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# COMMENT

## Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?

### I. INTRODUCTION

Neil Noesen refused to fill Amanda Phiede's prescription for birth control pills because he feared doing so might cause him to suffer "spiritual pain."<sup>1</sup> Karen Brauer lied to a customer that her birth control pills were not in stock because she believes such drugs cause abortions, and filling the prescription would have violated her religious beliefs.<sup>2</sup> American women who have long assumed they have a right to have their legally valid prescriptions for birth control pills filled at their local pharmacies, without hassles and without questions about their intent in using such pills, are finding that exercise of this presumed right is more difficult than expected.<sup>3</sup> The war against reproductive choice is being waged on a surprising new front—the pharmacy counter—as an increasing number of pharmacists are refusing to fill prescriptions for oral contraceptives because of their religious or moral beliefs.<sup>4</sup>

Kmart fired Karen Brauer, the pharmacist who lied to a customer that her birth control pills were out of stock, when she would not agree to dispense lawfully prescribed medications.<sup>5</sup> Brauer has since founded Pharmacists for Life International [PFLI],<sup>6</sup> an organization that advo-

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1. Todd Richmond, *Pharmacist Facing Disciplinary Hearing: He Refused to Fill UW-Stout Student's Birth Control Pill Prescription*, ST. PAUL PIONEER PRESS, Oct. 12, 2004, at B1.

2. Dennis M. Mahoney, *Prescription for Dispute: Can Pharmacist Refuse Service for Reasons of Conscience?*, COLUMBUS DISPATCH, Dec. 14, 2001, at 1E.

3. Twelve million American women use prescription hormonal contraceptives, making them the second most popular form of birth control after sterilization. Jeff McDonald, *More Health Professionals Balk at Giving Birth Control: Refusal to Prescribe, Dispense Increases; Moral Grounds Cited*, SAN DIEGO UNION-TRIB., Aug. 8, 2004, at A1, available at 2004 WLNR 16989368.

4. See Caroline Bollinger, *Access Denied*, PREVENTION, Aug. 2004, at 150, available at 2004 WLNR 13812854; Jill McGivering, *Pill Propelled into Abortion Debate*, BBC NEWS, Sept. 13, 2004, <http://news.bbc.co.uk/2/hi/americas/3652462.stm> ("At first these were just isolated cases [of pharmacists refusing to fill birth control pill prescriptions], mostly in the Midwest. But recently they have increased dramatically.")

5. James F. Sweeney, *May a Pharmacist Refuse to Fill a Prescription?*, PLAIN DEALER (Cleveland), May 5, 2004, at E1, available at 2004 WLNR 333123.

6. Karen L. Brauer, Editorial, *Pharmacists Put Patients' Interests First*, ATLANTA J.-CONST., Oct. 14, 2004, at 19A, available at 2004 WLNR 6339466.

cates for a legally protected right for pharmacists to refuse to dispense oral contraceptives.<sup>7</sup> PFLI argues that oral contraceptives cause abortions because oral contraceptives are not always successful at preventing fertilization.<sup>8</sup> Instead, oral contraceptives may damage the lining of the uterus, preventing the fertilized egg from implanting on the uterine wall.<sup>9</sup> This is known as the “post-fertilization” effect.<sup>10</sup> Thus, PFLI and other pro-life opponents of the pill argue that oral contraceptives can have the abortifacient (or pregnancy-ending) effect of preventing the fertilized egg from implanting.<sup>11</sup> PFLI’s argument is particularly controversial in its break from the established definition of conception as implantation of the fertilized egg, rather than mere fertilization.<sup>12</sup> Additionally, there is a lack of scientific evidence proving that the “post-fertilization” effect takes place.<sup>13</sup>

So, what happens to a pharmacist who refuses to dispense a legally valid prescription for oral contraceptives? Currently, the outcome depends on where the incident takes place. Some states have “conscience clauses” that protect the pharmacist, as advocated by PLFI,<sup>14</sup> and others do not. In Ohio, Kmart fired Karen Brauer for her refusal to fill birth control prescriptions, and, in part as a response to the attention Brauer’s ongoing lawsuit against Kmart has brought the issue, the state is considering extending conscience clause legislation to pharmacists.<sup>15</sup> Ohio legislation already protects doctors, nurses, and other health care workers who refuse to participate in abortions.<sup>16</sup>

In Texas, CVS did not reprimand a pharmacist who refused to fill a prescription for an oral contraceptive because CVS has a “refuse and

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7. Pharmacists for Life Int’l, *Why a Conscience Clause is a Must . . . NOW!*, <http://www.pfli.org/main.php?pfli=conscienceclausefaq> (last visited Jan. 11, 2005).

8. Pharmacists for Life Int’l, *The Pill – How It Works and Fails*, [http://www.pfli.org/faq\\_oc.html](http://www.pfli.org/faq_oc.html) (last visited Jan. 11, 2005).

9. *Id.*

10. See, e.g., Caroline Bollinger, *The Post-Fertilization Effect: Fact or Fiction?*, PREVENTION, Aug. 2004, at 153, available at <http://www.prevention.com/article/0,,s1-1-93-35-4166-1,00.html>.

11. Pharmacists for Life Int’l, *supra* note 8.

12. See Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, THE GUTTMACHER REPORT ON PUB. POLICY (The Alan Guttmacher Inst., New York, N.Y.), May 2005, at 7, available at <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf> (“[M]edical experts—notably the American College of Obstetricians and Gynecologists (ACOG)—agree that the establishment of a pregnancy takes several days and is not completed until a fertilized egg is implanted in the lining of the woman’s uterus. (In fact, according to the ACOG, the term ‘conception’ properly means implantation.)”).

13. Bollinger, *supra* note 10 (noting that even the vice president of the American Association of Pro-Life Obstetricians and Gynecologists admits there is no proof of the post-fertilization effect).

14. Pharmacists for Life Int’l, *supra* note 7.

15. Mahoney, *supra* note 2.

16. See Sweeney, *supra* note 5.

refer” policy that allows pharmacists to refer patients to another pharmacist at the same location or another store rather than dispense medications that offend their beliefs.<sup>17</sup> While the Texas Pharmaceutical Association publicly supports the CVS policy of providing for pharmacists’ conscientious objections, Kirsten Arnold, chief counsel for the Texas Pharmacy Board, stated that “the board would be concerned with a refusal to fill a prescription” because “[t]here’s nothing in [Texas] law that says a pharmacist can refuse to fill a prescription on ethical grounds.”<sup>18</sup>

In Georgia, long-standing pharmacy board regulations that allow pharmacists to refuse to dispense medications for ethical or moral reasons protected a pharmacist who refused to refill a birth control prescription because she did not believe in birth control.<sup>19</sup>

In contrast, Wisconsin pharmacist Neil Noesen faced a potential reprimand and the possible loss of his license for his refusal to fill a birth control prescription.<sup>20</sup> Noesen appeared at a disciplinary hearing in October 2004 for his conduct, which included not only his refusal to dispense the prescription, but also his refusal to transfer the prescription to another pharmacy or return the prescription to the customer.<sup>21</sup> Christopher Klein, a spokesman for the State’s Department of Regulation and Licensing, stated it was unlikely that Noesen’s license would be revoked,<sup>22</sup> despite Noesen’s obstruction of the customer’s ability to obtain oral contraceptives that had been legally prescribed.

This article will examine this growing trend of pharmacists refusing to dispense oral contraceptives, and consider whether such pharmacists should have a protected right to base refusals on their personal beliefs. This comment will also discuss this phenomenon’s potential threat to reproductive choice, arguing that the pharmacist’s right to follow his conscience must yield to a woman’s privacy right to make her own reproductive choices. Part II will trace the historical development of the right to use contraceptives and the subsequent limitations on that right.

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17. Mahoney, *supra* note 2; Press Release, Planned Parenthood Fed’n. of Am., Inc., Planned Parenthood Demands CVS Action on Birth Control Prescriptions (Mar. 31, 2004), <http://www.plannedparenthood.org/pp2/portal/files/portal/media/pressreleases/pr-040331-birth-control-cvs.xml>.

