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AN ESSENTIAL PRESCRIPTION:  
WHY PHARMACIST-INCLUSIVE CONSCIENCE CLAUSES ARE NECESSARY

Brian P. Knestout

Four states, Arkansas, Georgia, Mississippi and South Dakota, have enacted statutes specifically protecting pharmacists from liability for refusing to fill birth control pill or emergency contraception pill ("ECP") prescriptions. At least 14 other states have considered, or are considering, similar legislation. These pharmacist-specific statutes are closely related to existing "conscience clause" statutes, passed in 46 states, which protect medical professionals who do not wish to perform or assist in procedures related to abortion, sterilization, or euthanasia.

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4. Depending on the political spectrum of the individual, the phrase "conscience clause" is a debatable point in itself; those who find such statutes problematic often refer to them as "refusal clauses." Since a large portion of the legal literature uses the term "conscience clause," this paper will refer to such clauses with that terminology.

5. For a comprehensive review of state conscience clause statutes, see Lynn D. Wardle, Protecting the Rights of Conscience of Health Care Providers, 14 J. Legal Med. 177 (1993).
The broader conscience clause statutes that generally cover medical professionals vary in specificity, and some may also cover pharmacists with regard to abortion, sterilization, euthanasia, and possibly other procedures. However, if pharmacists rely on conscience clauses that—are determined not to cover pharmacists, such professionals would have no shield from liability for actions taken to protect their morally or religiously held beliefs. The newer statutes recognize that pharmacists play a vital role in the health care system, distinct from other types of care providers, and consequently require separate protections. The statutes in Arkansas, Georgia, Mississippi and South Dakota are designed specifically to protect the rights of conscience of pharmacists, with regard to abortion, emergency contraception, assisted suicide, euthanasia, or all four actions.

Since the regulation of the pharmaceutical and medical professions is reserved to the states by the 10th Amendment, conscience clauses are constitutionally permissible. Common law police power doctrine recognizes that states have the power to enact laws for the preservation of the health, safety, and welfare of the people, provided that those laws do not conflict with superseding federal, or constitutional, law. Neither the 14th Amendment's protections of access to birth control and abortion, nor any individual's First Amendment right to free exercise of religion, compel or forbid the existence of such liability-shielding statutes.

The continued existence of more generally applicable conscience clauses, including both state and federal statutes, suggests concern by legislatures over the types of ethical dilemmas that can impact providers of medical care. However, considering the central role that pharmacists play in the modern American health care system, an interesting question is why pharmacist-


7. The South Dakota law, passed in 1998, was the first such pharmacist-specific statute in the nation and explicitly covers all four procedures. The Arkansas statute, originally passed in 1973 to cover doctors, nurses and other medical personnel, was amended in 2001 to include pharmacists and covers abortion and contraception. See ARK. CODE ANN. and S.D. CODIFIED LAWS, supra note 2.


specific clauses are not nearly as prevalent among states that have conscience clauses that protect other health care providers.

In Wisconsin, for instance, the governor vetoed an expansion of the state’s existing conscience clause because it would have given too much latitude to health care providers to withdraw from medically-approved procedures, such as euthanasia and fetal tissue research, for moral or religious reasons. Specific coverage for pharmacists in the bill, which would have allowed them to refuse to dispense ECP, had been removed from the bill before its passage by the legislature. The dropped coverage of pharmacists actually left one pro-life group in the unusual situation of protesting a bill they had originally championed.

The source of such clauses’ apparent unpopularity may spring from several unique questions posed at the intersection of existing law, advancing medical science, and changing social conceptions of health care. These questions arise in any effort to stretch a more generic conscience clause to cover the profession of pharmacy with regard to providing a patient with ECP or another drug upon receipt of a validly written prescription. Such questions include: do pharmacists qualify as medical professionals with regard to the existing conscience clauses? What role do pharmacists play in the medical procedures of abortion and contraception? And, perhaps most importantly, from a public policy perspective, who has the final decision regarding what medication is given to patients—pharmacists, physicians, or patients? Providing carte blanche protection to pharmacists from dispensing ECP or abortifacient drugs on religious or moral grounds, a right protected by the First Amendment’s Free Exercise clause, may conflict with a patient’s right to control her fertility, protected by the Fourteenth Amendment’s Due Process clause. The ensuing collision, played out in state courts, suggests a heady, complicated balance of interests.

This Comment will examine the unique conflicts that advances in pharmacological science and social conceptions of medicine have created for pharmacists with respect to the emerging flashpoint of prescriptions for ECP and abortifacient drugs. Section I will establish the scope of the dilemma in which pharmacists with moral qualms about emergency birth control find themselves. It will introduce the topic in light of a handful of recent incidents involving pharmacists who have refused to dispense birth control pills to people with valid prescriptions. It will explore the science of ECP


12. See Stacy Forster, Women's Health Debate Intensifies, MILWAUKEE J. SENTINEL, Apr. 21, 2004, at 01B.

13. Walters & Marley, supra note 11.
and the physiological effects of such drugs, examine the modern patient-centered view of medicine and the pharmacy profession's own view of itself (a view which has undergone a metamorphosis in recent years away from a mere functionalism toward a more holistic, patient-care-oriented approach), and review the existing ethical codes of pharmacists.

Section II will review the constitutional basis of the rights of the patient to birth control and abortion in 14th Amendment Due Process Clause jurisprudence, reviewing Griswold v. Connecticut,14 Eisenstadt v. Baird,15 Roe v. Wade,16 and Planned Parenthood v. Casey.17 It will also review the constitutional basis of a pharmacist's right to free exercise of religion in the First Amendment from two perspectives. First, as individuals, pharmacists have the right to practice religion so long as the practice does not violate the rights of others (as elucidated in Reynolds v. United States,18 Cantwell v. Connecticut,19 and Braunfeld v. Brown20) and so long as neutral, generally applicable laws are followed (Employment Div. v. Smith21). Second, as employees, pharmacists have a right to the accommodation of their religious beliefs by their employers unless the accommodation imposes an undue burden on the business (TWA v. Hardison22).

Section III reviews statutory and common law protections for pharmacists. It examines the pharmacy conscience clause of South Dakota and the broader medical provider conscience clause of Texas, which would not likely cover pharmacists. This section focuses on the wording and construction of the statutes that define the scope of duty and the nature of any applicable conscience clause. It also touches upon existing24 and proposed25 federal "conscience clause" provisions, and delves into common

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18. 98 U.S. 145 (1878).
22. Self-employed or independent pharmacists would not labor under this restriction since, by definition, they are not employees. However, given the prevalence of chain pharmacies, many pharmacists are affected by this line of case law, and it will be considered the default mode of modern pharmacy.
24. See 42 U.S.C. §300a-7 (2005), which provides an exception for those involved with federally-funded programs who refuse to perform or assist in abortions.
law doctrines that impose or excuse pharmacists from duties owed to the public.

Section IV will examine how state and federal courts have reconciled conflicts between medical professionals or public safety officers and patients with regard to ECP and abortion. Finally, Section V will highlight competing policy interests within the issue—concluding that pharmacist-specific conscience clauses are necessary to protect pharmacists who have ethical concerns regarding specific pharmaceutical regimens.

