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## Pharmacists' Right of Conscience: Strategies for Showing Respect for Pharmacists' Beliefs While Maintaining Adequate Care for Patients

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# PHARMACISTS' RIGHT OF CONSCIENCE: STRATEGIES FOR SHOWING RESPECT FOR PHARMACISTS' BELIEFS WHILE MAINTAINING ADEQUATE CARE FOR PATIENTS

## I. INTRODUCTION

David Scimio is a pharmacist at a grocery store in Chicago.<sup>1</sup> He believes that life begins at conception, and therefore does not wish to dispense emergency contraceptives, commonly known as the "morning after pill."<sup>2</sup> His employer willingly accommodated this belief by permitting him to transfer patients seeking this type of medication; Scimio was able to refer patients to another pharmacy less than 500 yards away.<sup>3</sup> However, on April 1, 2005, Rod Blagojevich, the Governor of Illinois, overrode this understanding between Scimio and his employer by issuing an emergency rule requiring all pharmacies to dispense emergency contraceptives "without delay."<sup>4</sup> The impetus of the rule was a report of pharmacists in downtown Chicago declining to fill two prescriptions for emergency contraception based upon conscientious reasons.<sup>5</sup>

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<sup>1</sup> E-mail from *Defender Online*, Center for Law and Religious Freedom, clfr@christianlegalsociety.org (Apr. 22, 2005). *Defender Online* is the e-mail newsletter of the Christian Legal Society's Center for Law and Religious Freedom.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 29 Ill. Reg. 5586 (Apr. 1, 2005). Although the rule applies to pharmacies rather than pharmacists as individuals, pharmacies will no longer be able to give their pharmacists the power to refer patients to other pharmacies, and pharmacists like Scimio will be forced to dispense emergency contraception if no one else is on duty who does not have a moral objection to dispensing the drugs. See *infra* notes 91-98 and accompanying text. The original version of the rule is located at 29 Ill. Reg. 5586, but it has since been amended. The current version is found at ILL. ADMIN. CODE tit. 68, § 1330.91 (2006).

<sup>5</sup> *Freedom of Conscience for Small Pharmacies: Hearing Before the H. Small Business Comm.*, 109th Cong. 7 (2005) [hereinafter *Hearing*] (statement of Sheila Nix, Senior Advisor to the Governor of Illinois). In each case, the woman was asked to come back a few hours later when a different pharmacist would be on duty. *Id.* at 7. In response to the Illinois emergency rule, the United States House Committee on Small Business conducted a hearing to consider the effects that this type of law is having and could potentially have on small businesses. *Id.* The Committee heard testimony from Luke Vander Bleek, an Illinois pharmacist who is challenging the new rule; Sheila Nix, the senior advisor to the Governor of Illinois; Michael Patton, the executive director of the Illinois Pharmacists Association; Linda Garrelts MacLean, who spoke on behalf of the American Pharmacists Association; and Megan Kelly, an Illinois resident who experienced a pharmacist refusal. Their viewpoints will be referred to throughout this Note, as they provide real world examples of how people have responded to the issue of duty-to-dispense legislation.

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To date, Illinois is the only state to adopt a rule or law explicitly requiring pharmacies to dispense medications with which they may have moral objections.<sup>6</sup> On the other hand, four states have enacted legislation specifically protecting pharmacists' rights of conscience, and many other states have considered similar legislation.<sup>7</sup> In fact, this type of legislation dates back to the 1970s, when most states enacted some sort of legislation protecting rights of conscience in response to the Supreme Court decision in *Roe v. Wade*.<sup>8</sup> However, the Food and Drug Administration's ("FDA") approval of drugs for use as emergency contraception has focused attention on whether pharmacists are protected by this legislation.<sup>9</sup>

This Note will discuss ways in which states can protect the consciences of their pharmacists while still providing adequate access to medications, using the current controversy over emergency

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<sup>6</sup> National Women's Law Center, *Pharmacy Refusals 101* (Aug. 2005), available at [http://www.nwlc.org/pdf/8-05Update\\_PharmacyRefusal101.pdf](http://www.nwlc.org/pdf/8-05Update_PharmacyRefusal101.pdf) [hereinafter *Pharmacy Refusals 101*]. However, bills have been introduced in other states and in Congress that would impose a duty on pharmacists to fill valid prescriptions that are not contraindicated. Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies that Won't Sell Emergency Contraception*, GUTTMACHER REPORT ON PUB. POL'Y 10-11 (Aug. 2005), available at <http://www.guttmacher.org/pubs/tgr/08/3/gr080310.pdf>. In addition, Massachusetts has a law requiring pharmacies to provide all commonly prescribed medications. *Women Sue Wal-Mart over Contraception*, BUFF. NEWS, Feb. 2, 2006, at A5 [hereinafter *Women Sue Wal-Mart*]. Three Massachusetts women recently filed suit against Wal-Mart, arguing that the store has violated this law by failing to carry emergency contraception. *Id.* Wal-Mart only carries emergency contraception in its Illinois stores. *Id.* A new California law going into effect on January 1, 2006 would require pharmacists to dispense any legally prescribed drug. CAL. BUS. & PROF. CODE § 733 (West 2006). There are three exceptions to this requirement: the pharmacist believes the prescription is contrary to law or would cause a harmful interaction, the drug is not in stock, or the pharmacist has an ethical, moral, or religious objection. *Id.* Pharmacists must notify their employers which drugs they have objections to. *Id.* However, "undue hardship" of the employer may override the pharmacist's objection. *Id.* If "undue hardship" is interpreted similarly to the same phrase in Title VII, the net effect of this law will likely be that pharmacists will be required to dispense all legally prescribed medications. See *infra* notes 68-71.

<sup>7</sup> Guttmacher Institute, *State Policies in Brief: Refusing To Provide Health Services* (Aug. 1, 2005), available at <http://www.guttmacher.org/statecenter/spibs/index.html> [hereinafter *State Policies in Brief*]; see also *Pharmacy Refusals 101*, *supra* note 6 (listing states that have introduced legislation to protect pharmacists). Arkansas, Georgia, Mississippi, and South Dakota have conscience clauses that specifically protect pharmacists. See *infra* notes 100-12 and accompanying text.

<sup>8</sup> Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 225 (2002); see also *State Policies in Brief*, *supra* note 7 (providing details on which states have adopted conscience clause legislation and who is covered).

<sup>9</sup> Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding To Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002).

contraception as a framework for the discussion.<sup>10</sup> Part II discusses the history of right of conscience legislation and compares the protections currently existing under state law.<sup>11</sup> Part III demonstrates that Supreme Court precedent does not require a duty to dispense emergency contraception and suggests alternatives that accommodate the interests of all parties.<sup>12</sup> Finally, Part IV provides a proposed statute that would resolve these issues.<sup>13</sup>

## II. THE CURRENT LAW REGARDING EMERGENCY CONTRACEPTION

This Part provides background information on emergency contraception and relevant laws regarding contraception and pharmacists' rights. Emergency contraception may or may not cause an abortion, depending on a person's judgment as to when life begins.

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<sup>10</sup> Although contraception and emergency contraception are the primary focus in the current debate over pharmacists' rights and duties, they are not the only type of drug to which pharmacists may have moral objections. For example, Oregon legalized assisted suicide through its Death With Dignity Act, and as a result, pharmacists in Oregon may be called upon to dispense drugs for use in assisted suicide. William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & L. 1, 13 (1996). The Death With Dignity Act states that health care providers shall not be subject to disciplinary action for failure to participate in assisted suicide. OR. REV. STAT. §§ 127.800-127.897 (2003). Thus, pharmacists appear to be covered by this provision, but it is not clear whether or not retail pharmacies would be protected. Alan Meisel, *Pharmacists, Physician-Assisted Suicide, and Pain Control*, 2 J. HEALTH CARE L. & POL'Y 211, 235 (1999). However, for pharmacists to assert their rights of conscience, they must know that the prescribed drugs are intended for assisted suicide. *Id.* at 231. While disclosing the intended use may raise concerns about patient confidentiality, there are legitimate reasons for pharmacists to know the prescription's intended use. *Id.* at 230-31. When a doctor prescribes drugs to a patient for the purpose of committing suicide, the prescription is generally a lethal dose of a drug that is normally used for pain relief. *Id.* at 231. Pharmacists are responsible for checking the dosage prescribed. *Id.* When pharmacists receive a prescription for a lethal dose of a drug, they cannot know whether the prescription is erroneous unless they know the intended use. *Id.* If in fact the dose is intended to be lethal, there may be additional information that the pharmacist may be obligated to give the patient, such as how to take the drug so that it will have the intended effect. *Id.* at 232. Oregon is the only state to have legalized assisted suicide, although initiatives have been introduced in other states. Allen & Brushwood, *supra*, at 11. However, most conscience clauses apply primarily to abortion (and sometimes to contraception). Meisel, *supra*, at 233-234. Therefore, if assisted suicide were legalized in other states, pharmacists may be left vulnerable. This remains a possibility since the Supreme Court recently upheld the Oregon Death With Dignity Act. *See Gonzales v. Oregon*, 126 S. Ct. 904 (2006). The Attorney General attempted to proscribe assisted suicide through the federal Controlled Substances Act, but the Court ruled that the federal Act does not give the Attorney General that authority. *Id.*

<sup>11</sup> *See infra* notes 14-127 and accompanying text.

<sup>12</sup> *See infra* notes 128-262 and accompanying text.

<sup>13</sup> *See infra* notes 263-87 and accompanying text.

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Accordingly, Part II.A describes emergency contraception and its possible effects.<sup>14</sup> Whether emergency contraception is considered abortion or contraception, it would appear to be constitutionally protected either under the Supreme Court's abortion or contraception precedent.<sup>15</sup> Part II.B discusses the history of conscience clause legislation and explains the current scope of the constitutional rights to abortion and contraception.<sup>16</sup> Part II.C provides background information on the practice of pharmacy and how pharmacists might protect themselves against civil, disciplinary, or discriminatory action in the absence of conscience clause legislation.<sup>17</sup> Although some states have enacted conscience clause legislation to protect pharmacists, most states have no specific legislation on this issue.<sup>18</sup> Part II.D gives an overview of the states' current stances on rights of conscience.<sup>19</sup> Finally, Part II.E discusses the framework for analyzing the constitutionality of laws requiring pharmacists to dispense medications to which they are morally opposed.<sup>20</sup>

A. *Emergency Contraception and Its Effects*

Emergency contraception is controversial because it may or may not cause an abortion.<sup>21</sup> Emergency contraception is contraception that may be taken up to 120 hours after unprotected intercourse or when regular contraception has failed.<sup>22</sup> It has technically been available for over twenty-five years because many common contraceptive pills can be used for that purpose if taken in large enough doses.<sup>23</sup> However, no product

<sup>14</sup> See *infra* notes 21-31 and accompanying text.

<sup>15</sup> Access to both abortion and contraception are constitutionally protected. See *infra* notes 32-56 and accompanying text.

<sup>16</sup> See *infra* notes 32-56 and accompanying text.

<sup>17</sup> See *infra* notes 57-81 and accompanying text.

<sup>18</sup> See *State Policies in Brief*, *supra* note 7.

<sup>19</sup> See *infra* notes 82-112 and accompanying text.

<sup>20</sup> See *infra* notes 113-27 and accompanying text.

<sup>21</sup> See *infra* notes 25-26 and accompanying text.

<sup>22</sup> Deborah Friedman, Planned Parenthood, *Refusal Clauses: A Threat to Reproductive Rights* (Dec. 2004), available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-041217-refusal-reproductive.xml>. Although emergency contraception may be taken up to 120 hours after unprotected intercourse, it is more effective when taken sooner. *Id.*

<sup>23</sup> Planned Parenthood, *Emergency Contraception* (June 2004), available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/ec/fact-emergency-contraception.xml> [hereinafter *Emergency Contraception*]. Emergency contraception is less effective than pre-coital methods of contraception. *Id.* Emergency contraception can also take the form of a copper-releasing intrauterine device ("IUD"); however, the IUD is not recommended for all women. *Id.* In addition, emergency contraception has sometimes been used to stop severe hemorrhaging, which is another

was specifically labeled and marketed for emergency contraception until the FDA approved Preven in 1998, followed by Plan B in 1999.<sup>24</sup>

Emergency contraceptive pills can produce one or more of the following effects: (1) delaying or inhibiting ovulation; (2) inhibiting fertilization by altering tubal transport of sperm and/or ova; or (3) inhibiting implantation of a fertilized egg in the uterine lining.<sup>25</sup> Therefore, if one judges that life begins when an egg is fertilized, emergency contraception can be deemed to have the power to cause an abortion.<sup>26</sup> However, because the FDA has adopted the view that pregnancy begins when a fertilized egg is implanted in the uterine lining, and has defined abortion as ending pregnancy, drugs such as Plan B and Preven are considered emergency contraception rather than abortifacients.<sup>27</sup>

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reason that people have advocated duty-to-fill legislation. *Hearing, supra* note 5, at 29 (statement of Sheila Nix). However, proponents of this type of legislation cite no evidence, statistical or anecdotal, that pharmacists would be unwilling to dispense emergency contraception for the purpose of stopping hemorrhaging. *Id.*

<sup>24</sup> Donald W. Herbe, Note, *The Right To Refuse: A Call for Adequate Protection of a Pharmacist's Right To Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 80 (2002). "Off-label" use of approved medications as emergency contraception is legal and was declared safe and effective by the FDA in 1997. *Emergency Contraception, supra* note 23.

<sup>25</sup> *Emergency Contraception, supra* note 23. Sources disagree on how likely emergency contraception is to effect implantation. *Compare Emergency Contraception, supra* note 23 (citing studies finding that emergency contraception is more likely to inhibit ovulation), with Family Policy Network, *Pro-Family Group Calls on Attorney General To Correct Opinion* (May 16, 2003), available at <http://familypolicy.net/va/?p=134> (citing text indicating that emergency contraception usually prevents implantation). The text cited by the Family Policy Network, *supra*, states, "Ovarian hormones (estrogen) taken in large doses within 72 hours after sexual intercourse usually prevent implantation of the blastocyst, probably by altering tubal motility, interfering with corpus luteum function, or causing abnormal changes in the endometrium. These hormones prevent implantation, not fertilization."

<sup>26</sup> See Herbe, *supra* note 24, at 79-80 (explaining why the label "emergency contraception" is conclusory and does not resolve the debate over whether the drug causes an abortion).

<sup>27</sup> Heather M. Field, Note, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN'S L.J. 141, 188 (2000). For example, in describing how Plan B works, the FDA has stated:

Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation). If a fertilized egg is implanted prior to taking Plan B, Plan B will not work.

FDA Center for Drug Evaluation and Research, *FDA's Decision Regarding Plan B: Questions and Answers* (May 7, 2004), available at <http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm> [hereinafter *FDA's Decision*]. By saying that Plan B works to prevent

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More specifically, drugs labeled as emergency contraception differ from abortifacients, such as RU-486, in that abortifacients can remove a fertilized egg from the uterine lining, but emergency contraceptives cannot.<sup>28</sup> Additionally, abortifacients are not sold in pharmacies.<sup>29</sup> However, several states have authorized pharmacists to prescribe emergency contraception themselves, thus allowing women to obtain access to emergency contraception without ever seeing a doctor.<sup>30</sup> In addition, emergency contraception has recently been made available to adults over the counter.<sup>31</sup>

B. *The History of Conscience Clause Legislation and the Current Scope of the Constitutional Rights to Abortion and Contraception*

While its characterization is not clear, emergency contraception likely fits somewhere within the Supreme Court's precedent on abortion or contraception.<sup>32</sup> These precedents inspired legislators to adopt

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pregnancy, while acknowledging that it may prevent implantation of a fertilized egg, the FDA has made a policy decision that pregnancy begins after implantation. *Id.* The AMA has also adopted the position that pregnancy begins at implantation, as have many medical dictionaries. Herbe, *supra* note 24, at 86.

