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Plan B: The Alternative Not Available to All Females

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I. Realities of American Life: Status of Teenage Pregnancy in America

According to a 2006 report, “each year, almost 750,000 teenage women aged 15-19 become pregnant.”² Minors from lower income families make up “73 percent of all pregnancies”³ in this group because they are “more likely to be sexually active and somewhat less likely to use contraceptives or to use contraception successfully.”⁴ The large number of young, impoverished mothers having babies has contributed to “one third of America’s children liv[ing] in homes where none of the parents had full-time, year-round jobs in 2004.”⁵ Research further supports that children living in households with “teen mothers are more likely to become teen parents themselves.”⁶

II. Recent Regulation: Plan B Access Selectively Expanded

On August 24, 2006, the Food and Drug Administration (“FDA”) announced that the emergency contraceptive, Plan B, also known as the Morning After Pill, would be available over-the-counter (“OTC”) to females and males eighteen years of age or older.⁷ In the case of minors, Plan B would continue to strictly be obtainable by prescription only.⁸ The FDA additionally mandated that due to the age restrictions, Plan B may only be issued by pharmacies where trained pharmacists are on hand to monitor its distribution.⁹

Plan B has been available via prescription in the United States since 1999.¹⁰ Only nine states currently have pharmacists trained to write prescriptions for Plan B at the time of purchase.¹¹ These states realized how important it is for Plan B to be taken without delay, given the seventy-two hour window where Plan

² Guttmacher Institute Report, *U.S. Teenage Pregnancy Statistics, National and State Trends and Trends by Race and Ethnicity*, 2 (2006), available at <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf> (last visited Jan. 13, 2007).

³ Advocates for Youth, *Adolescent Pregnancy and Childbearing in the United States*, 2 (2004), available at <http://www.advocatesforyouth.org/PUBLICATIONS/factsheet/fspre-chd.pdf> [hereinafter *Adolescent Pregnancy*] (last visited Jan. 13, 2007).

⁴ *Id.* at 2.

⁵ *Fewer Teens Have Babies or Dropout, But more Live in Poverty*, USATODAY.com, Jun. 27, 2006 also available at http://www.usatoday.com/news/education/2006-06-27-kids-pregnancy-dropout_x.htm?csp=34 (last visited Jan. 13, 2007).

⁶ *Adolescent Pregnancy*, *supra* note 3, at 2.

⁷ Press Release, *U.S. Food and Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older Prescription Remains Required for Those 17 and Under* (Aug. 24, 2006) <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html> [hereinafter *U.S. Food and Drug*] (last visited Jan. 13, 2007).

⁸ *Id.*

⁹ *Id.*

¹⁰ Erin Allday, *Over-the-Counter Plan B Approved, Morning-After Pill to be Available Without Prescription to Women 18 and older*, SAN FRANCISCO CHRONICLE, August 25, 2006 at A1 [hereinafter *Over-the-Counter*].

¹¹ *Id.*

B has been proven to be most effective,¹² and saw that the regulations governing its use often prohibited women from using it.¹³ Now that Plan B's accessibility to women eighteen and older has been significantly expanded, advocates are confident that the United States will see a decrease in the nation's 3,000,000 unplanned pregnancies.¹⁴

III. FDA's Unconstitutional Restrictions on Access to Plan B

Although the FDA's approval of Plan B as an OTC drug is an important first step in helping to prevent unwanted pregnancies, the FDA's age restrictions are insensitive to the realities of American life and are arguably an unconstitutional restriction of a female's decision to procreate. The current laws prevent Plan B from being obtained by poor, young minors who lack the health insurance to obtain a doctor's prescription for Plan B.

IV. Explanation of Age Restriction's Unconstitutionality

Advocates of the restriction rely on three primary arguments to justify excluding minors. First, policy makers fear that easy access to such powerful contraception will result in increased promiscuity among minors.¹⁵ Second, inadequate studies exist concerning the impact of Plan B on the health of a developing minor, which means the FDA cannot accurately predict how high doses of Plan B will physically affect a minor.¹⁶ Finally, proponents of the restriction argue that Plan B is an abortifacient, and, therefore, may be more aggressively regulated.¹⁷ I address each of these arguments in turn.

