

September 2005

Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?

Maryam T. Afif

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

Recommended Citation

Maryam T. Afif, *Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?*, 26 Pace L. Rev. 243 (2005)

DOI: <https://doi.org/10.58948/2331-3528.1155>

Available at: <https://digitalcommons.pace.edu/plr/vol26/iss1/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Comments

Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?

Maryam T. Afif*

I. Introduction

Recently several states have passed legislation that protects a pharmacist from being fired if he or she refuses to dispense prescribed birth control because of a “conscience” objection. While legislation to protect the conscience of healthcare providers has existed since the early 1970s, only recently has it been applied to pharmacists and to birth control. This comment discusses the deficiencies of this legislation from two perspectives: first, the adverse impact on women’s established legal rights that results from this legislation; and second, the loophole the legislation creates for pharmacists to escape their professional and legal obligations.

By the 1960s it seemed as though women had finally won a long fought battle to legally access contraceptives—including the newly introduced birth control pill. In a series of cases the Supreme Court found that women have a fundamental right to privacy with regard to matters of contraception and that this right is protected by the Fourteenth Amendment. Once established, this right was rarely challenged. Recently, however, pharmacists who do not believe in the use of birth

* J.D. Candidate 2006, Pace University School of Law. The author is grateful for the assistance of the members of Pace Law Review, especially the Executive Board. The author also thanks her friends and family who have put up with her for the last three years, most especially Fred Wendte. Professors Bennett Gershman and Bridget Crawford provided a tremendous supply of insight and assistance with this article, for which the author is extremely grateful. Any errors are the author’s own. This article is in loving memory of Carla A. Afif.

control have been refusing to dispense prescriptions for contraceptives and have been seeking refuge from the consequences of their actions through state legislation. In states that accommodate these pharmacists, women may effectively be denied access to birth control and will be left without a legal remedy. Legislation that denies women access to contraceptives presents an impermissible infringement upon their constitutional right to privacy. Accordingly, it should be challenged on substantive due process grounds.

Part II of this comment discusses the history of birth control and the laws relating to birth control and abortion. Part III discusses the current legislation and presents examples of pharmacists who have refused to dispense valid birth control prescriptions. This part also discusses the alleged "connection" between birth control and abortion and how this argument is used to defend conscience legislation. Part IV discusses the traditional legal approaches to handling pharmacists who refuse to dispense or who dispense incorrectly. Part V discusses the arguments for and against legal protection of pharmacists. Finally, Part VI discusses the legal consequences of continuing to protect pharmacists at the expense of women's health and rights and suggests causes of action for future plaintiffs.

II. History of Birth Control and Legal Rights to Access

For centuries, people have devised different methods of preventing pregnancy.¹ In the 1830s, contraceptive devices, such as condoms and abortifacients, started to be advertised in the United States.² This advertising and increased marketing marked the beginning of the contraceptive industry.³ Soon after, a variety of contraceptive devices became commercially available to consumers.⁴ This accessibility did not sit well with everyone. Moral crusaders and religious organizations, who did not believe in the practice of birth control, began collaborating to banish the sale of birth control items.⁵ Probably the most famous of these moral crusaders is Anthony Comstock. In the 1870s Comstock launched a campaign against pornography and immoral behavior.⁶

1. For an excellent study of the history of contraceptives see ANDREA TONE, *DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* (2001).

2. *Id.* at 14.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Comstock also helped found the New York Society for the Suppression of Vice and the Watch and Ward Society of Boston.⁷ Comstock took his campaign against vice to Congress and in 1873 Congress passed the “Comstock Act.”⁸ The Comstock Act banned the distribution, by mail, of obscene books, or other publications of allegedly indecent character, as well as “any article or thing designed or intended for the prevention of conception or producing of abortion.”⁹ With a few exceptions the Act essentially made the birth control business illegal.¹⁰ In response to the federal legislation, several states enacted “mini-Comstock” acts that further criminalized birth control or abortions.¹¹ These acts, however, did little to deter the crusaders and entrepreneurs who fought for women to have access to contraceptives and who sought to make improvements to existing contraceptive methods.

The origin of the birth control pill can be traced to two women who plotted its development.¹² By 1917, Margaret Sanger was already a tireless crusader for the birth control movement when she met Katharine McCormick, a scientist and philanthropist.¹³ The two worked together on issues of female emancipation and universal suffrage off and on throughout the early part of the twentieth century.¹⁴ In 1950, McCormick agreed to fund further birth control research, in part, to

7. *Poe v. Ullman*, 367 U.S. 497, 521 n.10 (1961) (Douglas, J., dissenting).

8. Comstock Act, 18 U.S.C. 334 (1873) (current version at 18 U.S.C. 1461 (2005)). For a discussion see Kathi L. Kern, “*The Cornerstone of a New Civilization*”: *The First International Council of Women and the Campaign for “Social Purity”*, 84 Ky. L.J. 1235, 1247 n.39 (1995-1996) (“The Comstock Act was debated in the U.S. Congress in December of 1872 and passed into law in March, 1873. Theoretically, the legislation was intended to curb the sale and distribution of obscene material; a cause supported by many suffragists and social purity advocates. In actuality, the law was used to prosecute women’s rights leaders who spoke openly of adultery and sexual exploitation. Perhaps the most famous (and notorious) application of Comstock was its use as the legal basis for the repeated arrest and prosecution of birth control advocate Margaret Sanger.”). *Id.*

9. TONE, *supra* note 1, at 22; see also J. E. Leonarz, Annotation, *Validity of Regulations as to Contraceptives or the Dissemination of Birth Control Information*, 96 A.L.R.2d 955 (2001) (describing the federal act and its application in the states).

10. TONE, *supra* note 1, at 23; see also *Tileston v. Ullman*, 26 A.2d 582 (Conn. 1942) (A Connecticut statute prohibited a physician from prescribing contraceptive devices to married women. This was later challenged in *Griswold v. Connecticut*, *infra* note 22).

11. TONE, *supra* note 1, at 23; see also *Poe*, 367 U.S. at 515 (Douglas’s dissent which discusses the history of Comstock-influenced legislation).

12. TONE, *supra* note 1, at 204.

13. *Id.*

14. *Id.* at 205.

address the growing population crisis.¹⁵ Due to Sanger's activism and McCormick's financing, Gregory Pincus received the support needed to research and invent what became the birth control pill ("the pill").¹⁶ In May 1960, the Food and Drug Administration approved the pill for use as a contraceptive, and soon after, the pill was made available to the public.¹⁷

The introduction of the birth control pill was a watershed moment in women's cultural history. The release of the birth control pill has been attributed to the start of the "sexual revolution," and it resulted in sweeping cultural and political changes as well as legal controversy.¹⁸ Within five years of its coming on the market, nearly six million women were taking the pill.¹⁹ In spite of its popularity, the pill was a prohibited contraceptive in states that had, years earlier, enacted Comstock legislation.²⁰ Connecticut, in particular, had some of the most severe statutes controlling access to contraceptives. Connecticut law made it a criminal offense to use drugs or devices designed to prevent conception.²¹ In spite of the harsh penalties, these statutes did not deter the women and men who wanted access to a viable and effective means of birth control. Accordingly, many of the state statutes restricting birth control were challenged. In several landmark cases in the 1960s and 1970s, various plaintiffs went to court claiming these statutes were unconstitutional.²² The result was a series of Supreme Court holdings that established that people have a fundamental right to privacy with regard to issues of contraception.²³

In *Griswold v. Connecticut*,²⁴ the directors of the Planned Parenthood League of Connecticut were convicted of violating a

15. *Id.* at 207.

16. *Id.* at 204.

17. *Id.* at 203; see also *Oral Contraceptive History—Birth Control Pills*, <http://inventors.about.com/library/inventors/blthepill.htm> (last visited Jan. 6, 2006).

