

A Crisis of Conscience: Pharmacists Decide Not to Dispense Contraception

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The U.S. Food and Drug Administration (FDA) on August 26, 2005, added to the controversy associated with the debate over abortion and contraception. On that day, the FDA's then-Commissioner Lester M. Crawford announced that the emergency contraceptive medication Plan B would not be designated as an "over-the-counter" drug,¹ thus maintaining the status quo with a prescription-only designation for the drug. Reasons offered for the decision included past policies of the FDA against marketing of a drug as both a prescription medication and an over-the-counter drug for the same indications. Additional issues included the use of age-based criteria to assign drug status² and the possibility that teenagers might obtain an over-the-counter contraceptive agent.³

Many, including Senators Hillary Clinton and Patty Murray, expressed surprise and shock over the FDA's decision. These Senators were particularly upset because they had agreed to lift their hold on Commissioner Crawford's confirmation contingent upon assurances that the Plan B issue would be resolved. After all, the FDA's own expert panel had approved over-the-counter status for Plan B on a 23 to 4 vote. Apparently, no one thought Commissioner Crawford would override his own panel. Susan F. Wood, the FDA's director of the Office of Women's Health, was so upset that she resigned over what she considered an unwarranted "overrule."⁴ When Commissioner Crawford himself resigned on September 23, just two months after being confirmed in the position, some speculated the Plan B overrule was partly responsible.⁵

These events should have surprised no one. Strong opposition to contraception has come from many organizations, including the Center for Law and Justice and Pharmacists for Life.⁶ State legislatures, Congress, and the Courts have been attempting to limit access to contraception under *Eisenstadt v. Baird*,⁷ and further constricting abortion under *Roe v. Wade*.⁸ Now, pharmacists have joined the debate by refusing to dispense both

¹ Mark Kaufman, *FDA Official Quits Over Delay on Plan B*, WASH. POST, Sept. 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/31/AR2005083101271.html>.

² Statement by Lester M. Crawford, FDA Commissioner, *FDA Takes Action on Plan B* (Aug. 26, 2005) at <http://www.fda.gov/bbs/topics/news/2005/NEW01223.html>.

³ Todd Zwillich, *US Pharmacies Vow to Withhold Emergency Contraception*, 365 LANCET 1677, 1678 (2005) (stating that the FDA is concerned about access by teenagers to Plan B, as a primary form of contraception).

⁴ Kaufman, *supra* note 1.

⁵ Lauren Neegard, *FDA Commissioner Crawford Resigns Amid Criticism*, AUSTIN AM. STATESMAN, Sept. 24, 2005, at A22 (claiming that Crawford's Plan B decision caused low morale at the FDA).

⁶ Wayne J. Guglielmo, *If You Prescribe Will They Dispense*, MED. ECON. (June 17, 2005) available at <http://www.memag.com>

⁷ Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229 (2005).

⁸ Julia Lichtman, Note, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. & POL'Y 345, 347 (2003) (noting that Supreme Court decisions since *Roe v. Wade*

contraceptive and abortifacient medications to women. At least 180 reports of refusals by pharmacists have been made since 1991.⁹ The number of cases is likely to increase.

The most notorious cases of refusing pharmacists come from Texas, Wisconsin, and New Hampshire.¹⁰ The most disturbing of the two Texas cases occurred when a pharmacist refused to fill a prescription for emergency contraception for a rape victim.¹¹ Perhaps the most surprising refusal took place in Wisconsin where a male pharmacist refused to refill a prescription for oral contraceptives on moral grounds.¹² In that case, a Wisconsin Department of Regulation and Licensing administrative law judge actually sanctioned the pharmacist and recommended that the Wisconsin State Pharmacy Examining Board seek action based on ethical considerations.¹³ The Wisconsin case, however, represented a departure from other cases, including those in Texas, where pharmacists generally escape formal sanctioning by a licensing board. Generally, a refusing pharmacist at most faces termination by an employer, but many never face discipline in any form.¹⁴

A refusing pharmacist may avoid punitive actions by invoking the principle of conscientious objection to the killing of another human being, the same justification used by the conscientious objector who wishes to avoid killing during military service.¹⁵ Relying on this principle has been a well-established right, and although its exercise may be a question of judgment, it generally is not subject to sanctions. At least one commentator has characterized this kind of refusal to provide care as a beneficence refusal – a desire to prevent harm to another.¹⁶ Pharmacists may also appeal to “conscience.” Such an appeal relies on the same principles that support physicians and other medical personnel who refuse to participate in or provide for medical abortions. This latter approach may be characterized as a conscientious refusal, as an act based upon a belief of conscience that prevents self-harm.¹⁷ Such conscientious refusal may violate a legal or professional duty, with resulting sanctions.¹⁸

