴⁵ Anna Glasier et al., *Case Studies in Emergency Contraception From Six Countries*, 22 *INT'L FAM. PLAN. PERSP.* 57, 58 (Jun. 1996). However, under English law, girls sixteen and under need a prescription to obtain EC. Latham, *supra* note 35, at 241.

⁴⁶ Abortion is available to French women until the tenth week of pregnancy if one attended counseling and waited one week before procuring the procedure. After the tenth week, French women must seek a doctor to certify that their health is endangered or the fetus is handicapped in order to procure an abortion. *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 13.

⁴⁷ The pill is available to women up until their seventh week of pregnancy. *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 13.

⁴⁸ *Childbirth by Choice Trust*, *supra* note 39, at 13.

⁴⁹ In October 2000, the French National Assembly voted to allow the distribution of EC to minors without parental consent or a doctor's prescription, and overturned a previous ruling prohibiting its supply to minors by school nurses. Latham, *supra* note 35, at 221–22.

⁵⁰ Latham, *supra* note 35, at 242.

R

R

R

R

R

R

R

Yet perhaps the countries with the most liberal stance on abortion and contraception are the Netherlands⁵¹ and Sweden.⁵² In the Netherlands, abortion has been legal since 1981, and in 1986, the government began to pay for abortions through the state health care system.⁵³ Similarly, in Sweden, since 1975, women have been able to obtain free abortions upon request.⁵⁴ Both countries boast of the lowest abortion rates in the world, in large part due to free EC, extensive sex education programs in schools and government family planning initiatives.⁵⁵

Given progress in Europe, “reproductive rights activism in the United States during the late 1960s and early 1970s drew strength from liberal abortion reforms overseas, particularly in Western Europe.”⁵⁶ Yet U.S. activists failed to achieve the same level of access to abortion and EC available in much of Western Europe, as American states did not adopt the same sort of social welfare stance with respect to reproductive rights as such European nations. To date, the United States has not developed as sophisticated a system of providing cost-effective and readily available abortion services or free access to contraception as in many European countries. Yet U.S. policymakers persist in employing Western European reasoning in justifying greater access to Plan B: bolstering greater access to EC by derogating abortion. Where such reasoning may be acceptable, even desirable, in much of Western Europe, where both EC and abortion are firmly available forms of choice, in the United States, where the right to abortion is precarious, such reasoning may further jeopardize the right to abortion in the future. In Europe, such a dialogue may simply be a debate informing women of the best reproductive choices available to them among well-established choices. In the United States, such a dialogue may eliminate abortion as a reproductive choice in a zero-sum game.

⁵¹ In the Netherlands, women can obtain abortions up until the twenty-fourth week of pregnancy if a woman and her doctor both agree that there is an “intolerable situation” and she waits five days. *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 19. **R**

⁵² In Sweden, women can obtain free abortions upon request up until the end of the eighteenth week of pregnancy. After the eighteenth week, approval from the National Board of Health and Welfare is necessary. *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 21. **R**

⁵³ *Childbirth by Choice Trust*, *supra* note 39, at 19. **R**

⁵⁴ *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 21. **R**

⁵⁵ *CHILDBIRTH BY CHOICE TRUST*, *supra* note 39, at 19, 21. **R**

⁵⁶ Ernst et al., *supra* note 13, at 755.

III. THE UNITED STATES TRAILING BEHIND AND MIMICKING THE DIALOGUE OF MANY EUROPEAN NATIONS

American policymakers, both for and against Plan B as an over-the-counter drug, have been echoing a preexisting dialogue in Western European nations. Both opponents and proponents in America have looked to Europe for guidance by citing European studies on EC, engaging in the debate as to whether EC should be classified as a form of abortion, whether Western values should embrace EC on moral grounds, and whether EC is a better alternative to abortion. As will be discussed *infra* in Parts III.A. and III.B., no matter what side American policymakers fall in this debate, they seem to directly and indirectly support their claims by comparing or contrasting Plan B to abortion.

A. EC Opponents' View: Plan B as a Failure to Prevent Abortion and as Morally Repugnant

American opponents to Plan B deregulation look to Europe in making two major claims:⁵⁷ (1) greater access to EC does not prevent abortion on the whole, and (2) like abortion, greater access to EC would lead to irresponsible behavior⁵⁸ and increased promiscuity.⁵⁹ They claim that liberal EC availability would “lead adolescents to form sex-based cults centered on the use of Plan B.”⁶⁰ Yet these arguments are flawed for a variety of reasons.