I. THE SCOPE OF THE PROBLEM: PHARMACY, MEDICINE AND THE MECHANICS OF EMERGENCY BIRTH CONTROL

A. Factual Events

Early in 2004, a rape victim entered an Eckerd pharmacy in the small town of Denton, Texas, and had her request to fill a drug prescription denied by the pharmacist on duty.\(^{26}\) The woman had a valid prescription for mifepristone,\(^{27}\) which is also called Mifepris or RU-486.\(^{28}\) The pharmacist on duty, Gene Herr, refused to fill the prescription, citing his religious beliefs that life begins at conception and that filling the prescription would possibly make him complicit in an abortion.\(^{29}\) Herr was fired by Eckerd for violating a company policy that requires pharmacists to fill prescriptions regardless of their moral or religious beliefs.\(^{30}\)

Herr was not the only pharmacist to be disciplined for refusing to dispense a valid prescription. A Wisconsin pharmacist, Neil Noesen, faced disciplinary action after refusing to fill a valid prescription for birth control, transfer the prescription to another pharmacy, or return the written
prescription to the patient so that it could be filled at another pharmacy.\textsuperscript{31} Karen Brauer, an Indiana pharmacist and president of Pharmacists for Life International,\textsuperscript{32} an interest group made up of pro-life pharmacists,\textsuperscript{33} was fired from K-mart after refusing to fill a valid prescription for a drug which she believed could possibly be used for a purpose that violated her religious beliefs.\textsuperscript{34}

John Boling, the pharmacy manager of a Temecula, California drug store, was reprimanded by his employer in 1997\textsuperscript{35} for refusing to fill a prescription for ECP presented by a married woman with a history of difficult pregnancies who was concerned about becoming pregnant again.\textsuperscript{36} The woman complained to the store manager and regional officials, and filled the prescription at another pharmacy.\textsuperscript{37} The California State Board of Pharmacy refused to discipline Boling, however, since no regulation mandated that he fill the prescription.\textsuperscript{38}

\textit{B. The Drugs}

The volatile reaction between a pharmacist's duty to his or her patient on one side of the counter and the pharmacist's conscience on the other, already brewing with regard to ECP, was catalyzed by the approval of mifepristone by the U.S. Food and Drug Administration (FDA) in September, 2000.\textsuperscript{39} Mifepristone blocks the body's absorption of progesterone, which is necessary for pregnancy to progress normally.\textsuperscript{40} Blocking progesterone absorption induces the shedding of the uterine lining and ends any possible


\textsuperscript{32} Id.


\textsuperscript{34} Ukens, \textit{supra} note 31.


\textsuperscript{37} Id.

\textsuperscript{38} Id.


\textsuperscript{40} See MIFEPREX (IFEPRISTONE) QUESTIONS AND ANSWERS, \textit{supra} note 28.
pregnancy. The medication is not available over the counter; it induces heavy bleeding and, consequently, must be prescribed by a doctor, who monitors the patient closely after it is administered.

Mifepristone was approved for use in ending early pregnancies—those that have not progressed past 49 days—but the drug has a number of other uses, including contraception. When taken in conjunction with another drug, misoprostol (a synthetic version of the hormone prostaglandin), mifepristone can induce an abortion. Thus, mifepristone can be used as both an emergency contraceptive (which blocks implantation of a fertilized egg) and an abortifacient (which expels a fertilized and implanted egg from the womb). Currently in the United States, it is only approved for chemical abortions, not as an ECP regimen.

ECP is a slightly different story. An ECP regimen consists primarily of the same active ingredients in ordinary birth control pills. These pills use either a combination of estrogen-progestogen, called the Yuzpe regimen, or progestogen only formulations, known as Plan B. They are taken in higher dosages than that used for regular contraception. Plan B appears to be somewhat more effective, and carries fewer side effects such as nausea and vomiting, than the Yuzpe regimen. If taken within 72 hours of unprotected

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43. Id.

44. PLANNED PARENTHOOD, supra note 28.


46. Id.


48. Turner & Ellertson, supra note 45, at 695.

intercourse, such drugs have been shown to be 75% to 85% effective in preventing pregnancy.  

The time factor for taking ECP medication is critical. Studies indicate that the effectiveness of ECP, whichever regimen is applied, falls after the initial 72 hour period. As a result, the American College of Obstetricians and Gynecologists recommend that the first dose of ECP be taken as soon as possible after unprotected intercourse.  

Having an ECP regimen readily accessible through a prior prescription appears to increase the likelihood that women will use the drugs to avoid unplanned pregnancy. This likelihood, along with the general health-safety of the drugs, may be a reason behind an independent panel of the FDA recommending approval of Plan B for over-the-counter (OTC) sales. Currently, the FDA has postponed making a final decision on whether such medications should be available OTC. It has already rejected one request for OTC status, citing insufficient data on possible consequences of selling the drug over the counter to teenagers.  

C. Changing Face of Modern Medicine and Changing Role of Pharmacists  

Making an ECP regimen available without a prescription would bypass the gatekeeper function of the pharmacist and eliminate the need for a conscience clause with respect to this type of drug. The advocacy of, and resistance to, such a move by the FDA also highlights two opposing views of the profession of pharmacy, the conflict of which contributes to the root problem facing today's pharmacists: are pharmacists mere retail functionaries who simply and somewhat robotically pull the appropriate bottle off the shelf, and who therefore can be easily removed from the distribution chain by making drugs available over-the-counter, or are they professionals expected to exercise independent judgment and charged with a duty to safeguard public health?

50. Turner & Ellertson, supra note 45, at 695.
52. Id.
53. Id.
While the public may tend to think of pharmacists in terms of the former, and while such a functionalism may have been the prior dominant mode of the profession, the parameters of a pharmacist’s responsibility are currently in flux. The practice of pharmacy finds itself in a watershed moment requiring “a change in the orientation of traditional professional attitudes and re-engineering of the traditional pharmacy environment.”\textsuperscript{57} The entire profession is trending away from a mere robotic functionalism toward active patient consultation.\textsuperscript{58}

Pharmacists recognize that their professional role places them in a position of responsibility, requiring them to act as a screen to deny improperly requested drugs and to dispense properly requested drugs to patients who are in the care of appropriately licensed and authorized physicians.\textsuperscript{59} Since many of the drugs can be deadly, and others can be used as narcotics, pharmacists have a duty to society to weed out illicit requests for drugs from licit requests.\textsuperscript{60} This duty includes the responsibility to screen seemingly valid prescriptions to make sure they have been prescribed for a legitimate medical purpose and in the usual course of a particular prescriber’s practice.\textsuperscript{61} Such a weighty burden makes pharmacists “mindful of their gatekeeper position at the end of a long chain of drug distribution and of their responsibility to not provide drug diverters with easy access to this closed system.”\textsuperscript{62}

In return for their monopoly on drug distribution, society expects pharmacists to act responsibly, withholding improperly requested medications while providing properly requested ones.\textsuperscript{63} Such an expectation is a logical source of a functionalist view of the profession. But the legal duties that pharmacists must fulfill have increased. If an error occurs despite the pharmacist’s valid exercise of his gate-keeping duty, courts are reluctant to find the pharmacist liable under the common law of many states for accurately filling prescriptions that result in harm to the patient.\textsuperscript{64} However,


\textsuperscript{58} APHA POLICY REPORT, supra note 8, at 4.

\textsuperscript{59} Id., at 1, 3.

\textsuperscript{60} David B. Brushwood, From Confrontation to Collaboration: Collegial Accountability and the Expanding Role of Pharmacists in the Management of Chronic Pain, 29 J. L. MED. & ETHICS 69, 69 (2001).


\textsuperscript{62} Brushwood, supra note 60, at 69.

\textsuperscript{63} Allen & Brushwood, supra note 61, at 2.

