Emergency Contraception and Physicians’ Rights of Conscience: A Review of Current Legal Standards in Wisconsin

Ciarán T. Bradley, MD

ABSTRACT
Recent legislation in Wisconsin mandating provision of emergency contraception to victims of sexual assault may create a conflict of conscience for some health care professionals. Although disputes exist over the exact mechanism of action of emergency contraception, those professionals who espouse a particularly strict stance may be reluctant to dispense the medication for fear that it could prevent a fertilized embryo from implanting in the uterus. While no objection of conscience clause was written into the new law, Wisconsin law has a long tradition of recognizing rights of conscience in matters of religious conflict. This legal tradition both at statutory and common law levels is summarized with application to the recent emergency contraception mandate. A case is made for a potential legal defense should a health care professional abstain from dispensing emergency contraception.

INTRODUCTION
On March 13, 2008, Governor Jim Doyle signed into law 2007 Wisconsin Act 102 (Act), concerning the distribution of emergency contraception (EC) to victims of sexual assault. In the Act, health care facilities that provide care to rape victims (ie, emergency rooms and urgent care clinics) are required under threat of financial penalty to provide unbiased information about emergency contraception and dispense the medication upon request.1 Thirteen other states have passed similar legislation, although laws in Arkansas, Colorado, and Illinois only require the provision of information about EC.2

Similar legislation had been previously unsuccessful, in large part due to vehement objection from conservative religious groups.3 In particular, traditional Roman Catholic teaching prohibits the administration of any medication that might inhibit the survival of a fertilized ovum, since from a Catholic perspective, human life must be respected from the moment of conception to death. However, owing to recent disputes over the exact mechanism of action of EC medication, and following the lead of their counterparts in Connecticut who faced a similar situation in their state last year, the Wisconsin Catholic Bishops withheld any formal opposition to the Act, tempering some of the debate that had previously occurred. Conversely, the 4 guilds of the Wisconsin Catholic Medical Association remained steadfast in their formal opposition to the Act, as did other groups representing religious conservatives.4

Despite nuanced disagreements over the exact mechanism of action of EC, these lobbies all acknowledged the potential effect that the Act could have on physicians’ rights of conscience protection. In contrast to other statutes that specifically exempt physicians and health care institutions from participating in procedures such as abortion or sterilization on the grounds of religious objection, no such clause was written into the Act. While the bishops’ main counsel, the Wisconsin Catholic Conference claimed that physicians’ rights of conscience would continue to be protected under those earlier related statues, it remains unclear how such a defense would fare in light of this newest legislation.5

For example, facing the same question a few months previously, the Connecticut bishops were advised that a right of conscience objection to the EC mandate in their jurisdiction likely would not succeed.6

The following discussion will examine the status of religious right of conscience protection in light of the new EC legislation in Wisconsin. It will begin with a brief overview of the current state of medical knowledge pertaining to EC, as well as an exploration of the disputed definitions of “pregnancy” and “abortion.” Next, the discussion will turn to the law in Wisconsin as it relates to religious rights of conscience. Should a
physician wish to exercise an objection of conscience to the Act, both statutory and common law standards ought to provide a reasonable case for protection from legal penalties.

**DISCUSSION**

**Emergency Contraception**

Emergency contraception is the generic term for high dose oral contraceptive medication given within 72 hours following sexual intercourse. The most common formulation is the drug levonorgestrel marketed by Barr Pharmaceuticals under the name Plan B®. As of August 2006, Plan B® is available over the counter to women 18 years of age or older and to minors with a prescription. EC has several potential mechanisms of action, including inhibiting ovulation, interfering with sperm migration and subsequent fertilization of the egg, and preventing implantation of the fertilized ovum in the uterine lining. Available scientific evidence supports the first 2 mechanisms most strongly, as there are insufficient and conflicting data to definitively refute or uphold the third, post-fertilization effect of EC.7-8 Consequently, the implantation-blocking effect is often referred to as a theoretical, or potential effect, as is the case in the package insert for Plan B® which states: “Plan B® may also work by preventing it [the embryo] from attaching to the uterus (womb).”9 Once implanted, EC no longer effects the continued survival of the embryo.

