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CONTRACEPTION, ABORTION, AND HEALTH CARE REFORM: FINDING APPROPRIATE MORAL GROUND

*Dena S. Davis, J.D., Ph.D.*¹

Although abortion has been the most obvious flashpoint of the culture wars, there is also a strong, though somewhat less politically overt, opposition to contraception on the part of conservative Christians, whether they are orthodox Roman Catholics or evangelical Protestants. That opposition can take political form, as part of a movement to impede access to contraception.

Anti-contraception activists are making incremental progress in passing laws that impede access to birth control.

Of the 23 states that mandate employers to provide insured coverage for prescription contraceptives to their employees, 14 have exemptions for religious employers, and Missouri allows any employer, religious or secular, to deny coverage for any kind of contraception. During the 2005 legislative session, more than 80 bills in 36 states were introduced that would restrict minors' access to birth control.²

"Conscience clause" laws in some states allow pharmacists to refuse to fill contraceptive prescriptions, and legislation has been introduced "that would allow not just pharmacists to refuse to dispense prescriptions, but would also protect cashiers who refuse to ring them up."³

The Catholic Church has used its political power to slow or impede programs to provide condoms to people in Africa to protect against HIV.⁴ On a trip to Africa in 2009, Pope Benedict declared that condoms are not the answer to the AIDS problem, and even "aggravate" the problem.⁵ The Church has also played a role in a number of United Nations Conferences on Population and Development, working with Islamic nations and some

1. Professor, Cleveland-Marshall College of Law, Cleveland State University (B.A., Marlboro College; Ph.D., University of Iowa; J.D., University of Virginia). I wish to thank the students who put together this extremely thoughtful symposium, and also my research assistant, Moira Kearney-Marks, and the library staff of the Cleveland-Marshall College of Law. I also wish to note that I was not aware, when I accepted this invitation to speak at the symposium, that Mississippi College of Law includes consideration of candidates' religious beliefs during the hiring process.

2. Priya Jain, *The battle to ban birth control*, Salon.com, Mar. 20, 2006, at ¶ 20, http://www.salon.com/life/feature/2006/03/20/anti_contraception.

3. *Id.*

4. See generally Richard Owen, *Pope says condoms are not the solution to AIDS—they make it worse*, Times Online, March 17, 2009, <http://www.timesonline.co.uk/tol/comment/faith/article5923927.ece>.

5. *Id.* at ¶ 2.

Latin American countries to water down language calling for increased access to “abortion, contraception, sex education” and general attention to “women’s issues.”⁶

Conservative Christians have been in the forefront of promoting abstinence-only programs, in which contraceptive use is not discussed, except often in a negative way, often teaching that contraceptives “don’t work” to avoid either pregnancy or sexually transmitted diseases. An interesting factor here that has not been discussed, is that for many young people, the sex education they get in middle school or high school is the only sex education they will ever encounter. Thus, while high school programs that offer education about money, or even alcohol, assume that young people will eventually grow up and borrow or drink responsibly, abstinence-only programs often behave as if contraception were like tobacco: something that is never an appropriate part of a person’s life.

In this essay, I make the argument that abortion and contraception are fundamentally different actions that occupy fundamentally different moral space, and that justify fundamentally different political action.⁷ I conclude that, while it is morally licit, even morally obligatory, for people who believe that embryos are people like us, to attempt to impede access to abortion, it is morally illicit to attempt to block access to contraception (including sterilization).

Ever since the beginning of Medicaid and other state-funded and/or state-regulated health insurance programs, we have political push and pull over how those programs help or hinder people’s access to abortion and to contraception. Almost immediately following *Roe v. Wade* in 1973,⁸ the Supreme Court decided that the right to access medical abortion did not include the right to state-funded abortion.⁹ In 1998 and 1999, the popularity of Viagra, which was covered by most health insurance plans, finally provided the impetus to push “contraceptive equity” clauses to success in a number of states: if prescription medications for erectile dysfunction are covered, then so must prescription contraceptives.¹⁰ The New York Times

6. Gregory M. Saylin, *The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America*, 28 VAND. J. TRANSNAT’L L. 1245 (1995).