With regard to the first claim, American opponents to Plan B deregulation have “blurred the line between contraception and abortion and have added a new wrinkle to the traditional anti-abortion movement.”⁶¹ They look to European studies that con-

⁵⁷ Another common opposition argument is that EC is a form of abortion. Yet this argument seemingly did not originate in Europe, nor did American opponents look to Europe in inspiration for this argument. Rather, this argument is common within religious groups that define abortion broadly as pregnancy prevention, in contrast to common scientific definitions that define abortion more narrowly as the termination of a nonviable fetus. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, OFFICE OF THE GENERAL COUNSEL, *supra* note 8.

⁵⁸ Michael Stebbins, *Plan B: The Behind-the-Counter Over-the Counter Pill?* SEED MAG., Aug. 9, 2006, <http://www.seedmagazine.com>.

⁵⁹ “Unfortunately, the issue of contraceptives such as emergency contraception becoming more easily available to women invariably gets erroneously associated with issue of single mothers, and under-age sex. . . . [T]he U.K. . . . has been criticized for sending the ‘wrong signals’ to teenage girls with their provision of contraceptives for use in an emergency.” Latham, *supra* note 35, at 240–241.

⁶⁰ Shorto, *supra* note 3, at 6:1.

⁶¹ Shorto, *supra* note 3, at 6:1.

R

R

R

R

clude that “[d]espite the clear increase in the use of EC, abortion rates have not fallen in the UK,”⁶² and then conclude that EC is not valuable because it does not prevent abortion.⁶³ The researchers stated that “[w]hile advanced provision of EC probably prevents some pregnancies for some women some of the time, the strategy did not produce the health breakthrough hoped for. The prospect of reducing abortion rates by widening access to EC through health services seems somewhat diminished by the findings of this study.”⁶⁴ Yet this argument is untenable because it is unclear that certain European governments deregulated EC as an attempt to decrease abortions.⁶⁵ Both EC and abortion are still largely available in Western Europe, as discussed *supra*, as two independent but related means by which women exercise reproductive freedom. EC is not undesirable simply because the abortion rate continues to grow.

With regard to the second claim, opponents have looked to European studies to prove their assertion that easy access to EC leads to increased societal promiscuity.⁶⁶ In particular, American opponents point to the phenomenon in several European countries where increased access to EC did not decrease the number of abortions.⁶⁷ These opponents deduce that if there is greater access to EC and the frequency of abortion does not decrease, there must be

⁶² *BBC News, Doubts Voiced Over Emergency Pill*, BBC NEWS, Sept. 15, 2006, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/5345766.stm>. “Despite the gradually increasing availability of emergency contraception, abortion rates are on the rise. In 1984, the abortion rate in England was 11 abortions per 1,000 women In 2004 the figure was 17.8 abortions per 1,000 women In the U.K., requests for abortion have grown from 1 percent of women in 1984, to 6 percent in 1996, to 12 percent in 2002.” *Ivanhoe Newswire, supra* note 7.

⁶³ Anna Glasier et al., *Advanced Provision of Emergency Contraception Does Not Reduce Abortion Rates*, 69 *CONTRACEPTION* 361, 363 (2005), available at www.physiciansforlife.org/content.view/795/36/. Opponents also point to a Scottish study in which health services provided several dosages of EC to women between the ages of sixteen and twenty-nine to keep at home for use at their discretion. Yet, when researchers compared the abortion rates of test subjects with that of other Scottish groups of women, the results of the study suggested that “widespread distribution of advanced supplies of EC through health services may not be an effective way to reduce the incidence of unintended pregnancies in the UK,” and did not reduce the abortion rate. *Id.* at 361.

⁶⁴ *Id.*, at 365.

⁶⁵ According to BBC News, “The government said that the emergency pill was not targeted at cutting abortions.” Rather, the U.K. government saw EC as a “back-up,” not a method to reduce unintended pregnancy rates. BBC News, *supra* note 62.

⁶⁶ Bossom, *supra* note 8.

⁶⁷ See, e.g., Glasier et al., *supra* note 63.