The potential post-fertilization, pre-implantation effect of EC has been the source of most concern for Catholic health care institutions. The United States Conference of Catholic Bishops (USCCB) in its Ethical and Religious Directives for Catholic Health Care Services (ERDs), supports the right of a woman to prevent pregnancy as a result of rape, or to uphold the third, post-fertilization effect of EC.7-8 This distinction implies that the new statute considers pregnancy to commence at implantation and not conception, since it does not take into account EC’s potential implantation-blocking effect. The examination of legal protections for rights of conscience that follows is directed specifically towards this subgroup.

**Definition of Pregnancy and Abortion in Wisconsin Law**

While the new Wisconsin Act does not explicitly define pregnancy, it would appear, at least by inference, that the authors of the bill support a different definition than that of the USCCB. In the new statute, §50.375(1)(a), “emergency contraception” is defined as, “a drug… that prevents a pregnancy after sexual intercourse.” However, any drug that is, “…prescribed to terminate the pregnancy of a female,” is not included in the definition of EC.13 This distinction implies that the new statute considers pregnancy to commence at implantation and not conception, since it does not take into account EC’s potential implantation-blocking effect. Additionally, the new §50.375(4) exempts hospitals from administering EC to a woman who is pregnant, “… as indicated by a test for pregnancy.”14 This clause offers little consolation to Catholic hospitals following the stricter ovulation approach, because standard pregnancy tests become positive around the time of implantation. A negative pregnancy test does not necessarily mean negative conception.

The disputed definition of “pregnancy” is significant, because it affects how one defines “abortion” and the hormonal trigger for ovulation, while progesterone normally becomes elevated after ovulation. Elevated LH and progesterone levels in combination suggest that ovulation has recently occurred.12 In a woman with normal levels, it is unlikely that she has yet ovulated, suggesting that even if EC does have a post-fertilization effect, an embryo does not yet exist, and the drug will only have a contraceptive effect in that case.

Other Catholic ethicists support an approach that only tests for an existing pregnancy that pre-dates the sexual assault.11 If the test is negative, they suggest administration of the drug. The justification for this course is grounded on several factors, including the generally low likelihood of pregnancy occurring as a result of sexual assault, the lack of evidence to support the post-fertilization effect to a degree of moral certitude, and the overall intention of administering the medication, which is to prevent conception, not inhibit implantation. The theological concepts involved in this debate deserve a much more robust examination than can be offered here. Suffice it to say, there are some physicians who maintain a moral objection to administering EC on the grounds of the potential post-fertilization effect. The examination of legal protections for rights of conscience that follows is directed specifically towards this subgroup.
whether statutory protections for health care professionals’ rights of conscience in the setting of abortion also apply to EC. Wisconsin statutes do not uniformly define abortion, containing varying iterations that are often in contradiction. For example, in §253.10(2)(a), “...‘abortion’ means the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant...” while §48.375(2)(a), which addresses parental consent requirements for minors, defines “abortion” as any means used, “...to terminate the pregnancy of a minor after implantation of a fertilized human ovum....” The second definition leaves little room for dispute, but in the first instance, abortion could occur either before or after implantation depending on whether “pregnancy” is taken to include the fertilized, un-implanted embryo. This interpretation is supported by §20.927(1g), which defines abortion as “...the intentional destruction of the life of an unborn child, and ‘unborn child’ means a human being from the time of conception until it is born alive.”

State lawmakers have recognized that until “abortion” is uniformly defined, laws such as the Act will be vulnerable to different interpretations. In July of 2007, the Wisconsin State Senate proposed 2007 Senate Bill 232 that would amend several statutes to achieve a uniform definition of abortion that does not include “the administration, delivery, prescribing, or dispensing of any federal Food and Drug Administration-approved contraceptive.” Such a law might limit statutory protections for physicians’ rights of conscience relating to EC. For now, SB 232 has been tabled. It may resurface in a future legislative session.

Statutory Protection for Rights of Conscience
Wisconsin statutes protect workers’ rights of conscience in a variety of settings. §111.337(1) generally defines discrimination on the basis of creed as “…refusing to reasonably accommodate an employee’s...religious observance or practice unless the employer can demonstrate that the accommodation would pose an undue hardship on the employer’s program....” Additionally, in §154.7(1) sub 3, physicians are protected from disciplinary action on the basis of unprofessional conduct by failing to comply with a patient’s advance directive as long as accommodations are made for a transfer of care to another physician.