\textsuperscript{64} See generally David J. Marchitelli, Annotation, Liability of Pharmacist Who Accurately Fills Prescription for Harm Resulting to User, 44 A.L.R. 5th 393 (1996).
courts have held, to varying degrees, that pharmacists may have a duty to warn their patients of the possible harmful or lethal effects of accurately filled prescriptions.\textsuperscript{65}

The imposition of this new duty has expanded beyond state court rulings. Federal standards now require pharmacists to review every prescription filled for a Medicaid patient for potential pitfalls including drug interactions, drug incompatibilities, patient allergies, and fraud.\textsuperscript{66} Pharmacists must also review medications with patients; exercise their own judgment, based on training and experience, in discussing prescription-related issues with patients; and track medical information on patients.\textsuperscript{67} In sum, "the result of this expansion in standards of practice is that pharmacists are expected to think about the appropriateness of a patient's drug therapy, to intervene when there is a potential problem, and to assure that the patient is fully empowered to use the medications safely and effectively."\textsuperscript{68} Thus, pharmacists appear to have two parallel duties: one toward society as a whole, and one toward each patient who steps up to the counter.

\textbf{D. Pharmacist Ethics}

In the Temecula, California incident, the company that operated the pharmacy had a policy that any pharmacist with a moral objection to filling a prescription must refer the prescription to another pharmacist on duty or to another pharmacy entirely if necessary.\textsuperscript{69} Such a referral policy foreshadowed the American Pharmacists Association's ("APhA") subsequent issuance of a formal policy regarding pharmacist conscience clauses.\textsuperscript{70} APhA is the primary professional association of pharmacists in the United States.\textsuperscript{71} Issued after the Temecula incident in 1998, the policy addresses the professional duties of pharmacists faced with dispensing a drug to which they object for religious or moral reasons.\textsuperscript{72}

\textsuperscript{65} \textit{Id.; see also} Happel v. Walmart Stores, 766 N.E.2d 1118 (Ill. 2002).
\textsuperscript{67} Allen & Brushwood, \textit{supra} note 61, at 4.
\textsuperscript{68} \textit{Id.} at 4.
\textsuperscript{69} \textit{Morning-After Pill: Pharmacists Might Not Dispense}, ABORTION REPORT, Apr. 24, 1997.
\textsuperscript{70} \textit{See} APHA POLICY REPORT, \textit{supra} note 8.
\textsuperscript{72} APHA POLICY REPORT, \textit{supra} note 8, at 1.
Pharmacists are expected, both by professional policy and in state law, to refuse from engaging in activities that conflict with their professional judgment. With the release of its 1998 Policy Report, the APhA announced an official stance to support the decision of pharmacists who refuse to fill a valid prescription for moral or ethical reasons. It thereby recognizes the existence of a third duty, one that is not legally binding but which has a degree of legal protection—a duty of a pharmacist to protect his or her own moral and religious beliefs.

However, the APhA stance urges pharmacists who refuse to fill a prescription on moral or ethical grounds to fulfill their responsibility to the patient in some other way. The most logical alternative is to refer the patient to another pharmacist or pharmacy that can fill the prescription. In this way, the APhA attempts to balance the needs of the patient and the individual pharmacist and helps prevent the pharmacist from asserting a paternalistic relationship over the patient through the imposition of his or her own moral viewpoint.

Pharmacists understand that they have a duty to prioritize their patients' interests. The patient's individual autonomy is to be respected, as are any differences in cultural or personal backgrounds. Thus, upon acceptance of a validly written prescription, pharmacists consider themselves to have an ethical duty to provide the patient with the medicine. The patient's goals, nevertheless, should be the overriding priority for the pharmacist.

Putting the patient's interests first flows from the set of goals that pharmacists aim to achieve, as espoused in the APhA's Code of Ethics. The Code of Ethics is based upon longstanding principles of biomedical ethics including respect for autonomy, non-maleficence, and beneficence.

Personal autonomy is the freedom from controlling interference of another and from external constraints that prevent the ability to make a meaningful choice. Non-maleficence is the avoidance of inflicting harm, commonly
referred to as the Hippocratic oath. Beneficence is the concept of actively preventing harm or providing a benefit to another person. Recognizing that each principle applies to the pharmacist-patient relationship, the Code declares that a pharmacist "respects the autonomy and dignity of each patient," that he "avoids... actions that compromise dedication to the best interests of patients," and that he "promotes the good of every patient in a caring, compassionate and confidential manner."

E. Conflicting Views of the Beginning of Life, and the Resulting Problem

What does it mean to promote the good of every patient? The ethical principles guiding pharmacists may conflict with regard to filling ECP prescriptions, due to competing views of conception and the beginning of life. If the pharmacist follows the prevailing medical opinion that life begins upon implantation of a fertilized egg in the uterine lining (as the American Medical Association and the American College of Obstetricians and Gynecologists hold), providing ECP could enable a person to avoid an unplanned pregnancy by averting conception. If a pharmacist, due to moral, religious or philosophical beliefs, holds that life begins at the earlier moment of fertilization (as some religious faiths hold), providing ECP to a woman after she has had intercourse could induce an abortion either by blocking implantation of a fertilized egg or by inducing menstruation after implantation.

For both ECP and RU-486, a pharmacist plays a key role in delivering the drug to the patient—since neither medicine is available over-the-counter, the patient must go through the pharmacist to obtain either of them. And if that pharmacist has moral questions or reservations about engaging in an abortion in some fashion, even indirectly, he is caught between a rock of

81. Id. at 113.
82. Id. at 165.
85. See CATECHISM OF THE CATHOLIC CHURCH, pt. 3, § 2, ch. 2, art. 5, ¶ 2270, available at http://www.vatican.va/archive/catechism/p3s2c2a5.htm ("Human life must be respected and protected absolutely from the moment of conception. From the first moment of [its] existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life.")
their own moral code and the hard place of their duty to provide drugs to the patient.

The APhA suggests a compromise, supporting a pharmacist who wishes to withdraw from a particular transaction, but holding that the pharmacist's duty to the patient continues in strength and that the pharmacist must refer the prescription to another pharmacist or pharmacy for processing. However, passing along a prescription could nevertheless force a pharmacist to violate his or her ethical principles by facilitating an action that they find morally objectionable. If a pharmacist believes that pregnancy begins at conception, and that the prescription would terminate an existing pregnancy, filling the prescription would violate the principles of beneficence and non-maleficence by killing the patient's child. However, this action seemingly undermines the patient's autonomy.

How, then, should a pharmacist, or a court faced with a pharmacist who has refused to fill a validly written prescription, decide between conflicting duties to patient, to society, and to self? Does a pharmacist have any right, outside of a conscience clause statute that provides an escape hatch, to refuse to provide the prescription? The process of answering these questions must begin by examining the rights of both parties in the transaction: patient and pharmacist.

II. RIGHTS OF THE PATIENT AND PHARMACIST: 1ST AND 14TH AMENDMENT JURISPRUDENCE

A. 14th Amendment Jurisprudence—The Rights of the Patient

An individual's constitutionally protected right to birth control was established by the U.S. Supreme Court in 1965 in Griswold v. Connecticut opinion. Griswold, the director of Planned Parenthood in Connecticut, provided information, instruction and medical advice to married couples regarding contraception. In so doing he ran afoul of two separate

86. See APHA POLICY REPORT, supra note 8.
87. See Forster, Women's Health Debate Intensifies, supra note 12, at 01B (quoting a Wisconsin physician who said "I don't do abortions, and if I refer a patient to someone who does, I'm just as responsible for that abortion as if I did it myself."); see also Pharmacists for Life International, Why a Conscience Clauses Is a Must... NOW!, http://www.pfl.org/main.php?pfl=conscienceclausefaq (last visited Aug. 2, 2006).
88. HARVEY ET AL., supra note 78.
89. Id.
Connecticut statutes in place at the time, one prohibiting the use of contraceptive devices, the other made it illegal to counsel or abet another in the commission of an offense. Thus, Griswold’s actions were criminal under the Connecticut law. Griswold challenged the law, saying that it violated an implied privacy right in the Due Process Clause of the 14th Amendment.