R

R

R

R

2007]

PLAN B DEREGULATION

269

an increase in promiscuity.⁶⁸ They point to the “tragedy in Britain”⁶⁹:

In Great Britain, the morning-after-pill is available without a prescription. In fact, in an effort to lower the teen birthrate, Britain has gone so far as to use public funds to enable women under 20 to walk into local pharmacies and pick up free doses of the morning-after pill. Meanwhile, *The London Times* reported an epidemic of sexually transmitted diseases among British teenagers, with skyrocketing diagnoses of the diseases among teens over a five-year-period.

Throwing the morning-after pill at teenagers will never solve this problem. It is far less dangerous and more effective to share with teenagers the concept that sex is a wonderful experience for couples to share with each other when they have the security of matching wedding bands.⁷⁰

Yet the problem in citing this study for the proposition that EC leads to promiscuity is a causal connection issue: it is unclear what factor(s) caused such a public health outbreak. Greater access to EC, a global increase in sexually transmitted diseases, or the effect of the media on sexual values are among many plausible explanations. Further, a consumer survey in the U.K. “where use of emergency contraception is thought to be the highest in the world, suggests that [only] around 12% of women have ever used emergency contraception” despite its vast and affordable availability.⁷¹ It seems that women in the U.K. either did not know of the availability of EC or simply chose not to use it. Nevertheless, only a relatively small percentage of women seem to use the drug, for whatever reason. “The majority of studies are in the developed countries and mostly in the United Kingdom . . . General findings point to the fact that knowledge of emergency contraception is not wide and is under-utilised.”⁷² Given this finding that not many women use EC, it seems unlikely that greater access to EC caused the outbreak of sexually transmitted diseases cited in the aforementioned study.⁷³ Given the fact that EC “is not widely known and is

⁶⁸ Bossom, *supra* note 8.

⁶⁹ Bossom, *supra* note 8.

⁷⁰ Bossom, *supra* note 8.

⁷¹ Haggai, *supra* note 1, at 343.

⁷² Haggai, *supra* note 1, at 339.

⁷³ A 1999 Finnish study also weakens the connection between the availability of EC and increased teenage sexual activity and related, increased abortion rates. In the study, Finnish students completed anonymous questionnaires asking about the frequency with

R
R
R
R
R

under-utilised,”⁷⁴ it is no surprise that the morning-after pill has not lead to a decrease in abortion.⁷⁵

B. *EC Proponents' View: Plan B as Desirable as Abortion Prevention and Distinctly Not Abortion*

Like opponents, American proponents have also looked to Europe. Plan B proponents' main argument for EC deregulation is that EC is desirable as an alternative to abortion because EC (1) is not abortion and (2) is useful as abortion prevention. Such a strategy may be useful in deregulating EC now, but may threaten the right to abortion in the future.

With regard to the first argument, proponents stress the fact that Plan B is not an antipregnancy pill.⁷⁶ From a scientific point of view, proponents resoundingly state that EC is not abortion, but a form of birth control pill.⁷⁷ They stress that EC does “not interfere with or harm an existing pregnancy . . . and is not RU-486, the ‘abortion pill.’”⁷⁸ While it is true that international health organizations, physicians, and scientists define EC as contraception and not abortion, Plan B proponents should be careful in utilizing such a distinction not to portray EC as a “lesser evil” to abortion. They should avoid arguments that “it’s better to prevent an unwanted pregnancy than have an abortion.”⁷⁹ While such may be subjectively true for many, such an argument is a pro-life argument in disguise, portraying abortion as an unnecessary evil given the availability of EC.

which they used the morning after pill. Despite the availability of EC without a prescription in Finland, only a small number of students had repeatedly used the pill. Also, the proportion of sexually active teenagers had not increased since earlier studies in the 1980s and 1990s, an era during which the morning-after-pill became more widely available in Finland. Latham, *supra* note 35, at 241. Further, despite the availability of EC and stagnant teenage sexual activity rate, the abortion rate is increasingly rising in Finland (although despite the increase, Finland still has one of the lowest abortion rates in the world). *Id.* See also Raija Julkunen, *Women's Rights in Finland—The Ascendancy of Citizen's Rights*, VIRTUAL FINLAND, Aug. 2002, <http://www.virtual.finland.fi/netcomm/news/ahow/article.asp?intNWSAID=25777>.

⁷⁴ Haggai, *supra* note 1, at 343.

⁷⁵ Glasier et al., *supra* note 45, at 60.

⁷⁶ Wood, *supra* note 5.

⁷⁷ Wood, *supra* note 5.

