PHARMACIST REFUSALS AND THIRD-PARTY INTERESTS: A PROPOSED JUDICIAL APPROACH TO PHARMACIST CONSCIENCE CLAUSES

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The issue of pharmacists refusing to dispense birth control or emergency contraception recently has become a major debate in the battle over reproductive rights. Several states have enacted legislation to protect refusing pharmacists, and many more are considering such laws. I explore these new laws against the backdrop of the existing legal landscape governing the actions of pharmacists, including tort law, Title VII of the Civil Rights Act of 1964, and free exercise jurisprudence. I then consider how courts might interpret refusal clauses upon which pharmacists may rely. I argue that courts should read pharmacist refusal statutes narrowly by limiting the protected act of conscience to the actual refusal to dispense medication, and not extending protection to behavior that could violate the pharmacist's duty of care to patients. Such an approach will not only minimize the impact of refusals on the interests of patients and employers, but will meld these new statutes with the existing legal framework addressing religious objectors, which has consistently shown concern for third-party rights.

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INTRODUCTION

On September 29, 2005, California Governor Arnold Schwarzenegger signed Senate Bill 644[1] into law, which allows a pharmacist to refuse to dispense medications on ethical, religious, or moral grounds, but only in cases where the pharmacist has notified his employer in advance of the drugs to which he objects, and only if the employer can reasonably accommodate the objection without undue hardship.[2]

This new legislation comes amidst a heated debate over pharmacist refusals, which are increasingly viewed as the latest battle over reproductive rights.[3] Though a handful of pharmacists have been refusing to fill certain contraception and emergency contraception (EC) prescriptions for years on moral or religious claims, such refusals increasingly have been making headlines

1. S. 644, 2005 Leg., Reg. Sess. (Cal. 2005) (enacting CAL. BUS. & PROF. CODE § 733 (West Supp. 2006), and amending *id.* §§ 4314–4315 (West 2003 & Supp. 2006)).

2. *See* CAL. BUS. & PROF. CODE §§ 733, 4314–4315; Nat'l Women's Law Ctr., Pharmacy Refusals: State Laws, Regulations, and Policies 2 (Jan. 2007), *available at* http://www.nwlc.org/pdf/PharmacyRefusalPoliciesJan2007.pdf; Rowlands, *infra* note 12, at 170–71; *Governor Puts a Wrap on Legislation*, L.A. TIMES, Oct. 9, 2005, at B4.

3. *See* Stephanie Simon, *Pharmacists New Players in Abortion Debate*, L.A. TIMES, Mar. 20, 2004, at A18; Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A1 ("The [pharmacist refusal] trend has opened a new front in the nation's battle over reproductive rights . . . .").

since 2002, appearing in national newspapers and on evening television programs.[4] Reproductive rights groups and other women's organizations argue that these refusals threaten women's health and access to legal drugs.[5] Religious rights advocates counter that pharmacists have a right to refuse to dispense medication that is contrary to their conscience.[6]

The dissenting pharmacists have obtained legislative protection in four states where statutes allow pharmacists to refuse to fill certain prescriptions,[7] and numerous other states are considering similar bills.[8] To date, no court has issued a final adjudication involving a tort claim by a patient against a pharmacist who refused to fill her prescription,[9] a Title VII claim by a pharmacist who was disciplined by his employer for refusing to dispense

4. *See, e.g.*, Tresa Baldas, *Fighting Refusal to Treat; 'Conscience' Clauses Hit the Courts*, NAT'L L.J., Feb. 7, 2005, at 1; Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at A3; Jim Ritter, *Planned Parenthood Protests Over Morning After Pill*, CHI. SUN-TIMES, Mar. 23, 2005, at 10; *Today* (NBC television broadcast Apr. 6, 2005). The U.S. Supreme Court voiced its awareness of the issue in dicta last term. Van Orden v. Perry, 125 S. Ct. 2854, 2880 n.16 (2005) (Stevens, J., dissenting) ("Varying interpretations of [the Sixth] Commandment explain the actions of . . . pharmacists who refuse to sell morning-after pills to women.").

5. *See generally* ACLU REPRODUCTIVE FREEDOM PROJECT, CONFLICTS BETWEEN RELIGIOUS REFUSALS AND WOMEN'S HEALTH: HOW THE COURTS RESPOND (2002), *available at* http://www.aclu.org/FilesPDFs/refusal_conflicts.pdf; ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002), *available at* http://www.aclu.org/FilesPDFs/ACF911.pdf [hereinafter ACLU, RELIGIOUS]; NAT'L WOMEN'S LAW CTR., DON'T TAKE "NO" FOR AN ANSWER: A GUIDE TO PHARMACY REFUSAL LAWS, POLICIES AND PRACTICES (2007), *available at* http://www.nwlc.org/pdf/DontTakeNo2007.pdf; Planned Parenthood, Summary of State Actions Related to Pharmacist Refusals (2005), http://www4.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-050418-pharmacist-refusals.xml.

6. *See* Donald W. Herbe, *A Right to Refuse: The Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 102 (2003); Bryan A. Dykes, Note, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002); Pharmacists For Life International, http://www.pfli.org (last visited Dec. 28, 2006); Center for Law and Religious Freedom, http://www.clsnet.org/clrfPages/index.phpx (last visited Dec. 28, 2006).

7. These states are Arkansas, Georgia, Mississippi, and South Dakota. *See* ARK. CODE ANN. § 20-16-304 (2005); GA. COMP. R. & REGS. 480-5-.03 (2005); MISS. CODE ANN. § 41-107-5 (2006); S.D. CODIFIED LAWS § 36-11-70 (1999).

8. *See* Nat'l Women's Law Ctr., Pharmacy Refusals 101, at 3 (Nov. 28, 2006), *available at* http://www.nwlc.org/pdf/PharmacyRefusals101_11.28.06.pdf.

9. Litigation in this area may be imminent. The New York Civil Liberties Union (NYCLU) recently filed a complaint against three pharmacists who refused to refill doses of emergency contraception (EC), alleging that the pharmacists neglected patients, acted beyond the scope of their authority, and breached their duty of care, among other claims. Press Release, ACLU, Pharmacists Should Be Held Accountable for Refusing to Honor Prescriptions for Emergency Contraception, NYCLU Says (Aug. 15, 2006), *available at* http://www.aclu.org/reproductiverights/contraception/26469prs20060815.html.

medications,[10] or a free exercise claim by a pharmacist who faced a common law or statutory duty to fill all prescriptions.[11]

In this Comment, I explore pharmacist refusals and attendant legal issues.[12] Part I discusses the history of pharmacist refusals and pharmacist

10. One court recently considered the related issue of whether Title VII would protect a pharmacist disciplined by his employer for walking away from customers seeking birth control or leaving them on hold indefinitely. *See* Noesen v. Med. Staffing Network, Inc., No. 06-C-071-5, 2006 U.S. Dist. LEXIS 36918 (W.D. Wis. June 1, 2006); Kevin Murphy, *Fired Pharmacist's Rights Not Violated*, CAPITAL TIMES (Madison, Wis.), June 3, 2006, at B1. Moreover, several pharmacists have filed a lawsuit against Walgreens, which placed pharmacists on unpaid leave for refusing to agree to the company's new policy requiring pharmacists to dispense EC. It is unclear, however, whether the lawsuit alleges Title VII violations or merely state law violations—the press release issued by plaintiffs' counsel discusses only state law. *See* Press Release, Am. Ctr. for Law & Justice, ACLJ Files Suit Against Walgreens Claiming Company Violated Illinois' Conscience Clause Act When it Fired Pharmacists (Jan. 27, 2006), *available at* http://www.aclj.org/News/Read.aspx?ID=2113.

