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Gender Discrimination within the Reproductive Health Care System: Viagra v. Birth Control

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GENDER DISCRIMINATION WITHIN THE REPRODUCTIVE HEALTH CARE SYSTEM: VIAGRA V. BIRTH CONTROL

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I. INTRODUCTION

Recently, Pfizer Inc. drew nationwide attention by announcing Federal Drug Administration (hereinafter "FDA") approval of its impotence pill, Viagra. Dubbed as the "magic blue pill", early studies indicate that Viagra enables men diagnosed with impotence to become aroused and engage in sexual intercourse.[1] National attention surrounding Viagra has prompted many insurance carriers to cover at least a part of the cost of the prescription. In fact, by May 1, 1998 nearly half of all Viagra prescriptions were subsidized by insurance carriers.[2] However, the health care industry's warm response to Viagra has renewed debate regarding apparent inequity of health care coverage between men and women. Specifically, health care critics attack those insurance carriers who continue to refuse coverage of contraceptives for women while providing prescriptive coverage of Viagra for men.[3]

For years women have protested the apparent inequity demonstrated by insurance carriers that claim to provide full prescriptive coverage to all enrolled members yet deny coverage of prescription contraceptives. Most recently, the Alan Guttmacher Institute, a national research center, conducted a survey and concluded that half of fee-for-service, large employer group health plans do not cover any method of contraception and only fifteen percent of group health plans provide coverage for the five most common types of contraceptives: contraceptive pills, intrauterine devices (IUDS), Depo-Provera shots,

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[1] Pfizer Viagra, The FDA Approved Impotence Pill (visited Sept. 26, 1998) <http://www.viagra.com/consumer/prod_info.htm>.

[2] Paul Rauber, *It's a Man's World*, SIERRA, Sept. 1, 1998, at 20.

[3] Janet Benshoof, *By Covering Viagra, Insurers Show that Men's Sexual 'Well-Being' is Still More Vital Than Women's*, CHI. TRIB., June 7, 1998, at 9.

Norplant inserts, and diaphragms.[4] Accordingly, women pay a reported sixty-eight percent more in "out-of-pocket" medical expenses than men.[5]

In an effort to rectify prescriptive inequity, many state legislatures have responded by introducing state legislation requiring private health plans to include contraceptive pills and devices.[6] Since January 1998, twenty states presented various bills to their state assemblies designed to increase insurance coverage of contraceptives for women. As evidence of strong public support for insurance prescription regulation, six states including Hawaii, Montana, New Mexico, Texas, Virginia and West Virginia have passed either laws or regulations concerning insurance coverage of contraceptives, although none require complete contraceptive coverage. This past April 1998, Maryland passed into law, the strongest contraceptive coverage state legislation yet, requiring insurers to cover contraceptive benefits.[7] However, other states hesitate to follow Maryland's lead. For example, California's Women's Contraceptive Equity Act was vetoed for the third time by Governor, Pete Wilson September 14, 1998 after passing both the California Assembly and Senate.[8]

Federal legislation regarding insurance for birth control has also been proposed to the U.S. Congress in the form of the "Snowe-Reid" bill, also known as the Equity in Prescription Insurance and Contraceptive Coverage Act (hereinafter "EPICC"). As proposed, EPICC would "prohibit insurers that offer prescription drug benefits coverage

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[4] David S. Broder, *You can Credit Viagra with Another Benefit*, HOUS. CHRON., July 27, 1998, at 18.

[5] Benshoof, *supra* note 3, at 9.

[6] *Should Health Insurers Cover Contraception Costs?,* 24 STATE LEGISLATURES 6, ISSN: 0147-6041, June 1, 1998 at 9.

[7] *Insurance Coverage of Contraceptives: Hearings on Insurance Coverage of Contraceptives S 766 Equity In Prescription Insurance and Contraceptive Coverage Act Before the Committee on Labor and Human Resources*, U.S. Senate (1998) (statement of Richard H. Schwarz, M.D., Chairman of the Department of Obstetrics and Gynecology, New York Methodist Hospital).

[8] Kate Michelman, *Wilson Vetoes Contraceptive Coverage Bill*, THE SAN FRANCISCO CHRON., Sept. 21, 1998, at A22.

from excluding contraceptive drugs and devices approved by the FDA or restricting the coverage for these drugs in ways other drug Ad coverage is not restricted."[9] Since there is no uniformity between contraceptive coverage state legislation, millions of women will likely fall through the cracks and loopholes created by state laws. Any chance for a uniform, all encompassing law mandating prescriptive coverage of contraceptives must come from the U.S. Congress.

This Article begins with an examination of the prescription drug, Viagra and the medical condition it is intended to aid. Additionally, this Article evaluates the five most common, and FDA approved forms of contraceptives: contraceptive pills, intrauterine devices (IUD'S), Depo-Provera shots, Norplant inserts and diaphragms. A basic understanding of the above prescriptions is necessary to determine if health care inequity exists between men and women in the area of prescriptive coverage or if there is such a difference between the medical conditions involved that insurance companies are justified in excluding contraceptive coverage while including Viagra coverage.

Part III of this Article analyzes whether health care inequity truly exists by comparing the intended use of Viagra with the intended use of contraceptives. Next, this Article will compare and contrast the medical necessity of Viagra with the medical necessity of contraceptives. Additionally, this Article provides a basic cost-benefit analysis in the event that insurance companies were required to provide prescriptive coverage of all five FDA approved methods of birth control. In addition to the most obvious arguments regarding equity in prescription coverage, this Article addresses the public policy arguments supporting legislative action mandating contraceptive coverage by insurance carriers. Finally, this Article reviews recent state legislation regarding contraceptive coverage and identifies the reasons why Federal legislation is necessary to rectify inequity in health care coverage between men and women.

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[9] *See* Statement of Richard H. Schwarz, M.D., *supra* note 7.

II. BACKGROUND

A. A Brief Summary of Male Impotence and Viagra (sildenafil citrate).

Male impotence, otherwise known as erectile dysfunction, is a common problem identifiable by a man's inability to achieve or maintain an erection.[10] With regard to a man's sexuality, doctors note that "decreased erectile function is not only the most common but also the most distressing and threatening [sexual dysfunction]. It can destroy a man's ego and threaten happy relationships."[11] Normally, males achieve erections when they are sexually excited and the arteries in the penis widen to increase blood flow to the area. As the veins become compressed, they restrict how much blood flows out of the penis causing it to enlarge and result in an erection.[12] If for some reason, blood flow is restricted to the penis, in most cases, a male will be unable to achieve an erection.

There are many causes of impotence including: 1) insufficient arterial blood flow, 2) venous leakage, 3) impaired nerve supply, 4) drug-induced impotence, 5) prostate problems, 6) hormonal impotence, and 7) psychogenic causes.[13] A variety of factors, including lifestyle habits, trigger the above conditions. Some factors such as stress, anxiety, alcohol consumption, and ingestion of certain narcotics, which may contribute to a man's erectile dysfunction, are easily overcome.[14] Other factors such as diabetes, hormonal imbalances and benign prostate enlargement create a more complex condition for physicians to treat.[15]

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[10] Robert D. Utiger, M.D., *A Pill for Impotence*, 338 NEW ENG. J. MED. 20, at 1458 (1998)

[11] *Id*. at 1458.

[12] Pfizer Viagra, Viagra (sildenafil citrate) Product Information (visited Sept. 26, 1998) <http://www.viagra.com/consumer/3c.htm>.

[13] Pfizer Viagra, Impotence Causes (visited Sept. 26, 1998) <http://members.aol.com/nat2704/enhan/causes.htm>.

[14] *Id.*

[15] *Id.*

Prior to the advent of oral prescriptions, male impotence was often treated with invasive surgical procedures and alternative therapies, including self-administered penile injections and urethral suppositories.[16] However, now there is an alternative to such painful and uncomfortable procedures. March 27, 1998 the FDA approved the first oral pill designed to sexually enhance men with impotence problems.[17] This pill, marketed by Pfizer Inc. as 'Viagra', swept the nation and sent Pfizer Inc.'s stock soaring within days of the FDA's publicly announced approval.