18. George Schwarz, *Amarillo, Texas, Pharmacists Say They Won’t Withhold Contraception*, AMARILLO GLOBE NEWS, Apr. 1, 2004, available at 2004 WLNR 18094174.

19. Editorial, *Our Opinions: The 50 States of Denial Pharmacists’ Ability to Reject Prescriptions on Personal Grounds Violates Consumers’ Rights*, ATLANTA J.-CONST., Oct. 14, 2004, at A18, available at 2004 WLNR 6339477.

20. Richmond, *supra* note 1.

21. Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at 3A, available at 2004 WLNR 6899597.

22. *Id.*

Part III will examine the argument for allowing pharmacists the right to refuse to fill prescriptions that are contrary to their belief systems. Part IV attempts to determine whose right should prevail, the patient's right to use contraceptives, or the pharmacist's right to refuse to fill prescriptions on moral, ethical, or religious grounds.

## II. THE RIGHT TO USE CONTRACEPTIVES

### A. *History of the Right*

The Food and Drug Administration first approved the use of oral contraceptives, commonly known as "birth control pills," for use as contraceptives in 1960.<sup>23</sup> However, women did not have an unimpeded right to use such drugs to control their fertility until the Supreme Court struck down, as unconstitutional, state laws infringing upon that right. Beginning with *Griswold v. Connecticut*<sup>24</sup> in 1965, the Court established a married person's right to use contraception.<sup>25</sup> In *Griswold*, the Executive Director of Planned Parenthood League of Connecticut and a medical doctor appealed their criminal convictions under Connecticut statutes that forbade any person from using, or aiding another person in using, "any drug, medicinal article or instrument for the purpose of preventing conception."<sup>26</sup> The Court noted that the appellants were convicted for the "information, instruction, and medical advice" they provided to *married persons*, a fact it found important because the law "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."<sup>27</sup> The Court found the Connecticut statute unconstitutional as an impermissible intrusion by the State into the marital relationship, which is a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees."<sup>28</sup> Writing for the majority, Justice Douglas asked, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>29</sup> However, the right of privacy upon which the Court relied is a right not specified but implied within the First, Fourth, and Fifth amendments to

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23. Suzanne White Junod, *FDA's Approval of the First Oral Contraceptive, Enovid*, UPDATE (U.S. Food and Drug Admin., Rockville, Md.), July-Aug. 1998, <http://www.fda.gov/oc/history/makinghistory/enovid.html>.

24. 381 U.S. 479 (1965).

25. *Id.* at 485-86.

26. *Id.* at 480 (quoting CONN. GEN. STAT. § 53-32 (1958)).

27. *Id.* at 480, 482.

28. *Id.* at 485.

29. *Id.* at 485-86.

the Constitution,<sup>30</sup> and the *Griswold* case appears to limit that right to the marital relationship.

The Supreme Court indirectly expanded the right to use contraceptives to unmarried people in *Eisenstadt v. Baird*.<sup>31</sup> At issue in *Eisenstadt* was a Massachusetts state law that made it illegal for single people to obtain contraceptives for the purpose of preventing pregnancy.<sup>32</sup> The Court found two possible legislative aims that were promoted by the statute: first, the protection of morals through the regulation of “the private sexual lives of single persons,”<sup>33</sup> and second, the prevention of health problems from physical side effects of contraception.<sup>34</sup> The Court rejected these claims as unreasonable given the lack of deterrent effect in preventing premarital sex,<sup>35</sup> and the overly broad sweep of the statute with respect to contraceptives that pose no hazard to health.<sup>36</sup> Having declared that the stated rationales for the statute were not reasonable, the Court stated that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”<sup>37</sup> Therefore, the Court held that the statute violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.<sup>38</sup> The Court reserved the question of whether *Griswold* constitutes an absolute bar to state prohibition on the distribution of contraceptives, because it based its decision on the differential treatment between married and unmarried individuals.<sup>39</sup> But, the Court did state that the *Griswold* right of privacy in the marital relationship is the right of privacy of *individuals* “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>40</sup>

The Court cleared up the ambiguity left by its decision in *Eisenstadt* in its decision in *Carey v. Population Services International*.<sup>41</sup> In

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30. See *id.* at 484-85; Karen Flax, Comment, *Women's Rights and the Proposed Family Protection Act*, 36 U. MIAMI L. REV. 141, 145 (1981) (“Justice Douglas admitted that this zone of privacy was not specified in the Constitution, but found the right within the ‘penumbras’ of explicit constitutional guarantees such as the first amendment’s right of association, the fourth amendment’s recognition of privacy in the home, and the fifth amendment’s guarantee of freedom from self-incrimination.”).

31. 405 U.S. 438 (1972).

32. *Id.* at 441-42.

33. *Id.* at 442 (quoting *Sturgis v. Attorney Gen.*, 260 N.E.2d 687, 690 (Mass. 1970)).

34. *Id.*

35. *Id.* at 448-49.

36. *Id.* at 451-52.

37. *Id.* at 453.

38. *Id.* at 454-55.

39. *Id.* at 452-54.

40. *Id.* at 453.

41. 431 U.S. 678 (1977).

*Carey*, the Court indicated that *Griswold* must be read "in light of its progeny" – *Eisenstadt, Roe v. Wade*,<sup>42</sup> and *Whalen v. Roe*<sup>43</sup> – to mean that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."<sup>44</sup> The Court noted that "regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision" can only be justified by a "compelling state interest" and "must be narrowly drawn to express only the legitimate state interests at stake."<sup>45</sup> The Court stated that the compelling state interest test applied to such regulations "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Eisenstadt v. Baird*, and *Roe v. Wade*."<sup>46</sup>

The Court in *Carey* held that by "[l]imiting the distribution of non-prescription contraceptives to licensed pharmacists," the New York statute in question "clearly imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and serves no compelling state interest to justify imposing such a burden.<sup>47</sup> Four Justices also found that the statute's limitation on the distribution of non-prescription contraceptives to minors under the age of sixteen was an unjustified intrusion by the State into the privacy rights of minors, as the "right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."<sup>48</sup>

### B. *Limits on the Right*

As outlined in the discussion above, *Griswold* and its progeny established that individuals have the right to *use* contraceptives. In *Population Services International v. Wilson*,<sup>49</sup> the predecessor to *Carey*, the Southern District of New York recognized *access* to contraceptives as "an aspect of the right to privacy, that is, a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth

42. 410 U.S. 113 (1973).

43. 429 U.S. 589 (1977).

44. See *Carey*, 431 U.S. at 687.

45. *Id.* at 688 (quoting *Roe*, 410 U.S. at 155).

46. *Id.* at 688-89.

47. *Id.* at 689-90.

48. *Id.* at 693-94 (noting that *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) invalidated state laws requiring parental consent for a minor to obtain an abortion and foreclosed "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors").

49. 398 F. Supp. 321 (S.D.N.Y. 1975).

Amendment.”<sup>50</sup> However, this view was rejected by the Supreme Court in *Carey*, which noted that there is no fundamental right of *access* to contraceptives, only the right to make decisions regarding childbearing, and therefore to *use* contraceptives.<sup>51</sup>

The recognition of a constitutionally protected right to make decisions affecting procreation begs the questions whether there is any guarantee of access to contraception. Although the Supreme Court has not directly settled this question, one can draw inferences about the limits on the right of access to contraception by examining court decisions regarding the right of access to abortions and insurance coverage for prescription contraceptives.

