

Contraceptive Conflicts at the Counter:
Resolving the Ethical Tension between Patient Autonomy and Pharmacists’
Conscientious Objection to Filling Prescriptions for Emergency Contraception
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I. Introduction

When a pharmacist is presented a prescription to which she is morally opposed, she has two options. Either she can ignore her own beliefs and fill the prescription, or she can refuse to do so. A patient who presents a prescription that a pharmacist refuses to fill has no options unless another pharmacist or pharmacy is willing and able to fill the prescription in a timely manner. The consequences of a pharmacist refusal for both parties may be quite serious. Pharmacists may be wrongfully discharged for exercising their religious beliefs. Patients may suffer medical injury as a result of being denied their medication. Under the current legal regime, neither pharmacists nor patients are adequately protected in the event of a pharmacy refusal. Accordingly, additional protection must come from state and federal legislatures and must adequately protect both pharmacists and patients.

Part II of this paper looks at this problem of pharmacy refusal and notes the concurrent advances in medical technology and the changing role of the pharmacist. Emergency contraception, the latest medication to create controversy, is perceived by some as medication that approaches the boundary between pregnancy prevention and abortion. It consists of the same hormones found in ordinary birth control pills. Like all hormonal contraceptive methods, depending on when during the menstrual cycle a woman uses the method, emergency contraception acts by delaying or inhibiting ovulation, inhibiting fertilization or inhibiting implantation of a fertilized egg. [cite to www.guttmacher.org/media/supp/ec121702.html]

According to the medically accepted definition, pregnancy does not begin until implantation.¹ Because emergency contraception prevents ovulation, fertilization or implantation, it is considered pregnancy prevention rather than termination. Some religions, however, believe that

¹ *Id.*

pregnancy begins at conception.² Therefore, for those who share this belief and hold it preeminent over the medical definition of pregnancy, medication such as emergency contraception that can interfere with an already fertilized egg is an abortion. A religiously observant pharmacist faced with a prescription for emergency contraception must choose between her professional responsibility and her conscience.

Prior to 1960, this conflict likely would not have existed. Paternalistic medicine was common practice and medical professionals were expected to make medical decisions on behalf of their patients.³ Any decision considered immoral by the health care provider likely would not have even been discussed with the patient. During the 1960s, however, notions of patient autonomy emerged, and patients expected to be sufficiently informed of their medical choices to make autonomous decisions.⁴ Medical professionals, as human beings, are similarly entitled to an autonomous right to follow their conscience.⁵ The situation is complicated when the patient's autonomous request for treatment conflicts with the medical professional's autonomous belief that participation in the requested treatment is morally objectionable.

This is especially true when the conflict involves pharmacists. Pharmacists, unlike physicians, are unable to choose a practice area that avoids morally sensitive duties.⁶ Moreover, throughout the past decade, pharmacists' responsibilities, and their corresponding duties, have

² Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 *Stan. L. Rev.* 1703, 1705 (1999). White notes that several religions have an objection to abortion including the Church of Jesus Christ of the Latter Day Saints, Seventh Day Adventists, and Baptists.

³ Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflict Rights and Obligations in the Physician-Patient Relationship*, 10 *J. CONTEMP. HEALTH L. & POL'Y* 47 (1993).

⁴ *Id.* at 49.

⁵ *Id.* at 51.

⁶ 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, 78 (2003)

grown considerably.⁷ The pharmacist is no mere automaton. Like a physician, she is responsible for using her wealth of information beneficently and, like a physician, she can be held liable when her actions cause injury to a patient.⁸ Pharmacists argue that, like physicians, they should similarly be able to refuse to act in ways that violate their conscience.⁹ There is, however, a considerable conflict when the pharmacist's role as a conscientious human conflicts with the pharmacist's role as dispenser of legally prescribed medication.

Part III of this paper looks at the two potentially litigable issues resulting from this conflict. The two primary litigable issues that emerge are (1) pharmacists who bring suit against their employers when discharged for refusing to fill a prescription and (2) patients who bring suit against pharmacists or pharmacies because they were denied timely access to emergency contraception. Current legal protections do not adequately protect either pharmacists or patients who bring suit.

Pharmacists discharged for their conscientious refusal to fill prescriptions must rely on the limited statutory protection of Title VII¹⁰ and the Church Amendment.¹¹ Title VII, passed as part of the Civil Rights Act of 1964, makes it unlawful for an employer to discriminate against an individual in hiring, firing, or in any other manner because of religion.¹² A pharmacist need only assert that filling morally challenging prescriptions violates the pharmacist's religious beliefs, that the employer was made aware of these beliefs, and that the pharmacist was fired for

⁷ Lauren Fleischer, *From Pill-Counting to Patient Care: Pharmacists' Standard of Care in Negligence Law*, 68 FORDHAM L. REV. 165 (1999).

⁸ *Id.*

⁹ *Testimony of the American Pharmacists Association: Hearing on Freedom of Conscience for Small Pharmacies Before the Small Bus. Comm.*, 109th Cong. (2005) (statement of Linda Garrelts MacLean, pharmacist, American Pharmacists Association).

¹⁰ Civil Rights Act § 703, 42 USC § 2000e-2 (1964)

¹¹ 42 U.S.C. § 300a-7.

¹² *Id.*

refusing to take actions that violated those beliefs.¹³ This protection is not absolute, or even sufficient, as a pharmacy can rebut the pharmacist's prima facie case by showing either that they "reasonably accommodated" the belief or that any further accommodation would be "unduly burdensome."¹⁴

Pharmacists may find support in the Church Amendment of 1973, which prohibits entities that receive federal grants from discriminating against health care providers who refuse to perform or assist in the performance of abortion.¹⁵ To succeed on this claim, pharmacists not only have to argue that dispensing emergency contraception falls within the legal definition of abortion, but that the federal government has some sufficient monetary involvement with the pharmacy. Neither of these arguments has a strong likelihood of success.

Lastly, pharmacists in some states may receive protection from conscience legislation passed in the wake of *Roe v. Wade*.¹⁶ Many states limit the protection strictly to physicians, and to those physicians who are morally opposed to abortion. Accordingly, pharmacists opposed to dispensing emergency contraception may not fall within the sweep of the protection. Accordingly, pharmacists are inadequately protected against wrongful discharge in the event of a pharmacy refusal.

On the other hand, patients who suffer injuries from being denied access to emergency contraception have almost no statutory legal protection. Patients must instead rely on tort law to assert a cause of action. Patients who suffer injury from being denied timely access to emergency contraception may have a negligence or medical malpractice cause of action. Further, some

¹³ See Section (II)(A) *infra*.

¹⁴ George Chamberlin, *Cause of Action for Discharge from Employment in Retaliation for the Exercise of Rights Protected by Title VII*, 4 CAUSES OF ACTION 2d 331 (2004).

¹⁵ See Section (III)(A) *infra*.

¹⁶ 42 U.S.C. § 300a-7.

jurisdictions have recognized the negligence-based tort of wrongful conception or wrongful pregnancy. Success in any of these suits depends on the court recognizing that pharmacists have a duty to provide legally prescribed medication in a timely manner – a somewhat dubious proposition.

Because courts are limited to merely interpreting laws and crafting opinions on that basis, adequate protection for both sides must stem from federal and state lawmakers. Part 3 of this paper looks at the role of our lawmakers in this conflict and sets out essential guiding principles for future legislation. Under current federal law, neither pharmacists nor patients are adequately protected in the event of a pharmacy refusal. Several states have tried to remedy this by passing or proposing statutory conscience laws offering various levels of protection for health care professionals who oppose certain procedures on moral grounds.¹⁷ Most proposed bills, however, protect only pharmacists to the detriment of the patients or do not adequately provide pharmacists a means by which they can conscientiously object.¹⁸ No current or proposed legislation adequately protects both patients and pharmacists.

Any law that is passed must adequately address the interests of both pharmacists and patients. First, laws must require that pharmacies implement systems that adequately accommodate conscientiously objecting pharmacists while guaranteeing patients timely access to legally prescribed medication. There are several ways this can be accomplished, including staffing the pharmacy so that a pharmacist willing to fill prescriptions is always on duty, arranging with other local pharmacies to fill prescriptions that will not be filled by a pharmacist, or permitting a prescribing physician to dispense prescriptions that may be morally-challenging to some pharmacists. Additionally, laws must protect pharmacists who are wrongfully

¹⁷ See Section (IV)(A) *infra*.

¹⁸ See Section (IV)(A) *infra*.

discharged for refusing to dispense medication in violation of their religious beliefs and patients who are injured by a pharmacy refusal.

II. Why Some Pharmacists Refuse to Dispense Emergency Contraception

Few issues excite modern passions, or a modern inability to compromise, like abortion. Emergency contraception, though medically distinct from abortion, relocates the controversy to the pharmacy counter and is a high-stakes issue for pharmacists, pharmacies, and patients. This issue has come to the forefront both because of advances in medical technology and the changing role of the pharmacist.

A. Emergency Contraception: The Lightning Rod

According to the general medical definition of pregnancy that has been endorsed by the United States Department of Health and Human Services and the American College of Obstetricians and Gynecologists, pregnancy begins when a fertilized egg is implanted into the lining of a woman's uterus.¹⁹ Because emergency contraception can work by preventing prevents implantation of the fertilized egg, it is considered prevention rather than abortion. When taken within 72 hours of unprotected intercourse, progestin-only regimens such as Plan B reduce the risk of pregnancy by 89 percent.²⁰ When taken within 24 hours, the risk is reduced by 95 percent.²¹ Once implantation occurs (i.e. once a woman is medically pregnant), emergency contraception such as Plan B will not induce an abortion nor will it affect the developing pre-embryo or embryo.²²

While emergency contraception prevents medical pregnancy, abortifacients such as mifepristone actually terminate an existing pregnancy. Unlike Plan B which is extremely time-

¹⁹ Planned Parenthood, *Difference*, *supra*, note 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

sensitive, mifepristone can be taken effectively up 63 days after the last menstrual period.²³ Whereas Plan B works by preventing or delaying ovulation, or by preventing fertilization or implantation, mifepristone ends pregnancy by blocking the hormones necessary for the maintenance of an already implanted fertilized egg in the uterus.²⁴ Furthermore, unlike emergency contraception which costs \$20 to \$25 per pill, abortifacients cost between \$350 and \$575.²⁵ Thus medically and economically, emergency contraception and medication abortions are distinct.

