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## RU 486 Examined: Impact of a New Technology on an Old Controversy

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# **RU 486 EXAMINED: IMPACT OF A NEW TECHNOLOGY ON AN OLD CONTROVERSY**

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Gwendolyn Prothro\*

*Abortion is an extremely divisive issue in American politics and culture. Prothro begins this Article by analyzing the current legal standards governing reproduction, which draw a sharp distinction between abortion and contraception. Prothro then examines the function of RU 486, demonstrating that it acts both as a contraceptive and as an abortifacient. Because of this dual capacity, RU 486 does not fit neatly into the current legal framework. Prothro concludes this Article by arguing that RU 486 should force the Supreme Court to create a new framework for the "procreative right." Prothro argues that this new framework should treat the procreative right as a continuum, basing legal protections on a close analysis of the rights at stake, rather than on artificial distinctions that do not accurately mirror the physiological process of pregnancy. This new continuum analysis, Prothro contends, will expand and deepen the abortion debate by focusing it on the broader issues underlying the current debate.*

It was the best of times, it was the worst of times, . . . it was the spring of hope, it was the winter of despair, we had everything before us . . . .<sup>1</sup>

## INTRODUCTION

Debating, lobbying, picketing, marching, harassing, shooting—such has been the abortion controversy in America. After decades of debate we have reached an impasse. The arguments have been articulated fully; the sentiments have

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1. CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (Dodd, Mead and Co. 1925) (1859).

been expressed. Yet, there is no resolution in sight. We have debated ourselves into polarized, extreme positions.<sup>2</sup> Many of us, weary of the shouting and shooting, are eager to find something new to move us past the impasse.<sup>3</sup>

RU 486, a new contragestive technology, may break the abortion controversy deadlock.<sup>4</sup> RU 486, or mifepristone, is a drug that blocks the activity of the hormone progesterone in the body. RU 486 has become a focus of political debate about abortion because its progesterone-blocking properties allow it to act as both an abortifacient and a contraceptive. Depending on the circumstances, RU 486 can stop ovulation, prevent implantation or terminate pregnancy after implantation.

This Article explores the legal impact of RU 486 on the abortion controversy in America. Part I defines the concepts discussed in this Article as well as the legal standards surrounding them. Part II introduces RU 486, its medical properties and potential uses. Part III discusses RU 486's potential legal impact on the abortion controversy. This Article argues that the existence of RU 486 further blurs the physiological and legal lines between contraception and abortion, forcing us to rethink the definitions and legal standards associated with each. Perhaps this re-examination can push us past the impasse by expanding and deepening the abortion debate, allowing us to discuss the broader issues it raises, such as sexual morality, family planning and gender roles.

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2. See James Davison Hunter, *Our Bodies Politic: Abortion, Condoms, Porn, AIDS: In Our Physical Selves, a Struggle for Civilization*, WASH. POST, Aug. 7, 1994, at C1 ("Debate . . . presupposes that people are talking to each other. A more apt description of the present situation is that Americans engaged in the contemporary culture war only talk past each other."); see also ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 129 (1993) (noting "the strife occasioned by this singularly divisive issue over the past twenty years"); HYMAN RODMAN, *THE ABORTION QUESTION* 160 (1987) (claiming that "the moral debate [over abortion] is irresolvable"); cf. *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 5 (Gilbert Y. Steiner ed., 1983) (discussing proposed "rules" to facilitate a higher quality of debate over the issue of abortion).

3. See Ellen Goodman, *A Place for the Abortion Pill in America*, WASH. POST, May 14, 1991, at A19 ("Americans overwhelmingly want to end the prolonged and nasty war over abortion."); cf. Clyde Wilcox, *The Sources and Consequences of Public Attitudes Toward Abortion*, in *PERSPECTIVES ON THE POLITICS OF ABORTION* 55, 61 (Ted G. Jelen ed., 1995) ("Although activists on the abortion issue take uncompromising positions and have world views that differ radically, the public is more ambivalent on abortion.") (citation omitted).

4. Cf. LAWRENCE LADER, *RU 486: THE PILL THAT COULD END THE ABORTION WARS AND WHY AMERICAN WOMEN DON'T HAVE IT* 19 (1991) (stating that RU 486 shows "how scientific progress can revolutionize our lives") [hereinafter LADER, RU 486].

## I. BACKGROUND

### A. *The Concepts*

One word, *abortion*, can ignite passionate debate and even incite violence.<sup>5</sup> The term, however, is not self-explanatory. Etymologically, the word "abort" finds its origin in the Latin *aboriri*, to miscarry.<sup>6</sup> Today, the term abortion refers to an induced abortion, or the deliberate termination of a pregnancy (as distinguished from the prevention of pregnancy, which is called contraception).<sup>7</sup> The definition of abortion depends on the definition of pregnancy, which is itself the subject of debate.

The American College of Obstetricians and Gynecologists defines pregnancy as beginning with the completed implantation of the fertilized egg in the womb,<sup>8</sup> and describes the development of human life along a continuum. This development begins with the fertilization of the ovum by the sperm.<sup>9</sup> Fertilization involves multiple steps, lasting twelve to twenty-four hours, after which the fertilized egg (called the zygote) moves to the uterus.<sup>10</sup> Five to six days after fertilization, the

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5. See *Abortion Debate Scrapbook*, PLAYBOY, Nov. 1989, at 50 (stating that between 1977 and 1987, 607 abortion clinics were picketed, 134 received harassing mail or telephone calls, 208 received bomb threats, 32 were bombed and 38 were set on fire); see also Curtis Boyd, *The Morality of Abortion: The Making of a Feminist Physician*, 13 ST. LOUIS U. PUB. L. REV. 303, 307 (1993); Alan Sverdlik, *Blasts Rock Atlanta Abortion Clinic*, WASH. POST, Jan. 17, 1997, at A3; Linda Wheeler, *Police, Volunteers Prepare to Protect Clinics*, WASH. POST, Jan. 21, 1995, at A12.

6. See WEBSTER'S NEW COLLEGIATE DICTIONARY 45 (9th ed. 1987).

7. See COMMITTEE ON TERMINOLOGY OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, OBSTETRIC-GYNECOLOGIC TERMINOLOGY 414 (1972) [hereinafter COLLEGE OF OBSTETRICIANS]. This definition excludes naturally occurring spontaneous miscarriages. See *id.*

8. See *id.* at 299, 327; see also Rebecca Cook, *Antiprogestin Drugs: Medical and Legal Issues*, 42 MERCER L. REV. 971, 972 (1991). Scientists did not have a basic understanding of pregnancy until 1827, when they discovered the egg. Before then, scientists had assumed that within each woman existed a homunculus, or "little man," who was fully formed but who lay dormant until "quickenings." See BARBARA MILBAUER, *THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY* 111 (1983).

9. See COLLEGE OF OBSTETRICIANS, *supra* note 7, at 299, 327.

10. See Brief *Amici Curiae* of the Alan Guttmacher Institute et al., in Support of Planned Parenthood of Southeastern Pennsylvania et al., at 29-30 n.22, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902) (describing the

fertilized egg (now called the blastocyst) implants itself in the lining of the uterus.<sup>11</sup> Implantation also involves multiple steps, occurring over six to seven days.<sup>12</sup> Only at the completion of implantation does pregnancy begin.<sup>13</sup> According to this medical definition of pregnancy, abortion is any procedure that terminates the development of a fertilized egg following implantation. A procedure that terminates the development of a fertilized egg prior to completed implantation is contraception.