11. While no court has rendered a final decision regarding the free exercise clause issue, one district court recently refused to dismiss a claim filed by pharmacists alleging that an Illinois law requiring pharmacies to dispense EC violated their right to free exercise of religion. Illinois District Court Judge Jeanne Scott allowed the lawsuit to move forward, holding that if the plaintiffs' allegations were true, the Illinois law may be subject to a strict scrutiny analysis under the First Amendment. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 1001–02 (C.D. Ill. 2006); *infra* notes 67–69, 109, 140.

12. Instead of advocating the repeal or modification of current legislation, or the institution of new legislation or federal intervention, I work within the framework of existing legislation and consider how judges can balance the rights of pharmacists, employers, and patients through interpretation of these new statutes. A number of recent student-written law review articles have also dealt with pharmacist refusals but have advanced alternative theories and arguments. *See, e.g.*, Maryam T. Afif, Comment, *Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?*, 26 PACE L. REV. 243 (2005); Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073 (2006); Melissa Duvall, Comment, *Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?*, 55 AM. U. L. REV. 1485 (2006); Katherine A. James, Note, *Conflicts of Conscience*, 45 WASHBURN L.J. 415 (2006); Tony J. Kriesel, Note, *Pharmacists and the "Morning-After Pill": Creating Room for Conscience Behind the Counter*, 7 MINN. J.L. SCI. & TECH. 337 (2005); Cristina Arana Lumpkin, Comment, *Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?*, 60 U. MIAMI L. REV. 105 (2005); Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacist's Conscience and Women's Access to Contraception*, 16 HEALTH MATRIX: J.L.-MED. 237 (2006); Minh N. Nguyen, Comment, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves from Them?*, 8 SCHOLAR 251 (2006); Dennis Rambaud, Note, *Prescription Contraceptives and the Pharmacist's Right to Refuse: Examining the Efficacy of Conscience Laws*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 195 (2006); Sophia Rowlands, *Chapter 417: Contraceptives and Conscience Find Compromise in California*, 37 MCGEORGE L. REV. 166 (2006); Holly Teliska, Note, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229 (2005); Sara J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 L. & INEQ. 399 (2006). A few academics have also weighed in on the topic. *See, e.g.*, Charu A. Chandrasekhar, *Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Law*, 70 ALB. L. REV. 55 (2006); Leslie C. Griffin, *Conscience and Emergency Contraception*, 6 HOUS. J. HEALTH L. & POL'Y 299 (2006); Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469 (2006); Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006).

refusal statutes. Part II examines pharmacists' general duty of care to patients and explores whether Title VII's protections for religious employment discrimination or the U.S. Constitution's protections for religious free exercise limit this general duty. Part III looks at how courts may interpret pharmacist refusal clauses.

Doctrine in the Title VII and free exercise areas has proven especially conscious of the impact that religious exemptions have on third parties. While the task is more delicate where a state has in place a refusal clause that immunizes the pharmacist from the ramifications of breaching his duty, precedent in the abortion refusal clause context has demonstrated promising analysis that considers the exemption's effect on third parties through a variety of different techniques. I argue that courts can continue to consider third parties when faced with pharmacist refusal clauses by viewing the act of conscience narrowly: Courts should extend immunity only to the actual refusal to dispense medication, not to a pharmacist's failure to warn an employer ex ante of his intent to refuse to dispense a medication, or to return or transfer a prescription to a patient. This simple approach will protect pharmacists with legitimate claims of conscience, but will also ensure that patients and employers have recourse when a pharmacist acts in a manner that exacerbates the harm to third parties. The need for this narrow approach is underscored by the very broad scope of some pharmacist refusal clauses, which threaten long-established employer and patient rights.

I. THE EVOLUTION OF THE PHARMACIST REFUSAL CLAUSE

A. The Church Amendment and Its Progeny

In response to the constitutionalization of abortion in *Roe v. Wade*,[13] and to a subsequent district court order requiring a Catholic hospital to perform a sterilization,[14] federal and state legislators passed legislation protecting healthcare professionals' rights. Congress enacted the Church Amendment,[15] which protected federally funded healthcare entities and providers that refused to perform or assist in sterilization or abortion procedures on religious or moral

13. 410 U.S. 113 (1973).

14. The injunction was ordered in an unpublished opinion by a Montana district court in *Taylor v. St. Vincent's Hospital* on October 27, 1972, and was dissolved in a proceeding a year later, after the Church Amendment was passed. *See* Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75, 76 (9th Cir. 1975).

15. The Church Amendment, named for its sponsor, Senator Frank R. Church of Idaho, was codified at 42 U.S.C. § 300a-7 (2000), amending the Public Health Service Act.

grounds.[16] Many states followed suit;[17] currently, forty-six states have statutes that protect healthcare professionals from being required—by an employer or by the state—to participate in abortion services, whether or not public funds are involved.[18] In addition, seventeen state statutes also apply to sterilization, and thirteen allow individual healthcare providers to refuse to provide birth control services or information about contraception.[19]

B. An Expanding Right to Refuse

The debate over conscience clauses quieted after the 1970s, only to reemerge in the 1990s as technological, legal, and policy developments led religious advocates to reconsider the issue.[20] Advances in medical technology such as in vitro fertilization and increased patient requests for assisted suicide fueled a new debate about the expansion of refusal clauses beyond the abortion and sterilization context for physicians and hospitals.[21] Also, the development of RU-486 (the "abortion pill" or "morning-after pill") led some to suggest that the debate would extend to pharmacists who opposed abortion.[22] However, not until the Food and Drug Administration (FDA) determined that

16. *See id.*

17. *See* ACLU, RELIGIOUS, *supra* note 5, at 1; Rachel Benson Gold & Adam Sonfield, *Refusing to Participate in Health Care: A Continuing Debate*, GUTTMACHER REP. ON PUB. POL'Y, Feb. 2000, at 8.

18. Guttmacher Inst., State Policies in Brief: Policies Allowing Providers to Refuse 1 (Feb. 1, 2007), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. I refer to the post–Church Amendment refusal clauses that generally protect both hospitals and individual healthcare providers from performing abortions as "abortion refusal clauses" or "abortion conscience clauses," as distinguished from "pharmacist refusal clauses" or "pharmacist conscience clauses." These early statutes are generally not considered broad enough to apply to pharmacists or their duties. *See infra* notes 26–30 and accompanying text.

19. *See id.* at 1; Gold & Sonfield, *supra* note 17, at 8.

20. *See* ACLU, RELIGIOUS, *supra* note 5, at 1; Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider 'Conscience,' Patient Needs*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2004, at 1, *available at* http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf.

21. *See* Sonfield, *supra* note 20, at 1. In addition to advances in reproductive technology, the implementation of laws that increased access to reproductive services has also fed the debate over refusal clauses, as did the Supreme Court's erosion of First Amendment protections for religious objectors in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* ACLU, RELIGIOUS, *supra* note 5, at 3.

22. *See* Carol Ukens, *Would RU-486 Throw R.Ph's in Legal, Ethical Briar Patch? Dispensing of Abortion Pill and Other Medications by Pharmacists*, DRUG TOPICS, Aug. 5, 1991. RU-486, called mifepristone in the United States, is a medication that is used to terminate early-stage pregnancies. *See id.* RU-486 was approved by the Food and Drug Administration (FDA) in 2000 but is only available from physicians and may not be dispensed by pharmacists. *See* Jeremy Manier & Barbara Brotman, *FDA Gives Final OK to Abortion Pill*, CHI. TRIB., Sept. 29, 2000, at N1.