Religious groups, who believe that pregnancy begins at conception rather than implantation, disagree with the distinction between emergency contraception and abortifacients. The National Conference of Bishops' "Ethical and Religious Directives for Catholic Health Care Services" speaks directly to this issue.²⁶ "Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which ... includes the interval between conception and implantation of the embryo." Because emergency contraception acts during the interval between conception and implantation, it is considered by Catholic directives to produce an abortion. Moreover, "[a]bortion ... is never permitted."²⁷ [For many religions,²⁸ This clause, with footnote 29 is extremely problematic. I have not read the article cited, but the paraphrase of the cited source does not support the conclusion of the sentence. The sentence says that many

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ethical and Religious Directives for Catholic Health Care Services, Fourth Edition Issued by NCCB/USCC, June 15, 2001 Copyright © 2001, United States Conference of Catholic Bishops, Inc. available at <http://www.usccb.org/bishops/directives.shtml>

²⁷ *Id.*

²⁸ Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 Stan. L. Rev. 1703, 1705 (1999). White notes that several religions have an objection to abortion including the Church of Jesus Christ of the Latter Day Saints, Seventh Day Adventists, and Baptists.

religions view EC as abortion, but the footnote merely says that there are a number of religions against abortion (and since we know that EC is not an abortifacient, it is an unacceptable leap to assume that these religions necessarily equate EC with abortion.) and for Catholics explicitly, prescriptions for emergency contraception *are* prescriptions for abortions – a prescription religious pharmacists may be opposed to filling.

For this reason, many of the large chain pharmacies have formed policies balancing a pharmacist's right to refuse with a patient's right to access legally prescribed medication. At one end of the spectrum are the pharmacies that focus almost exclusively on a patient's access to prescribed medication. Such pharmacies do not permit pharmacists to refuse to fill prescriptions on moral grounds.²⁹ The large discount retailer Costco has a stated policy to “not encourage or permit pharmacists to allow personal beliefs to impede the legitimate dispensing of legally prescribed medication.”³⁰ The grocer, Harris Teeter, asserts that “[a]s long as the prescription is ... in the best interest of the patient's wellness, we are professionally obliged to fill the prescription.”³¹ In a similar vein, Price Chopper, a supermarket operating in New England,³² states that “it is not within the standard of practice and scope of the pharmacy profession to make any moral judgments that may affect the health care decisions of our patients and their physicians.”³³

²⁹ These policies should not prevent a pharmacist from making professional judgments about the nature of the prescription, such as identifying any negative drug-drug interactions or potentially lethal doses of a prescribed medication; in fact, it is a pharmacist's legal obligation to do so.

³⁰ Planned Parenthood, *Behind the Counter: PPFA Brings You the Real Story* <http://www.saveroe.com/fillmypillsnow/scored.php> [Hereinafter: Save Roe]

³¹ *Id.*

³² Stores are found in New York, Massachusetts, Vermont, Connecticut, Pennsylvania and New Hampshire. At www.pricechopper.com.

³³ Save Roe, *supra* note 31.

At the opposite end are pharmacies like Rite Aid, Winn Dixie and Wal-Mart, which focus almost exclusively on guaranteeing a pharmacist's right to conscientious refusal. Winn Dixie, the grocery chain based largely in the Southeast, states that "[w]hen a pharmacist's religious beliefs prohibit the dispensing of legally prescribed medications," the pharmacist is to refer the customer to another pharmacy or have the customer wait until the next pharmacist comes on duty, if within four hours of presentment.³⁴ Rite Aid, operating 3400 stores in 28 states and the District of Columbia,³⁵ has a similar policy. If a Rite Aid pharmacist does not dispense the medication, he or she is required to first ask another pharmacist in the store to fill it, second refer the customer to another Rite Aid where the prescription can be filled, or third refer the customer to a competitor.³⁶ While these policies guarantee the right of the pharmacist to refuse on conscience or moral grounds, they provide no guarantee that a customer will have timely access to medication – particularly in areas served only by those pharmacies.

Like the two pharmacies above, Wal-Mart, the largest retailer in the United States and the fifth largest provider of pharmaceuticals,³⁷ generally has a policy of referring customers whose prescriptions will not be filled by a pharmacist to one of their competitors.³⁸ Unlike Rite Aid and Winn Dixie, however, Wal-Mart does not even carry emergency contraception. This poses a serious problem in terms of access to emergency contraception because, in many towns, Wal-Mart is the only pharmacy.³⁹

CVS and Kmart employ a more balanced approach seeking to reconcile pharmacists' consciences with customer needs. CVS makes it part of their policy to "fill all legally prescribed

³⁴ *Id.*

³⁵ At www.riteaid.com, August 7, 2005.

³⁶ Save Roe, *supra* note 31.

³⁷ At http://www.religioustolerance.org/abo_walm.htm

³⁸ Save Roe, *supra* note 31.

³⁹ Katie Fairbank, *Moral Battle Rages in Pharmacies*, The Dallas Morning News, April 24, 2005.

medications, including emergency contraception,”⁴⁰ yet strives to accommodate sincerely held religious convictions. In order to do so, CVS asks that pharmacists notify management in advance so that they can work together to determine how and whether that request can be accommodated. Pharmacists are further prohibited from discussing their personal views with customers seeking to purchase birth control medications.⁴¹ Kmart adopts a similar policy and ensures that a customer would never “be forced to leave the pharmacy without the timely filling of a valid prescription because of ethical, moral, or religious grounds of the pharmacist on duty.”⁴²

Even smaller pharmacies have taken sides. In Fabens, Texas, a small, largely Catholic town, the town’s sole pharmacist decided to stop dispensing contraception, consistent with his religious beliefs.⁴³ His store no longer carries any forms of birth control including oral contraceptives, condoms, or emergency contraception.⁴⁴ As a result, those in the town who want access to birth control or emergency contraception must drive the 27 miles to El Paso or head to nearby Mexico to cross the border for birth control. This situation is not unique in Texas as 199 towns in that state have only one drug store.⁴⁵

As a result, customers have reported prescription refusals in at least fourteen states.⁴⁶ In several of these refusals, the pharmacist has refused to return the prescription and has berated the customer’s morals, sometimes calling people “irresponsible” for using emergency

⁴⁰ Save Roe, *supra* note 31.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Katie Fairbank, *Moral Battle Rages in Pharmacies*, The Dallas Morning News, April 24, 2005.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Refusals have been reported in California, Georgia, Louisiana, Illinois, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Texas, Washington, and Wisconsin. National Women’s Law Center, *Pharmacy Refusals 101*, at http://www.nwlc.org/pdf/6-05Update_PharmacyRefusal101.pdf (June 6, 2005).

contraception.⁴⁷ Additionally, pharmacists have found themselves discharged from their employment for following their religious beliefs and conscientiously objecting to filling certain prescriptions. Both of these results are unjust.

B. The Changing Role of the Pharmacist

For centuries, the role of the medical professional was that of a beneficent, paternalistic, decision-maker. The reigning ideology, stemming in part from the language of the Hippocratic Oath, encouraged physicians to withhold prognoses and information about potential treatment options from their patients.⁴⁸ Such withholding was deemed beneficent, because physicians feared their patients would despair if they learned the truth of their condition. The decline in paternalism and the subsequent rise in patient autonomy fundamentally altered the customer-pharmacist relationship.

In the 1960s, patient autonomy came to replace paternalism as the leading medical ideology.⁴⁹ Patient autonomy conferred upon the patient the right to make their own informed decisions concerning potential medical treatments consistent with their own morality or belief system.⁵⁰ Although this autonomous right originated as a negative right – one’s right to prevent people from making decisions on your behalf – it has arguably evolved into a positive right – the right to demand specific treatment.⁵¹ This presents a dilemma for medical professionals who view the requested treatment as ineffective, unnecessary or immoral.⁵²

⁴⁷ *Id.*

⁴⁸ ROBERT M. VEATCH, *THE BASICS OF BIOETHICS* 15 (Prentice Hall 2003)

⁴⁹ PELLEGRINO, *supra* note 4, at 47.

⁵⁰ PELLEGRINO, *supra* note 4, at 48.

⁵¹ Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 566 (2002).

⁵² *Id.*

A health care provider's judgment is not written out of the equation. A patient who wishes to exercise his autonomous right to the fullest extent is still dependant on the beneficence of the physician to explain the variety of treatment options and the consequences of each.⁵³ Moreover, the physician, as a member of the human race, still retains his autonomous right to make decisions consistent with his own morality or belief system [note that this is true in almost all the states with respect to abortion, but in many fewer states with respect to family planning, like EC].. Thus while a physician can no longer force his paternalistic beliefs on his patient, neither must a physician surrender his own autonomous rights.⁵⁴

Pharmacists, though outside the traditional patient-physician relationship, have also been affected by the changing status of patient autonomy. Over the past few decades, pharmacists have seen their responsibilities increase. Once pharmacists were mere gatekeepers of a specific class of medication and were obligated to dispense medication upon presentment of a prescription.⁵⁵ Pharmacists now have certain legally-and ethically prescribed duties to inquire into the nature of the prescription and to exercise their judgment in determining whether or not to fill the prescription.⁵⁶ When faced with a prescription for a large dose of narcotics, the pharmacist is legally obligated to question the customer about the origins of the prescription. If the answers arising from that inquiry do not satisfy their best judgment, the pharmacist is legally obligated to refuse to fill the prescription.⁵⁷

Although the pharmacist is legally required to exercise *professional* judgment in specific situations, it is unclear whether the pharmacist may also exercise her *moral* judgment with

⁵³ PELLEGRINO, *supra* note 4, at 60.