18. TONE, *supra* note 1, at 233.

19. *Id.*

20. *Id.*

21. Conn. Gen. Stat. §§ 53-32 (repealed 1971).

22. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977); *Baird v. Lynch*, 390 F. Supp. 740 (W.D. Wis. 1974).

23. See *Griswold*, 381 U.S. at 479; *Eisenstadt*, 405 U.S. at 438.

24. 381 U.S. at 479. The holding of this case was, in many ways, foreshadowed by Justice Douglas' dissent in *Poe*: "I am also clear that this Connecticut law as applied to this married couple deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment." *Poe v. Ullman*, 367 U.S. 497, 515 (1961).

Connecticut statute that made the use and distribution of contraceptives a criminal offense.²⁵ The directors provided information, instruction, and medical advice about contraceptives to their married clients.²⁶ The defendants appealed their conviction on the ground that the statute was an invasion of the constitutional rights of their clients.²⁷ The Supreme Court agreed and reversed the defendants' conviction.²⁸ In reaching its conclusion, the Court described the penumbrae of rights created by the Bill of Rights and found that the relationship of married persons lies "within the zone of privacy created by several fundamental constitutional guarantees."²⁹ The Court noted that while the state could constitutionally regulate the manufacture or sale of contraceptives, it could not forbid their use.³⁰ The Court noted that "[s]uch a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"³¹ *Griswold* established that married couples have a right to be protected from state inquiry into their sexual activities. It also created a right to "privacy" that, while not explicit in the Constitution, became the basis for many critical holdings following this decision: "[w]hile, as recognized in [several cases, including *Griswold*], the Federal Constitution does not explicitly mention any right of privacy, the Supreme Court has declared that *the right of privacy is a fundamental right* guaranteed by the Federal Constitution."³²

The Supreme Court addressed the issue of a single woman's right to

25. *Griswold*, 381 U.S. at 480. The statute stated "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." . . . 'Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.'" *Id.* (quoting Conn. Gen. Stat. §§ 53-32 and 54-196).

26. *Id.* at 480.

27. *Id.* at 479.

28. *Id.*

29. *Id.* at 485.

30. *Id.*

31. *Id.* (internal citation omitted).

32. Ernest H. Schopler, Annotation, *Supreme Court's Views as to the Federal Legal Aspects of the Right to Privacy*, 43 L. Ed. 2d 871, § 2 (2004) (internal citations omitted) (emphasis added).

access contraceptives in *Eisenstadt v. Baird*.³³ In *Eisenstadt*, a man was convicted of giving contraceptive foam to an unmarried woman.³⁴ The Massachusetts law in controversy prohibited single women from accessing contraceptives for the purpose of preventing pregnancy.³⁵ The Court held that "the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment."³⁶ The Court went on to say that "[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."³⁷ *Eisenstadt* also noted that while the statute in question failed the reasonable basis test the appropriate test for cases involving fundamental rights would be strict scrutiny.³⁸

In *Baird v. Lynch*³⁹ a single woman was not allowed to purchase contraceptives at a local drug store.⁴⁰ She brought suit to question the constitutionality of a Wisconsin statute which imposed a fine or imprisonment on anyone who made contraceptives available for use in connection with premarital sexual intercourse.⁴¹ The court found the statute violated the fundamental interest of unmarried women to prevent pregnancy and held it was unconstitutional. The court summarized the previous cases dealing with this issue and stated that "[t]he right of privacy includes activities relating to marriage, procreation, contraception, abortion, and possession of obscene materials."⁴²

In 1977, the Supreme Court decided *Carey v. Population Services*,

33. 405 U.S. 438 (1972).

34. *Id.*

35. *Id.* at 440.

36. *Id.* at 443.

37. *Id.* at 453 (emphasis in the original).

38. *Id.* at 447 n.7

[I]f we were to conclude that the . . . statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. . . we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

Id. (internal citations omitted).

39. 390 F. Supp. 740 (W.D. Wis. 1974).

40. *Id.*

41. *Id.*

42. *Id.* at 751 (internal citations omitted).

International.⁴³ In *Carey*, the Court held that a New York statute prohibiting distribution of certain contraceptives and prohibiting the advertisement and display of contraceptives violated the defendant's right of privacy, which was protected under the Due Process Clause of the Fourteenth Amendment.⁴⁴ The Court declared the statute invalid as an unconstitutional suppression of expression protected by the First Amendment.⁴⁵ In reaching its decision, the Court relied on *Griswold* and its progeny, and stated that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."⁴⁶ The Court later used this reasoning to lift a ban by the United States Post Office preventing advertising of contraceptives through the mail. "[A]dvertising for contraceptives not only implicates 'substantial individual and societal interests' in the free flow of commercial information, but also relates to activity which is protected from unwarranted state interference."⁴⁷

By the early 1970s it seemed clear that the right of an individual to use and access contraceptives was a fundamental, constitutionally protected right.⁴⁸ The Court's reasoning in cases such as *Griswold* and *Eisenstadt* became the cornerstone of the plaintiffs' argument in *Roe v. Wade*,⁴⁹ arguably one of the most controversial cases decided in the later half of the twentieth century.⁵⁰ At issue in *Roe* was a state statute which prohibited abortions.⁵¹ The Court held that the right to have an abortion was protected under the umbrella of privacy and autonomy, although it

43. 431 U.S. 678 (1977).

44. *Id.*; U.S. Const. amend. XIV, § 1

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.

45. *Id.*

46. *Id.* at 687.

47. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (internal citations omitted). In later cases, however, plaintiffs would be unsuccessful in trying to expand the rights granted in *Carey* to other matters, such as marriage. See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981).

48. *Baird v. Lynch*, 390 F. Supp. 740, 751 (W.D. Wis. 1974).

49. 410 U.S. 113 (1973).

50. As of this writing there have been more than 7000 law review articles discussing *Roe v. Wade* and the issue of whether or not the case should be overturned is debated almost daily in the media.

51. *Roe*, 410 U.S. at 113.

recognized the state's power to regulate abortion.⁵² The Court concluded "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."⁵³ This holding helped establish the test for government restrictions on fundamental rights:

As a general proposition, the court, [in *Roe*], stated that some state regulation in areas protected by the right to privacy is appropriate; and that where "fundamental rights," such as the right of privacy, are involved, any state regulation limiting these rights may be justified only by a "compelling state interest," and legislative enactments regulating such rights must be narrowly drawn so as to express only the legitimate state interests at stake.⁵⁴

In 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁵ partially overruled *Roe*. In *Casey*, a divided Court overturned some aspects of *Roe*, including the notion that abortion is a fundamental right.⁵⁶ The essential holding of *Roe* was, however, upheld: a woman has the right to choose to have an abortion without state interference.⁵⁷ The Court continued, however, to acknowledge the states' right to regulate abortion and to protect their citizens' rights to object to procedures that offend their conscience.⁵⁸ In the current political climate, some states seem to be testing just how far they can take their powers of regulation and conscience protection.⁵⁹

Although the abortion issue continues to be hotly debated in political and religious arenas, it is, at least for now, legally settled that a state cannot interfere with a woman's right to privacy over matters of contraception. In the past 40 years, oral contraceptives have become part

52. *Id.*

53. *Id.* at 154.

54. Schopler, *supra* note 32 (internal citations omitted).

55. 505 U.S. 833 (1992).

56. *Id.* This is a simplification of a very complicated case. For a more comprehensive discussion of the history of abortion cases and the impact of *Casey* see David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833 (1999).

57. *Id.*

58. *Id.* "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." *Id.* at 966 (Rehnquist, C.J., concurring in part and dissenting in part).