EC was safe and effective,[23] and the drug was first officially marketed in the United States,[24] did the press begin to report on pharmacists who refused to fill prescriptions.[25]

Advocates of pharmacists' right to refuse quickly realized that the federal and state abortion conscience clauses were too narrow to protect a pharmacist's refusal to dispense medicine. Neither birth control nor EC fit within the definition of abortion,[26] either as medically defined[27] or as viewed by the

23. *See* Vokes, *supra* note 12, at 405 ("Although birth control pills were used off-label as emergency contraception for decades, emergency contraception was not officially approved by the [FDA] until September 1998.") (citation omitted); *see also* Leon Jaroff & Christine Sadlowski, *Rx: "Morning After" Pills*, TIME, July 15, 1996, at 59.

24. *See* Sandra G. Boodman, *The "Morning-After" Kit*, WASH. POST, Sept. 22, 1998, at Z12.

25. *See* ACLU, RELIGIOUS, *supra* note 5, at 3; Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access To Emergency Contraception*, GUTTMACHER REP. ON PUB. POL'Y, June 1999, at 1, *available at* http://www.guttmacher.org/pubs/tgr/02/3/gr020301.pdf; Sonfield, *supra* note 20, at 1; Carol Ukens, *Conscience v. Patient Rights: R.Ph.'s to Dispense Stirs Up Controversy*, DRUG TOPICS, May 19, 1997. It is unclear whether increased press coverage of pharmacist refusals actually correlated with higher incidence of such refusals or merely increased awareness. *See* Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies That Won't Sell Emergency Contraception*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2005, at 10, *available at* http://www.guttmacher.org/pubs/tgr/08/3/gr080310.pdf.

The FDA approved emergency contraceptive drug Plan B as an over-the-counter option for women ages eighteen and older in August 2006, after an embittered debate. *See* Judith Graham, *Plan B Cap Lifted: Over-the-Counter Sales of Contraceptive Approved*, CHI. TRIB., Aug. 25, 2006, at C1. However, the over-the-counter version of the drug is only available from licensed pharmacists behind pharmacy counters, and the drug is only available in prescription form for women ages seventeen and younger. *See id.* As a result, the issue of pharmacists refusing to dispense the drug is still highly relevant. *See, e.g.*, Editorial, *Plan B Moves, but Behind the Counter*, SEATTLE TIMES, Aug. 28, 2006, at B4 ("[B]y keeping the drug behind the counter, the restriction could run up against the proclivities of a few pharmacists who want to meddle in the contraceptive choices of women."); Press Release, ACLU, ACLU Says FDA Shift on Plan B is a Step in the Right Direction, But Says Arbitrary Age Restriction Infringes on Privacy Rights (Aug. 24, 2006), *available at* http://www.aclu.org/reproductiverights/gen/26520prs20060824.html.

26. Herbe, *supra* note 6, at 98 ("The problem with 'abortion-only statutes' is that they may not include [EC].").

27. Traditional birth control prevents pregnancy when taken on a daily basis. It either suppresses ovulation by the combined actions of estrogen and progestin (combined pill) or reduces and thickens cervical mucus to prevent sperm from reaching the egg (progestin-only minipill). *See* U.S. Food & Drug Admin., Birth Control Guide 3 (Dec. 2003), *available at* http://www.fda.gov/fdac/features/1997/babyguide2.pdf. EC is a method of preventing pregnancy after a contraceptive fails or after unprotected sex, and it should be taken within approximately seventy-two hours of intercourse. EC primarily works by preventing ovulation, like the combined birth control pill, though it possibly also prevents fertilization or implantation. *See* Ctr. For Drug Evaluation & Research, U.S. Food & Drug Admin., Plan B: Questions and Answers (Dec. 14, 2006), http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm ("Plan B works like a birth control pill to prevent pregnancy mainly by stopping the release of an egg from the ovary. It is possible that Plan B may also work by preventing fertilization of an egg (the uniting of sperm with the egg) or by preventing attachment (implantation) to the uterus (womb), which usually occurs beginning 7 days after release of an egg from the ovary. Plan B will not do anything to a fertilized egg already attached

courts.[28] Moreover, even if a court were to equate EC with abortion, merely dispensing the prescription would not likely fall within the conscience clause confines because dispensing medication does not constitute "performing or assisting" with an abortion, the common phrasing of abortion refusal clauses.[29] Consequently, proponents of pharmacist conscience rights lobbied state legislatures to pass pharmacist-specific refusal laws.[30]

C. Dissenting Pharmacists Obtain Protection

Four state legislatures have carved out religious exemptions for pharmacists who refuse to dispense certain prescriptions. They differ in scope as to what medications are covered, as well as in the degree of protection they afford the pharmacist. However, none of the current refusal clauses provides emergency

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to the uterus. The pregnancy will continue."); Nat'l Women's Health Info. Ctr., U.S. Dep't of Health & Human Servs., Frequently Asked Questions: Emergency Contraception (2002), *available at* http://www.4woman.gov/faq/econtracep.pdf; Dailard, *supra* note 25, at 11.

Both traditional birth control and EC differ from a medical or pill abortion, which terminates an existing pregnancy by forcing a fertilized and implanted egg out of the uterus. *See* Nat'l Women's Health Info. Ctr., *supra*, at 3. Notwithstanding the medical consensus on this issue, some argue that EC acts as an abortifacient because it may prevent implantation of a fertilized egg. *See, e.g.*, Herbe, *supra* note 6, at 87 ("[S]ome pharmacists believe life begins at fertilization, and thus find EC to be an early form of abortion."); Rachel Benson Gold, *The Implications of Defining When a Woman Is Pregnant*, GUTTMACHER REP. ON PUB. POL'Y, May 2005, at 7, *available at* http://www.guttmacher.org/pubs/tgr/08/2/gr080207.pdf. This viewpoint is inconsistent with the longstanding view of the medical profession and of the U.S. government that pregnancy begins at implantation. *See* Gold, *supra*, at 7.

28. *See* Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992) ("[B]ecause *Roe*'s scope is confined by the fact of its concern with *postconception* potential life, a concern otherwise likely to be implicated only by some forms of contraception [is] protected independently under *Griswold* and later cases . . . .") (emphasis added); Margaret S. v. Edwards, 488 F. Supp. 181, 191 (E.D. La. 1980) (arguing that abortion, as it is commonly understood, does not include the IUD, the "morning-after" pill, or, for example, birth control pills); Brownfield v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 245 (Cal. Ct. App. 1989) ("The conclusion that [EC] constitutes 'prevention,' i.e., birth control, rather than 'termination,' i.e., abortion, is consistent with [precedent]."); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 523 (1989) (O'Connor, J., concurring) ("It may be correct that the use of postfertilization contraceptive devices is constitutionally protected by Griswold and its progeny . . . ."); *id.* at 564 (Stevens, J., dissenting) ("To the extent that the Missouri statute [declaring that life begins at conception] interferes with contraceptive choices [like the use of EC], I have no doubt that it is unconstitutional under the Court's holdings in *Griswold v. Connecticut*; *Eisenstadt v. Baird*; and *Carey v. Population Services International*.") (citations omitted); Miller, *supra* note 12, at 250–51 (listing cases illustrating that postcoital contraception should be treated as contraception).

29. Herbe, *supra* note 6, at 99 ("A further problem with abortion-only statutes is that they protect against *participation* or *assistance* in abortion. Thus, if a pharmacist were successful in persuading a court that EC should be included within the definition of abortion, another hurdle would arise."). *But see* Brauer v. Kmart, No. C-1-99-618 (S.D. Ohio Jan. 23, 2001) (holding preliminarily that the Ohio abortion conscience clause could protect Karen Brauer, a pharmacist who refused to dispense birth control pills).