To aid pharmacists who choose to refuse, the American Pharmacists Association (APhA) in 1998 adopted the Pharmacist Conscience Clause, which states that the APhA “recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure [a] patient’s access to legally prescribed

have gradually constricted the ability of women to have an abortion by limiting access to public facilities and reducing the standard of scrutiny to “unduly burdensome”).

⁹ Teliska, *supra* note 7.

¹⁰ *Id.*

¹¹ Julie Cantor & Ken Baum, *The Limits of Conscientious Objection – May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008 (2004).

¹² Lichtman, *supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Cantor & Baum, *supra* note 11.

¹⁶ David B. Brushwood, *Conscientious Objection and Abortifacient Drugs*, 15 *Clinical Therapeutics* 204 (1993).

¹⁷ *Id.*

¹⁸ *Id.*

therapy”¹⁹ These clauses allow a pharmacist to remain true to his or her conscience, but still serve the needs of the patient. Most states have adopted them to support the right of a health care provider to refuse to supply abortion services out of conscience.²⁰ More recently, four states – Arkansas, Georgia, Mississippi, and South Dakota – have passed legislation specifically addressing and affirming the right of a pharmacist to make a conscientious refusal to dispense a medication even though a physician has lawfully prescribed it.²¹ The South Dakota statute affords its pharmacists the greatest discretion where “...there is reason to believe that the medication would be used to: (1) cause an abortion; or (2) destroy an unborn child as ... an individual organism of the species *Homo sapiens* from fertilization until live birth.”²² Because the statute defines the point of life as conception, a pharmacist may withhold medications, such as Plan B or Preven, which prevent pregnancies by either blocking development of the corpus luteum, ovulation, or implantation of the fertilized egg.²³ Such medications contain higher doses of traditional oral contraceptives and thus are not considered abortifacient medications like RU 486, which causes the expulsion of the products of conception.²⁴

As David B. Brushwood so aptly notes, the key to the interpretation of these statutes lies in the understanding of their “critical words and phrases.”²⁵ Careful reading of the words and phrases of all of these statutes reveals that they do not require a pharmacist to provide any alternative mechanism for a woman to obtain her medication.²⁶ This situation seems to violate the Pharmacist Conscience Clause that states the “APhA ... supports the establishment of systems to ensure patient’s access to legally prescribed therapy”²⁷ The APhA Code of Ethics for Pharmacists further states: “A pharmacist respects the autonomy and dignity of each patient.”²⁸ These pronouncements by the APhA, however, are hortatory and non-binding. The American Medical Association and other organizations have recognized the potential effect that the lack of alternative access may have on women: It creates an imbalance between the autonomy rights of the patient and those of the pharmacist.²⁹ More importantly, the women who are denied access to services with no reasonable alternative have less choice and therefore reduced autonomy. The end result is a further restriction of the ability of women, especially those who lack funds, to obtain birth control and abortion services. Unfortunately, the current versions of these clauses clearly favor the rights of the refusing pharmacists over the rights of

¹⁹ American Pharmacy Association, *Pharmacist Conscience Clause*, 38 J. AM. PHARMACY ASS’N. 417 (1998) available at <http://www.aphanet.org>. (citing the current version of the pharmacist’s conscience clause, which is not mandatory).

²⁰ Teliska, *supra* note 7.

²¹ *Id.*

²² *Id.*

²³ Jonathan D. Klein et al., Policy Statement, *Emergency Contraception*, 116 PEDIATRICS 1038 (2005).

²⁴ *Id.*

²⁵ Brushwood, *supra* note 17.

²⁶ Teliska, *supra* note 7.

²⁷ American Pharmacy Association, *supra* note 19.

²⁸ American Pharmacy Association, *Code of Ethics for Pharmacists*, (1994) available at <http://www.aphanet.org>. (citing the current version of their Code which was adopted in 1994, but it is not mandatory).

²⁹ Cantor & Baum, *supra* note 11.

patients to receive a lawfully written prescription. This situation is unlikely to change in the near future as long as contraception and abortion remain controversial.

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