59. See Lisa Chamberlain, *Marching for Their Lives*, SALON.COM, Apr. 21, 2004 http://archive.salon.com/news/feature/2004/04/21/womens_lives (discussing proposed legislation in 14 states to ban abortion outright).

of the cultural mainstream. The pill is nationally advertised and discussed with regularity on television and in books, magazines and, in many districts, in school health classes. Oral contraceptives are the most frequently prescribed contraceptive in America and have become a permanent fixture in our society.⁶⁰ Even the federal government has recognized the place the pill has in society. For example, in 1997, Senators Olympia Snowe and Harry Reid proposed the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC) which requires coverage for contraceptives by nationwide, private, employment-related insurance plans.⁶¹ In 1998, Congress agreed to provide contraceptive coverage to the 2,000,000 women who participate in the Federal Employees Health Benefits Program (the largest employer-sponsored health insurance plan in the world).⁶² Congress also found that contraceptive services are part of basic health care, allowing families to both adequately space desired pregnancies and avoid unintended pregnancy.⁶³ In the wake of the EPICC findings, an increasing number of states have passed legislation requiring insurance carriers to provide prescription contraceptive coverage for their plans that cover prescription medicine.⁶⁴

60. Lisa A. Hayden, *Gender Discrimination within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 177 (1998-1999). "The five most commonly used FDA approved contraceptive methods include contraceptive pills, intrauterine devices (IUD's), Depo-Provera shots, Norplant inserts and diaphragms." *Id.*

61. Equity in Prescription Insurance and Contraceptive Coverage Act of 2001, S. 104, 107th Cong. (2001) [hereinafter EPICC Bill] (further noting the finding of the U.S. Equal Employment Opportunity Commission (EEOC) that an employer's failure to include insurance coverage for prescription contraceptives in an employee health benefits plan, when it covers other prescription drugs and devices, constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964); *See also* Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Vol. 1, No. 4, Aug. 1998, available at <http://www.guttmacher.org/pubs/tgr/01/4/gr010405.html>.

62. EPICC Bill, *supra* note 61.

63. *Id.* Congress further found that by reducing rates of unintended pregnancy, contraceptives help reduce the need for abortion. Unintended pregnancies lead to higher rates of infant mortality, low-birth weight, and maternal morbidity, and threaten the economic viability of families. The National Commission to Prevent Infant Mortality determined that "infant mortality could be reduced by 10 percent if all women not desiring pregnancy used contraception." *Id.*

64. Breena M. Roos, Note, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives*, 82 B.U. L. REV. 1289, 1298 (2002). In California, the Women's Contraception Equity Act (WCEA) requires employers who offer prescription drugs to also cover prescription contraceptives. In *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004), the Act withstood a constitutional challenge from a religious employer with the court finding the statute met

In April 2005, Senators Frank Lautenberg, Barbara Boxer, and Jon Corzine introduced a bill entitled the "Access to Legal Pharmaceuticals Act."⁶⁵ The bill is intended "to establish certain duties for pharmacies when pharmacists employed by the pharmacies refuse to fill valid prescriptions for drugs or devices on the basis of personal beliefs, and for other purposes."⁶⁶ It includes three critical findings:

- (1) An individual's right to religious belief and worship is a protected, fundamental right in the United States.
- (2) An individual's right to access legal contraception is a protected, fundamental right in the United States.
- (3) An individual's right to religious belief and worship cannot impede an individual's access to legal prescriptions, including contraception.⁶⁷

The bill would require that, in the event that a pharmacist refuses to dispense oral contraceptives on the basis of a moral objection, the pharmacy where he or she works must ensure that another pharmacist fill the prescription.⁶⁸ The bill would also impose civil penalties of up to \$5000 a day for every pharmacy who violates the Act and would allow aggrieved individuals to bring civil suits against pharmacies and receive both punitive and actual damages.⁶⁹ In his presentation of the bill to Congress, Mr. Lautenberg noted "[the bill] ensures timely access to contraception and is crucial to protecting a woman's health and autonomy, and to keeping pharmacists and politicians out of personal, private matters."⁷⁰ Mr. Lautenberg further noted that "nobody has a right to come between any person and their doctor. Not the government . . . not an insurance company . . . and not a pharmacist."⁷¹

Prescription contraceptives are now commonplace in society. The pill is used by millions of women and is recognized by the government as an important facet of women's comprehensive healthcare.

both the rational basis and strict scrutiny tests. *Id.*

65. S. 809, 109th Cong. (2005) [hereinafter Legal Pharmaceuticals Act] (the bill was referred to the Senate Committee on Health, Education, Labor, and Pensions on Apr. 14, 2005).

66. Legal Pharmaceuticals Act, *supra* note 65.

67. *Id.*

68. *Id.*

69. *Id.*

70. 151 CONG. REC. S3655, 3685 (daily ed. Apr. 14, 2005) (statement of Sen. Lautenberg).

71. *Id.*

III. Women's Ability to Access Birth Control Is in Danger

In the years following *Roe* and *Casey*, some states have sought to take advantage of the Supreme Court's holding that states may regulate abortion so long as they ostensibly ensure women have access to abortion services.⁷² Abortion regulations enacted by the states range from denying indigent women insurance coverage for abortions (through Medicaid or other forms of state aid) to requiring patient counseling prior to obtaining an abortion.⁷³ For many people, whether or not a woman should have an abortion is a black and white issue. Politicians in most states face the unenviable task of trying to accommodate the concerns of their constituents who typically feel very strongly for or against the right of access to abortion services. While abortion rights remain a hotly contested legal and political issue, contraceptive rights seem positively innocuous. While there are people whose religion forbids the use of contraceptives, until recently, the issue rarely became a political or legal controversy. People who choose not to use contraceptives simply do not buy them. While certain forms of birth control are subject to federal regulation for health and safety reasons, it appeared that states no longer had the authority or desire to prohibit access to contraceptives. However, recent legislation in South Dakota and other states casts doubt on this assertion.⁷⁴

Recent events have propelled contraceptives back into the news and a seemingly well settled issue is again in controversy.⁷⁵ To understand these events, one first needs to examine how the birth control pill works and the controversy regarding when life actually begins.⁷⁶ Birth control

72. See generally Gary Knapp, Annotation, *Supreme Court's Views as to Validity, Under Federal Constitution, of Abortion Laws*, 111 L. Ed. 2d 879 (2004) (a comprehensive review of various approaches states have taken to legislate abortions).

73. *Id.*; see also Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. & POL'Y 345 (2003) ("restrictions [on abortions] include parental consent requirements, federal restrictions on the use of public funding to finance abortions, and conscience clauses to protect doctors, medical personnel, and medical entities from any liability for refusing to perform abortions."); 1 AM. JUR. 2D *Abortion and Birth Control* § 32 (2004) (discussing instances where the Supreme Court has upheld statutes which limit government funding for abortions).

74. See, e.g., South Dakota Statute *infra* note 103.

75. See news stories *infra* notes 87-94.

76. For background on how the FDA defines pregnancy for the purposes of approving contraceptives see Lisa Kaeser, *What Methods Should Be Included in a Contraceptive Coverage Insurance Mandate?*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Vol. 1, No. 5, Oct. 1998 available at <http://www.guttmacher.org/pubs/tgr/01/5/>

pills are made from synthetic hormones that prevent ovulation.⁷⁷ In some cases, however, a woman will release an egg and it may be fertilized, although the pill prevents the egg from being implanted in the woman's uterus.⁷⁸ The American College of Obstetricians and Gynecologists does not consider a non-implanted egg a pregnancy.⁷⁹ As one doctor notes, "from a medical point of view, pregnancy doesn't take place until that fertilized egg is implanted in the uterine lining."⁸⁰ Some religious organizations, such as the Roman Catholic Church, believe that life and conception occur at fertilization.⁸¹ This belief, coupled with a misunderstanding of how the pill works, has resulted in a perception that oral contraceptives can terminate a pregnancy and are, therefore, an abortion agent.⁸² While a percentage of Catholic providers historically have objected to birth control on religious grounds,⁸³ the comparison of chemical birth control to abortion has increased the number of providers who object to the pill.⁸⁴ Physicians who believe pregnancy starts with

gr010501.html.