In *Roe v. Wade*, the Supreme Court struck down as unconstitutional Texas laws criminalizing abortion, stating that the constitutional right of privacy encompassed a woman’s decision to terminate her pregnancy.<sup>52</sup> However, *Roe* states that a woman’s right to terminate her pregnancy is not absolute, but is subject to the State’s interests “in safeguarding health, in maintaining medical standards, and in protecting potential life.”<sup>53</sup> As a result, *Roe* limits the right to an abortion by stating that, prior to the end of the first trimester of pregnancy, a woman and her doctor may make the decision to abort free of state regulation, after the first trimester the State may regulate abortion “in ways that are reasonably related to maternal health,” and after the fetus become viable, the State may proscribe abortion except where medically necessary to preserve the health or life of the mother.<sup>54</sup> Consequently, *Roe* permits legislative limits on a woman’s access to abortion as a means of effecting reproductive choice by allowing states to circumscribe when, and under what circumstances, a woman can obtain an abortion.<sup>55</sup>

The Court gave substance to the extent of the State’s interest in protecting the health of the mother and the life of the fetus in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>56</sup> In *Casey*, the Court upheld a Pennsylvania statute restricting abortion by imposing a 24-hour waiting period, informed consent requirements, and reporting and recordkeeping by abortion providers.<sup>57</sup> The Court decided that the

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50. *Id.* at 331.

51. *See Carey*, 431 U.S. at 688.

52. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

53. *Id.* at 154.

54. *Id.* at 164-65.

55. *See id.*

56. 505 U.S. 833 (1992).

57. *Id.* at 882, 887, 900. The Court also upheld the statute’s definition of a medical emergency (which is important because a finding of a medical emergency obviates the need to comply with the waiting period requirement), but struck down the spousal notification requirement as an undue burden. *Id.* at 880, 893-94.

appropriate test for such regulations is the “undue burden” test, stating that “[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue.”<sup>58</sup> The Court stated that the State has the authority to “enact regulations to further the health or safety of a woman seeking an abortion,” but that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right [to choose an abortion].”<sup>59</sup>

The Court further limited access to abortion as a means of effecting reproductive choice in *Maher v. Roe*,<sup>60</sup> where it held that the State could limit use of Medicaid funds to medically necessary abortions without intruding upon a woman’s constitutional right of choice.<sup>61</sup> On the same day, the Court held in *Beal v. Doe*<sup>62</sup> that Title XIX of the Social Security Act does not require a state Medicaid program to fund elective abortions.<sup>63</sup> In *Maher*, the Court explained that “[w]e certainly are not unsympathetic to the plight of an indigent woman who desires an abortion, but ‘the Constitution does not provide judicial remedies for every social and economic ill.’”<sup>64</sup> The effect of these decisions is to limit access to elective abortions to women who can privately afford them, unless the State decides otherwise.

The development of conscience clause legislation soon after the *Roe v. Wade* decision further constrained access to abortion, by allowing medical providers to refuse to participate in abortions and other procedures that violate their beliefs.<sup>65</sup> The first such legislation was the federal Church Amendment, which prohibited courts and public officials from requiring health care providers receiving governmental funding to provide sterilizations or abortions.<sup>66</sup> The Church Amendment also protected health providers from reprisal in the workplace “for either performing or refusing to perform these services.”<sup>67</sup> The recent trend of conscience clauses that allow pharmacists to refuse to dispense medications on moral or religious grounds, including a South Dakota law passed in 1998, similarly threatens access to contraceptives.<sup>68</sup> In the

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58. *Id.* at 876.

59. *Id.* at 878.

60. 432 U.S. 464 (1977).

61. *Id.* at 466, 478.

62. 432 U.S. 438 (1977).

63. *Id.* at 447.

64. *Maher*, 432 U.S. at 479 (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

65. See Susan Berke Fogel & Lourdes A. Rivera, *Saying Roe is Not Enough: When Religion Controls Healthcare*, 31 *FORDHAM URB. L.J.* 725 (2004).

66. *Id.* at 746 n.152.

67. *Id.* at 746.

68. Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access to*

absence of conscience clause legislation, most state pharmacy boards require pharmacists to dispense all medications for which the patient has a legally valid prescription.<sup>69</sup> Part III of this article will examine these state conscience clauses more closely.

Another source for determining the contours of the right of access to contraception is case law regarding insurance coverage for prescription contraceptives. A trend toward legally-mandated insurance coverage for prescription contraceptives suggests that the right to use contraceptives may include a right of access.<sup>70</sup> Currently, only twenty-two states require that health insurers' prescription drug coverage include coverage of prescription contraceptives.<sup>71</sup>

For instance, California has adopted the Women's Contraception Equity Act (WCEA), which does not require that employers offer employees coverage for prescription drugs, but if the employer chooses to offer such coverage, the coverage must extend to prescription contraceptives.<sup>72</sup> At the same time, the WCEA allows religious institutions to opt out of such insurance coverage on the basis that those contraceptive methods are contrary to the employer's religious tenets.<sup>73</sup> As a result, the conscience clause in the statute allows a "religious employer" to offer drug policies that exclude coverage for contraceptives.<sup>74</sup> However, in *Catholic Charities*, the California Supreme Court found that the plaintiff did not qualify as a "religious employer" because it did not meet the criteria established in the statutory definition.<sup>75</sup> Therefore, as an employer not exempted by the conscience clause, if Catholic Charities provides any drug coverage as part of its employee health insurance plan, it must provide coverage for prescription contraceptives.

Access to prescription contraceptives also may be protected under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.<sup>76</sup> Under Title VII, an employer may not discrimi-

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*Emergency Contraception*, THE GUTTMACHER REPORT ON PUB. POLICY (The Alan Guttmacher Inst., New York, N.Y.), June 1999, at 1, 3, available at <http://www.guttmacher.org/pubs/tgr/02/3/gr020301.html>

69. *Id.* at 2-3.

70. See generally Kate Spota, Note, *In Good Conscience: The Legal Trend to Include Prescription Contraceptives in Employer Insurance Plans and Catholic Charities' "Conscience Clause" Objection*, 52 CATH. U. L. REV. 1081 (2003).

71. THE ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES (Aug. 1, 2005), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf).

72. *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 85 P.3d 67, 74 (Cal. 2004), cert. denied, 125 S. Ct. 53 (2004).

73. *Id.*

74. *Id.*

75. *Id.* at 76.

76. See generally Cheryl A. Danner, *Prescription Contraceptives: Educate Yourself on the*

nate against a female employee "affected by pregnancy, childbirth, or related medical conditions" with respect to employment conditions, including fringe benefits.<sup>77</sup> An Equal Employment Opportunity Commission (EEOC) decision in December 2000 found that a self-insured employer violated Title VII by failing to cover prescription contraceptives as part of an employee health insurance plan.<sup>78</sup> EEOC decisions, although not binding on courts, serve as guides for courts and are usually viewed with deference.<sup>79</sup> In fact, in *Erickson v. Bartell Drug Co.*,<sup>80</sup> a federal court adopted the EEOC's view and held that omission of contraceptives from prescription coverage discriminates against women under Title VII.<sup>81</sup>

Given the case law on the right to abortion and insurance coverage of contraceptives, it is still unclear whether there is any meaningful right of access to contraceptives. Certainly, the case law firmly establishes a right to use oral contraceptives, but without a right of access, the question remains whether that right is meaningful. *Roe v. Wade* established a woman's right to choose an abortion, but as discussed above, later cases limited that right, particularly in access to abortion, by allowing states to opt out of paying for abortions for the indigent and allowing providers to opt out of providing abortions through refusal clauses.<sup>82</sup> However, recent cases on employer insurance plans suggest that there is some right of access to oral contraceptives, or at least a right of access to the means to pay for oral contraceptives.

### III. THE PHARMACIST'S RIGHTS

Does a pharmacist have a legal right to refuse to dispense oral contraceptives? If the pharmacist refuses, does the patient have any legal recourse? Does the employer have the power to require the pharmacist to fill all legally prescribed medications, or to fire a pharmacist who refuses to fill certain prescriptions? Can the pharmacy licensing board take disciplinary action against the pharmacist for the refusal? What legal right does the pharmacist have to refuse to dispense oral contraceptives? In analyzing the legal rights of the pharmacist, I will discuss the potential ramifications the pharmacist risks in refusing to dispense oral

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*Discrimination You May Be Suffering Because You Work for a Private Educational Institution*, 31 J.L. & EDUC. 513 (2002).

77. *Id.* at 514 (quoting Title VII, 42 U.S.C. § 2000e(k) (1964)).

