

CONTRACEPTIVE INSURANCE MANDATES AND  
*CATHOLIC CHARITIES V. SUPERIOR COURT OF  
SACRAMENTO: TOWARDS A NEW UNDERSTANDING OF  
WOMEN’S HEALTH*

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## I. INTRODUCTION

On October 4, 2004 the United States Supreme Court denied certiorari in *Catholic Charities of Sacramento v. Superior Court of Sacramento*,<sup>1</sup> thereby leaving intact an Americans Civil Liberties Union (ACLU)-drafted<sup>2</sup> religious exemption to California's contraceptive drug insurance mandate.<sup>3</sup> The denial of certiorari was a significant victory for those seeking to require health care providers and payers<sup>4</sup> to participate in the delivery of elective reproductive treatments and procedures, even if the provision of such procedures would require the providers and payers to violate their consciences. The denial left standing a California Supreme Court decision upholding a narrow exemption for religious employers and finding a compelling governmental interest in coverage of contraception as a means to eliminate sex discrimination.

However, the victory should not be regarded as a signal by legislatures to pass, and other courts to approve, laws mandating the inclusion of prescription contraceptives in employee prescription drug benefit plans. It ought not to be regarded as a signal because the court made mistakes in disposing of Catholic Charities' First Amendment claims and made false assumptions about women's health care that false assumption being that contraception is basic women's health care such that failure to provide coverage for it amounts to sex discrimination.

In part II of this article, I discuss the ACLU agenda behind the religious-exemption approved by the court. In part III, I discuss how the California contraceptive mandate embodied the ACLU view. In parts IV and V, I offer a critique of the California Supreme Court's decision approving that exemption, with a

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1. 85 P.3d 67 (2004), *cert. denied*, 125 S.Ct. 53 (2004).

2. Press Release, ACLU, Supreme Court Denies Review of California Law Requiring Employers That Provide Prescription Drug Benefits to Include Contraceptive Coverage (October 4, 2004) ("The ACLU crafted the statutory exemption at issue, balancing the fundamental rights of gender equity, reproductive freedom, and religious liberty."), available at <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=16639&c=224>.

3. CAL. HEALTH & SAFETY CODE § 1367.25 (2000).

4. Including employers to the extent that employers are payers through their subsidy of employee health benefits.

discussion of the First Amendment implications. In part VI, I challenge the court's assumption that laws requiring contraceptive coverage eliminate sex discrimination, and I conclude in part VII with a different vision of women's healthcare.

## II. THE ACLU REPORT, "REPRODUCTIVE RIGHTS AND RELIGIOUS REFUSALS"

On January 22, 2002,<sup>5</sup> the ACLU released a policy guide entitled "Reproductive Rights and Religious Refusals,"<sup>6</sup> setting forth its view of the proper balance between the rights of health care providers, and of employers in the context of employee health insurance benefit plans, to object to participating in controversial reproductive treatments and procedures and the rights of women to obtain those treatments and procedures.

The ACLU's report begins with a discussion of the issue by providing historical background on conscience clauses,<sup>7</sup> enacted at the time of or immediately after the Court's decision in *Roe v. Wade*.<sup>8</sup> These clauses protect health care providers, both

5. This date coincided with the twenty-ninth anniversary of the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).

6. ACLU, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002) [hereinafter ACLU REPORT], available at <http://www.aclu.org/Files/OpenFile.cfm?id=10945>.

7. The ACLU refers to these clauses as "refusal clauses," a term recently selected by the ACLU for its political purposes. See George Gund Foundation, Pro-Choice Resource Center, & Reproductive Freedom Project, American Civil Liberties Union, *Conscientious Exemptions and Reproductive Rights in EXECUTIVE SUMMARY, NATIONAL MEETING* (2000), available at [http://www.prochoiceresource.org/about/CERR\\_Body.pdf](http://www.prochoiceresource.org/about/CERR_Body.pdf). Throughout this article, I will use the more traditional "conscience clauses" to refer to exemptions for objectors on the basis of moral or religious beliefs.

8. To date, forty-seven states have enacted conscience protections and there are numerous conscience protections in federal law. See ALASKA STAT. § 18.16.010(b) (Michie 2004) (struck down as applied to "quasi-public hospitals" in *Valley Hosp. Ass'n v. Mat-su Coalition for Choice*, 948 P.2d 963 (Alaska 1997)); ARIZ. REV. STAT. § 36-2151 (2003); ARK. CODE ANN. § 20-16-601 (Michie 2003); CAL. HEALTH & SAFETY CODE § 123420 (Deering 2004); COLO. REV. STAT. § 18-6-104 (2003); CONN. AGENCIES REGS. § 19-13-D54(f) (2004); DEL. CODE ANN. tit. 24, § 1791 (2003); FLA. STAT. ANN. § 390.0111(8) (West 2002); GA. CODE ANN. § 16-12-142 (2003); HAW. REV. STAT. ANN. § 453-16(d) (Michie 2003); IDAHO CODE § 18-612 (Michie 2004); 720 ILL. COMP. STAT. 510/13 (2004); IND. CODE ANN. §§ 16-34-1-3 (Michie 2004); IOWA CODE ANN. §§ 146.1 to 146.2 (West 2003); KAN. STAT. ANN. §§ 65-443 to 65-444 (2002); KY. REV. STAT. ANN. § 311.800 (Michie 2003); LA. REV. STAT. ANN. §§ 40:1299.3, :1299.32 to .33 (West 2003); ME. REV. STAT. ANN. tit. 22, §§ 1591-92 (West 2003); MD. CODE ANN., HEALTH—GEN. I § 20-214 (2003); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003); MASS GEN. LAWS ANN. ch. 272, § 21B (West 2003); MICH. COMP. LAWS ANN. §§ 333.20181 to .20184, 333.20199 (West 2003); MINN. STAT. ANN. §§ 145.414, 145.42 (West 2003); Miss. Code Ann. § 41-107-1 to 13 (2004); MO. ANN. STAT. §§ 188.100-120, 197.032 (West 2004); MONT. CODE ANN. § 50-20-111 (2004); NEB. REV. STAT. §§ 28-337 to 28-341 (2003); NEV. REV. STAT. 449.191, 632.475 (2003); N.J. STAT. ANN. §§ 2A:65A-1 to -4 (West 2003) (struck down as applied to

individual and institutional, from forced involvement in abortion. For years, the protection of these clauses remained largely unchallenged.<sup>9</sup> Today, the ACLU notices a renewed interest in conscience protections which it says can be explained by three factors: (1) the expansion of religious health systems through mergers and acquisitions;<sup>10</sup> (2) the growth of managed care with attendant interests in patients' access rights;<sup>11</sup> and (3) the development of new reproductive technologies, such as emergency contraception.<sup>12</sup>