<sup>28</sup> Herbe, *supra* note 24, at 79. The FDA approved the drug known as RU-486 or mifepristone in 2000 for use as an abortifacient. *Id.* at 78. Mifepristone may have other uses, but the only FDA-approved use is as an early pregnancy abortifacient. *Id.* at 78-79. It may be prescribed during the first forty-nine days after a woman's last menstrual cycle. *Id.* at 82.

<sup>29</sup> *Id.* Doctors distribute the drug directly to patients. *Id.*

<sup>30</sup> *Hearing, supra* note 5, at 64 (statement of Linda Garrelts MacLean, Member, American Pharmacists Assoc.). Pharmacists in Alaska, California, Hawaii, Maine, New Hampshire, New Mexico, and Washington have the authority to prescribe and dispense emergency contraception. *Id.* Other states, including Illinois, Kentucky, Maryland, Massachusetts, New Jersey, New York, Oregon, Texas, and Vermont, have also considered giving pharmacists this authority. *Id.*

<sup>31</sup> Jim Ritter, *ABC's of Plan B: 'Morning-after' Pill Available in Drugstores Next Week*, CHI. SUN-TIMES, Nov. 8, 2006, at 3. While making emergency contraception available over the counter to adults may alleviate the conflict between patients and pharmacists who do not want to dispense the drugs, there are still serious concerns about emergency contraception's appropriateness for over the counter status for minors. See JULIE WHEELAND, POPULATION RESEARCH INST., UNDER THE TABLE: WHY THE U.S. FOOD AND DRUG ADMINISTRATION SHOULD NOT APPROVE THE OVER-THE-COUNTER DISTRIBUTION OF MORNING AFTER PILLS (2004), available at [http://www.pop.org/under\\_the\\_table.pdf](http://www.pop.org/under_the_table.pdf). Wheeland argues that claims concerning emergency contraception's ability to prevent abortions are unproven, studies indicate that women of all ages have trouble comprehending appropriate use of emergency contraception based on the product's label, there are potential medical safety issues, and risks to adolescents have not been adequately studied. *Id.*

<sup>32</sup> See *supra* notes 25-26 and accompanying text (describing the possible effects of emergency contraception).

conscience clauses.<sup>33</sup> In *Roe v. Wade*, the Court first recognized a qualified right to abortion as an extension of the right to privacy.<sup>34</sup> Due to concerns about how this ruling would affect the medical profession, Congress enacted the Health Programs Extension Act, which protects a doctor's decision not to perform abortions.<sup>35</sup> This Act makes clear that the receipt of federal funding under the Public Health Service Act or the Community Mental Health Centers Act cannot be conditioned on an individual's or an entity's willingness to provide abortion or sterilization services.<sup>36</sup> The Act further forbids entities that receive these funds from

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<sup>33</sup> Holly Teliska, Note, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229 (2005).

<sup>34</sup> *Roe v. Wade*, 410 U.S. 113, 162 (1973). *Roe* attempted to balance the interests of pregnant women and the state by laying out a trimester framework. *Id.* at 164-65. During the first trimester, the decision to have an abortion was left to women and their doctors. *Id.* at 164. During the second trimester, the government was permitted to regulate abortion in a way that advanced maternal health and safety concerns. *Id.* During the third trimester, the government could choose to proscribe all abortions that were not necessary to protect the life or health of the mother. *Id.* at 164-65. In *Planned Parenthood of Se. Pa. v. Casey*, the Court dropped the trimester framework. 505 U.S. 833, 878 (1992). The Court permitted the government to regulate abortion from the beginning of the pregnancy on, which is now allowed in the interest of the fetus as well as the mother, but the government may not proscribe any abortion until after viability. *Id.* at 878-79. The Court still requires the government to permit abortions that are necessary to protect the health and safety of the mother even after viability. *Id.*

<sup>35</sup> Relevant portion codified at 42 U.S.C. § 300a-7 (2000). The Public Health Service Act was originally enacted in 1944 to create the office of the Surgeon General, the National Institute of Health, the Bureau of Medical Services, and the Bureau of State Services. Public Health Service Act, ch. 373, 58 Stat. 682 (1944). Since then, there have been many amendments and additions to the Public Health Service Act authorizing the federal government to make various grants, contracts, and loans relating to health care services. See 42 U.S.C. §§ 201 to 300hh-13 (2000 & Supp. 2002). The provision's Community Mental Health Centers Act have since been superseded or repealed. See 42 U.S.C. §§ 2681-2697b.

<sup>36</sup> *Id.* § 300a-7(b). Section (b) states:

The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require -

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or  
(2) such entity to -

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

discriminating in employment on the basis of the employee's willingness or unwillingness to participate in abortion or sterilization procedures.<sup>37</sup>

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(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

*Id.*

<sup>37</sup> *Id.* § 300a-7(c). Section (c) states:

(1) No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the [date of enactment of this Act] June 18, 1973, may -

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

(2) No entity which receives after [the date of enactment of this paragraph] July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the [Secretary of Health, Education and Welfare] Secretary of Health and Human Services may-

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

*Id.*

Forty-six states followed the federal government's lead and enacted their own legislation granting various protections for health care providers.<sup>38</sup>

Subsequently, the Supreme Court issued other rulings clarifying that the scope of the right to abortion only entails freedom from unduly burdensome government interference rather than an affirmative duty on the government to provide abortions or to make them more accessible.<sup>39</sup> The first of these cases is *Beal v. Doe*, in which the Court held that the Medicaid Act does not require states to fund abortions that are not medically necessary.<sup>40</sup> The Court further ruled in *Maher v. Roe* that states

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<sup>38</sup> See ALASKA STAT. § 18.16.010(b) (2004); ARIZ. REV. STAT. § 36-2151 (2003); ARK. CODE ANN. § 20-16-304 (2000); CAL. HEALTH & SAFETY CODE § 123420 (West 1996); COLO. REV. STAT. ANN. § 18-6-104 (West 2004); DEL. CODE ANN. tit. 24, § 1791 (1997); FLA. STAT. ANN. § 390.0111(8) (West 2002); GA. CODE ANN. § 16-12-142 (2006); HAW. REV. STAT. § 453-16(d) (1993); IDAHO CODE ANN. § 18-612 (2004); 745 ILL. COMP. STAT. 70/3-4 (2004); IND. CODE §§ 16-34-1-3 to 7 (1997); IOWA CODE § 146.1 (1997); KAN. STAT. ANN. § 65-443 (2002); KY. REV. STAT. ANN. § 311.800 (West 2002); LA. REV. STAT. ANN. §§ 40:1299.31-32 (2001); ME. REV. STAT. ANN. tit. 22, §§ 1591-1592 (2004); MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2005); MASS. GEN. LAWS ch. 112, § 12I (2003); MICH. COMP. LAWS §§ 333.20181- 333.20184 (2001); MINN. STAT. ANN. §§ 145.414, 145.42 (West 2005); MISS. CODE ANN. § 41-107-1 to 13 (2005); MO. REV. STAT. § 197.032 (West 2004); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. §§ 28-337 to 341 (1995); NEV. REV. STAT. ANN. § 632.475 (LexisNexis 2004); N.J. STAT. ANN. §§ 2A:65A-1 to 3 (West 2000); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2004); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); N.C. GEN. STAT. § 14-45.1(e)-(f) (2003); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (West 2004); OKLA. STAT. ANN. tit. 63, § 1-741 (West 2004); OR. REV. STAT. §§ 435.475, 435.485 (2003); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000); R.I. GEN. LAWS § 23-17-11 (2001); S.C. CODE ANN. §§ 44-41-40, 50 (2002); S.D. CODIFIED LAWS § 36-11-70 (2004); TENN. CODE ANN. § 39-15-204 (2003); TEX. OCC. CODE ANN. §§ 103.001-103.004 (Vernon 2004); UTAH CODE ANN. § 76-7-306 (2003); VA. CODE ANN. § 18.2-75 (2004); WASH. REV. CODE ANN. § 48.43.065 (West 1999); W. VA. CODE ANN. § 16-11-1 (LexisNexis 2001); WIS. STAT. § 253.09 (2004); WYO. STAT. ANN. §§ 35-6-105, 106 (2005). For a summary of the provisions contained in these laws, see *State Policies in Brief*, *supra* note 7. Conscience clause legislation has centered on the problem of health care providers who do not want to dispense controversial drugs; however, the converse problem may also occur: a health care provider may feel a duty to provide controversial drugs. See Allen & Brushwood, *supra* note 10, at 16-17 (discussing alternatives for protecting professionals who feel a responsibility to dispense controversial drugs, particularly when the professional's employer has decided not to provide the drugs).

<sup>39</sup> See *Beal v. Doe*, 432 U.S. 438, 445-46 (1977). In *Beal*, Justice Powell wrote that the state "has a valid and important interest in encouraging childbirth," which exists "throughout the course of the woman's pregnancy." *Id.* Furthermore, "Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth." *Id.* at 446. Therefore, the Court held that the omission of nontherapeutic abortions from Medicaid funding was not unduly burdensome. *Id.*

<sup>40</sup> *Id.* at 447. The Medicaid Act requires states to "include reasonable standards ... for determining eligibility for and the extent of medical assistance under the plan." *Id.* at 444. The Court held that it was not unreasonable for the state to exclude abortions that are not

do not have to issue Medicaid benefits for abortions even if they are providing funds for childbirth.<sup>41</sup> Although denial of Medicaid benefits makes it more difficult or even impossible for indigent women to have abortions, the Court held that the failure to fund abortions did not place an undue burden on the right to abortion because the government had not created the obstacle.<sup>42</sup> The Court held that the government is prohibited from creating undue burdens on the right to abortion; however, it is not responsible for removing obstacles not of its own making.<sup>43</sup> Furthermore, the Court acknowledged that the government was permitted to make a value judgment in favor of childbirth and to express that judgment through the allocation of benefits.<sup>44</sup>

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medically necessary. *Id.* at 445. This is also how the Department of Health, Education, and Welfare, the agency charged with the administration of the statute, interpreted the statute. *Id.* at 447. Furthermore, given the fact that most states banned abortions that were not medically necessary at the time the statute was enacted, the Court believed that Congress did not intend to *require* funding of abortions, but simply to *permit* them. *Id.*

<sup>41</sup> *Maier v. Roe*, 432 U.S. 464, 480 (1977). The Court held that providing Medicaid funds for childbirth, but not for abortion, did not discriminate against any suspect class. *Id.* at 470. Rejecting the Equal Protection argument, the Court turned to the question of whether or not the policy impinged on a fundamental right. *Id.* at 471.

<sup>42</sup> *Id.* at 474. The Court was considering the constitutionality of a Connecticut regulation that only provided Medicaid benefits for abortions if they were medically necessary and during the first trimester. *Id.* Writing for the majority, Justice Powell stated that the regulation in question placed no obstacles in the pregnant woman's "path to an abortion." *Id.* A woman seeking an abortion is not disadvantaged by the fact that the state has chosen to fund childbirth, but merely remains in the same position she would be in in the absence of the regulation. *Id.* The state in this case "has imposed no restriction on access to abortions that was not already there." *Id.*

<sup>43</sup> *Id.* at 474-75. Justice Powell wrote:

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

*Id.* at 475-76.

<sup>44</sup> *Id.* at 474. Congress later went a step further, amending the Medicaid Act to prohibit the use of Medicaid funds for abortions unless the mother is the victim of rape or incest, or the abortion is necessary to protect the life of the mother. *Harris v. McRae*, 448 U.S. 297, 302 (1980). The Court determined the constitutionality of this amendment (known as the Hyde Amendment) in *Harris*. *Id.* at 297. The controversy in *Harris* centered around the fact that the amendment did not allow funding for abortions that are necessary to protect the health of the mother, although the Court has consistently protected abortions that are necessary for the mother's health. *Id.* at 301. The Court upheld the amendment, thus determining that the government need not fund even those abortions that have been given almost complete protection by the Court. *Id.* at 317-18. Therefore, *Harris* further clarified that the government has no affirmative duty to make abortions available. *Id.* at 318. This notion was reaffirmed in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which

The Court has also issued rulings that defined the ways in which the government may regulate abortion and indicated that the government may express a preference for childbirth.<sup>45</sup> One way in which a state might express its preference for childbirth is through informed consent requirements.<sup>46</sup> Permissible informed consent requirements include the requirement of a waiting period before obtaining an abortion and the requirement that the woman be provided with certain information about abortion.<sup>47</sup> The government may also require a minor seeking an abortion to notify or obtain the consent of her parents.<sup>48</sup> These regulations are permissible because the Court has expressly stated that there is not a right to abortion on demand and that the government may attempt to persuade a woman not to choose abortion.<sup>49</sup>

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upheld a Missouri law which prohibited the use of public facilities and employees in abortions not necessary to save the mother's life. *See also* *Poelker v. Doe*, 432 U.S. 519 (1977). An indigent woman brought suit under 42 U.S.C. § 1983 against a city-owned hospital that would not perform an abortion for her. *Id.* at 519. The Court determined that the city was not required to fund abortions for the same reasons set out in *Maher v. Roe*. *Id.* at 521. The Court also noted that it made no difference that abortions were not funded because of the mayor's personal opposition to abortion. *Id.*

<sup>45</sup> *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (upholding a twenty-four hour waiting period, but striking down provisions requiring a woman to notify her husband before obtaining an abortion); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (holding that minors can be required to obtain the permission of their parents before obtaining an abortion if there is a judicial bypass).

<sup>46</sup> *Casey*, 505 U.S. at 882, 886. In *Casey*, the Court upheld a twenty-four hour waiting period, holding that the delay did not amount to a substantial obstacle to obtaining an abortion. *Id.* at 886. The Court also upheld the provision of "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." *Id.* at 882. The waiting period was upheld although it may make obtaining an abortion more expensive and more difficult for women who have to travel long distances to visit a doctor. *Id.* The Court has also upheld a forty-eight hour waiting period for minors. *See* *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

<sup>47</sup> *See supra* note 46.

<sup>48</sup> *Bellotti*, 443 U.S. at 649. Although adult women may not be required to obtain the consent of their husbands before obtaining an abortion, minors may be required to obtain permission because they may not be able to make informed decisions that are in their best interest. *Id.* at 634. Furthermore, in addition to the interest that the state may have in promoting childbirth, the parents also have a fundamental right to direct the upbringing of their children. *Id.* at 637. However, the Court recognized that there might be instances when a minor is mature enough to choose abortion or when it is nonetheless in the minor's best interest. *Id.* at 643-44. Therefore, states that require consent or notice must also provide the opportunity for a judicial bypass. *Id.* at 643-45.

<sup>49</sup> *See Casey*, 505 U.S. at 834. In an opinion authored by Justices O'Connor, Kennedy, and Souter, the Court described the states' power to express opinions on abortions, conveying that a woman has a "right to make the ultimate decision, not a right to be insulated from all others in doing so." *Id.* at 877. If a regulation merely creates "a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the

Although the powers and duties of the government have been clarified since *Roe v. Wade*, the Court has not taken a stance on when life begins.<sup>50</sup> In *Roe*, the Court acknowledged that experts in medicine, philosophy, and theology have been unable to agree upon when life begins, and the Court therefore refused to adopt its own definition of the beginning of life.<sup>51</sup> Because there is no definition of the beginning of life

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life of the unborn," and does not amount to an undue burden, then it is permissible. *Id.* The opinion further states that "a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal." *Id.* at 878. Regulations designed to foster the health of the women seeking an abortion are also valid if they do not create undue burdens. *Id.* After rejecting the notion that informed consent requirements place an undue burden on the right to abortion, the opinion states, "We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand." *Id.* at 887.