7. A complex and confounding issue is the “gray area” between contraceptives and abortifacients, a gray area that anti-contraception forces have made much of, in seeking to taint contraceptives by conflating them with abortion. Barrier methods such as condoms and diaphragms are clearly contraceptive, in that they prevent the sperm from uniting with the egg. Other methods, such as oral contraceptives and intra-uterine devices, as well as the “morning after pill,” work primarily as barriers and/or by stopping ovulation, but may also in some instances work to prevent a fertilized egg from implanting successfully in the uterus. This is not abortion, as abortion involves terminating a pregnancy, and pregnancy means that a fertilized egg has implanted. However, for those who believe that a fertilized egg is the moral equivalent of a human being (that is, from the moment of conception), creating a hostile uterine environment that discourages implantation is the moral equivalent of abortion. In this article, to keep the philosophical issues as clear as possible, I will attempt to the degree possible to concentrate on types of contraceptives that could not be argued as having an abortifacient effect.

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

9. *Harris v. McRae*, 448 U.S. 297 (1980).

10. Cheryl A. Beckett, *A Factor by Any Other Name: The Religious Employer’s Defense to Contraceptive Equity Claims under the Equal Pay Act and Title VII*, 7 RUTGERS J. L. & PUB. POL’Y 1 (2009).

commented that, “In general, resistance to the bills has come from Roman Catholic groups that oppose birth control and have fought, with mixed success, for exemptions for religious institutions.”¹¹ In the 2010 debate over health care reform, we saw some members of Congress demand that increased federal support for access to health care should not include any possibility of increased support for federally funded abortion.¹²

Belmont Abbey, a small Catholic college in North Carolina, noticed in 2007 that, after a change in insurance providers, the college’s health plan now covered contraception.¹³ The college immediately dropped that coverage for all its employees, stating that it was inconsistent with Roman Catholic teaching and with the Catholic identity of the college.¹⁴ Some employees objected, and complained to the EEOC.¹⁵ In August 2009, the EEOC stated that “By denying prescription contraception drugs, the college is discriminating based on gender because only females take oral prescription contraceptives. By denying coverage, men are not affected, only women.”¹⁶ The case continues, with the College vowing to close down before it complies.¹⁷

I do not personally agree with the pro-life position that embryos from the moment of conception are the moral equivalent of persons. But if I did believe that, I would take every nonviolent action in my power to impede access to abortion. To try to adopt the perspective and put myself in the position of someone who does believe this, I find it useful to imagine what it would be like to be one of the rare people in 18th century America who believed that blacks and whites were equal, and that slavery was a heinous crime. So, for example, that ridiculous bumper sticker, “If you don’t like abortions, don’t have one,” could be translated, in antebellum terms, as “If you don’t like slavery, don’t own one.” One immediately sees how insulting it would be to assume that, as long as she herself did not own a slave, an abolitionist could simply accept that slave ownership was a matter of individual choice. Where abortion is concerned, from a pro-life perspective, the lives of third parties are at stake. Therefore, it is unacceptable to simply respect other people’s beliefs and choices when, from that perspective, those choices lead to murder.

11. Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. TIMES (June 30, 1999), available at <http://www.nytimes.com/1999/06/30/us/insurance-for-viagra-spurs-coverage-for-birth-control.html?pagewanted=all>.

12. David D. Kirkpatrick, *Abortion Fight Complicates Debate on Health Care*, N.Y. TIMES (Sept 28, 2009), available at <http://www.nytimes.com/2009/09/29/health/policy/29abortion.html>.

13. Charlotte Allen, *The Persecution of Belmont Abbey*, 16 THE WEEKLY STANDARD No. 6, October 26, 2009, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/017/093aasuz.asp>; see also, *Federal Agency Finds Belmont Abbey College Discriminated Against Women*, CHRONICLE OF HIGH EDUCATION (Aug. 10, 2009), available at <http://chronicle.com/blogPost/Federal-Agency-Finds-Belmont/7637/>.