The ACLU then turns to the constitutional dimensions of the debate. The report rightly points out that the United States Supreme Court has not specifically addressed the question of the interaction between a woman's asserted interest in obtaining a reproductive treatment and a provider's asserted interest in objecting to the procedure.

As for the reproductive issues, the ACLU acknowledges that "although the U.S. Constitution protects reproductive rights, it does not ensure access to comprehensive reproductive health services or coverage."<sup>13</sup> The ACLU then cites case law clarifying that the abortion right under federal abortion jurisprudence is a negative liberty—a right from governmental interference, not a right of positive access.<sup>14</sup> It should also be noted, though the

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quasi-public hospitals in *Doe v. Bridgeton*, 366 A.2d 641 (N.J. 1976); N.M. STAT. ANN. § 30-5-2 (Michie 2004); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2003); N.C. GEN. STAT. § 14-45.1(e)-(f) (2003); N.D. CENT. CODE § 23-16-14 (2003); OHIO REV. CODE ANN. § 4731.91 (West 2003); OKLA. STAT. ANN. tit. 63 § 1-741 (West 2003); OR. REV. STAT. §§ 435.475(1), 435.485 (2001); 43 PA. CONS. STAT. ANN. § 955.2 (West 2003), 18 PA. CONS. STAT. ANN. § 3213(d) (West 2003), 16 PA. CODE §§ 51.1-51.61 (2003); R.I. GEN. LAWS § 23-17-11 (2003); S.C. CODE ANN. § 44-41-40 to -50 (Law. Co-op 2003); S.D. CODIFIED LAWS §§ 34-23A-12 to 34-23A-14 (Michie 2003); TENN. CODE ANN. §§ 39-15-204 to -205 (2003); TEX. OCC. CODE ANN. §§ 103.001-.004 (Vernon 2004), UTAH CODE ANN. § 76-7-306 (2003); VA. CODE ANN. § 18.2-75 (Michie 2004); WASH. REV. CODE § 9.02.150 (2003); W. VA. CODE §§ 16-2F-7, 16-2B-4 (2003); WIS. STAT. ANN. §§ 253.09, 441.06(6), 448.03(5) (West 2004); WYO. STAT. ANN. § 35-6-105 to -106, 35-6-114 (Michie 2003); 42 U.S.C. § 300a-7(b); 42 U.S.C. § 300a-7(c)(1); 42 U.S.C. §§ 300a-7(b), (c), (e) (1995); 42 U.S.C. § 238n (Supp. 1999); 20 U.S.C.A. §1688 (West 2000); Consolidated Appropriations Act, 2005, Division F, Title V, § 508 (d), Pub. L. No. 108-447, 118 Stat. 2809.

9. One exception to this is a 1978 New Jersey Supreme Court decision, *Doe v. Bridgeton*, 366 A.2d 641 (N.J. 1976) which struck down the conscience protection as applied to quasi-public hospitals.

10. ACLU REPORT, *supra* note 6, at 1.

11. *Id.* at 2.

12. *Id.* at 2.

13. *Id.* at 6

14. See *id.* at 12 n.2 and accompanying text (citing *Poelker v. Doe*, 432 U.S. 519 (1977) (holding City of St. Louis policy against performance of abortion, even for indigent women, in city-owned hospital constitutional); *Harris v. McRae*, 448 U.S. 297

ACLU fails to note, that the contraceptive right under the Constitution, created in *Griswold v. Connecticut*,<sup>15</sup> also is a negative liberty. In *Griswold*, the Court construed that liberty as a right of privacy,<sup>16</sup> a right to be left alone in the marital bedroom.<sup>17</sup> The right created in *Griswold* was not a positive right to demand that the government provide or pay for contraceptives, much less than a right to force health care providers to prescribe, or employers to subsidize, contraception. In the end, however, the ACLU acknowledges that there is no constitutional basis for requiring the government to affirmatively secure access to reproductive treatments and procedures such as abortion and contraception.<sup>18</sup>

With respect to the religious freedom element of the debate, the ACLU identifies *Employment Div. v. Smith*<sup>19</sup> as the relevant precedent for assessing a free exercise-based claim from a duty<sup>20</sup> to provide such reproductive care. In *Smith*, the Court held that a practitioner of the Native American Church cannot assert an exemption based on the free exercise clause of the First Amendment from Oregon's law banning the use of the drug peyote, even when used for religious purposes.<sup>21</sup> The general rule articulated by *Smith*, and cited by the ACLU is that free exercise jurisprudence "does not relieve an individual of the obligation to comply with a neutral law of general applicability."<sup>22</sup>

The ACLU also addresses Establishment Clause concerns about conscientious exemptions, noting that the Court upheld

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(1980) (upholding the Hyde Amendment's restrictions on use of federal funds for abortions except in the cases of pregnancy as a result of rape or incest or if the pregnancy endangers the life of the mother); and *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989) (holding that the State of Missouri may prohibit public employees in the course of their employment to perform abortions and the use of public facilities to perform abortions)).

15. 381 U.S. 479 (1965).

16. *Id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

17. *Id.* ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?").