<sup>50</sup> The Court has ruled, however, that an unborn child is not a person within the meaning of the Fourteenth Amendment. *Roe*, 410 U.S. at 158. Justice Blackmun wrote:

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. . . . [T]ogether with our observation that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.

*Id.* at 157-58.

<sup>51</sup> *Id.* at 159. The Court went on to describe various attitudes toward the definition of the beginning of life:

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that

for purposes of constitutional law, it is unclear whether the Court would apply abortion or contraception precedent to emergency contraceptives.<sup>52</sup>

However, it is also not clear that the distinction would make a difference if the Court were to consider whether or not the government or third parties have a duty to provide emergency contraception.<sup>53</sup> The choice to use contraception has been recognized as a fundamental right, and therefore appears to be broader in scope than the right to abortion, which has been labeled only a liberty interest.<sup>54</sup> While the scope of these

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have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians.

*Id.* at 160-61.

<sup>52</sup> See *id.* at 159.

<sup>53</sup> The Court has been fairly consistent in how it handles the government's duty to subsidize the exercise of fundamental rights. See *infra* note 56. In addition, the Constitution does not constrain individuals or business entities. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 401-02 (Aspen Law & Bus. 2001). "The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does not have to comply with the Constitution . . . [U.S. v. Stanley, 109 U.S. 3 (1883)] is generally regarded as the initial articulation of the state action doctrine." *Id.*

<sup>54</sup> The right to use contraception was first recognized in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Prohibition of contraception was considered a violation of the privacy of married couples. *Id.* at 485-86. The Court reasoned that a law prohibiting contraceptives could not be enforced without allowing the police "to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives." *Id.* at 485. In *Eisenstadt v. Baird*, the Court determined that the Equal Protection Clause required that single people be permitted to use contraception as well. 405 U.S. 438, 454 (1972). The Court reasoned that the right to use contraception was an individual right. *Id.* at 453. While *Griswold* focused on the privacy interests of a married couple, the *Eisenstadt* Court held that a marital couple was not an independent entity, but "an association of two individuals each with a separate intellectual and emotional makeup." *Id.* Therefore, the Court reasoned that "If the right of

rights may be different, that does not necessarily mean that the right to contraception would translate into an affirmative duty upon the government or other parties.<sup>55</sup> Fewer cases have dealt with contraception, so the Court has not specifically ruled on the duty of the government or other parties to provide contraceptives; however, the government has not generally been required to subsidize the exercise of fundamental rights and liberty interests unrelated to access to the courts.<sup>56</sup>

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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.” *Id.*

<sup>55</sup> *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (comparing abortion and contraception rights).

<sup>56</sup> *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 550 (1983) (rejecting a First Amendment challenge to a provision of federal tax law conditioning tax exempt status on the requirement that the organization not participate in lobbying or political activities). Writing for a unanimous Court, Justice Rehnquist wrote:

We have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo* upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Harris v. McRae* and *Maher v. Roe* considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.

The reasoning of these decisions is simple: “although government may not place obstacles in the path of a [person’s] exercise of . . . freedom of [speech], it need not remove those not of its own creation.” Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution “does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.” As we said in *Maher*, “[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law . . .” Where governmental provision of subsidies is not “aimed at the suppression of dangerous ideas,” its “power to encourage actions deemed to be in the public interest is necessarily far broader.”

*Id.* at 549-50. The government has sometimes been required to subsidize access to the courts. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that the government must waive court fees for indigent persons seeking a divorce); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the government must appoint counsel for indigent criminal defendants). However, even in this area, the Court has not always required the government to subsidize citizen’s rights. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the government does not have to appoint counsel to represent parents in cases concerning termination of their parental rights); *United States v. Kras*, 409 U.S. 434 (1973) (holding that the government does not have to waive bankruptcy filing fees for

C. *The Practice of Pharmacy*

Pharmacists are currently the most accessible health care providers.<sup>57</sup> Their practice is regulated through state statutes and regulations that outline the duties of pharmacists, which generally include screening for drug-drug interactions, drug-food interactions, drug-allergy interactions, incorrect dosage, incorrect duration, and clinical abuse or misuse.<sup>58</sup> These regulations also designate the actions for which a pharmacist may

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indigent persons). *Boddie* might be interpreted to mean that where the government provides the exclusive means for enjoying a constitutional right, the government must take steps to ensure that indigent individuals may still exercise that right. *See Boddie*, 401 U.S. at 382-83. Therefore, if pharmacists are viewed as state actors, one could argue that they are required to ensure adequate access to constitutionally protected products. *See id.* However, there are two problems with this analysis. One is that state licensing has not sufficed in previous cases to establish state action. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (holding that state-licensed insurers who participate in the review of worker's compensation claims are not state actors); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that a private club with a liquor license from the state is not a state actor). The other is that *Kras* undermined the "state monopoly" notion. 409 U.S. at 434. Although the majority opinion espoused a belief that *Kras* had remedies other than bankruptcy, this argument is fairly attenuated, and the message seems to be that the state control of the remedy is not the factor the Court is most concerned about. *See id.* at 453-55 (Stewart, J., dissenting).

<sup>57</sup> *Hearing, supra* note 5, at 60, 70 (statement of Linda Garrelts MacLean). There are more pharmacists per person than other types of health care providers. *Id.* Pharmacists provide access to thousands of types of drugs. *Id.* at 66. Like doctors, pharmacists have their own professional organizations. *Id.* at 60. The largest organization of pharmacists in the United States is the American Pharmacists Association ("APhA"). *Id.* The APhA advocates access to emergency contraception, but also asserts that pharmacists should have the right to refuse to dispense drugs to which they are morally opposed. *Id.* at 61. Naturally, the APhA endorses professionalism in exercising the right of conscience: "The pharmacist should not use their position of power to berate the patient, to share their own personal beliefs, or obstruct patient access to therapy—such as refusing to return a patient's legally valid, clinically appropriate prescription." *Id.* at 63. The APhA believes that there are alternatives to duty-to-fill legislation that would provide adequate access to emergency contraception without compromising the beliefs of pharmacists. *Id.* at 62-63. These alternatives are described in Part III.C. *See infra* notes 205-13 and accompanying text. The APhA favors giving pharmacists right of conscience protections that are similar to those already given to doctors. *Hearing, supra* note 5, at 69 (statement of Linda Garrelts MacLean, Member, American Pharmacists Assoc.). The American Medical Association ("AMA") has supported the APhA's stance that pharmacists should not be compelled to dispense drugs when they have moral objections, so long as they do not interfere with the patient's ability to gain access to those drugs. *Id.* at 68.

<sup>58</sup> *Id.* The APhA favors continued regulation at the state rather than federal level so that regulations reflect local needs. *Id.* States have pharmacy boards so that people with specialized knowledge, which legislators may lack, regulate the practice. *Id.*; *see also id.* at 65 (statement of Linda Garrelts MacLean) (describing how prescriptions may be "lawful" but still medically inappropriate).

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be disciplined.<sup>59</sup> Disciplinary measures may include revocation or suspension of a pharmacist's license or fines.<sup>60</sup>

In the absence of conscience protections commonly afforded to doctors, pharmacists may be vulnerable to civil liability, disciplinary action, and employment discrimination.<sup>61</sup> The protections that pharmacists may have against each of these actions are discussed in turn.<sup>62</sup> First, a patient who is denied service could pursue a civil negligence action against a pharmacist or pharmacy, claiming that the pharmacist failed to exercise reasonable care by refusing service.<sup>63</sup> A pharmacist who gives a good faith referral may be able to establish reasonable care, but this could be especially difficult for a pharmacist who feels morally unable to provide a referral.<sup>64</sup>

Conscientious objectors may also be concerned about disciplinary actions.<sup>65</sup> No state's pharmacy rules explicitly obligate pharmacists to fill valid prescriptions, but the possibility remains open that they would be so construed.<sup>66</sup> In fact, Wisconsin took disciplinary action against a pharmacist who did not fill or transfer a prescription for emergency contraception.<sup>67</sup>

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<sup>59</sup> Herbe, *supra* note 24, at 92.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 77-78; *See also* Allen & Brushwood, *supra* note 10, at 5-9 (describing these issues in the context of pharmacists with objections to drugs that will be used for assisted suicide). Civil liability, disciplinary action, and employment discrimination are the three primary issues addressed in the existing state legislation providing pharmacists with rights of conscience. *See* ARK. CODE ANN. § 20-16-304 (2000); GA. CODE ANN. § 16-12-142 (2006); MISS. CODE ANN. §§ 41-107-1 to 13 (2005); S.D. CODIFIED LAWS § 36-11-70 (2004).

<sup>62</sup> *See infra* notes 63-81 and accompanying text.

<sup>63</sup> Herbe, *supra* note 24, at 90-91 (theorizing that courts may analogize a refusal to fill a prescription for emergency contraception to inaccurate filling of a prescription for contraception, because in both cases the patient does not receive the desired medication and is exposed to pregnancy or increased risk of pregnancy).

<sup>64</sup> *Id.* at 88-89.

<sup>65</sup> *Id.* at 92-93. As used in this Note, the term "conscientious objector" is not intended to be a term of art, but is simply used generically to refer to the situation in which a pharmacist is morally opposed to dispensing a medication.

<sup>66</sup> *Id.* at 93.

<sup>67</sup> In the Matter of the Disciplinary Action Proceedings Against Neil T. Noesen (2004) (Case No. LS-0310091-PHM), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>. Pharmacist Neil Noesen refused to fill a prescription for an oral contraceptive because he does not believe in the use of contraception. *Id.* Noesen also refused to transfer the prescription, and he had not properly notified his employer that he had conscientious objections to the use of contraceptives. *Id.* As a result, Noesen was ordered to take classes in ethics for pharmacists. *Id.*

Conscientious objectors might also be susceptible to employment discrimination, in which case, the pharmacist might seek protection under Title VII of the Federal Civil Rights Act of 1964 ("Title VII").<sup>68</sup> Title VII forbids employers from refusing to hire, discharging, or otherwise discriminating against an individual because of the individual's religion.<sup>69</sup> The employer is excused from liability if the employer can demonstrate that it is unable to reasonably accommodate the employee's religious observance without undue hardship to the employer's business.<sup>70</sup> The Supreme Court has ruled that a cost that is more than de minimis is an undue hardship to the employer.<sup>71</sup>

The de minimis cost standard makes a Title VII claim difficult to maintain.<sup>72</sup> In *Brener v. Diagnostic Center Hospital*, the Fifth Circuit considered a Title VII claim against a hospital pharmacy that did not

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<sup>68</sup> 42 U.S.C. § 2000e to 2000e-17 (2000).

<sup>69</sup> *Id.* § 2000e-2(a). Unlawful employment practices are defined as follows:

It shall be an unlawful employment practice for an employer -

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.*

<sup>70</sup> *Id.* § 2000e(j). Title VII requires employers to make reasonable accommodations of employees' religious beliefs: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id.*

<sup>71</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Hardison was employed in TWA's maintenance and overhaul base, which needed to operate all day, every day. *Id.* at 66. He became a member of the Worldwide Church of God, and believed that he should not work on the Sabbath (sunset Friday to sunset Saturday). *Id.* at 67. Hardison reported his concerns to his manager, who agreed that he should have the Sabbath off whenever possible. *Id.* at 67-68. TWA attempted to accommodate Hardison's beliefs, but the union to which he belonged was unwilling to make exceptions to its seniority rules, which gave senior employees first choice of shifts. *Id.* at 68. The Court held that abandonment of the seniority system would be more than a de minimis burden on TWA, and that TWA should not be required to discriminate against some employees in order to give Hardison Saturdays off. *Id.* at 84-85.

<sup>72</sup> Allen & Brushwood, *supra* note 10, at 9; Herbe, *supra* note 24, at 94.

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accommodate a Jewish pharmacist who could not work on the Sabbath.<sup>73</sup> The pharmacy attempted to rearrange shifts so that the pharmacist would not have to work during the Sabbath, but stopped when it found that changing established work schedules lowered the morale of his co-workers.<sup>74</sup> The Fifth Circuit held that rearranging schedules and lowering morale constituted undue burdens.<sup>75</sup> Conscientious objectors might have similar difficulties establishing that accommodation of their beliefs are not undue burdens.<sup>76</sup>

Additionally, pharmacists who are fired because of their conscientious objections might attempt to seek relief through a common law wrongful discharge action.<sup>77</sup> A wrongful discharge action may be brought when the discharge violates public policy.<sup>78</sup> Therefore, a pharmacist cannot maintain an action for wrongful discharge unless the jurisdiction recognizes a public policy of protecting the conscience.<sup>79</sup>

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<sup>73</sup> *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982). Brener was one of five pharmacists employed by the hospital. *Id.* at 143. On weekends, one pharmacist only manned the pharmacy. *Id.* Shift assignments were allocated on a rotating basis, so that each pharmacist would have to work one out of every five weekends. *Id.* The pharmacists were free to trade shifts among themselves. *Id.*

<sup>74</sup> *Id.* at 143-44. After Brener notified his supervisor that his religion prohibited him from working on Saturdays, the supervisor intervened and directed the other pharmacists to trade shifts with Brener. *Id.* at 143. Previously, the supervisor had not intervened, but had left it up to the pharmacists themselves to arrange trades when they needed days off. *Id.* The supervisor also ordered some additional trades to accommodate Jewish holidays. *Id.* The supervisor began receiving complaints from other pharmacists, who felt that Brener was receiving special treatment. *Id.*

<sup>75</sup> *Id.* at 146-47. The Fifth Circuit relied on language from *Trans World Airlines, Inc. v. Hardison*, stating that it would be "anomalous" to conclude that making a "reasonable accommodation" of one employee's beliefs meant that the employer had to deny shift or job preferences to others. *Id.* at 146.

<sup>76</sup> *See id.* at 146-47.

<sup>77</sup> *See Allen & Brushwood, supra* note 10, at 6-7; 82 AM. JUR. 2D *Wrongful Discharge* §§ 53-64 (2003) (describing the scope of the public policy exception to at will employment).

<sup>78</sup> *Wrongful Discharge, supra* note 77, §§ 53-64.

<sup>79</sup> *Id.* The three major categories of protected employee conduct that may be protected by public policy are: "(1) exercising a statutory right or obligation; (2) refusing to engage in illegal activity; and (3) reporting criminal conduct to supervisors or outside agencies." *Id.* § 53. Consider the case of *Kalman v. Grand Union Co.*, 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982). A pharmacist managed a pharmacy within a grocery store and access to the pharmacy could not be separated from access to the store. *Id.* The store manager informed the pharmacist that the pharmacy would be closed on July 4, when the rest of the store would be open. *Id.* at 729. The pharmacist was under the impression that this was illegal, and was terminated when he protested to the pharmacy being closed while the rest of the store was open. *Id.* In a wrongful discharge suit against the store, the court held for the pharmacist, noting that the pharmacist "was not motivated by his personal values or conscience, but rather by his perception of his professional obligations," thus indicating

Even if such a policy is recognized, the employer will probably have an overriding business justification for the discharge.<sup>80</sup> As a result, conscientious objectors will not necessarily be discharged because of their beliefs, but because of the economic implications of accommodating those beliefs.<sup>81</sup>

*D. Overview of the States' Current Stances on Rights of Conscience*

Because of the weaknesses of the protections discussed in Part II.C, pharmacists and pharmacies will want to bring themselves under the protection of conscience clause legislation if possible.<sup>82</sup> Conscience clause statutes vary in coverage, with only thirteen states explicitly allowing health care providers to refuse to offer services relating to both contraception and abortion, and only four explicitly protecting pharmacists.<sup>83</sup> While few existing conscience clauses explicitly address issues relating to pharmacists or emergency contraception, some contain language that may be broad enough to cover those issues nonetheless.<sup>84</sup> Naturally, in the absence of explicit language, it is not clear whether the statutes will actually be construed to include pharmacists and pharmacies.<sup>85</sup>

Illinois is illustrative of this problem. Illinois's conscience clause, the Illinois Healthcare Right of Conscience Act, provides:

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that acting according to conscience would not form the basis for a claim of wrongful discharge. *Id.* at 729-30.

