

## Conflicts of Conscience

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*When he told me he wouldn't fill it, I just pulled over in the parking lot and started crying. I just couldn't believe it. I was just trying to be responsible.*<sup>1</sup>

### I. INTRODUCTION

In Texas, a pharmacist refused to fill a rape victim's emergency contraceptive prescription.<sup>2</sup> A Wisconsin student encountered a pharmacist who refused to fill her birth control prescription and refused to transfer it to another pharmacist.<sup>3</sup> A pharmacist told a woman in Minnesota seeking birth control to return in a few days to have a different pharmacist assist her.<sup>4</sup> These are just a few of the reported incidents of pharmacists refusing to fill contraceptive prescriptions because of the pharmacists' own personal beliefs.<sup>5</sup> These beliefs, however, conflict with the customers' right to take the prescribed medication.

A refusal to fill a legally valid prescription violates a woman's right to contraception and her right to make independent medical decisions.<sup>6</sup> Refusals also infringe on equal protection rights under the Fourteenth Amendment.<sup>7</sup> However, forcing pharmacists to fill prescriptions that are in conflict with their religious beliefs is a violation

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1. Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A01 (quoting Suzanne Richards). Richards was twenty-one when she attempted to have her emergency contraception filled in New Hampshire. *Id.* The pharmacist refused to fill her prescription, called her "irresponsible," and lectured her. NAT'L WOMEN'S LAW CTR., PHARMACY REFUSALS 101 2 (2005), available at [http://www.nwlc.org/pdf/11-05Update\\_PharmacyRefusal101.pdf](http://www.nwlc.org/pdf/11-05Update_PharmacyRefusal101.pdf). Because she was unable have the prescription filled in time, Richards missed the recommended seventy-two hour time frame for taking the medication. Stein, *supra*.

2. *All Things Considered: Texas Legislature Bill Aims to Protect Pharmacists that Refuse to Fill Prescriptions Based on Their Personal Beliefs* (NPR radio broadcast Apr. 5, 2005). A friend attempted to fill an emergency contraceptive prescription for the rape victim while the victim waited in the car. *Contraception: Pharmacist's Refusal to Fill Emergency Contraception Script Raises Questions*, WOMEN'S HEALTH L. WKLY., Mar. 21, 2004, at 28. The pharmacist refused to fill the prescription, and the friend equated this refusal to a "second victimization." *Id.* The pharmacist was subsequently terminated for his conduct. *Id.*

3. NARAL PRO-CHOICE AM. FOUND., GUARANTEE WOMEN'S ACCESS TO PRESCRIPTIONS 4 (2005), available at <http://www.prochoiceamerica.org/Issues/contraception/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=17602> [hereinafter GUARANTEE]. Also, in Wisconsin, a pharmacist refused to fill the emergency contraception prescription of a married woman. Stein, *supra* note 1. The woman and her husband had decided that a fifth child was not financially feasible for them. *Id.* Their need for the emergency contraception arose when their condom broke. *Id.*

4. GUARANTEE, *supra* note 3, at 1.

5. See, e.g., *id.*; Molly M. Ginty, *Pharmacists Dispense Anti-Choice Activism*, WOMEN'S ENEWS, May 2, 2005, <http://womensenews.org/article.cfm/dyn/aid/2278/content/archive>.

6. See *infra* Part III.A.1.

7. See *infra* Part III.A.2.

of the Free Exercise Clause.<sup>8</sup> Many states and the federal government have introduced legislation to address this conflict between pharmacists' and patients' rights.<sup>9</sup> Often, this legislation is in the form of conscience or refusal clauses and allows pharmacists to refuse to fill prescriptions that are against their personal beliefs.<sup>10</sup> If legislation is enacted to protect pharmacists' rights to make conscientious objections, then that legislation should also provide equal protection for patients' access to medication.

This note will explore the dilemma between pharmacists' religious beliefs and meeting patients' needs. Part II.A discusses the history of conscience clauses in the United States. Part II.B details the recent refusals to fill prescriptions. Parts II.C and II.D discuss important actors in the current conflict, including legislatures and pharmacist associations. Part III analyzes the conflict.<sup>11</sup> Finally, Part IV concludes with suggestions for a compromise.

## II. BACKGROUND

### A. *Development of Conscience Clauses*

Government-recognized conscientious objection has existed since before the Civil War,<sup>12</sup> and the federal government acknowledged conscientious objection before it instituted the draft during World War I.<sup>13</sup> Those objecting to military service believed that it was unconscionable to be forced to kill.<sup>14</sup> In *United States v. Seeger*,<sup>15</sup> the United States Supreme Court interpreted the Military and Training Service Act.<sup>16</sup> The Court clarified that, for an objection to qualify as religious, the person need "only to have a conviction based upon religious training and belief."<sup>17</sup> The Court explained that this requirement encompasses "all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>18</sup> Laws governing selective service continue to exempt individuals with conscientious objections founded on religious beliefs against combat training and military

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8. *See infra* Part III.A.3.

9. *See infra* Part II.C.

10. *See infra* Part II.C.

11. This note will not discuss the related topics of RU-486 or the validity of physician conscience clauses, and it will not address making emergency contraception pills available without a prescription.

12. *United States v. Seeger*, 380 U.S. 163, 170 (1965).

13. *Id.* at 170-71.

14. Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 *FORDHAM URB. L.J.* 783, 801 (2004).

15. 380 U.S. 163 (1965).

16. *Id.* at 176 (interpreting Military Training and Service Act, 50 U.S.C.A. app. § 456(j) (1990)).

17. *Id.*

18. *Id.*

service.<sup>19</sup> The exemption is based on the federal statute, not on any constitutional provision.<sup>20</sup>

In the field of medicine, conscience clauses first surfaced after *Roe v. Wade*.<sup>21</sup> Once the Supreme Court held in *Roe* that a woman has a limited right to an abortion, the federal government and states passed laws exempting certain healthcare professionals from having to perform various related medical procedures.<sup>22</sup> Congress enacted 42 U.S.C. § 300a-7, permitting entities that benefit from “certain federal funds to refuse to provide abortion or sterilization if such services are contrary to their religious or moral beliefs.”<sup>23</sup> Forty-seven states followed by passing their own statutes, allowing certain healthcare providers to refuse to perform abortions or sterilizations.<sup>24</sup>

Numerous courts have upheld these statutes.<sup>25</sup> In the landmark case, *Wolfe v. Schroering*,<sup>26</sup> the United States Court of Appeals for the Sixth Circuit held that private hospitals and healthcare facilities and their employees may refuse to perform or to participate in abortions for a variety of reasons.<sup>27</sup> Initially, courts held that this right to refuse to participate in abortion-related procedures did not apply to public

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19. 50 U.S.C. app. § 456(j) (2000). The statute provides that

(j) Nothing contained in this title [ ] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term “religious training and belief” does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [ ] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [ ], to have knowingly failed or neglected to perform a duty required of him under this title. The Director shall be responsible for finding civilian work for persons exempted from training and service under this subsection and for the placement of such persons in appropriate civilian work contributing to the maintenance of the national health, safety, or interest.

*Id.*

20. *E.g.*, *Richter v. United States*, 181 F.2d 591, 593 (9th Cir. 1950).

21. 410 U.S. 113 (1973); NARAL PRO-CHOICE AM. FOUND., REFUSAL CLAUSES: DANGEROUS FOR WOMEN’S HEALTH 1 (2005), available at <http://prochoiceamerica.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=16140> [hereinafter DANGEROUS].

22. *Roe*, 410 U.S. at 153-54; DANGEROUS, *supra* note 21.