Justice William O. Douglas agreed, and, in his opinion for the court, formulated the famous “penumbras” privacy right protection. Douglas argued that several fundamental rights were protected constitutionally, despite not being mentioned in the Bill of Rights. That included rights such as the right to raise one’s own child, the right to study language in private school, and the freedom to associate. Each right, while not delimited by an Amendment, existed within the “penumbra” or shadow of other enumerated rights. Since the Connecticut law did violate Griswold’s rights in this fashion, the statute, to pass muster, must be narrowly tailored to achieve a compelling state interest—the strict scrutiny standard. Since the state had not attempted to justify the basis of the statute, it was unconstitutional.

The individual’s right to privacy with regard to contraception was later refined by the Court in Eisenstadt v. Baird. After delivering a college lecture on contraception, Baird gave a contraceptive device to a young woman in the audience. Baird was convicted under a Massachusetts law which made it a felony for anyone besides a doctor or pharmacist to distribute contraceptives to married couples. The law also criminalized any attempt by anyone, doctors and pharmacists included, to distribute contraceptives to unmarried persons. The court held that the statute’s disparate treatment of individuals based on their matrimonial status violated the Equal Protection Clause. Justice William J. Brennan, Jr.’s opinion gave a broader outline to the right of privacy than had Griswold:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

91. Id. at 484.
93. Griswold, 381 U.S. at 503-04 (White, J., concurring in the judgment).
95. Id. at 440-41.
96. Id. at 453.
Five years later, in *Carey v. Population Services International*, Justice Brennan wrote for the court that, when a state "burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some state policy requires more than the unsupported assertion... that the burden is connected to such a policy." Justice Brennan added that strict scrutiny was required for restrictions on access to contraceptives, "because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings" in *Griswold*, *Eisenstadt* and subsequent cases.

*Griswold* and its progeny later formed the foundation for the Court's decision in *Roe v. Wade*, which acknowledged a woman's fundamental right to terminate a pregnancy. The Texas statute in place at the time criminalized abortion unless it was necessary to save the life of the mother. Roe, a pregnant single woman, challenged the statute, saying that it violated her right to privacy. The Court agreed, saying that a woman had a fundamental right to terminate her pregnancy in its earliest stages. Such a right was among those protected by the "penumbra" and emanation of the Bill of Rights and other amendments, particularly the 14th Amendment's concept of personal liberty. The court disagreed with the State's argument that the unborn child should be defined as a person.

However, the court also recognized the state's compelling interest in protecting unborn life. Thus, the fundamental right to privacy is not absolute. Instead, state regulation is appropriate regarding the timing of the decision. The court's opinion, written by Justice Harry A. Blackmun, established the "trimester" approach to balancing the conflicting rights of the mother to end the pregnancy and the rights of the state to protect the future life of the child. Within the first trimester, the rights of the mother are paramount. Within the second trimester, the health of the mother becomes a compelling interest for the state to protect, and thus regulation is appropriate. In the last trimester, the rights of the state to protect potential life are

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98. *Id.* at 679.
99. *Id.* at 688-89.
100. 410 U.S. 113 (1973).
101. *Id.* at 163.
102. *Id.* at 152-53.
103. *Id.* at 158. This decision which has import with regard to contraception, since it impacts the definition of the beginning of life.
104. *Id.* at 163.
paramount unless it could be argued that the procedure was necessary to protect the life and health of the mother.105

In dissent, Justice Rehnquist argued that the right to privacy did not apply to abortion, as the procedure was not performed in private, but rather with the aid of other persons.106 Thus, the appropriate test in Rehnquist's eyes was the standard "rational basis" approach where simply relating the law to a state purpose would be enough to validate it. The majority of the court disagreed, recognizing a right for women to end their pregnancies.107

The Court's acknowledgment, that both sides of the case had valid and compelling arguments, led it to the balancing approach of the trimester framework. The trimester framework, however, was later abandoned by the court in Planned Parenthood v. Casey.108 The Casey decision, authored by Justice Sandra Day O'Connor, created a new standard by which the state's interests would balance against the individual's interests—the "undue burden" test.109 The Court recognized the state's substantial interest in potential life throughout pregnancy, but limited the protection of that interest to regulations that would not impose an undue burden on a woman's right to choose to terminate her pregnancy.

Thus, the Constitution affords greater protection to government efforts to regulate contraception (under the Griswold strict scrutiny standard) than it does efforts to regulate abortion (under Casey's undue burden standard).110 Yet, the divergent case lines spring from a single source—the protection of the individual rights of privacy implicitly guaranteed by the Bill of Rights.111 The point of demarcation between the two lines of reasoning is society's interest in incipient life, the unborn fetus.112 Prior to the beginning of life, strict scrutiny applies to any government attempt at regulation or

105. Id. at 163-64.
106. Id. at 172. Justice Rehnquist also joined in Justice White's dissent, published separately. For their joint dissent, see 410 U.S. 179 (1973).
107. Id. at 163.
109. Id. at 833.
112. See Roe, 410 U.S. at 162-63 (state's compelling interest in protecting potential human life permits degrees of abortion regulation after the end of first trimester of pregnancy); Planned Parenthood, 505 U.S. at 870 (state's compelling interest begins at viability of fetus).
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Afterwards, such regulations must not impose an undue burden on the individual’s right to be pregnant or not pregnant.\footnote{113}{The concept of strict scrutiny—that a regulation is valid only if it is necessary and narrowly tailored to achieve a compelling state interest—first arose in Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a state law mandating sterilization of certain felons). It is the most difficult threshold test that the Court can apply to any given law. It can be applied to discern whether a law correctly balances competing rights of the individual and the state.}

\section*{B. First Amendment Jurisprudence—the Rights of the Pharmacist as an Individual and as an Employee}

For pharmacists, as for any individual, a religiously-motivated right to refuse to provide contraceptive drugs or devices, or to participate in an abortion by providing an abortifacient drug to a pregnant woman, is protected under the U.S. Constitution under the free exercise clause of the First Amendment.

The Supreme Court’s Free Exercise clause jurisprudence begins in 1878 with Reynolds v. United States.\footnote{114}{See Planned Parenthood, 505 U.S. at 874 (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause”).} George Reynolds, a Mormon in Utah Territory, was indicted for bigamy. Reynolds pled that he was required by his religion to have more than one wife. The court disagreed, turning for guidance to Thomas Jefferson’s letter to the Danbury Baptist Association, written in 1802.\footnote{115}{98 U.S. 145 (1878).} Jefferson’s letter is famous for coining the phrase “wall of separation between Church and State,”\footnote{116}{Id. at 164.} but the letter was also the first documentation of a distinction between religious action and religious opinion. Jefferson noted that he believed “that religion is a matter which lies solely between a man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only.”\footnote{117}{MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 92 (1996).} Following Jefferson’s distinction between action and belief, the Court held that the government could intrude upon religious belief inasmuch as it regulated “actions which were in violation of social duties or subversive of good order.”\footnote{118}{Reynolds, 98 U.S. at 164.}
The distinction between action and belief was further developed in *Cantwell v. Connecticut*, which upheld the conviction of a group of Jehovah's witnesses for violating a Connecticut law prohibiting solicitation of funds to support religious causes from non-members of that religion without prior approval of the government. Noting that free exercise of religion "embraces two concepts—freedom to believe and freedom to act," the Court then qualified the boundaries of those two freedoms by declaring that "[t]he first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Twenty years later, in *Braunfeld v. Brown*, the Court held that "freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." In *Braunfeld*, an Orthodox Jew claimed that a Pennsylvania law that criminalized certain retail sales on Sundays interfered with his freedom of religious expression. Writing the opinion of the court, Chief Justice Earl Warren used the distinction between belief and action to uphold the law, noting that the statute "does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief."