30. *See* ACLU, RELIGIOUS, *supra* note 5, at 3.

exceptions for women who are raped and attempting to prevent pregnancy with EC. The statutes also fail to require advance notice to the employer or patient of a pharmacist's intention to refuse to dispense, or to require the transfer of a refused prescription to another pharmacy.[31]

Arkansas adopted its pharmacist refusal clause in 1973 as a part of its Family Planning Act.[32] The provision states that nothing in the family planning subchapter prevents doctors, pharmacists, or other paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information.[33] It does not specifically discuss tort liability or employer actions stemming from a refusal; however, a later section in the subchapter allows both institutions and their employees to refuse to dispense contraceptives, and specifically immunizes them from tort liability where the refusal is based upon religious or conscientious objection.[34]

Georgia's pharmacist refusal clause appears under its Pharmacy Board section in the state's Rules and Regulations.[35] The rule describes various regulations pharmacists must abide by in order to avoid violation of the code, but it states 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,"[36] thus protecting a pharmacist from disciplinary action by a pharmacy board for refusing to dispense medication.[37] Whether it protects pharmacists from adverse action by employers or from tort liability is unclear.

Supporters and critics alike described the Mississippi refusal clause, passed in May 2004, as the most sweeping conscience clause legislation in this country's history.[38] The statute gives healthcare providers, including pharmacists, a specific right to refuse to perform any service that violates their conscience, and it is not limited to abortion or contraception services.

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31. *See infra* notes 32–47 and accompanying text. Some proponents of pharmacist refusal clauses do not support transferring prescriptions. *See* Timm Herdt, *2 State Drug Bills Pose Moral Issues*, VENTURA COUNTY STAR (Cal.), Apr. 5, 2005, at 1.

32. ARK. CODE ANN. § 20-16-304 (2006); *see also id.* § 20-16-301 (describing this subchapter as the "Arkansas Family Planning Act").

33. *Id.* § 20-16-304(4).

34. *Id.*

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

36. *Id.* at 480-5-.03(n).

37. In July 2006, Georgia amended its abortion conscience clause to apply to pharmacists who refuse to dispense medication. *See* GA. CODE ANN. § 16-12-142(b) (Supp. 2006). Interestingly, the amended statute includes some language that could be viewed as inconsistent with the pharmacist refusal clause appearing in Georgia's Rules and Regulations. The new law states that "[n]othing in this subchapter shall be construed to authorize a pharmacist to refuse to fill a prescription for birth control medication." *Id.* It is unclear whether the Georgia Legislature will address or resolve this inconsistency.

38. *Abortion Foes Back New Legislation*, CHI. TRIB., Sept. 16, 2004, at 10.

Though the law qualifies this right somewhat—prohibiting refusals solely based on a patient's race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation[39]—it does not protect patients from discrimination based on marital status or lifestyle choices. Further, it explicitly immunizes pharmacists from all civil, criminal, or administrative liability,[40] and it protects pharmacists from any discrimination by their employers or state pharmacy boards.[41] Discrimination is defined so broadly as to include something as minor as reassignment to a different shift.[42]

Responding to an incident in which a pharmacist battled with his employer after refusing to fill prescriptions for the morning-after pill for rape victims, South Dakota Right to Life, an anti-abortion group, successfully lobbied the state legislature in 1998 to pass South Dakota Code Section 36-11-70.[43] The law allows pharmacists to refuse to fill prescriptions used to cause an abortion, to destroy unborn children, or to cause death by suicide or euthanasia; refusal to dispense any other medication is not sanctioned.[44] Because South Dakota defines unborn child as "an individual organism of the species homo sapiens from fertilization until live birth,"[45] the statute may implicate EC.[46] The law shields both pharmacists and their employers from being sued by a customer, and protects pharmacists from disciplinary action or recrimination for refusing to dispense those medications.[47]

In addition to the pharmacist refusal laws in Arkansas, Georgia, Mississippi, and South Dakota, legislators in twenty states introduced forty-three similar

39. MISS. CODE ANN. § 41-107-5(1) (2006).
40. *Id.* § 41-107-5(2).
41. *Id.* § 41-107-5(3).
42. *Id.*
43. S.D. CODIFIED LAWS § 36-11-70 (1999); *see also* Deborah Barfield, *A Pharmacists' Conscience Issue*, NEWSDAY, May 18, 1998, at A4.
44. S.D. CODIFIED LAWS § 36-11-70.
45. *Id.* § 22-1-2(50A).
46. The FDA has stated that while EC works mainly by preventing ovulation, "[i]t is possible that [the drug] may also work by . . . preventing attachment (implantation) to the uterus (womb)." CTR. FOR DRUG EVALUATION & RESEARCH, *supra* note 27; *see also* Lee Ann E. Conard & Melanie A. Gold, *Emergency Contraceptive Pills: A Review of the Recent Literature*, 16 CURRENT OPINION OBSTETRICS & GYNECOLOGY 389, 391 (2004) ("These data support the hypothesis that the primary mechanism of action of EC is delaying or inhibiting ovulation rather than inhibiting the implantation of a fertilized egg."). Accordingly, EC may come within the purview of this statute because it may prevent an already-fertilized egg from implanting in the uterus. In addition, the South Dakota statue could apply to a number of other medications that may also cause harm to the fetus. *See* Nat'l Women's Health Info. Ctr., U.S. Dep't of Health & Human Servs., Frequently Asked Questions: Pregnancy and Medications 2 (2002), *available at* http://www.womenshealth.gov/faq/pregmed.pdf.
47. S.D. CODIFIED LAWS § 36-11-70 (2006).

refusal laws in the 2006 session.[48] Moreover, several other states have existing laws protecting healthcare providers that may be broad enough to protect pharmacists from dispensing contraceptive medications. For example, the Illinois Health Care Right of Conscience Act[49] protects physicians and other healthcare personnel who "refus[e] to perform . . . or participate . . . in any particular form of health care service which is contrary to [their] conscience."[50] Colorado,[51] Florida,[52] Maine,[53] Tennessee,[54] and Washington[55] also have statutes that could be interpreted to protect pharmacists who refuse to dispense certain medications.

D. The Patients' Rights Response

Primarily concerned with pharmacist refusals interfering with women's access to contraception and EC, women's organizations and some physician's groups have sought to increase awareness of the issue and have lobbied legislatures to take action.[56] In 2006, legislators in eleven states introduced legislation

48. *See* Nat'l Women's Law Ctr., *supra* note 8, at 3.

49. 745 ILL. COMP. STAT. ANN. 70/1–70/14 (2002).

50. *Id.* at 70/4. "Health care personnel" is defined as "any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services." *Id.* at 70/3(c). This language seems broad enough to apply to pharmacists, but Illinois Governor Rod Blagojevich has stated that it does not specifically apply to them. *See* Doug Moore, *Illinois Druggists Pledge to Defy Rule*, ST. LOUIS POST-DISPATCH (Mo.), Aug. 21, 2005, at B1 ("[P]harmacists . . . say they will not compromise their religious beliefs by filling emergency contraception prescriptions—something Illinois Gov. Blagojevich says they must do.").

51. COLO. REV. STAT. § 25-6-102(9) (2006).

52. Florida's Comprehensive Family Planning Act lays out guidelines for making birth control and other family-planning services available to its citizens, but, like the Arkansas law, makes clear that the Act shall not be construed to prevent a physician "or other person" from "refusing to furnish any contraceptive or family planning service, supplies, procedures, or information for medical or religious reasons." FLA. STAT. ANN. § 381.0051 (West 2005).