A. Increased Contraception Leads to Increased Promiscuity?

During the summer of 2005, the FDA rejected Barr Pharmaceutical's Plan B application for OTC availability stating, "There was not enough information on how easy access [to Plan B] would affect the sexual behavior of young teenagers."¹⁸ This claim is based on the dubious belief that fear of pregnancy is the main reason minors choose to abstain from having sexual intercourse. Without the risk of pregnancy, proponents argue, minors will feel more comfortable engaging in sexual intercourse, and will be more willing to forego the

¹² Plan B, Consumer Homepage, <http://www.go2planb.com/ForConsumers/Index.aspx> (last visited Jan. 13, 2007).

¹³ *Over-the-Counter*, *supra* note 10, at A1.

¹⁴ *Over-the-Counter*, *supra* note 10, at A1.

¹⁵ *Over-the-Counter*, *supra* note 10, at A1.

¹⁶ Peter Hill, *FDA Approves "Morning After" Pill*, Medical News Today (Aug. 25, 2006) available at <http://www.medicalnewstoday.com/healthnews.php?newsid=50509> [hereinafter FDA Approves] (last visited Jan. 15, 2007).

¹⁷ Gardiner Harris, *'Morning After' Pill Is Cleared for Wider Sales*, NY TIMES, Aug. 24, 2006 at 1 [hereinafter Wider Sales].

¹⁸ Marc Kaufman, *Morning-After Pill Study Contradicts Claim by Foes*, WASHINGTON POST at A09.

use of protection.¹⁹ Because Plan B does not protect against sexually transmitted diseases, opponents worry that an unintended effect of making Plan B available to minors would increase the rate of sexually transmitted diseases in this demographic.²⁰

The argument that widening the availability of Plan B to minors would encourage promiscuity among this age group is not likely to pass constitutional scrutiny given the Supreme Court's holding in *Carey v. Population Services International*.²¹ While these arguments do raise some cause for concern, the Supreme Court held in *Carey*²² that "no court or commentator has taken the argument seriously" that "free availability to minors of contraceptives would lead to increased sexual activity among the young."²³ Even in *Roe v. Wade*,²⁴ the Court did not accept the argument that legalizing abortions would encourage women to be sexually uninhibited.²⁵

The effectiveness of discouraging sexual activity by controlling access to contraceptives has been empirically denied. Attempts to regulate sexual morality by restricting the availability of contraceptives in order to punish those who choose to engage in pre-marital sex have failed.²⁶ Thus, there is a good chance that a constitutional challenge to the Plan B restriction would succeed.²⁷

B. Plan B's Effects on Minors

The FDA also supports Plan B's limited distribution because of the harmful effects of the drug on minors.²⁸ This argument, however, has not been substantiated by the evidence. In the United Kingdom, for example, Plan B has been available OTC to women sixteen years of age and older since 2001 and, to date, no studies report harm to minors using this contraceptive.²⁹

¹⁹ *FDA Approves*, *supra* note 16, at 1.

²⁰ *Wider Sales*, *supra* note 16 at 1.

²¹ *Carey v. Population Services International*, 431 U.S. 678 (1977).

²² *Carey*, 431 U.S. 678.

²³ *Id.* at 691.

²⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁵ *Id.*

²⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 440-441(1972); *Carey*, 431 U.S. at 681.

²⁷ As previous reproductive rights cases demonstrate, "the argument that sexual activity may be deterred by increasing the hazards attendant on it has been rejected by the Court as a justification for restrictions on the freedom to choose whether to bear or beget a child. *Eisenstadt*, 405 U.S. at 488; *Roe*, 410 U.S. at 148.

²⁸ Memorandum from Dr. Andrew von Eschenbach, Commissioner of the U.S. Food and Drug Administration (Aug. 23, 2006) *available at* <http://www.fda.gov/cder/drug/infopage/planB/avememo.pdf> (last visited Jan. 15, 2007).

²⁹ Jo Revill, *Morning-After Pill 'Did Not Fuel a Sex Explosion,'* THE OBSERVER UK (July 10, 2005).

In *Carey*,³⁰ the court decided that a statute requiring youth under sixteen to obtain contraception from physicians was not constitutional where “appellants assert[ed] no medical necessity for imposing a medical limitation on the distribution of nonprescription contraceptives to minors.”³¹ Without research to support the age distinction made by Plan B, the courts are left to conclude that the FDA’s regulation of this contraceptive is based more on politics than actual concerns with the physical harm of minors.