23. DANGEROUS, *supra* note 21.

24. *Kramlich*, *supra* note 14, at 802-03; DANGEROUS, *supra* note 21. The states without conscientious clauses for medical providers include Alabama, New Hampshire, and Vermont. NARAL Pro-Choice America Foundation, Refusal to Provide Medical Services, [http://www.prochoiceamerica.org/yourstate/whodecides/maps/medical\\_services.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/maps/medical_services.cfm) (last visited Jan. 25, 2006) [hereinafter Refusal to Provide].

25. *See Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Doe v. Bellin Mem’l Hosp.*, 479 F.2d 756, 760 (7th Cir. 1973).

26. 541 F.2d 523 (6th Cir. 1976).

27. *Id.* at 527.

facilities.<sup>28</sup> In *Webster v. Reproductive Health Services*,<sup>29</sup> however, the Supreme Court upheld a statutory prohibition on the use of public facilities for abortions that were not medically necessary.<sup>30</sup>

In addition to statutes that allow individuals to opt out of performing abortions, Congress enacted the Federal Refusal Clause in 2004, which applies to a broader class of medical entities.<sup>31</sup> The clause allows health care entities to refuse to “provide, pay for, provide coverage of, or refer for abortions.”<sup>32</sup> Individual states also enacted similar laws affecting medical coverage for abortions, such as barring insurance from providing coverage for abortion services.<sup>33</sup>

Refusal clauses have also arisen in the context of prescription drug coverage.<sup>34</sup> While twenty-three states have laws that support the coverage of contraception by insurance companies, ten of these states have refusal clauses that opponents consider “overly broad” in allowing insurers to opt out of providing contraceptive coverage.<sup>35</sup>

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28. *E.g.*, *Hodgson v. Lawson*, 542 F.2d 1350, 1356 (8th Cir. 1976); *Doe v. Hale*, 500 F.2d 144, 147 (1st Cir. 1974).

29. 492 U.S. 490 (1989).

30. *Id.* at 511.

31. DANGEROUS, *supra* note 21. The clause was part of the FY 2005 Consolidated Appropriations Act. *Id.* at 7 n.7. Sponsored by Representative Dave Weldon, the clause is also referred to as the Weldon Amendment or Clause. National Family Planning & Reproductive Health Association, Federal “Refusal Clause” Signed into Law by President Bush as Part of Omnibus Spending Bill, <http://www.nfprha.org/anda.asp> (last visited Jan. 25, 2006) [hereinafter Refusal Clause]. The text of the amendment provides the following:

(d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.

Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 507(d)(1), 118 Stat. 2809, 3163 (2004). President George W. Bush signed the bill into law on December 8, 2004. Refusal Clause, *supra*.

32. Refusal Clause, *supra* note 31. The clause is contrary to other federal laws and regulations. *Id.* For example, Title X requires that clinics receiving funding provide clients with referrals for abortions when requested. *Id.*

33. NARAL Pro-Choice America Foundation, Insurance Prohibition for Abortion, [http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance\\_prohibition.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance_prohibition.cfm) (last visited Jan. 25, 2006). Seventeen states currently bar insurance plans from providing coverage for abortion services. *Id.* These states are Arkansas, Colorado, Idaho, Illinois, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin. *Id.*

34. *See, e.g.*, Susan J. Stabile, *Religious Employers and Statutory Prescription Contraceptive Mandates*, 43 CATH. LAW. 169, 170 (2004).

35. NARAL Pro-Choice America Foundation, Insurance Coverage for Contraception, [http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance\\_coverage.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance_coverage.cfm) (last visited Jan. 25, 2006). The ten states with broad clauses are Arkansas, Connecticut, Delaware, Hawaii, Maryland, Missouri, Nevada, New Mexico, Rhode Island, and West Virginia. *Id.* The other thirteen states with laws that endorse contraceptive prescription coverage are Arizona, California, Georgia, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New York, North Carolina, Vermont, Washington, and Wisconsin. *Id.* As “overly broad” clauses, the statutes “unnecessarily deny women medically necessary information, referrals, or services.” NARAL Pro-Choice America Foundation, *Nationwide Trends: Refusal to Provide Medical Services*, [http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance\\_coverage.cfm](http://www.prochoiceamerica.org/yourstate/whodecides/maps/insurance_coverage.cfm)

Specifically, these clauses often excuse religious employers from complying with certain prescription coverage laws.<sup>36</sup>

### B. *Recent Refusals by Pharmacists*

Only five percent of American women do not use birth control during some point of their lives.<sup>37</sup> Without the use of contraceptives, twelve to fifteen pregnancies would result for the average woman.<sup>38</sup> Currently, pharmacists' refusals to fill prescriptions involve two categories of drugs that women use to control procreation: standard birth control and emergency contraception.<sup>39</sup>

Less than ten percent of pharmacists have reservations about filling prescriptions for birth control and emergency contraception.<sup>40</sup> Numerous stories, though, have emerged regarding women whose pharmacists have refused to dispense these medications.<sup>41</sup> In six months, there were almost 200 reported incidents across the country of pharmacists refusing to fill prescriptions.<sup>42</sup> Occurrences in the past two years have surfaced in at least nine states.<sup>43</sup>

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/www.prochoiceamerica.org/yourstate/whodecides/trends/issues\_medical\_services.cfm (last visited Jan. 25, 2006).

36. See Stabile, *supra* note 34.

37. Caroline Bollinger, *Access Denied*, <http://www.prevention.com/article/0,5778,sl-1-93-35-4130-1-P,00.html> (last visited Jan. 25, 2006).

38. NARAL Pro-Choice Oregon, 10 Important Facts on Contraception, <http://www.prochoiceoregon.org/s07/issues/200305151.shtml> (last visited Jan. 25, 2006).

39. Jim Ritter, *Planned Parenthood Protests over Morning-After Pill; Downtown Pharmacist Wouldn't Sell Emergency Contraceptive*, CHI. SUN TIMES, Mar. 23, 2005, at 10. To prevent pregnancy, emergency contraception is administered shortly after intercourse. AM. PHARM. ASS'N, EMERGENCY CONTRACEPTION: THE PHARMACIST'S ROLE 3 (2000), available at [http://www.pharmacist.com/pdf/emer\\_contra.pdf](http://www.pharmacist.com/pdf/emer_contra.pdf); Not-2-Late.com, The Emergency Contraception Website, <http://ec.princeton.edu/> (last visited Jan. 25, 2006). Forms of emergency contraception include pills and the copper-T intrauterine device (IUD). *Id.* In the pill form, a woman takes two doses of the emergency contraception twelve hours apart. NAT'L WOMEN'S HEALTH INFO. CTR., EMERGENCY CONTRACEPTION (2002), available at <http://www.4women.gov/faq/econtracep.pdf>. The pills are most effective if taken within seventy-two hours of unprotected intercourse. *Id.* For the IUD form, a medical provider places the IUD inside a woman's uterus and removes it at the appropriate time. *Id.* One million abortions and two million unintended pregnancies could be avoided through the use of emergency contraceptives. AM. PHARM. ASS'N, *supra*, at 1. Sometimes referred to as "the morning after pill," emergency contraception prevents implantation but cannot disrupt an established pregnancy. Not-2-Late.com, *supra*. It prevents ovulation, fertilization, or implantation. AM. PHARM. ASS'N, *supra*. Emergency contraceptives are not regarded as abortifacients. *Id.* An abortifacient is "a drug or other agent that effects abortion." THE OXFORD AMERICAN DICTIONARY AND THESAURUS 4 (2003). There are reports that other types of prescriptions are being refused as well. Tresa Baldas, *Fighting Refusal to Treat; "Conscience" Clauses Hit the Courts*, NAT'L L.J., Feb. 7, 2005, at 1. For example, a Texas pharmacist reportedly refused to distribute prescribed Ritalin. *Id.*

40. Ginty, *supra* note 5 (quoting Kathy Besinque, Associate Professor, University of Southern California School of Pharmacy in Los Angeles).