In a sop to the petitioner, Warren noted that the statute did make the practice of their religious beliefs "more expensive." Yet again, the Court refused to overturn the law, because "striking down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e. legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."

Justice William Brennan dissented, noting that the law violated the free exercise clause because it "put an individual to a choice between his business and his religion." Justice Potter Stewart went a step further than Brennan, stating that a law that "compels a [religious believer] to choose

120. 310 U.S. 296 (1940).
121. Id. at 301-02.
122. Id. at 303.
123. Id. at 303-04.
126. Id. at 603.
127. Id. at 605.
128. Id. at 606.
129. Id. at 611.
between his religious faith and his economic survival" is "a cruel choice" and should not be allowed to stand.\footnote{Id. at 616.}

Two years later, in \textit{Sherbert v. Verner},\footnote{374 U.S. 398 (1963).} the court tacked to the opposite side. In \textit{Sherbert}, a Seventh Day Adventist terminated for refusing to work on Saturdays was denied unemployment compensation.\footnote{Id. at 399.} The South Carolina State Supreme Court held that the petitioner's ineligibility for benefits infringed no constitutional liberties because it "place[d] no restriction upon the appellant's freedom of religion nor [did] it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."\footnote{Id. at 401.}

The U.S. Supreme Court thought otherwise, holding that a disqualification of benefits under such circumstances imposes a burden on the free exercise of religion: "the ruling forces [the religious believer] to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand."\footnote{Id. at 404.} The Court instituted a balancing test for such circumstances, requiring government actions that substantially burden a religious practice be justified by a compelling state interest.\footnote{Id. at 403-04.} The Court noted that there was no strong state interest at play in \textit{Sherbert} in creating a uniform day of rest, as there was in \textit{Braunfeld}.\footnote{Id. at 408.} It then reversed South Carolina's court.\footnote{Id. at 410.}

This more expansive reading of the First Amendment held sway for nearly twenty-seven years, until the court retreated with its decision in \textit{Dep't of Human Resources v. Smith}.\footnote{494 U.S. 872 (1990).} Two drug counselors in Oregon who were terminated for ingesting peyote in a religious ceremony were denied unemployment compensation.\footnote{Id. at 874.} Since ingestion of peyote was a criminal offense in Oregon, they were declared ineligible for benefits for engaging in work-related misconduct. The counselors sued, claiming a violation of their free exercise rights.\footnote{Id.}

The Oregon Supreme Court affirmed a lower court ruling that reversed the determination of ineligibility, holding that the criminality of the underlying

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conduct was not critical to decide the constitutional question. The court reasoned that, since the purpose of the statute was not to enforce Oregon's criminal laws, but rather to safeguard the finances of the state's unemployment compensation fund, the state's purpose were not compelling enough to justify the restriction on religious expression.

The U.S. Supreme Court disagreed, and held instead that generally applicable, religiously-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling state interest. Justice Antonin Scalia, writing the opinion for the Court, quoted Justice Felix Frankfurter's opinion in *Minersville School Dist. Bd. of Ed. v. Gobitis*:

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

A key difference for the Court was that the action at stake in *Sherbert*—refusing to work on a Saturday—was not criminal, whereas in *Smith* the action at stake—using peyote in a religious ceremony—was also a criminal offense, because peyote was on the government's list of controlled substances. Since use of a controlled substance was illegal, the court examined whether the prohibition of such use during a religious ceremony was constitutionally permissible. It held *Sherbert*'s balancing test inapplicable in such circumstances and noted that:

> [t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense.

141. *Id.* at 875.
142. *Id.*
143. *Id.* at 878-79.
144. *Id.* at 879 (quoting *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940)).
145. Compare *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (Appellant's request for unemployment compensation denied) with *Smith*, 494 U.S. at 874 (use of peyote is a felony because the material is defined as a controlled substance).
146. *Smith*, 494 U.S. at 875-76.
147. *Id.* at 885.
This kind of approach also rules in the employment context, as it does in the individual context, with regards to freedom of religious expression. In *Trans World Airlines, Inc. v. Hardison*, an airline employee sued his employer and labor union under Title VII after being terminated for refusing to work on Saturdays due to religious beliefs. The employee and the airline proposed various alternatives to accommodate his needs, but no workable solution could be found. The airline had a system where those employees with the most seniority had first choice for jobs within their department. When the employee switched jobs to a new department and lost the seniority he had obtained at his prior position, he was required to work shifts that conflicted with his religious beliefs.

The employee requested to work only four days a week, but the employer could not accommodate him—the position was essential, and the employee was, at times, the only person available to work particular shifts. It could not reasonably accommodate the employee's religious exercise. Justice Byron White, writing for the court, held that an employer should attempt to make a reasonable accommodation for the religious activities of its employees, but was not required to impose an "undue hardship" upon itself.

### III. State and Federal Statutory Protection of Pharmacists’ Right of Conscience

In *W. V. State Bd. of Ed. v. Barnette*, the court noted that when two rights collide, the State must intervene "to determine where the rights of one end and those of another begin." One way for society to balance these competing interests is by drafting and implementing legislative conscience

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148. *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)). Congress's later attempt to override the Court's rule in *Smith* through the 1997 Religious Freedom Restoration Act, or RFRA, was invalidated by the Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997).
150. *Id.* at 63.
151. *Id.*
152. *Id.* at 67.
153. *Id.* at 68.
154. *Id.* at 68-69.
155. *Id.* at 77 ("[i]t is our view that TWA made reasonable efforts to accommodate..." the employee. *Id.*).
156. *Id.* at 81, 84.
clauses. Recognizing that the rights of patients and medical professionals can clash in certain circumstances, most states have general conscience clauses that protect health care providers from participating in procedures they believe are morally objectionable. However, these statutes may or may not cover pharmacist’s actions depending on how broadly they were drafted.

A. General and Specific Conscience Clauses

Texas drafted a general conscience clause in 1973 which protects the rights of medical professionals who do not wish to perform an abortion for any reason. The statute states that only “[a] hospital or health care facility may not discriminate against a physician, nurse, staff member, or employee, or an applicant for one of those positions, who refuses to perform or participate in an abortion procedure.” Strictly interpreted, it would provide shelter only for a pharmacist employed by a hospital who is approached by a doctor or patient with a written prescription slip for mifepristone and who does not want to fill the prescription. The protection created by the statute would only apply to a pharmacist that is employed at a hospital or health care facility. In addition, the statute covers all grounds for a professionals’ refusal to participate in an abortion, whether for practical considerations or for religious reasons.

However, a pharmacist employed by a retail drugstore or pharmacy would not be covered under a strict interpretation of the statute and would be required to fill the prescription. Similarly, a retail drugstore or pharmacy would not fall under the “hospital or health care facility” provision and could therefore discriminate against such an employee.

One question that arises is whether filling a validly written prescription is equivalent to participating in an abortion. Neither law nor science seems to be capable of answering this question at the present time, because it depends on the definition of conception, a definition that has eluded certainty. The Supreme Court did not address the subject in Roe.