Viagra, referred to as "sildenafil citrate" by the medical profession, "helps a man with erectile dysfunction get an erection only when he is sexually excited."[18] One of the most exciting characteristics of Viagra is that it is effective against a wide variety of ailments causing impotence.[19] FDA reports indicate that Viagra alleviates the symptoms of erectile dysfunction for men suffering from different ailments including diabetes, spinal cord injury, prostate surgery, and other unorganic causes.[20] As such, Viagra provides welcome temporary relief to many men suffering from impotence.

Technically speaking, Viagra reacts by enhancing the smooth muscle relaxant effects of nitric oxide.[21] Normally, males naturally release the chemical, nitric oxide, in response to sexual stimulation.[22] This chemical reacts to channel increased blood flow to the penis. Since impotent men suffer from a lack of blood flow preventing them from achieving an erection, Viagra's enhancement of the smooth muscle relaxation allows

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[16] Mary Ann Elchisak, Pharmacology.guide@miningco.com, *Viagra Lawsuit for Insurance Coverage 05/18/98*, (visited Sept. 26, 1998) <http://pharmacology.miningco.com/library/98NEWS/bln0518c.htm>.

[17] FDA Talk Paper, *FDA Approves Impotence Pill, Viagra* (visited Sept. 26, 1998) <http://www.fda.gov/bbs/topics/answers/ANS00857.html>.

[18] Pfizer Viagra, The FDA Approved Impotence Pill, *supra* note 1.

[19] FDA Talk Paper, *supra* note 17; *See also* Utiger, *supra* note 10, at 1458.

[20] *Id.*

[21] *Id.*; *See also* Utiger, *supra* note 10, at 1458.

[22] *Id.*

increased blood flow to certain areas of the penis, which permits an impotent man, when sexually aroused, to get an erection.[23]

While Viagra does not "cure" the medical condition causing erectile dysfunction, it temporarily and effectively alleviates one of the more serious symptoms of male impotence, that being the man's inability to achieve an erection.[24] If ingested approximately one hour before sexual intercourse, Viagra will help stimulate the male's penis and enable him to maintain an erection.[25] However, a man will not get an erection by simply ingesting the drug, sexual arousal is also necessary.[26] The primary effect of the drug wears off approximately four hours after swallowed, although individual results may vary.[27] For men who choose Viagra to enhance their sexuality, a single dosage is required for each separate encounter.

Since its introduction to the public earlier this year, Viagra has been prescribed to nearly 300,000 men.[28] Viagra, which is available by prescription only, costs approximately ten dollars per pill for the consumer.[29] Even though Viagra is brand new to the pharmaceutical market, many insurance companies have responded enthusiastically by willingly covering the prescriptions, at least in part. Consumer reports indicate that almost fifty percent of the 300,000 men who take Viagra receive at least partial, if not complete reimbursement for Viagra.[30] While many insurance companies willingly reimburse their members for Viagra, the amount of Viagra they are willing to cover

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[23] *Id.*

[24] Pfizer Viagra, The FDA Approved Impotence Pill, *supra* note 1.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Doctors' Accusing Insurance Firms of Sex Discrimination For Covering Viagra*, THE JOURNAL RECORD, May 13, 1998.

[29] *Id.*; Health News, *Viagra's Questions: Who Needs It and How Often?,* (visited Sept. 26, 1998) <http://www.cleveland.com/living/health/news/043098_viagra.html>.

[30] *Doctors' Accusing Insurance Firms of Sex Discrimination For Covering Viagra*, *supra* note 28.

varies. Since Viagra is only a "take it as you need it" drug and not a daily dosage many carriers limit the amount of Viagra they will reimburse on a monthly basis.[31]

B. PREGNANCY AND THE FIVE MOST COMMON FDA APPROVED METHODS OF BIRTH CONTROL: CONTRACEPTIVE PILLS, INTRAUTERINE DEVICES (IUD'S), DEPO-PROVERA SHOTS, NORPLANT INSERTS AND DIAPHRAGMS.

A woman's "child bearing years" typically encapsule the age range from fifteen to forty-four years of age.[32] During this period of time, a sexually active woman is capable of becoming pregnant unless preventative measures are taken. Pregnancy occurs when the male sperm fertilizes the female egg and an embryo forms. Without any form of contraception, women can expect between15 and 24 pregnancies during their fertile years.[33] Using contraception, however, greatly reduces this number.

Over half of all pregnancies reported each year are unintended.[34] These unintended pregnancies carry a number of consequences including but not limited to an increase in infant mortality and morbidity, higher rates of abortion, low birth weight, and maternal morbidity.[35] Although there are multiple reasons for unintended pregnancies, one factor impacting this result is the failure to use birth control.[36] One reason women have sexual intercourse without birth control is that health insurance carriers often times

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[31] Health News, *Viagra's Questions: Who Needs It and How Often?,* (visited Sept. 26, 1998) <http://www.cleveland.com/living/health/news/043098_viagra.html>. Viagra has become the subject of litigation in the Eastern District of New York for a class of men arguing that the insurance industry is attempting to regulate their sexuality by limiting the amount of Viagra insurance companies will cover on a monthly basis. *Id.*

[32] *Should Health Insurers Cover Contraception Costs?,* 24 STATE LEGISLATURES 6, ISSN: 0147-6041, June 1, 1998 at 9.

[33] Paul Rauber, *It's a Man's World*, SIERRA, Sept. 1, 1998, at 20.

[34] Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364 (1998).

[35] *See* Law*, supra* note 34*,* at 364; American Civil Liberties Union Freedom Network, *Stop Inequities In Women's Health Coverage*, (visited Sept. 26, 1998) <http://www.aclu.org/action/epicc.html>.

[36] *Id.*

exclude coverage of some of the most effective forms of birth control.[37] Consequently, women must pay sometimes expensive fees to acquire such birth control, otherwise they employ cheaper and less effective methods of birth control.

To prevent pregnancy, several options exist for women including both reversible and irreversible sterilization. These birth control options vary in overall effectiveness, side affects, cost, comfort and convenience. The five most commonly used FDA contraceptive methods include contraceptive pills, intrauterine devices (IUD's), Depo-Provera shots, Norplant inserts and diaphragms. None of the above five methods is available over the counter and as such a prescription is necessary to access these contraceptives. A more radical and semi-permanent solution to pregnancy is permanent sterilization, a surgical procedure referred to as a tubal ligation where the woman's filopian tubes are tied to prevent eggs from releasing during the menstrual cycle. Finally, none of the birth control methods available to women is 100% effective. The only fool-proof way for fertile women to avoid pregnancy is complete abstinence.

1. Contraceptive Pills

"The pill" comes in a variety of forms and name brands, however the concept for each type of contraceptive pill is the same. Birth control pills contain hormones that enter into the blood stream when ingested to prevent the female from ovulating.[38] Although, the pill regimen varies somewhat between brands and types of contraceptive pills, most require that the woman take the pill daily, at the same time each day. If a woman does

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[37] *See* American Civil Liberties Union Freedom Network*, supra* note 35; *Doctors Accuse Insurers of Gender Bias Over Viagra*, THE FRESNO BEE, May 13, 1998, at A4.; *Insurance Coverage of Contraceptives: Hearings on Insurance Coverage of Contraceptives S 766 Equity In Prescription Insurance and Contraceptive Coverage Act Before the Committee on Labor and Human Resources*, U.S. Senate (1998) (statement of Richard H. Schwarz, M.D., Chairman of the Department of Obstetrics and Gynecology, New York Methodist Hospital).