53. ME. REV. STAT. ANN. tit. 22 § 1903(4) (West 2006).

54. TENN. CODE ANN. § 68-34-104 (West 2006).

55. WASH. REV. CODE ANN. § 48.43.065 (1999). Though Washington's statute only protects healthcare providers generally, it defines healthcare providers as anyone "regulated under Title 18 . . . to practice health or health-related services," which includes pharmacists. *Id.* § 48.43.005(16)(a) (Supp. 2006). Note also that a few other states have statutes protecting government employees who refuse to provide family-planning services. *See, e.g.*, COLO. REV. STAT. § 25-6-207; GA. CODE ANN. § 49-7-6 (Supp. 2006); OR. REV. STAT. § 435.225 (2006); W. VA. CODE § 16-2B-4 (2006); WYO. STAT. ANN. § 42-5-101 (Michie 2006).

56. *See, e.g.*, *Freedom of Conscience for Small Pharmacies: Hearing Before the H. Comm. on Small Business*, 109th Cong. 82 (2005) (testimony of Kim A. Gandy, President, National Organization for Women); *Protecting the Rights of Conscience of Health Care Providers and a Parent's Right to Know: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 107th Cong. 13 (2002) (statement of Catherine Weiss, Director, ACLU Reproductive Freedom Project); ACLU, RELIGIOUS, *supra* note 5; NAT'L WOMEN'S LAW CTR., *supra* note 5; Nat'l Women's Law Ctr., *supra* note 2; Nat'l Women's Law Ctr., *supra* note 8; Nat'l Women's Law Ctr., The Pharmacy Refusal

to reduce the harm from a pharmacist's refusal to fill a prescription.[57] As described earlier, California recently enacted a bill[58] that explicitly protects patients and employers from pharmacist refusals.[59] The statute allows a pharmacist to refuse to fill a prescription only if he has previously notified the employer of an intention to do so, and only if the employer can reasonably accommodate the objection without undue hardship. In 2006, the Nevada State Board of Pharmacy adopted regulations limiting a pharmacist's ability to refuse to dispense prescriptions to situations in which the pharmacist believes that filling the prescription would be unlawful, harmful to the patient, fraudulent, or not for a legitimate medical purpose.[60]

Federal lawmakers have proposed legislation to address pharmacist refusals as well. In the U.S. House of Representatives, Representatives Carolyn Maloney (D-NY) and Steve Israel (D-NY) proposed the Access to Legal Pharmaceuticals Act (ALPhA),[61] and in the U.S. Senate, Senators Frank Lautenberg (D-NJ) and Barbara Boxer (D-CA) proposed the Pharmacy Consumer Protection Act.[62] The ALPhA would mandate that pharmacies ensure that in-stock prescriptions are filled by another pharmacist without delay in the case of a refusal.[63] The Pharmacy Consumer Protection Act would require pharmacies that receive Medicaid funds to fill all valid prescriptions without delay.[64]

In addition to legislative action, the governors of Arizona, Wisconsin, and Illinois have weighed in on the issue in favor of patient protection. In April 2005, Arizona Governor Jane Napolitano vetoed a bill that would have

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Project (2000), http://www.nwlc.org/details.cfm?id=2185&section=health; AMA House of Delegates, Resolution on Pharmacies and Pharmacists—Duty to Fill Prescriptions (May 11, 2005), *available at* http://www.ama-assn.org/meetings/public/annual05/9a05.pdf.

57. Nat'l Women's Law Ctr., *supra* note 8, at 3.

58. S. 644, 2005 Leg., Reg. Sess. (Cal. 2005).

59. *See* CAL. BUS. & PROF. CODE §§ 733, 4314–4315 (West 2003 & Supp. 2006); *Governor Puts a Wrap on Legislation*, *supra* note 2.

60. 105 Nev. Reg. Admin. Regs. R036-06 (Apr. 10, 2006). In 2004, Maine clarified the meaning of one of its statutes to have a similar effect as the new Nevada law, permitting pharmacist refusals only if the pharmacist questions the legitimacy or appropriateness of the drug, or if he questions the photographic identification of the patient. *See* 02-392-19 ME. CODE R. § 11 (Weil 2005) (clarifying ME. REV. STAT. ANN. tit. 32, § 13795(2)); NAT'L WOMEN'S LAW CTR., *supra* note 5, at 4. Note also that several states have laws in place that, while not enacted in response to the pharmacist refusal debate, could nonetheless be interpreted to protect patient rights. *See generally* JODY FEDER, CRS REPORT FOR CONGRESS: FEDERAL AND STATE LAWS REGARDING PHARMACISTS WHO REFUSE TO DISPENSE CONTRACEPTIVES 3–4 (2005), *available at* http://maloney.house.gov/documents/olddocs/women/ALPHA/RS22293.pdf.

61. *See* Access to Legal Pharmaceuticals Act (ALPhA), H.R. 1652, 109th Cong. (2005); Sid Cassese & Ridgely Ochs, *Israel and Maloney Among Those Behind Legislation That Would Fine Drugstores That Refuse Customers*, NEWSDAY, Aug. 23, 2005, at A26.

62. Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005).

63. ALPhA, H.R. 1652, 109th Cong. (2005).

64. Pharmacy Consumer Protection Act of 2005.

allowed pharmacists to refuse to provide EC if doing so conflicted with their moral or religious beliefs,[65] and Wisconsin Governor Jim Doyle recently vetoed two similar bills.[66] Illinois Governor Rod Blagojevich issued an emergency rule in April 2005 requiring pharmacies that stock contraceptives to fill all prescriptions for birth control or EC without delay or face losing their licenses.[67] His actions were in response to two instances of pharmacists refusing to fill morning-after pill prescriptions, which the governor believed were "part of a concerted effort" to restrict women's access to birth control.[68] The Illinois state legislature voted to approve the rule in August 2005, making it a permanent part of the Illinois Administrative Code,[69] though several pharmacists are challenging the law.[70]

Pharmacy boards have also entered the debate. The American Pharmacists Association (APhA) Code of Ethics requires that a pharmacist "place[ ] the

65. *See Governor Vetoes Bill on Contraception Qualms*, L.A. TIMES, Apr. 15, 2005, at A19.

66. *See* David Callender, *Doyle Again Vetoes 'Conscience Clause'*, CAPITAL TIMES (Madison, Wis.), Oct. 15, 2005, at A3; Anita Weier, *Health Limits Vetoed*, CAPITAL TIMES (Madison, Wis.), Apr. 21, 2004, at A1.

67. The emergency rule was codified at ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006).

68. Press Release, Office of the Governor, Ill., Rod R. Blagojevich, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005), *available at* http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805.

69. *See* Abdon Pallasch, *Panel OKs Gov's Rule Ordering Dispensing of Contraceptives*, CHI. SUN-TIMES, Aug. 17, 2005, at 16.