Another question created by the Texas statute, is whether a pharmacist is considered a health care provider. That question, at least with respect to

158. See Wardle, supra note 5.
160. Id.
161. Id. This assumes, of course, that a hospital pharmacist would be considered a “staff member” or “employee.”
162. Id.
163. Id.
analogous medical malpractice statutes, varies according to state law.\textsuperscript{165} Texas state law contributes to the confusion by restricting the performance of abortions to physicians licensed to practice within the state.\textsuperscript{166} Since pharmacists are not physicians, they are arguably opening themselves up to legal liability if they allow themselves to participate or perform an abortion.

In contrast to Texas, South Dakota drafted a pharmacist-specific conscience clause statute in 1998. South Dakota law governing pharmacists begins by defining the practice of pharmacy.\textsuperscript{167} It lists three specific duties: “[i]nterpretation and evaluation of prescription drug orders and dispensing in the patient’s best interests;” “[p]rovision of counseling and care;” and “[t]he responsibility for compounding, distributing, storing and tracking drugs.”\textsuperscript{168} This definition is intriguing because it includes a subjective standard for pharmacists’ duty which requires that they must interpret and evaluate prescription drug orders.

Pharmacists are not allowed, under South Dakota law, to prescribe drugs as a medical practitioner or to dispense drugs without a prescription drug order.\textsuperscript{169} The South Dakota decided that licensed doctors write out the prescription, but do not have access or the ability to fill prescriptions. Pharmacists, on the other hand, are without the authority to write a prescription, but do have the power to use their discretion to act as a gatekeeper for the dispensing of powerful prescription drugs.

With the role of the pharmacist drawn explicitly, South Dakota’s conscience clause delineates the boundaries of a pharmacists’ ability to follow his or her conscience with regard to several specific actions. In so doing, it respects the doctor’s role, the patient’s best interests (as determined by the pharmacist using his or her skill and training) and the pharmacists’ duties. The statute indicates that “[n]o 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.”\textsuperscript{170}

\textsuperscript{165} See generally George L. Blum, Annotation, \textit{Medical Malpractice: Who Are “Health Care Providers” or the Like, Whose Actions Fall within Statutes Specifically Governing Actions and Damages for Medical Malpractice}, 12 A.L.R. 5th 1 (2005).
\textsuperscript{166} TEX. HEALTH & SAFETY CODE § 171.003 (2005).
\textsuperscript{167} S.D. CODIFIED LAWS § 36-11-2.2 (1999).
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} S.D. CODIFIED LAWS § 36-11-70 (1999).
South Dakota law defines an unborn child broadly, encompassing any human organism from "fertilization until live birth." South Dakota law states that "[n]o 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." Thus, the South Dakota law is quite specific while simultaneously accounting for several different ethical quandaries facing pharmacists.

Admittedly, federal legislation would preempt state statutes with regard to conscientious refusal to work if it were to pass both houses of Congress and obtain signature by the President. The Workplace Religious Freedom Act (WRFA) would have required employers to accommodate the religious principles of workers, unless significant difficulty or expense would result from the accommodation. On April 11, 2003, Mr. Santorum (R-PA) introduced the bill to amend Title VII of the Civil Rights Act of 1964 to require employers to "remove... conflict[s] between employment requirements and the [employees'] religious observance or practice...." Despite having broad bipartisan support, however, the American Civil Liberties Union opposed the WRFA because they feared that it would be used as a shield for racial or sexual discrimination. The bill languished in committee, suffering the same fate as many of the state religious conscience clauses with regard to pharmacists.

B. Common Law Protections From Liability

Beyond legislative exemptions, however, pharmacists also find a degree of protection in the common law Learned Intermediary Doctrine. The doctrine provides that prescription drug and medical device makers can satisfy their duty of care to patients by providing warnings to the prescribing physician. Doctors bear the burden of warning since they are the professionals who are legally allowed to prescribe medication. While

171. S.D. CODIFIED LAWS §22-1-2(50A) defines an "unborn child" as "an individual organism of the species homo sapiens from fertilization until live birth."
172. Id.
175. Gerstein, supra note 173, at 1
177. Id. at 405.
pharmacists are held to an "average practitioner" standard of care when filling a prescription, in general they are excused from liability for harmful drug interactions or side effects.\textsuperscript{178} Critics and several recent cases have, however, questioned the continuing vitality of this common law doctrine.\textsuperscript{179} Since "pharmacists are last in the chain of drug distribution," these critics argue that pharmacists should have a "duty to warn customers of adverse side effects and contraindications of [filled] prescriptions."\textsuperscript{180}

In general, courts have been reluctant to impose a duty to warn of adverse side effects on pharmacists.\textsuperscript{181} Requiring pharmacists to adhere to such principles could, in fact, violate the doctor-patient relationship and "force... pharmacists to practice medicine without a license."\textsuperscript{182} Drug makers, arguably, have already fulfilled the warning requirement to the patient by providing the warnings and information to the doctor.\textsuperscript{183} In addition, since the proper prescribing of any drug must take into account each patient's individual characteristics, symptoms and history, physicians are arguably in a better position than pharmacists to determine whether any given drug is appropriate.\textsuperscript{184}

Interestingly, the pendulum has swung the other way in other recent cases, at least with regard to warning of adverse drug interactions when the specifics of the situation are known to the pharmacist.\textsuperscript{185} Pharmacies that voluntarily offer services that purport to alert patients to dangerous drug interactions have been held to have voluntarily assumed a duty to warn of any potentially harmful interactions that are relevant to the particular patient.\textsuperscript{186} Some courts have explicitly rejected the Learned Intermediary Doctrine and instead have held that pharmacists have a duty to warn patients of drug interactions when they know that a specific patient is taking the drugs in question.\textsuperscript{187}

\textsuperscript{178} Id.
\textsuperscript{179} Id. at 406.
\textsuperscript{180} Id.
\textsuperscript{183} Nichols, 817 P.2d at 1134.
\textsuperscript{184} Moore ex rel. Moore, 825 So.2d at 664.
\textsuperscript{187} Happel v. Walmart Stores, Inc., 766 N.E.2d 1118 (Ill. 2002). For more substantial background on the Happel case, see Bob Neiner, \textit{A New Cure for}
Such an exception to the doctrine is founded upon such considerations as the foreseeability of harm, the likelihood of injury to the patient, the magnitude of the burden of imposing a duty, and the consequences on pharmacists of imposing a duty. In a modern pharmacy, where patient records are tracked by computer and interactions between previously dispensed medications can be automatically flagged, thus alleviating some of the pharmacist's burden, the benefits to the patient's health and safety may outweigh the burdens of the new duty.

IV. COURT DECISIONS BALANCING RIGHTS AND DUTIES

When faced with parties seeking protection under existing state conscience clauses, courts have taken three basic approaches to cases involving their application to pharmacist duties. In some cases, they have read the conscience clause narrowly so as to exclude the person or institution seeking its protection. In other cases, the courts have held the clause applicable and ruled in favor of the party refusing to perform services. In a third line of cases involving Title VII claims, they have instituted a balancing of interests. By instituting the undue burden test within Title VII, the Supreme Court recognized the balancing of rights necessary between employers and employees. Such balancing is instructive of the approach that courts take when faced with two sets of conflicting, constitutionally-grounded rights.