78. *Id.* at 513.

79. *Id.*

80. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

81. *Id.* at 1275-76.

82. See *supra* notes 56-69 and accompanying text.

contraceptives, and the defenses the pharmacist has against those ramifications.

### A. *The Patient's Options*

When a pharmacist refuses to dispense oral contraceptives, the patient is the first person affected by this choice and may complain to the pharmacist's employer or to the pharmacist's licensing board. The patient may even feel her constitutional right to privacy and right to use contraceptives have been interfered with by the pharmacist's refusal.

Part II of this comment discussed the evolution of the constitutional right to use contraceptives, including the limitations on the right of access. A patient who attempts to raise a constitutional challenge against a pharmacist who refuses to fill a prescription for oral contraceptives faces another hurdle: The pharmacist's refusal does not constitute state action, so the patient has no private cause of action to assert against the pharmacist. As the Supreme Court stated in *Jackson v. Metropolitan Edison Co.*,<sup>83</sup> the Due Process Clause of the Fourteenth Amendment "offers no shield" against "private conduct, 'however discriminatory or wrongful.'"<sup>84</sup> Even if the pharmacist exercised the choice to refuse under a conscience clause or provision of the state pharmacist licensing board, the Court's decision in *Jackson* makes clear that the pharmacist's "exercise of the choice allowed by state law where the initiative comes from [the pharmacist] and not from the State, does not make [the pharmacist's] action in doing so 'state action' for purposes of the Fourteenth Amendment."<sup>85</sup>

### B. *The Employer's Options: Employment-at-Will Versus Title VII*

A patient who is refused service by a pharmacist is likely to complain to pharmacy management. In response to such complaints, the pharmacist's employer may wish to discipline the pharmacist, require the pharmacist to agree to dispense all valid prescriptions in the future (subject to health and safety concerns), or even terminate the employment of a pharmacist who refuses to comply with this requirement. Does the employer have the right to take these steps to discipline a pharmacist who, for reasons related to conscience, refuses to dispense oral contraceptives?

Under the employment-at-will doctrine, "[m]anagement can discharge for good cause, or bad cause, or no cause at all."<sup>86</sup> Under this

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83. 419 U.S. 345 (1974)

84. *Id.* at 349 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

85. *Id.* at 357.

86. *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956).

doctrine, pharmacy management faces no negative legal repercussions for demoting or discharging a pharmacist who refuses to fill valid prescriptions. However, most states recognize an exception to the employment-at-will doctrine when the employee's discharge conflicts with a recognized public policy.<sup>87</sup> In such cases, the discharged employee can assert a claim of wrongful discharge against the employer.<sup>88</sup>

In the case of a refusing pharmacist, a wrongful discharge claim might not provide protection, because such a claim depends upon whether the state in which the pharmacist was discharged recognizes the right to conscientious refusal as a public policy.<sup>89</sup> Generally, the public policy exception has been limited to four cases: when the employee is discharged for "refusing to engage in an illegal activity at the behest of the employer; exercising a public duty; asserting a legal right or privilege; or whistleblowing."<sup>90</sup> None of these categories protects a pharmacist who refuses to fill a prescription on moral or religious grounds. Furthermore, pharmacy management can argue that a refusing pharmacist was not fired for following his conscience, but for refusing to perform his job duties, and thus behaving in a manner that conflicts with the pharmacy's business objectives.<sup>91</sup>

A stronger argument for a refusing pharmacist exists under Title VII of the Civil Rights Act, which provides that employers may not discriminate against employees on the basis of their religion.<sup>92</sup> Thus, Title VII might provide some protection to pharmacists who refuse to fill prescriptions for oral contraceptives because of a conflict with their religious beliefs.

Indeed, for refusing pharmacists of some faiths, their religious belief that *all* artificial birth control is wrong is their rationale for refusing to dispense oral contraceptives. For example, the only birth control allowed by the Catholic faith is natural family planning, such as use of the rhythm method.<sup>93</sup>

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87. See 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, 95 (2002-03).

88. *Id.*

89. *Id.*

90. *Id.* at 96 (quoting Mark Brossman & Laurie C. Malkin, *Beyond the Implied Contract: The Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting*, 600 PRACTICING L. INST. 587, 594 (1999)).

91. *See id.* at 95.

92. 42 U.S.C. § 2000e-2(a)(1) (2000).

93. William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 510 (2001); see also Spota, *supra* note 70, at 1084 ("Pope Paul VI's *Humanae Vitae*, or 'Of Human Life,' written in 1968, confirmed the Church's ban on artificial means of contraception.").

Other pharmacists who refuse to dispense oral contraceptives do so because they believe that oral contraceptives cause abortions in certain cases, and their religious beliefs prohibit them from aiding women in obtaining abortions.<sup>94</sup> These pharmacists, and other opponents of oral contraceptives, postulate that oral contraceptives do not always prevent ovulation, therefore allowing fertilization to occur, and that oral contraceptives prevent the fertilized ovum from implanting on the uterine wall.<sup>95</sup> Since these pharmacists also believe that fertilization of the ovum is in fact the beginning of pregnancy,<sup>96</sup> this “post-fertilization effect” of oral contraceptives is thus a form of abortion.<sup>97</sup>

Given the religious rationales that motivate some pharmacists’ refusals to fill prescriptions for oral contraceptives, it would not be difficult for such a pharmacist to establish a prima facie case of religious discrimination. To establish a prima facie case of religious discrimination, a pharmacist who is disciplined or fired for his refusal to fill prescriptions for oral contraceptives would only have to demonstrate that he had a bona fide religious belief in conflict with his employer’s requirement that he fill all valid prescriptions (subject to health and safety concerns), including oral contraceptives, that he informed his employer of his belief, and that he was discharged for failing to comply with the conflicting requirement.<sup>98</sup> Once the plaintiff establishes a prima facie case of employment discrimination, the burden shifts to the employer to show that it cannot reasonably accommodate the employee’s needs without undue hardship.<sup>99</sup>

While Title VII requires an employer to make “reasonable accommodations” for an employee’s religious beliefs, the employer can defend his decision not to accommodate if the accommodation would place an undue hardship on the employer’s business.<sup>100</sup> In *Trans World Airlines, Inc. v. Hardison*,<sup>101</sup> the Supreme Court held that requiring an employer “to bear more than a *de minimis* cost” to accommodate an employee’s

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94. See *Bollinger*, *supra* note 10.

95. *Id.* Mainstream experts estimate that ovulation occurs approximately two to three percent of the time in women taking oral contraceptives. *Id.*

96. The American College of Obstetricians and Gynecologists defines pregnancy as beginning with implantation on the uterine wall. *Id.*

97. *Id.*

98. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 144 (5th Cir. 1982).

99. *Id.*

100. Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2000) (defining religion as including “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.*” (emphasis added)).

101. 432 U.S. 63 (1977).

religious beliefs "is an undue hardship."<sup>102</sup> In that case, the employee's religious beliefs required him to observe the Sabbath on Saturdays. Trans World Airlines was unable to accommodate Hardison's request for Saturdays off without either incurring increased costs, or requiring other employees to trade shifts with him, in violation of the established seniority system.<sup>103</sup> The Court held that the employer was not required to ignore the seniority system that allowed other employees to refuse to trade schedules with the plaintiff, to incur an impairment to the department's functions due to the employee's absence on Saturdays, or to incur the additional cost of paying overtime wages to another employee.<sup>104</sup> All of these alternatives would have imposed an undue hardship on the employer.<sup>105</sup>

Similarly, in *Brener v. Diagnostic Center Hospital*,<sup>106</sup> the Fifth Circuit applied the undue hardship test in a case where an Orthodox Jewish pharmacist was discharged by the employer hospital because he refused to work from sunset Friday to sunset Saturday.<sup>107</sup> The *Brener* court found that the alternatives suggested by the plaintiff, including hiring a substitute pharmacist and operating without the plaintiff, would impose more than a de minimis cost on the employer.<sup>108</sup> The court also found that Brener's preferred solution—having the supervisor direct other employees to trade shifts with Brener—imposed an undue hardship on the employer because prior shift changes resulted in decreased morale among other employees.<sup>109</sup>

As in *Trans World Airlines* and *Brener*, accommodation of a pharmacist's conscientious objection to filling prescriptions for oral contraceptives would impose an undue hardship on employer pharmacies. In his article calling for greater conscience clause legislation, Donald W. Herbe analogizes the proposed accommodations in *Brener* to the potential accommodations a pharmacy can make for a refusing pharmacist, and concludes that Title VII protection is insufficient.<sup>110</sup> For example, a pharmacy could be required to have an additional pharmacist on duty during the objecting pharmacist's shifts, thus ensuring that there is always a pharmacist available who will fill prescriptions for drugs the accommodated pharmacist finds religiously objectionable.<sup>111</sup> If the

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102. *Id.* at 84.