77. TONE, *supra* note 1, at 237.

78. Jill McGivering, *Pill Propelled Into Abortion Debate*, <http://news.bbc.co.uk/2/hi/americas/3652462.stm> (last visited Jan. 6, 2006); see also *World News Tonight: A Closer Look the "Conscience" Laws* (ABC television broadcast, Apr. 6, 2004) [hereinafter *World News Tonight*]; *Contraception: Pharmacist's Refusal to Fill Emergency Contraception Script Raises Questions*, DRUG WEEK, Mar. 19, 2004, available at <http://www.NewsRx.com> [hereinafter DRUG WEEK].

79. Claire Hughes, *Abortion Debate Enters New Territory; Albany Focus Now on Women's Access to Emergency Contraception*, THE TIMES UNION (Albany, NY), Jan. 22, 2003, at A1.

80. *Id.*

81. See The Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html (last visited Jan. 7, 2006); 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 (2002-2003).

82. McGivering, *supra* note 78; see also *World News Tonight*, *supra* note 78; DRUG WEEK, *supra* note 78; Kimberlee Roth, *Pharmacists, Doctors Refuse to Dispense Pill on Moral Grounds*, CHICAGO TRIBUNE, Nov. 17, 2004, at C1; Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKLEY J. GENDER L. & JUST. 229, 235 (2005).

83. For background on Catholic hospitals and health care providers, see Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429 (1995); Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135 (2003).

84. Jeff McDonald, *More Health Professionals Balk at Giving Birth Control; Refusal to Prescribe, Dispense Increases; Moral Grounds Cited*, THE SAN DIEGO UNION-

fertilization are refusing to prescribe birth control for their patients on moral grounds, stating that participating in the distribution of the pill is tantamount to participating in an abortion.⁸⁵ This trend seems to be increasing and other providers, including pharmacists, are also refusing to dispense the pill based on this view.⁸⁶

In March 2004, Julee Lacey, a married woman with two children, went to her local CVS pharmacy in Texas to pick up a refill of her birth control pills.⁸⁷ The pharmacist told Lacey that she did not believe in birth control and refused to fill the prescription.⁸⁸ Lacey was forced to go to another pharmacy to fill her prescription.⁸⁹ A few months earlier, at another Texas pharmacy, a pharmacist and two co-workers refused to fill a prescription for emergency contraception (essentially a high dose of the same hormones that are in the birth control pill) for a rape victim.⁹⁰ In 2002, Neil Noesen, a pharmacist in Wisconsin, refused to refill a birth control prescription for Amanda Phiede, a college student.⁹¹ Noesen not only refused to fill Phiede's prescription, but he also refused to transfer the prescription to another pharmacy.⁹² Noesen claimed it would have been a sin to participate in filling the prescription.⁹³ These are not isolated incidents. Across the country, there are dozens of cases of women who are forced to overcome hurdles to get their birth control prescriptions filled.⁹⁴ These occurrences have ignited a firestorm of

TRIBUNE, Aug. 8, 2004, at A1. The dioceses of New York take the position that life begins at conception but do not equate emergency contraception with an abortion, especially in cases of rape. Hughes, *supra* note 79.

85. Roth, *supra* note 82; McDonald, *supra* note 84.

86. McDonald, *supra* note 84. One pharmacist refuses to dispense birth control because she believes "'it's particularly inefficient in stopping ovulation . . . [I]t can stop human life after it has started.'" *US Pharmacists Spark Debate by Refusing to Dispense Contraceptives*, Voice of America Press Release & Documents, Nov. 17, 2004 [hereinafter Voice of America].

87. *World News Tonight*, *supra* note 78.

88. *Id.*

89. *Id.*

90. DRUG WEEK, *supra* note 78.

91. Anita Weier, *Prescription Dilemma; Hearing Held for Pharmacist Who Denied Birth Control*, CAPITAL TIMES (Madison, WI), Oct. 11, 2004, at 1C; Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11.

92. Weier, *supra* note 91.

93. *Id.*

94. Todd Rosenbaum, *Prescribing Ethics*, CAVALIER DAILY, Nov. 12, 2004 (column); Roth, *supra* note 82. Roth notes that since May 2004, at least 180 incidents of providers who refuse to prescribe or dispense birth control or emergency contraception have been reported to the Planned Parenthood Federation of America. *Id.*

controversy on both sides of the abortion debate.

The situations highlighted above have not gone unnoticed by politicians. "Conscience clause" legislation first gained attention in the 1970s after *Roe* was decided.⁹⁵ All but six states enacted some form of conscience clause legislation.⁹⁶ Twenty-eight states passed legislation providing limited protection for providers who refuse to participate in abortion procedures.⁹⁷ A handful of other states have legislation that also protects providers who refuse to dispense contraception.⁹⁸ Most of these laws are limited to providers such as doctors, nurses, and hospitals. Some statutes, such as the Health Care Right of Conscience Act in Illinois,⁹⁹ are quite detailed and provide explicit definitions as to what constitutes an applicable objection, while other state statutes are less detailed. Every conscience statute seems to have a unique threshold for objections. For example, Maine allows a physician or private institution to refuse to provide family planning services when the refusal is based upon religious or conscious objection.¹⁰⁰ Virginia does not require a physician to participate in procedures resulting in an abortion if they state their objection in writing.¹⁰¹ Missouri protects most health care providers in both public and private practice from any cause of action relating to their refusal to treat a woman for abortion purposes.¹⁰²

95. Statutes with "conscience clauses" are designed to protect the rights of health care providers who refuse to provide or participate in procedures to which they have a moral objection. The majority of statutes limit the refusal to the abortion procedure, although some also include contraceptive and sterilization procedures. See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993); see also Leonard J. Nelson, III, *God and Women in the Catholic Hospital*, 31 J. LEGIS. 69 (2004).

96. Wardle, *supra* note 95, at 178. The six states without legislation were Alabama, Connecticut, Mississippi, New Hampshire, Vermont, and Washington (although this is subject to change in the next year). *Id.*

97. Bryan A. Dykes, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 586 (2002).

98. Arkansas, Colorado, Florida, Georgia, Maine, Oregon, Tennessee, West Virginia, Wyoming. Wardle, *supra* note 95, at 178.

99. 745 ILL. COMP. STAT. ANN. 70/1 to 70/14 (West 2005).

100. ME. REV. STAT. ANN. tit. 22, § 1903(4) (2003).

101. VA. CODE ANN. § 18.2-75 (2004).

102. MO. REV. STAT. § 197.032 (2004).

No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered

In 1998 South Dakota became the first state to offer legal protection specifically to pharmacists who refuse to dispense medication that they believe will cause an abortion.¹⁰³ Arkansas has a similar statute.¹⁰⁴ Neither the South Dakota nor Arkansas statutes provide a referral provision as recommended by the proposed federal legislation.¹⁰⁵ In July 2004, a sweeping statute became effective in Mississippi that allows health care providers, including pharmacists, to refuse to participate in procedures that go against their conscience.¹⁰⁶ While the Mississippi statute does not allow discrimination on the basis of race, gender, or sexual orientation, it does not prohibit a pharmacist from denying contraceptives to a woman based on her marital status.¹⁰⁷ Other states including Kentucky, Indiana, Ohio, and Wisconsin have also proposed laws protecting pharmacists.¹⁰⁸ By offering pharmacists legal protection from being fired or having to defend in a civil suit, states with this type of legislation are protecting one class of individuals at the expense of another.

nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.

Id.

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

No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: (1) Cause an abortion; or (2) Destroy an unborn child as defined in subdivision 22-1-2(50A); or (3) Cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing. No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.

Id.

