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# **WHEN TWO FUNDAMENTAL RIGHTS COLLIDE AT THE PHARMACY: THE STRUGGLE TO BALANCE THE CONSUMER'S RIGHT TO ACCESS CONTRACEPTION AND THE PHARMACIST'S RIGHT OF CONSCIENCE.**

*By Suzanne Davis & Paul Lansing<sup>1</sup>*

## **I. INTRODUCTION**

The dangerous intersection between a pharmacist's right of moral belief and a woman's right of contraceptive use continues to be an important topic for debate across the nation. In fact, the area of contraceptive rights has been a controversial issue since the United States Supreme Court's decision in *Griswold v. Connecticut* in 1965, which recognized a constitutional right of privacy in family planning decisions implicit within the meaning of the Bill of Rights. Now, over forty years since this landmark decision, courts continue to grapple with the notion of women's rights and how contraceptive use should be protected.

New developments in pharmaceutical research and technology have resulted in the formation of new legal and ethical issues. The most recent dilemma faced by both federal and state courts features women who desire a recently FDA approved contraceptive drug called Plan B and pharmacists who are morally opposed to the mode of action of the drug. This newfound ability to prevent birth using a drug taken after sexual activity presents a scenario the *Griswold* Court would have never anticipated. Nonetheless, the precedent beginning with *Griswold* has created a necessary collision between these two fundamental rights.

Pharmacists are placed in a unique position in this controversy. Pharmacists are licensed by the state yet some believe that they cannot comply with state requirements due to their individual religious beliefs. As nearly all Americans are familiar, the right to religious belief has been protected since the drafting of the Bill of Rights in the First Amendment. Consequently, many pharmacists, who are opposed to Plan B, think the government should not be allowed to interfere with their business and ethical decision to refuse to dispense the drug. As Illinois State Senator and Pharmacist/Pharmacy Owner, Frank Watson,

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states: “It’s an infringement on a business decision and also on the pharmacist’s right of conscience.”<sup>2</sup>

## II. BACKGROUND

Although government action on this issue is occurring nationwide, we have chosen to use an Illinois court case, *Morr-Fitz v. Blagojevich*, to exemplify the problem because the Illinois “Duty to Dispense” law analyzed in the case has been referred to as an appropriate template for the balance of pharmacist and patient rights.<sup>3</sup> The case is currently under review by the Illinois Supreme Court, as the Court heard arguments on March 18, 2008, and a decision is expected soon.<sup>4</sup>

In this case, the Plaintiffs allege having moral and religious objections to dispensing the “Morning After Pill”, also known as emergency contraception or Plan B because they believe that life begins at conception and the drug can prevent a fertilized egg from implanting in the uterus.<sup>5</sup> Although the plaintiffs have not yet been confronted with a consumer demanding an emergency contraception prescription be filled, they currently seek declaratory judgment from the Supreme Court to prevent suffering hardship from Blagojevich’s emergency order.<sup>6</sup>

Governor Blagojevich made the “Duty to Dispense” emergency order on April 1, 2005 in response to several consumer complaints that pharmacists were refusing to fill their valid prescriptions based on the pharmacist’s religious beliefs about the drug.<sup>7</sup> The emergency rule, that subsequently became permanent by legislative committee approval, requires Illinois Pharmacists to fill all valid prescriptions for

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<sup>2</sup> Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight in Many States*, N.Y. Times, Apr. 19, 2005, at 1, available at <http://www.nytimes.com/2005/04/19/national/19pill.html>.

<sup>3</sup> Sarah Tomkowiak, *Reconciling Principles and Prescriptions: Do Pharmacist Refusal Clauses Strike the Appropriate Balance Between Pharmacists’ and Patients’ Rights?*, 4 U. ILL. L. REV. 1329, 1353 (2007).

<sup>4</sup> Illinois Courts website, Illinois Supreme Court Docket page, <http://www.state.il.us/COURT/SupremeCourt/Docket/2008/03-08.pdf>.

<sup>5</sup> *Morr-Fitz v. Blagojevich*, 867 N.E.2d 1164, 1165 (Ill. App. Ct. 2007).

<sup>6</sup> Illinois Courts website, Illinois Supreme Court Oral Arguments video of Plaintiff’s oral arguments,

[http://163.191.183.117/court/SupremeCourt/Video/2008/031808\\_104692.wmv](http://163.191.183.117/court/SupremeCourt/Video/2008/031808_104692.wmv).

<sup>7</sup> *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 996 (C.D. Ill. 2006).

contraceptives, including emergency contraception.<sup>8</sup> Specifically, the administrative rule states as follows.

“Duty of Division I Pharmacy to Dispense Contraceptives: 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 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 be transferred to a local pharmacy of the patient’s choice under the pharmacy’s standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs. 2) For the purposes of this subsection (j), the term ‘contraceptive’ shall refer to all FDA-approved drugs or devices that prevent pregnancy.”<sup>9</sup>

The Illinois Department of Professional Regulation has made it clear that non-compliance with the new rule will not be tolerated. A spokesman for the state agency said in response to a fine against a St. Charles Illinois Osco Pharmacy for \$37,500 for its failure to dispense Plan B emergency contraception in 2006: “This is a significant fine. It’s important pharmacies understand that we intend to vigorously enforce this rule.”<sup>10</sup> Not complying can even result in the suspension of

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<sup>8</sup> 29 Ill. Reg. 5586 (Apr. 15, 2005); *see also* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2008)

<sup>9</sup> ILL. ADMIN. CODE tit. 68, § 1330.91(j), *amended by* 29 Ill. Reg. 13639, 13663 (Aug., 25, 2005).

<sup>10</sup> Gala M. Pierce, *Osco Hit with Fine*, DAILY HERALD, January 12, 2006, at 1, available at <http://www.dailyherald.com/search/searchstory.asp?id=142048>.

a pharmacy's license as well as the license of that site's chief pharmacist.<sup>11</sup>

Consequently, the gravity of this issue is clear. On one hand, pharmacists across the state have lost their jobs for their failure to dispense the drug. For example, four Walgreens pharmacists were put on indefinite unpaid leave for refusing to fill emergency contraception prescriptions.<sup>12</sup> Other pharmacists have been fired or denied promotions because of their refusal to dispense the drug.<sup>13</sup> Others such as Luke Vander Bleek, one of the Plaintiffs in the *Morr-Fitz* case, seek declaratory judgment to determine whether he will be able to practice his profession while holding firm to his moral beliefs.<sup>14</sup> If the Illinois Supreme Court rules against conscience protection, Vander Bleek recognizes he may be forced, due to his religious beliefs, to close the doors of his pharmacy and move to a different state or quit pharmacy altogether.<sup>15</sup>

On the other hand, consumers with valid prescriptions have been denied by pharmacies to have their prescriptions filled. This was Governor Blagojevich's concern when he announced the emergency order. He commented: "[A few weeks earlier] two women called in prescriptions to their local pharmacy in the South Loop [downtown Chicago] to purchase contraceptives. Each woman had a prescription from her doctor. Both women only sought to buy contraceptives yet both were denied. Why? Because the pharmacist refused to fill the prescription [sic]. Unfortunately, this story is not unique to Chicago or to Illinois. Cases like this have been popping up all over the country. It's happened in Wisconsin, Texas, New Hampshire, North Carolina, Ohio, California, and in other states around the country."<sup>16</sup> Subsequently at a press conference announcing the new law, the Governor added that: "those involved in this effort may be getting away

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<sup>11</sup> Jim Suhr, *Four Walgreen Pharmacists Disciplined for Not Filling Contraceptives*, BOSTON GLOBE, Dec. 1, 2005 available at [http://www.boston.com/news/nation/articles/2005/12/01/walgreens\\_places\\_4\\_pharmacists\\_on\\_leave/](http://www.boston.com/news/nation/articles/2005/12/01/walgreens_places_4_pharmacists_on_leave/).

<sup>12</sup> *Id.*

<sup>13</sup> Bruce D. White, DRUGS, ETHICS, AND QUALITY OF LIFE: CASES AND MATERIALS ON ETHICAL, LEGAL, AND PUBLIC POLICY DILEMMAS IN MEDICINE AND PHARMACY PRACTICE 86 (The Haworth Press, Inc. 2007).

<sup>14</sup> *Id.*

<sup>15</sup> Interview with Luke Vander Bleek, Plaintiff in *Morr-Fitz v. Blagojevich*, 867 N.E.2d 1164 (Ill. App. Ct. 2007)(No. 4-05-1050), May 15, 2008. (on file with author).

<sup>16</sup> WHITE, *supra* note 12, at 86.

with this in other states, but here in Illinois, we are not going to let that happen.”<sup>17</sup>

### A. The Illinois “Duty to Dispense” Rule

Basically, the rule states that upon receipt of a valid, lawful prescription for a contraceptive, which is defined as all FDA-approved drugs or devices that prevent pregnancy, 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.<sup>18</sup> If the drug is not in stock, the pharmacy must obtain the contraceptive under the pharmacy’s standard procedures for ordering contraceptive drugs not in stock.<sup>19</sup> However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient’s choice, under the pharmacy’s standard procedures for transferring prescriptions for contraceptive drugs.<sup>20</sup> Under any circumstances, an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.<sup>21</sup> However, the rule does allow for clinical opinions of the pharmacist.<sup>22</sup> Thus, the rule will not interfere with a pharmacist’s screening for potential drug therapy problems permitted by another Illinois statute, 225 ILCS 85/3 (q).<sup>23</sup> Consequently, if a pharmacist in Illinois refuses to fill a contraception prescription due to his religious beliefs only, then that pharmacist is breaking the Illinois “Duty to Dispense” law and subjects his pharmacy to liability under the rule.