⁵⁴ PELLEGRINO, *supra* note 4, at 52.

⁵⁵ William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & LAW 1, 2 (1996)

⁵⁶ *Id.*

⁵⁷ *Id.* at 3.

regards to emergency contraception. Unlike physicians who are able to choose practice areas consistent with their moral beliefs, pharmacists are general practitioners and, without statutory protection, are beholden to the ideology of their employers.⁵⁸ Moreover, under the current law of most states, physicians, but not pharmacists, are able to refuse to perform certain procedures that violate their conscience.⁵⁹

The American Pharmacists Association's code of ethics sheds light on, but does not resolve, this conflict. Among the tenets of the code of ethics is the principle that a "pharmacist places concern for the well-being of the patient at the center of professional practice."⁶⁰ The patient-focused tone of the code continues noting that the "primary obligation of a pharmacist is to individual patients"⁶¹ and that a "pharmacist is dedicated to protecting the dignity of the patient."⁶² Belying their patient-centered focus, the American Pharmacists Association "recognizes the individual pharmacist's right to exercise conscientious refusal."⁶³ Most importantly, the American Pharmacists Association "supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."⁶⁴

Because the balance between pharmacists' conscience right of refusal and a patient's right to access legally prescribed medication is not fully resolved by bioethical or pharmaceutical

⁵⁸ *Id.*

⁵⁹ For a general discussion about current statutory protection for health care providers, see Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 566 (2002).

⁶⁰ CODE OF ETHICS FOR PHARMACISTS, § III (2005)

⁶¹ *Id.* at § VII

⁶² *Id.* at § II

⁶³ AMERICAN PHARMACISTS ASSOCIATION, 2004 HOUSE OF DELEGATES, *Report of the Policy Review Committee*.

⁶⁴ *Id.*

principles, it will like fall upon the courts and the lawmakers to be the ultimate arbiters of this conflict.

III. The Courts as Mediators

The ethical issue discussed above gives rise to two major litigable issues. First, pharmacists may bring suits when they are wrongfully discharged from employment at the pharmacy for conscientiously refusing to fill certain prescriptions. Second, patients who suffered damages from being denied timely access to emergency contraception may bring suit against the pharmacists or pharmacies. Currently, neither patients nor pharmacists have adequate legal protection.

A. Pharmacists' Suits for Wrongful Discharge

Although additional cases brough by pharmacists wrongfully discharged for conscientiously refusing to fill prescriptions will likely emerge, two high profile cases have already entered our judicial system. The first case is that of Neil Noesen, a freelance pharmacist discharged from a Kmart pharmacy in Menomonie, Wisconsin.⁶⁵ When a student presented Noesen with a prescription for birth control pills, Noesen asked whether the student planned to use the birth control pills as contraception. When the student responded in the affirmative, Noesen kept her prescription and refused to return it.⁶⁶ The student could not get her prescription filled until several days later. On April 13, 2005, administrative law judge Colleen Baird's recommendations that Noesen be reprimanded and that his license be limited were approved by

⁶⁵ Judith Davidoff, *Democrats Unveil Their Bill on the Pill*, Capital Times (Madison, WI).

⁶⁶ *Id.*

the Pharmacy Examining Board, which emphasized that Noesen was being reprimanded “not for exercising his conscience but for refusing to transfer the prescription to another pharmacy.”⁶⁷

The second high profile pharmacy refusal case also occurred at a Kmart pharmacy, this time in Delhi, Ohio. There, a patient entered Kmart to get her birth control pill Micronor refilled.⁶⁸ Karen Brauer, the pharmacist on duty, was morally opposed to birth control, so she lied and said that no Micronor was in stock when it actually was.⁶⁹ After refusing to fill the prescription, and then refusing to sign an agreement that she would fill Micronor prescriptions in the future, she was fired by Kmart. Three years later, Brauer brought a civil suit against Kmart for wrongful discharge.⁷⁰ In a preliminary hearing, the district judge ruled that an Ohio conscience law designed to protect health care providers who refuse to participate in medical procedures resulting in an abortion also applies to pharmacists.⁷¹ Furthermore, the judge concluded that dispensing birth control pills fell within the definition of a “medical procedure” that results in abortion.⁷²

Pharmacists fired for conscientiously refusing to fill certain prescriptions must seek protection from either Title VII of the Civil Rights Act of 1964⁷³ or in the aptly named Church Amendment.⁷⁴ The language of Title VII states that it is unlawful “for an employer ... to discharge any individual ... because of such individual's race, color, *religion*, sex, or national

⁶⁷ Patricia Simms, *Testimony Urges Support for Rights of Pharmacists, Patients Senate Bill Would Protect Pharmacists, But it Doesn't Address Transferring Birth Control Prescriptions Following a Refusal*, Wisconsin State Journal, May 8, 2005.

⁶⁸ Cynthia L. Cooper, *Suit Claims Using Birth Control Pills is Abortion*, Women's e-news at www.womensenews.com (July 6, 2005).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Civil Rights Act § 703, 42 USC § 2000e-2 (1964)

⁷⁴ Leora Eisenstadt, *Separation of Church and Hospital: Strategies to protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 144 (2003).

origin.”⁷⁵ A prima facie case of liability for violating the provisions of the Civil Rights Act of 1964 requires proof that an employee (1) had a bona fide religious belief that conflicted with employment requirements; (2) that she informed the employer of this belief and of the conflict; and (3) that she was discharged or discriminated against for failing to comply with the conflicting employment requirement.⁷⁶ Under Title VII, an employee’s activities may be considered religious practices even if they are not formally required under the tenets of a religion, as long as they are sincerely motivated by religious beliefs.⁷⁷

This protection, however, is not absolute. The pharmacy may rebut the prima facie case of religious discrimination by showing that the defendant employer made a good faith effort to accommodate the employee’s religious beliefs, but could not do so without undue hardship.⁷⁸ The Fifth Circuit adopted this principle in *Brener v. Diagnostic Center Hospital* when a religiously observant Jewish pharmacist refused to work on the Sabbath.⁷⁹ The director of the pharmacy tried to accommodate the pharmacist’s religious beliefs by rescheduling the other pharmacists’ shifts.⁸⁰ The rescheduling, however, negatively impacted the workplace by disaffecting the other pharmacists and disrupting work.⁸¹ Because the pharmacy had attempted to accommodate the pharmacists’ religious beliefs, but found the accommodations unduly burdensome, the pharmacy was not held culpable under Title VII.⁸²

⁷⁵ Civil Rights Act § 703, 42 USC § 2000e-2, § (a)(1) (1964) (ital. added)

⁷⁶ George Chamberlin, *Cause of Action for Discharge from Employment in Retaliation for the Exercise of Rights Protected by Title VII*, 4 CAUSES OF ACTION 2d 331 (2004).

⁷⁷ 45A Am. Jur. 2d Job Discrimination § 129. Requirement that employee’s religious practices be motivated by religious beliefs.

⁷⁸ George Chamberlin, *Cause of Action for Discharge from Employment in Retaliation for the Exercise of Rights Protected by Title VII*, 4 CAUSES OF ACTION 2d 331 (2004).

⁷⁹ 671 F.2d 141 (5th Cir. 1982).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

A similar argument could be made in the context of a pharmacist's conscientious refusal to fill prescriptions. Pharmacist colleagues may be displeased when a morally challenging prescription is constantly passed off.⁸³ Consistent refusal could result in an increased workload for other pharmacists, breeding further resentment. Any conflict over who will fill a morally challenging prescription could result in a work stoppage similar to the one noted in *Brener*. Accordingly, the pharmacy need only respond that accommodation of the pharmacist's conscientious objection placed an undue hardship on the pharmacy, and the pharmacy will not be culpable under Title VII.⁸⁴

Pharmacists fired for refusing to fill morally sensitive prescriptions may also find limited statutory protection in the aptly named Church Amendment, signed into law by President Nixon on June 18, 1973.⁸⁵ The law states, in relevant part, that the receipt of any federal funds does not authorize a court or any public official to require an individual "to perform ... any sterilization procedure or abortion if his performance ... would be contrary to his religious beliefs or moral convictions."⁸⁶ Nor may an entity receiving such federal grants "discriminate in the ... termination of employment of any ... health care personnel ... because he refused to perform ... abortion on the grounds that ... performance ... would be contrary to his religious beliefs or moral convictions."⁸⁷

This protection is inadequate to protect pharmacists wrongfully discharged for following their religious beliefs. First, the language of the statute expressly grants this protection in

⁸³ ALLEN & BRUSHWOOD, *supra* note 42, at 8.

⁸⁴ HERBE, *supra* note 7, at 94. Reasonable accommodation does require that some accommodative steps be taken by the employer in the first place.

⁸⁵ Leora Eisenstadt, *Separation of Church and Hospital: Strategies to protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE J.L. & FEMINISM 135, 144 (2003).

⁸⁶ 42 U.S.C. § 300a-7, b-1.