70. In 2005, the American Center for Law and Justice filed both state and federal lawsuits on behalf of pharmacists, challenging the Illinois rule as violating the pharmacists' religious rights. *See* John Chase, *State Birth-Control Rule Challenged*, CHI. TRIB., Apr. 14, 2005, at 4 (discussing state lawsuit); Mary Massingale, *Governor, Agency Sued Over Contraceptive Rule*, STATE J.-REG. (Springfield, Ill.), Dec. 21, 2005, at 11 (discussing federal lawsuit). In November of that year, four Illinois pharmacists were placed on unpaid indefinite leave for refusing to agree to Walgreens' new policy—prompted by the Illinois rule—that all pharmacists dispense EC. *See* Leah Thorsen, *4 Walgreens Druggists Are Suspended in Pill Debate*, ST. LOUIS POST-DISPATCH (Mo.), Nov. 30, 2005, at B5. The American Center for Law and Justice filed suit against Walgreens on behalf of these pharmacists, all of whom are also plaintiffs in the suit against the governor. *See* Press Release, Am. Ctr. for Law & Justice, *supra* note 10. While this litigation was pending, Walgreens sought to join the pharmacists' federal lawsuit against the governor as a third-party intervenor, alleging that the governor's rule has forced the pharmacy to lose qualified pharmacists and subjected it to litigation. Walgreens requested that the litigation against it be stayed until the federal proceedings were resolved. On June 8, 2006, Judge Scott allowed Walgreens to intervene in the federal lawsuit against the governor, holding that the pharmacy has an interest in the subject matter of the lawsuit as well as its outcome, and is not adequately represented by the plaintiffs. *See* Menges v. Blagojevich, No. 05-3307, 2006 U.S. Dist. LEXIS 37770 (C.D. Ill. June 8, 2006). Three months later, the court refused to grant the state's motion for summary judgment. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006); *infra* note 10. The court held that the plaintiffs' free exercise claim could move forward because the plaintiffs' allegations, if true, might establish that the law should be subject to strict scrutiny. *Menges*, 451 F. Supp. 2d at 999–1002. Plaintiffs' Title VII preemption claim also survived dismissal. *Id.* at 1002–04; *see also infra* notes 100, 109, 140 (providing more detailed discussions of this case).

well-being of the patient at the center of the professional practice,"[71] but the APhA instituted a conscience clause for pharmacists in 1998 and has made clear its position that a pharmacist should be permitted to "step away" from his duties when he objects to a particular medication[72]: "[A] pharmacist with personal objections to certain activity should not be mandated to participate, but should establish alternative systems to assure patient access to legally prescribed, clinically safe therapy."[73] Six state pharmacy boards have adopted a stronger propatient stance than the APhA.[74]

II. PHARMACIST REFUSAL STATUTES CHANGE THE LAW CONFRONTING PHARMACISTS

A. Pharmacists' General Duty to Serve Patients and Fill Prescriptions

Pharmacists are regulated by state law and can face disciplinary action from state pharmacy boards or tort consequences if they fail to meet professional or legal standards.[75] As described above, several states and pharmacy boards have duty-to-fill laws or policies, or are considering them in some form. Pharmacists in states with such regulations have an unambiguous duty to serve patients by filling all prescriptions, and may face pharmacy board sanction, tort action, or employer discipline if they do not fulfill that duty.[76]

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71. Am. Pharmacists Ass'n, Code of Ethics for Pharmacists (Oct. 27, 1994), http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2903; *see also* Teliska, *supra* note 12, at 236 (stating that the American Pharmacists Association (APhA) ethics require pharmacists to put needs of patients first); James, *supra* note 12, at 430 (same).

72. *See Freedom of Conscience for Small Pharmacies*, *supra* note 56, at 11–13 (statement of Linda Garrelts MacLean, Wash. State Univ.) (discussing the development of the APhA's conscience clause); Teliska, *supra* note 12, at 237–38 & nn.66–70.

73. Letter from John Gans, Exec. Vice Pres., APhA, to James Oliphant, Editor in Chief, Legal Times (Aug. 22, 2005), *available at* http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/ContentDisplay.cfm&ContentFileID=679.

74. The Delaware, Massachusetts, New York, North Carolina, Oregon, and Texas Pharmacy Boards have specifically adopted propatient policies. *See* Nat'l Women's Law Ctr., *supra* note 2, at 2; Marcia D. Greenberger & Rachel Vogelstein, *Pharmacist Refusals: A Threat to Women's Health*, 308 SCIENCE 1557, 1557 (2005). The Wisconsin pharmacy board went so far as to penalize a pharmacist for refusing to fill or transfer an EC prescription. *See* Anita Weier, *Pharmacist Penalty Adds Up to $20,000*, CAPITAL TIMES (Madison, Wis.), Apr. 14, 2005, at A3. Washington state's pharmacy board recently adopted a proposed rule that would require pharmacists to fill all legal prescriptions if the drug is in stock. *See* Carol M. Ostrom, *Prescriptions Must Be Filled Under Newly Adopted Rule*, SEATTLE TIMES, Sept. 1, 2006, at B1.

75. *See* Herbe, *supra* note 6, at 90–93 (refusing pharmacists may be subject to tort liability or disciplinary action from pharmacy boards).

76. For example, Walgreens disciplined pharmacists in Illinois for failing to comply with its new policy—prompted by the Illinois rule—that pharmacists must dispense EC without delay. *See* Thorsen, *supra* note 69, at B5.

Even in states that do not explicitly require that a pharmacist honor all valid prescriptions, however, pharmacists have a general duty to patients to exercise reasonable care in practicing their profession,[77] which "requires the highest degree of prudence, thoughtfulness and diligence."[78] Like all health-care professionals, pharmacists are held to a higher standard of care than that of an ordinarily prudent person when the alleged negligence occurs in their area of expertise.[79] Some courts have found that pharmacists must be alert for patent or obvious errors in doctors' prescriptions;[80] others have required pharmacists to verify[81] or refuse to fill[82] questionable prescriptions; and a few courts have suggested that pharmacists have a duty to warn patients of the inherent risks in drugs.[83] But nearly all jurisdictions have held that the relationship between a pharmacist and a patient gives rise to a minimum duty to fill prescriptions properly and accurately, and that pharmacists are liable for damages that result from breach of that duty.[84] For example, in a landmark

77. *See* Herbe, *supra* note 6, at 90–93.

78. Eldridge v. Eli Lilly & Co., 485 N.E.2d 551, 552 (Ill. App. Ct. 1985).

79. *See* Lasley v. Shrake's Country Club Pharmacy, Inc., 880 P.2d 1129, 1132–33 (Ariz. Ct. App. 1994); Hooks SuperX, Inc. v. MacLaughlin, 642 N.E.2d 514, 519 (Ind. 1994).

80. *See, e.g.*, Heredia v. Johnson, 67 F. Supp. 1522, 1525 (D. Nev. 1993) ("At a minimum, a pharmacist must be held to a duty to fill prescriptions [and] be alert for plain error."); Nichols v. Cent. Merch., Inc., 817 P.2d 1131, 1133, (Kan. Ct. App. 1991); McKee v. Am. Home Prod. Corp., 782 P.2d 1045, 1055 (Wash. 1989) ("The pharmacist still has a duty to . . . be alert for clear errors or mistakes in the prescription.").

81. *See, e.g.*, Horner v. Spalitto, 1. S.W.3d 519, 523 (Mo. Ct. App. 1999); Gassen v. E. Jefferson Gen. Hosp., 628 So. 2d 256, 259 (La. Ct. App. 1993) ("[P]harmacist has a limited duty to inquire or verify from the prescribing physician clear errors or mistakes in the prescription.").

82. *See, e.g.*, Speer v. United States, 512 F. Supp. 670 (N.D. Tex. 1981); *Hooks SuperX*, 642 N.E.2d at 519 (stating that a duty to refuse to fill medications where the patient is requesting renewals at an accelerated pace "should be recognized here"); *cf. Eldridge*, 485 N.E.2d at 554.

83. *See, e.g.*, Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1129 (Ill. 2002) ("[A] narrow duty to warn exists . . . ."); Lasley v. Shrake's Country Club Pharmacy, Inc. 880 P.2d 1129 (Ariz. Ct. App. 1994) (holding that a duty to warn is a question of fact for the jury); Dooley v. Everett, 805 S.W.2d 380 (Tenn. Ct. App. 1990); *cf.* Allberry v. Parkmor Drug, Inc., 834 N.E.2d 199, 203 (Ind. Ct. App. 2005) ("[The pharmacist] had no duty to warn [plaintiff] of the side effects associated with Caverject."); Cottam v. CVS Pharmacy, Inc., 764 N.E.2d 814, 821 (Mass. 2002).