Abortion opponents define pregnancy differently. They believe that pregnancy and life begin with "the union of the sperm and the ovum."<sup>14</sup> Under this definition, abortion is any procedure that terminates the development of the fertilized egg at any point following the initial fertilization of the egg by the sperm. Contraception, then, is limited to procedures used prior to fertilization.<sup>15</sup>

Until now, the difference between abortion and contraception was clearly distinguished in definition and practice; technology kept the "grey" period between fertilization and implantation outside the scope of discussion. Common "barrier-method" contraceptives, such as the condom and the diaphragm, prevent the sperm from reaching the egg,<sup>16</sup> and thus act prior to the occurrence of pregnancy under both definitions. The traditional birth control pill also acts prior to pregnancy by suppressing ovulation.<sup>17</sup> In contrast, a tradi-

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details of fertilization) [hereinafter Brief *Amici Curiae* of the Alan Guttmacher Institute].

11. See *id.* at 30-31.

12. See *id.*

13. See David A. Grimes & Rebecca J. Cook, *Mifepristone (RU 486)—An Abortifacient to Prevent Abortion?*, 327 NEW ENG. J. MED. 1088, 1089 (1992).

14. Richard Glasow, Education Director of the National Right to Life Committee, quoted in Don Colburn, *A Morning-After Pill: New Study Says RU-486 Works Better than Current Methods*, WASH. POST, Oct. 13, 1992, (Health) at 7; see also GERMAIN GRISEZ, *ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS* 13-14 (1970) (claiming that the "certain moment when the new individual begins" occurs when the sperm and ovum unite).

15. To say that abortion opponents distinguish between contraception and abortion is not to suggest that they condone contraception while condemning abortion. Many condemn both with equal fervor. See *Abortion Debate Scrapbook*, *supra* note 5, at 51 (statement of Judie Brown, American Life Lobby) ("We are totally opposed to abortion under any circumstances. We are also opposed to abortifacient drugs and chemicals like the pill and the I.U.D., and we are also opposed to all forms of birth control, with the exception of [the rhythm method].").

16. See ROBERT A. HATCHER ET AL., *CONTRACEPTIVE TECHNOLOGY* 159-60, 196-98 (15th rev. ed. 1990).

17. See *id.* at 228.

tional abortion is a surgical procedure performed after the sixth week of pregnancy. The earliest surgical abortions remove the embryo from the lining of the uterus by vacuum aspiration<sup>18</sup> or dilation and curettage,<sup>19</sup> clearly terminating pregnancy under both definitions. RU 486 cuts across both definitions and forces examination of the "grey" period.

### B. Legal Standards

Constitutional jurisprudence and legislative enactments apply different standards to women's rights to contraception and abortion, and do not specifically address the "grey" period between fertilization and implantation.<sup>20</sup> Under current legal standards, a person has a constitutional right to use contraception, and a state cannot abridge that right without a compelling interest. *Griswold v. Connecticut*<sup>21</sup> and its progeny<sup>22</sup> established the fundamental right to use contraception, and this right "remains relatively uncontroversial and unchallenged."<sup>23</sup>

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18. See MILBAUER, *supra* note 8, at 75. Vacuum aspiration "calls for a small tube to be inserted into the uterus. The tube acts as a tiny vacuum and draws out any material, including the embryo, that is in the uterus." *Id.*

19. See *id.* When abortion is performed by dilation and curettage, "[t]he cervix is dilated and an instrument called a curette is used to scrape the lining of the uterus." *Id.*

20. Methods such as the intra-uterine device ("IUD"), Norplant, and the low-dose birth control pill operate both before and after fertilization, before and during the grey period. See HATCHER, *supra* note 16, at 355-57 (discussing IUD function and effectiveness); see also Donna Shoupe & Daniel R. Mishell, *Norplant: Subdermal Implant System for Long-Term Contraception*, 160 AM. J. OBSTETRICS & GYNECOLOGY 1286, 1287-88 (1989); HATCHER, *supra* note 16, at 228. Thus far, the law has treated these technologies as contraceptives. For example, the Pennsylvania legislature excluded oral contraceptives and the IUD from its definition of abortion, even though it defined life as beginning with fertilization. See Brief *Amici Curiae* of the Alan Guttmacher Institute, *supra* note 10, at 33-34; see also Margaret S. v. Edwin Edwards, 488 F. Supp. 181, 191 (E.D. La. 1980) ("Abortion, as it is commonly understood, does not include the IUD . . . or . . . birth control pills.").

21. 381 U.S. 479 (1965) (establishing the right of marital privacy, including the use of contraception).

22. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding unconstitutional a New York law restricting the sale and distribution of nonprescription contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right of privacy to include the right of unmarried people to use contraception).

23. Kari Hanson, *Approval of RU-486 as a Postcoital Contraceptive*, 17 U. PUGET SOUND L. REV. 163, 178 (1993); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) ("[I]n some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold* . . . *Eisenstadt* . . . and *Carey*

In *Griswold* the Supreme Court struck down a Connecticut statute prohibiting the use of "any drug, medicinal article or instrument for the purpose of preventing conception."<sup>24</sup> The Court held that the law unconstitutionally violated a married couple's right to privacy and sought "to achieve its goals by means having a maximum destructive impact upon" a protected relationship.<sup>25</sup> Writing for the majority, Justice Douglas looked beyond the text of the Constitution to identify values the "existence [of which] is necessary in making the express guarantees fully meaningful."<sup>26</sup> Justice Douglas found privacy to be a "unifying theme" among these Constitutional values and crystallized them into "zone[s] of privacy."<sup>27</sup> Finally, Justice Douglas wrote that the marriage relationship fits within the zone of privacy, and that the Connecticut law banning the use of contraception by a married couple unconstitutionally encroached upon this protected zone.<sup>28</sup>

Seven years later, the Court, relying on the Equal Protection Clause of the Fourteenth Amendment, extended the right of contraception to unmarried persons in *Eisenstadt v. Baird*.<sup>29</sup> Justice Brennan broadly stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>30</sup> In *Carey v. Population Services International*,<sup>31</sup> again writing for the

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... afford constitutional protection. We have no doubt as to the correctness of those decisions."); Brief of *Amici Curiae* 274 Organizations in Support of *Roe v. Wade* on Behalf of Appellees, at 8 n.12, *Ohio v. Akron Ctr. for Reprod. Health* (Akron II), 497 U.S. 502 (1990) and *Ragsdale v. Turnock*, 841 F.2d 1358, *appeal dismissed*, 503 U.S. 916 (1992) (Nos. 88-790 and 88-805) ("The United States has conceded the correctness of the *Griswold* line of cases before this Court.") [hereinafter Brief of *Amici Curiae* 274 Organizations].

24. 381 U.S. at 480.

25. *Id.* at 485.

26. *Id.* at 483.

27. *Id.* at 485; see also L. Kent Sezer, *The Constitutional Underpinnings of the Abortion Debate*, in PERSPECTIVES ON THE POLITICS OF ABORTION, *supra* note 3, at 131, 150 (analyzing the *Griswold* Court's movement from general privacy rights guaranteed by the Bill of Rights to a specific privacy right).

28. See *Griswold*, 381 U.S. at 485-86.

29. 405 U.S. 438, 443 (1972) (holding unconstitutional a Massachusetts statute banning the distribution of contraceptives, for the purpose of preventing conception, to unmarried persons but allowing their distribution to married persons with a prescription).

30. *Id.* at 453.

31. 431 U.S. 678 (1977).

majority, Justice Brennan recognized the right to contraception as fundamental and deserving of protection under the Court's strict scrutiny test.<sup>32</sup> The Court held that a state's regulation of contraception "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."<sup>33</sup>

Under current legal standards, a woman has a constitutional right to abortion. The Court recognized this right in *Roe v. Wade*,<sup>34</sup> and reinterpreted the right in *Planned Parenthood v. Casey*.<sup>35</sup> Although the Court likened the abortion right to the contraception right, the Court also distinguished the two rights at length.<sup>36</sup> Unlike the right to contraception, a woman's right to abortion can be regulated, and is anything but uncontroversial or unchallenged.<sup>37</sup>

In *Casey*, the Court's joint opinion began by focusing on "liberty,"<sup>38</sup> emphasizing its importance in terms reminiscent of the *Griswold* Court's description of "privacy." Just as the Court described "zones" of privacy in *Griswold*, the Court in *Casey* found that liberty was not a "series of isolated points,"<sup>39</sup> but a "realm," a broad value derived from the substantive component of the Fourteenth Amendment's Due Process Clause.<sup>40</sup> Within this protected realm of personal liberty existed procreative freedom, just as the marriage relationship existed within the *Griswold* privacy zone.