⁸⁷ 42 U.S.C. § 200c-1-A-B.

situations where an entity has received federal funds. It is silent as to whether private employers like Kmart, the defendant employer in both Noesen's and Brauer's suit, are held to similar standards. To be applicable to pharmacy refusals, the pharmacist must sufficiently link the pharmacy to receipt of federal funds.⁸⁸ Second, successful litigation requires that dispensing of birth control or emergency contraception be considered abortion – a potential hurdle. In 1989, a California court of appeals ruled that a Catholic hospital's refusal to disclose information about emergency contraception was not protected by California's conscience clause which protected only abortion, finding that emergency contraception is pregnancy prevention rather than abortion.⁸⁹

Pharmacists in some states may be able to rely on current conscience legislation.⁹⁰ After the Court's decision in *Roe v. Wade*, several states passed conscience clause legislation permitting objecting health care providers to refuse to participate in abortion or sterilization procedures.⁹¹ Currently, 46 states have some form of conscience clause.⁹² Though there is tremendous variability among the different conscience clauses, most limit protection to physicians. A pharmacist may be protected if the language is loosely worded enough to permit

⁸⁸ The practice of pharmacy, at a professional and business level, are regulated at the state level, and state pharmacy boards are the primary regulators of the practice. *Testimony of the American Pharmacists Association: Hearing on Freedom of Conscience for Small Pharmacies Before the Small Bus. Comm.*, 109th Cong. (2005) (statement of Linda Garrelts MacLean, pharmacist, American Pharmacists Association). Although private pharmacies do not receive federal funding to the same extent as do hospitals, the institution at which the legislation was aimed, they receive indirect federal funding through Medicare and Medicaid. Whether this level of funding is sufficient to get protection from the Church Amendment is a question still left to be answered by the courts.

⁸⁹ *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405 (Cal. Ct. App. 1989).

⁹⁰ For a full discussion, see Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 566 (2002).

⁹¹ *Id.*

⁹² *Id.* at 569.

any health care provider -- and not just physician -- to refuse, and if it covers any procedure that violates the pharmacist's conscience -- rather than simply abortion.

It is unclear, however, that either of the two pharmacists at the center of the high profile cases would receive protection from any of these legal arguments. While pharmacists who conscientiously object to filling certain prescriptions are somewhat protected, pharmacists who actively prevent patients from accessing legally prescribed medicine may not be. In affirming Noesen's reprimand, the Pharmacy Evaluation Board made clear that he was not being punished for conscientiously objecting, but for the manner in which he conscientiously objected.⁹³ Brauer, also, prevented a customer's access to birth control by lying.⁹⁴ While Title VII protects against religiously motivated firings, it does not protect discharges stemming from ethical violations.

For pharmacists who object in good faith and who do not attempt to otherwise stand in the way of a patient's access to legally prescribed medication, it appears that statutory protection is inadequate. Because courts are only equipped to interpret existing law, any additional protection must come from state and federal lawmakers.

B. Patients' Suits for Damages Stemming from Delays in Access to Prescribed Medication.

Although no suits have yet been filed for damages stemming from a pharmacist's denial of a prescription, such lawsuits are eminently foreseeable. In Denton, Texas, for example, a rape survivor seeking emergency contraception was turned away from an Eckerd's pharmacy by three

⁹³ Judith Davidoff, *Democrats Unveil Their Bill on the Pill*, Capital Times (Madison, WI).

⁹⁴ Cynthia L. Cooper, *Suit Claims Using Birth Control Pills is Abortion*, Women's e-news at www.womensenews.com (July 6, 2005).

pharmacists who refused to fill her prescription due to their religious beliefs.⁹⁵ Because she was able to fill her prescription at Walgreen's later that day, she suffered no injury.⁹⁶ It is, however, conceivable that a delay could result in injury and subsequent lawsuit.

A similar situation occurred in a case filed in the California Court of Appeals. In *Brownfield v. Daniel Freeman Marina Hospital*, a California plaintiff brought suit because the hospital where she was being treated for rape did not offer her emergency contraception.⁹⁷ The court agreed that "appellant's right to control her treatment must prevail over respondent's moral and religious convictions," and that a rape victim denied information may file an action for damages.⁹⁸ However, because the victim did not allege damages, she did not state a cause of action for injunctive or declaratory relief.⁹⁹ Accordingly, should a patient denied access to emergency contraception suffer injury, there is precedent for holding the conscientiously objecting medical provider liable.

Because victims of pharmacy refusals have no statutory protection available, they must rely on tort law to assert a cause of action. There are several tort-based doctrines under which patients could bring suit including negligence, medical malpractice, intentional or negligent infliction of emotional distress and wrongful birth or conception. These suits may be brought against a pharmacist, in an instance where a pharmacist actively interfered with a patient's access to medication, or against a pharmacy that did not establish adequate procedural protocol for accommodating a pharmacist's refusal and a patient's right to access.

⁹⁵ Planned Parenthood, *Refusal Clauses: A Threat to Reproductive Rights*, at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-041217-refusal-reproductive.xml> (July 9, 2005)

⁹⁶ *Id.*

⁹⁷ 208 Cal. App. 3d 405 (Cal. Ct. App. 1989).

⁹⁸ *Id.* at 412, 414.

⁹⁹ *Id.* at 414.

The difference between bringing a negligence suit and a medical malpractice suit turns on the duty assigned to pharmacists. Under traditional negligence principles, a pharmacist's conduct is negligent if that conduct creates an unreasonable risk of harm to the patient.¹⁰⁰ An unreasonable risk is one in which the risk created by the pharmacist's conduct outweighs the utility of the conduct.¹⁰¹ “Courts measure ordinary negligence defendants against a hypothetical reasonable person in determining whether the defendant has met the appropriate standard of care.”¹⁰² Seemingly, a patient need only assert that the pharmacist’s refusal to fill her prescription created an unreasonable risk of harm to her that outweighed the utility of the pharmacist’s conduct, and that a reasonable pharmacist in the same position would not have acted similarly. This simplicity belies the fact that quantifying the “utility” or reasonableness of religious beliefs is virtually impossible and may be a barrier sufficient to prevent litigation.

Under a medical malpractice regime, the standard of care is “determined by the skill and diligence exercised in similar matters by other professionals of ordinary competence.”¹⁰³ Malpractice gives greater deference to industry custom in defining a professional’s standard of care than does the negligence regime.¹⁰⁴ Traditionally, pharmacists were viewed as mere technicians and the legal duty applied to them was one of clerical accuracy.¹⁰⁵ Such a regime assumes that “patients rely on the skill of the physician, not the pharmacist, in deciding whether or when to take the medication” and that “a pharmacist should not use independent discretion in

¹⁰⁰ 32 AMJUR TRIALS 375 Pharmacist Liability § 3 Standard of care.

¹⁰¹ *Id.*

¹⁰² Lauren Fleischer, “From Pill-Counting to Patient Care: Pharmacists’ Standard of Care in Negligence Law.” 68 FORDHAM LAW REVIEW 165, 173 (October, 1999).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

filling prescriptions.”¹⁰⁶ In situations where the pharmacist does use independent judgment to a patient’s detriment, “courts have little difficulty in finding liability.”¹⁰⁷ Under the traditional approach, pharmacists who exercise their independent moral judgment in refusing to fill prescriptions for emergency contraception would likely be found liable for medical malpractice because they violated the duty of clerical accuracy by not accurately filling the prescription.

This may be altered under the limited-duty regime that is gaining acceptance. Under this legal regime, “pharmacists must apply their skill and knowledge to prevent unnecessary injury to customers.”¹⁰⁸ In some jurisdictions, pharmacists may be held liable even though a prescription was filled with clerical accuracy when the prescription indicated excessive or lethal doses, contained inadequate directions, or included known contraindications.¹⁰⁹ In circumstances where a pharmacist is presented with a prescription for a drug with known addictive properties, and the patient shows signs of addiction to that drug, the pharmacist may have a duty to refuse to fill the prescription.¹¹⁰ Because the limited-duty approach injects a measure of judgment into the pharmacist’s job, it may permit a pharmacist to escape liability for injuries stemming from a pharmacy refusal. The pharmacist could argue that she was acting to prevent injury to a patient’s fertilized egg by refusing to fill the prescription for emergency contraception. The counterargument is that a pharmacist would not likely escape liability for conscientiously refusing to dispense other types of medication – for example, heart medicine – if the pharmacist independently judged the medicine to cause harm. Because these arguments have never been tested in court, it is unclear which would be successful.

¹⁰⁶ *Id.* at 175.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 179.

¹⁰⁹ *Id.* at 180.

¹¹⁰ *Id.* at 182.

Both negligence and medical malpractice suits require that the plaintiff allege that the pharmacist's failure to discharge his or her duty directly or proximately resulted in harm to the patient.¹¹¹ In instances where such harm has occurred, the plaintiff is entitled to the damages she can prove beyond a preponderance of doubt. In situations where no physical injury occurred, a patient denied access to emergency contraception may be able to state a claim for negligent or intentional infliction of emotional distress.¹¹²

If either the pharmacist's conduct in refusing to fill the prescription or the pharmacy's conduct in inadequately preparing for this confrontation is found to be negligent, the plaintiff patient may be able to assert a claim for "wrongful conception" or "wrongful pregnancy." Recognized as a tort in several jurisdictions, a claim may be brought when physician, pharmacist, or other health professional provides ineffective contraception, the parents conceive, and the birth of a healthy, but unplanned, baby results.¹¹³ Although typically brought in the context of a negligent sterilization procedure,¹¹⁴ the language of most court documents does not so limit the claim.

In an unpublished opinion from a Michigan Court of Appeals,¹¹⁵ the court permitted a plaintiff to recover for wrongful pregnancy and medical malpractice unrelated to sterilization procedures. In that case, a plaintiff brought suit on behalf of his granddaughter, a developmentally disabled girl unable to consent to sexual interaction.¹¹⁶ The grandfather appointed Macomb-Oakland Guardianship to be the plenary guardian for his granddaughter, and

¹¹¹ 32 AMJUR TRIALS 375 Pharmacist Liability § 36. Elements of cause of action.

¹¹² *Id.*

¹¹³ *Taylor v. Kurapati*, 236 Mich.App. 315, 600 N.W.???.

¹¹⁴ *See e.g. Lovelace Medical Center v. Mendez*, 805 P.2d 603 (N.M. 1991) (finding wrongful pregnancy or wrongful conception when a physician found and ligated only one fallopian tube and failed to inform the mother of the unsuccessful operation).