84. *See* R. Paul Asbury, Comment, *Pharmacist Liability: The Doors of Litigation are Opening*, 40 SANTA CLARA L. REV. 907, 909 (2000) (noting that traditionally pharmacists were responsible only for accurately filling prescriptions, and that while that standard remains the minimum, now courts also impose liability for failing to ensure the appropriate use of medications and failing to consult physicians when problems arise); Lauren Fleischer, Note, *From Pill-Counting to Patient Care: Pharmacists' Standard of Care in Negligence Law*, 68 FORDHAM L. REV. 165, 174 (1999) (describing traditional duty of clerical accuracy as a minimum, with some courts imposing a higher standard on pharmacists); Herbe, *supra* note 6, at 90 ("All jurisdictions require technical accuracy in the administration of prescriptions."); *see also Hooks SuperX*, 642 N.E.2d at 517 ("It is a matter of common understanding that customers rely upon pharmacists for that expertise. Upon this basis, we conclude that the relationship between pharmacist and customer is sufficiently close to justify imposing a duty."); *Heredia*, 67 F. Supp. at 1525 ("At a minimum, a pharmacist must be held to a

1971 case, the Michigan Court of Appeals held a pharmacist liable for incorrectly dispensing a patient's birth control pills.[85]

By imposing liability on pharmacists who erroneously fill prescriptions, tort law obligates pharmacists to service patients by accurately filling their prescriptions. Commentators have suggested that a pharmacist's refusal to fill a woman's prescription could be considered a breach of his duty to accurately administer prescriptions, even where no state law or policy codifies this duty.[86] Such a breach could result in disciplinary action from state pharmacy boards. The New York Civil Liberties Union (NYCLU) adopted this position in a recent complaint with the New York Department of Education.[87] The organization argued that three CVS pharmacists should be subject to disciplinary action because their refusal to fill prescriptions for EC obstructed their patients' access to legal medication, breaching the pharmacists' duty of care.[88] While this complaint was filed on behalf of healthcare providers and sought only disciplinary action, the same alleged breach of duty could give rise to a tort claim on behalf of a patient who has suffered damages.

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duty to fill prescriptions as prescribed . . . ."); Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 730 (Mich. Ct. App. 1996) ("A pharmacist does owe to a customer a duty to properly fill a legal prescription.").

85. In *Troppi v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971), the court held the pharmacist liable for lost wages, medical expenses, pain and anxiety of pregnancy and childbirth, and the economic costs of rearing the child that plaintiff bore because she believed she was taking birth control medication that was in fact tranquilizer pills. *Id.* at 517 ("Public policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs. Given the great numbers of women who currently use oral contraceptives, such absolution cannot be defended on public policy grounds."). Similarly, in *Johnson v. Hay*, 931 F.2d 456 (8th Cir. 1991), the Eighth Circuit Court of Appeals found a pharmacist liable for refusing to fill a prison inmate's prescription: "Hay intentionally, not inadvertently, refused to fill Johnson's prescriptions," and thus "this conduct amount[ed] to intentional interference with the treatment prescribed by his attending physicians." *Id.* at 461.

86. *See* Afif, *supra* note 12, at 261 ("Extrapolating the legal reasoning behind the common law duty to dispense medicine correctly, one may find this legal duty also requires pharmacists to dispense prescribed birth control."); James, *supra* note 12, at 430 ("The reported incidents of pharmacist refusals and the proposed conscience clause statutes . . . violate a general duty to fill prescriptions by not placing patients' needs first."); Herbe, *supra* note 6, at 91 ("Women seeking [EC] or abortion drugs may analogize a refusal to fill a prescription with prescriptions inaccurately filled . . . ."); *see also* Smearman, *supra* note 12, at 512 (arguing that pharmacists have a duty to fill prescriptions because state pharmacy laws have limited the reasons pharmacists may refuse to fill prescriptions to valid legal and medical concerns, implicitly prohibiting refusals for other reasons such as religious or moral beliefs.). Some authors have noted, however, that if a pharmacist refuses to dispense but then transfers the prescription, he may have satisfied his standard of reasonable care. *See, e.g.*, Herbe, *supra* note 6, at 90.

87. *See* Press Release, ACLU, *supra* note 9; Letter from NYCLU to Richard Trumbull, Supervisor, Office of the Professions, N.Y. State Dep't of Educ. (Aug. 15, 2006), *available at* http://www.nyclu.org/pdfs/rrp_ec_complaints_complaintletter_081506.pdf. The New York Department of Education, Office of the Professions, is the regulatory body responsible for regulating pharmacists in New York.

88. *See* Letter from NYCLU, *supra* note 87, at 12–13. The NYCLU also argued that the pharmacists acted beyond the scope of their authority, violated antidiscrimination law, and engaged in abandonment and neglect of patients. *Id.* at 8–15.

B. Title VII Religious Discrimination Protection Does Not Absolve Pharmacists of Their Duty to Serve Patients

A pharmacist who is disciplined or terminated by his employer for refusing to dispense prescriptions[89] may argue that the employer's actions violate Title VII of the Civil Rights Act of 1964.[90] However, employment discrimination law is consistent with the view set forth above that pharmacists, like other healthcare professionals, have a general duty to serve patients; this duty is not excused simply because a pharmacist's refusal to fill prescriptions is religiously based.[91]

In the religious discrimination context, Title VII requires employers to reasonably accommodate an employee's religious practice if that conduct does not constitute an undue hardship on the employer.[92] In assessing this accommodation duty, even a de minimis cost to the employer is an undue hardship.[93] Courts have held that employers need not alter their seniority systems,[94] direct other employees to substitute for the religious employee,[95] or offer more than a

89. This has already occurred in Illinois. *See* Thorsen, *supra* note 69 (commenting on Walgreens pharmacists put on unpaid leave for failing to abide by pharmacy standards). Pharmacies have varying disciplinary policies in place to address pharmacist refusals. For example, CVS requires that refusals be discussed with a supervisor before they occur. *See* CVS Gets PPFA Thumbs Up, http://www.saveroe.com/fillmypillsnow/cvsgetsthumbsup (last visited Dec. 28, 2006). Kmart only allows exemptions to the extent that they do not interfere with customer access to medication. *See* Letter from Kmart to Planned Parenthood (May 9, 2005), *available at* http://www.saveroe.com/media/117_kmartletter.pdf. Similarly, Costco does not "permit . . . personal beliefs to impede the legitimate dispensing of legally prescribed medication." *See* Letter from Costco (n.d.), *available at* http://www.saveroe.com/media/113_costcoletter.pdf. However, Target and Wal-Mart—which, until recently, did not stock EC—do allow conscience-based pharmacist refusals under certain circumstances. *See* Planned Parenthood, Survey of Top Pharmacy Chains' Policies on Pharmacist Refusals (May 25, 2005), http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/pharmacist-refusals-10995.htm.

90. Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from discriminating—in hiring, firing, and in limiting, segregating or classifying employees or applicants—on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (2000). In this Subpart, I assume that the refusing pharmacist is able to establish a prima facie case of religious discrimination, and that the burden thus shifts to the employer to prove that accommodation would be an undue hardship. *See* Bergquist, *supra* note 12, at 1084 nn.87–90.

91. *See* Bergquist, *supra* note 12, at 1104–05; Herbe, *supra* note 6, at 95–97; Lumpkin, *supra* note 12, at 118–19.

92. *See* 42 U.S.C. § 2000e(j).

93. *See* TWA, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

94. *See id.* (altering seniority system to give airline employee certain days off to observe his religion would amount to "unequal treatment of employees on the basis of their religion").