14. Allen, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.*

I do not have a prescription for peace or compromise on the abortion front, to no one's surprise, I am sure. My purpose in this essay is to point out how radically different the contraception issue is from the abortion issue, and the implications of that difference for appropriate political and legislative approaches to health care reform.

The grounding belief of those who oppose abortion is their understanding that embryos, either from conception or from implantation, are human life that is the moral equivalent of you or me, and that ought to be legally protected in the same fashion. The Family Research Council, for example, declares that "A child in the womb is a distinct, developing, wholly human being, and each time a mother decides or a father pressures to end such a life it is a profound tragedy."¹⁸ The US Conference of Catholic Bishops proclaims: "Given the *scientific* fact that a human life begins at conception, the only moral norm needed to understand the Church's opposition to abortion is the principle that *each and every human life has inherent dignity, and thus must be treated with the respect due to a human person.*"¹⁹ In other words, from the moment of conception a human embryo has the same moral status as that of a human person born and living on this earth; therefore, abortion has the same moral status as homicide.

What are the primary reasons for opposition to contraception? This cannot be answered simply, as the reasons given by natural law Catholics will differ from that of conservative Protestants, and so on. What had, in the 1960s, been publicly perceived as a Catholic issue, is now also an issue for many evangelical Protestants. R. Albert Mohler, Jr., president of Southern Baptist Theological Seminary, wrote in 2006, in a column titled "Can Christians Use Birth Control:"

The effective separation of sex from procreation may be one of the most important defining marks of our age - and one of the most ominous. This awareness is spreading among American evangelicals, and it threatens to set loose a firestorm. . . . A growing number of evangelicals are rethinking the issue of birth control - and facing the hard questions post by reproductive technologies.²⁰

Here is a short list and brief explanations of some reasons that undergird opposition to contraception:

1) A contraceptive mind-set leads to abortion when contraception fails. Use of contraception by couples is part of a worldview in which one's

18. *Human Life & Bioethics*, Family Research Council, ¶ 3 (last visited Apr. 15, 2010), <http://www.frc.org/life—bioethics#abortion>.

19. *Respect for Unborn Human Life: The Church's Constant Teaching*, United States Conference of Catholic Bishops, ¶ 12 (last visited Apr. 15, 2010), <http://www.usccb.org/prolife/constantchurchteaching.shtml> (emphasis in original). In a longer paper, it would be worth pointing out some challenges to this "pure" form of the anti-abortion position, but I will leave that aside.

20. R. Albert Mohler, Jr., *Can Christians Use Birth Control* (May 8, 2006), <http://www.albertmohler.com/2006/05/08/can-christians-use-birth-control/>.

body is under one's control, not open to the workings of God or Providence, and children are something for which one has to plan and be ready.²¹ As Judie Brown, president of the American Life League, explained to journalist Russell Shorto,

"We see a direct connection between the practice of contraception and the practice of abortion. . . . The mind-set that invites a couple to use contraception is an antichild mind-set. . . . So when a baby is conceived accidentally, the couple already have this negative attitude towards the child. Therefore seeking an abortion is a natural outcome. We oppose all forms of contraception."²²

Economist Timothy Reichert makes the same claim, in market-oriented language:

The negative ramifications of childbearing on labor-market participation for women. . . . means that women rationally plan their human capital investments around childrearing during the later phases of their lives. [T]he ability to control pregnancy means that women, in particular, can now make human - capital investments that allow for careers that were previously unavailable to them. When, however, things go awry and threaten their investments, they demand abortions. The cost today of an unwanted pregnancy is not a shotgun wedding. Rather, the cost is the loss of tremendous investments in human capital geared toward labor -market participation during the early phases of one's life.²³

On a legal/historical level, George Weigel, in an article measuring "the impact of the Sixties on the politics of 2008," argues that "the legal consequences of *Griswold* must be underscored. Here the Supreme Court began to set in legal concrete the notion that sexual morals and patterns of family life are matters of private choice or taste, not matters of public concern in which the state has a legitimate interest."²⁴ Weigel writes that, "Just as the oral contraceptive pill facilitated the sexual revolution technologically, *Griswold* facilitated it constitutionally."²⁵ In fact, it is *Eisenstadt v. Baird*²⁶

21. See KRISTIN LUKER, *Abortion and the Politics of Motherhood* (Univ. of California Press 1984).

22. Russell Shorto, *Contra-Contraception*, N.Y. TIMES, ¶ 3 (May 7, 2006), http://www.nytimes.com/2006/05/07/magazine/07contraception.html?_r=1&pagewanted=all.