41. *Id.* "[There are] 180 recently reported incidents of pharmacists denying women birth control pills or emergency contraception." *Id.*

42. Ellen Goodman, *Rx for Drugstore Moralists: Quit*, BALT. SUN, Apr. 11, 2005, at 11A.

43. GUARANTEE, *supra* note 3, at 1-4. The nine states include Alabama, Georgia, Illinois, Massachusetts, Minnesota, New Hampshire, Ohio, Texas, and Wisconsin. *Id.*

One widely publicized incident occurred in 1996.<sup>44</sup> A customer complained to K-Mart after learning that pharmacist Karen Brauer had lied, telling her that the prescribed birth control pills were not in stock.<sup>45</sup> K-Mart terminated Brauer after she refused to agree to fill all future birth control prescriptions.<sup>46</sup> Brauer sued the corporation, claiming that it had violated the state's conscience clause.<sup>47</sup> Ten years later, the case is still pending in federal court due to K-Mart's bankruptcy.<sup>48</sup>

More recently, pharmacist Neil Noesen refused to fill a woman's contraceptive prescription after asking if it was for contraceptive purposes.<sup>49</sup> He also refused to transfer her prescription to another pharmacy.<sup>50</sup> Noesen's decision was based on his religious beliefs.<sup>51</sup> Two days passed before the woman was able to successfully fill her prescription, and she missed a dose of the medication during the delay.<sup>52</sup> As a consequence for failing to act in accord with the patient's health-care needs, Wisconsin's pharmacy board reprimanded Noesen, and it ordered him to attend ethics classes and to pay legal costs of \$20,000.<sup>53</sup> Emphasizing his refusal to transfer the prescription, the board also required Noesen to inform any future employer of his position regarding dispensing contraceptives and to give the employer a written plan detailing how he would ensure that patients received access to their prescriptions.<sup>54</sup>

### C. Reasons for Refusals

Reasons for refusing to fill prescriptions vary among pharmacists.<sup>55</sup> Some pharmacists decline on the ground that other laws prohibit dispensing drugs that the pharmacist believes may harm the patient by interfering with other medications.<sup>56</sup> Others have expressed concern with potential side effects of birth control, such as blood clots, nausea, and weight gain, and have convinced women to

44. See Correy E. Stephenson, *Increasing Number of Health Care Providers Refusing to Give Treatment Based on Religious Beliefs*, K.C. DAILY REC., Apr. 26, 2005.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Stacy Forester, *Reprimand Advised for Pharmacist Who Refused Birth Control Refill*, MILWAUKEE J. SENTINEL, Mar. 1, 2005; Opinion, *Put Patients' Interests Before Political Agendas; A Campaign to Expand Wisconsin's Conscience Clause Is Really About Promoting Ideology at Patients' Expense*, WIS. ST. J., Mar. 2, 2005, at A6 [hereinafter *Patients' Interests*].

50. *Patients' Interests*, *supra* note 49.

51. Anita Weier, *Pharmacist Penalty Adds Up to \$20,000*, CAP. TIMES, Apr. 14, 2005, at 3A.

52. *Patients' Interests*, *supra* note 49.

53. Weier, *supra* note 51.

54. *Id.*

55. Shari Rudavsky, *Birth Control Debate Sometimes Plays Out at Pharmacy Counter*, INDIANAPOLIS STAR, May 15, 2005, at 1A (quoting Karen Brauer); Bollinger, *supra* note 37.

56. See Ed Lamb, *Contraceptive Access Issues Highlight Pharmacists' Role*, PHARMACIST.COM, June 9, 2005, [http://www.pharmacist.com/articles/h\\_ts\\_0819.cfm](http://www.pharmacist.com/articles/h_ts_0819.cfm).

participate in natural family planning rather than take contraceptives because of these potential side effects.<sup>57</sup>

Religious convictions also play a role in pharmacist refusals.<sup>58</sup> Some pharmacists assert that dispensing the contraceptives violates their Christian faith.<sup>59</sup> They maintain that any interference with conception amounts to performing an abortion, which conflicts with their religious beliefs.<sup>60</sup> Some opponents of refusal clauses argue that the refusals are more about politics than religion.<sup>61</sup> For example, one commentator noted that “[t]he political climate has brought us to a place where pharmacists feel emboldened to obstruct access to health care in the guise of religion.”<sup>62</sup> Opponents view the pharmacists’ refusals to fill contraceptive prescriptions as simply another way to limit abortions.<sup>63</sup> The refusals to fill prescriptions are considered equivalent to spousal consent requirements, parental vetoes, waiting periods, and mandatory counseling for abortion because each restricts a woman’s choice regarding procreation.<sup>64</sup> Pharmacists believe legislative conscience clauses are necessary to protect their employment when they refuse to fill a prescription based on one of the above reasons.<sup>65</sup>

#### D. Recent Legislative Action

Recently, statutes have been proposed that address a pharmacist’s right to refuse filling a prescription.<sup>66</sup> Some of the legislation mandates that pharmacists fill all legal prescriptions while other legis-

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57. *CBS News: The Drugstore War* (CBS television broadcast Nov. 23, 2004), available at <http://www.cbsnews.com/stories/2004/11/23/eveningnews/main657435.shtml>. In addition to blood clots, nausea, and weight gain, possible side effects from birth control include strokes, high blood pressure, heart attacks, headaches, abdominal pain, and depression. U.S. Food & Drug Administration, *Birth Control Guide*, <http://www.fda.gov/fdac/features/1997/babytabl.html> (last visited Jan. 25, 2006).

58. *Healthcare Providers’ Rights of Conscience Act: Hearing on H.R. 2711 Before the S. Pub. Health & Welfare Comm.*, 2002 Sess. (Kan. 2002) (testimony of Paula Koch), available at [http://pfli.org/PKoch\\_Testimony\\_KS\\_Senate2002.html](http://pfli.org/PKoch_Testimony_KS_Senate2002.html) [hereinafter *Rights of Conscience Act*]; *CBS News*, *supra* note 57.

59. *See, e.g., Rights of Conscience Act*, *supra* note 58.

60. *CBS News*, *supra* note 57; Pharmacists for Life International, *A Declaration of Life*, <http://www.pfli.org/main.php?pfli=decopfphys> (last visited Jan. 25, 2006) [hereinafter *PLI Declaration*].

61. *CBS News*, *supra* note 57.

62. *See Ginty*, *supra* note 5 (quoting Rachel Laser, senior council at the National Women’s Law Center). “[T]he anti-choice right extremists have become emboldened by the current administration in Washington and they feel they are in the political ascendancy.” *CBS News*, *supra* note 57 (quoting Gloria Feldt of Planned Parenthood).

63. Anita L. Allen, *Commentary, Rx for Trouble*, *NEWARK STAR-LEDGER*, May 8, 2005.

64. *See id.*

65. *See Baldas*, *supra* note 39.