18. ACLU REPORT, *supra* note 6, at 7.

19. 494 U.S. 872 (1990).

20. A duty arising from a source other than federal constitutional law. The ACLU identifies statutes, regulations, state constitutions, and contract as other sources from which such a duty might arise. See ACLU REPORT, *supra* note 6, at 7.

21. 494 U.S. at 872.

22. *Id.*

the religious exemption in Title VII against an asserted Establishment Clause violation.<sup>23</sup>

The ACLU concludes that Supreme Court case law on the religion clauses of the First Amendment provides few answers for resolving questions about religious exemptions. And the organization highlights an earlier disposition in *Catholic Charities* as an example of the “the limits of constitutional claims.”<sup>24</sup>

According to the ACLU, constitutional law neither requires the delivery of reproductive care nor requires exemptions from duties to provide care. The ACLU has thus placed its guide in an important context: an area of law on which the Constitution is silent. The organization proposes to fill that silence with its own framework. That framework sets forth a view of the proper “balance”<sup>25</sup> between the rights of health care providers<sup>26</sup> to object to participating in controversial reproductive treatments and procedures and rights of women to obtain those treatments and procedures

The framework is a two-part test, the second part of which has two sub-parts. The first part asks “whether granting an exemption would impose burdens on people who do not share and should not bear the brunt of the objector’s religious beliefs.”<sup>27</sup> The second part asks first about the activity for which the exemption is sought and second about the nature of the organization seeking the exemption: “whether the exemption protects the religious practices of pervasively sectarian institutions or instead protects institutions operating in the public square.”<sup>28</sup>

It is worth commenting on a few features of this framework. First, the ACLU assumes that opting to not provide, or declining to facilitate the conduct in question (be it paying for contraception, performing a sterilization procedure, referring for an abortion) amounts to placing an affirmative obstacle, a burden, on the person, namely a woman, seeking it. And second, because of the stringent requirements of the second part of the

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23. *Id.* (citing *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987)).

24. ACLU REPORT, *supra* note 6, at 8.

25. *Id.* at 11 (“Our proposed framework balances protection for the public health in general, reproductive health in particular, patient autonomy, and gender equality with protection for individual religious belief and institutional religious worship.”)

26. And employers in the context of employee health insurance benefits. *See id.* at 11.

27. ACLU REPORT, *supra* note 6, at 9.

28. *Id.*

framework, very few religious organizations, especially those engaged in charitable efforts, would qualify. In fact, the ACLU acknowledges that the only health care providers appropriately qualified for their exemption are Christian Science Sanatoria: “Among health care institutions, Christian Science sanatoria may exemplify those that should qualify for a religious exemption. These sanatoria are staffed by Christian Science healers, and they attend only to those seeking to be healed exclusively through prayer.”<sup>29</sup> More diverse religious organizations, those that hire and serve people who do not share their faith, do not qualify for the ACLU exemption. And those that do provide non-religious services—medical services—even though their delivery of services is guided by an ethic informed by religious values or motivated by a religious conviction, do not qualify. The ACLU regards these religious organizations as public because they are engaged in the public sphere.<sup>30</sup>

### III. THE CALIFORNIA CONTRACEPTIVE MANDATE

The ACLU’s first legislative and legal victory in achieving approval for its view of an appropriate exemption arrived with the enactment and then upholding by the California Supreme Court of the California Contraceptive Equity Law.<sup>31</sup> The law provides that any health plan that provides prescription drug benefits must also include benefits for prescription contra-

29. *Id.* at 10.

30. *Id.* at 9.

31. CAL. HEALTH & SAFETY CODE § 1367.25 (2000). To date twenty states, including California, have passed and one state has adopted by administrative regulation contraceptive insurance mandates. See ARIZ. REV. STAT. §§ 20-1057.08, 20-1402, 20-1404, 20-2329, 20-826 (2002); CONN. GEN. STAT. §§ 38a-503e, 38a-530e (2004); DEL. CODE ANN. § 3559 (2003); GA. CODE ANN. § 33-24-59.1 (2004); HAW. REV. STAT. §§431:10A-116.6, 431:10A-116.7, 432:1-604.5 (2000); 215 ILL. COMP. STAT. 5/356z.4 (2004); IOWA CODE § 514C.19 (2003); ME. REV. ANN. STAT. tit. 24-A, §§ 2756, 2847-G, 4247 (2000); MD. CODE ANN. INS. § 15-826 (2002); MASS. GEN. LAWS ANN. ch. 175, § 47W; 176A, § 8W; 176B, §4W; 176G, § 4O (2004); MO. REV. STAT. § 376.1199 (2002); NEV. REV. STAT. ANN. §§ 689A.0415, 689A.0417, 689B.0376, 689B.0377, 695B.1916, 695B.1918, 695C.1694, 695C.1695 (2003); N.H. REV. STAT. §§ 415:18-1, 420-A:17-c, 420-B:8-gg (2004); N.M. STAT. ANN. §§ 59A-22-42, 59A-46-44, 59A-23-4 (2003); N.Y. INS. LAW §§ 3221 (16), 4303 (cc), 4322 (25) (2004); N.C. GEN. STAT. §§ 58-3-178, 58-50-125 (2003); R.I. GEN. LAWS §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2002); TEX. INS. CODE ANN. art. 21.52L (Supp. 2004); V.S.A. tit. 8 § 4099c (2001); and WASH ADMIN. CODE § 284-43-822 (2004). Of these, Arizona, Hawaii, New York and North Carolina have language identical to or very similar to the language of the California exemption. Georgia, Iowa, Vermont and Washington provide no exemption. The remaining states have various exemptions.

ceptives approved by the Food & Drug Administration (FDA).<sup>32</sup> The stated legislative purpose motivating the Contraceptive Equity Bill was the elimination of gender discrimination. The author of the bill indicated that the bill was intended to address[] the inequity in prescription benefits for women, since many plans do not provide routine coverage for birth control.”<sup>33</sup>

An exemption to the law allows “religious employers” to request an employee health benefit plan that excludes contraceptives. The law defines “religious employer” as an entity for which each of the following is true:

- (A) The inculcation of religious values is the purpose of the entity.
- (B) The entity primarily employs persons who share the religious tenets of the entity.
- (C) The entity serves primarily persons who share the religious tenets of the entity.
- (D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.<sup>34</sup>

Per the ACLU model, the exemption applies to only pervasively sectarian institutions as illustrated by subparagraphs (B) and (C) engaged in the actual practice of religion, illustrated by subparagraph (A). Here, religious practice is relegated to the spreading of the faith.