⁷⁸ Wood, *supra* note 5.

⁷⁹ Barbara Sibbald, *Emergency Contraception Could Lower Abortion Rate*, 170(143) CMAJ, 1903, 1903 (2004).

R

R

R

R

R

R

2007]

PLAN B DEREGULATION

271

With regard to the second argument, proponents claim that Plan B deregulation is valuable as a means of reducing the frequency of abortion.⁸⁰ Many argue that “EC is financially, psychologically and physically less burdensome than abortion.”⁸¹ American proponents make a counter-argument to opponents’ studies, maintaining that EC has actually lead to a decrease in abortion—some researchers claim that “43% of the reported drop in abortions between 1994 and 2000 was down to EC, and that around 51,000 pregnancies were prevented by it in 2000/01.”⁸² Many American proponents argue that “the only connection this pill has with abortion is that it has the potential to prevent the need for one.”⁸³ Yet, as discussed *supra* at Part II.A, alternative European research shows that abortion rates are on the increase in Europe despite deregulation of EC. Indeed, according to BBC News, “the government said that the emergency pill was not targeted at cutting abortions.” Rather, the U.K. government saw EC as a “back-up,” not a method to reduce unintended pregnancy rates.⁸⁴ It is unclear whether either the opponents’ or proponents’ cited research is correct. Both sides cite research in direct contrast to that of the other side. It is also unclear whether such studies can ever definitively attribute a single reason as to increases or decreases in abortion rates. Yet American proponents seem to be searching for some causal connection between greater EC availability and decreased abortion rates where none currently exists. They set up a diametrical opposition where EC stands in opposition to abortion, rather than alongside it as another tool women have in their arsenal against unwanted pregnancy.

⁸⁰ *Id.*

⁸¹ Haggai, *supra* note 1, at 339.

⁸² BBC News, *supra* note 62.

⁸³ Wood, *supra* note 5.

⁸⁴ BBC News, *supra* note 62.

R
R
R
R

IV. THE RIGHT CONCLUSION, BUT THE WRONG REASONING:
THE MOST COMPELLING REASON WHY THE UNITED
STATES CANNOT USE EUROPE'S REASONING
IN DEREGULATING EC

A. *Greater Social Welfare and Family Planning Options in
Europe than in the United States*

The most compelling reason why U.S. policymakers cannot employ Western Europe's reasoning is that many Western European countries take a more welfare state approach to reproductive rights than does the United States. These European nations with liberal reproductive rights policies embody the idea that "[i]f the state assumes the responsibility for restricting abortions on religious or moral grounds and in effect forces women to have children that they can not afford or want, then the state must also assume responsibility for the social consequences of that policy." Yet unfortunately, "the latter position is clearly at odds with the economic conservative ideology of limited government, lower taxes and balanced budgets"⁸⁵ that is so central to American social values.

As discussed *supra*, in Western Europe, in countries such as the U.K., France, the Netherlands, and Sweden, among other nations, emergency contraception and abortion are largely free via state-funded medical care, a stance drastically different than that in the United States.⁸⁶ For example, in the U.K., everyone is entitled to register with a general practitioner, the major source of emergency contraception.⁸⁷ For contraceptive services, women can also visit a general practitioner other than the one with whom they are registered.⁸⁸ In Western European countries such as the U.K.,

⁸⁵ Stefania Szlek Miller, *Religion and Politics in Poland: The Abortion Issue*, CANADIAN SLAVONIC PAPERS, Mar. – June 1997, http://findarticles.com/p/articles/mi_qa3763_is_199703/ai_n8752000/print.

⁸⁶ In the United States, the majority of all people who have health insurance obtain it through their workplace or purchase it directly. Thus, not all Americans are guaranteed health insurance. The federal government does not guarantee universal health care to all, but provides some relief and emergency care for the elderly, disabled, and poor. Those without insurance must pay for all medical expenses on their own; a high expense that forces many Americans to forego necessary medical treatment. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE U.S. (2005). In 1997, the World Health Organization ranked the United States only 37th in the world for its health care. This figure is drastically lower than the rankings of other developed nations. WORLD HEALTH ORGANIZATION, HEALTH SYSTEM PERFORMANCE IN ALL MEMBER STATES (1997).

⁸⁷ Glasier et al., *supra* note 45, at 58-59.