¹¹⁵ *Reyes v. Kay-Jan*, 2002 WL 522808 (Mich.App.) (Unpublished opinion).

¹¹⁶ *Id.*

she was placed in a group home run by Kay-Jan inc. During her stay at the group home, she was permitted to attend the local high school for the fall semester. A few months thereafter, the granddaughter became pregnant, likely by rape.¹¹⁷ The court held that the grandfather stated a claim for wrongful pregnancy and medical malpractice, and could contest on remand the costs of pregnancy and birth, related damages for pain and suffering, medical complications caused by the pregnancy, and mental distress.¹¹⁸

The North Carolina Supreme Court in *McAllister v. Ha*¹¹⁹ stated that the plaintiffs stated a claim for wrongful pregnancy in another unusual circumstance. There, parents brought suit against a doctor who did not adequately inform them of the risk of giving birth to a child with sickle-cell disease. The doctor tested the parents for increased risk of sickle-cell disease and “told plaintiffs that if there was anything to be concerned about, he would call them, and that if they did not hear from him, there was no cause for concern.”¹²⁰ The parents never heard from the doctor, although he learned that they had a one-in-four chance of giving birth to a child with the disease. The parents did give birth to an ill child and brought suit against the defendant doctor.¹²¹ While noting that the state does not recognize wrongful birth claims, the court differentiated those claims from claims where “the fact of the pregnancy *as a medical condition* ... [gave] rise to compensable damages and complete[d] the elements for a claim of negligence.”¹²² Because

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ 496 S.E.2d 577 (N.C. 1998)

¹²⁰ *Id.* at 580.

¹²¹ *Id.*

¹²² *Id.* at 582.

the doctor breached the duty of appropriate care, he could be held liable for damages stemming from the birth of a child.¹²³

Moreover, some courts have gone so far as to award parents of unexpected or wrongfully conceived children costs of raising the child to majority.¹²⁴ These courts generally recognize a legally protected interest in controlling the financial security and economic stability of their family.¹²⁵ Because under normal tort and contract principles, the cost is both reasonably foreseeable and a natural and probable consequence, the courts reason that physicians should be held liable in this regard for their negligence.¹²⁶ Accordingly, if a patient brings a claim for untimely filling of a prescription and either the pharmacist or pharmacy is found negligent – a difficult leap – the pharmacist or pharmacy may, in certain jurisdictions, be liable for the costs of raising a child until majority.

Because patients who are denied access to legally prescribed contraception have no statutory protection, they must rely on tort law. As with pharmacists, current protection for injured patients is inadequate. Therefore, any further protection must come from federal and state lawmakers.

IV. Statutory Protections for Pharmacists and Patients

¹²³ Clearly, however, not all unconventional wrongful conception suits are upheld. In *Henson v. Sorrell*, 1999 WL 5360 (Tenn.Ct.App.) (Unpublished opinion), a man brought suit against his former girlfriend after she stopped taking birth control without telling him. The court noted that suits “in which the father attempts to recover damages from the mother because of false representations concerning birth control also have been universally rejected primarily on the basis of public policy.”

¹²⁴ See, e.g. *Marciniak v. Lundborg*, 450 N.W.2d 243 (Wis. 1990) (finding that the costs of raising child to age of majority may be recovered by parents for damages caused by physician’s negligence); *Lovelace Medical Center v. Mendez*, 805 P.2d 603 (N.M. 1991) (same); *Burke v. Rivo*, 551 N.E.2d 1, 4 (Mass. 1990) (same).

¹²⁵ *Lovelace Medical Center*, 805 P.2d at 610-612.

¹²⁶ *Burke*, 551 N.E.2d at 4.

Current law, both state and federal, is extremely polarized. Certain laws focus solely on the rights of the pharmacists to refuse without regard to consequences of the patient. Others focus almost exclusively on patient access, requiring pharmacists to fill every legal prescription regardless of their conscience or moral beliefs. Most of these laws, however, are inadequate because they offer incomplete protection for both pharmacists and patients.¹²⁷

A. Current Laws and Proposed Legislation

Laws concerning the rights of pharmacists and patients come primarily from state lawmakers. Although federal laws such as Title VII and the Church Amendment are relevant to pharmacists' rights, state laws primarily establish duties of care and determine the extent of protection afforded pharmacists' conscientious objection.

Four states – South Dakota, Arkansas, Mississippi, and Georgia – currently recognize the rights of pharmacists to refuse to fill morally challenging prescriptions.¹²⁸ Of these, there is great variety in the extent of the protection offered. Georgia's statute is the most minimal stating only that "[i]t shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs."¹²⁹ Because pharmacist liability following a pharmacist refusal does not necessarily turn on whether conduct was or was not professional, the statute does not offer pharmacists much protection in the event of a patient's suit against the pharmacist. Moreover, because it does not provide protection against employment discrimination, it provides no help if a pharmacist is discharged for conscientiously refusing to fill prescriptions.

¹²⁷ See appendix A for a table of relevant laws and bills.

¹²⁸ S.D. CODIFIED LAWS § 36-11-70 (2005); ARK. CODE ANN. § 20-16-304 (2005); MISS. CODE ANN. § 41-107-5 (2005); GA. COMP. R. & REGS. R. 480-5-.03 (2005).

¹²⁹ GA. COMP. R. & REGS. R. 480-5-.03 (2005).

Arkansas' statute provides slightly more protection for pharmacists. In addition to asserting that “[n]othing ... shall prohibit a ... pharmacist ... from refusing to furnish any contraceptive procedures, supplies, or information,” it also states that “[n]o such institution, employee, agent, or physician shall be held liable for the refusal.”¹³⁰ South Dakota¹³¹ and Mississippi¹³² permit pharmacist refusals and provide immunity from liability, yet they go one step further. Both statutes make it unlawful for any person or institution “to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience.”¹³³

These four conscientious objection statutes go too far and not far enough in protecting pharmacists. The statutes go too far because none of them ensure patient access to legally prescribed medication, in violation of the Pharmacist Code of Ethics¹³⁴ and the principles of the American Pharmacists Association.¹³⁵ Moreover, they shield from liability a pharmacist who conscientiously refuses in an unethical manner or unnecessarily impedes a patient's access to emergency contraception – actions that are against the law in most states and rightfully should be the bases of liability. Georgia's law and Arkansas' law do not go far enough to protect pharmacists from discriminatory discharge following a pharmacy refusal – there is no protection against employment discrimination or wrongful discharge – and none of the statutes give

¹³⁰ ARK. CODE ANN. § 20-16-304 (2005)

¹³¹ S.D. CODIFIED LAWS § 36-11-70 (2005)

¹³² MISS. CODE. ANN. § 41-107-5 (2005)

¹³³ *Id.*

¹³⁴ CODE OF ETHICS FOR PHARMACISTS (2005) (“Pharmacists are health professionals who assist individuals in making the best use of medications. ... a pharmacist promises to help individuals achieve optimum benefit from their medications.”)

¹³⁵ *Testimony of the American Pharmacists Association: Hearing on Freedom of Conscience for Small Pharmacies Before the Small Bus. Comm.*, 109th Cong. (2005) (statement of Linda Garrelts MacLean, pharmacist, American Pharmacists Association) (“APhA ... supports the establishment of systems to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.”).

pharmacists a cause of action against their pharmacy employer should the pharmacy employer inadequately accommodate their beliefs.

Twelve states – Arizona, Arkansas, Georgia, Indiana, Maryland, Michigan, Rhode Island, South Dakota, Tennessee, Texas, Vermont, and West Virginia – are considering similar conscience legislation that will also protect the rights of pharmacists to refuse to fill certain prescriptions.¹³⁶ Like South Dakota’s and Mississippi’s laws, most of the bills permit pharmacists to conscientiously refuse to fill prescriptions, shield pharmacists from liability, and prohibit discrimination against a pharmacist based on the pharmacist’s conscientious refusal. Several of these proposed bills¹³⁷ focus on the pharmacist providing written notice of conscientious objection to the pharmacy employer. It is unclear what purpose these written notice serve – particularly when pharmacists and pharmacies are shielded from any liability that could require courtroom proof of the conscientious refusal.

Several of these bills have unique and interesting provisions. Maryland, for instance, states that “[a] pharmacist may not be required to ... refer a person to any source for emergency contraception.”¹³⁸ It is unclear whether this language permits withholding prescriptions so that they cannot be filled elsewhere, or simply permits the pharmacist to refuse to transfer the prescription to another pharmacy. South Dakota’s statute permits tax payers, as well as health

¹³⁶ H.B. 2541 (Ariz. 2005); S.B. 1485 (Ariz. 2005); S.B. 1141 (Ark. 2005); S.B. 123 (Ga. 2005); S.B. 48 (Ind. 2005); S.B. 541 (Md. 2005); H.B. 4741 (Mich. 2005); 5085 (R.I. 2005); H.B. 1255 (S.D. 2005); S.B. 76 (Tenn. 2005); H.B. 16 (Tex. 2005); H.B. 2061 (Tex. 2005); H.B. 183 (Vt. 2005); S.B. 673 (W. Va. 2005).

¹³⁷ H.B. 2541 (Ariz. 2005) (“A health professional or an employee of a health professional who states in writing ...”); S.B. 123 (Ga. 2005) (“any pharmacist who states in writing...”); H.B. 4741 (Mich. 2005) (A health care provider shall notify his or her employer in writing...”); S.B. 76 (Tenn. 2005) (“and who has stated such a conscientious objection in writing...”); H.B. 2061 (Tex. 2005) (“Written notice to employer required.”).