The joint opinion made several statements supporting the protection of procreative freedom from state interference, and quoted Justice Brennan's statement in *Eisenstadt* supporting an individual's right to make procreative decisions without "unwarranted governmental intrusion."<sup>41</sup> For example, the

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32. See *id.* at 686-89.

33. *Id.* at 688 (omissions in original) (citations omitted).

34. 410 U.S. 113 (1973), *modified*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

35. 505 U.S. 833 (1992).

36. See *Casey*, 505 U.S. at 849-53.

37. See, e.g., Hanson, *supra* note 23, at 182 ("Grounded in privacy, this fundamental right not to procreate remains relatively uncontroversial and unchallenged. On the other hand, the right to choose abortion has become increasingly controversial . . . since . . . *Roe* . . ."); Sylvia Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 923-32 (stating that *Roe* has been "effectively overruled" since 1989).

38. See *Casey*, 505 U.S. at 846 ("The controlling word in the case[] before us is 'liberty.'").

39. *Id.* at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

40. See *id.* at 847-48.

41. *Id.* at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).



Court asserted that "[i]t is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."<sup>42</sup> The Court then explained:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Our precedents "have respected the private realm of family life which the state cannot enter." . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>43</sup>

The *Casey* Court reaffirmed the fundamental right to use contraception and supported the cases that granted that right strict scrutiny protection from state intrusion.<sup>44</sup> The Court analogized abortion to contraception, stating, "[i]t should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection."<sup>45</sup> Standing alone, this analogy might lead to the assumption that the two rights should receive the same level of constitutional protection. The Court, however, went on to distinguish abortion from contraception, elaborating on the critical respects in which they were different and emphasizing the uniqueness of abortion.<sup>46</sup> The Court treated abortion differently from most liberty rights because the Court viewed abortion as a unique and different right.

The abortion standard developed by the Court in *Casey* does not protect post-viability abortion, which can be prohibited

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42. *Id.* at 849 (citations omitted).

43. *Id.* at 851 (citations omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

44. *See id.* at 852.

45. *Id.*

46. *See id.* ("These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it . . . . Abortion is a unique act. It is an act fraught with consequences for others . . . .").

except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."<sup>47</sup> Pre-viability abortions cannot be prohibited outright, but can be regulated as long as the regulations are rationally related to the state's interests (either in maternal health or in the potential life of the fetus) and not unduly burdensome on the woman's right to abortion.<sup>48</sup> A state regulation is unduly burdensome if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>49</sup> A regulation is not invalidated simply because it has "the incidental effect of making it more difficult or more expensive to procure an abortion."<sup>50</sup> The *Casey* Court found parental notification provisions (with judicial bypass clauses), waiting periods and state encouragement to choose childbirth to be acceptable regulations of abortion.<sup>51</sup>

Thus, the Court developed distinct standards for the rights of contraception and abortion. Contraception is protected with strict scrutiny, and states need compelling interests to regulate contraception. A woman is free to use birth-control pills, IUDs or diaphragms without undue restriction or state interference.<sup>52</sup> A reviewing court will emphasize the woman's rights and interests in using contraception, and will place a great burden on any state attempting to infringe on those rights through regulation.<sup>53</sup>

In contrast, a woman is not free to have an abortion unless she complies with reasonable state regulations.<sup>54</sup> If a woman

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47. *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 165 (1973)).

48. *See id.* at 878-79.

49. *Id.* at 877.

50. *Id.* at 874.

51. *See id.* at 879-87.

52. *See id.* at 859. Traditional and post-coital contraceptives are protected by the *Griswold* line of cases. *See id.* (stating that "*Roe's* scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception, protected independently under *Griswold* and later cases"); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring in part and in the judgment) (stating that "the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny"); *cf. Margaret S. v. Edwin Edwards*, 488 F. Supp. 181, 191 (E.D. La. 1980) (stating that "[a]bortion . . . does not include the IUD . . . [or] birth control pills").

53. *See Carey v. Population Servs. Int'l*, 431 U.S. 438, 687-91 (1977) (stating that the Court views "maintaining medical standards" and "protecting potential life" as compelling interests that justify regulating access to contraception).

54. *See Casey*, 505 U.S. at 878.

does not abort before viability, she is assumed to have "consented to the State's intervention on behalf of the developing child."<sup>55</sup> A reviewing court will emphasize the state's "profound interest in potential life" and the state's preference for childbirth.<sup>56</sup> A court is unlikely to resolve challenges to state abortion regulations as a matter of law. Instead, it must ordinarily "conduct extensive factual trials to assess the actual burdens of restrictive laws upon real women."<sup>57</sup>

The distinct legal standards developed by courts for contraception and abortion become problematic as new contragestive technologies become available to women, as contraception and abortion become less distinguishable in practice, and as the difference in definitions becomes less clear.

## II. RU 486

This section explores the medical origin and uses of RU 486, the new contragestive technology with the potential to make the legal standards for contraception and abortion more questionable and to blur the line further between contraception and abortion.

RU 486, or mifepristone, is a contragestive that acts as a progesterone antagonist or anti-hormone. The molecular structure of RU 486 resembles that of progesterone. RU 486 binds to the uterine progesterone receptors and inhibits progesterone activity in the uterus.<sup>58</sup> Without progesterone, the uterus cannot accept a fertilized egg for implantation or retain an egg already implanted.<sup>59</sup> The uterine lining breaks down, bleeds and secretes prostaglandin, producing contractions and expelling the egg.<sup>60</sup>

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55. *Id.* at 870.

56. *Id.* at 878.

57. Law, *supra* note 37, at 931.

58. See Louise Silvestre et al., *Voluntary Interruption of Pregnancy with Mifepristone (RU 486) and a Prostaglandin Analogue: A Large-Scale French Experience*, 322 NEW ENG. J. MED. 645, 645 (1990); LADER, RU 486, *supra* note 4, at 31-32.

59. See LADER, RU 486, *supra* note 4, at 31-32.

60. See Robin Herman, *The Politics of the Abortion Pill*, WASH. POST, Oct. 3, 1989, (Health) at 12; André Ulmann et al., *RU 486*, SCI. AM., June 1990, at 42, 44.

### A. As an Abortifacient

Dr. Etienne-Emile Baulieu, a French scientist, first synthesized RU 486 in 1980.<sup>61</sup> In 1982, Dr. Walter Herman led clinical tests of RU 486 in Switzerland.<sup>62</sup> Within a few years, Baulieu and his colleagues combined the administration of RU 486 with a dose of prostaglandin, supplementing the prostaglandin secreted by the uterus. This increased contractions and expelled the fertilized egg (or embryo) more effectively.<sup>63</sup> Thus, Baulieu and his colleagues developed the first non-surgical abortion alternative for women in the modern world.

Baulieu and his colleagues developed a regimen under which an aborting woman ingests a 600 milligram dose of RU 486 within the first seven to nine weeks of her pregnancy.<sup>64</sup> Thirty-six to forty-eight hours later, the woman returns to her doctor to receive a dose of prostaglandin.<sup>65</sup> Under the original regimen, the prostaglandin was administered intravaginally, or by injection at a fairly high dose. Since then, scientists have shifted to oral administration and lowered the dosage to reduce side effects.<sup>66</sup> "In most cases the embryo and all endometrial fragments [are] expelled within 24 hours after the prostaglandin [is] administered."<sup>67</sup>

Compared to surgical abortion, RU 486 is safe and effective.<sup>68</sup> Surgical abortion is over ninety-seven percent effective.<sup>69</sup> Taken without the prostaglandin follow-up, RU 486

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61. See Ulmann, *supra* note 60, at 45; Leonard A. Cole, *The End of the Abortion Debate*, 138 U. PA. L. REV. 217, 217 (1989).