Although the “Duty to Dispense” rule in Illinois began as an emergency executive order, Governor Blagojevich filed with the Joint Committee on Administrative Rules to make the rule permanent.<sup>24</sup> After the review process, the administrative committee approved the rule.<sup>25</sup> However, after the Illinois Pharmacists Association complained

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<sup>17</sup> *Id.*

<sup>18</sup> ILL. ADMIN. CODE tit. 68, §1330.91(j)(April 18, 2005)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See generally id.*

<sup>23</sup> *Id.*

<sup>24</sup> News Release, Office of the Governor, Governor Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), *available at* <http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3862>.

<sup>25</sup> *Id.*

the rule would violate the Illinois Practice Act, Governor Blagojevich amended the rule to its current version.<sup>26</sup> Since the rule was not voted on by the entire legislature, legislative history on the rule is non-existent. However, the Governor's public comments do give some insight as to why he personally felt the rule was necessary. For example, although the Illinois rules do not appear to target any one type of contraceptive, the Governor made it clear by his public statements that the rule was intended to coerce compliance by pharmacists who have religious objections to emergency contraception also known as the "morning after pill."<sup>27</sup> The Governor acknowledged that the rule was made in response to the actions of pharmacists across the state that declined to fill emergency contraception prescriptions because of their religious and moral opposition.<sup>28</sup> In a press release, the Governor said, "pharmacies are not free to let [religious] beliefs stand in the way of their obligation to their customers."<sup>29</sup> In a letter to Family-Pac, the Governor advised that if individual pharmacists refused to fill certain birth control prescriptions, their employers would face significant penalties.<sup>30</sup> Finally, in March of 2006, the Governor announced that pharmacists who object to dispensing certain drugs on moral grounds "should find another profession."<sup>31</sup>

### **B. Burden on Pharmacies Instead of Pharmacists Does Not Alleviate the Problem.**

Although the Illinois "Duty to Dispense" rule addresses the duties of pharmacies not pharmacists, it impacts pharmacists since they are the ones who must dispense the contraceptive drugs at the pharmacy. Therefore, if they refuse to dispense based on religious beliefs, they subject their pharmacies to liability and consequently,

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<sup>26</sup> Press Release, American Pharmacists Association, Statement of the American Pharmacists Association and the Illinois Pharmacists Association, Illinois Governor Denigrates Pharmacy Profession, (Dec. 2, 2005) (on file with author).

<sup>27</sup> *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 997 (C.D. Ill. 2006).

<sup>28</sup> *Id.*

<sup>29</sup> News Release, Office of the Governor, Statement From Governor Rod Blagojevich: In Response to Lawsuit Filed by Pat Robertson's American Center for Law and Justice Challenging Governor's Emergency Rule for Pharmacies (Apr. 13, 2005), *available at*

<http://www.illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=3849>.

<sup>30</sup> *Menges*, 451 F. Supp. 2d at 997.

<sup>31</sup> *Id.*

many will lose their jobs or will be discriminated against in the hiring process because of their beliefs.

However, some argue that by placing the burden of compliance on pharmacies and not individual pharmacists, Illinois has circumvented the argument of freedom of conscience and religion because business entities do not enjoy the moral freedoms guaranteed under the law as individuals do.<sup>32</sup> The issue of whether businesses have moral being in a society is also a highly debatable topic but even if one accepts the notion that businesses are not moral entities, the practical effect Illinois' "duty to dispense" law has on individual pharmacists can not be ignored just because the rule's title says it applies only to pharmacies. Actually, the rule in application allows pharmacies more freedom since it can choose to stock or not stock; but the individual pharmacists little freedom because if their pharmacy chooses to stock the drug he or she must disburse it or risk being fired for subjecting the pharmacy to liability and if the pharmacy chooses not to stock the drug, then he or she must have the drug ordered by the pharmacy or transfer the patient to another pharmacy but only if the patient so desires.

Also relevant is that many pharmacies in small towns are owned and operated by the pharmacist and only one or two pharmacists are employed. In these cases, if the pharmacy chooses to stock some contraception but not to stock Plan B, the patient has the right to force the pharmacy to order the drug and fill the prescription or else be held liable under the rule for its failure to do so. For example, the plaintiff in the *Morr-Fitz* case, Luke Vander Bleek, is the owner and head pharmacist of his two northwestern Illinois pharmacies in Morrison and Prophetsville so the practical effect if his pharmacy violated the rule would be that his only source of income in his businesses would be subject to sanctions.<sup>33</sup>

### **C. Walgreens Settlement Not a Cure for All Pharmacies.**

In another case against Governor Blagojevich, Walgreens settled out of court in October of 2007 with the State of Illinois and plaintiff pharmacists to allow an objecting pharmacist to have a working relationship with a non-objecting remote pharmacist, who would authorize a licensed technician to dispense on the remote

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<sup>32</sup> See generally Tomkowiak, *supra* note 2.

<sup>33</sup> Interview with Luke Vander Bleek, Plaintiff in *Morr-Fitz v. Blagojevich*, 867 N.E.2d 1164 (Ill. App. Ct. 2007), (May 15, 2008) (on file with author).



pharmacist's behalf.<sup>34</sup> This arrangement works out well for Walgreens because it has licensed technician managers on duty for every shift so they can cover the objecting pharmacists refusals.<sup>35</sup>

However, many pharmacies do not have the privilege of having licensed technicians on staff at all times.<sup>36</sup> Rural or independent pharmacies may not have sufficient demand to support hiring a technician just to dispense one drug. In addition, putting this added responsibility for patient's health care on a technician as opposed to a pharmacist, who has more training on the topic, might not be viewed as the most professionally responsible alternative.<sup>37</sup> Thus, arguably, in many pharmacy settings, allowing licensed technicians to dispense the drug would not make good business or professional sense.

#### **D. The Multi-State Pharmacy Dilemma**

Another problem that arises is how franchised pharmacies with a nationwide presence will comply with different rules in every state. A brief survey of the ways states have chosen to regulate this issue shows the confusion that exists for multi-state pharmacies. Four states have similar laws with similar problems as Illinois. California, Nevada, Maine and New York, have "duty to dispense laws" for emergency contraception, which place an affirmative duty on either the pharmacist or pharmacy to ensure prescriptions for contraception are filled without delay.<sup>38</sup> Some state's pharmacy boards have regulated the issue by declaring it a pharmaceutical professional obligation to provide timely access to contraception or to provide a means by which it may be obtained.<sup>39</sup> For example, in Wisconsin, pharmacist Neil Noeson received a reprimand from the state board with an approximately \$20,000 monetary penalty for costs of the proceeding, was ordered to file a plan stating how he would make sure patients received their lawful medications in the future, and was required to undergo six hours of continuing pharmacy education in order to keep his pharmacy

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<sup>34</sup> Interview with Mike Patton, Executive Director Illinois Pharmacists Association, (May 15, 2008) (on file with author).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Tomkowiak, *supra*, at 1353.

<sup>39</sup> National Women's Law Ctr., *Pharmacist Refusals 101* (July 2008), at 3, *available at* <http://www.nwlc.org/pdf/PharmacyRefusalsJulyFINAL.pdf>.

license.<sup>40</sup> In North Carolina, the pharmacy board states that a pharmacist with an ethical conflict to a drug still must not obstruct a patient from obtaining that medication and must take proactive measure to ensure the patient receives their medication.<sup>41</sup>

On the other hand, four states, South Dakota, Arkansas, Mississippi, and Georgia, have pharmacist refusal laws that give the pharmacist a broad right to refuse to dispense based on his or her conscience.<sup>42</sup> In South Dakota, pharmacists can not only refuse to dispense emergency contraception but they also do not have any duty to refer or transfer the patient nor provide advance notice to their patients as to their plans not to dispense the drug.<sup>43</sup> Arkansas specifically declares that pharmacists have authority to refuse to furnish any kind of contraceptive supplies and that medical institutions, including pharmacies, are protected from liability based on religious or conscientious refusals.<sup>44</sup> Georgia's legislature states that it is not "unprofessional" behavior to refuse to fill any prescriptions if it is against a pharmacist's personal belief to do so.<sup>45</sup> Mississippi allows healthcare providers, including pharmacists, to refuse to participate in any service to which he or she is morally or religiously opposed.<sup>46</sup>

Obviously, there is a great divide among state legislatures in this country as to how this issue should be handled. As can be observed above, the political leaning of the state is often indicative of how the state will handle this issue. Not surprisingly, more conservative states tend to value conscience protection over contraceptive rights and more liberal states tend to value contraceptive rights over conscience protection. This, in turn, makes it extremely difficult for a multi-state pharmacy chain to plan its business procedures according to the law because the law, and even the reasoning behind the law, is vastly different in every state.

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<sup>40</sup> Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 *STAN. L. & POL'Y REV.* 83, 88 (2006).

<sup>41</sup> Tomkowiak, *supra*, at 1355.

<sup>42</sup> National Women's Law Ctr., *Pharmacist Refusals 101* (September 2006 Update), at 3, <http://www.nwlc.org/pdf/PharmacyRefusalsJulyFINAL.pdf>.

<sup>43</sup> S.D. CODIFIED LAWS § 36-11-70 (2006).

<sup>44</sup> ARK. CODE ANN. § 20-16-304(4)-(5) (West 2006).

<sup>45</sup> GA. COMP. R. & REGS. 480-5-.03(n) (2006).

<sup>46</sup> MISS. CODE ANN. §41-107-5 (2005).

## E. Abortion Law and Federal Conscience Protection

In fact, rational minds in the United States have differed on issues such as these ever since the Supreme Court decided *Roe v. Wade* in 1973.<sup>47</sup> Conscience protection for individuals and entities involved in health care has been evolving ever since abortion rights, which prohibit any undue burden on a woman's right to an abortion.<sup>48</sup> Like the moral objection faced by pharmacists with dispensing emergency contraception, doctors, nurses, and other healthcare staff have sought protection from being forced to participate in an abortion, which they see as ending a life.