Wisconsin law also protects workers’ rights of conscience specifically related to abortion and sterilization. In §253.09(1), hospitals and health care professionals are free from being “…required to admit any patient or to allow the use of the hospital facilities for the purpose of performing a sterilization procedure or removing a human embryo or fetus. A physician...or any employee of a hospital in which such a procedure has been authorized, who shall state in writing his or her objection to the performance of or providing assistance to such a procedure on moral or religious grounds shall not be required to participate in such a medical procedure.” Additionally, §441.06(6) and §448.03(5) absolve nurses, and all other health care professionals, respectively, of civil liability resulting from a religious refusal to perform “…sterilization procedures or to remove or aid in the removal of a human embryo or fetus from a person....” Interestingly, §253.09, §441.06, and §448.03 use the description, “removal of human embryo or fetus,” as a surrogate for the term “abortion” but none of them explicitly offer a definition for abortion.

In 1 potential scenario, a Catholic physician might refuse to dispense EC for a victim of sexual assault, because LH and progesterone testing revealed a high likelihood that ovulation had already occurred, which would mean that a conception might have already occurred. This physician should have adequate protection under current Wisconsin statutes to refuse on the basis of a right of conscience, since §253.09 allows for religious refusals to “…remove or aid in the removal of a human embryo....” The physician’s refusal hinges on the chance that dispensing the medication will not only have a contraceptive effect, but instead may affect the ability of the fertilized ovum to implant.

Additionally, the physician’s defense would rely on a definition of “embryo” that includes “…the developing organism from fertilization to the end of the eighth week.” This is one accepted medical definition for an “embryo,” although others might limit “embryo” to the time after implantation. Finally, the physician would have to ensure that his or her employer was notified in writing of a potential religious conflict prior to the refusal. If these criteria were met, this physician would likely have adequate protection of his or her religious right of conscience under §253.09. The state might counter with the claim that the spirit of §253.09 is to protect rights of conscience in the setting of “abortion” as it is commonly understood (ie mechanical or chemical disruption of an implanted embryo or fetus). However, neither §253.09 nor its related statutes specify that the embryo must be implanted to constitute an abortion. Only §48.375(2)(a), relating to parental consent for minors, uses this narrower definition of “abortion.”

Common Law
Wisconsin has a robust lineage of jurisprudence examining religious rights of conscience. It has been noted
several times that the Wisconsin Constitution offers “...more expansive protections for freedom of conscience than those offered by the Free Exercise Clause of the First Amendment of the United States Constitution.” Article I, section 18 of the Wisconsin Constitution declares that “The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; ...nor shall any control of, or interference with, the rights of conscience be permitted....” Several Wisconsin cases at appellate and Supreme Court level have further defined these religious rights of conscience.

In State v Miller, the court applied a compelling state interest/least restrictive alternative test to determine whether a group of Amish farmers ought to be forced to display reflective orange, slow-moving vehicle signs on their horse-drawn buggies, a practice that the Amish found objectionable and akin to lavish adornment. The test was applied in 2 parts. First, the plaintiffs had to show that they had a seriously held religious belief that was burdened by the state law. The application of civil law requirements to religious beliefs does not automatically constitute a burden on those beliefs, but if evidence can be furnished to establish a church’s principles or tenets relating to the law in question, then a burden might be displayed. Next, the state had to prove that the law in question preserved a compelling state interest, and that the interest could not be satisfied through a less restrictive alternative.

Once the farmers in Miller established that using bright, worldly objects to mark their buggies was against Amish teaching, the state failed to then show that a less restrictive alternative to the law did not exist, since the plaintiffs had devised a more subtle, but equally effective method of marking their buggies with reflective tape around the edges. Conversely, in Peace Lutheran Church & Academy v Village of Sussex, a Lutheran community was unable to show that their religious doctrine contained teaching that would prevent the placement of a sprinkler system in the sanctuary of their church, as required by fire code. Since a dogmatic conflict was not established, the state was not forced to prove its compelling interest in maintaining a fire code or the absence of a less restrictive alternative.

In the context of EC, if a Catholic physician were to abstain from providing EC as mandated in the new law, the physician would first have to prove that a sincerely held, established belief was burdened by the administration of the drug. In light of the possible, albeit contested, post implantation effect of EC, and the Church’s teaching that proscribes involvement in an abortifacient procedure, he or she ought to be able to satisfy this first part of the legal test. It would then fall upon the state to show that its compelling interest, ensuring similar health care delivery for all sexual assault victims, could not be served by a less restrictive alternative. Such an alternative might be transfer of care to a different physician or facility willing to dispense EC.