103. *Id.* at 76-77.

104. *Id.* at 82-85.

105. *Id.*

106. 671 F.2d 141 (5th Cir. 1982).

107. *Id.* at 143-44.

108. *Id.* at 146-47.

109. *Id.*

110. Herbe, *supra* note 87, at 94-95.

111. *Id.*

pharmacy would normally have only one pharmacist on duty, such an accommodation would clearly result in an undue economic hardship to the employer.<sup>112</sup> However, even a pharmacy that normally has more than one pharmacist on duty runs the risk of experiencing decreased employee morale if the employer requires other pharmacists to fill “morally controversial” prescriptions.<sup>113</sup> This is particularly burdensome if another pharmacist has moral objections to filling such prescriptions, but elects to put his professional duty to patients above his personal conscience.<sup>114</sup> A court applying the undue hardship test in such a situation would likely find that decreased employee morale poses a sufficiently undue hardship as to excuse the pharmacy employer from accommodating the religious objections of the refusing pharmacist.<sup>115</sup>

Some pharmacists object so strongly to oral contraceptives that even referral to another pharmacist or pharmacy is objectionable as “no more than passive participation in the activity they initially refused to actively assist.”<sup>116</sup> In such a case, the burden on the pharmacy employer is even greater, since unsatisfied patients are likely to feel the pharmacy itself is refusing to assist them, rather than the pharmacist acting alone. A pharmacist who refuses to refer a valid prescription for reasons of conscience would be unlikely to find any protection in Title VII’s proscriptions against religious discrimination, as the necessary accommodation (allowing the pharmacist to turn away, rather than refer, customers) imposes undue hardships upon the employer.

### C. *The Licensing Board’s Disciplinary Powers*

Pharmacists in most states are regulated by state pharmacy boards created by statutes.<sup>117</sup> Under these statutes, state pharmacy boards may have the authority to censure a pharmacist for refusing to fill a prescription for oral contraceptives, or for refusing to transfer the prescription to another pharmacist or pharmacy.<sup>118</sup> For example, under the West Vir-

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112. *Id.*

113. *Id.* at 95.

114. *Id.*

115. See generally *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146-47 (5th Cir. 1982).

116. Herbe, *supra* note 87, at 89.

117. *Id.* at 92.

118. See *id.* (“Each state’s statute and regulations generally designate the offenses for which a pharmacist may be subject to disciplinary action, and further what action the state board may take against the pharmacist. For example, in Ohio the state board ‘may revoke, suspend, limit, place on probation, or refuse to grant or renew an identification card [license], or may impose a monetary penalty . . . .’” (quoting OHIO REV. CODE ANN. § 4729.16 (2004))); Marilyn Gardner, *Pharmacists’ Moral Beliefs vs. Women’s Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11 (stating that pharmacist Neil Noesen, who refused to fill or transfer a customer’s prescription, was to “appear before a court commissioner in Madison, Wis., to face a disciplinary

ginia Code, pharmacists are required to fill any prescription order unless there is a valid reason for the pharmacist's inability to do so.<sup>119</sup> If the pharmacist refuses to fill a prescription for oral contraceptives, he is required to document a valid reason for his refusal. The state pharmacy board would review the pharmacist's reason for refusal and determine whether the pharmacist violated the code.<sup>120</sup>

In a number of states, however, a pharmacist has a duty to refuse to dispense a prescription when doing so would conflict with his professional judgment.<sup>121</sup> Similarly, the American Pharmaceutical Association's ("APhA") policy calls for pharmacists to refuse to dispense medications when doing so would conflict with their professional judgment. Nonetheless, the APhA recognizes that this policy does not address refusals based on the pharmacist's moral or personal objections,<sup>122</sup> indicating that similar state policies do not protect pharmacists who refuse to fill prescriptions based on conscience. In 1998, the APhA's Policy Committee recommended that the APhA recognize a pharmacist's right to conscience-based refusals, but require that pharmacists tell their employers of their objections to dispensing particular medications, so that employers can make appropriate accommodations for patients.<sup>123</sup> The APhA's House of Delegates amended the existing policy to reflect the Committee's recommendations in 2004.<sup>124</sup>

As one example of the power of state pharmacy boards, Neil Noesen faced a disciplinary hearing before Wisconsin's Pharmacy Examining Board for his failure to transfer to another pharmacy or return a prescription for oral contraceptives to the patient because of his religious beliefs.<sup>125</sup> PFLI, who submitted an amicus curiae brief in support of Noesen, argued that Noesen's refusal did not cause the patient

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hearing on charges of unprofessional conduct. The Wisconsin Department of Regulation and Licensing could fine him or revoke his license.").

119. AM. PHARM. ASS'N, 1997-98 POLICY COMMITTEE REPORT: PHARMACIST CONSCIENCE CLAUSE (1998).

120. *Id.* The decision of the pharmacy board would also be subject to judicial review. *Id.*

121. *See, e.g.,* Stephanie E. Harvey et al., *Do Pharmacists Have the Right to Refuse to Dispense a Prescription Based on Personal Beliefs?*, [http://www.nm-pharmacy.com/body\\_rights.html](http://www.nm-pharmacy.com/body_rights.html) (last visited Jan. 7, 2005).

122. AM. PHARM. ASS'N, *supra* note 119.

123. *Id.*

124. AM. PHARM. ASS'N, REPORT OF THE 2004 SESSION OF THE APHA HOUSE OF DELEGATES (2004) ("APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."), [http://www.aphanet.org/AM/Template.cfm?Section=search&section=about\\_APhA1&template=/CM/ContentDisplay.cfm&ContentFileID=225](http://www.aphanet.org/AM/Template.cfm?Section=search&section=about_APhA1&template=/CM/ContentDisplay.cfm&ContentFileID=225).

125. Brief Amicus Curiae In the Matter of Disciplinary Proceedings against Neil Noesen, R.Ph., by Pharmacists for Life Int'l in Support of Defendant, *In re Disciplinary Proceedings Against Neil T. Noesen, R.Ph.*, No. LS-0310091-PHM (Wis. Pharmacy Examining Bd. 2005).

any harm, as she was able to get her medication the next day, and because “birth control pills . . . are not a medical necessity, since there are other options for preventing birth.”<sup>126</sup> PFLI also argued that Noesen has a protected freedom “to serve the Creator, and serve his fellow humans according to the dictates of his conscience.”<sup>127</sup> However, the administrative law judge found that Noesen had violated the state ethics code prohibiting a pharmacist from endangering “the health, welfare or safety of a patient” by putting the patient at risk of an unwanted pregnancy through his refusal to dispense oral contraceptives or transfer or return of the prescription to the patient.<sup>128</sup> The judge recommended that Noesen be reprimanded and required to attend ethics classes; the Pharmacy Examining Board adopted the judge’s proposed decision as its final decision on April 13, 2005.<sup>129</sup>

The power of pharmacy licensing boards to require pharmacists to fill valid prescriptions, even against the pharmacist’s conscience, does not violate the pharmacist’s right of free exercise of religion. In *Employment Division, Department of Human Resources v. Smith*,<sup>130</sup> the Supreme Court stated that an individual’s religious beliefs do not “excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>131</sup> Free exercise jurisprudence allows the State to require individuals “to comply with a ‘valid and neutral law of general applicability’” even when such compliance conflicts with the individual’s religion.<sup>132</sup> Only in cases in which “other constitutional protections, such as freedom of speech and of the press” are affected by the statute in question has the Court held that “a neutral, generally applicable law” is barred by the First Amendment.<sup>133</sup>

State licensing board rules requiring pharmacists to fill any valid prescription would apply generally and neutrally to all pharmacists, regardless of religious or moral beliefs.<sup>134</sup> Such rules would not target

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126. *Id.*

127. *Id.*

128. *In re* Disciplinary Proceedings Against Neil T. Noesen, R.Ph., No. LS-0310091-PHM (Wis. Pharmacy Examining Bd. 2005), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>.