62. See Megan Rosenfeld, *Conception of a Controversy: the French Doctor and His Pill to Prevent Pregnancy*, WASH. POST, Dec. 18, 1986, at C1.

63. See Ulmann, *supra* note 60, at 47.

64. See *id.* at 47-48.

65. See *id.* at 47.

66. See Allan Rosenfield, *Mifepristone (RU 486) in the United States: What Does the Future Hold?*, 328 NEW ENG. J. MED. 1560, 1560 (1993). In part, the change from injectable to oral prostaglandins occurred because of the death (the only death reported thus far) of a thirty-one year-old, obese, heavy smoker in her thirteenth pregnancy. The woman suffered a fatal heart attack after the injection of prostaglandin. See Amy D. Porter, *International Reproductive Rights: The RU 486 Question*, 18 B.C. INT'L & COMP. L. REV. 179, 193 (1995).

67. Ulmann, *supra* note 60, at 47.

68. See *id.* at 47-48; see also Lauren Picker, *Abortion to Go?*, HARPER'S BAZAAR, Oct. 1994, at 246, 268.

69. See Picker, *supra* note 68, at 268.

is eighty percent effective in terminating pregnancies.<sup>70</sup> Taken with the prostaglandin follow-up, RU 486 is ninety-six percent effective, almost as effective as a surgical abortion.<sup>71</sup> An RU 486 abortion does not involve many of the risks of surgery, such as injuries to the cervix or uterus, infections or complications from anesthesia.<sup>72</sup> An RU 486 abortion, however, is not less expensive than surgery,<sup>73</sup> and is also more time-consuming than surgery, extending over a period of days as opposed to a few hours, and requiring more recuperation time.<sup>74</sup>

As with the administration of many drugs, an RU 486 abortion has side effects. The side effects are analogized to the effects of menstrual periods or miscarriages; hence physician supervision is an important part of the RU 486 abortion protocol.<sup>75</sup> Most of the side effects are caused by the prostaglandin follow-up rather than by RU 486 itself.<sup>76</sup> With time, the side effects may be minimized as scientists continue to experiment with different prostaglandin analogues and doses. Until then, however, an RU 486 abortion will cause discomfort. Many women aborting with RU 486 experience uterine bleeding, lasting an average of nine days.<sup>77</sup> Many women also experience abdominal pain and cramping,<sup>78</sup> and others suffer from nausea and fatigue.<sup>79</sup> Some women—those over the age of thirty-five, heavy smokers and women suffering from asthma, diabetes, hypertension or heart problems—are at risk of

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70. See Ulmann, *supra* note 60, at 47.

71. See Silvestre, *supra* note 58, at 646.

72. See Cole, *supra* note 61, at 219; cf. Emily MacFarquhar, *The Case of the Reluctant Drug Maker*, U.S. NEWS & WORLD REP., Jan. 23, 1989, at 54 (The World Health Organization, "citing tests over the past seven years in more than 10,000 women, has confirmed that RU-486 is safe and efficacious.").

73. See Picker, *supra* note 68, at 247.

74. See Louise Levathes, *Listening to RU 486*, HEALTH, Jan./Feb. 1995, at 86.

75. See Picker, *supra* note 68, at 246. As of December 1992, only three women, out of 100,000, suffered serious adverse side effects. Nevertheless, experience illustrates the importance of medical monitoring of the RU 486 abortion process. See Debora Fliegelman, Comment, *The FDA and RU 486: Are Politics Compatible with the FDA's Mandate of Protecting Public Health?*, 66 TEMP. L. REV. 143, 146 (1993) (discussing some of the adverse side effects experienced in clinical trials of RU 486).

76. See Michael Klitsch, *Antiprogestins and the Abortion Controversy: A Progress Report*, 23 FAM. PLAN. PERSP. 275, 275 (1991).

77. See Silvestre, *supra* note 58, at 646; Ulmann, *supra* note 60, at 47-48. A few women, however, may bleed so heavily as to require medical intervention. See Klitsch, *supra* note 76, at 275-76.

78. See Klitsch, *supra* note 76, at 276.

79. See Porter, *supra* note 66, at 193.

experiencing more serious side effects.<sup>80</sup> For the women at higher risk, an RU 486 abortion is not appropriate.<sup>81</sup>

Some critics of RU 486 worry that the side effects extend beyond those thus far identified,<sup>82</sup> and that there may be serious long-term health effects that remain undiscovered. Scientists, however, point out that "[t]he drug metabolizes quickly; three-quarters is dissipated within two days."<sup>83</sup> RU 486 is unlikely to remain in the woman's system to cause future problems.<sup>84</sup> As of 1994, more than 150,000 European women have used the drug "safely and effectively."<sup>85</sup> Women have returned to normal menstrual cycles after aborting with RU 486, and many have later given birth to "normal" children.<sup>86</sup>

Surgical abortion is required in the four percent of cases in which RU 486 does not induce abortion.<sup>87</sup> Critics worry about the few women who do not follow the RU 486 protocol and take the RU 486 without returning for the prostaglandin, or women who take both drugs but do not abort and do not return for a surgical abortion.<sup>88</sup> Initial results of RU 486 studies indicate that a child born despite an RU 486 administration does not suffer abnormalities.<sup>89</sup> Incomplete abortions, however, may lead to serious complications, and physician supervision should be stressed.<sup>90</sup>

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80. See Picker, *supra* note 68, at 247.

81. See Porter, *supra* note 66, at 193. The French Ministry of Health prohibits women older than thirty-five, heavy smokers and women with a history of heart or circulatory difficulties from using RU 486. *See id.*

82. See Gary Samuelson, *DES, RU-486, and Deja Vu*, 2 J. PHARMACY & L. 56, 65-70 (1993); see also Dorothy Wickenden, *Drug of Choice: The Side Effects of RU 486*, NEW REPUBLIC, Nov. 26, 1990, at 24, 26 (John Willke, president of the National Right to Life Committee, stated that RU 486 is "[a] powerful, poisonous steroid [that] kills unborn babies, will injure and kill women, and will cause an epidemic of fetal deformity").

83. Cole, *supra* note 61, at 219.

84. See Cole, *supra* note 61, at 219; see also David Van Biema, *But Will It End the Abortion Debate?*, TIME, June 14, 1993, at 54 (stating that "informed advocates argue that [fetal deformity] is chemically impossible").

85. See *CBS This Morning* (CBS television broadcast, Oct. 28, 1994) (interview with Dr. David Grimes).

86. See Etienne-Emile Baulieu, *RU 486 as an Antiprogesterone Steroid: From Receptor to Contraception and Beyond*, 2626 JAMA 1808, 1812 (1989).