[38] James F. Fries, M.D., Donald M. Vichery, M.D., TAKE CARE OF YOURSELF: THE GUIDE TO HEALTH AND MEDICAL SELF-CARE, at 455 (Addison-Wesley Pub. Co.)(1993).

not follow prescription guidelines, the effectiveness of the pill may decrease.[39] On the average though, "the pill" is 97% effective against pregnancy if taken according to recommended guidelines.[40]

2. Intrauterine Devices (IUD's)

The IUD is a small device inserted into the woman's uterus by a doctor which remains inside the woman until removed or expelled.[41] Many major pharmaceutical companies manufacture different types of intrauterine devices, including some completely plastic in design and others, a combination of plastic and copper or synthetic progesterone.[42] These devices work by inhibiting the buildup of the uterine lining, which enables implantation of the fertilized egg, and causing the female body to build up a high number of white cells which attack the sperm and/or the fertilized egg if it reaches the uterus.[43] If inserted correctly, the IUD provides women with an effectiveness rate of over 98%.[44]

3. Depo-Provera Shots

Depo-Provera shots are one of the most recent additions to FDA approved contraceptive methods. These shots are injected into the woman by a physician every three months.[45] Each injection contains synthetic hormones called progesten medroxyprogesterone acetate. These hormones enter the blood stream and prevent pregnancy for a period of three months.[46] According to the manufacturer's information,

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[39] *Id.*

[40] Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457, 458 (1997).

[41] Fries, *supra* note 38, at 455.

[42] Renee B. Allen, *International Regulation of Defective Medical Devices: Protecting the Foreign Consumer Through Recall*, 7 B.U. INTL L.J. 85, 86 (1989).

[43] *Id.* at 86.

[44] Segal, *supra* note 40, at 459.

[45] William Green, J.D., Ph. D., *Consumer-Directed Advertising of Contraceptive Drugs: The FDA, Depo-Provera and Product Liability*, 50 FOOD & DRUG L.J. 553 (1995).

[46] Segal, *supra* note 40 at 461.

Depo-Provera is 99% effective in preventing pregnancy, a rate equivalent to surgical sterilization.[47]

4. Norplant Inserts

Norplant has been available to women in the United States since 1991 when it received FDA approval.[48] Norplant inserts are a series of six capsules placed in the woman's arm subdermally which slowly release synthetic progestogen levonorgestrel. These synthetic hormones inhibit ovulation and prevent sperm from passing through a thickened cervical mucus.[49] One of the biggest advantages of the Norplant insert is that this contraceptive method lasts for a period of up to five years.[50] Norplant inserts also boast of an effectiveness rate of 99%, equal to surgical sterilization.[51]

5. The Diaphragm

The diaphragm, one of the most popular "barrier methods" of birth control, is a rubber membrane placed over the opening to the uterus in the vagina. Just prior to intercourse, the diaphragm is inserted and then remains inside the vagina for a number of hours following intercourse.[52] Women must see a doctor in order to be properly fitted for a diaphragm. After a physician has prescribed the diaphragm, a woman has the freedom to use her diaphragm at any time without first seeking medical care. Unfortunately, diaphragms have a comparatively lower effectiveness rate of only 89%, relative to the methods mentioned above.[53]

Other forms of birth control are available to women without a prescription. These birth control methods include condoms, foams, spermicidal jellies and the "rhythm method." While these methods cost much less than prescription methods, they carry a

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47 Green, *supra* note 45 at 565.
48 Segal, *supra* note 40 at 461.
49 *Id.* at 460.
50 *Id.*
51 *Id.*
52 Fries, *supra* note 38, at 455.
53 *Id.* at 456.

much higher incidence of pregnancy. For example the "rhythm method", a method of periodic abstinence during ovulation, is only approximately 68% effective in preventing pregnancy.[54] Additionally, condoms, which cover the male penis, may break during intercourse resulting in an effectiveness rate of only 84%.[55] Consequently, many women look to their insurance providers to subsidize the cost of more effective contraception.

III. AUTHOR'S ANALYSIS:

A. COMPARISON OF THE USES AND MEDICAL CONDITIONS ASSOCIATED WITH PRESCRIBING VIAGRA VERSUS CONTRACEPTIVES.

Outrage rang out May 19, 1998 in the U.S. District Court, for the Eastern District of New York, as attorneys, representing a class of male participants in a group health plan, blasted insurance companies for attempting to regulate a man's sexuality.[56] Plaintiffs in this case allege that insurance provider restrictions on the number of "covered" Viagra pills men are entitled to each month constitutes exclusion of "*effective treatment for this vital human function*."[57] Unsurprisingly, this case has already reached the U.S. District Court and received national attention, even though Viagra has only been available to consumers since late March, 1998. Yet, women have been fighting for nearly forty years to require insurance companies to provide contraceptive prescriptions for the exact same *"vital human function."*[58] Ironically though, in contrast to the litigation surrounding the newly developed Viagra, a suit has never been brought to get insurers to pay for birth control.[59]

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[54] *Id.*

[55] *Id.*

[56] Mary Ann Elchisak, Pharmacology.guide@miningco.com, *Viagra Lawsuit for Insurance Coverage 05/18/98*, (visited Sept. 26, 1998) <http://pharmacology.miningco.com/library/98NEWS/bln0518c.htm>.

[57] *Id.*

[58] Janet Benshoof, *By Covering Viagra, Insurers Show that Men's Sexual 'Well-Being' is Still More Vital Than Women's*, CHI. TRIB., June 7, 1998, at 9.

[59] Debra Baker, *Viagra Spawns Birth Control Issue*, 84-AUG A.B.A. J. 36, (1998).

1. A Common Thread: Prescriptions that Provide the User with Control Over His or Her own Sexuality.

As described above in Part I.A. of the Introduction, Viagra enables men, suffering from debilitating impotence, to enjoy a more fulfilling lifestyle by aiding the male in what is deemed by many as a "vital human function."[60] This vital human function encompasses sexuality and the ability to engage in sexual intercourse free from anxiety brought on by the affects of impotence. Viagra is not a drug designed to provide a cure for illnesses such as diabetes and prostate cancer.[61] Instead Viagra prevents the unwanted affects of these conditions from interfering in a male's basic desire to engage in sexual intercourse free from anxiety of impotence. In fact, one of the most exciting advantages of the "use-it-as-you-need-it" drug, is that it is not a daily pill, but a pill that is taken only before a man chooses to engage in sexual intercourse.[62] As a result men, suffering from various debilitating conditions who receive Viagra, are given control of their own sexuality rather than remaining a pawn to their illness. Thus, Viagra is not a miracle medical breakthrough because it cures impotence (since it doesn't), but because men who suffer from various afflictions may finally enjoy a full sexuality free from anxiety of their pre-existing condition, whatever it may be.

Contrary to what some may believe, contraceptives offer women the same miracle medical breakthrough that men enjoy who receive Viagra. Although, female contraceptives obviously do not alleviate the symptoms of male impotence, they perform essentially the same function for women as Viagra performs for men. As explained above in Part I. B. of the Introduction, female contraceptives are used primarily to prevent

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[60] Pfizer Viagra, The FDA Approved Impotence Pill (visited Sept. 26, 1998) <http://www.viagra.com/consumer/prod_info.htm>.

[61] *Id.*

[62] Health News, *Viagra's Questions: Who Needs It and How Often?,* (visited Sept. 26, 1998) <http://www.cleveland.com/living/health/news/043098_viagra.html>.

pregnancy.[63] Typically, contraceptives are not prescribed to "cure" any reproductive or other illness that a woman may suffer. Instead, contraceptives are used by women wanting to enjoy sexuality free from the anxiety of an unwanted pregnancy. As demonstrated by disparaging national statistics, identifying over half of pregnancies each year as unintended, this fear of unwanted pregnancy is quite real.[64] Without access to effective contraception, women may feel unable to engage in sexual intercourse at all. And those who do have sexual intercourse despite access to effective birth control, must prepare to face sometimes dire consequences, including an unwanted pregnancy. Thus, effective contraception is crucial in providing a woman the ability to control and enhance her sexuality.

Although many insurance companies prefer to draw a distinct line between Viagra and female contraceptives, both prescriptions are used by men and women to achieve the same "*vital human function*", the freedom to control their own sexuality. Generally, prescriptions issued for either Viagra or female contraceptives are not intended to cure a patient's illness. Viagra provides temporary relief from impotence and contraceptives prevent unwanted pregnancy. While these prescriptions work in entirely different fashion, medically speaking, both enable men and women alike to engage in the vital human function of sexual intercourse. Consequently, equity demands that insurance companies providing prescriptive coverage to one sex to enhance sexuality must provide the same prescriptive coverage to the opposite sex.