¹³⁸ S.B. 541 (Md. 2005)

care providers, to conscientiously object.¹³⁹ Tennessee permits an entire pharmacy to conscientiously object, so long as the owner “promptly posts notice of such objection in writing in a place clearly visible to pharmacy customers.”¹⁴⁰ Interestingly, only Texas’s bill could require health care providers to participate in services to which they conscientiously object, even if they have previously notified their employers in writing.¹⁴¹ This requirement would only occur if a health care provider asserts an objection less than 24 hours before a scheduled procedure and a replacement cannot be obtained.¹⁴²

In response to proposals for increased conscience protection, four states – California, Missouri, New Jersey and West Virginia – have proposed legislation guaranteeing a patient’s access to medication.¹⁴³ Under the California bills, a pharmacist can refuse to fill prescriptions if the prescription is contrary to law, contraindicated, or the pharmacist conscientiously objects.¹⁴⁴ For a pharmacist to conscientiously object, the pharmacist must notify her employer in writing in advance, and the employer “shall establish protocols that ensure that the patient has timely access to the prescribed drug or device despite the licentiate's refusal to dispense the prescription or order.”¹⁴⁵ Employers are prohibited from discriminating against pharmacists, just as pharmacists are prohibited from harassing patients seeking drugs such as emergency contraception.¹⁴⁶ If a patient presents a prescription for a drug that is not carried by the pharmacy, the pharmacy must either offer to fill the prescription with a generic or similar

¹³⁹ “[N]o health care payer is required to pay for ... any health care service or product that violates its conscience.” H.B. 1255 (S.D. 2005).

¹⁴⁰ S.B. 76 (Tenn. 2005)

¹⁴¹ H.B. 2061 (Tex. 2005)

¹⁴² *Id.*

¹⁴³ A.B. 21 (Cal. 2005); S.B. 644 (Cal. 2005); S.B. 458 (Mo. 2005); S.B. 2178 (N.J. 2005); H.B. 2807 (W. Va. 2005).

¹⁴⁴ A.B. 21 (Cal. 2005); S.B. 644 (Cal. 2005).

¹⁴⁵ A.B. 21 (Cal. 2005).

¹⁴⁶ A.B. 21 (Cal. 2005); S.B. 644 (Cal. 2005).

version,¹⁴⁷ or immediately notify the patient, promptly transfer the prescription, or return the prescription to a patient.¹⁴⁸ Missouri's bill, though less comprehensive, similarly permits a pharmacist to conscientiously object, presuming the objection can be accommodated by the pharmacist's employer without undue hardship.¹⁴⁹

Both New Jersey and West Virginia are more stringent with their allowances to pharmacists. New Jersey's law succinctly states that "[a] pharmacist shall not refuse to dispense or refill a prescription or medication order solely on the grounds that to dispense or refill the prescription or medication order would contravene the pharmacist's philosophical, moral or religious beliefs."¹⁵⁰ Similarly, West Virginia only permits refusal when prescribed medication is contraindicated or the medication is "not in stock and is unavailable for dispensation."¹⁵¹ Must-fill legislation similar to West Virginia's can have unintended consequences. Because a pharmacist has no duty to fill prescriptions that are not in stock, many more pharmacies may choose simply not to stock controversial medication. Such legislation could ironically result in medications being less accessible to patients.

Illinois recently instituted such a must-fill policy. On February 23, 2005, a pharmacist at a Chicago Osco refused to fill a medical prescription for contraceptives.¹⁵² In response, on April 1, 2005, Governor Blagojevich filed an emergency rule that requires pharmacists that sell contraceptives to fill prescriptions for birth control without delay. If the contraceptive is not in stock, the pharmacy must order it or transfer it to another local pharmacy, if that is the patient's

¹⁴⁷ A.B. 21 (Cal. 2005).

¹⁴⁸ S.B. 644 (Cal. 2005).

¹⁴⁹ S.B. 458 (Mo. 2005).

¹⁵⁰ S.B. 2178 (N.J. 2005).

¹⁵¹ H.B. 2807 (W. Va. 2005).

¹⁵² Planned Parenthood, *A Summary of State Legislation, Laws, and Administrative Action*, at www.plannedparenthood.org (July 6, 2005).

preference.¹⁵³ On May 17, 2005, the Illinois Joint Committee on Administrative Rules voted in favor of sustaining the emergency rule, the finality of which will soon be decided.¹⁵⁴ In the meantime, two lawsuits have been filed by the American Center for Law & Justice on behalf of three pharmacists opposed to the rule.¹⁵⁵ [The APhA originally opposed the regulation, but no longer does.]

Several federal bills have been introduced in the House and Senate that are more general and have a different focus. Rather than delving into the details about who is impacted in various scenarios, bills S.809, H.R. 1652 and H.R. 1539 focus instead on the conduct of the pharmacy and the pharmacist.¹⁵⁶ All require that the pharmacy ensure that, in the event a pharmacist refuses to fill a prescription that is in stock, the prescription be promptly filled by another pharmacist. All require that the pharmacy does not employ anyone who will harass customers or refuse to return a prescription. One bill creates a private cause of action for those aggrieved by violations of the provision. Because of the general nature of these bills, however, there are several important issues that are not addressed. One of the more important issues left unanswered is how the situation is resolved in towns with only one pharmacist.

For legislation to adequately protect the interests of justice, it must protect both parties. Moreover, it must protect both of these parties to a greater, yet more nuanced, extent than do any of the current or proposed bills.

B. Fundamental Principles for Future Legislation

Although legislation to this point has mostly been polarized, future legislation can and must accommodate the pharmacist's right to conscientious refusal and the patient's right to

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Access to Legal Pharmaceuticals Act of 2005, H.R. 1652, S. 809, 109th Cong. (2005).

access legally prescribed medication in a timely manner. To do so, a law should have, at a minimum, three components. First, it should require that every pharmacy have a plan that can accommodate a conscientiously objecting pharmacist while guaranteeing a patient's seamless access to medication. As discussed below, there are several ways this can be accomplished. Second, the law should provide adequate protection for pharmacists who are wrongfully discharged or discriminated against for conscientiously objecting to dispensing emergency contraception. Third, the law must ensure that patients have timely access to emergency contraception and ensure a cause of action for any party injured as a result of being denied access to emergency contraception.

Legislation must require that pharmacies have a policy in place that accommodates an employee pharmacist's conscientious beliefs while guaranteeing seamless access to legally prescribed medication. Such a policy requires proactive behavior on the part of the pharmacies that employ conscientiously objecting pharmacists and dialogue among local health care providers to ensure seamless access.¹⁵⁷ In larger pharmacies, the solution may simply involve staffing the pharmacy in a way that ensures the availability of another pharmacist to dispense the prescription.¹⁵⁸

In smaller pharmacies, accommodation of a pharmacist's conscientious objection may require more advance planning. A patient's request for emergency contraception can be accommodated by contracting with another nearby pharmacy willing to fill the prescription. An advance arrangement among the pharmacies would ensure a patient's access. The pharmacy could then post notice of their refusal and direct a patient of the best way to get timely access to

¹⁵⁷ *Testimony of the American Pharmacists Association: Hearing on Freedom of Conscience for Small Pharmacies Before the Small Bus. Comm.*, 109th Cong. (2005) (statement of Linda Garrelts MacLean, pharmacist, American Pharmacists Association).

¹⁵⁸ *Id.*

emergency contraception. In the event that no other local pharmacies are willing to dispense emergency contraception, laws should permit the prescribing physician to dispense the medication to their own patients.¹⁵⁹

Confrontation can be avoided entirely by providing enough information to direct patients to appropriate channels for filling their prescriptions for emergency contraception. One way of avoiding confrontation is by directing prescribers and patients proactively to those pharmacies that carry emergency contraception and away from those pharmacies that conscientiously object.¹⁶⁰ Organizations such as the Association of Reproductive Health Professionals operate national hotlines and websites that list providers of emergency contraception.¹⁶¹ When patients have this knowledge and pharmacies proactively dialogue with other local health care providers, these conflicts can be avoided altogether. In the event a pharmacy has an adequate accommodation plan, the pharmacy would not be held liable for any injuries stemming from a refusal. A pharmacy would never be held liable, either civilly, criminally or administratively, for a pharmacist's refusal that violates the pharmacy's accommodation policies (i.e. harassment or refusing to return a prescription).

Second, legislation must protect pharmacists who conscientiously object to dispensing any medication, including emergency contraception, in almost every circumstance. "Pharmacists, like physicians and nurses, should not be forced to participate in procedures to which they have moral objections."¹⁶² In order to receive protection, pharmacists should notify their employer in

¹⁵⁹ American Medical Association Resolution: "Preserving Patients' Ability To Have Legally Valid Prescriptions Filled," (2005).

¹⁶⁰ *Testimony of the American Pharmacists Association: Hearing on Freedom of Conscience for Small Pharmacies Before the Small Bus. Comm.*, 109th Cong. (2005) (statement of Linda Garrelts MacLean, pharmacist, American Pharmacists Association).

¹⁶¹ *Id.*

¹⁶² *Id.*

advance of their objection. The employing pharmacy then has an obligation to accommodate the employee, consistent with the policies above. If employee pharmacists have notified their employer of their conscientious objection, they will not be held liable for injuries stemming from their refusal to fill prescriptions for emergency contraception, provided they comply with the accommodation plan.

Legislation must also ensure that pharmacists are protected from potential discrimination – either in hiring, firing, or otherwise – on the basis of the pharmacist’s beliefs, and should grant pharmacist’s a cause of action for wrongful discharge or other discrimination in such circumstances. A pharmacist should not, however, be shielded from civil, criminal or administrative liability in the event the pharmacist has actively impeded a patient’s access to medication. “The pharmacist should not use their position of power to berate the patient, to share their own personal beliefs, or obstruct patient access to therapy – such as refusing to return a patient’s legally valid, clinically appropriate prescription. In most states this activity is prohibited by law.”¹⁶³ Accordingly, a pharmacist is not permitted to bring suit against an employer for wrongful discharge when the pharmacist was discharged for harassing, refusing to return, or otherwise impeding a patient’s access to medication, in violation of the pharmacy’s accommodation plan.