Arguably, Congress foresaw the inevitable moral arguments that would result from *Roe* and promptly reacted with the Church amendment that same year. The Church amendment made it clear that individuals or entities that received federal funds or assistance could not be required by any state actor to perform or assist in an abortion if contrary to religious beliefs or moral convictions.<sup>49</sup> Further, the Church amendment protected individuals in employment disputes by prohibiting discrimination on the basis of a refusal to perform an abortion because of an employee's religious beliefs or moral convictions.<sup>50</sup> The Weldon Amendment provided further protection from government coercion of abortion in 2004, by holding back federal funds from any state or local government that discriminates against any health care entity, including physicians, other health care professionals, hospitals, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility organization or plan, on the basis that the entity does not provide, pay for, provide coverage for, or refer for abortions.<sup>51</sup> In addition, the Danforth Amendment prohibited discriminatory action against doctors, medical students, and health training programs by a state or local government due to any refusal to provide a wide range of abortion related services for any reason whether it be religious/moral or not.<sup>52</sup>

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<sup>47</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>48</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878-89 (1992).

<sup>49</sup> Pub. L. No. 93-45, 87 Stat. 91, 95 (1973); *codified at* 42 U.S.C. §300a-7 (2000).

<sup>50</sup> *Id.* at §300a-7(c)(1)(B).

<sup>51</sup> Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, §508(d)(1), 118 Stat. 2809, 3163; see also Dep'ts of Lab., Health & Hum. Serv. and Educ. & Related Agencies Appropriations Act of 2006, Pub. L. No. 109-149, §508(d)(1), 119 Stat. 2833, 2879.

<sup>52</sup> 20 U.S.C. §1688 (2008).

## F. State Conscience Protection

State Legislatures also passed various conscience protection statutes in response to *Roe v. Wade*. Many gave healthcare providers an unconditional ability to step away based on a conscience objection.<sup>53</sup> Illinois, for example, enacted one of the most comprehensive right of conscience laws in the nation. This statute sets forth the public policy of the state as: “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” and “to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability” upon persons who refuse to act contrary to their conscience or conscientious convictions in “refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of healthcare services and medical care.”<sup>54</sup> Conscience is defined as “a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths.”<sup>55</sup> The plaintiffs in the *Morr-Fitz* case argue this statute ushers in broad protection for all those involved in healthcare and thus discrimination based on their moral opposition should be prohibited.<sup>56</sup>

Other states, such as Hawaii, provide liability protection for hospitals and individuals for their refusals to participate in abortion procedures.<sup>57</sup> Pennsylvania, California, Nebraska, and Oregon allow refusals for abortion services and the rendering of information about

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<sup>53</sup> ARK. CODE ANN. § 20-16-601(a) (2005); CONN. AGENCIES REGS. § 19-13-d54(f) (2005); DEL. CODE ANN. tit., 24, § 1791(a) (2005); FLA. STAT. ANN. § 390.0111(8) (West 2002); IND. CODE ANN. § 16-34-1-4 (West 1993); IOWA CODE ANN. § 146.1 (West 2005); KAN. STAT. ANN. § 65-443 (2002); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (2004); MICH. COMP. LAWS ANN. § 333.20181 (West 2001); MINN. STAT. ANN. § 145.414(a) (West 2005); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2003); N.C. GEN. STAT. § 14-45.1(e), (f) (2005); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (LexisNexis 2006); 18 P.A. CONS. STAT. ANN. § 3213(d) (West 2000); S.D. CODIFIED LAWS §§ 34- 23a-11, 12 (1994); TENN. CODE ANN. § 39-15-204 (2006); WYO. STAT. ANN. § 35-6-106 (2007).

<sup>54</sup> 745 ILL. COMP. STAT. 70/2 (1998).

<sup>55</sup> *Id.* at 70/3(e).

<sup>56</sup> Illinois Courts website, Illinois Supreme Court Oral Argument Audio & Video for *Morr-Fitz v. Blagojevich*, available at [http://163.191.183.117/court/SupremeCourt/Video/2008/031808\\_104692.wmv](http://163.191.183.117/court/SupremeCourt/Video/2008/031808_104692.wmv).

<sup>57</sup> HAW. REV. STAT. ANN. §453-16(d) (LexisNexis 2005).

abortion so long as the objection is made available to the public.<sup>58</sup> Arizona, Colorado, Georgia, Idaho, Kentucky, Massachusetts, New York, Rhode Island, and Virginia, permit objections if the person refusing states in writing the reasons for objecting.<sup>59</sup> Montana and Kentucky, like Illinois, also have provisions for discrimination on the basis of a refusal.<sup>60</sup>

### G. What is the Pharmacist's Dilemma?

At the crux of the *Roe* debate and the subsequent conscience protection arguments lies the question of when life begins. This ethical dilemma is also the cause for the pharmaceutical debate surrounding emergency contraception. Some say that when an egg is fertilized there is no other descriptive word for the organism but human because it contains, at that moment, all the genetic material necessary for a human life.<sup>61</sup> Others claim that life begins at implantation of the fertilized egg to the uterus because this attachment must take place to sustain life and many fertilized eggs naturally will not implant.<sup>62</sup> Still others have maintained that life begins at birth since the baby is no longer reliant on the mother's placenta for nourishment.<sup>63</sup>

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<sup>58</sup> CAL. HEALTH & SAFETY CODE § 123420(c) (West 2006); NEB. REV. STAT. § 28-337 (1995); OR. REV. STAT. ANN. §§ 435.475(1), 435.485(1) (West 2003); 16 PA. CODE § 51.1.32 (2005).

<sup>59</sup> ARIZ. REV. STAT. ANN. § 36-2151 (2003); COLO. REV. STAT. ANN. § 18-6-104 (West 2007); GA. CODE ANN. §16-12-142 (2007); IDAHO CODE ANN. § 18-612 (2004); 720 ILL. COMP. STAT. ANN. 510/13 (West 2003); KY. REV. STAT. ANN. § 311.800(4) (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 112 section 121 (West 2003); N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 1992); 43 PA. CONS. STAT. ANN. § 955.2(a) (West 1991); R.I. GEN. LAWS § 23-17-11 (1996) (providing an exception for scheduled abortions only); VA. CODE ANN. § 18.2-75 (2004).

<sup>60</sup> 745 ILL. COMP. STAT. ANN. 70/7 (West 2002); KY. REV. STAT. ANN. § 311.800(5)(c) (West 2007); MONT. CODE ANN. § 50-20-111 (2007).

<sup>61</sup>Pharmacists for Life International, *Abortifacient FAQs: "Oral Contraceptives" FAQs: A Pill You Might Not Want to Swallow* (2005); [http://www.pfli.org/faq\\_oc.html](http://www.pfli.org/faq_oc.html) (last visited Nov. 3, 2008), see also The American Heritage Medical Dictionary 660 (2007); T.W. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY 3 (8th ed. 2000), see also CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH 2322 (2d ed. 1997).

<sup>62</sup> Donald W. Herbe, *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, 86 (2002).

<sup>63</sup> Catholics For Choice, *Abortion and Catholic Thought: The Little-Told History*, CONSCIENCE (Autumn 1996),

It is difficult to test with certainty how emergency contraception works to prevent pregnancy because of the complexity of the reproduction process and the inability to effectively test a human control group.<sup>64</sup> Barr Pharmaceuticals/Duramed, the makers of Plan B, state in their patient pamphlet that the drug's mode of action is stopping ovulation or the production of eggs in females, preventing fertilization or the uniting of egg and sperm, or preventing attachment or implantation of the fertilized egg to the uterus.<sup>65</sup> Another possible way that it prevents pregnancy is by inhibiting the transport of the fertilized egg to the uterus.<sup>66</sup> Although Barr states that the main mechanism of action is prevention of ovulation, statistics show that it would prevent or delay ovulation only when given within a small window of the fertile cycle, within two to seven days before ovulation would have naturally occurred.<sup>67</sup> However, data on the occurrence or number of instances that the drug inhibits pregnancy post-fertilization is currently unavailable.<sup>68</sup> Consequently, there is no definitive, scientifically backed conclusion as to how this drug actually works in a given situation. However, some theorize that the number of post-fertilization incidents could be as high as 78%.<sup>69</sup>

So, is Plan B causing an abortion? Traditionally, abortifacient is defined as prevention of implantation in the uterus so one answer may be: "Not necessarily but potentially." Or a better answer may be "It depends." It depends on when an individual believes life begins and it depends on how the drug works in a given situation, which is undetermined thus far with reliable certainty. However, regardless of an individual's personal beliefs on this scientific issue, policy makers must realize that rational minds have differed on this issue for centuries and pharmacists are no exception in this sensitive moral debate.

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[http://www.catholicsforchoice.org/pubs/cfc\\_archive/articles/TheHistoryofAbortion.asp](http://www.catholicsforchoice.org/pubs/cfc_archive/articles/TheHistoryofAbortion.asp) (last visited Nov. 10, 2008).

<sup>64</sup> Edward L. Rivet II, *Morning After Pills/Emergency Contraception: Fact, Fiction & Fraud*, RIGHT TO LIFE OF MICHIGAN (Sept. 2006).

<sup>65</sup> Barr Pharmaceuticals/Duramed Plan B Patient Pamphlet, How Plan B Works, <http://www.go2planb.com/ForConsumers/AboutPlanB/WhatIsPlanB.aspx> (last visited Nov. 3, 2008).

<sup>66</sup> WHITE, *supra* note 12, at 89.