⁸⁸ Glasier et al., *supra* note 45, at 58-59.

where there is more of a welfare state system, the government takes a greater part in family planning, providing women with more options, not only as to contraception and terminating pregnancy, but also as to decisions regarding raising a family. In countries such as Finland⁸⁹ and Sweden,⁹⁰ the government greatly subsidizes child care and provides for generous parental leave policies from work. These nations support a woman's choice no matter what she decides as to potential motherhood.⁹¹ Such is not true with regard to the United States, where many women often can neither afford contraception and abortion, nor raising children. In the United States, the government incentivizes child-rearing and a nuclear family structure, but does little in the way of supporting women with regard to child care in cultivating such.⁹² "American

⁸⁹ Finland is a good example of a social welfare state's involvement in the reproductive rights revolution. "In Finland, the expansion of social care services was part of the expansion of the welfare state in the 1960s and evening out social disparities." The Finnish government incentivizes family by supporting homecare of children, and by allowing eleven months of parenting leave on top of which, working parents can obtain childcare leave until the child reaches the age of three as well as homecare allowance. Finland was also one of the first countries to introduce a separate fathering leave so that a father can take six to twelve days off from work to attend to the birth of his child. "Since the end of the 1980s, the birth rate in the Nordic countries, with their individual social security, working mothers and permissive abortion laws, has been higher than in societies, for example Spain and Italy, that favour family-centricity, housewifery and strict abortion controls." Indeed, Finland boasts of one of the world's lowest abortion rates despite the high level of access to it. In Finland, motherhood is more of a meaningful choice; if one decides not to have a child, the government supports such through permissive abortion and contraceptive policies, whereas if one chooses motherhood, the state aids with child care support. Julkunen, *supra* note 73.

⁹⁰ Sweden is another country in direct opposition to U.S. policy. Not only has abortion been free and available even to youth in Sweden since 1975, "Sweden has lead the way for other nations with a gender-neutral parental-leave law that provides almost full salary for up to one year for either parent of a new child." Jan E. Trost & Mai-Briht Begstrom-Walan, *Sweden*, in THE INTERNATIONAL ENCYCLOPEDIA OF SEXUALITY 1.A. (Robert Francoeur ed., 2001), available at <http://www2.hu-berlin.de/sexology/IES/sweden.html>. In that same vein, sex education became a mandatory part of public education in 1956, with courses focusing on relationships, sexuality and living together in the 1970s. *Id.* at 3.A.

⁹¹ For example,

Nordic countries are Protestant, social democratic welfare states. In these countries, female work as an end in itself is relatively desirable. Family benefits are high and are always paid to the mother. In Protestant liberal welfare states (e.g. the U.S.), which are characterized by rather pronounced equality in the make-up of their labour markets, but which sustain minimal family welfare.

Julkunen, *supra* note 73.

⁹² Both U.S. state and federal governments privilege (via e.g. marital tax benefits, testamentary rights) child-rearing within the institution of marriage, showing a preference for the nuclear family model. At the same time, governments do very little in terms of providing state-funded child care, contraception, or abortion.

R

R

culture conceives citizenship and welfare as diametrically opposed, as if state-ensured welfare did not go with a free society . . . on the other hand . . . the Nordic counties [for example] are governed more by an ethic of caring than an ethic of justice.”⁹³

B. *If Europe's Approach Were to Take Hold in the United States: Plan B Limiting Abortion*

European nations with more of a social welfare structure can afford to support deregulation of EC by contrasting EC with abortion or by derogating abortion because both options are secure family planning devices largely at women's disposal. Debating the various pros and cons of family planning strategies is part of a healthy dialogue where women have many reproductive rights and the state supports them in whatever they choose—motherhood or not motherhood. However, in the United States, where the next Supreme Court decision could reverse *Roe v. Wade*, young women still need a prescription for emergency contraception, and the government does little in subsidizing child care and parental leave, the strategy of securing Plan B as an OTC by pejoratively contrasting it with abortion is dangerous. The United States is not yet on safe ground in the reproductive rights movement where policymakers can engage in the same sort of dialogue as our European counterparts. Whereas the debate in Europe is an argument over the merits of two viable, secure means of family planning, in the United States, the debate is over the merits of two reproductive freedoms, where policymakers bolster one at the expense of the other. Why are the

“abortion and unintended pregnancy rates so much lower in Europe[?] . . . People talk about the easy access to contraception there but . . . it's really a matter of the underlying social norms. In Europe, these things are in the open, and the only issue is to be careful. Here in the U.S., people are still arguing about whether it's O.K. to have sex.”⁹⁴

Engaging in the type of dialogue in which many European countries engage could lead to Plan B becoming abortion's replacement or an excuse to further limit the “burdens” the state can place on women seeking an abortion.⁹⁵ In this way, despite the FDA's

⁹³ Julkunen, *supra* note 73.