66. *See, e.g., NAT’L WOMEN’S LAW CTR., LAWS AND BILLS GOVERNING PHARMACIST REFUSALS* (2005), available at <http://www.nwlc.org/pdf/NWLCPharmacyRefusalsMap10-05.pdf> [hereinafter *LAWS AND BILLS*].

lation specifically provides pharmacists the opportunity to opt out of filling certain prescriptions.<sup>67</sup>

On April 8, 2005, U.S. Representative Carolyn McCarthy introduced an amendment to the Public Health Service Act.<sup>68</sup> The amendment addressed “the responsibilities of a pharmacy when a pharmacist employed by the pharmacy refuses to fill a valid prescription for a drug on the basis of religious beliefs or moral convictions . . . .”<sup>69</sup> McCarthy’s amendment would require pharmacies to ensure that if one pharmacist refuses to fill a prescription, then another pharmacist will fill it.<sup>70</sup> The amendment would also prohibit pharmacies from employing individuals who refuse to transfer prescriptions to other pharmacies or return prescriptions to customers.<sup>71</sup>

Shortly after Representative McCarthy introduced her amendment, other legislators presented a separate bill in both the House of Representatives and the Senate.<sup>72</sup> The Access to Legal Pharmaceuticals Act is intended to prevent pharmacists from denying customers properly prescribed medications based on the pharmacist’s personal beliefs.<sup>73</sup> This bill seeks to “protect the right of individual pharmacists to refuse to fill a prescription, but would also ensure that pharmacies will fill all prescriptions, even if a different pharmacist has to do it.”<sup>74</sup> Sponsors of the bill emphasize the health benefits of contraceptives.<sup>75</sup>

State legislatures have taken a variety of approaches to pharmacist refusals. Four states have statutes that include refusal clauses.<sup>76</sup> In 2004, almost forty bills were introduced by legislators from fourteen states that would allow a pharmacist to decline to fill any drug

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67. *Id.*

68. H.R. 1539, 109th Cong. (2005). The Public Health Services Act is a comprehensive act addressing a variety of public health issues. 42 U.S.C. §§ 201-300 (2000). The last action on the amendment was on April 22, 2005, when it was referred to the House Subcommittee on Health. THOMAS, Bill Summary & Status: S. 809, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01539>; (last visited Jan. 25, 2006).

69. H.R. 1539.

70. *Id.*

71. *Id.*

72. Press Release, Congresswoman Carolyn B. Maloney, Lawmakers Introduce Legislation to Ensure Pharmacies Fill *All* Dr. Prescriptions (Apr. 14, 2005), available at <http://www.house.gov/maloney/press/109th/20050414ALPHA.htm>. U.S. Senator Frank Lautenberg and U.S. Representatives Carolyn Maloney and Debbie Wasserman-Schultz sponsored the legislation. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* According to Lautenberg, “[a] pharmacist’s personal beliefs should not come between a patient and their [sic] doctor.” *Id.* Maloney stated, “[a]ccess to birth control is a women’s health [sic] issue and a private matter, not to be tampered with by a pharmacist with an agenda.” *Id.* Wasserman-Schultz pointed out that the refusals target women. *Id.* The House referred the bill to the Health Subcommittee, and the Senate referred the bill to the Committee on Health, Education, Labor, and Pensions. THOMAS, Bill Summary & Status: H.R. 1652, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01652>; (last visited Jan. 25, 2006); THOMAS, Bill Summary & Status: S. 809, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00809>; (last visited Jan. 25, 2006).

76. LAWS AND BILLS, *supra* note 66. The states include Arkansas, Georgia, Mississippi, and South Dakota. *Id.*

prescription based on “personal or moral convictions.”<sup>77</sup> In 2005, fourteen states introduced bills permitting pharmacists to decline to fill prescriptions because of personal beliefs.<sup>78</sup> Alternatively, in six states, legislators introduced bills during their 2005 session compelling pharmacists to dispense medication for all valid prescriptions,<sup>79</sup> and four states already require pharmacists to ensure that valid prescriptions are filled.<sup>80</sup>

### E. *Positions of Relevant Organizations*

In a recent poll, eighty percent of Americans said that they believe pharmacists who personally oppose birth control for religious reasons should not refuse to sell contraceptives.<sup>81</sup> While governments will decide whether to impose statutory refusal clauses, many additional actors play a role in a patient’s actual access to medications. These actors include prescribing physicians, the retailers that sell the medications, and the pharmacists themselves.<sup>82</sup>

The American Pharmacists Association (APhA) is a professional organization of pharmacists with over 50,000 members.<sup>83</sup> It is America’s oldest pharmacist professional association.<sup>84</sup> The APhA maintains that a pharmacist can decline to fill prescriptions only if he ensures customers can still obtain their medication from another source.<sup>85</sup>

Pharmacists for Life International (PLI) is a pro-life pharmacy group.<sup>86</sup> PLI believes that pharmacists should not fill contraceptive prescriptions and should “refuse to refer customers elsewhere.”<sup>87</sup> It

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77. Baldas, *supra* note 39. For example, in Wisconsin, a bill that protected medical workers from being forced to participate in certain procedures that are against their convictions passed the legislature, but it was vetoed by Governor Jim Doyle. Ben Jones, *Doyle Vetoes “Conscience Clause,”* POST-CRESCENT, Apr. 22, 2004, at 1A.

78. LAWS AND BILLS, *supra* note 66. Those fourteen states include Arizona, Arkansas, California, Georgia, Indiana, Maryland, Michigan, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. *Id.*

79. LAWS AND BILLS, *supra* note 66. Those states include California, Missouri, Nevada, New Jersey, West Virginia, and Wisconsin. *Id.*

80. *Id.* Those states include California, Illinois, Massachusetts, and North Carolina. *Id.*

81. *CBS News*, *supra* note 57.

82. The American Bar Association (ABA) has also taken a position against legislation that permits pharmacists to outright refuse to fill prescriptions. Molly McDonough, *Rx for Controversy: Battle over Dispensing Emergency Contraceptives Creates Competing Legislation*, 4 ABA J. EREPORT 23 (2005). It supports referrals to other pharmacies if a pharmacist refuses to fill a prescription. *Id.*

83. American Pharmacists Association, About APhA, [http://www.aphanet.org/AM/Template.cfm?Section=About\\_APhA](http://www.aphanet.org/AM/Template.cfm?Section=About_APhA) (last visited Jan. 25, 2006).

84. *Id.*

85. *In Search of Plan C*, ECONOMIST, Apr. 7, 2005, available at [http://economist.com/cities/printerfriendly.cfm?Story\\_ID=3844353](http://economist.com/cities/printerfriendly.cfm?Story_ID=3844353).

86. Pharmacists for Life International, Welcome to Pharmacists for Life International!, <http://www.pfli.org/main.php?pfli=aboutus> (last visited Jan. 25, 2006) [hereinafter PLI Welcome].

87. *In Search of Plan C*, *supra* note 85; see Pharmacists for Life International, Pharmacist’s Model Conscience Clause, [www.pfli.org/main.php?pfli=modelpharmacistcc](http://www.pfli.org/main.php?pfli=modelpharmacistcc) (last visited Jan. 25,

has created its own Model Conscience Clause, which does not provide for referrals of refused prescriptions.<sup>88</sup> The model clause allows for objections based on “personal, ethical, moral or religious grounds.”<sup>89</sup>

Physician associations have also taken positions on pharmacist refusals. The American Medical Women’s Association (AMWA) supports initiatives that increase the use and availability of emergency contraception for preventing unintended pregnancy.<sup>90</sup> It asserts that anyone with a valid prescription should have access to contraception.<sup>91</sup> The American Medical Association (AMA) also advocates timely access to valid prescriptions for patients.<sup>92</sup> In a resolution adopted on May 11, 2005, the AMA announced its concern for patient health and the importance of the physician-patient relationship, stating that legislation should require “individual pharmacists or pharmacy chains to fill legally written prescriptions or to provide immediate alternative access without interference.”<sup>93</sup> The association has committed to engage in collaborative efforts to support legislation that will “protect a patient’s right to obtain legally prescribed, medically indicated therapy.”<sup>94</sup> At its annual meeting, the AMA House of Delegates supported the filling of prescriptions by physicians in limited circumstances.<sup>95</sup> Physician disbursements of medication would be allowed if a pharmacist who is able and willing to fill the prescription cannot be located within thirty miles.<sup>96</sup>

In addition, the policies of major drug stores influence access to contraceptives. For example, Walgreen’s allows a pharmacist to refuse to fill a prescription only if the pharmacist can locate someone

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2006) [hereinafter PLI Model Conscience Clause]. Its “mission is to make pharmacy once again a *life-saving* profession.” PLI Welcome, *supra* note 86.