A. Narrow and Broad Readings

In one Pennsylvania case, a hospital admissions clerk claimed that performing the necessary clerical operations to admit patients seeking an abortion violated her religious beliefs. The hospital had attempted to accommodate her beliefs by finding her a different shift for her to work that would not include abortion patients, but terminated her after she refused several alternative offers. She sued the hospital under Pennsylvania's conscience clause, which held that no doctor, nurse, or staff member could be forced to participate in an abortion. The court ruled for her employer,
noting that the statute only covered professionals who were "directly involved" with the procedure.\textsuperscript{192} Since the clerk was never required to directly participate in the procedure, she was held to be outside the confines of the statute, and her termination was deemed appropriate.\textsuperscript{193}

For individuals who do fit statutory definitions of covered personnel, courts have considered such statutes as bright-line protections. For instance, in a case where a nurse-anesthetist in a isolated rural medical facility refused to assist in sterilization procedures and was subsequently terminated from employment, the highest state court ruled that the state’s conscience clause, which covered sterilization practices, provided her with an unqualified right to refuse.\textsuperscript{194} While a lower court had ruled against the nurse, noting that the lack of other medical facilities or replacement personnel in the area imposed an undue burden on the patient and the hospital, the higher court found such burdens to be irrelevant when clearly confronted by an applicable statute.\textsuperscript{195}

\textbf{B. Title VII “Balancing”}

The interaction between the dual interests of notice to patients impacted by a refusal to perform services on the one hand, and public health, safety and welfare policy on the other, is most clearly seen in cases where courts have balanced competing claims to protected rights within a Title VII employment context. Generally, in such situations, “as long as the employer has offered a reasonable accommodation for the employee—in other words, as long as the employer has made a fair effort to minimize potential conflicts between the employee’s work and his or her religious beliefs—the employer will generally win.”\textsuperscript{196}

In \textit{Rodriguez v. City of Chicago},\textsuperscript{197} a Roman Catholic police officer brought a Title VII claim against the City of Chicago in order to be exempted from patrolling and guarding abortion clinics in his precinct.\textsuperscript{198} The Seventh Circuit Court of Appeals affirmed the district court ruling to

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\textsuperscript{192} \textit{Spellacy}, 18 Empl. Prac. Dec. (CCH) at ¶ 8871.
\textsuperscript{193} \textit{Id.} The Court also held that since the hospital had attempted to accommodate the clerk’s religious beliefs, and since further attempts would be an undue hardship, the clerk had no cognizable claim under Title VII. \textit{Id.}
\textsuperscript{194} \textit{Swanson v. St. John’s Lutheran Hosp.}, 597 P.2d 702 (Mont. 1979).
\textsuperscript{195} \textit{Id.} at 709-10.
\textsuperscript{197} 156 F.3d 771 (7th Cir. 1998).
\textsuperscript{198} \textit{Id.} at 772-74.
reject the officer's claim, because the officer had refused the city's offer to transfer him, without loss of pay or benefits, to other precincts that did not have abortion clinics.\textsuperscript{199} Chief Judge Richard Posner, in his concurrence, explained the rejection by noting:

\begin{quote}
[t]he objection to recusal... is not inconvenience to the police department.... The objection is to the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect. The public knows that its protectors have a private agenda; everybody does. But it would like to think that they leave that agenda at home when they are on duty.\textsuperscript{200}
\end{quote}

The Third Circuit Court of Appeals took a similar tack in \textit{Shelton v. University of Medicine & Dentistry},\textsuperscript{201} in which a labor and delivery room nurse refused to assist during any procedures in which the life of an unborn child might be threatened either directly or indirectly.\textsuperscript{202} On one occasion, she refused to participate in an emergency procedure for a pregnant woman with a ruptured membrane.\textsuperscript{203} On another, she refused to assist in an emergency Caesarian-section for a woman who had complete placenta previa that caused the patient to bleed profusely—the procedure was necessary to save the patient's life.\textsuperscript{204} After having refused the option to transfer to a position in the newborn intensive care unit, the nurse was fired.\textsuperscript{205} The court determined that:

public protectors such as police and firefighters must be neutral in providing their services. We would include public health care providers among such public protectors. Although we do not interpret Title VII to require a presumption of undue burden, we believe public trust and confidence requires that a public hospital’s health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in time of emergency.\textsuperscript{206}

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\textsuperscript{199} Id. at 778; See Rodriguez v. City of Chicago, 975 F.Supp. 1055, 1059 (N.D. Ill. 1997) (detailing the city's attempts to make reasonable accommodations for the officer's religious beliefs).
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\textsuperscript{200} Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring).
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\textsuperscript{201} 223 F.3d 220 (3d Cir. 2000).
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\textsuperscript{202} Id. at 222 n.1. The hospital at which Shelton worked did not perform elective abortions, but emergency abortions were performed occasionally to safeguard the life and health of patients. \textit{Id}.
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\textsuperscript{203} Id. at 222-23.
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\textsuperscript{204} Id. at 223.
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\textsuperscript{205} Id. at 223-24.
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\textsuperscript{206} Id. at 228.
C. Balancing and the Brownfield Decision

Balancing has also been used beyond the Title VII context. In Brownfield v. Daniel Freeman Marina Hospital,207 a California appellate court read the state's conscience clause, which exempted religiously-affiliated hospitals from liability for not providing abortion services,208 narrowly as it weighed the competing concerns of patient, health care provider, and society within a malpractice context. A rape victim sued a Roman Catholic-affiliated hospital for refusing either to give her ECP or to inform her about it.210 The victim asked for equitable remedies, including an injunction, but asked for no damages. The trial court sustained the hospital's demurrer due to the insufficiency of the victim's factual pleadings and her requested types of equitable relief.211

The Court of Appeals affirmed the decision of the lower court, holding that the hospital's failure to inform the victim about ECP did not amount to an unfair practice in that it did not amount to an "unfair, dishonest, deceptive, destructive, fraudulent, or discriminatory practice."212 Further, the court held that:

[W]hen a rape victim can allege... that a skilled practitioner of good standing would have provided her with information concerning and access to estrogen pregnancy prophylaxis under similar circumstances; that if such information had been provided to her she would have elected such treatment; and that damages have proximately resulted from the failure to provide her with information concerning this treatment option, said rape victim can state a cause of action for damages for medical malpractice.213

Since the victim in this case could not offer enough facts to show current or prospective injuries suffered by herself or the public that could not be compensated by legal damages,214 the appellate court found that the trial court was correct in its ruling.

By ruling in the method that it did, the court explicitly left the door open to liability for refusal to fill a valid prescription for birth control pills if the pharmacist believes, in good faith, that the pills will be used to end a life that

211. Id. at 409.
212. Id. at 411.
213. Id. at 414 (citing Cobbs v. Grant, 8 Cal. 3d 229, 245 (1972).
214. Id.
has been conceived but has not yet been implanted. With no definition of abortion in the statute, the California court did not investigate or attempt to discover the legislative intent behind the statute.\(^{215}\) It read the statute narrowly, leaving the question open for later cases.

While in this case the victim could not allege facts demonstrating that she or the general public had suffered or would suffer injuries that could not be compensated by an award of damages,\(^{216}\) the court’s view on whether dispensing birth control pills to be used as emergency contraception constituted an abortion is illuminating. The California appellate court held that providing emergency contraception was a preventative measure, not a terminative measure.\(^{217}\) Such a determination indicates that the court will follow the scientifically accepted definition of pregnancy, and thus, will not allow pharmacists to define pregnancy to include embryos that have been conceived but not implanted.\(^{218}\) California’s conscience clause lists abortion as an act from which a medical professional can abstain only for “moral, ethical, or religious” reasons.\(^{219}\)

The California court’s position poses a problem for pharmacists nationwide, because most general conscience clauses at the state level cover abortion but do not cover emergency contraception.\(^{220}\) In fact, neither assisted suicide nor euthanasia is covered by the California conscience clause.\(^{221}\) Abortion is defined as the termination of pregnancy—but pregnancy itself is not defined.\(^{222}\) The same problem affects many other broadly written state statutes.\(^{223}\)

V. COSTS OF BALANCING AND THE NECESSITY OF PHARMACIST-SPECIFIC CONSCIENCE CLAUSES

Given the foregoing applications of “general” health care provider conscience clauses in the courts, the odds seem stacked against any individual pharmacist seeking to abstain from actions that violate the

\(^{215}\) Wardle, \textit{supra} note 5, at 200.