The Fifth and Fourteenth Amendments of the U.S. Constitution provide equal protection under the laws. Since many health care providers or employers receive state or federal funding, the above provisions of the U.S. Constitution extend to a majority of

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[63] James F. Fries, M.D., Donald M. Vichery, M.D., TAKE CARE OF YOURSELF: THE GUIDE TO HEALTH AND MEDICAL SELF-CARE, at 455 (Addison-Wesley Pub. Co.)(1993).

[64] Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364 (1998).

health care providers. Thus, the majority of insurance companies are prohibited from selectively providing coverage on the basis of gender, and an insurance provider's decision to continue providing insurance coverage for Viagra while excluding prescription coverage of female contraceptives demonstrates intentional discrimination on the basis of gender/sex. Consequently, decisions made by these carriers to continue exclusion of equal prescriptive coverage to women violates both federal and state statutes.[65]

In addition to violating federal and state constitutional provisions, any further denial of the similarities between Viagra and contraceptives, (primarily their aid in sexual function), offends both public policy and the concept of equality. For an insurance company to engage in a debate regarding the relative seriousness of the effects of impotence versus the effects of unwanted pregnancy is futile. It would be absurd to deny that either condition is less serious simply because it only effects one sex. By virtue of being female, women alone are faced with the risk of pregnancy every time they engage in sexual intercourse without effective contraception. Likewise, by nature's design, only men suffer the effects of impotence when they engage in sexual intercourse without a medical prescription such as Viagra. Consequently, different types of prescriptions are necessary to provide both men and women the same control over their own sexuality. In short, both men and women deserve equal access to the types of prescriptions that will aid them in achieving a healthy sexuality.

2. Defining Contraceptive Use As A Medical Necessity.

For years, insurance companies have excluded some if not all forms of contraceptives based on the determination that prescription birth control is not a "medical necessity."[66] Most recently, with the introduction of Viagra, insurance companies have

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[65] Carol Jonann Bess, *Gender Bias In Health Care: A Life of Death Issue For Women With Coronary Heart Disease*, 6 HASTINGS WOMEN'S L.J. 41 (1995).

[66] *Contraceptive Insurance Bill May Be Vetoed*, SUNDAY GAZETTE, Feb. 8, 1998, at 9A.

revived this "medical necessity" distinction to answer the growing swell of critics who question insurance carriers' coverage of Viagra and continued exclusion of contraceptives.[67] Specifically, insurance companies who claim "full prescription coverage" to all members, deny access to contraceptives by stating that they are simply not "medically necessary" to treat any medical condition and thus are merely "elective" or "optional" medical services.[68] On the other hand, these same insurance companies offer prescriptive coverage of Viagra, classifying it as a "medically necessary" drug to treat male impotence. As an illustration of this mentality, Richard Coorsh, a spokesperson for the Health Insurance Association of America states "there is a clear distinction between Viagra, . . . approved as a cure for a medical dysfunction, and contraception, . . . a 'lifestyle drug.' "[69] Consequently, only 15% of indemnity insurance plans offer coverage of the five most common contraceptive methods, while almost half of all Viagra prescriptions are subsidized by health insurance.[70]

The medical insurance industry has met with much opposition regarding their view of contraceptives as "elective" services. Critics of this description, including medical associations and women's groups, assert that birth control for women is in fact a "medical necessity" within the insurance industry's definition.[71] The American College of Obstetricians and Gynecologists (hereinafter "ACOG") has pinpointed several serious and sometimes life threatening consequences for women and their children, when they are not afforded reasonable access to effective contraception. These consequences include

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[67] *Insurance Coverage of Contraceptives: Hearings on Insurance Coverage of Contraceptives S 766 Equity In Prescription Insurance and Contraceptive Coverage Act Before the Committee on Labor and Human Resources*, U.S. Senate (1998) (statement of Richard H. Schwarz, M.D., Chairman of the Department of Obstetrics and Gynecology, New York Methodist Hospital).

[68] See Baker, *supra* note 59, at 36.

[69] *Id.*

[70] Paul Rauber, *It's a Man's World*, SIERRA, Sept. 1, 1998, at 20.

[71] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67; American Civil Liberties Union Freedom Network, *Stop Inequities In Women's Health Coverage*, (visited Sept. 26, 1998) <http://www.aclu.org/action/epicc.html>.

increased infant mortality and morbidity, high rates of abortions, low birth weight and maternal morbidity.[72] Therefore, it is argued that the ability to control fertility is essential to a woman's health. A woman who regulates her own fertility has the ability to ensure appropriate timing between pregnancies as well as limit the size of her chosen family.[73] Hence, adequate timing between pregnancies and family size, with the aid of contraceptives, results in improved infant and maternal health.

To recognize the weakness of insurance providers' "medical necessity" argument, contraceptives must be placed in context with other prescriptions. Health care systems prefer to classify contraceptives as "preventative" or "elective" options in order to justify exclusion of coverage. This classification backfires, however, when compared with other medications. For instance, often doctors prescribe blood pressure medications to patients with hypertension. These medications do not "cure" hypertension, they simply prevent the patient's blood pressure from raising, yet they are covered by medical insurance.[74] Another example of preventive medicine includes allergy medications prescribed to prevent the uncomfortable and inconvenient side affects allergy sufferers may manifest.[75] More to the author's point, most medical insurance providers cover the cost of immunization shots.[76] Immunization shots are a primary example of purely preventive and elective medication, yet they are a necessity to ensure the well being of men, women and children. The above examples clearly demonstrate that a "preventative" or "elective" classification of a prescription does not necessarily render it a "selective" or "lifestyle" medication.

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[72] *See* American Civil Liberties Union Freedom Network*, supra* note 71; *See also* Law, *supra* note 64, at 364.

[73] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67.

[74] Interview with Dr. Anita Nelson, UCLA Medical Center (CBS television broadcast, May 12, 1998), *available in* 1998 WL 7261637.

[75] *See* Baker, *supra* note 59, at 36.

[76] *Id.*

Based on the preventative roll contraception plays in controlling fertility and avoiding the very serious consequences of unwanted pregnancy, contraceptives are essential to a woman's health and well being and as such are a "medical necessity." Insurance companies who describe contraception as "a lifestyle drug" tread dangerously close to stereotyping women who elect to control their fertility as "promiscuous" or "scandalous."[77] Moreover, the fact that Viagra allows men to become more sexually active, suggests it could also be described as a "lifestyle drug." Yet traditional stereotypes of men suggest that men are "meant to have erections and sexual pleasure,"[78] and therefore Viagra merely aids what nature intended. On the other hand, traditional stereotypes of women say that women are intended to get pregnant, become mothers and only tolerate sex.[79] Thus, the traditional stereotype of women discourages use of "unnatural" contraception and even abortion.[80] Rather than bind women to outdated and oppressive standards, insurance companies should recognize that both Viagra and contraceptives are medically necessary to the well being and sexual health of both men and women.

B. RECOGNIZING DIFFERENCES THAT EXIST WHEN PROVIDING HEALTH CARE TO MEN AND WOMEN.

The human physique readily demonstrates men and women are different in biological form. Most significant to this discussion, however, is the notable difference between male and female reproductive systems. Simply stated, only women can become pregnant. As a result, women have very different reproductive health needs than men. For example, only women require "prenatal" care, maternity care and postnatal care. Additionally, only women are treated for diseases such as ovarian cancer, endometriosis,

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[77] *See* Baker, *supra* note 59, at 36; *See* also Janet Benshoof, *By Covering Viagra, Insurers Show that Men's Sexual 'Well-Being' is Still More Vital Than Women's*, CHI. TRIB., June 7, 1998, at 9.

[78] *See* Benshoof, *supra* note 77, at 9.

[79] *Id.*

[80] *Id.*

and cervical cancer. While it is true that these differences clearly exist, these distinctions do not justify the current disparities in health care.