The California exemption so closely follows the ACLU paradigm because the ACLU in fact drafted this exemption.<sup>35</sup>

32. See CAL. HEALTH & SAFETY CODE § 1367.25 (a)(1) (2000). The FDA website provides a chart indicating which methods, drugs and devices it has approved for contraception and which are available by prescription. Among the drugs are post-coital pills, marketed under the names Preven (which has since been voluntarily removed from the market in the United States) and Plan B. It is worth noting that this regimen may have an abortifacient mode of action depending on when in her cycle a woman takes them. The drugs may interfere with the implantation of a newly conceived human embryo. FDA, *Birth Control Guide* (Dec. 2003), available at <http://www.fda.gov/fdac/features/1997/babyguide2.pdf>.

33. California Assembly Committee on Health, Bill Analysis, AB 39, March 9, 1999, available at [http://info.sen.ca.gov/pub/99-00/bill/asm/ab\\_0001-0050/ab\\_39\\_cfa\\_19990309\\_110624\\_asm\\_comm.html](http://info.sen.ca.gov/pub/99-00/bill/asm/ab_0001-0050/ab_39_cfa_19990309_110624_asm_comm.html).

34. CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (2000).

35. See ACLU Press Release, *supra* note 2. The ACLU also provides, “worksheets” for the purpose of drafting an exemption according to their test. See ACLU Reproductive Rights Freedom Network, *Worksheet for Assessing Impact and Scope of Noncompliance (“Conscience”) Clauses* (on file with the Texas Review of Law & Politics).

IV. *CATHOLIC CHARITIES OF SACRAMENTO V.  
SUPERIOR COURT OF SACRAMENTO*

The law became effective on January 1, 2000<sup>36</sup> and Catholic Charities of Sacramento filed suit on July 20, 2000.<sup>37</sup> Catholic Charities is a social service organization that provides, among other services, “immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, housing and vocation training of the developmentally disabled”<sup>38</sup> under the guidance of the bishop. The organization challenged the contraceptive mandate because the Church opposes the use and subsidy of contraception<sup>39</sup> and Catholic Charities did not qualify for the exemption. The organization was unqualified because its purpose is the delivery of social services to the poor and not the teaching of the faith; it serves the poor of any denomination or no denomination and not just the Catholic poor; and because it employs people of diverse (or no) religious backgrounds.<sup>40</sup> Catholic Charities sought the exemption, even though it could technically comply with the mandate by eliminating prescription drug benefits altogether, because it wanted to follow what it regarded as another important religious commitment, namely the provision of fair wages to its employees.<sup>41</sup>

V. FIRST AMENDMENT ISSUES

Catholic Charities asserted eight constitutional challenges, three of which were under the Establishment Clause, three under the Free Exercise Clause, one under the California Constitution and one under the Fourteenth Amendment’s requirement of rational basis. The court rejected each claim.

Here I will limit my discussion to on one part of the Establishment Clause claim and one part of the Free Exercise Claim.

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36. CAL. HEALTH & SAFETY CODE §1367.25 (a) (2000).

37. Catholic Charities of Sacramento v. Superior Court of Sacramento, Complaint, on file with Texas Review of Law & Politics, [hereinafter Complaint].

38. Complaint, *supra* note 37, ¶ 57.

39. *Id.* ¶ 74 (noting that the Church considers contraception an intrinsic evil and that subsidy of contraceptives would amount to facilitating the conditions for commission of this gravely sinful act.)

40. *Id.* ¶¶ 59, 62

41. *Id.* ¶ 75

A. *Establishment Clause Problem: Defining “religion”*<sup>42</sup>

Catholic Charities challenged the exemption as involving an impermissible distinction between religious and secular activities of a religious institution. In upholding the exemption against this challenge, the court set forth less than persuasive reasoning. In its complaint, Catholic Charities stated the issue as follows:

Plaintiff is informed, believes and thereupon alleges that the Legislature undertook deliberate efforts to carve up the Roman Catholic Church into discrete segments, some of which the legislature capriciously regarded as “religious” and some as “secular.” The distinctions drawn by the Legislature between religious organizations engaging in purportedly “religious activities,” as opposed to those engaging in purportedly “secular activities,” are wholly contrary to Roman Catholic teaching which regards religious organizations, such as Catholic Charities, as vital Roman Catholic religious ministries.<sup>43</sup>

The court responded by noting that exemptions are permissible and if exemptions are permissible, it would be impossible for the legislature to grant an exemption without distinguishing between “religious” and “secular.”<sup>44</sup>

The court then cited *Corporation of Presiding Bishop v. Amos*,<sup>45</sup> and *East Bay Asian Local Development Corp. v. State of California*<sup>46</sup> as examples of cases that upheld exemptions delineating between “secular” and “religious.” In fact, the statute upheld in *Amos*, provides: “This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”<sup>47</sup>

And the statute upheld in *East Bay Asian Local Development Corporation* provides,

42. Another establishment question worth considering is whether excessive entanglement is at issue because of the statute’s requirement of employees’ sharing tenets. The court considered that argument waived because Catholic Charities freely admitted in its complaint that it did not meet the requirements of the exemption. See *Catholic Charities*, 85 P.3d at 79.

43. Complaint ¶43, ¶ 172.

44. *Catholic Charities*, 85 P.3d at 79.

45. 483 U.S. 327 (1978).