<sup>80</sup> *Wrongful Discharge*, *supra* note 77, § 181.

An employer has a recognized interest in maintaining a business in an efficient and profitable condition. What constitutes good cause for dismissal of an employee is generally a matter for an employer's good business judgment; it depends on the particular circumstances of each case and involves a balancing of the employer's interest in operating a business efficiently and profitably with the employee's interest in maintaining employment. However, an employer is not required to give the interests of the employees as much consideration as its own when it comes to financial matters.

*Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *supra* notes 61-81 and accompanying text.

<sup>83</sup> *State Policies in Brief*, *supra* note 7. The states providing rights of conscience regarding contraception are Arkansas, Colorado, Florida, Georgia, Illinois, Maine, Massachusetts, Mississippi, New Jersey, South Carolina, South Dakota, Virginia, and Washington. *Id.* These provisions vary in whether they apply to individuals or institutions and whether they apply explicitly to pharmacists and pharmacies. *Id.*

<sup>84</sup> For example, many statutes contain catchall phrases that might be construed to include pharmacists. The Illinois statute is an example. See *infra* note 95.

<sup>85</sup> See *infra* notes 89-98 and accompanying text (describing the problems in interpreting Illinois conscience clause legislation).

No person, association, or corporation, which owns, operates, supervises, or manages a health care facility shall be civilly or criminally liable to any person, estate, or public or private entity by reason of refusal of the health care facility to permit or provide any particular form of health care service which violates the facility's conscience as documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.<sup>86</sup>

"Health care" is defined as:

[A]ny phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons . . . .<sup>87</sup>

"Health care facility" as defined by the Act includes:

[A]ny public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ventures, and all other combinations of those organizations . . . .<sup>88</sup>

The language of the Illinois Healthcare Right of Conscience Act appears to be broad enough to cover pharmacies that do not wish to dispense certain medications.<sup>89</sup> A pharmacy could fall within the

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<sup>86</sup> 745 ILL. COMP. STAT. 70/9 (2004).

<sup>87</sup> *Id.* at 70/3(a).

<sup>88</sup> *Id.* at 70/3(d).

<sup>89</sup> See *supra* notes 86-88 and accompanying text. In fact, Illinois has one of the broadest conscience clauses in the nation. Dykes, *supra* note 9, at 569. The Illinois Healthcare Right

category of "dispensary" or "other institution or location wherein health care services are provided to any person," and medication is explicitly mentioned in the definition of health care.<sup>90</sup> Nevertheless, Illinois Governor Blagojevich adopted an emergency rule requiring pharmacies to dispense contraceptives "without delay" when presented with a valid prescription.<sup>91</sup> If the desired contraceptive is not in stock, the pharmacy

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of Conscience Act does contain an exception to the right of refusal when emergency medical care is required, but emergency medical care is probably limited to life-threatening situations, not simply situations where time is of the essence. *Id.* at 570-71.

<sup>90</sup> See 745 ILL. COMP. STAT. 70/3. A broad interpretation of this statute seems to be supported by the statement of public policy found within the Health Care Right of Conscience Act:

The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

*Id.* at 70/2.

<sup>91</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005). The rule reads:

(1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must either be transferred to a local pharmacy of the patient's choice or returned to the patient, as the patient directs.

(2) For the purposes of this subsection (j), the term "contraceptive" shall refer to all FDA-approved drugs or devices that prevent pregnancy.

(3) Nothing in this subsection (j) shall interfere with a pharmacist's screening for potential drug therapy problems due to therapeutic duplication, drug-disease contraindications, drug-drug interaction (including serious interactions with nonprescription or over-the-counter-drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions, or clinical abuse or misuse, pursuant to 335 ILCS 85/3(q).

*Id.* The emergency rule does not use the term "emergency contraception," but the drugs are included nonetheless because the FDA has taken the stance that drugs such as Plan B

is required to stock the drug according to its standard procedures.<sup>92</sup> The patient may only be transferred if that is what the patient prefers.<sup>93</sup> To further ensure conformity with this regulation, pharmacies are required to post a notice informing patients of their rights and instructing them on how to file complaints.<sup>94</sup>

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and Prevent only *prevent* pregnancy. See *supra* note 27 and accompanying text. Section 1330.91 only applies to retail pharmacies. ILL. ADMIN. CODE tit. 68, § 1330.91(a). While Illinois is the only state that currently has this sort of policy in effect, bills endorsing similar legislation have been introduced in a few states. Dailard, *supra* note 6, at 10. Some states, while not requiring pharmacists to fill prescriptions to which they are morally opposed, do require that pharmacists transfer the prescription. *Id.* Nevada has passed a law to this effect. 2005 Nev. Stat. 65. Although Wisconsin does not currently have any laws requiring the transfer of prescriptions, the state's pharmacy review board disciplined a pharmacist who refused to fill or transfer a birth control prescription. See *supra* note 67. While transfer may or may not be required, most states do require pharmacists who do not wish to fill a particular prescription to return the prescription to the patient if it is legally valid and is not otherwise contraindicated. *Hearing, supra* note 5, at 63 (statement of Linda Garrelts MacLean).

<sup>92</sup> ILL. ADMIN. CODE tit. 68, § 1330.91. The phrase "the pharmacy's standard procedures for ordering contraceptive drugs not in stock" has been somewhat clarified by the addition of section 3. See *Hearing, supra* note 5, at 7-8 (statement of Sheila Nix). In addition, Illinois executives have also interpreted this phrase to mean that a pharmacy that does not normally carry contraceptives at all would not have to fill a prescription for emergency contraception. *Id.* at 15 (statements of Sheila Nix and Rep. Donald Manzullo). However, a pharmacist that normally fills prescriptions for contraceptives, but not emergency contraceptives, is still subject to this rule. *Id.* at 22 (statements of Rep. Steve King and Sheila Nix). This interpretation has been justified by reliance on the FDA definition of contraceptives. *Id.*

<sup>93</sup> *Hearing, supra* note 5, at 22.

<sup>94</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(k). The notice must be on an eight and one half inch by eleven inch paper and "be clearly visible from the area at which the pharmacy intakes prescriptions." *Id.* Section 1330.91(k)(2) lays out the specific language that must be used in the notice:

IF YOU USE CONTRACEPTIVES KNOW YOUR RIGHTS.

If this pharmacy dispenses prescription contraceptives, then you have the following rights under Illinois law:

The pharmacy must dispense your prescribed contraceptives without delay, consistent with the normal timeframe for filling any other prescription.

When your contraceptive is out of stock, you have the following options: the pharmacy must cooperate with your doctor to determine a suitable alternative, order the contraceptive, or transfer the prescription to another pharmacy of your choice.

You can instruct the pharmacy to return the prescription slip to you at any time prior to dispensing.

You may file a complaint with the Department of Financial and Professional Regulation - Division of Professional Regulation through the Department's website <http://www.idfpr.com>.

*Id.*

Pharmacists as individuals also are not explicitly mentioned in the statute, but could come within the definition of “health care personnel,” who are also protected.<sup>95</sup> Governor Blagojevich has not denied that the Health Care Right of Conscience Act applies to pharmacists, but rather justifies his rule on the basis that it applies only to retail pharmacies, which have advertised themselves as being in the business of filling prescriptions.<sup>96</sup> However, the rule applies even to pharmacies that are owned and operated by a single pharmacist and to pharmacies where all the pharmacists on staff happen to have a conscientious objection.<sup>97</sup> Therefore, even if the rule is properly applied to pharmacies, it can still reach conduct of individual pharmacists, whose actions might be statutorily protected.<sup>98</sup>

Some states have taken the opposite approach from Illinois by enacting legislation that explicitly protects pharmacists.<sup>99</sup> So far only four states have enacted such legislation, although bills for similar legislation have been introduced in several other states.<sup>100</sup> Among these laws, the Mississippi statute affords pharmacists the most protection, applying broadly to health care providers, including pharmacies, pharmacists, and pharmacist employees.<sup>101</sup> It gives health care providers

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<sup>95</sup> 745 ILL. COMP STAT. § 70/3(c) (2004) defines “health care personnel” as “any nurse, nurses’ aid, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services.” A pharmacist could be considered a “professional” or “other person who furnishes, or assists in the furnishing of, health care services.” *See id.*

<sup>96</sup> *Hearing, supra* note 5, at 21-22 (statements of Rep. Steve King and Sheila Nix, advisor to the Governor of Illinois).

<sup>97</sup> *Id.* at 25 (statements of Chairman Donald A. Manzullo and Sheila Nix); *see also id.* at 36 (statements of Luke Vander Bleek, owner of a small chain of pharmacies in Illinois) (describing how all pharmacists in his pharmacies have conscientious objections to emergency contraception and how he has not been able to recruit other pharmacists to work in the rural areas where his pharmacies are located).

<sup>98</sup> *See supra* note 97.

<sup>99</sup> *See infra* notes 100-101 and accompanying text.

<sup>100</sup> *Pharmacy Refusals 101, supra* note 6. In 2005, Arizona, Arkansas, California, Georgia, Indiana, Maryland, Michigan, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wisconsin introduced bills that would permit pharmacists and/or pharmacies to refuse to dispense medications on the basis of conscientious objections. *Id.* The South Dakota bill has been enacted. *See infra* notes 106-07 and accompanying text. Similar bills were passed in Arizona and Wisconsin as well, but were vetoed by those states’ governors. *Pharmacy Refusals 101, supra* note 6.

<sup>101</sup> MISS. CODE ANN. § 41-107-3 (2005). Section 3(b) of the Mississippi Health Care Rights of Conscience Act defines “health care provider” as follows:

“Health care provider” means any individual who may be asked to participate in any way in a health care service, including, but not limited to: a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home

the right to refuse to provide any service that violates their consciences.<sup>102</sup> Therefore, the Act presumably covers any new developments in the field of medicine that may raise ethical questions, and it eliminates the confusion as to whether drugs such as Plan B and Preven fit into the category of abortion or contraception.<sup>103</sup> The Act also grants health care providers immunity from liability for exercising their rights of conscience, and it creates a cause of action when a health care provider is discriminated against for exercising the right of conscience.<sup>104</sup>

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employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of, a health care procedure.

*Id.* Section 3(c) defines "health care institution":

"Health care institution" means any public or private organization, corporation, partnership, sole proprietorship, association, agency, network, joint venture, or other entity that is involved in providing health care services, including, but not limited to: hospitals, clinics, medical centers, ambulatory surgical centers, private physician's offices, pharmacies, nursing homes, university medical schools and nursing schools, medical training facilities, or other institutions or locations where health care procedures are provided to any person.

*Id.*

<sup>102</sup> *Id.* § 41-107-5. Section 5(1) of the Mississippi Health Care Rights of Conscience Act creates rights of conscience for health care providers:

A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.

*Id.* Section 7 confers the same rights on health care institutions, and section 9 confers rights of conscience on health care payers. *Id.* §§ 41-107-7, 9.

<sup>103</sup> *Id.* § 41-107-3. Section 3(a) of the Mississippi Health Care Rights of Conscience Act defines health care service as follows:

"Health care service" means any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.

*Id.* Since "dispensing or administering any device, drug, or medication" is a health care service, and pharmacists, as health care providers, are not required to participate in health care services that violate their consciences, the Mississippi Health Care Rights of Conscience Act seems to anticipate that controversial drugs may be created in the future and protect pharmacists from that contingency. *Id.*

<sup>104</sup> *Id.* § 41-107-5. Section 5(2) of the Mississippi Health Care Rights of Conscience Act provides:

No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates

Three other states have laws explicitly protecting pharmacists, but provide less comprehensive protection than the Mississippi statute.<sup>105</sup> South Dakota allows pharmacists to refuse to dispense abortifacients, emergency contraception, or drugs that may be used for euthanasia.<sup>106</sup>

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his or her conscience. However, this subsection does not exempt a health care provider from liability for refusing to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.

*Id.* Sections 7 and 9 provide immunity to health care institutions and health care payers, respectively. *Id.* §§ 41-107-7, 9. Section 5(3) proscribes discrimination against health care providers who exercise their rights of conscience:

It shall be unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience. For purposes of this chapter, discrimination includes, but is not limited to: termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, disciplinary or retaliatory action.

*Id.* Sections 7 and 9 proscribe discrimination against health care institutions and health care payers, respectively. *Id.* §§ 41-107-7, 9. Section 11 creates a cause of action:

(1) A civil action for damages or injunctive relief, or both, may be brought for the violation of any provision of this chapter. It shall not be a defense to any claim arising out of the violation of this chapter that such violation was necessary to prevent additional burden or expense on any other health care provider, health care institution, individual or patient.

(2) Damage Remedies. Any individual, association, corporation, entity or health care institution injured by any public or private individual, association, agency, entity or corporation by reason of any conduct prohibited by this chapter may commence a civil action. Upon finding a violation of this chapter, the aggrieved party shall be entitled to recover threefold the actual damages, including pain and suffering, sustained by such individual, association, corporation, entity or health care institution, the costs of the action, and reasonable attorney's fees; but in no case shall recovery be less than Five Thousand Dollars (\$5,000.00) for each violation in addition to costs of the action and reasonable attorney's fees. These damage remedies shall be cumulative, and not exclusive of other remedies afforded under any other state or federal law.

(3) Injunctive Remedies. The court in such civil action may award injunctive relief, including, but not limited to, ordering reinstatement of a health care provider to his or her prior job position.

*Id.* § 41-107-11 (2005) (emphasis removed).

<sup>105</sup> See *infra* notes 106-12 and accompanying text.

<sup>106</sup> S.D. CODIFIED LAWS § 36-11-70 (2004). The statute reads:

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South Dakota's law also protects both pharmacists and their pharmacies from liability and disciplinary or discriminatory action.<sup>107</sup> Arkansas's conscience clause offers similar protections, but only applies to contraceptives.<sup>108</sup> Georgia amended its conscience clause to specifically protect pharmacists, but pharmacists are only given the right to refuse to fill prescriptions for drugs that have the purpose of terminating a pregnancy.<sup>109</sup> As a result, pharmacists in Georgia are not allowed to

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No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to:

- (1) Cause an abortion; or
- (2) Destroy an unborn child as defined in subdivision 22-1-2(50A); or
- (3) Cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing.

No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.

*Id.* Section 22-1-2(50A) defines "unborn child" as "an individual organism of the species homo sapiens from fertilization until live birth"; therefore, the conscience clause should apply to emergency contraception since it is still effective after fertilization. *Id.* § 22-1-2(50A).

<sup>107</sup> S.D. CODIFIED LAWS § 36-11-70 (2004).