88. PLI Model Conscience Clause, *supra* note 87. The Pharmacists for Life International board of directors adopted the clause in 1988. *Id.*

89. *Id.*

90. American Medical Women’s Association, AMWA’s Position Statement on Emergency Contraception, <http://www.amwa-doc.org/index.cfm?objectid=0EF88909-D567-0B25-531927EE4CC23EFB> (last visited Jan. 25, 2006) [hereinafter AMWA Position Statement]. The AMWA is a medical organization founded in 1915. *Id.* It has 10,000 women physicians as members. *Id.*

91. American Medical Women’s Association, AMWA Addresses Member Concerns at the National Level, <http://www.amwa-doc.org/index.cfm?objectid=105B7033-D567-0B25-5DE227F37F2946F6> (last visited Jan. 25, 2006).

92. Am. Med. Ass’n, House of Delegates Resolution 9 (A-05) (2005).

93. *Id.* The AMA believes that refusals “may jeopardize a patient’s health, may compromise the patient-physician relationship, and could be construed as a form of discrimination . . .” *Id.* Some of the proposed state legislation may “interfere with patient ability to implement physician treatment plans and create barriers to care, patient abandonment and potential discrimination issues.” Am. Med. Ass’n, House of Delegates Resolution 6 (A-05) (2005).

94. Am. Med. Ass’n, House of Delegates Resolution 6 (A-05).

95. See Jennifer Silverman, *AMA Delegates Approve Policies on Fair Prescribing*, FAM. PRAC. NEWS, July 15, 2005, at 64.

96. *Id.*

who is willing.<sup>97</sup> CVS contends that its official policy is to fill all prescriptions.<sup>98</sup> The chain, however, will make accommodations for a “sincerely held religious conviction.”<sup>99</sup> Wal-Mart has made the “business decision” to not stock the morning after pill, but it does refer customers to other pharmacies.<sup>100</sup>

### III. ANALYSIS

#### A. Arguments Opposing the Clauses

##### 1. Refusals to Fill Contraceptive Prescriptions Conflict with the Right to Privacy

The United States Supreme Court has held that the right to contraception falls under the right to privacy.<sup>101</sup> A pharmacist violates a woman’s constitutional right to privacy when he refuses to fill a contraceptive prescription. This right to privacy is essential to personhood in the United States. As stated by the Supreme Court in *Union Pacific Railway Co. v. Botsford*,<sup>102</sup> “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>103</sup>

The Supreme Court first acknowledged the right to privacy as a fundamental right for married couples in *Griswold v. Connecticut*.<sup>104</sup> In *Griswold*, Planned Parenthood employees provided information and prescribed contraceptives to married couples.<sup>105</sup> The State prosecuted the employees under a Connecticut statute that restricted the use of and the dissemination of information about contraceptives.<sup>106</sup> The Supreme Court reversed their conviction and stated that the “law . . . operate[d] directly on an intimate relation of husband and wife

97. Barbara Jones, *Pharmacists Eye Fate of “Conscience Clause,”* INDEP. TRIB., May 26, 2005, available at [http://www.independenttribune.com/servlet/Satellite?pagename=CIT/MGArticle/CIT\\_BasicArticle&c=MGArticle&cid=1031782935033](http://www.independenttribune.com/servlet/Satellite?pagename=CIT/MGArticle/CIT_BasicArticle&c=MGArticle&cid=1031782935033).

98. *Id.* CVS advertises itself as “America’s largest retail pharmacy.” Press Release, CVS, CVS/Pharmacy Encourages Customers to “Know Your Medicine, Know Your Pharmacist” (Sept. 30, 2005), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=183405&p=iro-newsArticle&ID=764060&highlight=>.

99. Jones, *supra* note 97.

100. Marilyn Gardner, *Pharmacists’ Moral Beliefs vs. Women’s Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, available at <http://www.csmonitor.com/2004/0426/p11s01-usju.htm>; AMWA Position Statement, *supra* note 90.

101. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). Similar rights recognized under the right to privacy include the rights of marriage, procreation, and childrearing. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 536, 541 (1942) (procreation); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (childrearing).

102. 141 U.S. 250 (1891).

103. *Id.* at 251.

104. 381 U.S. 479 (1965).

105. *Id.* at 480.

106. *Id.*

and their physician's role in one aspect of that relation."<sup>107</sup> The Court determined that this right to privacy existed as a penumbra under the First, Fourth, and Fifth Amendments.<sup>108</sup> The Court considered the various constitutional amendments that protect a person's right to privacy and concluded that *Griswold* "concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."<sup>109</sup>

In *Eisenstadt v. Baird*,<sup>110</sup> the Supreme Court considered a Massachusetts law that, in part, prohibited single persons from obtaining contraceptives.<sup>111</sup> The Court held that the statute "violate[d] the rights of single persons under the Equal Protection Clause . . . ."<sup>112</sup> *Griswold* had already recognized a right to contraception encompassed in the right to privacy for married persons, and the Court determined that there was no basis to treat married and unmarried individuals differently.<sup>113</sup> As the Court stated, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>114</sup>

When a pharmacist refuses to fill a contraceptive prescription, he denies the customer her right to decide whether to use contraception. This right was established by the Supreme Court's holdings in *Griswold* and *Eisenstadt*. When legislatures enact statutes that condone pharmacist refusals, they interfere with a patient's "decision . . . to bear . . . a child."<sup>115</sup> In doing so, the legislatures violate an individual's right to privacy that the Supreme Court has found imbedded in the Constitution.

The right to privacy not only encompasses the right to contraception but also includes the right to make other medical decisions.<sup>116</sup> "Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health."<sup>117</sup> When an individual arrives at a pharmacy with a prescription, she has already consulted with a physician and made the

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107. *Id.* at 482, 486.

108. *Id.* at 484. "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. In a concurring opinion, Justice Arthur Goldberg stated that the Ninth Amendment guaranteed certain essential rights that were not enumerated in the other amendments. *Id.* at 488-89 (Goldberg, J., concurring).

109. *Id.* at 485 (majority opinion).

110. 405 U.S. 438 (1972).

111. *Id.* at 442.

112. *Id.* at 443.

113. *Id.* at 454-56.

114. *Id.* at 453.

115. *Id.*

116. *See, e.g.,* *Armstrong v. Montana*, 989 P.2d 364 (Mont. 1999).

117. *Id.* at 378.

decision to proceed with a certain medication. Refusing to fill the prescription and to assist a patient in following through with her legal medical decisions is another violation of the right to privacy. If legislatures endorse such refusals, then they will also be effectively endorsing the diminution of a woman's constitutional right to privacy.

## 2. Equal Protection Analysis and Violations of Due Process

Legislation that permits pharmacists' refusals to fill prescriptions sanctions the unequal treatment of men and women. Because there is currently no prescribed male contraceptive, pharmacists are most often refusing medications only prescribed for women.<sup>118</sup> Therefore, male customers are not usually directly affected by the current trends in pharmacist refusals.