46. 13 P.3d 1122 (Cal. 2000).

47. 42 U.S.C. § 2000e-1(a), cited by *Corp. of the Presiding Bishop*, 483 U.S. at 329–30.

Subdivision (b) shall not apply to a noncommercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation, provided that both of the following occur: (1) The association or corporation objects to the application of the subdivision to its property. (2) The association or corporation determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association of corporation of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission, if the application is approved.<sup>48</sup>

Neither of these statutes defines “religious” nor distinguishes between secular and religious activities of a religious organization. In fact, it was possible for the legislature to grant an exemption without the further definition.

The court appears to have missed the argument. The question is not whether, by granting an exemption, a legislature has implicitly distinguished between secular organizations (which do not get the benefit of the exemption) and religious organizations (which do get the benefit of the exemption). The question is once the legislature has decided to grant an exemption to a religious employer, may it further define “religious employer” in such a radical way that some employers that one would ordinarily think of as religious (Catholic Charities) do not qualify because the legislature has deemed them “secular”. Another part of the question is whether the legislature may define “religious employer” in such a way that some activities of the employer are protected and some are not. Under the terms of the exemption, a Catholic parish would qualify but perhaps not the parish’s elementary school. Catholic Charities argued that the parsing of the religious organization into secular components was problematic but the court failed to address the argument altogether.

The court also discarded a precedent cited by Catholic Charities, *Espinosa v. Rusk*.<sup>49</sup> In *Espinosa*, the Tenth Circuit Court of Appeals considered an Albuquerque ordinance that regulated

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48. CAL. GOV’T CODE § 25373(d) (2003).

49. *Catholic Charities*, 85 P.3d at 79–80 (construing *Espinosa*, 634 F.2d. 477 (10th Cir. 1980)).

fundraising efforts.<sup>50</sup> The ordinance exempted charitable fundraising for religious purposes but not secular and it defined secular as “. . . relating to affairs of the present world, such as providing food, clothing and counseling.”<sup>51</sup> The Tenth Circuit invalidated the ordinance because “it involves municipal officials in the definition of what is religious.”<sup>52</sup> Never dealing with the merits of the argument suggested by *Espinosa*, the California Supreme Court returned to its conclusion, “the government may constitutionally exempt religious organizations from generally applicable laws in order to alleviate significant governmentally imposed burdens on religious exercise.”<sup>53</sup> The court, again, missed the argument, which was not about the permissibility of exemptions but what kind of exemption is permissible once the legislature has decided to grant one.

Failing to address Catholic Charities’ arguments of Establishment Clause violations, the court upheld the ACLU’s contrived view of “religious” embodied in the California statute.

#### B. *Free Exercise Problem: Applicability of Smith*

When the court addressed Catholic Charities’ free exercise claims, it treated those claims as seeking exceptions to *Employment Division v. Smith*.<sup>54</sup> The threshold question, though, is whether *Smith* applies at all.

In *Smith* the Court articulated a rule it said developed out of a century of case law dealing with free exercise challenges.<sup>55</sup> Justice Scalia, the opinion’s author, said that in that century of case law, “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>56</sup> As a consequence of the decision, free exercise challenges are no

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50. *Espinosa*, 634 F.2d. 477.

51. *Id.* at 479.

52. *Id.* at 481.

53. *Catholic Charities*, 85 P.3d at 79.

54. *Id.* at 82 (“To demonstrate an exception to the general rule is, in fact, precisely what Catholic Charities seeks to do.” (referring to *Employment Division v. Smith*, 494 U.S. 872 (1990))).

55. *Employment Division v. Smith*, 494 U.S. at 879.

56. *Id.* at 878–79.

longer subject to strict scrutiny.<sup>57</sup> Once it is determined that a free exercise challenge is directed at a neutral and generally applicable law, the enquiry is over. The only exception, noted Justice Scalia, is when the free exercise challenge is combined with another asserted right such as free speech. In those “hybrid right” situations, the First Amendment might bar application of a neutral and generally applicable law.<sup>58</sup>

The California Supreme Court said that Catholic Charities was seeking an exception to the rule of *Smith*: “To demonstrate an exception to the general rule is, in fact, precisely what Catholic Charities seeks to do. On four separate grounds, Catholic Charities argues we should examine the WCEA (Women’s Contraceptive Equity Act) under strict scrutiny despite the holding of *Smith*.”<sup>59</sup> In fact two of Catholic Charities’ arguments were directed against the application of *Smith* at all. The third argument amounted to seeking an exception to *Smith* on account of asserted hybrid rights. And the fourth argument did not implicate *Smith* at all because it involved a claim under the California Constitution. If *Smith* did not apply, then the court would have to examine the contraceptive law under a strict scrutiny standard.

In terms of application of *Smith*, Catholic Charities argued that the California mandate is not neutral and generally applicable. Catholic Charities argued that the law was not neutral because it facially targeted religion. Furthermore, it argued that the law was not generally applicable because evidence from the legislative record suggested that the bill’s sponsors and supporters intended to target Catholic organizations in particular.

The court concluded that the law was neutral and generally applicable though by its own language, the court admitted that the law was not generally applicable. The court said, “the WCEA [Women’s Contraceptive Equity Act] refers to the religious characteristics or organizations in order to *exempt* those organizations from an *otherwise* generally applicable duty.”<sup>60</sup> By its own

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57. Congress attempted to correct *Smith*’s heightened standard for free exercise claims through the Religious Freedom Restoration Act which was ultimately struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

58. *Smith*, 494 U.S. at 881.

59. *Catholic Charities*, 85 P.3d at 82.