\(^{216}\) \textit{Brownfield}, 208 Cal. App. 3d at 414.


\(^{218}\) \textit{Id.}

\(^{219}\) \textsc{CAL. HEALTH \& SAFETY CODE} § 123420(a), \textit{supra} note 207.

\(^{220}\) Herbe, \textit{supra} note 217, at 97-98 (citing numerous statutes).

\(^{221}\) See \textsc{CAL. HEALTH \& SAFETY CODE} § 123420(a), \textit{supra} note 207.

\(^{222}\) \textit{Id.}

\(^{223}\) Herbe, \textit{supra} note 217, at 98.
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pharmacist's religious or moral principles. The foregoing cases reveal that
courts have balanced the needs of health care providers against the needs of
patients and, by implication, society. 224

Undoubtedly, several important public policies are furthered by ensuring
pharmacists dispense properly prescribed medications regardless of their
personal moral or ethical views. First, the possibility of discrimination is
reduced by requiring pharmacists to fill all prescriptions regardless of their
personal views. 225 Second, patients would not be confused over the issue of
liability for incorrect prescriptions, since the Learned Intermediary standard
would suggest such liability remains with doctors and drug makers. 226 Third,
pharmacists could be encouraged by the lack of liability to second-guess
doctors' prescriptions, and therefore, assume more than their fair share of
gate-keeping duties. 227

In addition, the larger trend toward patient-centric medicine 228 suggests
patient's desires for treatment should take priority. The APhA's own ethics
clause acknowledges this trend by downplaying the prevention of harm to a
patient (non-maleficence) while strongly highlighting the autonomy of the
patient and acting for the good of the patient (beneficence). 229

In terms of individual rights, a patient's 14th Amendment right to
contraception is solidly established, 230 and the absence of a high court ruling
on when life begins complicates both ECP and chemically-induced abortion
issues. At the same time, the First Amendment rights of pharmacists seem to
be more limited due to the necessity of following neutral, generally
applicable laws in the expression of religious beliefs. 231

General conscience clauses and their related jurisprudence are clearly
inadequate when applied to the changing substance of modern pharmacy.
First, the orientation of the profession of pharmacy itself is moving away
from functionalism and toward patient interaction. 232 Such a shift implies the
necessity of providing pharmacists with the authority to make difficult

224. See supra Section IV and accompanying notes.
225. Mississippi's very broad conscience clause, for instance, specifically forbids
coverage of refusals based on "race, color, national origin, ethnicity, sex, religion, creed
226. See supra Section III.B and accompanying text; see also Barney, supra note 176,
at 413, 414-15.
227. See Barney, supra note 176, at 413, 415-16.
228. See APHA POLICY REPORT, supra note 8, at 4; see also supra Section I.C for a
discussion of the pharmacy profession's changing view of its role in health care.
229. See supra notes 76-80 and accompanying text.
230. See supra Section II.A and related notes.
231. See supra Section II.B and related notes.
232. See supra Section I.C and related notes.
decisions in light of their personal judgment.\textsuperscript{233} Secondly, decreasing common law protections and the imposition of new social duties at both the state and federal level, including the duty to warn, as medicine becomes more complicated indicates that pharmacists are assuming more responsibility for positive patient outcomes.

Third, society continues to have a social interest in pharmacists acting as gatekeepers to prevent the illicit use of prescription drugs, and to prevent harm to patients. Fourth, as modern pharmaceutical science advances, drugs are increasingly able to accomplish chemically that which only physical procedures could do in the past,\textsuperscript{234} thereby putting more power and potential liability at the doorstep of pharmacists. Finally, there is a valid public policy rationale to ensuring that those choosing to join the ranks of pharmacists are not only well-trained, but are ethical, conscientious individuals. Pharmacists must be able to resist dispensing invalid prescriptions or dispensing drugs that they know will harmfully interact with another drug.

The foregoing reasons suggest that pharmacists are increasingly in a position akin to physicians with regard to the patients that they treat. Much like physicians, they have responsibility for using their own professional judgment to secure public health and safety. In order to protect the members of the profession from inevitable conflicts with personal moral or religious values, a measure of legal protection in the form of conscience clauses should cover their actions, much as the actions of doctors are covered in most states.\textsuperscript{235}

\section*{CONCLUSION}

Critics of conscience clauses have held that such statutes should be narrowly restricted to purely sectarian institutions.\textsuperscript{236} Any type of connection to the public world would require the institution, and the people operating

\textsuperscript{233} See supra Section 1.C and D and related notes.

\textsuperscript{234} For instance, an abortion can now be accomplished through the use of mifepristone instead of a surgical abortion procedure. See supra Section 1.B and related notes.

\textsuperscript{235} See APHA POLICY REPORT, supra note 8.

\textsuperscript{236} See REPRODUCTIVE FREEDOM PROJECT, ACLU, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS, EXECUTIVE SUMMARY 3 (2002), http://www.aclu.org/FilesPDFs/refusal_report_sum.pdf ("While entities operating in the public world ought to play by public rules, churches, temples, [and] mosques... ought generally to be free of the requirements of laws repugnant to their beliefs. A church should not have to include coverage for contraception in a health benefit plan for ministers and other clerics.").
within it, to conform to secular principles. In short, such critics argue that if an individual or institution is “[i]n the public world, they should play by public rules.” Such a test would add to another requirement prior to validation of a conscience clause that no burden be imposed on any other individual. Any type of burden that would be imposed on another person by a pharmacist’s morally or religiously motivated refusal would be grounds to nullify the exemption.

The problem with this two-pronged analysis of conscience clauses is more than simply holding the ethical code of the actor—in this case, the pharmacist—to be lower in value than the person seeking the benefits of the action—the patient. In so doing, the pharmacist is treated as a mere functionary, able to operate only within the parameters dictated by the patient. But more importantly, it runs contrary to the changing nature of pharmaceutical care—and that nature is changing due to social demands placed upon pharmacists by advancing medical and pharmaceutical science. Pharmacists are asked to be the gatekeepers that protect society from those who would abuse powerful drugs; yet they are supposed to check their consciences at the door while they do so. They are supposed to be thinking, rational actors in the transaction and exercise their own judgment and initiative—yet, should a religious or moral scruple intrude, they are expected to be mere robotic functionaries.

Such a view is inherently flawed and does not reflect the modern reality in which pharmacists find themselves. Following such a view would require some pharmacists to violate one of the principle ethical goals of their profession—non-maleficence. If a pharmacist holds non-maleficence as a primary duty, the pharmacist must refuse to cooperate in a procedure that will result in the death of a living human being.

The only solution to this dilemma may be the solution that the APhA suggested, namely, to endorse a conscience clause, but simultaneously require pharmacists to refer a valid prescription to another service provider. Those members of the profession who bear the burden of this course of

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238. WEISS ET AL., supra note 237, at 11.
239. Id. at 9.
240. Id.
241. American Pharmacists Association, Principles of Practice of Pharmaceutical Care, supra note 57; see also BEAUCHAMP & CHILDRESS, supra note 79, at 58.
action are those who believe that a referral is equivalent to the act itself. However, such a view safeguards most of the ethical goals of pharmacists while simultaneously serving the public need for effective provision of legally prescribed drugs.