104. ARK. CODE ANN. § 20-16-304 (2004). Subsection (5) states in relevant part:

No private institution or physician, nor any agent or employee of such institution or physician, nor any employee of a public institution acting under directions of a physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when the refusal is based upon religious or conscientious objection. No such institution, employee, agent, or physician shall be held liable for the refusal.

Id.

105. See, e.g., Legal Pharmaceuticals Act, *supra* note 65.

106. MISS. CODE ANN. § 41-107-1, -3, -5 (2005).

107. Teliska, *supra* note 82, at 243-244.

108. Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at 3A; see also Rosenbaum, *supra* note 94; Dykes *supra* note 97.

IV. Duty of a Pharmacist

Pharmacist's Professional Duty

According to the Code of Ethics for Pharmacists, a pharmacist has a professional, legal, and ethical duty to accurately dispense medication according to the prescription written by a doctor.¹⁰⁹ Pharmacists are professionals and “‘are expected to exercise special skill and care to place the interests of their clients above their own immediate interests.’ When a pharmacist’s objection directly and detrimentally affects a patient’s health, it follows that the patient should come first.”¹¹⁰ The pharmacist’s duty extends to refusing to dispense a medication if he or she feels it may harm the patient.¹¹¹ Examples of when this is permissible include “if the physician made an error in the strength or dosage, if a drug interaction is possible, or if it seems, in the pharmacist’s judgement, that the prescription was obtained illegally.”¹¹² As with other healthcare professionals, a pharmacist’s duty to his or her patient is paramount.

Given the seriousness of the professional obligation, a pharmacist risks his or her job when he or she does not fulfill this duty. The policies regarding termination of pharmacists vary between major pharmacy chains. Most pharmacies, such as Eckerd, will fire pharmacists who do not fulfill their professional duty.¹¹³ However, when it comes to contraceptives, one major chain, CVS, does not fire pharmacists who

109. See Code of Ethics for Pharmacists, available at <http://www.aphanet.org/pharmcare/ethics.html> (last visited Nov. 15, 2005). “Central to a pharmacist’s responsibilities is the duty to faithfully and accurately fill prescriptions according to the terms and instructions written thereon by the prescribing physicians and other authorized practitioners.” *Id.*; David J. Marchitelli, Annotation, *Liability of Pharmacist Who Accurately Fills Prescription for Harm Resulting to User*, 44 A.L.R.5th 393, *2a (1996). An example of the statutory interpretation of this duty can be found in IND. CODE ANN. § 25-26-13-16(b) (LexisNexis 2004) (stating in part: “A pharmacist has a duty to honor all prescriptions from a practitioner or from a physician, podiatrist, dentist, or veterinarian licensed under the laws of another state.”).

110. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008-2012, Nov. 4, 2004 (internal citation omitted) (weighing the pros and cons of pharmacist conscience objections to emergency contraception).

111. Stephanie E. Harvey, et al., *Do Pharmacists Have the Right to Refuse to Dispense a Prescription Based on Personal Beliefs?*, available at http://www.nm-pharmacy.com/body_rights.htm (last visited Jan. 7, 2006).

112. *Id.*

113. Teliska, *supra* note 82, at 240.

refuse to dispense.¹¹⁴ Some chains, such as Walgreens, require the pharmacist who wishes to abstain from filling a prescription to assist the patient in finding another pharmacist who will fill the prescription.¹¹⁵ Other pharmacies have policies as to what types of contraceptive items they will offer. For example, Wal-Mart stocks and dispenses the pill, but refuses to sell emergency contraception.¹¹⁶

In Ohio, Karen Brauer was fired from her job at K-Mart when she refused to fill a prescription for birth control.¹¹⁷ Neil Noesen is currently facing disciplinary charges arising from his refusal to dispense the pill.¹¹⁸ In Julie Lacey's case, the pharmacist was allowed to keep her job, although in the other Texas case, both Gene Herr (the pharmacist) and his two co-workers (who also refused to help the customer) were fired.¹¹⁹

As with the abortion debate, laws supporting conscience objections have passionate opponents and supporters. As an illustration, noted below are two letters to the editor of a Wisconsin newspaper, written in the midst of the Noesen hearing. One reader wrote in opposition to Noesen's actions, pointing out that birth control pills can be used to treat other medical problems and are not always prescribed for contraception.¹²⁰ The reader stated:

While I respect pharmacist Neil Noesen's religious beliefs, it is not his job to tell someone, based on those beliefs, what medical treatment they should receive It is not the pharmacist's job to make medical decisions; their [sic] job is to fill the prescription as written by the physician.¹²¹

Writing in response to this letter, another reader stated:

Noesen's only choice that day was whether he would violate his conscience by providing a medication that would be used to frustrate the patient's natural, normal and healthy bodily functions It doesn't require an M.D. certificate to know which choice was appropriate. It only requires a

114. Jill Filipovic, *Whose Conscience Counts?*, WASHINGTON SQUARE NEWS (via U-Wire), Oct. 20, 2004. Eckerd, for example, has a policy that states that no pharmacists can ever choose not to fill a prescription solely on moral or religious grounds. DRUG WEEK, *supra* note 78.

115. DRUG WEEK, *supra* note 78.

116. McDonald, *supra* note 84.

117. Voice of America, *supra* note 86.

118. Weier, *supra* note 91.

119. DRUG WEEK, *supra* note 78.

120. A.M. Bartlett, Middleton, Letter to the Editor, *Pharmacist Shouldn't Do M.D.'s Job by Deciding on Patient's Medications*, CAPITAL TIMES (Madison, WI), Oct. 16, 2004, at 11A.

121. *Id.*

genuine love for neighbor, a well-formed conscience and the courage to act appropriately, none of which should be discouraged by any institution.¹²²

These quotes show how strongly people feel about conscience objections and the interactions those objections have with personal freedoms. Some clearly believe the right to patient autonomy is superior to a pharmacist's convictions, while others believe that pharmacists should not be forced to compromise his or her beliefs.

Ms. Brauer, Mr. Noesen, Mr. Herr, and other pharmacists who have been fired represent one group of casualties in this battle between conscience and professional duty. On the other side are the patients who have had their rights violated and, perhaps, their health compromised.

The American Pharmacists Association has a policy that permits moral objections by pharmacists as long as the pharmacist makes a referral for the patient.¹²³ The Association acknowledges that "there needs to be an alternative system in place to ensure patient access to legally prescribed therapy."¹²⁴ However, not all pharmacists are willing to make a referral or ensure a patient has an alternative. Ms. Brauer, currently the President of a group called Pharmacists for Life International, says "[t]he suggestion that a pharmacist who refuses to dispense a drug which can kill a human should refer the patient to another person who will dispense a drug which can kill a human is ridiculous' . . . 'There should not be an expectation to refer. It's another expectation to participate.'"¹²⁵ Even if a pharmacist provides a referral, the patient must often wait upwards of a day or more to get her prescription filled. This is time that patients cannot always afford. Contraceptives are only effective when taken regularly¹²⁶ and a delay in taking the pill can compromise its effectiveness.¹²⁷

Pharmacist's Legal Duty

Beyond their professional duty to correctly dispense medicine, pharmacists have a legal duty to their patients.¹²⁸ Pharmacists have a

122. Mark Kimble, Madison, Letter to the Editor, *Pharmacist Made Moral Choice*, CAPITAL TIMES (Madison, WI), Oct. 20, 2004, at 11A.

123. Rosenbaum, *supra* note 94.

124. Roth, *supra* note 82.

125. Voice of America, *supra* note 86.

126. Feminist Women's Health Center, *The Pill—Oral Contraceptives*, <http://www.fwhc.org/birth-control/thepill.htm> (last visited Jan. 7, 2006).