Although readily apparent differences exist between men and women, the Equal Protection Clause of the U.S. Constitution provides some protection for women in that it prohibits various forms of gender discrimination.[81] Specifically, an employer's insurance policy may not adversely impact women disproportionately compared to men unless the employer demonstrates a "business necessity" or makes a showing that there is a legitimate reason for the sex-based classification.[82] While this Constitutional standard appears to provide insurance providers with clear guidelines for developing non-discriminatory health insurance plans, the reality is quite opposite. For instance, the Court held in General Electric Co. v. Gilbert[83] that a "comprehensive" insurance plan which excluded pregnancy-related medical conditions from disability coverage did not constitute sex discrimination. Since the enactment of the federal Pregnancy Discrimination Act in 1978, *Gilbert* has been overturned.[84] However, *Gilbert* remains as an example of the Court's broad interpretation of what constitutes a sex-based classification by employer insurance programs.

While the U.S. Supreme Court may not have provided a clear set of guidelines regarding health care allocation between men and women, they have clearly set forth equality in health coverage as the ultimate goal. Subsequently, insurance companies are faced with the complex problem of developing a standard to ensure the ultimate goal of equity in health care for men and women alike. Given the fact that men and women are naturally different, equal allocation of medical care and prescriptions on the basis of identical treatments and medications will prove inequitable. Cost of care as the standard for allocation of services is also unlikely to effect equitable coverage. Historically,

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[81] *See* Law, *supra* note 64, at 375.

[82] *Id.*

[83] General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).

[84] *See* Law, *supra* note 64, at 376.

medical research has focused primarily on male illnesses rather than female diseases.[85] As a consequence, the cost of care for women may be much greater than for men.[86] Currently, a majority of medical insurance carriers use "medical necessity" as the appropriate marker for whether or not to provide various treatments and prescriptions.[87] The lack of contraceptive coverage for women, however, clearly illustrates the weakness of this standard.

Rather than attempting to correlate various medical treatments between men and women, insurance companies must take into account the basic differences between men and women, and then identify the independent needs of both sexes. After identifying the individual needs of their members, insurance companies can begin to evaluate the services necessary to ensure the health and well-being of all members alike. By applying this "independent" approach it is likely that insurance companies will be forced to recognize the critical role effective contraception plays in the continued health and well-being of female members.

C. CONTRACEPTIVES: A COST-BENEFIT ANALYSIS FROM THE INSURER'S PERSPECTIVE.

Private insurance companies, like most "for-profit" businesses, operate in part by monitoring the cost of health services and examining whether these costs may be reduced and at what sacrifice. Therefore, any discussion suggesting additional medical coverage of female contraceptives is not complete unless the costs involved are analyzed and can be justified. Justifications may include the actual costs avoided, incidental benefits and public welfare. If the expense of contraceptives is outweighed by the relative benefit and

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[85] Keelyn Friesen, *Non-Passage of the Women's Health Equity Act: Inaction May Lead to Cancerous Results*, 14 HAMLINE J. PUB. L. & POL'Y 243, 243-245 (1993).

[86] *Id.*

[87] *See supra* Part III.A-B.

costs avoided, insurance companies would be wise to adopt full contraceptive coverage for women to increase overall profits while reducing overall expense.

1. COSTS INCURRED.

Given the amount of resistance insurance companies have shown with regard to providing full contraceptive coverage, it is somewhat surprising to learn that the controversy only equates to $21.40 per employee per year.[88] This figure represents an additional cost to the average employer of $17.12 per employee per year and an additional cost of $4.28 to each employee per year. The increase in cost to the insurer would average an additional $16.00 per enrollee each year.[89] Ultimately, the added expense to employers who provide employees with medical insurance is less than 1% of the average total cost of providing coverage.[90] Although this figure may appear expensive to some, when compared with the $100-$300.00 cost per month per male for Viagra, the cost of female contraception is relatively low.[91]

2. COSTS AVOIDED.

Several costs usually born by insurance carriers can be avoided by providing contraceptive coverage to women. In fact, a study conducted by an Institute of Medicine Committee on Unintended Pregnancy concluded that insurance companies' failure to provide effective contraception was one of the reasons for the high rate of unintended pregnancy.[92] As a result, health providers must bear the cost of these pregnancies. The cost of childbirth alone, without any complications, averages between $3,000 - $5,000 per woman.[93] As discussed in Part III.A.2. of the Author's Analysis above, unintended

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[88] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67.

[89] Planned Parenthood Federation of America, Inc., *The Equity In Prescription Insurance And Contraceptive Coverage Act*, (visited Sept. 26, 1998) <http://www.plannedparenthood.org/Library/BIRTHCONTROL/Equity.html>.

[90] *Id.*

[91] *See* Elchisak, Viagra Lawsuit for Insurance Coverage, *supra* note 56.

[92] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67.

[93] *Should Health Insurers Cover Contraception Costs?,* 24 STATE LEGISLATURES 6, ISSN: 0147-6041, June 1, 1998 at 9.

pregnancy may result in low-birth weight infants and infants with serious medical conditions. The estimated expense of childbirth and follow-up care rises dramatically to an average of between $14,000 and $30,000 per year for the first year of life for infants born with a low birth-weight.[94] Thus, a comparison between the $16.00 per enrollee per year versus the average $5000.00 per childbirth demonstrates that unintended pregnancy financially impacts insurance companies much more than the minimal cost for contraceptive coverage.

The number of unintended pregnancies each year also results in a higher number of abortions.[95] According to the Alan Guttmacher Institute of New York, of the 3.6 million women who have unwanted pregnancies each year, 44% percent seek an abortion.[96] Abortion creates significant financial and psychological burdens for women and ultimately that burden is passed on, at least in part, to health insurance providers.[97]

As discussed in Part II.B., women without contraceptive health care coverage, have other inexpensive alternatives to prescription birth control.[98] A woman choosing condoms as a form of birth control is likely to spend on the average $15.00 - $20.00 per month.[99] Additionally, the "rhythm method" is available to women at no expense and without a prescription. Although these so-called "less expensive" alternatives appear to be reasonable in price, they may carry a hidden cost. Both condoms and the rhythm method provide significantly lower effectiveness rates when compared to their prescription counterparts. Unfortunately, the most effective forms of birth control are also the most costly, potentially costing hundreds of dollars for women at the outset of

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[94] *See* Law, *supra* note 64, at 366-67.

[95] *See* American Civil Liberties Union Freedom Network*, supra* note 71; *See also* Law, *supra* note 64, at 364.

[96] *If Viagra Is Covered, Why Not the Pill? It's Unfair For Insurance Companies To Cover Viagra and Not Contraceptives*, GREENSBORO NEWS & RECORD, Aug. 10, 1998, at A6.

[97] *See* Law, *supra* note 64, at 367.

[98] *See supra* Part II.B.

[99] Fries, *supra* note 63, at 455.

use.[100] Often, the fees involved are too great for women to consider unsubsidized prescription birth control a viable option. Consequently, women forced to use these alternative methods bear a much higher risk of unintended pregnancy. And as seen above, insurance companies incur significant expenses due to unintended pregnancy.

3. *FINANCIAL BENEFITS GAINED BY INCLUDING CONTRACEPTIVES IN HEALTH CARE COVERAGE.*

The nominal additional cost incurred by insurance providers and employers choosing to include contraceptive coverage to women members, is far outweighed by the benefits gained from such coverage. A 1995 American Journal of Public Health study reported that contraceptive coverage would pay for itself.[101] Only a 15% increase in the number of women using oral contraceptives would produce enough savings in pregnancy costs to provide full contraceptive coverage to all health plan members[102] In conclusion, access to effective contraception would provide insurance companies significant financial savings.

4. THE COST OF VIAGRA IMPACTS THE COST OF WOMEN'S HEALTH

Currently, women pay 68% more than men in out-of-pocket costs for medical care. This percentage is likely to increase with the advent of Viagra. Viagra, which costs on the average, between $200.00 and $300.00 per month, has already been subsidized by nearly half of insurance companies.[103] As such, more men than ever are enjoying sexual activity and enhanced sexuality due to the fact that Viagra increases the sexual potency of men. It follows that this increased sexual potency could potentially increase the number of unwanted pregnancies.[104] Consequently, Viagra may actually inflate the cost of health

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[100] *See* Planned Parenthood Federation of America, Inc., *supra* note 89.

[101] *See* Benshoof, *supra* note 77, at 9.

[102] *Id.*

[103] *Doctors' Accusing Insurance Firms of Sex Discrimination For Covering Viagra*, THE JOURNAL RECORD, May 13, 1998.