⁹⁴ Shorto, *supra* note 3.

⁹⁵ *Stenburg v. Carhart*, 530 U.S. 914 (2000).

recent classification of Plan B as an OTC seems like an apparent victory in the reproductive rights movement, it may be only a small victory for contraception, but a larger defeat of abortion rights.

C. *Towards a Better U.S. Solution: Plan B and Abortion as Independently Desirable and Viable Under the Constitution.*

If the United States is to maintain predominantly privatized health care, minimal coverage of contraception, abortion, and child care in the future, it will not follow Western Europe's lead. Instead, the United States needs to forge its own path, while ideally incorporating some social welfare successes from abroad. If U.S. policymakers seek to make motherhood a meaningful choice,⁹⁶ they should incorporate elements of Western Europe's stance on reproductive rights into the United States, such as greater access to abortion, contraception, child care, and sex education. But whatever strategy the United States employs in the future, it must return to the Constitution for guidance. Plan B proponents should support the benefits of both Plan B and abortion as independently beneficial means by which American women can make wise health-related decisions and exercise their right of reproductive autonomy. They should make clear that Plan B is not a "lesser evil." In so doing, proponents should cite their fundamental right to privacy under the landmark *Griswold v. Connecticut*⁹⁷ decision. They should assert that under the *Griswold* penumbra standard,⁹⁸ women have a right to privacy which includes the right to use contraception. As Plan B and emergency contraception are a form of contraception, women should have meaningful access to such. Given the time-sensitive nature of the drug, as well as its safety,⁹⁹

⁹⁶ Albeit, the U.S. government is under no obligation to enlarge reproductive rights to the extent they are in Western Europe. Given the strong pro-life voices in the United States, it is clear that there is a large contingency opposing *Roe v. Wade*. This note, however, argues that the United States should seek more pro-life objectives vis-à-vis EC deregulation and abortion as a right under the Constitutional penumbral right to privacy.

⁹⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁸ *Id.*

⁹⁹ A woman is at a higher risk of thrombosis from pregnancy than the Pill. An unwanted and unplanned pregnancy has serious and long-term consequences for a woman's mental and physical health. Contraceptives are less of a risk to health than abortion, pregnancy, or childbirth. It does not follow, therefore, that contraceptives are too medically dangerous to be available over the counter.

Latham, *supra* note 35, at 233.

there is no compelling reason to withhold it without a prescription, not even from women under the age of eighteen.¹⁰⁰ Similarly, the right to abortion falls under the fundamental right to privacy under *Roe*. Although the future of *Roe* is uncertain, and this note does not seek to explore ways in which to secure *Roe* in the future, it does assert that one of the ways of doing so is ensuring that women's access to reproductive technologies is not a zero-sum game in which emergency contraception is mutually exclusive with abortion, or vice versa. "EC is no substitute for correct, regular use of contraception. It is not, and was never intended to be, a panacea for abortion."¹⁰¹ Until women have both the right to abortion and contraception firmly within their grasps, they will not achieve the same type of reproductive autonomy as in many other Western nations.

V. CONCLUSION

Although Plan B proponents cleverly found a way in which to move forward in the reproductive rights movement by attempting to appeal to pro-life activists, proponents must be careful not to go too far. Although they have successfully kept afloat in a sea of conservatism dominating American politics as of late, proponents must keep their eye to long-term goals of giving women every opportunity for reproductive freedom, giving them meaningful options between motherhood and the prevention of motherhood. They must not bolster one option by weakening another. Rather, as the United States is not a welfare state, it must lean upon the Constitution as a basis in reaffirming reproductive rights as fundamental, a key element in propelling the reproductive rights movement into the future. In order to ensure that abortion and EC are two distinct reproductive choices, a woman should always have a constitutional right to privacy and choice.

¹⁰⁰ However, this note does not expressly address the age requirement aspect of Plan B's viability as an OTC.

¹⁰¹ BBC News, *supra* note 62.