23. Timothy Reichert, *Bitter Pill: A Cost-Benefit Analysis of Contraception*, FIRST THINGS, ¶ 33 (2010), <http://www.firstthings.com/article/2010/04/bitter-pill>.

24. George Weigel, *The Sixties, Again and Again*, FIRST THINGS, ¶ 22 (2008), <http://www.firstthings.com/article/2008/03/004-the-sixties-again-and-again-36>.

25. *Id.* at ¶ 20.

26. *Eisenstadt v. Baird*, 405 U.S. 438, 458 (1972).

rather than *Griswold*²⁷ that truly exemplifies “the Sixties.” Whereas *Griswold* sets the right to use contraceptives within the sanctity of “the marital bedroom,”²⁸ in *Eisenstadt*, contraception becomes the right of the individual, within or without marriage.²⁹

2) Easy access to contraception leads to sexual immorality,³⁰ and a lessening of respect for women by men.

3) Contraception distorts the meaning of marriage and the relationship between husband and wife. When a wife is always sexually available, without reproductive consequences, a man may come to view his spouse as a sexual object.

4) Concern about low birth rates. Conservative commentator Mary Eberstadt, in an article blaming just about every societal ill (including the sex abuse scandals in the Roman Catholic Church) on increased acceptance of contraceptives, notes that Roman Catholics are upset over the lack of priests and the closing of Catholic schools and parishes, without acknowledging these as the direct effects of smaller Catholic families.³¹ Father Raymond J deSouza writes:

Birth rates have plummeted all over the affluent West. If children are a sign of hope in the future, Europe - and to a lesser extent Canada, Australia and the United States - is losing its will to live . . . Over in Spain, which competes with Italy for Europe's lowest birth rate, the new socialist government has indicated that it wants to promote gay marriage and further liberalize abortion laws. The Spanish future will have more sex and fewer babies - that is to say a future with less of a future.³²

5) The classic natural law position, as articulated by the Roman Catholic Church in *Casti Connubii* (1930),³³ *Humanae Vitae* (1968)³⁴ and elsewhere:

. . . any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God

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

28. *Id.* at 485.

29. *Eisenstadt*, 405 U.S. at 458.

30. See generally, POPE PAUL VI., *Humanae Vitae*, Vatican (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

31. Mary Eberstadt, *The Vindication of the Humanae Vitae*, FIRST THINGS, ¶ 6 (2008), <http://www.firstthings.com/article/2008/07/002-the-vindication-of-ihumanae-vitaei-28>.

32. Raymond J. deSouza, *Gianna's Message*, Old National Review, ¶ 8 (2004), available at http://old.nationalreview.com/comment/de_souza200405180901.asp.

33. POPE PIUS XI, *Casti Connubii*, Vatican (1930), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

34. POPE PAUL VI., *supra* note 30.

and of nature, and those who indulge in such are branded with the guilt of a grave sin.³⁵

The Church has always taught the intrinsic evil of contraception, that is, of every marital act intentionally rendered unfruitful. This teaching is to be held as definitive and irreformable. Contraception is gravely opposed to marital chastity; it is contrary to the good of the transmission of life (the procreative aspect of matrimony), and to the reciprocal self-giving of the spouses (the unitive aspect of matrimony); it harms true love and denies the sovereign role of God in the transmission of human life.³⁶

The basic contrast is: When abortion is at issue, the primary argument is harm to a (putative) third person, the unborn child. When contraception is at issue, the primary argument is the immorality of the act itself, the corruption of the person who uses contraception, and of the marital union.