[104] *RX For Viagra and Female Contraceptives*, BUFFALO NEWS, July 5, 1998, at H2.

care for women.[105] In light of this inseparable connection between unintended pregnancy and Viagra, insurance companies, now more than ever, should be able to see the economic feasibility and benefit from providing prescriptive coverage of contraceptives.

From a purely economic perspective, providing access to contraceptive coverage for women is fiscally beneficial for insurance companies. The cost of preventative care is minimal in comparison to the expense of treatment after the fact, especially in the context of birth control and pregnancy. Thus, a cost-benefit analysis evaluating the inclusion of contraceptive coverage, supports health insurance sponsorship of effective birth control.

D. REGULATION OF EQUITABLE PRESCRIPTION COVERAGE REFORM.

1. CURRENT STATE LEGISLATION REGULATING CONTRACEPTIVE COVERAGE BY INSURANCE CARRIERS.

Currently no Federal legislation exists dictating that insurance companies who claim to provide "full prescription coverage" must also subsidize female contraception. However, in light of the renewed controversy surrounding the exclusion of contraceptive coverage, a number of states have taken measures to ensure equity in health care for men and women. This section will examine current state legislation addressing contraceptive coverage within the states. Additionally, a comparison between Maryland, the most restrictive state, and California, a state without regulation, will provide the reader with an understanding of the contrasting views legislatures hold regarding regulation of private insurance carriers.

Although effective forms of birth control, such as oral contraceptives, have been available to women for the past forty years,[106] only recently have a number of women's organizations and individuals begun to tackle the issue of insurance coverage for

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[105] The Feminist Majority Foundation Online, *Feminist News* (May 12, 1998) <http://www.feminist.org/news/newsbyte/may98/0512.html> (quoting Luella Klein of the American College of Obstetricians and Gynecologists).

[106] *See* Benshoof, *supra* note 77, at 9.

contraceptives.[107] This movement has taken shape in the form of state legislative reform designed to require family access to insurance subsidized contraceptive coverage. Since the late 1990's at least 20 states have introduced legislation mandating contraceptive coverage.[108] Of these twenty, Hawaii, Montana, New Mexico, Texas, Virginia and West Virginia, have adopted some regulation pertaining to contraceptive coverage.[109] The most aggressive state measures taken thus far, have been by Maryland, which adopted a bill almost identical to the Equity in Prescription Insurance and Contraceptive Coverage Act ("EPICC") mandating that all insurers cover contraceptive benefits.[110]

Even though a number of states have progressed toward more equitable ideals for health care coverage, it is unlikely that any uniformity among all states will be achieved in the near future. Strong opposition confronts lawmakers attempting to pass bills intended to mandate contraceptive coverage for women. State legislative debate regarding prescription equity has centered on three arguments posed against equitable coverage.[111] First, opponents of legal mandates, requiring birth control be viewed equally along with other necessary prescription drugs, regard laws requiring health providers or employers to provide coverage for particular conditions as overly intrusive government action.[112] Second, those against contraceptive equity legislation, argue that any of the proposed requirements would create too great a financial burden on small business.[113] Finally, opponents complain that mandatory contraceptive coverage would impinge upon the religious freedom of those morally opposed to medical contraception.[114] Such

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[107] *See* Law, *supra* note 64, at 393 (*citing* Center for Reproductive Law & Policy Contraceptive Conference, New York, N.Y. (July 18-20, 1997).

[108] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67; See Baker, *supra* note 59, at 37.

[109] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67 .

[110] *Id.;* Insurance News Network, Growing Support For Contraceptive Coverage (modified Aug. 7, 1998) <http://www.insure.com/health/pill.html>.

[111] *See* Law, *supra* note 64, at 393-94.

[112] *Id.*

[113] *Id.*

[114] *Id.*

opposition from various groups has impeded any significant improvement for women across the United States.

Much of the opposition described above has been debated as superficial and irrational. For example, any opposition, alleging the commonly used "undue government intrusion" argument, is trumped by the fact that not all government mandates are negative. For instance, until Congress mandated maternity health care in 1978, two out of five insurance plans excluded maternity care.[115] Today, very few arguments exist that contend mandatory maternity health coverage is too burdensome. It is foreseeable that a similar contraceptive coverage bill will eventually be seen in the same light. Additionally, the added expense of contraceptive coverage born by businesses (large or small) is far less than the costs involved in abortion, childbirth, and treatment of newborns, typically covered by insurance.[116] Furthermore, those religious opponents contending violations of religious freedom may not be allowed to discriminate against women who choose to use birth control as an effective method of family planning.[117] This debate continues today within many state legislatures regarding the requirement that insurance providers include contraceptive coverage in their health care plan.

As mentioned above in this section, some states are much further along in the process of adopting equitable prescription coverage measures than others. California is a prime example of a state extremely reluctant to hold insurance carriers to a standard of full equitable coverage. On three separate occasions, California's Governor Pete Wilson has vetoed bills introduced in the state assembly and senate to ensure paid coverage for a range of contraceptive methods.[118] The California legislature's most recent attempt to adopt regulation requiring paid contraceptive coverage for women, referred to as the

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[115] David Broder, *Women Benefit From Viagra Debate*, THE PLAIN DEALER, July 28, 1998, at 9B.

[116] *See supra* Part III.B.2; *see also* Law, *supra* note 64, at 393-94.

[117] *See* Law, *supra* note 64, at 393-94.

[118] Kate Michelman, *Wilson Vetoes Contraceptive Coverage Bill*, THE SAN FRANCISCO CHRON., Sept. 21, 1998, at A22.

Women's Contraception Equity Act, was passed by the Assembly Aug. 26, 1998 and passed by the Senate Aug. 12, 1998.[119] Excerpts of this bill are provided in pertinent part below.

> SEC. 2. Section 1367.25 is added to the Health and Safety Code, to read:
>
> 1367.25. (a) Every group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 1999, and every individual health care service plan contract of a type and form first offered for sale on or after January 1, 1999, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits:
>
> (1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration approved prescription contraceptive methods, designated by the plan. In the event the patient's provider, acting within his or her scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient, the plan shall also provide coverage for another federal Food and Drug Administration approved, medically appropriate prescription contraceptive method prescribed by the patient's provider.
>
> (2) Outpatient prescription benefits for an enrollee shall be the same for an enrollee's covered spouse and covered nonspouse dependents.
>
> (b) Nothing in this section shall be construed to deny or restrict in any way any existing right or benefit provided under law or by contract.
>
> (c) Nothing in this section shall be construed to require an individual or group health care service plan to cover experimental or investigational treatments.
>
> (d) The requirements of this section shall not apply to a group health care service plan contract purchased by an employer that is a religious organization or a controlled religious subsidiary or a religious organization, including a church, religious institution,

[119] A.B. 1112, Cal. Reg. Sess.(Cal. 1998).

> religious association, or other religious organization that is not organized for private profit and that is exempt from registering and reporting regularly to the Registry of Charitable Trusts in the Office of the Attorney General, as defined by Section 12580 and following of the Government Code, if the provision of prescription contraceptive methods as described in this section is inconsistent with the religious beliefs of the organization.
>
> (e) Any enrolled employee whose family has a gross annual household income equal to or less that 400 percent of the federal poverty level, and his or her enrolled dependents, of an employer that elects not to provide coverage for prescription contraceptive methods as described in this section shall be eligible for a voucher, through the California State-Only Family Planning Program as established by Section 24000 of the Welfare and Institutions Code, for prescription contraceptive benefits as described in this section.. . . .[120]

This latest version of California's proposed Women's Contraception Equity Act (hereinafter "the Act") was drafted to appease critics of previous legislation and Governor Wilson's advisors who protested passage of the Act on the grounds that such regulation would require religious organizations and associations, who oppose contraception as immoral, to financially sponsor this program.[121] In an attempt at compromise, drafters of the Act included a "conscience clause" (Section 1367.25(a)2(d),(e)), extending exemption to bona fide religious organizations and church-affiliated hospitals who choose to opt out of the program.[122] Under the proposed Act, women, who are members of insurer programs claiming exemptions, may become eligible to receive contraceptives through a state program traditionally earmarked for low-income women.[123]

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[120] *Id.*

[121] Max Vanzi, *California and the West Contraceptive Mandate for Insurers Vetoed Capitol*, L.A. TIMES, Feb. 12, 1998, at A3.