129. *Id.*

130. 494 U.S. 872 (1990).

131. *Id.* at 878-79; cf. *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 85 P.3d 67, 76 (Cal. 2004), cert. denied, 125 S. Ct. 53 (2004) (holding that a Catholic employer was required to include women’s prescription contraceptives in its health insurance plan if the employer covered other prescription drugs, because the employer did not qualify as an exempt religious employer under the California statute).

132. *Employment Div.*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

133. *Id.* at 881.

134. See Heather Rae Skeeles, Comment, *Patient Autonomy Versus Religious Freedom:*

any particular religion, nor would any other constitutional right be at stake to bar the application of the rule.<sup>135</sup> However, if the rules required a pharmacist to dispense medications without commenting on the controversial nature of the drugs to the patient, the rule might be barred as impeding the pharmacist's right of free speech.

#### D. *Powerful Protection from Conscience Clauses*

Even if there is currently insufficient protection for the pharmacist's right to refuse, conscience clauses have the potential to give pharmacists ironclad protection against repercussions for following their conscience. Conscience clauses are statutes or regulations that protect health care employees from repercussions for refusal to participate in health care services to which they are morally or religiously opposed.<sup>136</sup> Such clauses began appearing in federal and state law in the early 1970's, originally to protect recipients of federal funds from mandatory participation in abortion or sterilization procedures conflicting with their moral or religious beliefs.<sup>137</sup> Most states followed suit, adopting conscience legislation protecting health care providers who refuse to provide services conflicting with their religious or moral beliefs.<sup>138</sup>

A critical question with respect to such conscience clauses is whether they extend to pharmacists who refuse to dispense oral contraceptives, or whether they simply protect doctors and nurses who refuse to participate in the provision of abortion services.<sup>139</sup> Until 1998, no state board of pharmacy had adopted a conscience clause explicitly applicable to pharmacists.<sup>140</sup> South Dakota was the pioneer state; the state's conscience clause applies specifically to pharmacists and protects the pharmacist from "any disciplinary, recriminatory, or discriminatory action against the pharmacist," as well as from any claims for damages against the pharmacist, for a refusal to dispense any medication which there is reason to believe "would be used to: (1) Cause an abortion; or (2) Destroy an unborn child . . . ."<sup>141</sup>

Arkansas, Mississippi and Georgia also explicitly allow pharma-

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*Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1030 (2003).

135. *Id.*

136. Lynne D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 178 (1993).

137. Bassett, *supra* note 93, at 552-53.

138. *Id.* at 554.

139. See Herbe, *supra* note 87, at 97 ("As nearly all conscience statutes were enacted without regard to pharmacists, these statutes are deficient in the context of pharmaceutical distribution of reproductive medications in both their scope and protection.")

140. See Harvey et al., *supra* note 121.

141. S.D. CODIFIED LAWS § 36-11-70 (2004).

cists to refuse to dispense contraception.<sup>142</sup> Arkansas' statute states that "[n]othing in this [Family Planning] subchapter shall prohibit a physician, *pharmacist*, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information . . . ."<sup>143</sup> The Mississippi statute provides that "[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,"<sup>144</sup> and explicitly includes pharmacists in the definition of health care provider.<sup>145</sup> The Georgia Code of Professional Conduct states that "[i]t shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs."<sup>146</sup>

Other state conscience clauses either apply only to health care providers such as doctors and nurses, apply only to the provision of abortion services, or are ambiguous as to whether pharmacists have a legal right to conscientious refusal.<sup>147</sup> For instance, Florida's conscience clause family planning statutes "shall not be interpreted so as to prevent a physician *or other person* from refusing to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons; and the physician *or other person* shall not be held liable for such refusal."<sup>148</sup> The phrase "or other person" is sufficiently ambiguous to discourage reliance by pharmacists.

Ambiguous state conscience clauses that do not explicitly protect pharmacists who refuse to dispense contraceptives do not provide pharmacists with much protection. Courts have interpreted conscience clauses strictly, to exempt only those individuals and the conduct explicitly mentioned in statutes.<sup>149</sup> For example, a California court refused to apply the California conscience clause in a case in which a private religious hospital refused to give a woman information about emergency contraception (the "morning-after pill"), because the clause only applied to provision of abortion services, and, the court held, the pill was not an abortifacient.<sup>150</sup> Even if a pharmacist were able to convince a court that

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142. THE ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (Aug. 1, 2005), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf).

143. ARK. CODE ANN. § 20-16-304(4) (2000) (emphasis added).

144. MISS. CODE ANN. § 41-107-5(1) (Supp. 2004).

145. MISS. CODE ANN. § 41-107-3(b) (Supp. 2004).

146. GA. COMP. R. & REGS. 480-5-.03 (2001).

147. See Herbe, *supra* note 87, at 97-98; Wardle, *supra* note 136, at 178-85.

148. FLA. STAT. § 381.0051 (2004) (emphasis added).

149. See Bassett, *supra* note 93, at 555-58; Wardle, *supra* note 136, at 199-205.

150. Bassett, *supra* note 93, at 556 (citing *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240 (Cal. Ct. App. 2d 1989)).

oral contraceptives are abortifacients using the “post-fertilization effect” argument,<sup>151</sup> most conscience clauses only protect against “participation or assistance in abortion.”<sup>152</sup> Whether pharmacists who dispense drugs that arguably induce abortions can be considered to have participated or assisted in abortions remains an open question, although clearly, dispensation of oral contraceptives might not be a significant enough act to constitute participation or assistance in abortion.<sup>153</sup>

However, state conscience clauses that explicitly protect a pharmacist from being required to dispense any medication that violates his conscience, such as the extremely broad Mississippi statute,<sup>154</sup> likely provide ironclad protection for the refusing pharmacist. A court applying the Mississippi statute would likely apply the statute as strictly as other conscience clauses have been applied, but in this case, to the benefit of the refusing pharmacist. For example, a Montana court held that a nurse-anesthetist who refused to participate in sterilization procedures was protected by that state’s conscience statute from being discharged for her refusal, even where the employer hospital alleged that the employee had participated in prior procedures, and the refusal created a substantial burden for the employer.<sup>155</sup>

In at least one case, however, a court has exhibited a desire to minimize the absolute protection of a statute protecting pharmacists. In *Kenny v. Ambulatory Centre of Miami*,<sup>156</sup> a Florida court found that the state’s conscience clause was evidence of a “policy permitting religious practices to supercede or take priority over certain employment practices” and that the employer could not fire or discipline an employee for exercising their religious beliefs.<sup>157</sup> After reviewing court decisions applying similar conscience statutes in other states, the Florida court adopted “the requirement that an employer must reasonably accommodate an employee’s religious practices unless he establishes that he would suffer undue hardship,” a requirement not contained in the language of the Florida statute.<sup>158</sup> While the adoption of the undue hardship exemption, borrowed from Title VII, would arguably make the plaintiff’s case more difficult, the court nonetheless held that the plaintiff nurse was entitled to reinstatement, unpaid wages, and damages for

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151. See discussion *supra* pp. 2-3.

152. Herbe, *supra* note 87, at 99.

153. See *id.*

154. MISS. CODE ANN. § 41-107-5(1) (Supp. 2004); MISS. CODE ANN. § 41-107-3(b) (Supp. 2004).

155. *Swanson v. St. John’s Lutheran Hosp.*, 597 P.2d 702 (Mont. 1979).