127. Marchitelli, *supra* note 109.

128. *Id.*

common law duty to a patient to accurately dispense medication.¹²⁹ Pharmacists, like other medical professionals, may also be liable in “wrongful birth” tort actions.¹³⁰ Extrapolating the legal reasoning behind the common law duty to dispense medicine correctly, one may find this legal duty also requires pharmacists to dispense prescribed birth control.

In *Troppi v. Scarf*¹³¹ a pharmacist mistakenly gave tranquilizers, instead of birth control, to a patient and, as a result, the woman got pregnant.¹³² The court found the pharmacist’s actions negligent and wrongful and found that they directly and proximately caused damage.¹³³ The court then allowed the woman to sue for damages.¹³⁴ The court stated that public policy made tort liability appropriate:

[P]ublic policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds.¹³⁵

Troppi set the standard for tort liability for pharmacists.

In *Hooks SuperX v. McLaughlin*,¹³⁶ a customer sued his pharmacist for continuing to fill his prescription for a dangerous and addictive drug.¹³⁷ In holding that the pharmacist had an obligation to prevent, or at least question, the customer’s rapid rate of pill consumption the court stated, “[t]he relationship between pharmacist and customer is a direct one based upon contract and is independent of the relationship between physician and patient.”¹³⁸ The court went on to say that “privity of contract is a relationship sufficient to form the basis for tort liability.”¹³⁹ Because customers rely upon pharmacists for their expertise, the court concluded that pharmacists had a legal duty to their customers.¹⁴⁰

129. *Id.*

130. Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15 (2004).

131. 187 N.W.2d 511 (Mich. Ct. App. 1971).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 517.

136. 642 N.E.2d 514 (Ind. 1994).

137. *Id.* at 516.

138. *Id.* at 517 (internal citations omitted).

139. *Id.*

140. *Id.* at 517.

In *Riff v. Morgan Pharmacy*,¹⁴¹ a patient sued her doctor and pharmacy for negligently prescribing and filling a prescription without warning her of the dosage requirements and the side effects.¹⁴² The court found for the patient and against the pharmacy, noting that “[p]ublic policy requires that pharmacists who prepare and dispense drugs and medicines for use in the human body must be held responsible for the failure to exercise the degree of care and vigilance commensurate with the harm which would be likely to result from relaxing it.”¹⁴³

The pharmacist’s legal duty is not absolute.¹⁴⁴ The pharmacist must have a reason to suspect that harm will come to the patient from the prescription.¹⁴⁵ Otherwise, “where the pharmacist has no specific knowledge of an increased danger to a particular customer, the pharmacist has no duty to warn that customer of potential side effects.”¹⁴⁶ In *Pittman v. Upjohn Co.*,¹⁴⁷ a young man visiting his grandmother mistakenly took one of her diabetes pills, believing it was aspirin.¹⁴⁸ The man suffered a severe reaction to the drug, resulting in permanent brain damage.¹⁴⁹ The man’s guardian sued the drug manufacturer, physician, and pharmacist.¹⁵⁰ The court granted summary judgment to the defendants holding, in part, that the pharmacist’s duty to warn does not extend to injuries that are not reasonably foreseeable.¹⁵¹ Some state legislatures have made the duty of a pharmacist even clearer. The Supreme Court of Washington interpreted its state law defining the standard of care for health care providers to include pharmacists and noted that “[a pharmacist] has no duty to fail or refuse to supply a customer with drugs for which the customer has a valid and lawful prescription from a licensed physician”¹⁵²

While the courts and pharmacist community seem to agree that

141. 508 A.2d 1247 (Pa. Super. Ct. 1986).

142. *Id.* at 1248.

143. *Id.* at 1251.

144. See Steven W. Huang, *The Omnibus Reconciliation Act of 1990: Redefining Pharmacists’ Legal Responsibilities*, 24 AM. J.L. & MED. 417 (1998); Marchitelli, *supra* note 109.

145. *Id.*

146. Cottam v. CVS Pharmacy, 764 N.E.2d 814, 821 (Mass. 2002).

147. 890 S.W.2d 425 (Tenn. 1994).

148. *Id.* at 426.

149. *Id.*

150. *Id.*

151. *Id.*

152. McKee v. Am. Home Prods., Corp., 782 P.2d 1045, 1049 (Wash. 1989) (quoting Pysz v. Henry’s Drug Store, 457 So. 2d. 561, 561-62 (Fla. Dist. Ct. App. 1984)).

pharmacists have a duty to accurately dispense medication, they do not agree as to whether the pharmacist can withhold dispensing due to moral objections. The pharmacy profession is run at the state level, with each state determining the qualifications it will require of its pharmacists.¹⁵³ To date there is no national standard regarding what, if any, legal or professional boundaries should be placed on pharmacists with conscious objections. Legislators add to this confusion by passing laws that, seemingly, either support or do not support a pharmacist's right to make a moral objection, making geographic location a factor in a woman's ability to access birth control.

V. Should Pharmacists Be Protected From Termination When They Refuse to Dispense?

The Argument in Favor of Giving Legal Protection to Pharmacists Who Refuse to Dispense Due to Moral Objections

In an article discussing the pros and cons of the rights of pharmacists to raise a conscience objection, Julie Cantor¹⁵⁴ and Ken Baum¹⁵⁵ reason that pharmacists cannot be asked to completely abandon their morals for the sake of their profession.¹⁵⁶ The authors believe that to do so would "impose too heavy a toll."¹⁵⁷ In an article advocating for protection of pharmacists' conscience objections, another author argues that "[t]he public benefits when pharmacists can freely exercise their autonomy [sic] and refuse to participate in medical services that violate their conscience."¹⁵⁸ Others believe that conscience objections must be allowed in order to protect a pharmacist's constitutionally protected free exercise of religion.¹⁵⁹ Proponents of pharmacist protection further believe Title VII of the Federal Civil Rights Act of 1964 (protecting against religious discrimination in the workplace) is an inadequate

153. For a list of licensing requirements by state see the chart at <http://www.visalaw.com/IMG/pharmacistchart.pdf> (last visited Jan. 7, 2006).

154. Ms. Cantor holds a law degree from the University of California at Berkeley's Boalt Hall School of Law and a MD from the Yale University School of Medicine. <http://www.mto.com/lawyers/bio/cfm?attorney10=289> (last visited Nov. 2, 2005).

155. Dr. Baum completed a joint MD/JD program at Yale University School of Medicine and Yale Law School. *Id.*

156. Cantor & Baum, *supra* note 110.

157. *Id.*

158. Dykes, *supra* note 97, at 586.

159. Weier, *supra* note 91.

remedy to protect the rights of pharmacists who make moral objections.¹⁶⁰

The ethical challenges faced by pharmacists are not limited to the issues of birth control and abortion. In a paper presented at the Annual Meeting of the American Society for Pharmacy Law, William L. Allen and David B. Brushwood argue that it is appropriate for a pharmacist to raise a conscience objection to other medications if the pharmacist feels the prescribed therapy is morally objectionable and note that "the pharmacist is an active participant [in drug therapy] whose values, attitudes, and beliefs should be given consideration."¹⁶¹ The authors also note that conscience objections are not always limited to a pharmacist who wishes to opt out of dispensing medication. They point out that for some pharmacists their conscience may demand that they participate in the dispensing of certain medications.¹⁶² In conclusion, the authors suggest that state-owned pharmacies allow pharmacists to observe the demands of their consciences, while private pharmacies adopt their own policies to which the pharmacist must adhere.¹⁶³