87. See Silvestre, *supra* note 58, at 646.

88. See Samuelson, *supra* note 82, at 66-68.

89. See Baulieu, *supra* note 86, at 1812 (recommending caution in administration despite these results).

90. See Samuelson, *supra* note 82, at 66-68.

Though not a panacea, RU 486 offers a safe and effective alternative to surgery for a woman seeking an abortion in the first seven to nine weeks of pregnancy.<sup>91</sup>

### B. As a Contraceptive

RU 486 has potential beyond its use as an abortifacient because it can be used by a woman before she is pregnant. RU 486, without a prostaglandin follow up, may be a safe and effective postcoital contraceptive.<sup>92</sup> A 1992 Scottish study of 800 women, published in the *New England Journal of Medicine*, reported that RU 486, if taken within seventy-two hours of unprotected intercourse, is more effective than the alternative postcoital contraceptive, which relies on high doses of estrogen and progestogen.<sup>93</sup> RU 486 also causes less nausea and vomiting than the postcoital contraceptive alternative.<sup>94</sup>

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91. Although this Article focuses on RU 486, the discussion also applies to other forms of chemical abortion. For instance, scientists have also studied methotrexate as an abortifacient. See Mitchell D. Creinin & Eric Vittinghoff, *Methotrexate and Misoprostol vs. Misoprostol Alone for Early Abortion: A Randomized Controlled Trial*, 272 JAMA 1190, 1190-95 (1994) (finding that methotrexate induces abortion in the first eight weeks of pregnancy, based on a small study sample). In August 1995, Dr. Richard Hausknecht publicly confirmed methotrexate as an RU 486 alternative to induce abortion in the first nine weeks of pregnancy. See Richard Hausknecht, *Methotrexate and Misoprostol to Terminate Early Pregnancy*, 333 NEW ENG. J. MED. 537, 537-40 (1995); see also Sharon Begley, *Abortion by Prescription*, NEWSWEEK, Sept. 11, 1995, at 76. The methotrexate abortion protocol is similar to that of RU 486. Cf. Hausknecht, *supra*, at 537 & 540 (describing methotrexate as an alternative to surgical abortion which gives women more privacy and control over the abortion process).

92. See Anna Glasier et al., *Mifepristone (RU 486) Compared with High-Dose Estrogen and Progestogen for Emergency Postcoital Contraception*, 327 NEW ENG. J. MED. 1041, 1041-44 (1992). Acting as a postcoital contraceptive, RU 486 prevents implantation of the fertilized egg. See Grimes & Cook, *supra* note 13, at 1089. RU 486 interrupts the egg's development after fertilization and thus fits into the abortion opponents' definition of abortion, but not into the medical definition of abortion. See *supra* notes 14-15 and accompanying text.

93. See Glasier *supra* note 92, at 1041-44. No woman in the RU 486 group became pregnant, while four in the standard group did. See *id.* at 1042. The overall failure rate was low for the standard regimen as well (1%), see *id.*, but Glasier predicted that a larger study would demonstrate how much more effective RU 486 is than the alternative, see K.A. Fackelmann, *New Use for the French "Abortion" Pill*, SCI. NEWS, Oct. 10, 1992, at 228.

94. See Glasier, *supra* note 92, at 1042-43. Forty percent of the women in the RU 486 group experienced nausea, compared to sixty percent in the group that received the standard post-coital contraceptive alternative; three percent of the women in the RU 486 group experienced vomiting on the day of treatment, compared to seventeen percent in the alternative group. See *id.* at 1043.

RU 486 can be administered in one dose, instead of the multiple doses of the alternative.<sup>95</sup> The major drawback of RU 486 in the Scottish study was that the drug delayed the onset of a woman's menstrual period, which could cause anxiety for unwarned women.<sup>96</sup>

RU 486 may become an alternative to daily birth control pills. Studies suggest that by blocking the progesterone secreted during the early phase of a woman's cycle, RU 486 may block the release of the egg (ovulation).<sup>97</sup> Taken in the latter part of the menstrual cycle RU 486 induces menstruation.<sup>98</sup> Instead of taking a traditional birth control pill every day, a woman could take an RU 486 pill for only three days of her cycle.<sup>99</sup> A woman taking RU 486 would be less likely to forget to take the pills and would suffer fewer side effects than a woman taking daily birth control pills.<sup>100</sup> RU 486 also may allow more women to use monthly contraceptives because a woman who cannot tolerate estrogen or progestogen may be able to tolerate RU 486.<sup>101</sup>

Many questions remain unanswered. For example, an RU 486 birth control pill may lead to lower estrogen levels in

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95. See *id.* at 1041, 1043-44.

96. See *id.* at 1044. Forty-two percent of the women in the RU 486 group had delays in the onset of the next menstrual period, compared to thirteen percent in the alternative group. See *id.* at 1044.

97. See Jeremy Cherfas & Joseph Palca, *Hormone Antagonist with Broad Potential*, 245 *SCIENCE* 1322 (1989). Lynette Nieman of the National Institute of Health found that administration of RU 486 to women in the first part of their cycles delayed ovulation, while administration to women in the later part of their cycles induced menstruation. See David Hamilton, *RU 486: More than an Abortion Pill*, *TECH. REV.*, May-June 1990, at 18. Even under the abortion opponents' definition, RU 486 acts as a contraceptive rather than an abortifacient when it delays ovulation. See *supra* notes 14-15 and accompanying text.

98. See Cherfas & Palca, *supra* note 97, at 1332; see also Hamilton, *supra* note 97, at 18.

99. See Tony Kaye, *Are You for RU 486? A New Pill and the Abortion Debate*, *NEW REPUBLIC*, Jan. 27, 1986, at 13, 14 (explaining that RU 486 would either prevent the ovum from implanting if fertilization had taken place, or merely induce menstruation if it had not).

100. See Joannie M. Schrof, *Reproduction Showdown: Advocates Predict the Abortion Pill Will Revolutionize Women's Health*, *U.S. NEWS & WORLD REP.*, Mar. 22, 1993, at 32, 34; see also Sandy Rovner, *The Pill: Three Decades Later*, *WASH. POST*, Jan. 16, 1990, (Health) at 17 (explaining that many women experience side effects from taking daily birth control pills and that a "stumbling block" to their effectiveness is forgetfulness).

101. See Hamilton, *supra* note 97, at 18 ("[W]omen may eventually take RU 486 as an estrogen-free contraceptive. That would provide an alternative for women over 35, for whom the current hormone-based contraceptives increase the risk of cancer.").



women, which may put them at greater risk of osteoporosis.<sup>102</sup> RU 486 administered in the latter part of a woman's cycle may lead to shorter menstrual cycles, the consequences of which are unknown.<sup>103</sup> Scientists also do not yet know the full health impact of repeated RU 486 treatments over an extended period of time.<sup>104</sup>

### C. As a Medicine<sup>105</sup>

RU 486 may have medical applications extending beyond reproductive control.<sup>106</sup> As a progesterone antagonist, RU 486 stimulates lactation.<sup>107</sup> By softening and dilating the cervix, RU 486 also may induce labor, reducing the need for caesarean sections in difficult live births, or facilitating the expulsion of a fetus that spontaneously died before birth.<sup>108</sup> Also, when

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102. *See id.*

103. *See id.*

104. *See id.*

105. The medical applications of RU 486 have broadened the support for the drug in the United States. *Cf.* Diane M. Gianelli, *Wyden: Pressure Groups Blocking RU 486 Testing; FDA Denies Charges*, AM. MED. NEWS, Dec. 7, 1990, at 3 (describing testimony at a congressional hearing in support of research on other medical uses of RU 486). Those opposed to RU 486's contraceptive use also oppose bringing RU 486 into the United States under a therapeutic-use umbrella. *See id.*; *cf.* H.R. 798, 102d Cong. § 2 (1991) (introduced by former Representative Robert Dornan (R-CA), an abortion rights opponent) (prohibiting providing any "form of Federal financial assistance" for research on RU 486 in order "to obtain its approval under the Federal Food, Drug, and Cosmetic Act"); H.R. 619, 101st Cong. (1989) (prohibiting federal funding for RU 486 research).

106. *See* Etienne-Emile Baulieu, *Contraception and Other Clinical Applications of RU 486, an Antiprogestosterone at the Receptor*, 245 SCIENCE 1351, 1355-56 (1989) ("RU 486 has also been used to treat PR-containing meningiomas and breast cancer that has become resistant to tamoxifen."); *see also* *The Product Liability Fairness Act of 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Affairs & Tourism of the Senate Comm. on Commerce, Science and Transp.*, 104th Cong. 212 (1995) (statement of Phyllis Greenberger, Executive Dir., Society for the Advancement of Women's Health Research) (listing other possible medical uses for RU 486); Ulmann, *supra* note 60, at 48 (discussing possible applications of RU 486); Marsha F. Goldsmith, *As Data on Antiprogestosterone Compounds Grow, Societal and Scientific Aspects Are Scrutinized*, 265 JAMA 1628, 1629 (1991) (discussing the potential use of RU 486 in treating breast cancer).