<sup>67</sup> Rivet, *supra* note 63, at 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

### III. ISSUES

The underlying issue concerning this legal and ethical debate is the competing fundamental rights of religious and moral beliefs versus access to contraception. First, we will address this issue from the legal standpoint, analyzing the effect of federal and state codes and court precedent on the *Morr-Fitz v. Blagojevich* case. Again, we have chosen the state of Illinois to exemplify the legal struggle because Illinois has both broad conscience/religion protection statutes and a duty to dispense emergency contraception law. As previously mentioned, other states are in this paradoxical position so Illinois would be representative of many states that are grappling with this issue. Second, we will look at the issue from a public policy point of view to provide resolution to the question of which fundamental right should be valued over the other or whether it is possible for this clash of rights to be avoided by government actors altogether. Finally, we will present a philosophical perspective on the issue by discussing the underlying principles that support each right.

In the legal discussion section, we will discuss the legal position of the pharmacist plaintiffs in the *Morr-Fitz* case in detail, as this position has been largely ignored by previous academic publications. This position focuses on the statutory and constitutional protection of the right of conscience and right to religious beliefs and the professional rights and responsibilities involved in pharmacy according to the American Pharmacy Association. Specifically, we will address the Illinois Right of Conscience Act, the Illinois Religious Restoration Act, Title VII of the Civil Rights Act, the First Amendment to the United States Constitution and the American Pharmacy Association's Code of Ethics and give the arguments that can be made in favor of a pharmacist's right to refuse to dispense emergency contraception under each. Then, we will address the opposing legal view to give a balanced legal background to the issue. This position highlights the First Amendment's exception for generally applicable laws as well as the potential for "Duty to Dispense" laws to pass the strict scrutiny test. It also points out the Title VII obstacles to religious discrimination protection on this issue. Another issue unique to Illinois is a statutory interpretation issue found in the Illinois Healthcare Right of Conscience Act that leaves pharmacists off the list of protected individuals. Finally, the American Pharmacy Association's focus on pharmacists' duties to their patients will be addressed.

The public policy section will delineate the zero sum nature of this issue. We will then address the ways that the competing rights of contraceptive use and religious freedom can be compared by policymakers to determine which right should prevail. An important aspect of this discussion is the role that technology has played in creating this problem as well as the role technology can play in resolving the issue. Finally, we will look at the consequences to both the consumer and the pharmacist in valuing one right over another.

Finally, the philosophical perspective section broadens the nature of the issue to a discussion on the essence of democracy. By dissecting each right into the principles and premises that form it, we will expand on the discussion of comparing the competing rights. By contrasting the privacy right that underlies contraceptive use with the right of differing beliefs that underlies conscience protection, we will discuss how the marketplace of ideas drives societal morality.

## IV. LEGAL

### A. The Plaintiff/Pharmacist's Position

#### 1. Illinois Healthcare Right of Conscience

The statute with the closest connection to the *Morr-Fitz* case is the Illinois Healthcare Right of Conscience Act.<sup>70</sup> As mentioned above, this act provides that no health care personnel can be held civilly or criminally liable to a person or public official for refusing to participate in health care services that are contrary to his or her conscience.<sup>71</sup> The protection also includes discrimination on the basis of one's conscience. Conscience is broadly defined as any religious belief or sincerely held moral belief.<sup>72</sup> Although not specifically mentioned as health care personnel in the statute, pharmacist is defined by another Illinois statute, the Illinois Pharmacy Practice Act, as "an individual health care professional and provider currently licensed by this State to engage in the practice of pharmacy."<sup>73</sup> Here, Plaintiff Luke Vander Bleek is claiming that his religious belief that this drug terminates a human life because prevents pregnancy after the egg is fertilized is against his conscience to dispense, which is what the rule is requiring

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<sup>70</sup> 745 ILL. COMP. STAT. 70/3-70/4 (1998).

<sup>71</sup> *Id.* at 70/4.

<sup>72</sup> *Id.* at 70/3.

<sup>73</sup> 225 ILL. COMP. STAT. ANN. 85/3(k-5) (West 2007).



him to do in order to keep his job or avoid significant fines.<sup>74</sup> Consequently, the State, by its own action, is restricted in enacting rules that will coerce a health care provider to violate his or her conscience in this way.

## 2. Illinois Religious Freedom Restoration Act

Secondly, the Illinois Religious Restoration Freedom Act<sup>75</sup> was enacted to restore the compelling interest test utilized in free exercise claims before the United States Supreme Court issued its 1990 decision in *Employment Division v. Smith*.<sup>76</sup> The Illinois Religious Freedom Restoration Act guarantees that the State government cannot substantially burden the exercise of religion without compelling justification.<sup>77</sup> This law is based on the declared principle that the free exercise of religion is an inherent, fundamental and inalienable right secured by the Illinois Constitution.<sup>78</sup> The statute goes on to state that the government may not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates it is in furtherance of a compelling government interest and it is the least restrictive means of furthering the interest.<sup>79</sup> Exercise of religion is defined as "an act or refusal to act that is substantially motivated by religious belief."<sup>80</sup> Proponents of the Governor's executive order claim that access to health care and the need for emergency contraception is the government motivation, however, the rule is not narrowly tailored to meet that goal. The rule only applies the Division I pharmacies, not hospitals or emergency rooms, which is arguably where the drug is the most useful due to ease of access especially for dangerous pregnancies. In fact, Illinois as well as several other states, recognize the need for emergency contraception in hospitals by requiring all hospitals to provide rape

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<sup>74</sup> Illinois Courts website, Illinois Supreme Court Oral Argument Audio & Video for *Morr-Fitz v. Blagojevich*, available at [http://163.191.183.117/court/SupremeCourt/Video/2008/031808\\_104692.wmv](http://163.191.183.117/court/SupremeCourt/Video/2008/031808_104692.wmv).

<sup>75</sup> 775 ILL. COMP. STAT. ANN. 35/10-35/15 (West 2001).

<sup>76</sup> *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); see also 775 ILL. COMP. STAT. 35/15.

<sup>77</sup> 775 ILL. COMP. STAT. 35/15.

<sup>78</sup> *Id.* at 35/10 (a)(1).

<sup>79</sup> *Id.* at 35/15.

<sup>80</sup> *Id.* at 35/5.

victims with emergency contraception or to inform them about how to obtain it.<sup>81</sup>

### 3. Federal Law: The First Amendment and Title VII of the Civil Rights Act

Under the First Amendment to the United States Constitution, a state law designed to discriminate against an individual because of his or her religious beliefs is subject to strict scrutiny.<sup>82</sup> Again, this means that the state must show that the rule serves a compelling interest and is narrowly tailored to meet that interest. However, if a law is religiously neutral and generally applicable, it is not subject to strict scrutiny even if there is an indirect effect on religious beliefs and practices.<sup>83</sup> On the other hand, official action that is masked as neutral but is in reality hostile can be found to target religious conduct.<sup>84</sup>

A case brought in the United States District Court for the Central District of Illinois, *Menges v. Blagojevich*, analyzes the federal laws that come into play with this issue. In this case, Plaintiff John Menges claimed he was fired when he failed to agree in writing to dispense emergency contraception as was required by his employer, Walgreens, after Blagojevich's executive order.<sup>85</sup> Although the federal district court did not rule on the merits of the case, the court presumed the plaintiff could substantiate their claims and thus denied the defendant's motion to dismiss.<sup>86</sup> However, the court did analyze the issues posed by the case in its motion to dismiss written opinion. The cause of action included Title VII of the Civil Rights Act and the First Amendment right to religious freedom. With regards to Title VII, the court in *Menges* denied the Governor's motion to dismiss on the grounds that the rule could require employers to discriminate on the basis of religion in violation of the Act.<sup>87</sup> Although in some cases the employer could have an undue hardship defense, claiming that the pharmacist's refusal to dispense causes more than a "de minimis"

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<sup>81</sup> Marie McCullough, *New Jersey Must Tell Rape Victims of Emergency Birth Control*, PHILA. INQUIRER, Mar. 24, 2005, at B6.

<sup>82</sup> See generally *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990).

<sup>83</sup> *Id.*

<sup>84</sup> See generally *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

<sup>85</sup> *Menges*, 451 F. Supp. 2d at 998.

<sup>86</sup> *Id.* at 995.

<sup>87</sup> *Id.* at 1003.

burden on the employer, in many cases, a reasonable accommodation could be made, which is required under Title VII.<sup>88</sup>

With regard to the First amendment claim, the court in *Menges* concluded that it must first look at the face of the rule and then, if facially neutral, the true purpose of the rule.<sup>89</sup> In evaluating the rule, the court in *Menges* decided that it was facially neutral but its purpose is made clear by the Governor's public statements that the rule's purpose is to "force individuals who have religious objections to Emergency Contraceptives to compromise their beliefs or leave the practice of pharmacy."<sup>90</sup> Therefore, the rule is not religiously neutral. As such, the court held that the rule is not generally applicable and thus could fail strict scrutiny.<sup>91</sup> The rule is not narrowly tailored to meet the interest in that it only covers Division I pharmacies, not hospitals and emergency rooms, which, if included, would make emergency contraceptives more readily available. In addition, in order to avoid punishment under the rule a pharmacy may elect to not carry any form of contraceptive. This viable option would decrease the availability of contraceptives, not increase it. Thus, it is at least plausible that Illinois' Rule is unconstitutional.

#### **4. American Pharmacist's Association Recognizes the Need for Conscientious Refusal**

Although the American Pharmacist Association's (APhA) Code of Ethics for Pharmacists is not binding as law, the Code does provide some guidance on professional obligations. The Association's resolution with the closest connection to this issue states: "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."<sup>92</sup> The APhA Committee

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<sup>88</sup> *Id.* at 1004.