For some proponents of conscience legislation, there is no compromise. One author suggests that the best solution is to enact federal and state legislation to provide legal protection to pharmacists.¹⁶⁴ This proponent suggests that "[l]egal protection must serve two purposes in order to appropriately ensure a pharmacist's right of conscientious refusal: 1) prevent and deter detrimental recriminatory action against the pharmacist; and 2) provide adequate remedies in the case where the pharmacist is sued or disciplined."¹⁶⁵ The author reasons that because other healthcare providers are legally allowed to refuse to participate in an abortion procedure, pharmacists should be granted the same protection.¹⁶⁶ Another proponent of legal protection suggests that conscience legislation is necessary to protect health care provider autonomy: "[i]deally, such legislation should allow health care providers to practice their skills in an integrated manner, maintaining their religious, philosophical, ethical, and moral integrity when they encounter

160. Herbe, *supra* note 81, at 93.

161. William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & LAW 1, 1 (1996).

162. *Id.*

163. *Id.*

164. Herbe, *supra* note 81, at 100.

165. *Id.*

166. *Id.* at 77.

requests or assignments that violate their conscience.”¹⁶⁷

Proponents of statutes protecting pharmacists also argue that the pharmacist’s fundamental right to free exercise of religion is at stake.¹⁶⁸ If a pharmacist’s religion is the reason for his or her objection, they may claim protection under Title VII of the Federal Civil Rights Act of 1964,¹⁶⁹ which states, in part, that employers may not “refuse to hire . . . discharge . . . or otherwise discriminate against any individual . . . because of such individual’s . . . religion.”¹⁷⁰ However, in the workplace, the right of free exercise of religion is not absolute, nor is Title VII a guarantee of protection.¹⁷¹ Although the employer has an obligation to accommodate the religious practices of an employee, “the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. A reasonable accommodation need not be on the employee’s terms only.”¹⁷² If an employee’s objections cause undue burden to an employer he or she may still face termination.¹⁷³ Hence, proponents argue that conscience clause legislation is necessary to protect individuals who may not qualify for protection under Title VII.

The Argument Against Providing Legal Protection to Pharmacists Who Refuse to Dispense Due to Moral Objections

After evaluating many of the arguments for and against legal protection for pharmacists, Cantor and Baum came to the conclusion that it may be impossible, in all cases, to protect the rights of both the pharmacist and the patient.¹⁷⁴ This is especially true in rural communities served by a single pharmacist.¹⁷⁵ In those cases they come down on the side of the patient, concluding:

Our principle of a compassionate duty of care should apply to all health

167. Dykes, *supra* note 97, at 568.

168. Herbe, *supra* note 81, at 94.

169. Civil Rights Act, 42 U.S.C. § 2000e (2004).

170. 42 U.S.C. § 2000e-2(a)(1) (2004).

171. Herbe, *supra* note 81, at 94.

172. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982).

173. Herbe, *supra* note 81, at 94-95 (discussing all the potential burdens that an employee may place upon an employer that would not result in Title VII protection).

174. Cantor & Baum, *supra* note 110.

175. Voice of America, *supra* note 86; see also Lichtman, *supra* note 73 (discussing the adverse impact to poor and underserved women in rural areas with few abortion providers and strict abortion regulations).

care professionals. In a secular society, they must be prepared to limit the reach of their personal objection. Objecting pharmacists may choose to find employment opportunities that comport with their morals—in a religious community, for example—but when they pledge to serve the public, it is unreasonable to expect those in need of health care to acquiesce to their personal convictions.¹⁷⁶

Susan Scrimshaw, Dean of the University of Illinois-Chicago School of Public Health, feels that low-income and rural women will be disproportionately affected by legislation that allows a pharmacist to refuse to dispense.¹⁷⁷ Scrimshaw notes “‘if you don’t have a car and you’re in a neighborhood with few pharmacies, you’re in trouble [in terms of accessing contraceptives].”¹⁷⁸

Other critics of conscience objection clauses challenge the notion of pharmacist protection on the grounds that “moral conviction” is an ill-defined term and that it can be used to foster discriminatory behavior.¹⁷⁹ As one critic suggests, “this legislation creates somewhat of a slippery slope in terms of pharmacists’ discretion. For instance, if a racist pharmacist was opposed to dispensing heart disease medication to blacks, could he refuse to do so based on so-called moral convictions?”¹⁸⁰ And others object to the notion that one person’s moral viewpoint can be legally imposed upon another. By allowing a pharmacist to refuse to dispense, the pharmacist is interfering with both the will and rights of the patient and his or her physician. These opponents state that “[it is] outrageous that someone can deny someone access to the health care services that their physician has prescribed for them.”¹⁸¹ Rosemary Ellis¹⁸² points out an unexpected irony that may result from lack of birth control access: “[I]n not making the pill available to women, inevitably, more unintended pregnancies and more abortions are going to happen.”¹⁸³ As a result, she feels that the moral stand taken by pharmacists may soon undermine public health and

176. Cantor & Baum, *supra* note 110, at 9.

177. *Market Watch: Debate Over Contraception Access Reignites* (CBS television broadcast May 13, 2004); see also Teliska, *supra* note 82 (discussing the adverse impact that pharmacist refusal clauses have on the health needs of rural and low income women).

178. *Market Watch*, *supra* note 177.

179. Rosenbaum, *supra* note 94.

180. *Id.*

181. Voice of America, *supra* note 86.

182. Rosemary Ellis is the Editorial Director of Prevention magazine. *Id.*

183. *New Medical Trend: Women Who Were Denied Birth Control, The Flipside* (CNN Television Broadcast July 14, 2004).

safety.¹⁸⁴

By forcing employers to retain employees who do not perform their jobs, legislators are also burdening employers. As the court in *Brener v. Diagnostic Center Hospital*¹⁸⁵ stated, if by accommodating a person's religious practice an employer's business faces an undue hardship, then accommodation is not required.¹⁸⁶ The Supreme Court seems to agree with the *Brener* holding. A few years later the Court held that "an employer has met its obligation under [the Civil Rights Act of 1964] when it demonstrates that it has offered a reasonable accommodation to the employee."¹⁸⁷ Furthermore the Court has noted that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."¹⁸⁸ While *Brener* addressed protection under Title VII, opponents of conscience clause legislation would argue that the same rules should be applied to statutes protecting pharmacists. The actions of an objecting pharmacist are likely to cause a hardship to his or her employer. If there are multiple pharmacists on duty, an objecting pharmacist will require his or her coworkers to fill extra prescriptions, thereby increasing their workload and decreasing their morale. If the objecting pharmacist is alone, he or she will be turning away customers in order to accommodate his or her objection. An employer is thus burdened both operationally and financially by being required to accommodate objecting pharmacists.

It is clear that both the proponents and opponents of pharmacist protection are concerned with rights, whether they are the rights of a pharmacist to his or her moral and religious convictions or the rights of a patient to privacy, health and choice. In assessing the arguments, the courts must carefully balance the impact of restriction and accommodation and try to construct a policy that will, hopefully, result in the least amount of infringement upon the rights of the affected parties.

184. *Id.* For another review of the public policy and health issues related to contraceptive use, see EPICC Bill, *supra* note 61.

185. 671 F.2d 141 (5th Cir. 1982).

186. *Id.* at 146.

187. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

188. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (noting, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.") *Id.* (internal citation omitted).

VI. The Consequences of Legal Protection for Pharmacists and Suggested Causes of Action

While laws protecting the conscience of health care providers have been around for a long time, laws protecting pharmacists are relatively new. When a state protects a pharmacist from the consequences of refusing to dispense birth control, the state is, in effect, denying a patient her constitutional rights. To analyze these statutes one must look at the nature of the right being restricted and how the statute could be challenged. Laws that protect pharmacists from the consequences of failing to dispense prescriptions interfere with patients' access to oral contraceptives. The right to access contraceptives is covered by the right to privacy.¹⁸⁹ The right of privacy is a fundamental right under the Fourteenth Amendment. Accordingly, a denial of these rights constitutes a substantive due process violation.