107. *See* Ulmann, *supra* note 60, at 48 (stating that RU 486 triggers lactation in monkeys).

108. *See id.*; *see also* Goldsmith, *supra* note 106, at 1628 ("[T]he results of the clinical trials of RU 486 for . . . ripening of the cervix at term and expulsion of the fetus after spontaneous intrauterine death during the second and third trimester . . . are so encouraging that its approval for these purposes appears to be 'imminent.'").

used as a progesterone antagonist, RU 486 may treat tumors, such as breast cancer and meningioma. Breast cancer sometimes spreads with the assistance of estrogen and progesterone; by blocking the progesterone receptors, RU 486 seems to stop the growth of the tumors.<sup>109</sup> In some patients studied, RU 486 shrank tumors "to less than half their former size."<sup>110</sup> In addition, RU 486 does not appear to lose effectiveness over time as do other repeated hormonal cancer therapies, although it does cause side effects for some patients (such as nausea, hot flashes and dizziness).<sup>111</sup> RU 486 also may treat meningioma, a type of tumor in the brain or spinal cord, which, although generally benign, can become so large as to cause neurological disorders.<sup>112</sup> Meningioma tumor cells contain progesterone receptors and grow in reaction to progesterone;<sup>113</sup> by blocking progesterone activity in the tumor, RU 486 may stop the tumor's growth. Studies of progesterone-antagonist applications of RU 486 are ongoing.<sup>114</sup>

Additionally, studies indicate that RU 486 may prove therapeutic as a treatment for skin wounds and Cushing's Syndrome.<sup>115</sup> RU 486 may facilitate healing of skin wounds, such as burns and abrasions, by blocking the activity of corticosteroids which delay healing.<sup>116</sup> RU 486 may also counter the excess production of cortisone that causes Cushing's Syndrome, and either treat the disease or maintain a patient's health long enough for surgery to be effective in removing the tumor.<sup>117</sup> Studies of RU 486 as an antiglucocorticoid are ongoing.<sup>118</sup>

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109. See Hamilton, *supra* note 97, at 19.

110. *Id.* Scientists studied the effects of RU 486 on breast cancers in Montpellier, France and at the Lombardi Center of Georgetown University in Washington, D.C. See Cherfas & Palca, *supra* note 97, at 1322.

111. See Hamilton, *supra* note 97, at 19.

112. See Cherfas & Palca, *supra* note 97, at 1322 (noting that studies have been conducted in Holland, France and the U.S., but "no clear-cut results are in yet"); Herman, *supra* note 60, at 14 (noting that preliminary findings at the University of Southern California showed some success in treating these tumors with RU 486).

113. See Herman, *supra* note 60, at 14.

114. See Cherfas & Palca, *supra* note 97, at 1322.

115. See *id.* at 1322 ("Cushing's syndrome . . . can be caused by a tumor in the adrenal cortex that can't be detected when it first arises. RU 486 can be used to keep patients alive until the tumor becomes large enough to be isolated and surgically removed.").

116. See Cherfas & Palca, *supra* note 97, at 1322.

117. See *id.* Dr. George Chrousos of the National Institutes of Health, is studying this application of RU 486. Between 1983 and 1990, he treated eight Cushing's patients, among whom five "showed complete regression of the disease." Gianelli, *supra* note 105, at 24.

118. See Cherfas & Palca, *supra* note 97, at 1322.

III. THE LEGAL IMPACT OF RU 486 ON ABORTION<sup>119</sup>

Physiologically, the RU 486 technology "blurs the distinction between contraception and abortion"<sup>120</sup> because it operates before fertilization, in the "grey" period between fertilization and implantation, and after implantation.<sup>121</sup> RU 486's range of effectiveness suggests that there is not a bright-line distinction between preventing pregnancy and terminating it in its early stages. The two practices overlap.<sup>122</sup>

In the past, the distinction between contraception and abortion was clear because contraception operated before fertilization (undeniably before the beginning of a pregnancy), while abortion operated after six weeks of fertilization (undeniably after the beginning of a pregnancy). RU 486 acts at

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119. This Article does not focus on the political impact of RU 486, but rather on the legal implications of the drug's existence. The political implications of RU 486 have been discussed widely, especially with regard to the drug's potential to make abortion a private procedure. See LAWRENCE LADER, A PRIVATE MATTER 10, 18, 213 (1995); see also David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 ST. LOUIS U. PUB. L. REV. 261, 264 (1993) ("Many within the abortion rights movement hope that RU-486 . . . will make abortion truly private, truly an act both chosen and controlled by the individual women. Such technologies arguably could eliminate the public vulnerability of abortion, because separate abortion facilities would no longer exist as sites of protest. . . . The prescribing and dispensing of abortifacients, and the care of aborting women, would perhaps be tasks integrated into the larger medical establishment. Thus, technology would ultimately make real the promises of pro-choice rhetoric.") (footnotes omitted); Ernest Van den Haag, *Is There a Middle Ground?*, NAT'L REV., Dec. 22, 1989, at 29, 31 (stating that "technological changes [like RU 486] may make much of the legal-abortion debate academic").

120. David Savage & Karen Tumulty, *Behind-the Scenes Battle Rages Over "Abortion Pill,"* L.A. TIMES, May 14, 1989, at 1 (statement of Sharon Camp, Vice President of the Population Crisis Council).

121. See Porter, *supra* note 66, at 209. To some extent, the line was blurred by earlier technologies, such as the low-dose birth control pill and the IUD, that operate both before and after fertilization. See *supra* note 20 and accompanying text. Under the abortion opponents' definition, such technologies are both contraceptives and abortifacients. See *supra* notes 14-15 and accompanying text. RU 486 is the first to operate before and after fertilization, as well as after implantation. RU 486 is, thus, the first contragestive technology to be both a contraceptive and an abortifacient under the medical definition of pregnancy. See Elizabeth A. Silverberg, *Looking Beyond Judicial Deference to Agency Discretion: A Fundamental Right of Access to RU 486?*, BROOK. L. REV. 1551, 1608 (1994); see also *supra* notes 10-13 and accompanying text. To use standard definitions, RU 486 can function as a contraceptive, a postcoital contraceptive or an abortifacient, depending on the time of its use during the procreative process. See *supra* Parts II.A-II.B.

122. See Oral Argument of Frank Susman on Behalf of the Appellees at 27, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (No. 88-605).

different times, including the period after fertilization but before the sixth week of pregnancy that was ignored by past practice. Depending on the time of its use, RU 486 may prevent ovulation, implantation, or retention of the fertilized egg by the uterus after implantation. It is difficult to determine which uses of RU 486 are contraceptive and which are abortive.

It is no longer clear that the abortion decision is "different in kind from the decision not to conceive in the first place."<sup>123</sup> While abstinence seems clearly different from an abortion, the use of a contraceptive IUD, which could potentially terminate procreative development one to three days after intercourse,<sup>124</sup> is not clearly different from the use of an abortifacient several days later. Is the use of RU 486 one day after intercourse so clearly different from its use three, five or ten days later? Physiologically, it would seem that "contraception and abortion are . . . points on a continuum,"<sup>125</sup> different in degree but not in kind.