156. 400 So. 2d 1262 (Fla. 3d Dist. Ct. App. 1981).

157. *Id.* at 1267.

158. *Id.* at 1266.

having been demoted by the employer hospital for her refusal to participate in abortions.<sup>159</sup> The court found that the employer had made minimal attempts to accommodate the nurse's religious beliefs, but that the employer did not show that it would suffer undue hardship by making further accommodations such as rearranging schedules.<sup>160</sup>

An employer who is subject to a state conscience statute that explicitly protects pharmacists from forced dispensation of oral contraceptives has little or no recourse when the employee pharmacist refuses to dispense such medications to the detriment of the employer's business. At best, the employer can hope that its state courts will adopt the same "undue hardship" exemption adopted in *Kenny*, but even in that situation, the burden will be on the employer to prove that it could not accommodate the employee's objections without suffering a significant burden. If the courts do not apply such an exemption for the employer, then the employer will have to pay extra costs to ensure that a pharmacist who is willing to dispense oral contraceptives is available at all times. Those who fail to take such measures not only run the risks of incurring liability to female patients who are wrongfully denied their rights, but also of losing customers.

#### IV. WHOSE RIGHT SHOULD PREVAIL?

What is the pharmacist's role in health care? Currently, a pharmacist is a necessary intermediary for women's access to oral contraceptives because oral contraceptives are not available without a prescription.<sup>161</sup> A pharmacist's professional ethical duty is to protect the patient's best interests.<sup>162</sup> Therefore, a patient's interests have priority over the pharmacist's interests. A pharmacist "presented with a validly authorized prescription for a legal medication, by a patient aware of the risks involved in taking the medication, and for whom the medication would be reasonably safe," has "an ethical duty to fill and dispense the prescription."<sup>163</sup> Pharmacists in such a position need to respect their patient's autonomy. Instead, however, pharmacists who refuse to dispense oral contraceptives place their concern for their own ethical autonomy above the autonomy of their patients.

One argument in support of this position has been levied against religious hospitals that refuse to provide emergency contraception to

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159. *Id.* at 1267.

160. *Id.* at 1266.

161. REPROD. HEALTH TECH. PROJECT & THE ALAN GUTTMACHER INST., *THE UNFINISHED REVOLUTION IN CONTRACEPTION: CONVENIENCE, CONSUMER ACCESS AND CHOICE* (Oct. 2003), available at <http://www.guttmacher.org/pubs/2004/09/20/UnfinRevInContra.pdf>.

162. Herbe, *supra* note 87, at 87.

163. *Id.* at 88.

rape victims. The argument suggests that such hospitals "waive the right to ethical autonomy . . . by engaging in monopolistic practices . . . in cases of traumatic intervention for victims of sexual assault, or when the hospitals cease to be nonprofit corporations."<sup>164</sup> This argument can be extended to cover pharmacists working in for-profit settings. Accordingly, such pharmacists have similarly waived the right to place their ethical autonomy over their patients' rights to make their own choices about their healthcare in concert with their physicians.

Women have a need, and arguably a right,<sup>165</sup> to reliable access to birth control, both to control their fertility and for health reasons.<sup>166</sup> An important question, then, is whether a pharmacist's refusal to dispense oral contraceptives really creates an access problem. It is true, as PFLI observes in its amicus brief for Neil Noesen, that the laws "are not designed to protect [women] from feeling insulted" when they realize that their "choice of elective medication is clinically and ethically controversial."<sup>167</sup> Where there are market alternatives available, such as in a city with a large number of pharmacies and pharmacists who might not object to filling a prescription for oral contraceptives, perhaps the problem is not really access, but inconvenience. However, a pharmacist's refusal to dispense oral contraceptives can be particularly devastating in rural areas, and to populations of women who have limited access due to other factors.<sup>168</sup>

According to a study of family planning service provision in rural Washington, twenty-four percent of U.S. residents live in rural areas.<sup>169</sup> In such areas, "access to health care is often limited by provider shortages, by the absence of local services, by lack of transportation and by economic factors."<sup>170</sup> The study noted that there are some rural areas in Washington that have no access to local family planning clinics.<sup>171</sup> While access to family planning clinics can only serve as a proxy for

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164. Bassett, *supra* note 93, at 583.

165. See *supra* notes 70-82 and accompanying text.

166. Bollinger, *supra* note 10 (noting that oral contraceptives are also prescribed for reasons other than contraception, such as treatment of endometriosis and fibroids).

167. See Brief Amicus Curiae In the Matter of Disciplinary Proceedings against Neil Noesen, R.Ph., by Pharmacists for Life Int'l in Support of Defendant, *supra* note 125.

168. See Gardner, *supra* note 118 (quoting Lisa Boyce, vice president of public affairs for Planned Parenthood of Wisconsin, criticizing Wal-Mart's decision not to stock emergency contraception because "'many rural communities only have one pharmacy,' . . . 'so you only have one pharmacist. Or the next pharmacy is miles away.'").

169. Sharon A. Dobie et al., *Family Planning Service Provision in Rural Areas: A Survey in Washington State*, FAM. PLAN. PERSP., May-June 1998, at 139.

170. *Id.* The article further notes that "[o]f the 30 poorest health service areas in the state, 25 were rural. Of the 53 rural health service areas, 25 reported primary care provider shortages . . . ." *Id.* at 141.

171. *Id.* at 142.

women's access to contraceptives, such clinics serve "[o]ne-third of all women seeking contraceptive services" and "nearly two-thirds of low-income and teenage women."<sup>172</sup>

Even in those cases where a pharmacist's refusal constitutes a mere inconvenience to the patient, an employer should be able to ensure that patients bringing prescriptions to its pharmacy have their legal prescriptions filled without hesitation (subject to the pharmacist's professional health-related judgment). Requiring employer pharmacies to do more than make reasonable accommodations for employees' religious or other objections imposes on the employer too great a burden in terms of lost customer goodwill, as the patient will likely perceive the pharmacy itself to be rejecting her prescription and finding her choice of contraception morally objectionable.

Both patients and employers need a repeal or revision of overly-permissive conscience clauses to strike a balance between the rights of pharmacists and their customers and employers. States should stop reacting to conservative pressure to pass these conscience clauses and should more carefully consider the impact that these new protections for pharmacists will have on women's right of access to contraception. California is a progressive example; legislators are trying to pass a law that would require pharmacists to dispense oral contraceptives when presented with a valid prescription.<sup>173</sup>

In the absence of individual states recognizing that permissive conscience clauses threaten access to oral contraceptives and thus the right of reproductive choice, Congress could pre-empt such state conscience clauses by enacting a federal statute requiring pharmacists to fill valid, legal prescriptions regardless of their individual objections, or allowing pharmacies to discipline employee pharmacists who refuse to do so.<sup>174</sup> Such pre-emption would be valid under Congress's Commerce Clause<sup>175</sup> power, as oral contraceptives are distributed nationally (even globally) and are part of the stream of interstate commerce.<sup>176</sup>

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172. *Id.* at 139.

173. Harrison Sheppard, *Bill Would Require Birth Control Sales*, DAILY NEWS (Los Angeles), Dec. 31, 2004, at N5.

174. Elizabeth Tobin, Note, *Blurring the Line Separating Church and State: California Exposes the Inherent Problems of Charitable Choice*, 86 MINN. L. REV. 1629, 1647 (2002) (stating that under the Supremacy Clause, federal law pre-empts state law where "a federal law and a state law exist in a related field or create a conflict in their application").

175. U.S. CONST. art. I, § 8, cl. 3.

176. See *Gonzalez v. Raich*, 125 S. Ct. 2195, 2205 (2005) (holding that Congress has the power to regulate the manufacture, distribution, and possession of medical marijuana by intrastate growers and users, and stating that "[f]irst, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." (citations omitted)).