Although there has not been a case on this specific issue, it is reasonable to expect that a woman who is denied access to birth control by a pharmacist (who is protected by state law), could successfully bring suit under the Fourteenth Amendment. Following are some suggested arguments that a plaintiff might make, should he or she wish to challenge a statute that offers legal protection to a pharmacist who refuses to dispense the pill.

In order to set forth a Fourteenth Amendment claim, a state actor must violate a protected right of an individual.¹⁹⁰ A statute can be attacked either on its face (looking only at the language of the statute) or as applied (looking at the effect of the statute). In reviewing whether the statute is unconstitutional as applied, the court will look at how the law works in practice and if the result interferes with a person's constitutional rights. If the statute interferes with a right, the court will look at the nature of the right. When the right violated has been found by the Court to be fundamental, then the statute will be subject to strict

189. Schopler, *supra* note 32.

[O]ne aspect of "liberty" protected by [the] due process clause of Fourteenth Amendment is right of personal privacy, or guaranty of certain areas or zones of privacy; this right of personal privacy includes interest in independence in making certain kinds of decisions, and among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, *contraception*, family relationships, and child rearing and education.

Id. (emphasis added).

190. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

scrutiny.¹⁹¹ “Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”¹⁹² This heightened level of scrutiny is the appropriate level of analysis for cases involving any statute that provides a bar to access to birth control because the right of access to contraceptives falls within the fundamental right to privacy.¹⁹³ As the Court in *Eisenstadt* stated, “if we were to conclude that the . . . statute [at issue] impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationaly related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest.”¹⁹⁴

A statute does not necessarily need to act as a complete bar to access in order to be found unconstitutional. The Court has held that “infringements of fundamental rights are not limited to outright denials of those rights. . . . [T]he compelling-state-interest test is applicable not only to outright denials but also to restraints that make exercise of those rights more difficult.”¹⁹⁵ Therefore, a state that interferes with a fundamental right, or which makes access more difficult, is subject to a strict standard of review.

Because there is no medical support to show that oral contraceptives are abortion agents, the law applied to statutes restricting access to pharmaceuticals should apply the strict scrutiny test. However, even if a court were to apply the less rigorous, “undue burden” test used in abortion cases,¹⁹⁶ the state must still show an important interest.¹⁹⁷

191. *Id.*

192. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (internal citations omitted).

193. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt*, 405 U.S. at 448.

194. *Eisenstadt*, 405 U.S. at 447 n.7.

195. *Maher v. Roe*, 432 U.S. 464, 487 (1977).

196. With issues around abortion, the strict scrutiny level of review has been replaced with the less rigorous and more confusing “undue burden” standard defined in *Casey*. In *Casey*, a plurality of three Justices concluded that “not all [abortion] regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.” *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992). The Court further noted that “not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.” *Id.* at 873 (Per Justices O’Connor, Kennedy and Souter).

197. *Id.* at 876. The undue burden standard was first suggested in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), which states that a statute that restricts

Because the states do not have a compelling, or even important, interest in denying women access to contraceptives, the statutes that provide protection to pharmacists violate the substantive due process rights of women. The state must show that the statute in question is pursuing a compelling objective and that the means chosen by the state are necessary to achieve the compelling end.¹⁹⁸ If there are less restrictive means that would accomplish the same objective, then the means are not necessary and the state's statute will be held unconstitutional.¹⁹⁹

The following is a hypothetical application of the strict scrutiny test to the South Dakota statute. South Dakota has some of the most restrictive laws regarding abortion and is one of only a few states that allow a pharmacist to refuse to dispense the pill or other contraceptives.²⁰⁰ South Dakota is a predominantly rural state and is sparsely populated.²⁰¹ Accordingly, if a pharmacist refuses to dispense the pill, the patient may have a difficult time filling her prescription (or she may never be able to fill it). By passing a statute that protects the pharmacist from legal action from his or her employer and/or the patient, the state action has essentially barred patients from accessing their medication.

The purpose of the South Dakota statute is, ostensibly, to protect the religious and moral values of pharmacists who object to birth control and/or abortion.²⁰² Presumably, the state interest is to protect pharmacists (and other healthcare providers) from having to compromise

abortion will be deemed unconstitutional only if its *purpose or effect* is to place substantial obstacles in the path of a woman seeking an abortion. *Id.* Critics of the undue burden standard point out that "the Court did not explain how it could abandon strict scrutiny while emphatically reaffirming 'a constitutional liberty of the woman to have some freedom to terminate her pregnancy.'" Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 145 (1995) (citation omitted); see also Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

198. See generally *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

199. *Id.*

200. Lichtman, *supra* note 73, at 353 (observing that in the past ten years South Dakota has passed 15 laws restricting abortions).

201. See U.S. census data for South Dakota, <http://quickfacts.census.gov/qfd/states/46000.html> (last visited Jan. 7, 2006).

202. This is a reasonable inference based on the language of the statute, the result of the legislation, as well as the fact that an extremely small percentage of South Dakota's state legislature is pro-choice. Lichtman, *supra* note 73.

their moral values due to participation in allegedly objectionable activities. To pass the strict scrutiny test the state would need to show that this state interest is compelling and that the interest cannot be achieved by less restrictive means.²⁰³ Applying the undue burden test, the state would need to show that its actions are not intended to deny women access to contraceptives.

The state's interest in protecting pharmacist's moral objections to birth control is in direct conflict with its citizens' interest in maintaining their fundamental and constitutionally protected right of protection from state interference regarding access to contraceptives. Unlike cases involving the rights to education or marriage, the state does not possess paternalistic power to interfere with women's rights to birth control.²⁰⁴ Any law that interferes with a fundamental right cannot be allowed to stand absent a compelling state interest. The state's actions are not narrowly tailored to avoid significant interference with women's fundamental rights. The South Dakota statute allows pharmacists to escape liability for their actions and does not provide for any recourse (such as a referral requirement or having a non-objecting pharmacist on staff) for women who encounter an objecting pharmacist. Accordingly the statute (and any others written without a referral clause) should be found unconstitutional and re-written to ensure that contraceptive access is not completely cut-off.

VII. Conclusion

Offering legal protection to pharmacists comes at too great a cost to women's health and legal rights. The pill is a viable and effective method of birth control for many women and, as Congress has noted, it

203. The pharmacists might argue that if they were not protected, they are facing religious discrimination. When a plaintiff claims religious discrimination, there must be interference in the plaintiff's religious purpose. Here the pharmacists have a secular purpose (dispensing medication) and a statute that requires the dispensing of valid prescriptions would probably not be found in violation of the Establishment Clause. For a discussion of the Establishment Clause and contraceptive access see *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).

204. See *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (Plaintiffs asked the court to hold the law preventing minors from marrying without parental consent to be declared an unconstitutional infringement on their fundamental right to marry. The court declined to use the strict scrutiny test, holding that because the plaintiffs' right was merely postponed it was not the same as a law (such as the one struck down in *Carey*) forbidding access to contraceptives.).

can be used to prevent other social, economic, and medical problems.²⁰⁵ The Supreme Court has clearly established that a state cannot interfere with a woman's right to access contraceptives, including the pill. While pharmacists should be free to practice their religion, that practice cannot interfere with their professional duty to dispense valid prescriptions free of moral judgment. Furthermore, the vague wording in most conscience clause statutes does not restrict objections to those of a religious nature. A pharmacist can use any personal moral objection as an excuse not to dispense a prescription. The result of a pharmacist's objection can be quite severe for the patient (an unintended pregnancy or health problems), and the duties imposed under tort law should apply. A pharmacist should not be able to escape the legal consequences of his or her actions. States that allow pharmacists to do so are clearly protecting the rights of a small segment of their citizens at the expense of others.

If these statutes are challenged in court, it is likely that the statutes will be found to be unconstitutional. While this is a serious consequence, it is appropriate given the rights at stake.

205. See EPICC Bill, *supra* note 61; see also Legal Pharmaceuticals Act, *supra* note 65.