The blurred physiological line between contraception and abortion causes more than semantic difficulties. RU 486 does not neatly fit into the analytic framework developed by the courts. A woman who takes RU 486 monthly as a birth control pill may be protected by *Griswold* and its progeny, free to act without state interference.<sup>126</sup> A woman who takes RU 486 within seventy-two hours of unprotected intercourse, as a postcoital contraceptive, also may be protected by the *Griswold* line, free to act without state interference.<sup>127</sup> A woman who takes RU 486 in her eighth week of pregnancy, practicing the equivalent of a surgical abortion, may be subject to *Casey* and will not be free to act without interference from burdensome state regulations. What about the woman who takes RU 486 two, four, five, ten, twenty, or thirty days after unprotected intercourse? Is she protected by *Griswold*, or is she subject to state regulation under *Casey*? Courts have

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123. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting), *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

124. See *Hatcher*, *supra* note 16, at 355 (stating that the IUD could prevent fertilization and/or impair, prevent or inhibit implantation).

125. Brief of *Amici Curiae* 274 Organizations, *supra* note 23, at 8.

126. See *supra* notes 20-30 and accompanying text.

127. See *supra* note 52. The issue of postcoital contraceptives has not been litigated because no state has attempted to impose burdensome regulations on its use. Therefore, the Court's comments are merely indicative of its leanings.

not had the occasion to characterize the termination of the procreative process occurring after fertilization but before the sixth week of pregnancy.

To preserve its current framework and maintain a clear distinction between contraception and abortion, the Court needs to categorize the period between fertilization and the sixth week of pregnancy, the period thus far ignored by law.<sup>128</sup> The Court will have to recognize the existence of this “grey” period between fertilization and implantation and to define its constitutional significance.

The Court could adopt the abortion opponents’ definition of pregnancy and draw a bright line declaring that any method used prior to fertilization is contraception and any method used afterward is abortion.<sup>129</sup> With such a line, only barrier method contraceptives—condoms and diaphragms—would be contraception because other traditional “contraception” methods—IUDs and low-dose birth control pills—have the potential to act after fertilization. A bright line drawn at fertilization would run counter to the Court’s assertion that low-dose birth control pills, IUD’s and postcoital contraceptives are methods of contraception protected by *Griswold*.<sup>130</sup> A bright line drawn at fertilization could also run counter to common understandings of contraception. Although the Court is not bound by public sentiment, it is sensitive to public opinions and is eager to maintain its legitimacy in the eyes of the people.<sup>131</sup>

Alternatively, the Court could adopt the medical definition of pregnancy and maintain the bright line distinction between contraception and abortion by drawing a line at implantation.<sup>132</sup> Such a line, however, would be difficult to

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128. See *supra* notes 16–20 and accompanying text.

129. See *supra* notes 14–15 and accompanying text.

130. See *supra* note 52 and accompanying text.

131. In *Casey*, the Court stated that:

The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands. . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them . . . . Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Planned Parenthood v. Casey, 505 U.S. 833, 865–66 (1992).

132. See *supra* notes 8–13 and accompanying text.

administer.<sup>133</sup> While the Court could conceivably judge a method according to the fertilization line by determining whether the method allows the egg and the sperm to come in contact,<sup>134</sup> the Court cannot draw a bright line at implantation with any accuracy. Scientists estimate that implantation begins five to six days after fertilization, and is completed six to seven days later. This time period leaves room for much uncertainty and error.<sup>135</sup> To make any determination regarding implantation, the Court would need to know the date of intercourse and the details of a woman's menstrual cycle. In order to enforce such a prohibition, a State would be forced to "allow the police to search the sacred precincts of . . . bedrooms for telltale signs."<sup>136</sup> This is not acceptable; because "the very idea is repulsive to . . . notions of privacy."<sup>137</sup>

The Court has stated that "[c]onsistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."<sup>138</sup> A bright line between contraception and abortion is not justifiable. RU 486 blurs the physiological line between abortion and contraception. "In the absence of a bright physiological line, there can be no bright constitutional line drawn between the moments before and after conception."<sup>139</sup>

In *Casey*, abortion was said to be unique because it was "fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist."<sup>140</sup> Are the consequences of ingesting the RU 486 pill different depending on whether the woman

133. Cf. *Casey*, 505 U.S. at 855 (stating that the Court should consider whether *Roe* has become "unworkable" as part of its *stare decisis* analysis).

134. If contact occurs, there will be fertilization and the method is abortive. If there is no opportunity for contact, there can be no fertilization, and the method used to prohibit contact between the egg and the sperm is contraceptive.

135. See *supra* notes 8–13 and accompanying text.

136. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

137. *Id.*

138. *Casey*, 505 U.S. at 870.

139. Brief of *Amici Curiae* 274 Organizations, *supra* note 23, at 9; see also Annette Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 307–08 (1993) ("The more difficult it is to draw fine physiologic lines between contraceptives and abortifacients, the more difficult it is to treat them as morally distinguishable.").

140. *Casey*, 505 U.S. at 852.

swallows it on day zero, one, five or ten? Why is the state interest in potential life not important enough preceding or immediately following intercourse to allow for any but the most "compelling" and narrow regulation, but so important days later to allow for all but the most "unduly burdensome" regulation?

The Constitution, the Supreme Court and societal notions of equity mandate that the law be fair and treat similarly situated people similarly. Would it not violate such a mandate to grant one woman total freedom to act while severely curtailing the freedom of another woman taking the same action moments later? Can the law restrict one woman's right simply because of a suspicion that her fertilized egg may have completed its implantation? If it has not, then the woman has been treated differently from another woman whose egg was also not implanted but who was allowed to use postcoital contraceptives.

The Court should not impose distinct categories of "contraception" and "abortion" when the categories overlap and are not clearly distinguishable. "It is difficult to attach very much significance to any one point in time in a developmental continuum. All attempts to do so are vulnerable to the question of why this moment is ethically distinct from one hour earlier or one hour later in the [pregnancy]."<sup>141</sup>

In setting standards, the Court must use "reasoned judgment."<sup>142</sup> The Court can establish a sounder, more workable and more reasoned "procreative right" standard by ridding itself of the artificial bright line between contraception and abortion and adopting a "continuum" approach, a series of blurred lines paralleling the physiological developmental continuum of pregnancy.<sup>143</sup> With a continuum approach, the Court need no longer search for physiological reference points

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141. Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 748 (1992).

142. *Casey*, 505 U.S. at 849.

143. See Brownstein & Dau, *supra* note 141, at 698-700 (discussing the concept of a developmental continuum analysis). Frank Susman, representing Reproductive Health Services in *Webster*, used the term "procreative right" in oral arguments. "The bright-line, if there ever was one, has now been extinguished. That's why I suggest to this court that we need to deal with one right, the right to procreate. We are no longer talking about two rights." Susman, *supra* note 122, at 28. Susman was referring to contragestive methods which operate before and after fertilization (but not after implantation). See *id.* at 27-28.

to act as demarcation lines, and it need no longer overhaul its standards every time science and medicine find new reference points and new technologies to blur the line between existing reference points.

Critics of the continuum approach may be concerned about a slippery slope, fearing that the blurring of contraception and abortion would extend to such an extreme that a court could no longer distinguish between barrier method contraceptions and partial-birth abortions. The Court, however, has responded to similar fears by noting that interests are not static.<sup>144</sup> Even if there were no legal bright lines separating contraception from abortion, the legal treatment of pre-fertilization contragestion would differ from that of a third trimester abortion because the interests at stake are different.

The Court can use a sliding scale or balancing test to define the procreative standard, to evaluate the various contragestive methods and to weigh the different interests that exist along the continuum. The Court can find that a state's interests in potential life, maternal health and the general preference for childbirth increase as the procreative process progresses.<sup>145</sup> Under the continuum approach, the Court can also find that a woman's right to have an abortion decreases as the pregnancy progresses. Commentators argue that a woman's interest in having an abortion shifts just as a state's interests do.<sup>146</sup> They posit that a woman needs "sufficient time to make a deliberate, informed and reflective choice as to whether or not she wants to carry her pregnancy to term,"<sup>147</sup> but that her interests in, and rights to, sexual autonomy, bodily integrity and psychological integrity weaken as the pregnancy progresses.<sup>148</sup> Finally, they claim that "if the woman's interest in terminating her pregnancy declines to a sufficient extent, the balancing necessary to justify abortion restrictions may be accomplished without determining exactly when the conceptus experiences a life worth living."<sup>149</sup>

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144. See, e.g., *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (stating that the state's interests in the protection of potential life and maternal health grow "in substantiality as the woman approaches term").