<sup>89</sup> *Id.* at 999-1000.

<sup>90</sup> *Id.* at 1000.

<sup>91</sup> *Id.* at 1001.

<sup>92</sup> Press Release, Letter from the Am. Pharmacists Ass'n (APhA) to the Office of Pub. Health & Human Serv., HHS Proposed Rule on Provider Conscience: Docket ID: HHS-OS-2008-0011; Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices In Violation of Federal Law (Sept. 25, 2008) *available at* <http://www.pharmacist.com/AM/Template.cfm?Section=Home&CONTENTID=17810&TEMPLATE=/CM/ContentDisplay.cfm>.

Report expressly allows for “stepping away” from an activity that violates the pharmacist’s conscience.<sup>93</sup> However, the APhA has not specifically directed how a pharmacist should balance the competing interests of serving patients and conscience protection.

## B. The State of Illinois Position

First, “Duty to Dispense” laws could be viewed as generally applicable under First Amendment analysis. In *Menges*, the court reasoned the Illinois executive order was not generally applicable due to the public commentary of the Governor as noted above.<sup>94</sup> However, many state’s duty to dispense legislation would not have the same inflammatory history and one could argue that even in Illinois the Governor’s comments do not rise to the level of proving the rule’s purpose is to target a religious practice or belief.

Second, even if a court finds the rule is not generally applicable under the First Amendment, one might successfully argue that duty to dispense rules like the one in Illinois do pass the strict scrutiny test as written or with minor adjustments. Reproductive rights are considered fundamental rights. Plus, access to legal prescriptions is also highly valued in our society. Thus, it would not be difficult to show that the state has a compelling interest to protect. Consequently, the question would immediately turn to narrow tailoring to meet the interest. In Illinois, there is some question as to why all pharmacies are not included in the rule but one may argue that Division I pharmacies are statistically causing the obstacle in obtaining emergency contraception or if necessary, an amendment to include all pharmacies is an easy fix to insure narrow tailoring.

Third, it is also logical to assume that Title VII liability can be avoided because the burden on the employer is substantial. Although the court in *Menges v. Blagojevich* ultimately overlooked the Title VII obstacles for the plaintiff since it was deciding a motion to dismiss, the court reasoned that it would be difficult for the plaintiffs to demonstrate that accommodating their beliefs would impose only a *de minimus* burden on the employer.<sup>95</sup> Since the plaintiff pharmacists did not want

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<sup>93</sup> Am. Pharmacists Ass’n, *Congress Eyes Birth Control Bill*, (Apr. 18, 2005) available at

[http://www.pharmacist.com/AM/Template.cfm?Section=Pharmacy\\_Today2&template=/CM/HTMLDisplay.cfm&ContentID=8742](http://www.pharmacist.com/AM/Template.cfm?Section=Pharmacy_Today2&template=/CM/HTMLDisplay.cfm&ContentID=8742) (last visited Nov. 14, 2008).

<sup>94</sup> *Menges*, 451 F. Supp. 2d at 1000-02.

<sup>95</sup> *Id.* at 1003

to dispense the drug at all, pharmacies may have to rearrange other pharmacists' schedules, hire a sufficient number of non-objecting pharmacists, or keep extra personnel for each shift in order to accommodate an objecting pharmacist. Obviously, substantial hardship could result from a pharmacy's attempt to accommodate while complying with the state's duty to dispense law.

Fourth, but specific only to the Illinois Healthcare Right of Conscience statute, there is a statutory interpretation argument that conscience protection was never extended to pharmacists because they were left off of the list of protected individuals in the statute.<sup>96</sup> In 1997, when the Illinois Healthcare Right of Conscience Act was under review, pharmacists were included in the original drafts.<sup>97</sup> However, it is somewhat of a legislative mystery as to why pharmacists were left out of the final draft of the bill. Perhaps even more peculiar is the fact that clerical positions at healthcare institutions have been interpreted by Illinois courts to be covered under the statute. Specifically, the Illinois Healthcare Right of Conscience Act protected a language interpreter at a healthcare facility against discrimination when she was fired for not providing her interpreter services about abortions.<sup>98</sup> Thus, one may reason that if the Illinois legislature wanted to include pharmacists in the statute's protection, it would not have left them out in the final draft and if interpreter services at healthcare facilities that provide abortions are covered by the statute, surely the legislature must be intentionally treating pharmacists as a different classification.

Fifth, United States Supreme Court decisions give contraceptive use the highest level of constitutional protection including the right to obtain contraceptive services free from governmental interference and, as such, conscience statutes could be one example of such governmental interference.<sup>99</sup> The Supreme Court precedent of *Griswold* and *Eisenstadt* collectively held that using contraception is considered a fundamental right under right of privacy law and consequently it should be free from governmental interference.<sup>100</sup> Consequently, conscience protection that caused an undue burden to a woman's right to access contraception could be viewed as a constitutional violation.

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<sup>96</sup> Interview with Mike Patton, *supra* note 33 (on file with author).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Tomkowiak, *supra* note 2, at 1332.

<sup>100</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Finally, although the APhA Code of Ethics does not conclusively state how to appropriately balance this issue, its eight principles for pharmaceutical behavior highlight the non-discriminatory nature of pharmacy and the profession's dedication to serve the best interests of their patients.<sup>101</sup> Duties, such as "placing concern for the well-being of the patient at the center of professional practice" and "respect personal and cultural differences among patients", show the Association suggests that a pharmacist's primary ethical obligation is to insure patients obtain their lawfully prescribed medicine.<sup>102</sup>

### **C. Admission of Two-Sided Nature of this Legal Issue is the First Step for Recovery**

One common fault of writing on this topic is the author's failure to adequately address the valid legal arguments on the State's side of the debate. As we have shown, constitutional legal justification is available on both sides of this issue primarily because both sides deal with fundamental rights. Federal and state statutory backing is also plausible on both sides of the debate. The APhA cannot even conclusively determine how pharmacists should balance the competing interests and even if it could, its Code of Ethics is not binding for a pharmacist to follow.

Therefore, we believe one must recognize that the state and federal legal precedent on this issue could reasonably be interpreted in favor of either side. As such, it is imperative that courts across the nation realize that the determining factor of this debate may not be legal in nature but rather ideologically and (perhaps unfortunately) politically based. In fact, the essence of the dispute will either call for a value judgment by a given court in deciding whether to make the right to contraceptive use or the right to conscience paramount or will demand a legislative mandate to remain neutral, allowing government actors to step away from the value determination. Consequently, the public policy aspect of this article is perhaps just as important as the legal arguments.

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<sup>101</sup> Am. Pharmacists Ass'n, Code of Ethics (2004), *available at* [http://www.pharmacist.com/AM/Template.cfm?Section=Code\\_of\\_Ethics\\_for\\_Pharmacists&Template=/CM/HTMLDisplay.cfm&ContentID=5420](http://www.pharmacist.com/AM/Template.cfm?Section=Code_of_Ethics_for_Pharmacists&Template=/CM/HTMLDisplay.cfm&ContentID=5420) (last visited Nov. 14, 2008)

<sup>102</sup> *Id.*

## V. PUBLIC POLICY

### A. A Zero Sum Game

Policymakers cannot get around the fact that the crux of the matter is the underlying value given to the right to privacy versus the right to conscience. One can argue the merits of the case, whether the situation fits under the parameters of a given conscience protection statute, whether government intervention is necessary for greater access to a drug and even whether this case should follow the precedent set out by prior abortion law, but at the end of the day one has to make a determination as to the value government should give to the freedom of choice of a woman and her reproduction as it relates to the freedom of privacy versus the freedom of individuals to make choices based on their moral, ethical and/or religious beliefs. This is precisely why states have been so divided on this issue to date. Since the issue boils down to choosing women's rights versus religious freedom, naturally states have tended to split down political party lines on the issue.

Therefore, we will look at the issue from the stance of a court attempting to determine how to value the right to contraception or right to conscience in a given case. Using this analysis, we conclude that the issue necessarily becomes a zero sum game in that one right must win at the expense of the other right, at least at some level. Then, we will examine the possibility of a government neutrality position that would divert that value determination into the hands of the consumers.

### B. A Pitfall in Policymaking

Unfortunately, instead of recognizing the complexity of the issue, some scholars have based their public policy argument on several specific stories at the expense of the bigger picture. One oft cited account occurred in St. Charles, Illinois when a twenty-nine-year-old art teacher was refused her emergency contraception prescription because of the "personal beliefs" of the pharmacist.<sup>103</sup> Another example commonly used to show the repulsive nature of pharmacists acting out of conscience involves Kim Smith, a married mother of a newborn baby who attempted to fill a prescription for emergency contraception after experiencing a birth control failure with her husband. This

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<sup>103</sup> Sarah J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 LAW & INEQ. 399 (2006).

northern California resident was denied her prescription by the pharmacist, who also refused to transfer the prescription and gave a soliloquy about Smith's irresponsibility.<sup>104</sup>

Proponents of the right of contraception use these and other examples, to argue that conscience clauses unfairly discriminate against women, threaten women's reproductive health, and grossly interfere with a woman's right to privacy by blocking access to contraception. They highlight the far-reaching nature of these harmful consequences by showing staggering statistics that the vast majority of women in the United States use some type of birth control pills for contraception.<sup>105</sup>

After hearing the factual situations of several plaintiffs who were denied their prescriptions and focusing on the fundamental right to privacy and the potential discriminatory effects against a super majority of women, at first glance it seems most humane and respectful to value contraception access over conscience protection. However, "tunnel vision" policymaking, which looks only at specific fact patterns in making a determination, can fail to recognize the overall ramifications of setting a particular policy. Therefore, legislators should carefully evaluate the nature of this comparison of values in order to avoid oversimplification of the issue.