Besides the unknown harm that Plan B has on minors, proponents of the Plan B restriction feel that minors will manipulate the pill’s intended purpose and place themselves at greater risk of contracting STDs.³² What these adversaries fail to realize is that education and awareness can weaken the likelihood of such occurrences. Steven Galston, Acting Director of the Center for Drug Evaluation and Research, stated during an interview, that the cut off age of eighteen is “commonly considered to be the age of majority—the age when a person acquires the legal rights and responsibilities of being an adult.”³³

Galston is clearly overlooking the fact that most teens are thought to be capable of participating in one of the most dangerous activities before reaching the age of majority: driving. Driving is a hazardous activity because not only is an individual’s life put at risk every time they step behind the wheel of a car, but the lives of others are put in harm’s way as well. The hazards related to driving include serious injury and death. If these teens are responsible enough to drive, one wonders why they are not considered capable of making decisions regarding their reproductive rights. At this time, it does not appear that the FDA has provided enough evidence to support the restriction of Plan B by prescription only to minors, and would, thus, fall short of making a successful case before the court.

C. Plan B Is Not an Abortifacient

The last argument is that Plan B acts as an abortifacient, therefore, justifying restricting the access of minors. Plan B is distributed in the form of two .75 milligram pills composed of a synthetic form of the female hormone progestin.³⁴ This contraceptive is considered by many to be a method of preventing conception by preventing an egg from implanting in the wall of the uterus.³⁵ In contrast, various people, including gynecologists, believe that this pill performs the same function as a chemical abortion.

³⁰ *Carey*, 431 U.S. 678.

³¹ *Id.* at 697.

³² Robert Stein, *FDA Approves Plan B’s Over-the-Counter Sale*, WASHINGTON POST at A04.

³³ Donna Young, *FDA’s OK Nonprescription Sales of Plan B*, American Society of Health-System Pharmacists (Aug. 24, 2006) *also available at* <http://www.ashp.org/news/ShowArticle.cfm?id=16522> (last visited Jan. 15, 2007).

³⁴ Plan B, Consumer Homepage, What Is Plan B? *available at* <http://www.go2planb.com/ForConsumers/Index.aspx> (last visited Jan. 15, 2007).

³⁵ Plan B, Consumer Homepage, <http://www.go2planb.com/ForConsumers/Index.aspx> (last visited Feb. 2, 2007).

However, courts do not currently acknowledge the implantation of the egg in the uterus as conception.³⁶ As such, the interests of the unimplanted, fertilized egg cannot legally outweigh the interests of the woman who chooses to use Plan B. Furthermore, minors are not generally denied abortions; rather, they are just required to obtain parental consent.³⁷ The Supreme Court has held that even parental consent can be dispensed with at the discretion of the judge.³⁸ Despite whether Plan B is viewed as an abortifacient, the complete prohibition of access to some minors is still not allowed under the law as it stands.

V. Conclusion

The numbers of young, poor, minority teenagers becoming pregnant causes great concern nationally and globally. Unfortunately, this is the world we live in and whether people agree or disagree, children of all ages are participating in risky sexual behaviors. On a more positive note, “the teenage pregnancy rate in this country is at its lowest level in 30 years, down 36% since its peak in 1990.”³⁹ According to some researchers, the decline in teenage pregnancy can be attributed to “both increased abstinence and changes in contraceptive practice.”⁴⁰ If these researchers are correct, then are we halting this improvement by disallowing access to Plan B to minors with no health insurance? Regardless of the answer to that question, too many impoverished teens, under the age of majority, are having sex, yet their access to Plan B is restricted by the regulations in force today. These regulations are vulnerable to both constitutional and policy challenges and should not remain in place.

³⁶ *Roe v. Wade*, 410 U.S. 959 (1973).

³⁷ L. Jeanne Kaufmann. Parental Consent or Notification for Abortion, *available at* (Feb. 2004), <http://www.ncsl.org/programs/health/adolabor.htm>, (last visited Feb. 2, 2007).

³⁸ *Bellotti v. Baird*, 443 U.S. 622 (1979).

³⁹ Guttmacher Institute Report, *U.S. Teenage Pregnancy Statistics, National and State Trends and Trends by Race and Ethnicity*, 2 (2006), *available at* <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf> (last visited Jan. 13, 2007).

⁴⁰ Guttmacher Institute Report, *U.S. Teenage Pregnancy Statistics, National and State Trends and Trends by Race and Ethnicity*, 2 (2006), *available at* <http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf> (last visited Jan. 13, 2007).