<sup>108</sup> ARK. CODE ANN. § 20-16-304 (2000). The statutes reads:

It shall be the policy and authority of this state that:

- (1) All medically acceptable contraceptive procedures, supplies, and information shall be available through legally recognized channels to each person desirous of the procedures, supplies, and information regardless of sex, race, age, income, number of children, marital status, citizenship, or motive; . . .
- (3) Dissemination of medically acceptable contraceptive information in this state and in state and county health and welfare departments, in medical facilities, at institutions of higher learning, and at other agencies and instrumentalities of this state be consistent with public policy;
- (4) Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information; and
- (5) No private institution or physician, nor any agent or employee of such institution or physician, nor any employee of a public institution acting under directions of a physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when the refusal is based upon religious or conscientious objection. No such institution, employee, agent, or physician shall be held liable for the refusal.

*Id.*

<sup>109</sup> GA. CODE ANN. § 16-12-142(b) (2006). The pharmacist is required to state the objection in writing. *Id.*

refuse to fill prescriptions for “birth control medication.”<sup>110</sup> Additionally, pharmacists are required to make “reasonable efforts to locate another pharmacist who is willing to fill such subscription” or to return the prescription to the patient.<sup>111</sup> While pharmacists are protected from liability and disciplinary or recriminatory action, no part of Georgia’s conscience clause explicitly protects pharmacies.<sup>112</sup>

E. *Framework for Evaluating the Constitutionality of Duty-to-Dispense Laws Under the Free Exercise Clause*

Laws such as Illinois’s emergency rule—which create a duty to dispense despite personal beliefs—might be susceptible to a challenge under the Free Exercise Clause.<sup>113</sup> Since the Supreme Court decision in *Employment Division v. Smith*, the constitutionality of such laws depends on whether they are “generally applicable.”<sup>114</sup> In *Smith*, the respondents were employees who had been fired for ingesting peyote, a controlled substance under Oregon law.<sup>115</sup> Although their use of peyote was in

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<sup>110</sup> *Id.* Pharmacists may refuse to dispense “a drug which purpose is to terminate a pregnancy,” but may not refuse to dispense “birth control medication, including any process, device, or method to prevent pregnancy and including any drug or device approved by the federal Food and Drug Administration for such purpose.” *Id.* However, the FDA has approved emergency contraception, and considers these drugs to prevent rather than terminate a pregnancy. See *supra* note 27 and accompanying text. Therefore, one wonders whether pharmacists are really protected from dispensing emergency contraception. Furthermore, the statute ignores the fact that some people are opposed to contraception in general.

<sup>111</sup> GA. CODE ANN. § 16-12-142(b).

<sup>112</sup> See *id.* § 16-12-142(b).

<sup>113</sup> See *infra* note 121 and accompanying text (describing the applicable standard).

<sup>114</sup> See *Empl. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872 (1990). Justice Scalia, writing for the Court, noted that “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.” *Id.* at 881; see, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious). Justice Scalia also referred to cases involving the right of parents to direct the upbringing of their children. *Smith*, 494 U.S. at 881; see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

<sup>115</sup> *Smith*, 494 U.S. at 874. Respondents Alfred Smith and Galen Black had been employed at a private drug rehabilitation organization. *Id.*

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conjunction with a religious practice, the Employment Division denied the respondents unemployment benefits since they had been fired for misconduct.<sup>116</sup> The Court ruled against the respondents' Free Exercise claim, declining to apply strict scrutiny and concluding that the Free Exercise Clause did not bar the application of a generally applicable law.<sup>117</sup>

*Church of Lukumi Babalu Aye, Inc. v. Hialeah* is the only Supreme Court case to extensively interpret and apply *Smith*.<sup>118</sup> In *Lukumi*, the Court declared unconstitutional ordinances of the city of Hialeah, Florida, that prohibited animal sacrifices.<sup>119</sup> The ordinances were passed in an emergency session of the city council in an attempt to prevent the animal sacrifice practices of the Santeria, a religion that blends aspects of Catholicism with the religious beliefs of African slaves brought to Cuba.<sup>120</sup> The Court expounded on the neutrality principle of *Smith*, explaining that "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or

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<sup>116</sup> *Id.* *Smith* and Black were members of the Native American Church, which uses peyote for sacramental purposes. *Id.* Peyote is a hallucinogen derived from *lophophora williamsii lemaire*, a cactus plant. *Id.*

<sup>117</sup> *Id.* at 888-90. The Court stated:

Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.

*Id.* (internal citations omitted).

<sup>118</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Discussing *Smith*, the *Lukumi* Court stated that a law of "[n]eutral and of general applicability" does not need to be justified by a compelling government interest even if it has an "incidental effect of burdening a particular religious practice." *Id.* at 531. The Court also noted that "neutrality and general applicability are interrelated," and therefore "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.*

<sup>119</sup> *Id.* at 524. The ordinances prohibited ritual animal sacrifices, defining "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." *Id.* at 527.

<sup>120</sup> *Id.* at 524-27. Followers of the Santeria religion express their devotion to spirits, called *orishas*, through animal sacrifice. *Id.* at 524. According to the religion, the *orishas* are powerful but not immortal, and therefore depend on the animal sacrifices for survival. *Id.* at 525. These sacrifices take place upon several events, including birth, marriage, death, for the cure of the sick, the initiation of new members and priests, and annual celebrations. *Id.* There were an estimated 50,000 adherents of this religion in South Florida at the time of this case. *Id.*

context.”<sup>121</sup> In addition, facial neutrality is not determinative; a facially neutral law violates the First Amendment if it nonetheless targets a religious practice.<sup>122</sup> Hialeah’s ordinances were held not to be neutral because they clearly referenced a religious practice, and practically the only behavior that was forbidden by the ordinance was the sacrificial rituals of the Santeria.<sup>123</sup>

Whatever stance a state takes on pharmacists’ rights, it must be evaluated in terms of the constitutional rights of both the pharmacist and the patient.<sup>124</sup> While most states have some form of legislation creating a right of conscience, only a few explicitly refer to pharmacists.<sup>125</sup> Emergency contraception is the current focus of the tension between pharmacists’ and patients’ rights, and the resulting conflicts may give rise to civil, disciplinary, or discriminatory actions against pharmacists.<sup>126</sup> Although pharmacists might be able to defend themselves against these actions in the absence of a specific conscience clause, such a clause is helpful in determining pharmacists’ rights and responsibilities.<sup>127</sup>

### III. THE CASE FOR RIGHTS OF CONSCIENCE FOR PHARMACISTS

A review of the Supreme Court’s abortion precedent suggests that a pharmacist’s refusal to provide emergency contraception is not a violation of the patient’s constitutional rights.<sup>128</sup> Because the Supreme Court has not required the government to take affirmative steps to make abortions available, private citizens should not be required to do so

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<sup>121</sup> *Id.* at 533. When this sort of discrimination occurs, strict scrutiny applies: “Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” *Id.* (internal citations omitted).

<sup>122</sup> *Id.* at 534. The opinion written by Justice Kennedy states that facial neutrality is not determinative. *Id.* The Free Exercise Clause forbids “covert suppression of particular religious beliefs.” *Id.* “[C]ompliance with the requirement of facial neutrality” cannot act as a shield for government action that targets religious practices. *Id.* The Court will “survey meticulously” laws that create “religious gerrymanders.” *Id.*

<sup>123</sup> *Id.* at 535. The Court also found that the law was not of general applicability because it was too underinclusive given the city’s stated purpose of preventing cruelty to animals. *Id.* at 536. The ordinances created an exception for the slaughter of animals raised for food purposes, and did nothing to prevent cruelty to animals unrelated to religious practices. *Id.*

<sup>124</sup> See *supra* notes 32-56, 113-23 and accompanying text.

<sup>125</sup> See *supra* note 38.

<sup>126</sup> See *supra* note 10 and accompanying text.

<sup>127</sup> See *supra* notes 61-81 and accompanying text.

<sup>128</sup> See *infra* notes 137-43 and accompanying text.

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either.<sup>129</sup> Therefore, states do not have to enact laws like Illinois's emergency rule in order to protect patients' constitutional rights.<sup>130</sup> Although a state may be able to enact a law like Illinois's without violating a pharmacist's freedom of religion, a state should treat pharmacists' beliefs with respect, especially because there are alternatives to duty-to-dispense legislation that would still provide patients with adequate access to medications.<sup>131</sup> In fact, from a policy standpoint, duty-to-dispense legislation has some negative consequences that may seriously undermine its effectiveness and its desirability.<sup>132</sup> Part III.A explains why the patient's rights are not infringed by a pharmacist's refusal to dispense emergency contraception or other drugs to which pharmacists may be morally opposed.<sup>133</sup> Part III.B then explains why pharmacists' beliefs should be respected and protected, even though states may be able to constitutionally enact duty-to-dispense legislation.<sup>134</sup> Part III.C discusses alternatives to duty-to-dispense legislation and the policy considerations that favor use of those alternatives.<sup>135</sup> Finally, Part III.D discusses the benefits of conscience clause legislation.<sup>136</sup>

A. *Patients' Rights Are Not Infringed by Pharmacist Refusal To Dispense*

Supreme Court precedent indicates that patients' rights are not infringed by pharmacists' refusal to dispense.<sup>137</sup> The Supreme Court has made clear through its abortion funding cases, such as *Beal v. Doe* and *Maher v. Roe*, that the government is only required to avoid unduly burdening the right to an abortion; it is not required to take affirmative steps to make abortions available or easier to access.<sup>138</sup> Although the scope of the right to contraception is broader, there is no indication that this right creates any duties either; in general, the Court has not required the government to subsidize the exercise of constitutional rights.<sup>139</sup>

<sup>129</sup> See *infra* notes 137-43 and accompanying text. Although emergency contraception might be analyzed under the Court's contraception precedent instead, the outcome probably would not be different. See *supra* notes 53-56 and accompanying text.

<sup>130</sup> See *infra* notes 137-43 and accompanying text.

<sup>131</sup> See *infra* notes 155-70 and accompanying text.

<sup>132</sup> See *infra* notes 214-47 and accompanying text.

<sup>133</sup> See *infra* notes 137-54 and accompanying text.

<sup>134</sup> See *infra* notes 155-204 and accompanying text.

<sup>135</sup> See *infra* notes 205-47 and accompanying text.

<sup>136</sup> See *infra* notes 248-62 and accompanying text.

<sup>137</sup> See *supra* notes 39-56 and accompanying text (describing the Supreme Court's abortion and contraception precedents).

<sup>138</sup> See *supra* notes 39-44 and accompanying text (explaining the holdings of *Beal v. Doe* and *Maher v. Roe*).

<sup>139</sup> *Supra* note 56. The main exception is for rights related to access to the courts. *Id.*

Furthermore, the Constitution constrains only the government, and does not generally constrain individuals or business entities.<sup>140</sup> In the few cases in which the Court has held that a constitutional right imposed a duty upon a third party, that third party has always been the government.<sup>141</sup> It would be quite anomalous if the Court, upon hearing a case that presented the issue, would hold that the right to abortion or contraception created a duty for professionals.<sup>142</sup> A woman's right to use emergency contraception does not include a right to obtain that product from a particular source, regardless of whether emergency contraception is considered contraception or abortion.<sup>143</sup>

Some commentators have argued that pharmacists should be required to dispense emergency contraception because some poor women, particularly those in rural areas, may only have access to one pharmacy or a few pharmacies.<sup>144</sup> However, the fact that some women may not be able to access emergency contraception in a timely manner is not a reason for a blanket rule requiring all pharmacists to dispense emergency contraception in all situations.<sup>145</sup> The problem of poor rural

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<sup>140</sup> See *supra* note 53.

<sup>141</sup> See *supra* note 56.

<sup>142</sup> See *supra* note 56.

<sup>143</sup> See *supra* notes 53-56 and accompanying text.

<sup>144</sup> See Julia Lichtman, Note, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. POVERTY L. & POL'Y. 345 (1997); Teliska, *supra* note 33.

<sup>145</sup> The Governor of Illinois did not promulgate his rule in response to large numbers of women being able to obtain emergency contraception, but on the basis of *two* complaints of pharmacists refusing to fill prescriptions in downtown Chicago. *Hearing, supra* note 5, at 7 (statement of Sheila Nix). In fact, several women who have filed complaints have acknowledged that they could have easily obtained their prescription if they had waited a few hours or went to another nearby pharmacy. *Id.* (statement of Sheila Nix); *id.* at 35 (statement of Megan Kelly, an Illinois resident who experienced a pharmacist refusal). Women who are intentionally driving out of their way to test small pharmacies in remote areas are generating some of these refusals. *Id.* at 9 (statement of J. Michael Patton, III, Pharmacists Assoc.). Not only are actual refusals rare, but it appears that the overall demand for emergency contraception is low in Illinois, particularly in rural areas. See *id.* (statement of J. Michael Patton) (noting that one pharmacy has only had two requests for emergency contraception in five years); *id.* at 28 (statement of Luke Vander Bleek) (stating that his chain of pharmacies dealt with 15,000 different patients in the past year, but has only received two requests for emergency contraception in the past two years). Pharmacists in small rural towns have found that demand for emergency contraception is particularly low because women actually prefer to go out of town to have their prescriptions filled in order to better protect their privacy. *Id.* at 9 (statement of J. Michael Patton). On a nationwide level, refusals also seem to be a statistically minor problem. *Id.* at 67 (statement of Linda Garrelts MacLean). MacLean stated:

[N]early 3.3 billion prescriptions are dispensed each year in the outpatient setting, and averaging about 9 million prescriptions per day. Proponents of "duty to fill" laws document approximately

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women who would otherwise be able to obtain emergency contraception, but cannot solely because the nearest pharmacist refuses to dispense it, appears to be statistically small and therefore does not warrant a rule of the breadth similar to the one in force in Illinois.<sup>146</sup> Rather, it appears that the rule would function more often than not to serve the customer's convenience rather than need.<sup>147</sup> As discussed above, a pharmacist's refusal to dispense would not violate a woman's constitutional rights.<sup>148</sup> Therefore, states should consider whether there are ways to increase poor women's access to emergency contraception that do not compromise pharmacists' beliefs.<sup>149</sup>

The Supreme Court's decisions upholding regulations of abortion, such as *Casey*, also demonstrate that the right to an abortion is not

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twelve examples of refusals to fill since 1996. One must question the need for new laws or regulations to address a handful of situations that may have been avoided through better communication and alternative systems.

*Id.* at 67-68. If patients are in fact being treated poorly by pharmacists, there is no particular reason to believe that market forces will not take care of it:

Decisions about what services to provide and by whom should be left up to individual health care providers. Decisions about which systems to implement and how to implement them should be left up to pharmacy managers and pharmacists. Patients will choose the pharmacy and pharmacists who best serve their needs, and market forces will dictate what services the pharmacies provide.

*Id.* at 67. As in Illinois, nationwide demand for emergency contraception appears to be very low. WHEELAND, *supra* note 31, at 11. Wheeland states:

[The Alan Guttmacher Institute's] Contraceptive Use study found that [emergency contraception] had been used by only 3% of women who had experienced condom breakage, 2% of inconsistent condom users, and 1% of inconsistent pill users. Since [emergency contraception] is promoted primarily for a "contraceptive accident," such low rates of . . . usage for that purpose appear to call into question the true importance of [emergency contraception] for "contraceptive failure."

*Id.* Pro-choice organizations' representations concerning the demand for emergency contraception have not always been completely neutral since a number of them, including Planned Parenthood affiliates, founded the Women's Capital Corporation, the for-profit corporation that is the original manufacturer of Plan B. *Id.* at 5. The corporation was sold to Barr Laboratories in 2003, but not before these organizations launched a very organized campaign to generate a market for emergency contraception, including application for over-the-counter status. *Id.* at 5, 8-9.