### C. Access to Contraception: Inability v. Inconvenience?

Interestingly, most of the patients, whose denial stories have been publicized, the conscientious refusals resulted in only a temporary inconvenience in obtaining emergency contraception.<sup>106</sup> By their own accounts, these women have driven less than an hour to obtain an emergency contraception prescription.<sup>107</sup> One complainant admitted to filling the prescription in less than an hour after the refusal took place.<sup>108</sup>

In addition to the testimonials of the affected women themselves, even small town data reveals emergency contraception is available upon a local pharmacist's refusal within just over a 15-mile radius from a given patient.<sup>109</sup> For most Americans this drive should

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<sup>104</sup> Tomkowiak, *supra* note 2, at 1330.

<sup>105</sup> *Id.*

<sup>106</sup> Kyung Song, *Olympia Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES, Aug. 1, 2006, at AS.

<sup>107</sup> See National Women's Law Ctr., Pharmacist Refusals 101, *supra* note 38.

<sup>108</sup> *Id.*

<sup>109</sup> Robin F. Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J. L. & MED. 41, 52-3 (2008).



not pose an insurmountable problem. According to the Federal Highway Administration, 870 per 1,000 or 87% of the driving age population in the United States are licensed drivers.<sup>110</sup> Of this 87% there are more licensed female drivers than males.<sup>111</sup> These statistics do not even take into account other means of transportation, such as public transit systems in cities.

Another example supporting accessibility comes via Planned Parenthood. Planned Parenthood prides itself in supplying emergency contraception with no questions asked and that its clinics are readily accessible in all fifty states with eight hundred and eighty clinics nationwide.<sup>112</sup>

Since Plan B's shelf life is two years, a woman who is sexually active could also acquire the drug well in advance of the 72-hour window in which she must take it, even if she prefers obtaining the drug from a pharmacy in her area.<sup>113</sup> With a little planning, there is no reason why a woman could not take emergency contraception immediately following intercourse. Chances are, even if she does not get the drug in advance, she could still access the drug within the 72-hour timeframe at a Planned Parenthood.

In addition, if she is able to use the Internet, which constitutes the super-majority of adult Americans under age 49, she could have the drug at home within 24 hours. According to census information, 82% of Americans ages 18-29 and 80% ages 30-49 use the Internet at least on an occasional basis.<sup>114</sup> In addition, over 50% of females in the United States have Internet access at home and at work and have used the Internet within the last 30 days.<sup>115</sup> Although statistical information

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<sup>110</sup> Federal Highway Administration, Licensed Drivers By Sex and Ratio to Population-2006 <http://www.fhwa.dot.gov/policy/ohim/hs06/pdf/dl1c.pdf> (updated in Oct. 2007).

<sup>111</sup> *Id.*

<sup>112</sup> Planned Parenthood, About Us, <http://www.plannedparenthood.org/about-us/about-us-90.htm> (last visited Nov. 14, 2008).

<sup>113</sup> Barr Pharmaceuticals/Duramed Plan B Pharmacist Information, Stocking Information, <http://www.go2planb.com/Plan-b-pharmacists/plan-b-otc.aspx> (last visited Nov. 14, 2008).

<sup>114</sup> U.S. Census, Online Statistical Abstract of the U.S., Adult Computer and Adult Internet Users, by Selected Characteristics: 1995-2005, <http://www.census.gov/compendia/statab/2007/tables/07s1138.xls> [hereinafter Adult Computer and Internet Use]

<sup>115</sup> U.S. Census, Online Statistical Abstract of the U.S., Internet Access and Usage and Online Service Usage: 2006,

varies on the relation between average income and Internet usage, it appears Internet usage and access is not necessarily correlated to level of income.<sup>116</sup> Consequently, most adult women in their childbearing years, regardless of their income, could use the Internet to purchase emergency contraception.

Further, purchasing the drug on the Internet is an easy process. A simple “Google” search using the words “Order Plan B” or “Order Morning After Pill” revealed over five on-line pharmacies on the first result page where Plan B could be purchased and shipped to the consumer’s home.<sup>117</sup> Several of these on-line pharmacies offered guaranteed overnight shipping for a nominal charge and free shipping for standard delivery.<sup>118</sup> The price of the drug on-line ranged from \$30-\$50 and the average retail price of the drug is between \$39 and \$42 so obtaining the drug on-line should not even result in an inflated price.<sup>119</sup>

Thus, “access” may be better represented in this comparison as “inconvenience.” Maybe this is more of an information or planning crisis than an accessibility issue. As such, a woman is free to access this drug in a “conscience protection state” so long as she either: a) does some minor advance planning, b) has access to the internet or c) has the ability to travel a relatively short distance within a 72-hour period.

#### **D. Duty to Dispense Leaves No Palatable Option for Pharmacists.**

Conversely, a pharmacist in a state with a “duty to dispense” law does not have as many choices. At least in Illinois, his or her choices are to dispense if the patient demands or refer the patient if the patient allows him to. To a pharmacist who believes the drug is causing an abortion, this is really like saying either you terminate the life or contribute to someone else taking the life. As for the Illinois pharmacy owner who does not think it moral to stock emergency contraception, the only option is to refuse to stock any type of contraceptive.

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<http://www.census.gov/compendia/statab/tables/08s1127.pdf> [hereinafter Internet Access and Usage and Online Service Usage]

<sup>116</sup> See Adult Computer and Internet Use *supra* note 113; see also Internet Access and Usage and Online Service Usage, *supra* note 114.

<sup>117</sup> Internet search using Google search engine, performed by Suzanne Davis on July 23, 2008.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

Yet, some advocates argue that even the smallest inconvenience in access to birth control must be avoided under the spirit of *Griswold v. Connecticut*, which began the new era of technological advances that led to the development of woman's rights and solidified a woman's right to have absolute control over her body.<sup>120</sup> Further, they argue that the undue burden rules that apply to abortion implicitly apply to emergency contraception as well such that government cannot interfere in any way with a woman's right to obtain contraception.

However, the Court in *Griswold* established only negative rights i.e. that the government cannot prevent individuals from obtaining birth control or make its use illegal as Connecticut was attempting to do.<sup>121</sup> Conversely, in Illinois, the government is inferring a positive right to demand the assistance of others in obtaining a drug. This positive duty to assist someone in this way is unprecedented. In fact, even concerning abortion law's undue burden test, the Court in *Harris* declared: "[a state] need not remove those obstacles not of its own creation."<sup>122</sup>

## VI. PHILOSOPHICAL PERSPECTIVE

### A. Underlying Premise of Each Right

Finally, when comparing the conflicting rights, we think one should also be cognizant of the underlying premise that supports each right. The underlying premise that supports contraceptive use is the right of privacy or the ability to control one's own body. The underlying premise that supports religious beliefs is the freedom to possess different views, ideas and beliefs about life. In this conflict, we conclude that the right to privacy only exists because the freedom to have differing views, ideas, and beliefs exists. As such, the value of conscience could be viewed as a foundation on which other rights build upon. We would go so far as to say that the right to privacy would mean nothing in a society if the essence of democracy—the marketplace of differing ideas—is not protected.

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<sup>120</sup> See generally *Griswold*, 381 U.S. 479.

<sup>121</sup> *Id.*

<sup>122</sup> *Harris v. McRae*, 448 U.S. 297, 316 (1980).

## B. Right of Conscience is the Foundation for All Other Rights.

We liken this discussion to that of Robert Vischer when he discusses how individuals need to mediate viewpoints in society.<sup>123</sup> It is this exchange of ideas that allows individuals the freedom to make associations with others to “live out the promise of freedom in cooperation and connection with others, gathering together to pursue commonly held beliefs, values, and worldviews.”<sup>124</sup> As Vischer points out, this concept is not new to this generation. Over 200 years ago, Alexis de Tocqueville recognized this “principle of association” that makes our nation great.<sup>125</sup> Thus, if the marketplace of ideas is monopolized by the state with a morality mandate then the space traditionally left for reasonable minds to differ and associate about morality is taken away.<sup>126</sup> As Justice Holmes stated in his famous dissent in *Abrams v. United States*, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>127</sup> In other words, ethical truth is found at the intersection of individual human ideals and principles and societies’ acceptance of that morality.

This is why we call the right of conscience the foundation that all other rights are built upon. Without the ability to test individual ideas of morality in society, no common consensus can be reached as to which ideals and principles need to be accepted. It is the freedom to rationalize one’s existence and his or her relation to others that leads to any other principle of “rights.” Thus, other “rights” such as privacy, only come about in a society because rational minds have mediated in society the principle that people should be able to control what happens to their own bodies. Consequently, privacy becomes an “end” only because the freedom to express differing beliefs and ideas in society is the “means” to that end.

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<sup>123</sup> Vischer, *supra* note 39, at 95-99.

<sup>124</sup> Robert Vischer, *The American Enterprise: The Pharmacist Wars*, February 14, 2006 (on file with author).

<sup>125</sup> *Id.* [see above]

<sup>126</sup> Vischer, *supra* note 39, at 114.

<sup>127</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

### C. The Difference between Affirmative Duties and Negative Rights

If the government takes a power position over morality by placing an affirmative duty on one side to conform to its mandate then the foundation of differing ideas in society has been replaced by a method of morality building that is built from the top down. In other words, if the government controls the “means” by which a society arrives at morality, then the “ends” may only reflect the morality of those in power. Although our democratic government system is supposed to reflect the views of society through election of government officials, if some of the views of society are not allowed to be expressed, it is unlikely the government actors will have a balanced perspective.