When the government treats two similarly-situated groups differently based on gender, courts use a middle-tier analysis to determine whether the disparate treatment is permissible.<sup>119</sup> Any government regulation of the pharmacists' refusals must be substantially related to an important government objective to justify unequal treatment based on gender.<sup>120</sup> Denying women legally valid prescriptions does not achieve an important government objective. Even though conscience clauses may be facially gender-neutral, they are unconstitutionally discriminatory as applied because their primary design is to prevent the filling of women's prescriptions.<sup>121</sup> Legislation that sanctions such unequal treatment violates the Equal Protection Clause.

Even though no prescribed male contraceptive has been developed, male-specific drugs related to sexual reproduction exist.<sup>122</sup> Specifically, a variety of drugs combat male impotency.<sup>123</sup> There are no known reports of pharmacists refusing to fill men's prescriptions for these drugs.<sup>124</sup> Proponents of refusal clauses may argue that impotency-fighting drugs facilitate reproduction, while contraceptives prevent reproduction. Filling male-oriented prescriptions and refusing female-oriented ones, however, allows pharmacists to assist men in controlling their right to procreate and to deny women their right to control the same process. This unequal treatment of the freedom to

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118. In at least one instance, a man who attempted to fill a prescription on behalf of a woman was refused. *See, e.g., All Things Considered, supra* note 2. There is some research on male oral contraception, but the drugs will not be ready for clinical trials for at least five years. *See* Alan Bavley, *Nonhormonal Contraceptive for Men Sought: KU Research Team Hopes to Give Birth to Male Pill*, K.C. STAR, June 20, 2005.

119. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

120. *See id.*

121. Conscience clauses are facially neutral because they do not expressly treat women differently than men.

122. *See, e.g.,* Viagra, <http://www.viagra.com> (last visited Jan. 25, 2006).

123. *Id.*

124. *See, e.g.,* Cindy Richards, Editorial, *Pharmacists Mix Business with Pressure*, CHI. SUN TIMES, Apr. 6, 2005, at 65.

procreate cannot be sanctioned by legislation without violating equal protection principles.

A pharmacist's refusal to discuss contraceptive options may also interfere with a person's due process right to liberty under the Fourteenth Amendment.<sup>125</sup> Imbedded in the concept of liberty is personal choice.<sup>126</sup> When a pharmacist refuses to provide a woman her chosen contraceptives, he interferes with her liberty interests.<sup>127</sup> Additionally, intruding into one's health decisions may be considered an infringement on "life."<sup>128</sup> If the government sanctions refusals to fill prescriptions, then it deprives a woman of "life" decisions without the due process that the Fourteenth Amendment demands.

### 3. The Establishment Clause

It is often assumed that the First Amendment broadly guarantees religious freedom; however, the Amendment actually only guarantees the freedom from any law regarding an establishment of religion or the free exercise of religion.<sup>129</sup> The Establishment Clause of the First Amendment incorporates the concept that the government cannot enact laws that aid or prefer one religion over another.<sup>130</sup> A legislature's endorsement of pharmacists' refusals to fill prescriptions on moral or religious grounds violates the Establishment Clause, as not all religions oppose contraceptive use.<sup>131</sup> Legislation that supports a pharmacist's belief against providing contraceptives elevates that

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125. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Fourteenth Amendment to the U.S. Constitution provides the following:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

126. Renée C. Wyser-Pratte, Comment, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception*, 79 OR. L. REV. 1121, 1150 (2000).

127. In one case, a court recognized the possibility of a lawsuit against a Catholic hospital that did not provide information about emergency contraception to a woman who had been raped. *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240, 244 (Ct. App. 1989). The court stated that a woman's "right to control her treatment must prevail over [a hospital's] moral and religious convictions." *Id.* It further stated that "[m]eaningful exercise of this right is possible only to the extent that patients are provided with adequate information upon which to base an intelligent decision." *Id.* at 245.

128. See Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILLIAMS U. L. REV. 9, 23-24 (2003).

129. The First Amendment provides the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

130. See *id.*

131. Conscience clauses already exist for certain medical professionals to opt out of abortions and other procedures. See, e.g., Kramlich, *supra* note 14, at 802-03; DANGEROUS, *supra* note 21. Proponents argue that these clauses are valid, as they are often linked to Congress's spending power and reflect Congress's preference for childbirth. Steven Ertelt, *Pro-Life Law*

conviction above a patient's belief that contraceptives are acceptable. Endorsing refusals by pharmacists without requiring the transfer or return of prescriptions, legislatures essentially sanction infringements on patients' beliefs.

Proponents of the refusal clauses claim that birth control and emergency contraceptives are abortifacients and violate their Christian beliefs.<sup>132</sup> Statistics show, however, that many pharmacists do not understand how emergency contraceptives work.<sup>133</sup> The definition of pregnancy from the American College of Obstetricians and Gynecologists provides that pregnancy does not begin with the fertilization of the egg.<sup>134</sup> Instead, it begins with the implantation of a fertilized egg into the uterine lining.<sup>135</sup> Because oral and emergency contraceptives do not prevent implantation, they do not disrupt an established pregnancy and cause an abortion.

The Constitution protects "the right to believe as one wishes and to practice that belief according to the dictates of conscience, *without violating the personal rights of others . . .*"<sup>136</sup> Opponents of conscience clauses assert that pharmacists may believe whatever they choose but have no right to impose those viewpoints on others.<sup>137</sup> Opponents also argue that pharmacists should not express personal convictions to the patient or lecture unsuspecting customers who have already discussed their options with a physician.<sup>138</sup> Allowing a pharmacist to proselytize violates a patient's right to be free from another's religious convictions. If a pharmacist does not fill a prescription that is consistent with a patient's viewpoint, then he infringes upon her beliefs that the medicines are religiously and morally acceptable.

#### 4. Standard of Care for Pharmacists

Courts have considered pharmacists' duty to customers in several cases and have determined that pharmacists owe a duty of care to

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*Firm's Brief Defends Hospital Abortion Conscience Clause*, LIFE NEWS.COM, Dec. 23, 2004, <http://www.lifenews.com/nat1068.html>.

132. *CBS News*, *supra* note 57; PLI Declaration, *supra* note 60.

133. See *In Search of Plan C*, *supra* note 85; AM. PHARM. ASS'N, *supra* note 39, at 1. To illustrate, a study of South Dakota pharmacists revealed that thirty-seven percent did not understand how emergency contraceptives worked. *In Search of Plan C*, *supra* note 85.

134. Bollinger, *supra* note 37.

135. *Id.* This definition of pregnancy is also accepted by the American Medical Women's Association and the National Institutes of Health. AMWA Position Statement, *supra* note 90. As participants in the medical field, pharmacists should follow the accepted definitions.

136. *Murphy v. Murphy*, 574 N.W.2d 77, 80 (Minn. Ct. App. 1998) (emphasis added) (citing *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963)).

137. See *Pharmacist Denies Woman's Request for Morning-After Pill*, UNION LEADER, Sept. 27, 2004, at C7.

138. *Id.*

their customers.<sup>139</sup> Jurisdictions define this obligation differently.<sup>140</sup> While some courts limit the responsibility, only requiring pharmacists to fill lawful prescriptions properly,<sup>141</sup> others exempt a pharmacist from the duty to warn a patient about side effects of the medication or to monitor prescriptions for abuse.<sup>142</sup> Courts have also found pharmacists not liable for damage caused by prescriptions filled as ordered by a physician.<sup>143</sup> The reported incidents of pharmacist refusals and the proposed conscience clause statutes, however, still violate a general duty to fill prescriptions by not placing patients' needs first.