60. *Catholic Charities*, 85 P.3d at 83 (emphasis added).

terms, the court is conceding the law is not generally applicable. After all, “otherwise” means “in different circumstances.”<sup>61</sup>

## VI. CONTRACEPTION AND SEX DISCRIMINATION

In the end, the court did apply strict scrutiny in accordance with California free exercise jurisprudence. The court found that the contraceptive law served the compelling interest of “eliminating gender discrimination”<sup>62</sup> and that the mandate for prescription coverage of contraception in prescription drug plans was a narrowly-tailored means to this interest. Thus, the court suggests that failure to provide contraceptive coverage when a plan does include prescriptive drug benefits amounts to sex discrimination. The California Supreme Court specifically cited data from the legislature that showed women of child-bearing ages<sup>63</sup> pay sixty-eight percent more than men in out-of-pocket health care expenses.<sup>64</sup> The court noted that part of this cost is attributable to the cost of contraception and the cost of unintended pregnancy. The court suggested that this interest was sufficient to justify an imposition upon Catholic Charities which it intimated was engaging in “subtle forms of gender discrimination.”<sup>65</sup> The court also cited Congress’s passage of the Pregnancy Discrimination Act as an amendment to Title VII as evidence of a governmental interest in eliminating the “subtle form” of gender-based discrimination of failure to cover prescriptive contraceptives.<sup>66</sup> And it cited a district court decision specifically applying the Pregnancy Discrimination Act to the issue of contraceptive coverage in employee health plans.<sup>67</sup>

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61. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1976).

62. *Catholic Charities*, 85 P.3d at 92.

63. Generally considered ages 15–44.

64. *Catholic Charities*, 85 P.3d at 92. The same argument has been used in order to advance a federal contraceptive mandate, the Equity in Prescriptive Insurance and Contraceptive Coverage Act. S. 104/H.R. 1111 (107th Congress). During a hearing on the bill, Senator Barbara Mikulski urged that the bill be passed in order to eliminate a “gender tax.” Senator Barbara Mikulski, *Senator Mikulski Chairs Hearing on Contraceptive Coverage*, (Sept. 10, 2001), available at <http://mikulski.senate.gov/press/01/09/2001A05810.html>.

65. *Catholic Charities*, 85 P.3d at 92 (suggesting that Catholic Charities is engaged in “subtle discrimination” by not covering contraception in the health plan).

66. *Id.* at 93 (citing 42 U.S.C. § 2000e(k)).

67. *Catholic Charities*, 85 P.3d at 93 (citing *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001)).

My focus here is to demonstrate that health plans that do not include contraceptive coverage neither create an economic inequity between genders nor engage in subtle discrimination against women.

A. *A Subtle Form of Sex Discrimination?*

The court pointed to and proponents of contraceptive mandates have pointed to the Pregnancy Discrimination Act as a basis for requiring contraceptive coverage to eliminate sex discrimination.<sup>68</sup> The Pregnancy Discrimination Act consisted of amendments to the Civil Rights Act to define discrimination based on “pregnancy, childbirth, or related medical conditions” to mean discrimination on the basis of sex.<sup>69</sup> The court also cited *Erickson v. Bartell Drug Company* as a federal precedent holding that failure to include contraceptive drugs among covered drugs in a health plan is a violation of Title VII as amended by the PDA.<sup>70</sup>

An argument for invoking the PDA to address failure to cover contraceptive drugs relies on a reading of *Int’l Union v. Johnson Controls* in which the Court held that discrimination against women who might become pregnant is prohibited by Title VII.<sup>71</sup> One proponent of contraceptive mandates, Professor Sylvia Law, extends this analysis one step further to women who are capable of becoming pregnant but are actively seeking to not become pregnant.<sup>72</sup> Law also looks to an Illinois district court order that applied the PDA against a company that discriminated against an employee with a condition that caused infertility and who sought infertility treatment.<sup>73</sup> Law takes the decision to mean that the PDA protects women “who can potentially become pregnant” and concludes that, “the phrase ‘related medical conditions’ was meant to be expansive. The *Pacourek* Court agreed when it stated that “[r]elated” is a generous choice of wording’ . . . [i]nsurance coverage for contraception should be

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68. *Catholic Charities*, 85 P.3d at 93 (citing 42 U.S.C. § 2000e(k)). See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 377 (1998).

69. 42 U.S.C. § 2000e(k) (2000).

70. *Catholic Charities*, 85 P.3d at 93 (citing *Bartell*, 141 F.Supp.2d at 1270–72).

71. *Int’l Union v. Johnson Controls*, 499 U.S. 187 (1991).

72. Law, *supra* note 68, at 377–82.

73. See *Pacourek v. Inland Steel Company*, 858 F. Supp. 1393 (1994).

included in this broad definition.”<sup>74</sup> Law also cites legislative history, quoting one member of Congress who said the PDA protects women, “before, during and after her pregnancy.”<sup>75</sup>

In *Bartell*, the court held that

Bartell’s exclusion of prescription contraception from its prescription plan is inconsistent with the requirements of federal law. The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgement of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees. Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only can get pregnant, bear children, or use prescription contraception.<sup>76</sup>

The court’s holding is in tension with not only the language but also the purpose of the PDA, even as it identifies that purpose. First, there is clearly an inconsistency in the language of the statute which refers to “pregnancy, childbirth and related medical conditions.”<sup>77</sup> Contraception is not a medical condition related to pregnancy nor is it related to childbirth. Complications from delivery are related to childbirth. “Morning sickness” is a medical condition related to pregnancy. Contraception is the exact opposite of any condition related to pregnancy.

Second, the *Bartell* Court recognized the plain intent of the PDA:

When Congress enacted the PDA, it clearly had in mind the obvious and then-commonplace practice of discriminating against women in all aspects of employment, from hiring to the provision of fringe benefits, based on an assumption that only women would get pregnant and leave the workforce. This perception relegated women to the role of the marginal,

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74. Law, *supra* note 68, at 381 (quoting *Pacourek*, 858 F. Supp at 1402).

75. Law, *supra* note 68, at 381.

76. *Bartell*, 141 F.Supp.2d at 1271.