Understandably, if an individual’s ethical decisions have a direct impact on the life, health, or property of another, then the government must take action by creating a negative shield to protect against social chaos. For example, most regulation of business is coined in the negative i.e. you can not do this or that, such as selling alcohol or cigarettes to underage buyers, distributing illegal drugs, producing a defective unreasonably dangerous product, selling guns to ex-felons etc. because these regulations are sufficiently related to protecting the health, safety and welfare of consumers.

Duty to dispense regulation, on the other hand, demands the sale of a certain product to a consumer who asks for it, an affirmative duty. It is true that in some cases, especially when a group is underrepresented in the marketplace of ideas, affirmative duties may be necessary to protect the health, safety and welfare of the group; however, governments need to tread carefully when it comes to controlling this way. For example, if the State instead mandated that pharmacies not discriminate against persons of a certain gender, race, age or income, then the affirmative duty would be protecting the free flow of expression in the marketplace of ideas. However, pharmacies in this case are not distinguishing based on the people group but rather on the product. This is product discrimination or a business decision not discrimination based on a person. Governments should insure the latter discrimination against persons does not occur but that does not mean the government should place an affirmative duty to force the pharmacy to provide whatever product a certain people group demands.

Granted, if a product is entirely inaccessible due to pharmacies’ discrimination against the product, i.e. a market failure, and the government thinks the drug is essential for society, then the

government may have to force alternative avenues for dispensing the drug and, if necessary, place an affirmative duty on pharmacies to dispense. However, as aforementioned, the market has not failed on this issue and there are many avenues to access the drug so such drastic affirmative duty measures need not be taken at this point.

#### **D. A Tangible Right vs. A Philosophical Right**

It is easy to minimize the importance of differing beliefs in the marketplace of ideas when faced with an urgent and concrete problem such as a woman who is denied a valid prescription by her pharmacist for a drug she desires. It is human nature to feel sorry for a woman who has had a moral judgment passed upon her by a professional whom she trusts. Harms, such as this, to which we all as humans can readily identify, we define as tangible harms. The oft cited case mentioned above of a married woman and mother to a newborn, who suffered a birth control failure with her husband and went to her pharmacist to obtain emergency contraception only to be met with chastisement for her decision and forced to leave without the drug, is a perfect example of a tangible right.<sup>128</sup> A violation of a tangible right arouses empathy and compassion because by putting oneself in the woman's shoes, one can easily identify with the physical and/or emotional harm the complainant faces. Consequently, it is only natural to want to stand up for the tangible rights of the woman at all costs.

Conversely, the freedom of conscience is an intangible or philosophical right. The harms of violating such a right are not immediately apparent or recognizable. The pharmacist does not necessarily face any physical or emotional harm for filling a valid prescription. Likely, a vast majority of people would not see any detriment to the pharmacist whatsoever by placing themselves in his shoes. Consequently, an intangible right is characterized by the lack of empathy or compassion that is felt by its violation because it has only intellectual or philosophical consequence. Instead, the complainant suffers an existential harm steeped in his ability or freedom to reason his views on life. It is the intangible rights that allow people to define who they are and what they stand for and to form common ties with other like-minded persons in a society in order to gain a common identity and purpose.

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<sup>128</sup> Tomkowiak, *supra* note 2, at 1330.

Consequently, even though it is tempting to side with the tangible right in this situation at the expense of the intangible, doing so can create a much greater philosophical harm in a society. Again, it comes down to the ability of an individual to freely participate in the marketplace of ideas by expressing his own ideas, beliefs and viewpoints, which creates a foundation on which other rights in a society can be built.

## VII. POSITIONS

### A. Conscience Must “Win”

Therefore, if one fundamental right must “win”, given the nature of a zero-sum game, then it should be the freedom of conscience for the foregoing reasons. To summarize, when comparing the two rights, we found the access to contraception policy arguments to be more of an inconvenience concern, where women have several alternative choices for emergency contraception. Meanwhile, pharmacists were left with no real option other than to violate conscience under “duty to dispense” legislation. Instead, “duty to dispense” legislation infers a positive duty on pharmacists to assist a patient in what he believes is an immoral act. Secondly, it is important not to discount the importance of intangible or philosophical rights, as freedom of conscience is the foundation on which other rights are built and there is inherent value in the ability of humans define themselves and shape the values of their society.

One of trends in academic writing on this issue we have noticed is the authors’ unwillingness to admit that they are in fact favoring one right over another and, consequently, they fail to address how they are comparing the rights and the premises of why they are supporting one over the other.<sup>129</sup> Most recognize the legal issue of the conflicting fundamental rights but then propose a solution they call a win-win or balanced solution that necessarily elevates one of the rights at the expense of the other.<sup>130</sup> Recognition that these rights may not be

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<sup>129</sup> Vokes, *supra* note 102, at 420; *see also* Tomkowiak, *supra* note 2, at 1360; *see also* Claire A. Smearman, *Drawing the Line: The Legal, Ethical, and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 474 (2006); *see also* Lorraine Schmail, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL’Y 139, 140 (2006), *see also* Robin F. Wilson, *supra* note 108.

<sup>130</sup> Tomkowiak, *supra* note 2, at 1332; Smearman, *supra* note 128, at 538.

reconcilable should necessarily be the first step in determining an appropriate solution.

## B. Tomkowiak's Recommendations

For example, Ms. Sarah Tomkowiak provides the following recommendations to balance the competing rights and "...allow individual pharmacists to exercise their moral beliefs, while ensuring that patients still receive the minimal standard of pharmaceutical professional care and that women are never denied access to legally prescribed birth control."<sup>131</sup> Tomkowiak states that these beliefs can be reconciled by federal and state "duty to dispense" legislation, state pharmacy board regulation prohibiting obstruction of prescriptions and imposing a duty to provide timely access to contraceptives, collaborative practice agreements allowing pharmacists to dispense emergency contraception without an advance prescription from a physician, AMA and APhA resolutions allowing physicians to dispense drugs directly in some cases and to develop a registry to inform consumers of pharmacies' refusal policies, respectively and finally by employment practices that insure a pharmacist who will dispense emergency contraception is always available.<sup>132</sup>

Even at first glance, it is quite obvious which right Tomkowiak thinks should win at the expense of the other yet she still maintains she is balancing the competing rights. Tomkowiak ultimately suggests that state pharmacy boards require pharmacists to provide timely access to contraception and prohibit obstruction by pharmacists in obtaining any lawful prescription.<sup>133</sup> She supports strong action against any pharmacist who impedes on the patient's ability to obtain birth control.<sup>134</sup> By allowing pharmacies to be significantly penalized for a failure to dispense and individual pharmacists to be professionally sanctioned for their failure to dispense, Tomkowiak has effectively resolved the issue with no practical balance of rights at all.

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<sup>131</sup> Tomkowiak, *supra* note 2, at 1350.

<sup>132</sup> *Id.* at 1350-60.

<sup>133</sup> *Id.* at 1355.

<sup>134</sup> *Id.* at 1356.



### C. Wilson's "Live and Let Live" Solution

Ms. Robin Wilson also provides a solution in attempt to balance the competing rights. Commendably, Wilson expressly recognizes that her solution could be viewed as a lose-lose solution as opposed to a win-win.<sup>135</sup> Also, she recognizes that in this enterprise both parties cannot win. "The ability of the pharmacists to refuse to dispense irreducibly comes at the expense of the disappointed and inconvenienced patient; and the ability of the patient to demand EC from the pharmacist comes necessarily at the pharmacist's expense." "They [state legislatures] could choose not to burden the professional's choice at all—prizing religious liberty more highly than access." Conversely, "They could force providers to provide every service legally requested—prizing patient access more highly than moral or religious freedom."<sup>136</sup> She believes that the best we can hope for is the following "live-and-let-live" solution. She proposes that pharmacies should be required to stock emergency contraception unless it can prove that to do so would result in undue hardship.<sup>137</sup> She believes that Illinois' rule burdens individuals more than facilities, which is distributing burdens backwards because conscientious objections of individuals should be afforded more protection than businesses which lack moral being.<sup>138</sup> Although pharmacies may incur additional expense by mandatory stocking rules, Wilson maintains this would make emergency contraception more accessible and pharmacists would be able to refuse to dispense so long as no significant hardship would result to the patient or to the business.<sup>139</sup>

Practically, this position again favors right of access to contraception at the expense of conscience. Although Wilson proposes that employees should not be discriminated against because of their beliefs about contraception, in reality that is what must happen in order for this plan to work in practice. Pharmacies that employ objector pharmacists would be forced to staff around them making it practically difficult to keep an objector on staff, especially if the situation did not rise to the level of the undue hardship exception. In addition, it would be difficult for the employer to determine when undue hardship had legally occurred to allow for an objection. Instead, the likely result

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<sup>135</sup> Wilson, *supra* note 108, at 63.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 61-62.

<sup>138</sup> *Id.* at 61.

<sup>139</sup> *Id.*

would be for the employer to take the easy route and avoid hiring objectors. In addition, as Wilson herself points out, if no other non-objecting pharmacist is available and the patient would experience hardship if the objecting pharmacist refused service, then the objecting pharmacist would be forced to dispense.<sup>140</sup>

#### D. Vischer's Market-Based Approach

Robert Vischer maintains that this controversy is not necessarily a two-dimensional issue. Instead, the state should step back and allow all sides of the debate to “live out their convictions in the marketplace, maintaining a forum in which pharmacies craft their own particular conscience policies in response to the demands of their employees and customers.”<sup>141</sup> Vischer thinks that if all actors in the situation were left room by policy makers to operate within the “moral marketplace”, an ongoing exchange of society’s pluralistic values would foster social ties to determine moral ideals in ways that “state-enshrined” rules that “monopolize the marketplace of ideas” cannot.<sup>142</sup> Vischer argues that businesses should also be considered actors in the moral marketplace because they become mediating institutions, which adopt a moral stance by the goods and services they offer.<sup>143</sup> Further, Vischer claims that in a pluralistic society, government must create space for “divergent views to coexist.” In addition, he submits that “...where consensus is impossible, social toleration of competing claims—rather than the collective elevation of one and the negation of all others—is in order.”<sup>144</sup>

Thus, Vischer resolves that the state should only step in the case of market failure. However, ensuring access to relevant information would be the state’s role.<sup>145</sup> In addition, the state must recognize the difference between market-driven inconvenience, which is not a market failure and lack of access, which would demand state intervention.<sup>146</sup> Vischer concludes with an insightful quote, “Making space for the unpopular exercise of conscience is an American tradition, but that tradition cannot be relegated to the Amish-style enclave and isolated

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<sup>140</sup> *Id.* at 63.