[122] Cal. A.B. 1112.

[123] *Id.,* Dan Morain & Max Vanzi*, California and the West Bill Requiring Contraceptive Coverage Approved Capitol*, L.A. TIMES, Aug. 27, 1998, at A3.

In a disappointing move for lawmakers and women's rights groups alike, Gov. Wilson vetoed A.B. 1112 September 11, 1998.[124] Gov. Wilson's objections to the proposed Act included the contention that "working women could have access to state-funded contraceptive services intended exclusively for low-income women."[125] Despite Gov. Wilson's steadfast position opposing equitable prescription coverage, Californians may eventually enjoy equitable health care coverage. November 3, 1998, California voters went to the polls in record numbers and elected Democrat Lieutenant Governor Gray Davis as California's next Governor.[126] Lt. Gov. Davis pledged that if elected, he would support the Women's Contraception Equity Act.[127] Whether such a promise will be fulfilled remains to be seen.

The above overview of California's historical legislative analysis readily demonstrates the problems many state legislatures currently face while attempting to improve prescription coverage for women. Maryland is only one state out of fifty that has chosen to adopt full equitable coverage for women within its state boundaries. Unlike Maryland, the majority of states have not even endeavored to address the issue of equitable prescription coverage. As a result of these scattered and variable efforts to ensure contraceptive coverage for women, many advocates of insurance reform have turned to the Federal legislature.

2. STATE LEGISLATIVE LOOPHOLES AND CURRENT FEDERAL REGULATIONS EXPOSE THE NEED FOR A FEDERAL PRESCRIPTIVE EQUITY LAW.

Ultimately, Federal intervention appears necessary to achieve contraceptive coverage for all women alike. Aside from the unlikelihood that the states will ever adopt uniform legislation mandating contraceptive coverage for women, several loopholes exist

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[124] *Insurance News: Contraceptive Coverage*, HEALTH NEWS DAILY, Sept. 18, 1998, *available in* 1998 WL 12762338.

[125] Morain, Vanzi, *supra* note 123, at A3.

[126] *Decision 98'* (ABC television broadcast, Nov. 3, 1998).

[127] Michelman, *supra* note 118, at A22.

at the state level which prevent equitable coverage to all women within a particular state. Specifically, employers with self-insured plans may invoke exemption under the federal Employment Retirement Income Security Act of 1974 (ERISA), which preempts state regulation.[128] Apart from state "loopholes", current federal legislation fails to sufficiently protect women's health care needs.[129] An evaluation of the various problems with current state and federal legislation exposes the need for federal reform.

In the event that federal legislation, mandating equitable prescription coverage, is not forthcoming, states will be left to determine the future of women's health care for themselves. Unfortunately state reform falls short of adequate protection for millions of women and families across the country. Families insured by employers with self-insured plans are "shielded by the federal ERISA preemption."[130] "ERISA prohibits states from mandating benefits or defining discrimination in employee benefit plans more broadly than federal law."[131] Consequently, any state provisions requiring insurance companies to pay for contraceptive methods would be inapplicable to ERISA employers because there is no existing federal legislation mandating contraceptive coverage.

Since employers are capable of circumventing state provisions under the protection of ERISA, contraceptive equity advocates have turned to existing federal provisions to prevent further "contraception discrimination" by insurance companies. Specifically, a number of women's groups and civil rights advocates have begun to analyze whether continuing to exclude contraceptive coverage to women violates Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978 (hereinafter "PDA").[132] Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of

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[128] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67 .

[129] Sylvia Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998).

[130] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67 .

[131] Law, *supra* note 129, at 395-96.

[132] *Id.* at 389-94.

employment, because of such individual's race, color, religion, sex, or national origin."[133] Additionally, the PDA expressly prohibits employers from discriminating "on the basis of pregnancy, childbirth, or related medical conditions" and dictates that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, **including receipt of benefits** under fringe benefit programs. . ."[134] Based on the preceding language, advocates contend that contraception and family planning is included in "pregnancy related medical conditions" and as such, employers must subsidize contraceptive prescriptions[135]

The obvious argument from an employer's and/or insurance provider's perspective states that the PDA must be interpreted much more narrowly to exclude contraceptive services from "pregnancy, childbirth, and related medical conditions."[136] Those opposed to providing contraceptive coverage contend that contraception is not included in the above list and therefore does not apply. Moreover, opponents defend their position by rationalizing that contraception is about preventing pregnancy, not protecting pregnant women from discrimination.[137]

Advocates of contraceptive coverage rebut the narrow interpretation of the PDA by alleging that neither the statute's language nor its legislative history supports such a narrow view.[138] Specifically, advocates contend that the PDA is not restricted to protection for pregnant women due to its explicit prohibition of discrimination against a woman who has had an abortion. Hence, advocates conclude that the PDA also protects women attempting to avoid pregnancy and therefore employers may not exclude contraceptive prescription coverage from their medical benefits. Finally, as further rebuttal, supporters of contraceptive coverage note that the word choice of the legislature,

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[133] 42 U.S.C. §2000e-2(a)(1) (1994).
[134] 42 U.S.C. §2000e(k), (emphasis added).
[135] Law, *supra* note 129, at 376-78.
[136] *Id.* at 377.
[137] *Id.* at 376-77.
[138] *Id.* at 378.

specifically "or related medical conditions", in enacting the PDA was intended to favor inclusion rather than exclusion of women's health concerns.[139]

While many debate the application of Title VII and the PDA to exclusion of contraceptive coverage, the fact remains that Title VII only applies to "qualified employers" and Title VII provides a religious exemption for bona fide religious organizations who choose to discriminate based on religious convictions. Consequently, a small employer who is beyond the reach of Title VII, may choose to exclude contraceptive coverage without repercussion, even if such a policy violates the PDA. In addition, an employer, who is attached to a bona fide religious organization, may claim religious exemption on the grounds that contraception is "immoral" and thus avoid subsidizing contraceptive coverage to their employees. In short, after extensive court battles are waged over the interpretation of Title VII and the PDA, these statutes may prove effective against some employers, however, for more thorough and effective relief, new all encompassing legislation mandating contraceptive coverage must be approved.

3. HISTORICAL PUBLIC POLICY SUPPORTS FEDERAL LEGISLATIVE REFORM OF PRESCRIPTIVE INEQUITY.

In a small way, Viagra has furthered the cause to rectify prescriptive inequity by attracting popular media to the perplexing question of why contraceptive coverage is not provided for women while Viagra is included? Although this inequity has existed for years, it remained a silent struggle for women until the media forced this issue into the public eye by questioning the insurance coverage of Viagra versus contraceptives. Since this latest exposure, strong public support has rallied behind legislation that would mandate prescription contraceptive coverage.

Recently, Americans were polled regarding their opinions about federal legislation requiring insurance companies to provide contraceptive coverage for women. A Kaiser Family Foundation poll indicated that 75% of all Americans support insurance coverage

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[139] *Id.* at 381.

for contraceptives while only 50% advocated coverage of Viagra.[140] In fact, public support in favor of federal legislation remained strong even when people polled were informed that such legislation could result in increased individual premiums as much as $1- $5 per person per month.[141] Support is even stronger among the group that would be directly impacted by such reform, namely women between the ages of 18 and 44. When polled, nine out of ten women in this group strongly favored insurance mandates for prescription contraceptive coverage.[142] Hence, a majority of constituents conclude federal legislation is the proper course of action to remedy prescription inequity even with additional expense.

Public policy dictates that all women across America must have access to effective and affordable contraception. "Ready access to contraceptive services increases the likelihood that the estimated 12 million Americans contracting sexually transmitted infections each year will be diagnosed and treated."[143] Moreover, as mentioned in Part III.A.2. of this Article, nearly half of all pregnancies in the United States each year are unintended.[144] These unintended pregnancies have serious consequences including higher infant mortality, low birth weight, and maternal morbidity. Yet women's studies indicate that women who had access to and used family planning services before conception were more likely to receive proper prenatal care.[145] Consequently, infant mortality and low birth weight is drastically reduced with adequate prenatal care. As an illustration, "the National Commission to Prevent Infant Mortality estimated that 10 percent of infant

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[140] Staci Hupp, Iowa State Daily, *Birth Control Pills Still Get the Shaft* (visited Sept. 26, 1998) <http://www.uwire.com/uwire/98/6/oped06259804.chtml>.