A recent statement by the American College of Obstetrics and Gynecology’s ethics committee recommended that physicians unwilling to provide certain reproductive services due to a conflict of conscience must offer referral to a physician willing to comply with the patient’s request. This statement has been challenged by some authors who assert that even if the physician is not forced to provide the particular service they believe is morally objectionable, the transfer itself might still constitute moral complicity in the act in question.29 Catholic ethicists continue to grapple with the concept of material cooperation in the setting of morally disputed reproductive services. A thorough exploration of the nuances of that particular debate is to a large extent beyond the scope of this discussion.

Nevertheless, if a physician were to evoke a conflict of conscience on the matter of transferring care, the court would likely look to the recent high profile case of a pharmacist in Menomonie, Wis who abstained from filling a prescription for the oral contraceptive pill and refused to arrange transfer of the prescription to another pharmacy. In Noesen v State of Wisconsin Department of Regulation and Licensing, Pharmacy Examining Board, the 3rd District Court of Appeals upheld the circuit court’s finding that the plaintiff was guilty of unprofessional conduct as described in Wisconsin Administrative Code §Phar 10.03(2) for not notifying his employer in advance that he would be unwilling to transfer the prescription. The court felt that the plaintiff was unable to display how such a notification, but not necessarily the transfer or the dispensing of the drug itself, burdened his religious beliefs. The court also upheld a standard of care that dictates that a pharmacist should inform a patient of alternative options to receiving the medication that he or she refuses to dispense.

The Noesen decision is at least in part reassuring for physicians concerned with rights of conscience as they relate to EC. In one respect, the case reaffirms the strong right-of-conscience protection established at the statutory and common law levels mentioned above, because it does not explicitly challenge Noesen’s refusal to dispense the medication. For physicians more concerned about the moral cooperation involved in transferring
care, it would appear that the Noesen court agreed with a standard of care that at minimum requires a practitioner to notify his or her employer in advance of any religious objections to arranging a transfer and to inform the patient of alternative methods of obtaining the medication. If a process was in place that allowed for the patient to obtain the medication without a physician referral, then the state might be forced to acknowledge the presence of a less restrictive alternative. The Noesen decision did not comment on this possibility. As of yet, an appeal to Noesen has not been scheduled on the Wisconsin Supreme Court register of pending cases.33

**CONCLUSION**
The recent legislation mandating provision of EC to victims of sexual assault will create a conflict of conscience for some Catholic hospitals and physicians who harbor continued concerns over its potential post-fertilization effect. In light of Wisconsin’s strong constitutional, statutory, and common law recognition of religious rights of conscience, Catholic physicians should continue to have adequate protection if they abstain in good conscience from dispensing EC. Although statutory protections of conscience already in place regarding abortion might apply to the Act, added case law seems to further support a physician’s refusal to dispense the medication.

**Acknowledgments/Funding/Support:** Thank you to Arthur Derse MD, JD, and Mark Repenshek, PhD, who offered advice and commentary during preparation of the initial drafts of this manuscript.

**Financial Disclosures:** The author is a member of the Milwaukee Guild of the Catholic Medical Association.

**REFERENCES**
16. Wis. Stat. §20.927(1g).
18. Wis. Stat. §111.337(1).
20. Wis. Stat. §253.09(1).
21. Wis. Stat. §441.06(6); Wis. Stat. §448.03(5).
25. Wis. Constitution. Article I. §18
32. Admin. Code § Phar. 10.03(2).
The mission of the *Wisconsin Medical Journal* is to provide a vehicle for professional communication and continuing education of Wisconsin physicians.

The *Wisconsin Medical Journal* (ISSN 1098-1861) is the official publication of the Wisconsin Medical Society and is devoted to the interests of the medical profession and health care in Wisconsin. The managing editor is responsible for overseeing the production, business operation and contents of *Wisconsin Medical Journal*. The editorial board, chaired by the medical editor, solicits and peer reviews all scientific articles; it does not screen public health, socioeconomic or organizational articles. Although letters to the editor are reviewed by the medical editor, all signed expressions of opinion belong to the author(s) for which neither the *Wisconsin Medical Journal* nor the Society take responsibility. The *Wisconsin Medical Journal* is indexed in Index Medicus, Hospital Literature Index and Cambridge Scientific Abstracts.

For reprints of this article, contact the *Wisconsin Medical Journal* at 866.442.3800 or e-mail wmj@wismed.org.

© 2009 Wisconsin Medical Society