<sup>146</sup> See *supra* note 145. One must also consider that in the case of a woman who is too poor to travel to visit a pharmacy, the fact that the nearest pharmacist is a conscientious objector may not be the proximate cause of her inability to obtain emergency contraception. A woman at that income level may be unable to afford to see a doctor to get a prescription in the first place, or she may be unable to pay for the drugs themselves.

<sup>147</sup> See *supra* notes 145-46.

<sup>148</sup> See *supra* notes 137-43 and accompanying text.

<sup>149</sup> See *supra* notes 137-43 and accompanying text.

violated just because a woman seeking an abortion encounters people who disagree with her choice.<sup>150</sup> For example, under *Casey*, a state may adopt a policy encouraging childbirth and, pursuant to that policy, require women to be presented with certain information before she obtains an abortion, although she may be wholly in disagreement with that policy.<sup>151</sup> Whatever burden may be placed on women by hearing pharmacists say that they will not distribute emergency contraception because they are morally opposed to it does not constitute a violation of women's rights to abortion.<sup>152</sup> The experience may be unpleasant or inconvenient for the patient, but a patient's dislike for a pharmacist's views is not a strong enough basis for limiting the pharmacist's ability to express or act in accordance with his or her views.<sup>153</sup> In the United States, viewpoints are not suppressed merely because they are unpleasant to the audience.<sup>154</sup>

*B. Pharmacists' Beliefs Are Entitled to Respect*

While duty-to-dispense legislation is not necessary in order to protect patients' rights, it is possible that a state could draft a law requiring pharmacists to dispense drugs that would not be in violation of First Amendment rights.<sup>155</sup> It is questionable whether a law like the Illinois emergency rule is permissible under the Supreme Court's Free Exercise precedent.<sup>156</sup> Because the Illinois emergency rule only applies to

<sup>150</sup> See *supra* notes 45-49 and accompanying text (discussing *Casey* and other precedents permitting regulation of abortion).

<sup>151</sup> See *supra* notes 46-47 and accompanying text.

<sup>152</sup> Again, contraception precedent may be the precedent that is actually applied to emergency contraception, but it is not clear that it would make a difference. See *supra* notes 53-56 and accompanying text. While the government is not allowed to prohibit the use of contraception, it does not necessarily follow that the government is not allowed to express its opinion about contraception. In fact, governmental bodies often do just that, for example, through school sexual education programs. There is no clear reason why the government would be allowed to express an opinion on contraception, but a pharmacist or pharmacy would not.

<sup>153</sup> See *United States v. Kokinda*, 497 U.S. 720, 748 (1990). "Although the Government, within certain limits, may protect captive listeners against unwelcome intrusions, in public locations 'we expect individuals simply to avoid speech they do not want to hear.'" *Id.*

<sup>154</sup> See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) ("The plain, if at times disquieting, truth is that in our pluralistic society . . . 'we are inescapably captive audiences for many purposes.' Much that we encounter offends our esthetic, if not our political and moral, sensibilities. . . . the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" (internal citations omitted)); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

<sup>155</sup> See *supra* note 128 and accompanying text.

<sup>156</sup> *Id.* The standard is whether the rule is a generally applicable law under *Smith* and *Hialeah*. See *supra* notes 114-23.

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contraception (defined to include emergency contraception), the rule primarily controls the behavior of pharmacists who believe that life begins at some point before implantation.<sup>157</sup> The rule was admittedly enacted in response to pharmacists refusing to dispense emergency contraception because of moral concerns.<sup>158</sup> The impetus for the rule was reports of two prescriptions for emergency contraception that were not filled because of conscientious objections.<sup>159</sup> In both cases, the patient was asked to call back a few hours later when a different pharmacist was on duty.<sup>160</sup> Therefore, state officials were not responding to patients' inability to obtain emergency contraception, but to the pharmacists' beliefs. While the rule is neutral on its face, like the ordinance in *Lukumi*, it was enacted in response to a particular practice and was narrowly constructed to target that practice.<sup>161</sup> Therefore, it should not be considered a generally applicable law.<sup>162</sup>

The rule's limited scope not only makes the targeted beliefs identifiable, but also weakens the state's justification.<sup>163</sup> It would be difficult for the state to argue that it has a compelling interest in providing access to prescription drugs in a timely manner when it has only chosen to regulate contraception.<sup>164</sup> Time will often be of the essence in obtaining drugs, yet the state has only created a duty to dispense contraception, and only in retail pharmacies.<sup>165</sup> Like the ordinance in *Lukumi*, the narrow application of the Illinois rule seems to belie its facial neutrality.<sup>166</sup> While the Illinois rule may not withstand constitutional scrutiny, a state could likely adopt a general policy of making drugs available to patients with valid prescriptions and require pharmacists to dispense drugs of any type.<sup>167</sup> Such a law could be

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<sup>157</sup> See *supra* note 91.

<sup>158</sup> See *supra* note 5 and accompanying text.

<sup>159</sup> See *supra* note 5 and accompanying text.

<sup>160</sup> See *supra* note 5 and accompanying text.

<sup>161</sup> See *supra* note 122 and accompanying text.

<sup>162</sup> See *supra* notes 120-23 (discussing the holding in *Lukumi*).

<sup>163</sup> See *supra* notes 120-23. The law in *Lukumi* was also invalidated because its limited scope betrayed its purpose of targeting a particular belief. *Lukumi*, 508 U.S. at 535-36.

<sup>164</sup> See *supra* note 91.

<sup>165</sup> See *supra* note 91. One reason that advocates of the duty-to-dispense legislation have insisted that this legislation is necessary is because emergency contraception has sometimes been used to stop severe hemorrhaging. See *Hearing, supra* note 5, at 29. It seems much more likely that a severely hemorrhaging patient would be seeking the services of a hospital than a retail pharmacy. Yet the Illinois rule does not apply to hospitals or any medications other than contraception. See *supra* note 91.

<sup>166</sup> See *supra* note 122 and accompanying text.

<sup>167</sup> See *supra* notes 113-23. The law would have to be facially neutral and not target any particular belief. *Id.*

considered a generally applicable law that does not target any particular belief.<sup>168</sup>

Although a state may be able to devise a law that would require pharmacists to dispense drugs to which they are morally opposed without necessarily violating their First Amendment rights, a state should not force pharmacists to act against their consciences if there are other ways to achieve the state's goals.<sup>169</sup> Because states do not have to require pharmacists to dispense drugs in order to protect the patients' constitutional rights, states should make an effort to provide access to drugs without compromising pharmacists' beliefs.<sup>170</sup>

Part of the debate over the rights and duties of pharmacists is how the role of pharmacists is characterized.<sup>171</sup> Pharmacists are the most accessible members of the health care community.<sup>172</sup> Therefore, some critics view pharmacists as playing too important a role to be given rights of conscience that would allow them to refuse certain prescriptions.<sup>173</sup> However, as explained above, a patient's rights are not infringed by a pharmacist's refusal.<sup>174</sup> Furthermore, there are alternative methods for providing adequate and timely access to drugs.<sup>175</sup>

On the other hand, others view pharmacists as order takers, who should not have or expect any discretion.<sup>176</sup> Under this view, doctors

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<sup>168</sup> *Id.*

<sup>169</sup> See *Hearing*, *supra* note 5, at 13 (statement of Linda Garrelts MacLean). Describing a combination of the alternatives discussed below in Part III.C, MacLean states that "[o]ne individual's rights should not outweigh another's. Our policy balances the needs of the patient and the individual needs and duties of the pharmacist. Implemented well, patients receive care and pharmacists are not-will not be forced to ignore their personal beliefs." *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Teliska, *supra* note 33 (arguing that pharmacists should not be allowed to refuse to dispense because poor women may have a difficult time obtaining access to emergency contraception); Friedman, *supra* note 22 (stating that pharmacists "serve on the frontlines of the health care system"); cf. *Hearing*, *supra* note 5, at 14 (statement of Megan Kelly) (asserting that pharmacists who do not dispense are interfering with the doctor-patient relationship); see *id.* at 65 (statement of Linda Garrelts MacLean) (stating that proposals for duty-to-dispense legislation portray pharmacists as "robots" or "automatons").

<sup>172</sup> See *supra* note 57 and accompanying text.

<sup>173</sup> See Teliska, *supra* note 33; Friedman, *supra* note 22.

<sup>174</sup> See *supra* notes 137-43 and accompanying text.

<sup>175</sup> Alternatives are discussed below in Part III.C. See *infra* notes 205-13.

<sup>176</sup> See *Hearing*, *supra* note 5, at 65 (statement of Linda Garrelts MacLean) (describing the clinical role of the pharmacist versus the robot-like function sometimes portrayed in the media and recent legislative proposals).

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play the most important role.<sup>177</sup> However, doctors in most jurisdictions are given rights of conscience.<sup>178</sup> If doctors, who bear the greatest responsibility in the chain of medical care, enjoy special protections, those who merely play an ancillary role should enjoy them as well.<sup>179</sup> If there is a strong enough justification for allowing the most responsible members of the medical community to refuse services, that justification should be strong enough to release those health care providers with lesser responsibility.<sup>180</sup> Pharmacists, like doctors, enter the field of medicine to heal and not harm.<sup>181</sup> Therefore, they should also have a right to refuse to participate in procedures that they believe are harmful.<sup>182</sup> A pharmacist who is morally opposed to emergency contraception, for example, is concerned about potential harm to an unborn child.<sup>183</sup> While the pharmacist is not being asked to participate in the actual physical act of harm, a pharmacist may still believe that it is wrong to provide the means by which harm is accomplished.<sup>184</sup> The distinction between participation and enabling is not a distinction that everyone finds meaningful.<sup>185</sup>

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<sup>177</sup> *Id.* at 14 (statement of Megan Kelly). Some view pharmacist refusals as an interference with the doctor and patient's collaborative decision of what is medically appropriate for the patient. *Id.* However, from the pharmacist's perspective, duty-to-fill legislation *requires* pharmacists to be involved in the doctor-patient relationship. *See id.* at 20 (statement of Luke Vander Bleek). Mr. Vander Bleek states:

With respect to the contention that somehow I am inserting myself in a patient-physician relationship, nothing could be further from the truth. Indeed, what I am requesting here, [is for the] government to stop trying to pull me into that relationship. . . . They have their relationship. I don't want to be involved in products that might endanger human life, and I request that I can still own a pharmacy, a small business in the State of Illinois and be excerpted from that requirement that I need to be pulled into that particular relationship.

*Id.*

<sup>178</sup> *See supra* note 38.

<sup>179</sup> This notion is already acknowledged by some states, which have more comprehensive conscience clauses. *See, e.g.,* 745 ILL. COMP. STAT. § 70/3(c) (2004) (granting rights of conscience to nurses, nurse's aids, and medical students, among others); MISS. CODE ANN. § 41-107-3 (2005) (granting rights of conscience to physician's assistants, nurses, nurse's aids, and pharmacists, among others).

<sup>180</sup> Particularly in the case of emergency contraception, a conscientious objector is concerned about potential harm to a human life in the form of an embryo. Pharmacists, like doctors, have a right to assert a beneficent refusal. *See Allen & Brushwood, supra* note 10, at 6.

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

<sup>183</sup> *See infra* note 224.

<sup>184</sup> *See Hearing, supra* note 5, at 5 (statement of Luke Vander Bleek).

<sup>185</sup> *See id.*

Pharmacist refusals might be viewed as an interference with the doctor and patient's collaborative decision of what is medically appropriate for the patient.<sup>186</sup> However, the pharmacist is not substituting his or her judgment for the doctor's; rather, the pharmacist simply does not wish to be a participant in that decision.<sup>187</sup> The doctor may be the one who has consulted with the patient, examined her, and evaluated her medical history.<sup>188</sup> Nevertheless, the doctor's right to refuse to prescribe emergency contraception exists independently of this knowledge.<sup>189</sup> A doctor may refuse to prescribe emergency contraception solely on the basis of a conscientious objection, even when the prescription would be medically appropriate.<sup>190</sup> Therefore, the source of the right of conscience is not the doctor's special knowledge or training.<sup>191</sup> If the doctor may exercise the right of conscience independent of any knowledge of what is medically appropriate for the patient, then a lack of such knowledge should not serve as a barrier to pharmacists possessing the same rights of conscience.<sup>192</sup>

One might also argue that pharmacists are licensed by the states and should submit to any conditions on the practice of pharmacy that the states might wish to impose, including a duty to dispense particular drugs.<sup>193</sup> However, doctors are also licensed by the states, and almost every state has chosen to give doctors rights of conscience.<sup>194</sup> Once again, there is no clear reason to treat pharmacists differently.<sup>195</sup> The decision to practice pharmacy does not signify an acquiescence to participate in any and every medical decision involving a prescription, since pharmacies generally do not carry all drugs in the first place.<sup>196</sup>

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<sup>186</sup> See *supra* note 177.

<sup>187</sup> See *supra* note 177.

<sup>188</sup> See *Hearing, supra* note 5, at 33-34 (statements of Rep. Donald Manzullo and Sheila Nix) (discussing that a doctor could refuse to prescribe emergency contraception solely on conscientious grounds and regardless of any information revealed in consulting with and examining the patient).

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> *Id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *supra* note 58 and accompanying text.

<sup>194</sup> See *supra* note 38 (surveying state conscience clauses).

<sup>195</sup> See *supra* notes 179-80 and accompanying text.

<sup>196</sup> Even large chain pharmacies like Wal-Mart do not carry all prescription medications. *Women Sue Wal-Mart, supra* note 6. Furthermore, the scope of a business is an elusive concept. See *Hearing, supra* note 5, at 31 (statement of Rep. Steve King). Representative King stated:

You can take this same philosophy [that pharmacies must dispense emergency contraception because it is in their line of business] and you

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The logical scope of a pharmacist's practice, therefore, does not necessarily include dispensing all medications.<sup>197</sup>

Moreover, the belief that emergency contraception is abortion is entitled to respect.<sup>198</sup> There is no conclusive scientific method of determining when life begins, and because the Supreme Court has declined to make a judgment call about what constitutes the beginning of life, its precedent has centered on balancing rights.<sup>199</sup> However, the beginning of life is what is really at the heart of the abortion controversy.<sup>200</sup> If the beginning of life could be conclusively determined, the difference between abortion and the taking of a life would be clear, and a large part of the abortion controversy could be resolved.<sup>201</sup>

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can extrapolate this on point after point after point. Anyone who can establish the political power and the leverage to move forward with this kind of philosophy and set aside a conscience protection ....

You could require bookstores to carry pornography; you could require all retail establishments . . . to carry Lotto cards and any other kind of gambling equipment there is; you could require anyone who sold soft drinks to also sell alcohol; you could require the pharmacist to sell euthanasia/suicide drugs; you could require doctors to perform abortions, all under this same philosophy.

*Id.* Sheila Nix, senior advisor to Governor Blagojevich, responded to this statement, saying:

Well, pharmacies are in the business of providing prescription drugs. I would say that a retail store that sells soft drinks is not in the business of providing alcohol, so there is a difference. Class 1 retail pharmacies put themselves out there, they advertise that they fill prescriptions; and we are just saying if you advertise you fill prescriptions, you should fill the prescription.

*Id.* However, the scope of a business is an elusive concept; a given business can be described broadly as in Representative King's statement, or narrowly as in Nix's statement, and the difference between the two is arbitrary.

<sup>197</sup> See *supra* note 196.

<sup>198</sup> See *supra* note 169.

<sup>199</sup> See *supra* notes 50-51 and accompanying text.