145. See *Roe*, 410 U.S. at 162-64.

146. See *Brownstein & Dau*, *supra* note 141, at 749-59.

147. *Id.* at 753-54.

148. See *id.* at 754-59.

149. *Id.* at 749.



This procreative continuum approach does not dictate a specific outcome. With the adoption of this approach the Court can balance the same factors identified in past opinions and create a procreative standard under which the interests of the state and the woman intersect along the continuum early in the pregnancy. Under this procreative standard, states could restrict most abortions and could regulate traditional contraception. The Court could create a standard under which the state's interests do not outweigh the woman's until very late in the pregnancy, protecting contraception and most abortions<sup>150</sup> from state interference. The Court could also create a standard where early contragestion, whether contraceptive or abortive, receives some protection while later contragestion receives less. Despite these differing potential outcomes, the proposed continuum approach toward contragestive technologies is a unified approach. The variation in protection will occur gradually rather than suddenly,<sup>151</sup> more accurately reflecting the gradual shifts in the identified interests and rights.

The continuum approach to the procreative right is consistent with the majority of Americans' views on the subject, and is thus more legitimate than the bright line labels and distinct legal standards used today.<sup>152</sup> The continuum approach, however, may not be welcomed by abortion activists on either side of the debate who derive their power by "cast[ing] the [abortion] issue in black and white."<sup>153</sup> This continuum standard creates varying shades of grey that are more difficult to use in soundbites, rallying cries or mobilizing speeches.

The shades of grey and blurred lines created by RU 486 will not end the abortion controversy. The existence of RU 486, however, may broaden and deepen the abortion debate,

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150. *See Abortion Surveillance: Preliminary Analysis—United States, 1986 and 1987*, 262 JAMA 2076, 2076 (1989) (stating that in 1987 approximately fifty percent of all abortions were performed before the ninth week of pregnancy, and about eighty-eight percent were performed during the first trimester).

151. *See supra* Part I.B.

152. *See Wilcox, supra* note 3, at 67. Social scientists label a narrow majority of Americans "situationalists" because their views on abortion depend on the circumstances of the pregnancy. *See id.*; *see also* ELIZABETH ADELL COOK ET AL., *BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION* 191-196 (1992) (summarizing the ways that most Americans think about the abortion issue). Americans support abortion most strongly in the early weeks of pregnancy, and in situations of "danger to the mother's health, a strong chance of serious defects in the baby, and pregnancy that results from rape." Robert Blendon et al., *The Public and the Controversy over Abortion*, 270 JAMA 2871, 2872 (1993).

153. Kaye, *supra* note 99, at 15.

perhaps merging it with a larger societal debate of reproductive control, family planning, sexual morality, sexual conduct, sexual education and the role of women in the family and society.<sup>154</sup> Carol Maxwell wrote that:

Abortion has become the issue; I believe it is a red herring, distracting people from the more profound issues of human suffering and limited life-possibilities. By focusing on the legal status of abortion, we deal with the effect of diverse social problems rather than addressing the problems themselves.<sup>155</sup>

If that is our predicament, then RU 486 may help to end the distraction and allow us to focus on the profound issues and problems in our society.

It is unlikely that a nation so bitterly divided over abortion will come to unanimous agreement on the broader issues of sexual morality, reproductive control and gender roles. There will be opposing sides for these issues, just as there are today for abortion, and as there have been in the past for virtually every social, political or economic matter.<sup>156</sup> For example, if the abortion debate becomes part of a larger debate about reproductive control, there will be those who favor contragestive technologies, stating:

Women's capacity to control reproduction is central to their lives. The ability to plan whether to have children, how many, and when, is critical to equality in the workplace, educational plans, political participation—indeed, to control over the way in which our lives are spent in general.<sup>157</sup>

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154. Cf. COOK ET AL., *supra* note 152, at 4 (“[T]he abortion issue involves, at least in part, a debate about ‘proper’ sexual behavior.”); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 193 (1984) (“[T]his round of the abortion debate is so passionate and hard-fought because it is a referendum on the place and meaning of motherhood.”); Amy Fried, *Abortion Politics as Symbolic Politics: An Investigation into Belief Systems*, 69 SOC. SCI. Q. 137, 137–54 (1988) (analyzing survey results about the symbolism of abortion politics); Law, *supra* note 37, at 935 (“[T]he abortion dispute . . . poses a conflict between competing visions of the role of gender, sexuality, and family in a good life and good society.”).

155. Carol J.C. Maxwell, *Introduction: Beyond Polemics and Toward Healing*, in *PERSPECTIVES ON THE POLITICS OF ABORTION*, *supra* note 3, at 16.

156. See BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* 148 (1993) (discussing the effect of the abortion controversy on the political debates over other important social issues).

157. MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS* 353 (1994).

And there will be those who oppose contragestive technologies:

[There] are . . . serious medical and social problems that have flourished as a by-product of [living in a] contraceptive culture[.] The first is the teenage pregnancy epidemic . . . . Data indicated that for every million dollars added to the budget for contraceptive research, education, and supply, another 200 teenage pregnancies occurred. . . .

Another medical problem more easily related to the advance in contraceptive technology is the epidemic of STDs. . . .

The social problems clearly related to the technological advances in contraception . . . are divorce and the single-parent family and its effects on the children involved. . . .

. . . .

. . . In my judgment the only answer is a return to teaching chastity in our homes, schools, and churches.<sup>158</sup>

Those in opposition may claim that this technology (like abortion), "by giving women control over their fertility, . . . breaks up an intricate set of social relationships between men and women . . . and supports a world view that deemphasizes (and therefore downgrades) the traditional roles of men and women."<sup>159</sup>

Those opposing and supporting contragestive technology and abortion have "dramatically different world views"<sup>160</sup> not easily reconciled. Nevertheless, disagreement is different from the "culture war"<sup>161</sup> that has existed to date.<sup>162</sup> Educated and rational debate is a healthy and integral part of our democracy. In contrast the shouting and shooting of the abortion controversy has the potential to undermine our democracy. RU 486 may make a significant contribution by altering the terms of the debate, even if it cannot end the debate.

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158. William F. Colliton, Jr., *Contraception and Abortion: Is There a Connection?*, 13 ST. LOUIS U. PUB. L. REV. 315, 323-26 (1993).

159. LUKER, *supra* note 154, at 162.

160. Law, *supra* note 37, at 936.

161. See Hunter, *supra* note 2, at C2.

162. See *supra* notes 2-3, 5 and accompanying text.

## CONCLUSION

RU 486 offers women an alternative to traditional methods of contragestion, and offers men and women an alternative to traditional treatments for serious diseases.<sup>163</sup> Legally, RU 486 blurs the line between contraception and early abortion. This blurring should promote the adoption of a unified continuum approach to reproductive control.<sup>164</sup> However, RU 486 is neither a panacea nor the ultimate answer to the abortion controversy. It cannot bring an end to the abortion controversy or offer us resolution in a neat, painless pill.<sup>165</sup> Like all technologies, and like the law, RU 486 is merely a tool for society to use in its struggles. As an instrument of change, RU 486 has the potential to affect our lives in significant positive and negative ways. Society, however, must define its culture and norms for itself. If there is a resolution to the abortion controversy, it will be found through social discourse, and not through a pill. "The understanding of abortion as an actual practice in real lives—the social norms about abortion—[should] be negotiated in the more fluid and multiplicitous realm of culture."<sup>166</sup>

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163. *See supra* Part II.C.

164. *See supra* Part III.

165. *See* Hunter, *supra* note 2, at C2.

166. CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 123 (1990).