The American Pharmacists Association instituted a code of ethics for pharmacists.<sup>144</sup> This code specifically states that a pharmacist should respect differences with patients, regardless of whether they are personal or cultural.<sup>145</sup> By expressing his own religious beliefs about a patient's medical decisions, a pharmacist disrespects the patient's different opinion. The code of ethics also explicitly states that "[t]he primary obligation of a pharmacist is to individual patients."<sup>146</sup> When a pharmacist elevates his own religious beliefs above filling a valid prescription, he violates this primary ethical obligation.

Proponents of the refusal clauses argue that pharmacists are already exempt from filling some prescriptions on other grounds.<sup>147</sup> These grounds, including incompatibility with another prescription or known patient allergies,<sup>148</sup> are strictly based on the patient's safety.<sup>149</sup> If a pharmacist fears an adverse drug interaction, he would not simply deny filling the prescription or lecture a customer. Such a denial would only expose the customer to greater medical concerns. Logically, a pharmacist would consult a prescribing physician and inform her of his concerns. When a pharmacist refuses to fill a prescription

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139. See, e.g., *Lasley v. Shrake's Country Club Pharmacy*, 880 P.2d 1129, 1130 (Ariz. Ct. App. 1994).

140. See *Allberry v. Parkmor Drug, Inc.*, 834 N.E.2d 199, 201 (Ind. Ct. App. 2005); *Adkins v. Mong*, 425 N.W.2d 151, 152 (Mich. Ct. App. 1988); *Troppi v. Scarf*, 187 N.W.2d 511, 513 (Mich. Ct. App. 1971).

141. *Adkins*, 425 N.W.2d at 152. In *Troppi v. Scarf*, a pharmacist was held liable for filling a prescription for an oral contraceptive with a tranquilizer. 187 N.W.2d at 512-13. The plaintiffs in *Troppi* had not intended to have more children after seven successful pregnancies and a miscarriage. *Id.* at 512.

142. *Allberry*, 834 N.E.2d at 201. *But see Lasley*, 880 P.2d at 1130 (holding that a pharmacy's duty of care includes a duty to warn of drug risks); *Kintigh v. Abbott Pharmacy*, 503 N.W.2d 657, 661 (Mich. Ct. App. 1993) (affirming that a pharmacist has "no duty to identify an addicted customer and then refuse to sell him a controlled substance").

143. *Madison v. Am. Home Prods. Corp.*, 595 S.E.2d 493, 496 (S.C. 2004). *But see Powers v. Thobani*, 903 So. 2d 275, 276-77 (Fla. Dist. Ct. App. 2005) (allowing a negligence cause of action against a pharmacist for failing "to provide for [a customer's] health, safety and welfare").

144. American Pharmaceutical Association, Code of Ethics for Pharmacists, available at <http://www.aphanet.org/pharmcare/ethics.html> (last visited Jan. 25, 2006).

145. *Id.*

146. *Id.*

147. See, e.g., Carli Richard, *Illinois Emergency Order Modified for Contraceptive Prescriptions*, PHARMACIST.COM, Apr. 11, 2005, [http://www.pharmacist.com/articles/h\\_ts\\_0776.cfm](http://www.pharmacist.com/articles/h_ts_0776.cfm).

148. *Id.*

149. *Id.*

because of his moral beliefs, he does not place the patient's needs first.

## 5. Public Health

When a pharmacist denies filling a contraceptive prescription, he may jeopardize the customer's health. Some pharmacists explain that they are concerned about filling birth control prescriptions because of possible adverse side effects;<sup>150</sup> however, contraceptives offer many health benefits besides preventing pregnancy.<sup>151</sup> As a pharmacist does not have access to medical records and does not know why a physician prescribed a particular medication, the pharmacist may deny a woman necessary medical care by refusing to fill a prescription.<sup>152</sup> The pharmacist may actually exacerbate health problems. For women with certain health conditions, any pregnancy may be unsafe.<sup>153</sup> Unintended pregnancies generally carry greater health risks than intended pregnancies for both the mother and child.<sup>154</sup> If pharmacists continue to refuse to fill prescriptions for contraceptives and to provide an alternative source for the medications, then the number of unintended pregnancies may rise.

Additionally, unplanned pregnancies may result in a greater number of abortions.<sup>155</sup> Unintended pregnancies contribute to over 1.5 million abortions in the United States annually.<sup>156</sup> An increase in the number of women who cannot prevent pregnancy likely will result in a higher number of abortions.<sup>157</sup> This rise in abortions presents another potential health risk, as abortion is a surgical procedure that has more

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150. *CBS News*, *supra* note 57.

151. Allen, *supra* note 63. Contraceptives also treat irregular menstrual cycles and menstrual pain. *Id.* In pill form, contraceptives may reduce a woman's risk for ovarian cancer and help treat endometriosis. Bollinger, *supra* note 37. For rape victims, emergency contraception may add to emotional stability in a time of crisis. Allen, *supra* note 63.

152. NAT'L WOMEN'S LAW CTR., COMBATING PHARMACIST REFUSAL BILLS: MESSAGING 1 (2005), <http://www.nwlc.org/pdf/3-2005CombatingRefusalsMessages.pdf>.

153. DANGEROUS, *supra* note 21. Conditions such as cancer, sickle cell anemia, and heart disease increase the danger of pregnancy. *Id.*

154. See Guttmacher Institute, Get "In the Know": Questions About Pregnancy, Contraception and Abortion, <http://www.guttmacher.org/in-the-know/safety.html> (last visited Jan. 25, 2006) [hereinafter Get "In the Know"]. Deaths related to pregnancy or aggravated by pregnancy totaled 396 in 2000. *Id.* An estimated 3.2 million unintended pregnancies occur in the United States annually. AMWA Position Statement, *supra* note 90. Unintended pregnancies may result in negligent prenatal care. See American Medical Women's Association, AMWA's Position Paper on Reproductive Health, <http://www.amwa-doc.org/index.cfm?objectid=2441A11E-D567-0B25-59A74BA228491FD0> (last visited Jan. 25, 2006). Mental health issues, abuse, and not achieving life goals are all risks for women facing an unintended pregnancy. *Id.* Children of unintended pregnancies face low birth weights, shortened life spans, and an increased risk of abuse or neglect. *Id.*

155. Cynthia Dailard, *Promoting Prevention to Reduce the Need for Abortion: Good Policy, Good Politics*, 8 THE GUTTMACHER REP. ON PUB. POL'Y 1 (2005); Bollinger, *supra* note 37.

156. AMWA Position Statement, *supra* note 90.

157. Dailard, *supra* note 155, at 2.

potential complications than a daily pill regimen.<sup>158</sup> The filling of all legal prescriptions may prevent many of these health risks.

## 6. Confidentiality

In the incident involving pharmacist Neil Noesen,<sup>159</sup> Noesen asked his customer whether she was using her birth control for contraception.<sup>160</sup> If he asked this question while in the presence of other customers, the inquiry presented a problem of confidentiality. To ask customers why they take a particular medication is a violation of the customer's right to privacy and may conflict with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because it may announce to other customers what prescriptions someone takes.<sup>161</sup> HIPAA does not prevent a pharmacist from discussing a prescription with a patient, and the Act recognizes that sometimes communication must take place in a setting where it may be overheard.<sup>162</sup> The Act authorizes such communication when necessary for quick and effective healthcare, but it obligates pharmacists to take reasonable precautions to protect customer privacy.<sup>163</sup> An in-depth inquiry into a person's contraceptive practices and exploring the rationale for the prescription is not likely to meet the requirement of reasonable precautions.<sup>164</sup> Ensuring confidentiality is key to ensuring appropriate health care for patients.