77. 42 U.S.C. § 2000e(k) (2000).

temporary workers who had . . . no hope of promotion, and no claim to the full panoply of employment benefits.<sup>78</sup>

As the court so eloquently stated, the PDA was intended to protect pregnant women in the course of employment.<sup>79</sup> Pregnant women (or women who might some day bear children) might be regarded as less reliable employees than men because their children, once born, would divide the employee's attention, or throughout pregnancy they would have more sick-related absences or be less capable of performing work duties. But there is a vast difference between these women and women who are actively working to not become pregnant through contraception. Women who are not pregnant and who are trying to not become pregnant would not be the subjects of the kinds of problems the PDA intended to address. The non-pregnant employee is not taking leave time for morning sickness and is not leaving the workforce to deliver a child. It is therefore a mistake to rely on the PDA as a source for a requirement of contraceptive coverage.

#### B. *An Economic Inequity?*

Cited by the court and frequently cited by advocates of contraceptive-insurance mandates is the finding that women of childbearing age (women ages fifteen to forty-four) pay sixty-eight percent more than men of the same ages for health care. This happens to be an inaccurate basis for arguing the need for contraceptive insurance coverage because in fact, contraception represents about one percent of the total out-of-pocket costs for women.<sup>80</sup> A large portion of the out-of-pocket costs are actually attributable to pregnancy-related services. In fact, twenty percent of the expenses are for these services, which include normal delivery,<sup>81</sup> prenatal care,<sup>82</sup> pregnancy complications,<sup>83</sup> mis-

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78. *Bartell*, 141 F.Supp.2d at 1274.

79. *Id.*

80. See WOMEN'S RESEARCH AND EDUCATION INSTITUTE, WOMEN'S HEALTH INSURANCE COSTS AND EXPERIENCES (1994) [hereinafter WREI PAMPHLET]. The total out-of-pocket health expenditures for women are \$124.5 billion. Contraception represents just \$1.5 billion. *Id.* at 10. In these findings, abortion is also included under the definition of "contraception" so it is unclear how much of the \$1.5 billion actually represents contraception, though the authors say, "the vast majority of expenditures in this category of contraceptive services were for prescribed contraceptives. See WREI PAMPHLET, TECHNICAL APPENDIX 3-4 [hereinafter TECHNICAL APPENDIX].

81. TECHNICAL APPENDIX, *supra* note 80, at 2.

carriages,<sup>84</sup> and ectopic (extra-uterine)<sup>85</sup> pregnancies. Of pregnancy-related expenses, the costs of hospital stays associated with delivery were one of the largest.<sup>86</sup> If policymakers want to begin to correct the inequity between men and women in out-of-pocket health care expenses, they ought to consider ways to improve coverage for maternity and, in particular, hospital stays.<sup>87</sup>

Some might argue that the contraceptive mandated benefit alleviates these maternity expenses. If women cannot become pregnant, they might say, then the expenses for maternity will be nil. Implicit in such an argument is a concern about unintended pregnancies. In fact the California Supreme Court cited data that unintended pregnancies cost more than intended pregnancies because of “health risks, premature deliveries, and increased neonatal care.”<sup>88</sup> If there are data associated with more costly unintended pregnancies, there must be unintended pregnancies that women are choosing to continue. Unintended pregnancies are not the same as unwanted pregnancies. An unintended pregnancy can quickly become a welcomed pregnancy even as soon as the woman learns of the pregnancy.<sup>89</sup> In fact, half of unintended pregnancies do not end in abortion, and more than half of unintended pregnancies that do end in abortion are among contraceptive users.<sup>90</sup> Therefore, mandated contraceptive coverage is not the solution to supposedly more expensive unintended pregnancies. Support mechanisms that

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82. *Id.* I take the definition “indicators for care in pregnancy” to mean prenatal care.

83. *Id.* at 2–3.

84. *Id.* at 2. I take “other pregnancy with abortive outcome with the exception of induced abortion” to mean miscarriage.

85. WREI PAMPHLET, *supra* note 80, at 2.

86. *Id.* at 12 (“Hospital care related to giving birth comprises one of the largest portions of out-of-pocket expenditures for expectant mothers.”).

87. Title VII of the Civil Rights Act of 1964, Pub. L. 95-555, 92 Stat. 2076 already requires that once an employer provides a health plan, it must cover maternity to the same extent as the plan covers other conditions. But nothing prevents an employer from providing greater maternity coverage.

88. *Catholic Charities*, 85 P.3d at 92.

89. The author herself has experience providing pregnancy tests and counseling for such women.

90. See Alan Guttmacher Institute, *Induced Abortion* [hereinafter *Induced Abortion*] (2002), available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf) (showing half of unintended pregnancies are terminated and fifty-four percent of abortion patients were contracepting during the month in which they became pregnant).

provide early prenatal care to women with once unintended but eventually chosen pregnancies are the solution.

In fact, plans not covering prescriptive contraceptives treat men and women the same. Employers that provide health plans without prescriptive contraceptive coverage and coverage for other prescriptive drugs are treating their male and female employees similarly. Male employees' dependents under such an employee health benefit plan, namely spouses, also do not receive the benefit. And presumably these male employees may have an interest in such coverage. After all, they are in a sexual relationship with their spouses, and if they, like their female colleagues, want to limit family size then they may have an obvious interest in a contraceptive drug benefit. Family planning advocates advancing the agenda for contraceptive insurance coverage suggest that an interest in contraception is unique to women. Child-bearing is unique to women but child-rearing is not.

Health plans issued according to Catholic teaching represent the equality between men and women more acutely. The Catholic Church promotes natural family planning (NFP) as a means to spacing children. NFP is a highly effective,<sup>91</sup> chemical-free<sup>92</sup> and virtually cost-free means<sup>93</sup> of family planning based on the observation and recording of signs of fertility. The various methods of NFP rely on communication between and collaboration of spouses to decide whether to abstain during the fertile phase (thereby avoiding pregnancy) or to engage in marital relations to achieve, or be open to the possibility of, pregnancy. Under Catholic teaching, contraception that is "the use of mechanical, chemical, or medical procedures to prevent conception from taking place as a result of sexual intercourse"<sup>94</sup> is prohibited for both men and women.<sup>95</sup> Sterilization whether

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91. See World Organisation Ovulation Billings Method, *Trials of the Billings Ovulation Method*, at <http://www.woomb.org/bom/trials/index.html> (last visited Feb. 4, 2005).