Third, legislation must ensure that patients have timely access to all medication. “Patients should receive their medications without harassment and interference.”¹⁶⁴ They are not, however, entitled to demand performance from conscientiously objecting pharmacists. In the event a patient is injured by a pharmacist’s refusal to dispense emergency contraception, the patient

¹⁶³ *Id.*

¹⁶⁴ *Id.*

should have a private cause of action so that any injury may be reimbursed. The suit should be brought against a pharmacy in the event the pharmacy had inadequate accommodation plans and against the pharmacist employee if the pharmacist acted contrary to the accommodation plan.

Legislation with all three components will adequately protect all parties in the event of a pharmacy refusal. More importantly, legislation of this type ensures that pharmacy refusals would be minimal by focusing on refusal prevention. Lastly, it appropriately accommodates both the pharmacist's conscientious objection with a patient's need for timely access to prescribed medication.

V. Conclusion

Advances in medical technology have given rise to morally challenging prescriptions such as emergency contraception. At the same time, the role of the pharmacist has continually expanded. Though once considered a mere technician – responsible for filling every legal prescription presented – today's pharmacist has wide-ranging responsibilities that require that the pharmacist exercise professional judgment in dispensing medication. When the pharmacist exercises moral judgment, instead of professional judgment, and refuses to dispense medication, severe consequences can result for both parties. Patients can suffer injuries from being denied timely access to medication. Pharmacists may be wrongfully discharged for acting in accordance with their religious beliefs. Neither of these parties is sufficiently protected in the event of a pharmacy refusal.

Federal and state legislatures have several pieces of relevant legislation pending. Most bills take an all-or-nothing approach, either protecting pharmacists to the detriment of patients, or protecting patients to the detriment of pharmacists. In order to protect all parties, legislation must prevent conflicts from occurring by encouraging dialogue among regional health care

providers. It must also protect pharmacists from wrongful discharge for acting consistent with their beliefs. It must protect patients who suffer injury stemming from a pharmacy refusal. Anything less is unjust to both patients and health care providers.

Purpose	State	Law/Bill Number	Language
Current legislation recognizing a pharmacist's right to conscientiously object.	South Dakota	South Dakota Code 36-11-70	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.
	Arkansas	Arkansas Code 20-16-304	(4) Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information; and (5) 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.
	Mississippi	Mississippi Code 41-107-5	(1) <i>Rights of Conscience.</i> A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation. (2) <i>Immunity from Liability.</i> No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience. However, this subsection does not exempt a health care provider from liability for refusing to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation. (3) <i>Discrimination.</i> It shall be unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience. For purposes of this chapter, discrimination includes, but is not limited to: termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, disciplinary or retaliatory action.
	Georgia	<i>Ga. Comp. R. & Regs. r. 480-5-.03</i>	(n) Refusal to Fill Prescription. It shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs.

Considering legislation that would permit pharmacists to conscientiously object.	Arizona	Arizona House Bill Number 2541	<i>Right to refuse to participate in certain activities.</i> A health professional or an employee of a health professional who states in writing an objection to participating in any of the following activities on moral or religious grounds is not required to participate in that activity and is not subject to disciplinary action for not participating in that activity: 1. An abortion. 2. Emergency contraception.
		Arizona Senate Bill Number 1485	Same as above.
	Arkansas	Arkansas Senate Bill 1141	(A)(1) a health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates the health care provider's conscience (b)(1) no health care provider shall be civilly, criminally, or administratively liable solely for declining to participate in a health care service that violates his or her conscience. (c) it is unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board that certifies competency in medical specialties to discriminate against any health care provider in any manner based on the provider's declining to participate in a health care service that violates the provider's conscience.
	Georgia	Georgia Senate Bill 123	(B) any pharmacist who states in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to fill a prescription for a drug which purpose is believed by the pharmacist to have the effect or possible effect of terminating a pregnancy; and the refusal of the person to fill such prescription shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against the person. The written objection shall remain in effect until the person revokes it or terminates his or her association with the facility with which it is filed.
	Indiana	Indiana Senate Bill Number 48	No person shall be required, as a condition of training, employment, pay, promotion, or privileges, to (1) Agree to perform or participate in the performing of abortions. (2) dispense: (a) a medical device or drug that may result in, or that is intended to result in, an abortion; or (b) artificial birth control.
	Maryland	Maryland Senate Bill Number 541	A pharmacist may not be required to dispense emergency contraception or refer a person to any source for emergency contraception.
	Michigan	Michigan House Bill Number 4741	(1) A health care provider may object as a matter of conscience to providing or participating in a health care service on ethical, moral, or religious grounds. (2) A health care provider shall notify his or her employer in writing of a conscientious objection described in subsection (1). The written notice shall be given directly to his or her supervisor and shall include a statement explaining his or her conscientious objection and the health care service or services to which he or she specifically objects to providing or participating in under this act.
	Rhode	Rhode Island	(A) A health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience.

		Number 5085	<p>(b) No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.</p> <p>(c) It shall be unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience.</p>
	South Dakota	South Dakota House Bill Number 1255	<p>Section 2. Any health care provider has the right not to participate, and no health care provider is required to participate, in a health care service that violates the provider's conscience.</p> <p>Section 3. No health care provider is civilly, criminally, or administratively liable for declining to participate in a health care service that violates the provider's conscience.</p> <p>Section 4. No person, health care provider, health care institution, public or private institution, public official, or any board that certifies competency in medical specialties may discriminate against any health care provider in any manner based on the provider's declining to participate in a health care service that violates the provider's conscience. For purposes of this section, discrimination includes termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, disciplinary, or retaliatory action.</p> <p>Section 9. Any health care payer has the right to decline to pay, and no health care payer is required to pay for or arrange for the payment of any health care service or product that violates its conscience.</p> <p>Section 10. No health care payer and no person, association, corporation, or other entity that owns, operates, supervises, or manages a health care payer is civilly or criminally liable by reason of the health care payer's declining to pay for or arrange for the payment of any health care service that violates its conscience.</p>
	Tennessee	Tennessee Senate Bill Number 76	<p>SECTION 3. A pharmacist who objects to filling a particular type of prescription on the grounds that it violates his or her ethical or religious principles, and who has stated such a conscientious objection in writing to his or her supervisor, shall not be required to fill such a prescription and may not be disciplined by any administrative authority for refusing to fill such a prescription.</p> <p>SECTION 4. (a) When an owner or operator of a pharmacy objects to filling a particular type of prescription on the grounds that it violates his, her or its ethical or religious principles, and promptly posts notice of such objection in writing in a place clearly visible to pharmacy customers, such owner or operator shall not be required to fill such a prescription and may not be disciplined by any administrative authority for refusing to fill such a prescription.</p> <p>(b) An owner or operator of a pharmacy may post a sign in a place clearly visible to pharmacy customers stating the type of prescription which will not be filled at such pharmacy.</p> <p>SECTION 5. No employer may discharge, discipline, discriminate or retaliate against, or deny employment or promotion to, a pharmacist because the pharmacist refuses, or states to the employer an intention to refuse, to fill a particular type of prescription; provided, the refusal is based on the grounds that it violates the pharmacist's ethical or religious principles and the pharmacist has stated the conscientious objection in writing to his or her supervisor.</p> <p>SECTION 6. A pharmacist who refuses to fill a particular type of prescription under Section 3 and the owner or</p>

			operator of the pharmacy at which that pharmacist practices shall be immune from liability for any damage caused by the refusal.
	Texas	Texas House Bill Number 16	<p>A physician, PHARMACIST, nurse, staff member, or employee of a hospital, health care facility, OR PHARMACY who objects to directly or indirectly performing or participating in an abortion procedure OR DISPENSING AN EMERGENCY CONTRACEPTIVE may not be required to directly or indirectly:</p> <p>(1) perform or participate in the procedure</p> <p>(2) DISPENSE OR PARTICIPATE IN THE DISPENSING OF THE CONTRACEPTIVE</p> <p>(a) A hospital, health care facility, OR PHARMACY may not discriminate against a physician, PHARMACIST, nurse, staff member, or employee, or an applicant for one of those positions, who refuses to</p> <p>(1) perform or participate in an abortion procedure; OR (2) DISPENSE OR PARTICIPATE IN THE DISPENSING OF AN EMERGENCY CONTRACEPTIVE.</p> <p>(b) A hospital, health care facility, OR PHARMACY may not discriminate against a physician, PHARMACIST, nurse, staff member, or employee because of the person's willingness to participate in an abortion procedure OR THE DISPENSING OF AN EMERGENCY CONTRACEPTIVE at another facility OR PHARMACY.</p> <p>(c) An educational institution may not discriminate against an applicant for admission or employment as a student, intern, or resident because of the applicant's attitude concerning abortion</p>
		Texas House Bill Number 2061	<p>Right to object. (a) notwithstanding any other law, a health care provider may in accordance with this chapter and as a matter of conscience object to providing or participating in the provision of a health care service on ethical, moral, or religious grounds. (b) a health care provider may assert an objection under this section: (1) at the time the provider is offered employment; (2) at the time the health care provider adopts an ethical, moral, or religious belief system that conflicts with providing or participating in the provision of a health care service; or (3) not later than 24 hours after receiving notice that the provider is scheduled to participate in a health care service to which the provider objects on ethical, moral, or religious grounds.</p> <p>Written notice to employer required. (a) a health care provider that exercises the right to object provided under section 172.151 shall notify the provider's employer in writing of the objection. The written notice must: (1) be given directly to the health care provider's supervisor; and (2) include a statement explaining the provider's objection on ethical, moral, or religious grounds and any health care service to which the provider specifically objects to providing, or participating in the provision of, under this chapter....</p> <p>(a) following receipt of a written notice from a health care provider, an employer may not require the provider to provide or participate in the provision of the health care service or services to which the provider specifically objects in the notice. (b) if a health care provider asserts an objection under this subchapter less than 24 hours before a scheduled health care service, an employer shall make a reasonable effort to excuse the provider from providing or participating in the provision of the health care service or find a replacement for the provider. If a replacement is unavailable and the health care provider cannot be excused, the employer may require the health care provider to provide or participate in the provision of that scheduled health care service.</p> <p>A health care provider may not assert an objection under this subchapter: (1) during a public health emergency; (2) under circumstances in which a patient's condition, in the reasonable medical judgment of an</p>