<sup>200</sup> In Illinois, for example, executives have tried to appear neutral by adopting the FDA definition of contraception, which includes traditional oral contraceptives as well as emergency contraception. *Hearing, supra* note 5, at 7 (statement of Sheila Nix). However, this is tantamount to deciding that pregnancy begins at implantation and not at fertilization. See *id.* at 26 (statements of Sheila Nix and Chairman Donald A. Manzullo). These state officials do not recognize that a pharmacist may have no moral objection to regular oral contraceptives, but still be opposed to emergency contraception. See *id.* at 25-26 (statements of Sheila Nix and Chairman Donald A. Manzullo). Adopting the FDA definition of contraception glosses over the very thing that makes emergency contraception controversial. See *id.*

<sup>201</sup> See *supra* notes 25-27 and accompanying text. For example, if there were a scientific experiment that could prove that life begins at implantation, then emergency contraception would not cause an abortion by anyone's definition of the term. While the drug might still be somewhat controversial, since some people are opposed to contraception in general, clearly a large part of the controversy would be resolved. However, no such proof or

However, there is no such method, and the fact that the FDA and the AMA have defined pregnancy in such a way that emergency contraception is not abortion does not raise that policy decision to the level of scientific fact.<sup>202</sup> Therefore, a pharmacist's decision that life begins with fertilization should be afforded the same respect as a patient who believes life begins at some later point.<sup>203</sup> Even if it could be conclusively stated that emergency contraception does not cause abortions, that fact would not ease the conscience of pharmacists who are morally opposed to contraception in general.<sup>204</sup>

*C. Alternatives to Duty-to-Dispense Legislation and Other Policy Considerations*

Because pharmacists' beliefs are entitled to respect, states should look to alternatives to duty-to-dispense legislation to maintain adequate access to medications.<sup>205</sup> Some pharmacies may be able to come up with a working system of their own, such as modifying pharmacists' work schedules.<sup>206</sup> In states where pharmacists are permitted to prescribe emergency contraception, women seeking this medication can go directly to pharmacists who have chosen to take part in this program.<sup>207</sup> When a patient seeks a prescription from a doctor, the doctor can refer the patient to pharmacists they know would be willing to fill the prescription.<sup>208</sup> Another alternative would be for physicians to dispense the pills to patients themselves.<sup>209</sup> A physician who is comfortable prescribing emergency contraception could also dispense the medication, and thus eliminate the possibility of the patient running into a pharmacist who is opposed to emergency contraception.<sup>210</sup>

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consensus exists, and thus, all beliefs should be respected. *See supra* note 169 and accompanying text.

<sup>202</sup> *Supra* notes 25-27 and accompanying text.

<sup>203</sup> The Supreme Court's refusal to rule on the beginning of life indicates that differing viewpoints should be respected. *See supra* notes 50-51 and accompanying text.

<sup>204</sup> Illinois pharmacists who are morally opposed to contraception in general may be exempt from the Illinois rule creating a duty to dispense. *See supra* note 92. However, this may still be a problem in other states that choose to enact duty-to-fill legislation.

<sup>205</sup> *See supra* note 169.

<sup>206</sup> *Hearing, supra* note 5, at 62 (statement of Linda Garrelts MacLean).

<sup>207</sup> *Id.* at 62-63 (statement of Linda Garrelts MacLean); *see also supra* note 30 (listing the states that have given pharmacists the authority to prescribe).

<sup>208</sup> *Hearing, supra* note 5, at 62 (statement of Linda Garrelts MacLean).

<sup>209</sup> *Id.* at 63 (statement of Linda Garrelts MacLean).

<sup>210</sup> *Id.* MacLean, a Washington pharmacist, has found that a combination of pharmacist-prescribing and physician-dispensing has effectively dealt with the demand for emergency contraception, even in rural areas of the state. *See id.* at 37 (statements of Rep. Nydia Velazquez and Linda Garrelts MacLean). Pro-choice advocates cite few examples of women being unable to obtain emergency contraception in a timely manner even after a

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Additionally, emergency contraception is readily available at family planning centers.<sup>211</sup> There is also a national hotline and a website that can give information to patients looking for a pharmacist who will dispense emergency contraception.<sup>212</sup> With better communication, the situation in which a patient faces a pharmacist who does not wish to dispense the desired medication can be prevented.<sup>213</sup>

There are several other policy reasons why these alternatives are better than a law creating a duty to dispense.<sup>214</sup> First, pharmacies are businesses and need to be able to make individualized decisions that are appropriate for their business.<sup>215</sup> While a pharmacy may decide not to carry emergency contraception for moral reasons, it may also be a business decision.<sup>216</sup> There may not be a high demand for emergency contraception among the pharmacy's clientele, or stocking the drug might drive off other classes of clientele that the pharmacy wishes to attract.<sup>217</sup> Laws like the Illinois emergency rule, which requires pharmacists to order emergency contraceptives if they do not have them in stock when a patient brings in a prescription, may not be an economically practical way for the pharmacy to deal with the

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pharmacist refusal. *See supra* note 145. The primary example is Neil Noesen, the Wisconsin pharmacist who not only refused to dispense, but also refused to transfer or return the patient's prescription. *See supra* note 67. When pharmacists transfer the prescription or refer, women have generally been able to have their prescription filled within two hours or less. *See supra* note 145.

<sup>211</sup> *See* Emergency Contraception, *supra* note 23. Planned Parenthood is one of the leading providers of emergency contraception. *Id.* In 2004 alone, Planned Parenthood provided emergency contraception services to approximately 983,537 women. Planned Parenthood Services, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-pp-services-2003.xml> (last visited Nov. 6, 2006). Planned Parenthood operates more than 850 clinics located in all states and the District of Columbia. *Id.* Planned Parenthood is also very accessible to poor women. The organization serves about 5,000,000 clients each year, approximately 74% of who have incomes at or below 150% of the federal poverty line. Planned Parenthood by the Numbers, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-pp-by-numbers.xml> (last visited Nov. 6, 2006).

<sup>212</sup> *Hearing, supra* note 5, at 62 (statement of Linda Garrelts MacLean). The hotline is 1-888-not-2-late, and the website is <http://not-2-late.com>. *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 66-67 (statement of Linda Garrelts MacLean, Member, American Pharmacists Assoc.) (describing how duty-to-dispense legislation can impede a pharmacy's ability to make good business decisions).

<sup>215</sup> *See id.* MacLean states: "[I]t is a reality that health care is a business, and pharmacy practice a component of that business. 'Duty to fill' legislation affect business—and specifically small businesses—by dictating how a business must accommodate its staff, in this situation, its pharmacists." *Id.* at 66.

<sup>216</sup> *Id.* at 66-67.

<sup>217</sup> *See supra* note 145 (discussing the demand for emergency contraception).

situation.<sup>218</sup> Pharmacies, like other businesses, exist to make a profit rather than to provide people access to their rights, and therefore need to be able to make decisions about which products they carry.<sup>219</sup> When determining whether to carry a particular product, a business will consider the demand for that product and the segment of the market the business wishes to attract, the health plans they participate in, and the prescribing patterns of the physicians in the area.<sup>220</sup> With about 10,000 drugs currently on the market, most pharmacies can only afford to carry those drugs for which there is a demand.<sup>221</sup> While a pharmacy may have to turn customers away if it chooses not to stock emergency contraception, if this drug is not in high demand among the pharmacy's clientele, the costs of stocking or special ordering the drug can be more costly than turning away the few customers who want to purchase it.<sup>222</sup> Pharmacies should be able to decide what to stock based on their business judgment and moral inclinations.<sup>223</sup> Moreover, pharmacists should be able to incorporate moral decisions into the operation of their businesses because they are not discriminating against the patient; they are simply choosing not to be involved with the patient's decisions and exercising their business judgment.<sup>224</sup>

One aspect of pharmacies that makes them different from most other businesses is that customers must purchase prescription drugs from a

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<sup>218</sup> See *Hearing, supra* note 5, at 67. Special ordering costs more, and may not arrive within a timely manner. *Id.* In such a case, it is normal for patients to be referred to other pharmacies. *Id.*

<sup>219</sup> See *id.* at 66-67.

<sup>220</sup> *Id.* at 67.

<sup>221</sup> *Id.* at 66-67; see *supra* note 196.

<sup>222</sup> See *supra* note 145 (discussing the demand for emergency contraception).

<sup>223</sup> See *Hearing, supra* note 5, at 61 (statement of Linda Garrelts MacLean). MacLean states: "Pharmacist services are a business. Intruding on how and what I choose to provide my patients is an intrusion into how I run my small business." *Id.*

<sup>224</sup> See *Hearing, supra* note 5, at 20 (statement of Luke Vander Bleek). Vander Bleek states:

I think it is interesting that some people might want to confuse my position and say I am discriminating against a class of people or a particular medical condition of people. I am objecting to a medication and what that medication does.

I have regard for the third person in the relationship. There is me. There is the expectant mother that comes in. And there is the live child that I have to recognize has the possibility of existing, and that my involvement in dispensing this prescription is involvement in the extinguishing of that life.

*Id.* Some state conscience clauses specify that refusal must be based on personal moral beliefs rather than discriminatory reasons. See ARK. CODE ANN. § 20-16-304 (2000); MISS. CODE ANN. §§ 41-107-1 to 13 (2005).

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pharmacist.<sup>225</sup> In that sense, pharmacists play a “gate-keeping” role.<sup>226</sup> However, patients also need to obtain a prescription before purchasing prescription drugs from doctors, who in most states are given the rights of conscience.<sup>227</sup> A conscientious refusal is not necessarily an abandonment of the patient; if pharmacists refer patients to another pharmacist or pharmacy who can fill the prescription in a timely manner, then they have still served the patient while preserving their own consciences.<sup>228</sup> Pharmacists, who believe that they cannot, in good conscience, give a referral or transfer can at least return the prescription and direct the patient back to the doctor, who might then dispense the drug or provide a referral to a different pharmacy.<sup>229</sup>

Nevertheless, some critics of conscience clause legislation believe it is unfair for pharmacists to refuse service since they are the only ones legally allowed to sell prescription medications.<sup>230</sup> Licensing creates a barrier to new pharmacies entering the market; therefore, if a significant number of pharmacists choose not to dispense emergency contraception, they might substantially limit consumers’ ability to enjoy their constitutional rights.<sup>231</sup> However, the business aspect of pharmacies cannot be ignored. Compliance with duty-to-fill legislation is not without its costs.<sup>232</sup> In Illinois, for example, a pharmacy that does not

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<sup>225</sup> See Teliska, *supra* note 33, at 247.

<sup>226</sup> See *id.*

<sup>227</sup> See *supra* note 38 (surveying state conscience clauses). Plan B is now available to adults over-the-counter; however, minors still need a prescription. Ritter, *supra* note 31.

<sup>228</sup> See Hearing, *supra* note 5, at 32 (statement of Linda Garrelts MacLean). MacLean, describing how she has seen this work, states:

[I]f a pharmacist must step away because of a conscience clause, that pharmacist still has the obligation to ensure that a woman gets what she needs.

What I can tell you is, that is what I see day in and day out. Whether it is because we don’t have this particular expensive drug on the shelf, if it is emergent, and that patient needs a drug, I can call five pharmacies and transfer the prescription. I can ensure I have taken care of that patient. . . . If it is not emergent, we can decide on what the best route is.

*Id.*

<sup>229</sup> See *id.* at 62-63 (statement of Linda Garrelts MacLean) (describing how pharmacists can exercise their rights of conscience while still serving the patient).

<sup>230</sup> See Teliska, *supra* note 33, at 247.

<sup>231</sup> See Hearing, *supra* note 5, at 37 (statement of Rep. Nydia Velazquez) (raising the question of what would happen if all pharmacists in a particular area decided not to dispense a medication).

<sup>232</sup> See *id.* at 10 (statement of J. Michael Patton, III. Pharmacists Assoc.) (describing how some pharmacies are questioning the viability of continuing to operate in Illinois as a result of the rule requiring them to dispense emergency contraception).

want to sell emergency contraception must forgo selling any kind of contraception.<sup>233</sup> A pharmacy that is willing to sell emergency contraception, but wishes to accommodate the beliefs of its individual pharmacists has to make sure that a pharmacist that can fill prescriptions for emergency contraception is on duty or on call at all times.<sup>234</sup> When a pharmacy has decided to accommodate the conscientious objections of its pharmacists, or to not carry emergency contraception at all, it necessarily has accepted that it will turn away some business.<sup>235</sup> At that point, the pharmacy needs to do what it can to cut its losses; a rule like the one in force in Illinois does not give businesses that flexibility.<sup>236</sup>

The Illinois rule also requires pharmacists to order emergency contraception if it is not in stock and a patient demands it.<sup>237</sup> In some areas, the demand for emergency contraception is very low, and pharmacies in that area will not want to stock it on a regular basis.<sup>238</sup> Meeting the requirement to stock emergency contraception at the demand of the patient may be costly for a small pharmacy.<sup>239</sup> All these procedures can be prohibitively expensive for pharmacies and may drive them out of business or out of state.<sup>240</sup> If legislatures do not consider the economic impact of duty-to-fill legislation on pharmacies, they may unintentionally decrease the number of operating pharmacies, along with access to emergency contraception and other medications.<sup>241</sup>

There are several other potential unintended consequences of duty-to-fill legislation. Such legislation may decrease access to emergency contraception by encouraging pharmacies not to stock the drugs at all in the hope that women will prefer to be transferred or will no longer need

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<sup>233</sup> See *supra* note 92.

<sup>234</sup> See *supra* note 92.

<sup>235</sup> As businesses, pharmacies should be free to make this choice. See *supra* note 214. If patients dislike how they are treated by these pharmacies, they will go elsewhere, and the market will adjust to their demands. See *supra* note 145.

<sup>236</sup> See *supra* notes 232-34 and accompanying text.

<sup>237</sup> See *supra* note 92.

<sup>238</sup> See *supra* note 145.

<sup>239</sup> See *Hearing, supra* note 5, at 10 (statement of J. Michael Patton) (describing how some pharmacists are questioning the viability of continuing to practice in Illinois); *id.* at 67 (statement of Linda Garrelts MacLean) (describing the cost implications of special-ordering medications).

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* Some small towns are served by a single pharmacy. See *Hearing, supra* note 5, at 25. If the only pharmacist in the town exits the market because of conscience concerns, the town may have difficulty attracting a new pharmacy. See *supra* note 97.

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the medication by the time they can get it in stock.<sup>242</sup> Some pharmacies that are willing to sell emergency contraception, but wish to accommodate the individual beliefs of their pharmacists, may have to set aside their own working policies in order to conform to state law.<sup>243</sup> Finally, poorly crafted laws may interfere with pharmacists' other duties.<sup>244</sup> The Illinois emergency rule, for example, requires that pharmacies must dispense emergency contraception "without delay."<sup>245</sup> However, pharmacists have a duty to screen for drug-drug interactions, drug-food interactions, drug-allergy interactions, incorrect dosage, incorrect duration, and clinical abuse or misuse, all of which naturally involve some "delay."<sup>246</sup> While the rule was amended to clarify that pharmacists were not expected to curtail these responsibilities or give patients seeking emergency contraception any sort of preferential or expedited treatment, this is still a potential pitfall for other legislatures considering enacting duty-to-fill legislation.<sup>247</sup>

*D. The Benefits of Conscience Clause Legislation*

Enacting legislation that affords pharmacists rights of conscience will give the beliefs of pharmacists the respect they deserve; however, clarification of pharmacists' rights and responsibilities will benefit all parties involved.<sup>248</sup> Pharmacists are professionals who are expected to live up to certain standards.<sup>249</sup> In order to do that, they need to know what actions they can take without risking discrimination, discipline, or civil liability. Patients will also know what they can and cannot expect from pharmacists.<sup>250</sup> Because there are realistic concerns that conscientious objectors could be vulnerable to civil liability, disciplinary

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<sup>242</sup> See *Hearing, supra* note 5, at 68 (statement of Linda Garrelts MacLean, Member, American Pharmacists Assoc.) (explaining that not stocking emergency contraception may be the only way a pharmacy can avoid the situation of forcing their pharmacists to dispense).