Another possible solution to the potential negative effects on access to oral contraceptives from pharmacist refusals to dispense such contraceptives is for the Food and Drug Administration to give at least some oral contraceptives over-the-counter (OTC) status.<sup>177</sup> However, this solution raises concerns that unlinking oral contraceptives from the requirement of a prescription would lead to women foregoing the annual medical examination most prescribers require as a prerequisite to prescribing the drugs.<sup>178</sup> While these concerns are probably exaggerated,<sup>179</sup> this solution presents other problems, including that OTC status means that these drugs would no longer be covered by prescription drug insurance, making them less affordable for women whose prescription contraceptives are currently covered by health insurance.<sup>180</sup> Additionally, it is possible that the latest innovations in contraception initially would be available by prescription only,<sup>181</sup> leaving the possibility that the most effective products would still be accessible only through those pharmacists who do not refuse to fill such prescriptions.

While the recent trend in conscience clauses is to expand protection to encompass pharmacists who refuse to fill prescriptions for religious or moral reasons,<sup>182</sup> there is cause for hope in a bill introduced in the House of Representative by Representatives Carolyn Maloney (D-NY), Christopher Shays (R-CT), Debbie Wasserman Schultz (D-FL), and Joseph Crowley (D-NY).<sup>183</sup> If passed, the Access to Legal Pharmaceuticals Act would require that when a pharmacist refuses to dispense a legally prescribed medication, the pharmacy ensures another pharmacist fill the prescription without delay.<sup>184</sup> The proposed bill also prohibits a refusing pharmacist from interfering with the customer's efforts to get the prescription filled, such as by refusing to return the prescription to the customer, refusing to transfer the prescription if the customer

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177. See REPROD. HEALTH TECH. PROJECT & THE ALAN GUTTMACHER INST., *supra* note 161.

178. *Id.* at 3-4.

179. *Id.* at 3 ("Although there is a lack of consensus, it is worth noting that a handful of experts contend that most contraceptive options—with the exception of the IUD—are appropriate candidates for a switch [to OTC status].").

180. *See id.* at 4.

181. See W. Steven Pray & Joshua J. Pray, *How Medications Gain FDA-Approved OTC Status*, U.S. PHARMACIST, Oct. 2003, at 10, available at [http://www.uspharmacist.com/index.asp?show=article&page=8\\_1149.htm](http://www.uspharmacist.com/index.asp?show=article&page=8_1149.htm).

182. See generally Bryan A. Dykes, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002); Gloria Feldt, *Whose Conscience?*, TOMPAINE.COM, Oct. 8, 2004, [http://www.tompaine.com/articles/whose\\_conscience.php](http://www.tompaine.com/articles/whose_conscience.php).

183. See Press Release, Rep. Carolyn B. Maloney, D-N.Y., On 40th Anniversary of Supreme Court Birth Control Decision, Some Women Have Seen Their Rights Vanish (June 7, 2005), <http://www.house.gov/Maloney/press/109th/20050607Griswold.htm>.

184. Access to Legal Pharmaceuticals Act, H.R. 1652, 109th Cong. (2005).

requests a transfer, harassing or intimidating the customer, or breaching the customer's medical confidentiality.<sup>185</sup> The bill would also create a private cause of action for the aggrieved patient, with provision for actual and punitive damages, injunctive relief, and attorney's fees and costs.<sup>186</sup>

While a federal law preempting state conscience clauses would resolve many of the problems addressed in this article, it seems unlikely such a law will be enacted. If anything, the results of the 2004 presidential election are evidence of increased political conservatism and the heightened power of the religious right to affect policy.<sup>187</sup> In 2005 alone, legislation that would expand conscience protection to pharmacists has been introduced in states including Arizona, Indiana, Michigan, Rhode Island, Tennessee, and Vermont.<sup>188</sup>

Perhaps the real problem is the public's lack of awareness of these laws and their repercussions. Most Americans are supportive of the use of oral contraceptives, and 95 percent of American women use some form of birth control at some point in their lives.<sup>189</sup> Fortunately, the popular press is bringing needed attention to this topic by reaching out to the population whose rights are most endangered—young women.<sup>190</sup> Perhaps greater attention to this growing trend and its potential ramifications for reproductive choice is needed to spur debate on the proper limits of pharmacists' power to control access to oral contraceptives. At the very least, women, and the men with whom they share responsibility for controlling their fertility, should be aware of this threat so they have a chance to protest before they lose an important right.

## V. CONCLUSION

Are these pharmacists' attacks of conscience mere isolated events, or are they part of an organized effort to deprive women of the ability to exercise reproductive choice? Pro-choice commentators have

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185. *Id.*

186. *Id.*

187. See generally PLANNED PARENTHOOD FED. OF AM., INC., A PLANNED PARENTHOOD REPORT ON THE BUSH ADMINISTRATION AND ITS ALLIES: THE ASSAULT ON BIRTH CONTROL AND FAMILY PLANNING PROGRAMS (2003), [http://www.plannedparenthoodnj.org/library/files/79\\_assaultonb.pdf](http://www.plannedparenthoodnj.org/library/files/79_assaultonb.pdf).

188. See PLANNED PARENTHOOD FED. OF AM., INC., STATE BY STATE ACTION: SUMMARY OF STATE ACTIONS RELATED TO PHARMACIST REFUSALS (2005), <http://www.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-050418-pharmacist-refusals.xml>.

189. Bollinger, *supra* note 10.

190. See, e.g., Susan Bakos, *Is Your Sex Life Being Censored?*, MARIE CLAIRE, Oct. 2004, at 183, 186 (asking "Is Your Pharmacist Crossing Lines?" and listing the states in which legislation to allow pharmacists to refuse to fill prescriptions for RU-486 and the morning-after pill has been either enacted or proposed).

denounced the pharmacists' actions as part of a general, conservative attack on women's access to abortion and control of their own fertility.<sup>191</sup> The Bush administration's policies on health funding and sex education reflect attempts to limit access not just to abortion but also to birth control, including condoms.<sup>192</sup> Behind these restrictions on the means through which women exercise reproductive choice looms the larger issue of controlling sexuality in general.<sup>193</sup>

These incidents of pharmacists' refusals to dispense oral contraceptives seem to be on the rise,<sup>194</sup> possibly because of the concerted efforts of organized anti-choice groups such as Pharmacists for Life International. Groups that traditionally fought against access to abortion are now extending the anti-abortion argument to encompass oral contraceptives.<sup>195</sup> The refusing pharmacists also have legal assistance now, as organizations such as the Liberty Legal Institute<sup>196</sup> and the American Center for Law and Justice<sup>197</sup> have begun to litigate on behalf of refusing pharmacists.

This trend indicates an urgent need to protect a woman's right to control her own fertility, and particularly a need to protect choice at a preventative level. Surely, pro-life and pro-choice activists should be able to agree that prevention of unintended pregnancies is a desirable result.<sup>198</sup> Women need to have *access* to oral contraceptives for their right to use contraceptives to be a real right, and not just a nominal one.

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191. See PLANNED PARENTHOOD FED. OF AM., INC., *supra* note 187.

192. See *id.*

193. See *id.* at 1 ("This attack is an intense effort by those who have historically played in the anti-abortion wars to reframe sexual mores, confuse the public, and mix science with religion.")

194. See McGivering, *supra* note 4; McDonald, *supra* note 3.

195. See McGivering, *supra* note 4.

196. Linda Stewart Ball, *Conservative Group Is Flip Side to ACLU*, DALLAS MORNING NEWS, Apr. 8, 2004, at 4B.

197. See Press Release, American Center for Law and Justice, ACLJ Not Deterred by Entry of Planned Parenthood into Lawsuit Against Kmart Involving Abortion Producing Drugs (Oct. 11, 2001), [http://www.acljlife.org/news/pr\\_011111\\_kmart\\_planned\\_parenthood.asp](http://www.acljlife.org/news/pr_011111_kmart_planned_parenthood.asp).

198. See PLANNED PARENTHOOD FED. OF AM., INC., *supra* note 187, at 3 (noting Democratic Senator Dick Durbin's surprise that so many of his colleagues who are against abortion are also opposed to birth control).

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