			<p>attending physician or medical director of the health care facility that employs the health care provider, requires immediate action to prevent the patient's death or is such that a delay would create a serious risk of substantial and irreversible impairment of a major bodily function to that patient and another qualified health care provider is not available to provide that health care service; or (3) based on a patient's: (a) race, color, religion, sex, or national origin, within the meaning of section 703 of the federal civil rights act of 1964.</p> <p>A health care provider's objection to providing or participating in the provision of a health care service in accordance with this subchapter may not be the basis for: (1) civil liability; (2) a criminal action; (3) an administrative action or an action affecting the provider's license; (4) termination of employment or refusal of staff privileges at a health care facility, except as provided by section 172.158; or (5) disciplinary action, penalties, or discrimination, including denial of promotions and raises in wages.</p>
	Vermont	Vermont House Bill Number 183	<p>(a) a health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience.</p> <p>(b) no health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.</p> <p>(c) it shall be unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience.</p>
	West Virginia	West Virginia Senate Bill Number 673	<p>(a) Rights of conscience. A health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience.</p> <p>(b) Immunity from liability. No health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.</p> <p>(c) Discrimination. It shall be unlawful for any person, health care provider, health care institution, public or private institution, public official, or any board which certifies competency in medical specialties to discriminate against any health provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience.</p>
Considering legislation that would guarantee patients access to legal prescriptions.	California	California Assembly Bill Number 21	<p>(a) Notwithstanding any other provision of law, a pharmacist shall dispense a lawful prescription unless one of the following circumstances exists:</p> <p>(1) The pharmacist determines, based on his or her professional training and judgment, that dispensing the prescription is contrary to law or, after consulting with the patient's prescriber, that it is contraindicated for the patient.</p> <p>(2) The pharmacy does not have the prescribed trade or brand name drug in stock. The pharmacist shall offer the patient another drug product, if available, with the same ... generic drug name.</p> <p>(3) (A) The pharmacist elects to refuse on ethical, moral, or religious grounds to dispense a drug pursuant to a lawful request. A pharmacist may decline to dispense a drug on these grounds only after notifying his or her employer in writing of his or her objections. The pharmacist shall provide this notification upon acceptance of employment and immediately after any change to that decision.</p> <p>(B) An employer shall, upon receipt of the notification described in subparagraph (A), establish a policy and</p>

			<p>protocol to accommodate the patient's NEED for the drug.</p> <p>(b) An employer shall not withdraw an offer of employment or terminate employment based on the notification or change in the notification, as described in subparagraph (A) of paragraph (3) of subdivision (a). It shall constitute unprofessional conduct and a violation of this chapter for a pharmacist to harass a patient by engaging in extreme or outrageous conduct and intentionally causing the patient emotional distress or by engaging in conduct with reckless indifference to the likelihood of causing the patient emotional distress. For these purposes, the emotional distress shall be actual and severe as determined by a reasonable person.</p>
		<p>California Senate Bill Number 644</p>	<p>(a) No licentiate shall obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient. A violation of this section constitutes unprofessional conduct by the licentiate and shall subject the licentiate to disciplinary action by his or her licensing agency.</p> <p>(b) Notwithstanding any other provision of law, a licentiate shall dispense drugs and devices, as described in subdivision (a) of Section 4024, pursuant to a lawful order or prescription unless one of the following circumstances exists:</p> <p>(1) Based solely on the licentiate's professional training and judgment, dispensing pursuant to the order or the prescription is contrary to law, or the licentiate determines that the prescribed drug or device would cause a harmful drug interaction or would otherwise adversely affect the patient's medical condition.</p> <p>(2) The prescription drug or device is not in stock. If an order or prescription cannot be dispensed because the drug or device is not in stock, the licentiate shall take one of the following actions:</p> <p>(A) Immediately notify the patient and arrange for the drug or device to be delivered to the site or directly to the patient in a timely manner.</p> <p>(B) Promptly transfer the prescription to another pharmacy known to stock the prescription drug or device that is near enough to the site from which the prescription or order is transferred, to ensure the patient has timely access to the drug or device.</p> <p>(C) Return the prescription to the patient and refer the patient . The licentiate shall make a reasonable effort to refer the patient to a pharmacy that stocks the prescription drug or device that is near enough to the referring site to ensure that the patient has timely access to the drug or device.</p> <p>(3) The licentiate refuses on ethical, moral, or religious grounds to dispense a drug or device pursuant to an order or prescription. A licentiate may decline to dispense a prescription drug or device on this basis only if the licentiate has previously notified his or her employer, in writing, of the drug or class of drugs to which he or she objects, and the licentiate's employer can, without creating undue hardship, provide a reasonable accommodation of the licentiate' s objection. The licentiate's employer shall establish protocols that ensure that the patient has timely access to the prescribed drug or device despite the licentiate's refusal to dispense the prescription or order.</p>
	<p>Missouri</p>	<p>Missouri Senate Bill Number 458</p>	<p>1. Pharmacists have a duty to fill all lawful prescriptions properly. If a pharmacist holds sincere religious beliefs that are inconsistent with filling any lawful prescription, such pharmacist shall:</p> <p>(1) notify his or her employer or prospective employer in writing as soon as possible of the prescriptions he or she refuses to fill; and (2) fill the prescription unless his or her employer can accommodate the pharmacist's belief without undue hardship to the employer or customers.</p>

	New Jersey	New Jersey Senate Bill Number 2178	A pharmacist shall not refuse to dispense or refill a prescription or medication order solely on the grounds that to dispense or refill the prescription or medication order would contravene the pharmacist's philosophical, moral or religious beliefs.
	West Virginia	West Virginia House Bill Number 2807	<p>(b) A pharmacist or other person involved in dispensing medications may refuse to fill a prescription only if:</p> <p>(1) The medication is not in stock and is unavailable for dispensation; or</p> <p>(2) A review of the patient history at the pharmacy shows that the medication sought to be purchased is contraindicated when used in combination with other medications that the patient takes and it appears that the patient's physician is not aware of the contraindication.</p> <p>(c) Any pharmacist or other individual involved in dispensing medicines who refuses to fill or dispense any prescription in violation of this section is subject to disciplinary action by the Board of Pharmacy.</p> <p>(d) Upon receipt of a written complaint to the Board of Pharmacy about any violation of this section, the Board shall conduct an investigation pursuant to its administrative provisions. Any person found to be in violation of this section is subject to a fine by the Board of Pharmacy of not less than five hundred dollars and not more than one thousand dollars per occurrence.</p> <p>(e) In the event a person suffers physical or emotional harm as a result of any pharmacist or other person refusing to dispense medications or other substances in violation of this section, the pharmacist or other person and the pharmaceutical business or employer is liable for the damages, including physical, economical or special damages, attorney fees and costs and punitive damages.</p>
Federal Bills under consideration	S. 809; H. R. 1652	Access to Legal Pharmaceuticals Act	<p>(1) If a product is in stock and a pharmacist employed by the pharmacy refuses on the basis of a personal belief to fill a valid prescription for the product, the pharmacy ensures, subject to the consent of the individual presenting the prescription in any case in which the individual has reason to know of the refusal, that the prescription is, without delay, filled by another pharmacist employed by the pharmacy.</p> <p>(2) Subject to subsection (b), if a product is not in stock and a pharmacist employed by the pharmacy refuses on the basis of a personal belief or on the basis of pharmacy policy to order or to offer to order the product when presented a valid prescription for the product--</p> <p>(A) the pharmacy ensures that the individual presenting the prescription is immediately informed that the product is not in stock but can be ordered by the pharmacy; and</p> <p>(B) the pharmacy ensures, subject to the consent of the individual, that the product is, without delay, ordered by another pharmacist employed by the pharmacy.</p> <p>(3) The pharmacy does not employ any pharmacist who engages in any conduct with the intent to prevent or deter an individual from filling a valid prescription ... including-- (A) the refusal to return a prescription form to the individual after refusing to fill the prescription or order the product, if the individual requests the return of such form; (B) the refusal to transfer prescription information to another pharmacy for refill dispensing when such a transfer is lawful, if the individual requests such transfer; (C) subjecting the individual to humiliation or otherwise harassing the individual; or (D) breaching medical confidentiality with respect to the prescription or threatening to breach such confidentiality.</p> <p>(2) PRIVATE CAUSE OF ACTION- Any person aggrieved as a result of a violation of a requirement of subsection (a) may, in any court of competent jurisdiction, commence a civil action against the pharmacy</p>

			involved to obtain appropriate relief, including actual and punitive damages, injunctive relief, and a reasonable attorney's fee and cost.
	H. R. 1539		<p>a) In General- A pharmacy may not receive any prescription drug in interstate commerce unless the pharmacy maintains compliance with the following requirements:</p> <p>(1) If a pharmacist employed by the pharmacy refuses to fill a valid prescription for a drug on the basis of religious beliefs or moral convictions, the pharmacy ensures that the prescription is promptly filled by another pharmacist employed by the pharmacy, not to exceed four hours after such refusal.</p> <p>(2) The pharmacy does not employ any pharmacist who--</p> <p>(A) with the intent to prevent a patient from filling a valid prescription for a drug, refuses to return an unfilled prescription to the patient, or to transfer an unfilled prescription to another pharmacy at the request of that pharmacy; or</p> <p>(B) engages in any other conduct with such intent, other than the conduct described in paragraph (1).</p>