<sup>243</sup> See *id.*

<sup>244</sup> *Id.* at 65.

<sup>245</sup> See *supra* note 92. The rule had to be amended subsequently to clarify that the rule was not intended to interfere with a pharmacist's duty to screen for potential problems including duplication, drug-drug or drug-food interactions, or incorrect dosage or duration.

<sup>246</sup> See *supra* note 92.

<sup>247</sup> See *supra* note 92.

<sup>248</sup> See *Hearing, supra* note 5, at 14, 30 (statements of Megan Kelly and Rep. Steve King). While the right to abortion and contraception probably does not impose affirmative duties on health care professionals, patients may nonetheless perceive that it does, and therefore may be upset by a refusal even when it is done politely and professionally. *Id.*

<sup>249</sup> See *supra* notes 58-61.

<sup>250</sup> See *supra* note 248.

action, and employment discrimination, a conscience clause that clearly lays out a pharmacist's rights and responsibilities would be the most reliable form of protection.<sup>251</sup> Protections under Title VII are particularly weak, since the employer only needs to establish that accommodation of the employee's beliefs involve more than a *de minimis* cost.<sup>252</sup> In a pharmacy, there may be certain shifts where only one pharmacist is needed.<sup>253</sup> Arranging the schedule so that a conscientious objector never works the single shift could result in lower morale and disruption of established work schedules, which are undue burdens under *Brener*.<sup>254</sup> Additionally, although when more than one pharmacist is on duty, objectionable prescriptions could be handled by one of the other pharmacists, co-workers likely would resent having to handle all the objectionable prescriptions for the conscientious objector, especially since these prescriptions are likely to be technically challenging.<sup>255</sup> This policy would also lower morale and likely amount to an undue burden under *Brener*.<sup>256</sup>

Although forty-six states have some type of conscience clause, it is not clear that these statutes will be applied to pharmacists or to emergency contraception.<sup>257</sup> In the states that do not explicitly protect pharmacists, courts may or may not construe the conscience clause to protect them.<sup>258</sup> These conscience clauses may contain catch-all provisions that a pharmacist could logically fit into, but it will ultimately be up to judges to determine whether pharmacists should be or were intended to fit into these provisions.<sup>259</sup> Likewise, in the thirty-four states that have conscience clauses that only apply to abortion, it is not clear

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<sup>251</sup> See *supra* notes 61-81 and accompanying text.

<sup>252</sup> Allen & Brushwood, *supra* note 10, at 8; Herbe, *supra* note 24, at 94.

<sup>253</sup> Herbe, *supra* note 24, at 94.

<sup>254</sup> See *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982).

<sup>255</sup> Allen & Brushwood, *supra* note 10, at 8.

Pharmacists tend to be impatient with colleagues who find other things to do when technically or therapeutically challenging prescriptions are presented. The colleague who passes off to others the prescriptions for medications that are difficult to compound, or for medications that are being used in a novel ways [sic] that are difficult to understand and evaluate, will be seen as a slacker who is failing to meet a responsibility to co-workers. The morally challenging prescription is likewise one that can breed resentment among colleagues when a pharmacist seeks to avoid it.

*Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See *State Policies in Brief*, *supra* note 7.

<sup>258</sup> See *supra* notes 83-85 and accompanying text.

<sup>259</sup> See *supra* notes 83-85 and accompanying text.

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that the clauses will be applied to emergency contraception since the determination of whether emergency contraception causes abortion depends on the definition of when pregnancy begins.<sup>260</sup> If a state adopts legislation based on the alternatives suggested above, both the pharmacist and the patient can avoid the uncomfortable situation that occurs when their beliefs conflict.<sup>261</sup>

IV. PROPOSED LEGISLATION

The justifications for giving doctors rights of conscience are similar to the arguments in favor of granting rights of conscience to pharmacists.<sup>262</sup> Because pharmacists and doctors are similarly situated, they should be granted similar rights of conscience.<sup>263</sup> This goal can in some cases be achieved through amendments to existing conscience clauses. However, in other cases, simply inserting pharmacists and pharmacies may fail to provide the clarification that is necessary. In such a case, a statute such as the following could be enacted:

Section 1. Rights of Conscience for Pharmacists

*(a) No pharmacist is required to dispense medications to which he or she has a conscientious objection. A conscientious objection exists when dispensing a drug would conflict with the pharmacist's religious, moral, or ethical principles. This section shall not be construed to permit a pharmacist to refuse to serve a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation.*

*(b) Employee pharmacists must notify their employers in writing of any objections before the right of conscience may be exercised.*

*(c) A pharmacist who declines to fill a lawful prescription that is not otherwise contraindicated shall take one of the following actions:*

- (i) refer the patient to another pharmacist,*
- (ii) transfer the prescription to another pharmacy, or*
- (iii) return the prescription to the patient and refer the patient back to the patient's physician.*

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<sup>260</sup> See *supra* notes 83-85 and accompanying text.

<sup>261</sup> See *supra* notes 205-13 and accompanying text.

<sup>262</sup> See *supra* notes 171-97 and accompanying text.

<sup>263</sup> See *supra* notes 171-97 and accompanying text.

*(d) No pharmacist shall be held civilly liable for exercising the right of conscience if he or she has complied with sections (b) and (c). Exercise of the right of conscience shall not be the basis of any disciplinary or administrative action against a pharmacist who has complied with sections (b) and (c).*

*(e) No employer may discriminate against an employee pharmacist because of his or her conscientious objections. Discrimination includes, but is not limited to, refusing to hire, terminating employment, or otherwise to discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment.*

*(f) A civil action for damages or injunctive relief, or both, may be brought for the violation of any of the provisions of this section.*

#### *Section 2. Rights of Conscience for Pharmacies*

*(a) No pharmacy shall be required to stock or sell any medication to which its owners or other persons entitled to make business decisions for the pharmacy have a conscientious objection. A conscientious objection exists when stocking or selling a drug would conflict with the owners' or decision-makers' religious, moral, or ethical principles. This section shall not be construed to permit a pharmacist to refuse to serve a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation.*

*(b) No pharmacy shall be held civilly liable for exercising the right of conscience. Exercise of the right of conscience shall not be the basis of any disciplinary or administrative action against a pharmacy. No pharmacy shall be liable for its employees who exercise their rights of conscience and have complied with sections (1)(b) and (1)(c).*

*(c) A civil action for damages or injunctive relief, or both, may be brought for the violation of any of the provisions of this section.<sup>264</sup>*

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<sup>264</sup> Portions of the model statute appearing in italics are the author's own words. Non-italicized portions are based upon 42 U.S.C. § 2000e-2(a) (2000); GA. CODE ANN. §§ 16-12-

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One of the primary goals of this proposed statute is clarification of rights, responsibilities, and clear definitions. One issue that is clarified in the proposed statute is that both pharmacists and pharmacies are covered, and the statute explains how the right of conscience applies to each.<sup>265</sup> While rights of conscience are important to pharmacists as individuals, they are also important to pharmacists as business owners.<sup>266</sup> Pharmacy owners may have both ethical and economical concerns about providing certain medications, so rights of conscience are also important to pharmacies.<sup>267</sup> Providing rights of conscience to pharmacies is akin to providing those rights to hospitals.<sup>268</sup>

Another issue that is clarified by this proposed statute is that objections need not be based on religion. A few states limit the application of their conscience clauses to religious institutions; however, requiring a religious basis for an objection confuses rather than clarifies rights and responsibilities.<sup>269</sup> If this sort of requirement is imposed on individuals, the government is put in the position of defining which objections are sufficiently "religious" to merit exemption.<sup>270</sup> If a person has ethical objections to a medication, it should not matter whether that objection is based on any religious considerations. Applying the religion requirement to institutions is also problematic as it is not always clear whether an institution is religious.<sup>271</sup> Even if it is clear that an institution is religiously affiliated, it may not be clear whether the desire to refuse a service is based on that religious affiliation.<sup>272</sup>

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142 (2006); MISS. CODE ANN. § 41-107-3(h), 5(1), 11(1); and S.D. CODIFIED LAWS § 36-11-70 (2004).

<sup>265</sup> See *supra* notes 90-112 and accompanying text (describing how existing conscience clauses apply to pharmacies versus pharmacists).

<sup>266</sup> See *Hearing*, *supra* note 5, at 4-6 (statement of Luke Vander Bleek).

<sup>267</sup> *Id.*

<sup>268</sup> Forty-three states allow hospitals to choose not to provide abortion services. *State Policies in Brief*, *supra* note 7. Fifteen of these states only exempt private hospitals, and one (California) only exempts religiously affiliated hospitals. *Id.* Ten states allow hospitals to choose not to provide contraception. *Id.* Six of these states only exempt private hospitals, and one (Virginia) only exempts religiously affiliated hospitals. *Id.*

<sup>269</sup> California exempts individuals and religious institutions from providing abortion services. *Id.* Virginia exempts individuals and institutions from providing abortion services, but only exempts religious institutions from providing contraception. *Id.*

<sup>270</sup> For example, see the Supreme Court's struggle to define "religious training and belief" in relation to the Selective Service Act in *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>271</sup> See Pellegrino, *supra* note 8, at 235-38 (describing conscience issues for religiously-affiliated hospitals).

<sup>272</sup> *Id.*

While the objection need not be based on religious beliefs, it must be based on conscientious considerations rather than the pharmacist's feelings about the patient. The proposed statute prohibits the pharmacist from refusing to dispense based on the patient's race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation. Therefore, a pharmacist could not, for example, use this statute to refuse to dispense retroviral medications to an HIV-infected patient based on the assumption that the patient is homosexual.

This proposed statute also avoids the unnecessary confusion of whether emergency contraception is contraception or abortion, following the example of states that have conscience clauses that apply broadly to all medications.<sup>273</sup> The additional advantage to this approach is that it also allows for the fact that there may be new medications in the future that create controversy.<sup>274</sup> A primary reason to create conscience clause legislation is to clarify to pharmacists, pharmacies, and patients what their rights are.<sup>275</sup> If the conscience clause only deals with medications that are currently in existence, those rights will be thrown into confusion again as soon as new controversies arise.

Another issue that is resolved by the proposed statute is what pharmacists and pharmacies must do to bring themselves under the protection of the legislation and to satisfy their professional duties. Specifically, the proposed statute requires employees to notify their employers of their objections.<sup>276</sup> This requirement should help pharmacies to better anticipate and plan for potential problems. The statute also embraces the APhA view that pharmacists who exercise their rights of conscience should still cooperate with patients so that they can have their prescriptions filled by another pharmacist.<sup>277</sup> The statute

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<sup>273</sup> See 745 ILL. COMP. STAT. 70/1-70/14 (2004); MISS. CODE ANN. §§ 41-107-1 to 13 (2005); WASH. REV. CODE ANN. § 48.43.065 (West 1999).

<sup>274</sup> See *supra* notes 10, 102-03 and accompanying text.

<sup>275</sup> See *supra* notes 247-49 and accompanying text.

<sup>276</sup> See GA. CODE ANN. § 16-12-142(b) (2006) for an example of a law requiring notice.

<sup>277</sup> *Hearing, supra* note 5, at 61. The APhA's policy is as follows:

APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.

APhA's policy supports the ability of a pharmacist to opt out of dispensing a prescription or providing a service for personal reasons and also supports the establishment of systems so that the patient's access to appropriate health care is not disrupted. In sum, our policy supports a pharmacist 'stepping away' from participating but not 'stepping in the way' of the patient accessing the therapy.

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requires pharmacists to refer the patient to another pharmacist, transfer the prescription to another pharmacy, or return the prescription to the patient with a referral back to the patient's physician. The physician could then dispense the medication or refer the patient to another pharmacy. While some pharmacists may believe that they are still involved with the patient's choice if they take these actions, pharmacists should recognize that they may not control the patient's choices.<sup>278</sup> Rather, pharmacists should have the right to not be directly involved in providing medications to which they are morally opposed, but should not be allowed to control what patients do after they leave that particular pharmacy.<sup>279</sup> Therefore, requiring pharmacists to at least return the prescription with a referral to the physician is a reasonable limitation on the right of conscience that will help keep patients' options from becoming too restricted.

The proposed statute resolves the three areas in which conflict may arise when a pharmacist wishes to exercise a right of conscience: civil liability, employment discrimination, and disciplinary action.<sup>280</sup> The statute explains how pharmacists and pharmacies are protected in each of these situations. A right of conscience means very little if pharmacists and pharmacies may nonetheless be subject to civil liability or disciplinary action. A more complex issue is whether an employer that wishes to provide controversial drugs, such as emergency contraception, may require its pharmacists to dispense these medications despite their personal beliefs. While an employer may wish to accommodate its employees' beliefs, that accommodation will not necessarily be without cost.<sup>281</sup> However, there will often be a fine line between employment discrimination based on personal beliefs and a legitimate business decision, thereby making it difficult to prevail in a Title VII claim.<sup>282</sup> Because Title VII may allow a significant number of actual employment discrimination cases to fall through the cracks, protection against employment discrimination has been included in the proposed statute.<sup>283</sup> Without this additional protection, the effects of the conscience clause may be significantly watered down because pharmacies are increasingly

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*Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> See *supra* notes 61-81 and accompanying text.

<sup>281</sup> See *supra* notes 77-81 and accompanying text.

<sup>282</sup> See *supra* notes 252-57 and accompanying text.

<sup>283</sup> See *supra* notes 252-57 and accompanying text.

under the management of chain operations and many pharmacists are employees rather than owners.<sup>284</sup>

Finally, the proposed statute addresses whether a cause of action is created for pharmacists and pharmacies whose rights are infringed. A cause of action may be necessary for these rights to be effective, especially if the state has chosen to grant pharmacists protection against employment discrimination.<sup>285</sup> If a civil or disciplinary action is brought against a pharmacist who refuses to dispense, that pharmacist can defend on the basis of the conscience clause. However, in the case of employment discrimination, the pharmacist will want to bring the suit. Rights of conscience in the workplace might never be enforced, therefore, unless there is a private cause of action.

#### V. CONCLUSION

In conclusion, states may provide pharmacists and pharmacies with rights of conscience without infringing upon the constitutional rights of patients. Pharmacists' beliefs should be respected and accommodated, especially when there are ways to do so without depriving patients of validly prescribed medications. Specific conscience clause legislation is the best method for protecting pharmacists' consciences, and such legislation also provides the most clarity and certainty when well-drafted. Conscience clause legislation should address who is covered, whether a religious objection is required, the medications involved, the scope of the protection, any requirements for compliance, and whether a private cause of action is created. Such legislation provides adequate protection to pharmacists and clarifies the rights of both pharmacists and patients. If such legislation operates in tandem with policies such as pharmacist prescribing, doctor dispensing, and doctor referrals to pharmacies known to handle the prescription, which have shown promise in some states, then patients should have adequate access to medications without forcing pharmacists to compromise their beliefs.

**Jessica D. Yoder\***

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<sup>284</sup> See Dailard, *supra* note 6, at 11-12. Major national pharmacy chains include Walgreens, CVS, Eckerd, and Wal-Mart. See Teliska, *supra* note 33, at 239-40.

<sup>285</sup> See Dykes, *supra* note 9, at 596.

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