92. See Diocesan Development Program for Natural Family Planning, *Basic Information on Natural Family Planning*, at <http://www.usccb.org/prolife/issues/nfp/information.htm> (last visited Feb. 4, 2005).

93. See *id.*

94. CATECHISM OF THE CATHOLIC CHURCH 872 (2d ed. 2000).

95. See Pope Paul VI, *Humanae Vitae* (July 25, 1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

of men or women<sup>96</sup> is likewise not permissible and therefore the Church's subsidy of sterilization through employee health plans insurance coverage is also impermissible.<sup>97</sup> Interestingly, this is the second most common form of contraception yet its provision was not the subject of the California mandate or similar contraceptive equity mandates.<sup>98</sup> So, under Catholic teaching, men and women are treated similarly and insurance plans issued in accordance with Catholic teaching reflect this.

Advocates for, and legislators supporting, mandated contraceptive coverage have pointed to a seeming inequity in insurance coverage of male-impotence drugs, such as Viagra, but not hormonal contraceptives. Activists have pointed to, for example, high rates of insurance coverage of Viagra, compared to low rates of coverage for contraception. Such an analogy fails. Impotence drugs, used properly,<sup>99</sup> treat a diseased state infertility. Fertility is a healthy condition, and efforts to impede it (i.e., contraception), are lifestyle choices not medical choices.<sup>100</sup> An employer's coverage of Viagra is no more an indicator of an unfair gender preference than would be an employer's coverage of drugs for ovulation but not coverage (a subsidy) for condoms.<sup>101</sup>

96. However, the Church allows hysterectomy for women when the uterus itself is a diseased organ and failure to remove would jeopardize a woman's life or health. Such a procedure is a not contraceptive. See *Responses to Questions Proposed Concerning "Uterine Isolation" And Related Matter*, in CONGREGATION FOR THE DOCTRINE OF THE FAITH (July 31, 1993), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_31071994\\_uterine-isolation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_31071994_uterine-isolation_en.html).

97. See United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (June 15, 2001) at ¶ 70 (noting that Catholic health care organizations are not permitted to engage in "material cooperation" in sterilization), available at <http://www.usccb.org/bishops/directives.htm>. "Material cooperation" means simply lending any kind of material support, including funds.

98. See William Mosher et al., *Use of Contraception and Use of Family Planning Services in the United States: 1982-2002* ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, December 10, 2004, at 17, available at <http://www.cdc.gov/nchs/data/ad/ad350.pdf>. According to the CDC's data, 16.7 percent of women and 5.7 percent of men are using sterilization as their "current method of contraception." *Id.*

99. See FDA, Draft Package Insert Viagra (March 25, 1998), available at <http://www.fda.gov/cder/foi/nda/98/viagra/viagralabel.pdf> (noting that "Viagra is indicated for the treatment of erectile dysfunction.") As a treatment it has a therapeutic purpose. Contraception is non-therapeutic.

100. This is not to deny that for some women becoming pregnant may be medically unhealthy. However, it does not follow that contraception is the only available response to such circumstances.

101. Interestingly, the drug components of Viagra have also been made available as a topical cream for women with deficiencies in libido. So, Viagra is not a drug exclusively

It just happens to be the case that there are currently no methods of prescription contraception currently available to men. However, such methods are in development and according to one researcher, one method may be available as soon as this year.<sup>102</sup> If such methods are made available and health plans cover hormonal contraceptives neither for men nor women, then a legislative purpose to eliminate sex discrimination (or a sex discrimination lawsuit (premised on Title VII for example) would be rendered meaningless. With the availability of hormonal contraceptives for men on the horizon, can a claim of sex discrimination be based on such a highly factually intensive situation?

#### VII. CONCLUSION: WOMEN'S UNIQUE HEALTH NEEDS AND CONTRACEPTIVES' UNIQUE HEALTH RISKS

This is not to say that women do not have unique health needs. It is preferable that women with certain health conditions plan pregnancies, but access to early prenatal care can alleviate these conditions.

Sixty-two percent of all women contracept.<sup>103</sup> Clearly some women who contracept are making a lifestyle choice because they do not want children or have all of the children they would like. Some of these women will inevitably become pregnant. A significant portion of these pregnancies will end by abortion while a similar proportion will be carried to term.<sup>104</sup> Some women may contracept out of concern for health reasons, but it does not follow that an interest in spacing children or not having more children translates into a need for contraception.

The Catholic Church promotes Natural Family Planning as the means to plan, postpone, achieve or completely avoid pregnancy. At most what can be said about contraception is that it is

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for men. See Sabra Chartrand, *A Female Counterpart to Viagra*, N.Y. TIMES, Jan. 27, 2003 at C7.

102. See Damaris Christensen, *Male Choice: The Search for New Contraceptives for Men*, SCI. NEWS at 222 (Sept. 30, 2000), available at <http://www.sciencenews.org/articles/20000930/bob10.asp>.

103. See William D. Mosher, *Use of Contraception and Use of Family Planning Services in the United States: 1982-2002*, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, at 7 (2004), available at <http://www.cdc.gov/nchs/data/ad/ad350.pdf>. thirty-one percent of women do not contracept because they are pregnant, recently post-partum, trying to conceive or are sterile. Another seven percent of women are sexually active and are not contracepting.

104. See *Induced Abortion*, *supra* note 90.

a lifestyle choice. In fact, it is a lifestyle choice that has its own health risks. Some women may carefully balance their interest in using contraception to avoid pregnancy and bear those health risks. But it is quite another matter to use legislative and legal efforts to force organizations that have deeply held convictions against those choices to subsidize them.