[141] *See* Statement of Richard H. Schwarz, M.D., *supra* note 67 .

[142] *Id.*

[143] Planned Parenthood Federation of America, Inc., *The Equity In Prescription Insurance And Contraceptive Coverage Act*, (visited Sept. 26, 1998) <http://www.plannedparenthood.org/Library/BIRTHCONTROL/Equity.html>.

[144] Law, *supra* note 129, at 364.

[145] Planned Parenthood Federation of America, Inc., *supra* note 143.

deaths could be prevented if all pregnancies were planned."[146] Accordingly, public health and safety require government intervention to secure access to effective prescription contraception for women.

E. EPICC: A START IN THE RIGHT DIRECTION.

The growing swell of public support for mandatory prescriptive contraceptive coverage has manifested itself into various state and federal legislative movements within the past year. Democrats and Republicans alike have introduced various bills in the House and Senate which would remedy prescription inequity for women in the United States. Although legislative progress is slow, growing public support for private insurance mandates improves the likelihood that women will eventually enjoy prescription equity.

Historically, the federal legislature has been leery of mandating insurance benefits for private carriers. Suggestions of government intervention, have always been met with strong opposition by employers, insurance companies and anti-abortion advocates.[147] As a result, the government has only ensured contraceptive coverage and family planning services to a minority of women within the public sector. Since 1973, contraceptive coverage and family planning has been provided to eligible women under Medicaid.[148] Unfortunately, the government's "hands-off" approach has enabled insurance companies to exclude contraceptive coverage for women for nearly 40 years.

In light of the recent public ground swell advocating contraceptive coverage, the federal government has taken significant steps to change its historical policy of minimal intervention in order to remedy health care inequity. On July 16, 1998 the House voted to require health insurance companies covering federal employees to provide contraceptives

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[146] *Id.*

[147] *Correct Contraception Inequity, Lawmakers Are Urged: Family Planning Groups Want Health Insurance Required To Cover Costs*, THE BALTIMORE SUN, Aug. 2, 1998, at 16A.

[148] *Should Health Insurers Cover Contraception Costs?*, 24 STATE LEGISLATURES 6, ISSN: 0147-6041, June 1, 1998 at 9.

along with other prescriptions.[149] This amendment, referred to as the "Lowey Amendment" would required federal insurance plans to cover all five of the FDA approved contraceptive methods mentioned in Part II.B. of this Article including the pill, diaphragm, IUD, Norplant and Depo-Provera.[150] Without this amendment, only 19% of federal health plans, insuring 1.2 million women of child bearing age would cover all five of the most common forms of birth control.[151]

The latest federal reform movement has spawned the introduction of more expansive legislation aimed at eradicating health care prescriptive inequity for all women across America. As a prime example, Democratic Senator, Harry Reid of Nevada, who is anti-abortion and Republican Senator, Olympia Snowe of Maine, who is pro-choice, collaborated to draft Bill S.766 entitled "Equity in Prescription Insurance and Contraceptive Coverage Act of 1997" (hereinafter "EPICC").[152] In 1997, when the Snowe-Reid bill was first introduced, the senators were unable to convince enough sponsors to simply submit their bill for a hearing.[153] However, this year public support has grown, and on July 21, 1998, a committee hearing convened to review EPICC.[154]

EPICC requires that if "a health insurance plan covers benefits for other FDA approved prescription drugs or devices, it also must cover benefits for FDA approved prescription contraceptive drugs or devices."[155] Additionally, EPICC mandates that "if the

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[149] David Broder, *Viagra Doing More Than Advertised*, PEORIA JOURNAL STAR, July 27, 1998, at A4.

[150] Women's Cancer Network News, *House Amendment Gives Federal Employees Contraceptive Coverage* (visited Sept. 26, 1998) <http://www.wcn.org/news/98/Jun/le06198c.asp>.

[151] *Id.*

[152] Broder, *supra* note 115, at 9B.

[153] *Id.*

[154] *Id.*

[155] *Insurance Coverage of Contraceptives: Hearing on S.766 "Equity in Prescription Insurance and Contraceptive Coverage Act of 1997 Before the Committee on Labor and Human Resources*, U.S. Senate (1998) (statement of Vermont Senator, James M. Jeffords, Chairman of the Committee).

insurance plan covers benefits for other outpatient services provided by a health care professional, it also must cover outpatient contraceptive services."[156] The contraceptives covered by EPICC include those mentioned above in Part II.B. of this Article: oral pills, IUD's, Depo-Provera, Norplant and the diaphragm.[157] EPICC, however, does not require special treatment of prescription contraceptives, nor does it require insurers to pay for either medical or surgical abortions.[158] Instead it merely requires "equitable treatment" of men and women regarding health care coverage.[159] Unlike the Lowley Amendment, EPICC would extend to private health care providers across the country.

During the Congressional hearing for EPICC, a number of prestigious and highly respected national medical associations voiced their endorsement for the passage of this bill. Among those groups supporting EPICC are the America Medical Association, the American Academy of Family Physicians, the American Medical Women's Association, and the American College of Obstetricians and Gynecologists.[160] These groups believe that the exclusion of contraceptive coverage amounts to gender bias and places "an unfair burden on women."[161] Furthermore, some of these groups have stated that while it is regrettable that ensuring equitable health care for women requires government intervention, they believe it to be necessary.[162]

EPICC is definitely a step in the right direction, however, further change must be accomplished for women within the health care system. Ultimately, a broader version of EPICC is necessary to provide full equitable coverage to women. New contraceptive technologies emerge daily which improve effectiveness, comfort, and convenience for women wanting to avoid pregnancy. Researchers are currently working to develop a

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156 *Id.*
157 *Id.*
158 *See* Statement of Richard H. Schwarz, M.D., *supra* note 67.
159 *See* Statement of Sen. James M. Jeffords, *supra* note 155.
160 *Id.*; *See* Statement of Richard H. Schwarz, M.D., *supra* note 67.
161 Statement of Richard H. Schwarz, M.D., *supra* note 67.
162 *Id.*

contraceptive vaccine for women, and scientists have already designed a drug referred to as RU 486 which medically terminates an early pregnancy.[163] While neither of these drugs has been FDA approved and much controversy surrounds their introduction into the United States, future advances must be taken into consideration. It follows that EPICC should include language broad enough to encompass future FDA approved contraceptives developed to improve a woman's health.

IV. CONCLUSION

Health care inequity has existed for women for years but the advent of Viagra has brought this inequity to the surface once again. If insurers provide Viagra to men to enhance their sexuality and give them the freedom to control when and where they can have sex, then insurers must provide women the same freedom. This freedom for women comes in the form of effective contraception allowing a woman who chooses to engage in sexual intercourse, to fully control when, where and the consequence of sex. While different in form, Viagra and prescription contraception achieve the same underlying goal, enhanced sexuality.

Opponents of equitable coverage for women defend their position on several grounds including describing contraception as a "lifestyle" drug and claiming that the additional cost would unreasonably burden small employers and insurance carriers. These arguments, however, are simply incompatible with the facts. Contraception is a medical necessity for women. It ensures adequate timing between pregnancies and avoids unwanted pregnancy often resulting in abortion, low-birth weight, infant mortality and maternal morbidity. Furthermore, the additional cost of $16.00 per person per year for prescription contraceptive coverage is far outweighed by the financial benefits gained in avoiding unwanted pregnancy.

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[163] Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457, 464-65 (1997).

The time for Federal legislative intervention has come to remedy this current inequity. Adequate state legislation is scattered at best and ERISA loopholes make it impossible for states to provide full coverage to all women. The passage of EPICC would greatly improve health care for women across America. Until Federal reform takes place, insurance companies will continue to discriminate against women as readily demonstrated by the policy many maintain to include Viagra while excluding contraception from prescriptive coverage.