The harm principle laid down in *On Liberty* by John Stuart Mill reads:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant.³⁷

Conceding for the sake of argument that the embryo is morally protectable human life, Mill's harm principle would argue for using the law to impede access to abortion, but not to contraception.

Whether the use of contraception is morally harmful to the user (inside or outside of marriage) is an inherently subjective question, based on one's philosophy of sex and marriage and parenthood. According to the National Conference of Catholic Bishops, "contraceptives have helped many people to engage in sexual relationships that are unfaithful, selfish, short-term, and altered to be sterile, not life giving."³⁸ To others, the meticulous use of contraceptives to prevent both pregnancy and sexually transmitted disease, is a mark of respect and concern for one's partner. In that philosophy, contraception is a cherishing act.

35. POPE PIUS XI., *supra* note 33.

36. POPE PAUL VI, *supra* note 30; see also *Vademecum for Confessors Concerning Some Aspects of the Morality of Conjugal Life*, Vatican's Pontifical Council for the Family, ¶ 30 (1997), available at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_12021997_vademecum_en.html.

37. John Stuart Mill, *On Liberty* 12 (Forgotten Books 2008) (1859).

38. Susan E. Willis, Esq., *Contraception: The Fine Print*, United States Conference of Catholic Bishops, ¶ 2 (2009-2010), <http://www.usccb.org/prolife/programs/rlp/2009/presslength/wills.shtml>.

By the same token, from one perspective, the act of planning, postponing, or avoiding parenthood is seen as sinful or selfish, against God's plan. The most radical example of this perspective is probably the Quiverfull movement, where women show obedience to God by having as many children as He sends them, and then home-schooling those children, often as many as 10 or 12.³⁹ On the other hand, many people of all religious persuasions believe that parenthood is a choice, not the automatic concomitant of marriage.

Arguments abound for the secondary effects of abortion and contraception, with social science data called in on all sides. We have heard arguments that abstinence programs do and do not work to prevent teen pregnancy, do and do not put teens at risk for STD's by preaching that condoms do not work. We have seen many arguments blaming the divorce rate and everything else on contraception, but the data are all associative, not causal, and in any case are inherently subjective in how we evaluate it.⁴⁰ "Contraception leads to divorce" sounds like a bad thing, but if what that really means is that a woman with two kids instead of 12 is more able to get a decent job and to leave a bad marriage if necessary, some of us might consider that a good thing.

In short, those of us who abide by the Harm Principle ought not to use the law to impede access to contraception, because contraception does not harm third parties. Even those of us, like Lord Devlin, who believe instead that an appropriate use of the law is to coerce morality, cannot claim anything near societal consensus on the morality of contraceptive use. Social science data on societal harms is equally contested and subjective.

This is not to say that the religious and moral proscriptions against contraception are empty or unpersuasive. They may well be rich and compelling, perhaps more compelling than the arguments in favor of contraception. But the anti-contraceptive forces may not appropriately use the law to force people to accept what persuasion has not accomplished.

39. Kathryn Joyce, *All God's Children*, Salon.com, ¶ 2, (March 14, 2009), http://www.salon.com/life/feature/2009/03/14/joyce_quiverfull.

40. In "Bitter Pill," economist Timothy Reichart does attempt to provide a causal argument. Roughly, he argues that contraception gives women less bargaining power in the "marriage market," which means that more women who do marry will make "bad deals," or settle for less than they had hoped for. This in turn leads to less margin for discontent when the marriage proves even less happy than they had expected, and also leads them, in the years leading to marriage, to develop more market earning power in order to increase their bargaining power within marriage and to provide an economically easier "exit." Showing a graph that documents the meteoric rise in female law and medical students since 1970, Reichart comments, "[W]omen have substituted labor-market-rewarded human capital for human capital that earned its return in nonmonetary ways such as deeper and stronger relationships, mother-child relationships that result in better day-to-day moral formation of children, and community activism." Timothy Reichert, *supra* note 23, at ¶ 26. Reichart offers no data to support the claim that, for example, professional women have familial relationships that are weaker and more shallow than those of stay-at-home wives. Timothy Reichert, *supra* note 23.