<sup>141</sup> Vischer, *supra* note 39, at 86.

<sup>142</sup> *Id.* at 95.

<sup>143</sup> *Id.* at 101-02.

<sup>144</sup> *Id.* at 110.

<sup>145</sup> *Id.* at 112-13.

<sup>146</sup> *Id.*

military conscript; the tradition must extend to the heart of our society, where our moral convictions and daily existences intersect. If moral pluralism is going to mean anything in our society, it has to mean something at Walgreen's",<sup>147</sup>

## VIII. PROPOSAL

We find one of the main premises of Vischer's argument particularly relevant. He insightfully points out that our nation is not just built on individual freedom, but also by the principle of association, where individuals live out the promise of freedom in cooperation and connection with others.<sup>148</sup> Thus, morality driven associations and allegiances will allow individual consciences to thrive.<sup>149</sup> We will expound on this premise to provide additional support for Vischer's argument and then give several suggestions to enhance the market-based solution.

### A. Expansion of Vischer's Premise

As organizational leadership scholars have recognized for many years now, effective organizations naturally become vehicles for individuals to realize their own values and identities.<sup>150</sup> This occurs because they have become outlets for the value concerns of its various constituencies. Especially concerning pluralistic institutions, such as health care and academia, "Different segments of society tolerate and support it for very different reasons, and individual people infuse it with a wide variety of different values."<sup>151</sup> Effective businesses thus attempt to create an integrated entity by "knitting these constituencies together", fostering cooperation among the different segments, and ultimately winning the consent of various value groups.<sup>152</sup>

Pharmacies are no exception to this rule. Pluralistic in nature, as professional and market based entities, pharmacies will naturally be one outlet where many different viewpoints and morals converge. As

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<sup>147</sup> *Id.* at 119.

<sup>148</sup> Vischer, *supra* note 123.

<sup>149</sup> *Id.*

<sup>150</sup> Matthew S. Kraatz, *Leadership as Institutional Work: A Bridge to the Other Side.*, in *INSTITUTIONAL WORK: ACTORS AND AGENCY IN INSTITUTIONAL STUDIES OF ORGANIZATION*, at Ch. 4 (Thomas B. Lawrence, Roy Suddaby and Bernard Leca, eds.) (forthcoming)

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

such, a successful pharmacy will allow the marketplace of ideas to drive its integrated organizational identity.

This organizational theory also accentuates the nature of societal morality—as a product of both individual ideals and values and as a part of a whole marketplace where those ideals and values war for acceptance. In other words, governance needs to let people be both individually driven moralists, while connecting to society and the roles and obligations that connection brings.

For example, employees align individual values with a business' identity by choosing to work for a place employment that he feels shares his point of view. However, in accepting the job, that individual now has responsibilities to further the interests of that organization as a whole and work out his individual concept of truth within the context of the organization. Meanwhile, businesses attempt to align their identity with the different segments of consumers, who have individual values, as well as maintaining the ability of its workers to express themselves as individuals, with different concepts of morality, within its integrated structure.

Applying this to the industry of pharmacy in society, policymakers should allow pharmacists to be principled individuals while effectively fulfilling a role of a professional in society. Meanwhile, consumers should allow be allowed to have ideals while expressing their collective role through their alliances with certain businesses.

## **B. The Option to Wait**

Therefore, to balance the role of a pharmacy to be driven professionally and financially, to balance the role of a pharmacist to be principled while being a professional and to balance the role of the consumer to have ideals and impress them on society, the following steps should be pursued by government. First, the legislators must realize that sometimes the best strategy is the option to wait and do nothing at least for the time being. In this case, wait for the market to settle this dispute uninterrupted by government mandate. Although it is a humble position for policy-makers to take, they must recognize that government action is not a cure-all for all situations.

We recognize that some authors have argued this position is not politically feasible or realistic. For example, Wilson succinctly dismisses Vischer's market based argument on the grounds that it is not a realistic approach given the tendency of legislatures to regulate this

issue. The two fundamental problems Wilson sees with his argument is that federal and state governments are already considering legislation on both sides of issue and that policymakers are unlikely to let the market contest occur on an issue that has built in urgency.<sup>153</sup> Although we appreciate her pragmatist perspective, she may have discounted a market-based solution too quickly. Government actors would still be responding to the problem to appease constituent's appetites for action just in a more neutral way. Instead of playing the activist role of choosing one side over the other, government actors would be active in maintaining a mediator position through information sharing and passive guidance of the affected parties.

Notably, just because government would take a more passive role, does not mean it is any less important. It would simply mean that the state would be one piece of the puzzle instead of painting the whole picture by itself. The state's supporting role would include remaining neutral in its regulation and encouraging the marketplace of ideas by widening the avenues by which all the starring actors, such as the pharmacies, pharmacists and consumers, may express themselves on the issue. First, we will speak to the effects of remaining neutral and then we will address some passive steps the state could take to encourage an even playing field.

Remaining neutral would allow the starring actors the chance to be heard in the marketplace. If the government were to take an active stance on this issue, which as proven above necessarily means that it must favor one side over the other, then the opportunity for individual expression of morality and societal acceptance of morality has been eliminated. Keep in mind that the free enterprise system that has served America so well is based on the premise that business owners are primarily profit driven. Although some may have moral convictions that cause them to not sell in a given situation, as a whole they are sufficiently inclined to sell products for which there is a demand. When reasonable minds can differ, which is the case here, then likely there are segments in society with opposing beliefs and those with like beliefs will find each other in the marketplace. Generally, business morals will align with employee and customer ethics in order to be successful.

Then, consumers can speak to this issue by choosing to use the drug, choosing not to, choosing to individually or collectively boycott a pharmacy that sells emergency contraception or choosing to

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<sup>153</sup> Wilson, *supra* note 108, at 60.

individually or collectively boycott one that does not. Pharmacists can speak by choosing to fill emergency contraception prescriptions or not or choose to work for an employer with policies for or against emergency contraception. Physicians can speak by prescribing the medication or by not suggesting it to consumers. However, the best position for the government in this type of dilemma is not to speak and let the marketplace of ideas do the talking.

### C. Voluntary Increase of Emergency Contraception Avenues

One passive step the state could take, if necessary to increase the avenues for individual expression on this issue, is to allow for more voluntary distribution channels for the drug. Although applying Tomkowiak's proposal for state and federal legislation and pharmaceutical board regulation would render this part of her solution useless, she does suggest some helpful ways to voluntarily increase access to emergency contraception. For example, voluntary collaborative practice agreements and exceptions for doctors to dispense the drug directly if they so desire, would allow for more ways consumers could receive emergency contraception from pharmacists or doctors respectively.<sup>154</sup> In addition, now that the drug is over the counter for most consumers, states could allow any business or organization to carry the drug with the requirement that a licensed or trained individual would only dispense the drug if the consumer provided proof of age. In doing so, the government has increased timely access to the drug but only through persons who support the use of the drug.

Further, State Pharmacy Board websites could include a list of approved reputable Plan B retailers with links to sites where the drug could be purchased on-line or in the store. Since a vast majority of Americans are connected to the internet in some capacity, women who demand the drug could easily access their State's Plan B website to retrieve this information on how to purchase the drug and the expected timeframe and cost for delivery. If necessary, the state legislature could mandate that this Plan B web address be posted or handed out at all pharmacies that refuse to dispense the drug as well to insure that women who are refused purchase of the drug would know alternative location to obtain it.

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<sup>154</sup> Tomkowiak, *supra* note 2, at 1357.

#### **D. Information Requirements to Facilitate Marketplace of Ideas**

Another passive step states could take to facilitate the free flow of information on the topic is through notification policies. Pharmacies and/or pharmacists could be required to inform the public of their willingness or unwillingness to dispense the drug. This database could be maintained by the state's pharmacy association and made available to the public through local health departments, the association's website, and/or posted at each pharmacy. It is also important to note that the state should not interrupt the free flow of ideas by adverse licensing and professional requirements for pharmacists who express their unwillingness to dispense. Licensing of pharmacists should still include the basic standards for competence, training, education, sanitation, record-keeping etc. but a provision adding the sale of particular drugs to these qualifications would not be necessary nor appropriate under this government neutrality position.

### **IX. CONCLUSION**

In conclusion, we think that the marketplace of ideas should be allowed to function on this issue. So long as consumers have access to distribution channels for emergency contraception and to information regarding where the drug is available, there is no reason why the market would fail to reconcile this dilemma. However, if Wilson is correct that governments will not be able to fight the urge to take an active role in this dispute, then freedom of conscience should be the paramount fundamental right. This determination is necessary to provide the proper balance of rights because placing an affirmative duty on pharmacists to dispense a drug negates the basic premises on which our nation is built and only avoids a slight inconvenience to consumers who desire emergency contraception. Finally, it is important for governments to recognize that there are sound arguments on both sides of this legal debate and that an in depth analysis of the ethical and public policy ramifications of regulation on this issue is absolutely necessary.