## 7. Potential Expansion to Other Fields

Pharmacists refusing to fill prescriptions are doing so based on personal beliefs. Enacting conscience clauses for pharmacists creates the possibility that other professions may advocate similar clauses. For example, there is support for statutes that would protect a government attorney's right of conscience.<sup>165</sup> At least one lawyer attempted to invoke a conscience clause to avoid continuing legal education re-

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158. In 1999, four legal abortion-related deaths occurred in the United States. Get "In the Know," *supra* note 154.

159. See *supra* Part II.B.

160. Forester, *supra* note 49; *Patients' Interests*, *supra* note 49.

161. A major objective of HIPAA is to protect people's health information. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS., OCR PRIVACY BRIEF: SUMMARY OF THE HIPAA PRIVACY RULE: HIPAA COMPLIANCE ASSISTANCE 1, available at <http://www.hhs.gov/ocr/privacysummary.pdf> (last revised May 2003). It protects information being transmitted in any form, including oral transmission of information. *Id.* at 3.

162. United States Department of Health and Human Services, Health Information Privacy and Civil Rights Questions and Answers: Can Health Care Providers Have Confidential Conversations, Even If They Might Be Overheard?, [http://healthprivacy.answers.hhs.gov/cgi-bin/hipaa.cfg/php/enduser/std\\_adp.php?p\\_faqid=196&p](http://healthprivacy.answers.hhs.gov/cgi-bin/hipaa.cfg/php/enduser/std_adp.php?p_faqid=196&p) (last visited Jan. 25, 2006).

163. *Id.*

164. *Id.*

165. See generally Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311, 312 (2003) (arguing for protection of government attorneys when they decline an assignment based on perceptions that the assignment is illegal or improper).

quirements.<sup>166</sup> Corrections employees have also tried to use conscience clauses to avoid participating in training contrary to their religious beliefs.<sup>167</sup>

Other countries have also addressed similar issues. In Europe, some journalists have sought to use conscience clauses to protest assignments that they consider unethical.<sup>168</sup> In Swansea, Wales, postal workers have an informal conscience clause allowing them to refuse to deliver political leaflets.<sup>169</sup> Some United Kingdom social workers have tried to rely on conscience clauses to oppose adoptions by homosexual couples.<sup>170</sup> However, most people who refuse to comply with a requirement of their employment are charged with insubordination. Therefore, if governments intervene in the case of pharmacists, then they will have to intervene in many other professions to ensure that the rights of consumers are protected.

### B. *Proponents' Response*

Proponents of conscience clauses for pharmacists rely on the First Amendment's Free Exercise clause to justify their position.<sup>171</sup> The Constitution bars government from interfering with the freedom of religion but does not guarantee patients every desired medical procedure. The government cannot burden someone because of his religious beliefs.<sup>172</sup> Although valid government interests can justify regulation of religious practices,<sup>173</sup> the government cannot require an individual to do something contrary to his religion without a compelling government interest.<sup>174</sup> Supporters of the clauses argue that no government interest exists that would justify forcing pharmacists to violate their personal beliefs.

Generally, only laws purposely regulating religious beliefs are unconstitutional.<sup>175</sup> If legislatures enact laws that force pharmacists to fill prescriptions contradicting the pharmacists' religious beliefs, then the legislatures may be viewed as regulating religion. Forcing pharmacists to fill prescriptions that they find objectionable would therefore be a violation of the Free Exercise Clause of the First Amendment.

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166. *In re* Petition of Elliot Rothenberg, 676 N.W.2d 283, 293 (Minn. 2004).

167. *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1204 (8th Cir. 2001).

168. Dominic Ponsford, *Code Review to Consider Conscience Clause*, FIN. TIMES INFO., Feb. 26, 2004.

169. Leon Watson, *Postmen Fail to Use "Conscience" Clause*, SOUTH WALES EVENING POST, June 8, 2004, at 8.

170. See Jonathan Pearce & Roger Smith, *Rebels Without a Clause*, COMMUNITY CARE, June 12, 2003, <http://www.communitycare.co.uk/Articles/2003/06/12/41061/Rebels+without+a+clause.html>.

171. Stephenson, *supra* note 44.

172. *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

173. *Reynolds v. United States*, 98 U.S. 145, 162-67 (1878).

174. *Sherbert*, 374 U.S. at 402-03.

175. *State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990).

### C. *Compromise*

Although opponents of pharmacist exemptions have reasons to support their opposition, both opponents and proponents of the clauses can find constitutional support for their respective views. Opponents are sustained by the constitutional right to privacy, as well as the equal protection, due process, and establishment clauses of the Constitution.<sup>176</sup> Proponents of conscience clauses rely on the Free Exercise clause.<sup>177</sup> To protect the patient's access to medication and a pharmacist's valid religious views, it may be necessary to settle on a compromise. Both the Access to Legal Pharmaceuticals Act and Representative McCarthy's proposed amendment to the Public Health Services Act appear to be adequate compromises because they allow pharmacists to decline to fill prescriptions, while ensuring that the pharmacy has a mechanism in place to meet patients' needs.<sup>178</sup>

Even the proposed federal legislation presents obstacles and should be revised. For instance, waiting for another pharmacist to report to work may not be feasible considering the time-sensitivity of most contraceptives. Additionally, the proposed legislation appears to provide no solution for pharmacies that only employ one pharmacist. A referral to another pharmacy might solve this problem in an urban area but not in a rural area where there is no second pharmacy. The AMA's recommendation that physicians be authorized to fill prescriptions when a pharmacist is not available or willing should be added to any legislation. This approach would allow prescribing physicians to further assist their patients in the absence of pharmacists' approval.

In addition to legislative action, physicians should work with local pharmacists to generate a list of the pharmacies and pharmacists who are willing to meet a patient's prescription needs.<sup>179</sup> This practice would prevent patients from receiving inappropriate lectures. It would also expedite the filling of time-sensitive prescriptions. Combined with legislative action, such a system would help ensure legally prescribed prescriptions are filled without burdening anyone's constitutional rights.

## IV. CONCLUSION

There is concern that conscience clauses for pharmacists will lead to pharmacists refusing to fill prescriptions outside the area of contra-

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176. *See supra* Part III.A.1-3.

177. *See supra* Part III.B.

178. *See supra* Part II.D.

179. In Oregon, healthcare professionals follow this approach for prescriptions used for assisted suicides. Ed Langlois, *Conscience Situation OK—For Now*, CATH. SENTINEL, Sept. 2, 2005.

ception. For example, pharmacists who believe AIDS is a punishment from God may not fill a patient's prescription for AIDS medication. Doctors who think children should only be born to heterosexual, married couples may not provide adequate fertility treatment or may not encourage their patients to explore their options fully.<sup>180</sup>

The current trend of pharmacists refusing to fill prescriptions because of personal beliefs violates a woman's constitutional rights, a pharmacist's duty of care, and a woman's right to confidentiality. Forcing pharmacists to fill prescriptions that conflict with their religious beliefs also violates their constitutional right to free exercise of religion. Allowing individual pharmacists to decline to fill prescriptions while mandating that pharmacies have a policy to ensure that customers' needs are met will help alleviate the concerns of both parties to the conflict. Thus, any legislation that is enacted should balance the needs of both pharmacists and patients.

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180. *See, e.g.,* NAT'L WOMEN'S LAW CTR., ASK! WILL THE MORAL OR RELIGIOUS BELIEFS OF YOUR HEALTH CARE PROVIDERS LIMIT YOUR ACCESS TO HEALTH CARE? (2004).