95. *See* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146–47 (5th Cir. 1982) (holding that to require nondissenting employees to fill in for pharmacist so he could observe religious holidays would "depriv[e] them of their shift preference at least partly because they do not adhere to the same religion as [plaintiff]").

lateral transfer[96] in order to meet the reasonable accommodation standard. Moreover, courts have expressed concern for the effect that a religious exemption will have on third parties,[97] especially in situations where the public trust in healthcare (or other service) workers is implicated.[98]

Commentators have argued that, if confronted with a Title VII claim by a pharmacist disciplined for refusing to fill a contraceptive prescription, a court would likely find that accommodating the pharmacist's refusals would unduly burden the employer.[99] If an employer hires a pharmacist who refuses to fill certain prescriptions, it may have to arrange for an additional pharmacist during the dissenting pharmacist's shifts, or otherwise alter existing schedules, to ensure that all prescriptions are filled in a timely manner.[100] Precedent suggests that such costs would constitute an undue burden, both because of the cost to the employer and the burden on other employees.[101]

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96. *See* Shelton v. Univ. of Med. & Dentistry, 223 F.3d 220, 226–29 (3d Cir. 2000) (holding that hospital's offer of lateral transfer to nonabortion facilities was reasonable accommodation for plaintiff labor-and-delivery nurse who refused to participate in emergency abortion procedures); Rodriguez v. City of Chicago, 156 F.3d 771 (7th Cir. 1998) (finding that plaintiff policeman who refused to guard abortion clinic could have requested transfer under collective bargaining agreement, which would have been a reasonable accommodation).

97. *See Hardison*, 432 U.S. at 81 ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees . . . in order to accommodate or prefer the religious needs of others . . . .").

98. *See Shelton*, 223 F.3d at 228 ("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."); *Rodriguez*, 156 F.3d at 779 (Posner, J., concurring) ("Police officers and firefighters have no right under Title VII . . . to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."); *see also* Endres v. Ind. State Police, 349 F.3d 922, 927 (7th Cir. 2003) (holding that Title VII required no accommodation at all for a Baptist police officer who refused to protect gamblers at a casino and was subsequently terminated) ("Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism—as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.").

99. *See generally* Bergquist, *supra* note 12, at 1085–1105 (engaging in detailed analysis of the accommodations employers must make for refusing pharmacists under Title VII); *id.* at 1104 (concluding that "nearly every available reasonable accommodation imposes more than de minimis costs on a pharmacy's business"); Lumpkin, *supra* note 12, at 115–18; *see also* Herbe, *supra* note 6, at 93–95 (arguing in favor of expanded conscience clauses because Title VII provides insufficient protection for refusing pharmacists). *But see* Rambaud, *supra* note 12, at 213 ("Title VII may provide significant protections for a pharmacist's right of conscience in the context of both hiring and firing.").

100. These are obviously not the only accommodations an employer might make. For an exhaustive look at employers' options when confronted with refusing pharmacists, see Bergquist, *supra* note 12, at 1084–1104.

101. *See supra* note 99. In a recent case addressing religious accommodations for pharmacists, Judge Shabaz of the Western District of Wisconsin relied upon existing Title VII case law to find that the civil rights statute did not prevent an employer from disciplining a pharmacist who refused to come into contact with women seeking birth control. *See* Noesen v. Med. Staffing

Moreover, a court confronting a refusing pharmacist may be concerned that exempting a pharmacist from his duty to dispense medication would harm patients; at the very minimum, pharmacist refusals result in a delay in service for patients, and they could result in an unintended pregnancy. A court may be especially critical of the selective nature of the pharmacist's actions and find that pharmacist refusals, which to date affect only women who take birth control or EC,[102] do not warrant exemptions given the potential for erosion of public trust.[103]

Network, Inc., No. 06-C-071-S, 2006 U.S. Dist. LEXIS 36918 (W.D. Wis. June 1, 2006). Neil Noesen, a Roman Catholic pharmacist who had already been disciplined by the Wisconsin state pharmacy board for refusing to dispense birth control to a patient in 2002, was hired by Wal-Mart in 2005 to fill a temporary pharmacist position. *See* Weier, *supra* note 74. Wal-Mart agreed to accommodate his refusal to dispense birth control. Noesen's supervisor never asked Noesen to dispense, or otherwise touch prescriptions for birth control, and always had another pharmacist on duty to fill prescriptions or answer questions about birth control. *Noesen*, 2006 U.S. Dist. LEXIS 36918, at *5–*6. However, he did ask that Noesen notify other pharmacists if customers were waiting for birth control at the pharmacy counter or on hold on the telephone. *Id.* at *6. Noesen refused to abide by the supervisor's requests, complaining that he was "pressuring [Noesen] to attend customers who were seeking birth control." *Id.* Noesen's behavior became disruptive, and he was fired. *Id.* He initiated a Title VII action against Wal-Mart, and Wal-Mart sought summary judgment on the ground that it had reasonably accommodated the pharmacist. *Id.* at *12. The court granted the motion. Noting that Title VII only requires that an employer "provide one reasonable option that will eliminate the conflict between the employee's job and religious beliefs," the court found that Wal-Mart had given Noesen precisely the accommodation he had requested—to avoid dispensing contraceptives—and that he was entitled to no additional accommodation. *Id.* at *12–*13. This analysis is consistent with Amy Bergquist's prediction that pharmacies need only make a good faith effort to accommodate a pharmacist's objections in order to satisfy Title VII. *See* Bergquist, *supra* note 12, at 1104–05. In the recent case *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006), the court reached a different result. Judge Scott refused to dismiss plaintiffs' claim that a duty-to-fill law was preempted by Title VII, finding that plaintiffs' allegations, read in the light most favorable to them, might establish that pharmacies can reasonably accommodate pharmacists who refuse to dispense EC without incurring an undue burden. The court relied upon plaintiffs' argument that many pharmacies currently accommodate employees with objections to EC, suggesting that employers need not necessarily incur significant costs in making such arrangements. *Menges*, 451 F. Supp. 2d at 1002–04. Note that this case—examining whether a duty-to-fill law is preempted by Title VII—reflects a different procedural posture than a case in which a pharmacist sues a pharmacy under Title VII for disciplining him based on his refusal to fill a prescription.

102. The one-sided nature of pharmacist refusals raises questions about sex discrimination. I briefly discuss the possibility that pharmacist refusals violate the Equal Protection Clause *infra* note 203, but I do not closely examine whether such refusals might implicate state or federal antidiscrimination laws. There may be some support for such an argument, however. In its recent complaint against the three pharmacists who refused to fill EC, the NYCLU argued that the pharmacists' actions violated the New York Human Rights Law, which prohibits sex discrimination in any place of public accommodation. *See* Press Release, ACLU, *supra* note 9. The NYCLU analogized pharmacists' refusals to dispense EC, which only women take, to companies' refusal to provide contraception coverage in their healthcare plans, which constitutes unlawful employment discrimination under Title VII. *See id.* A forthcoming law review article discusses the relationship between pharmacist refusals and public accommodation laws in detail. *See generally* Chandrasekhar, *supra* note 12.

103. *See supra* note 98.

The above case law suggests that although Title VII is sensitive to the religious beliefs of employees, and requires employers to accommodate those beliefs where possible, it does not override a pharmacist's general duty to serve patients. If a pharmacist violates pharmacy policy by failing to dispense a prescription and is correspondingly disciplined, Title VII would protect him only to the extent that accommodating his beliefs would not jeopardize the employer or other third parties.

C. Constitutional Free Exercise Rights Do Not Exempt Pharmacists From Their Duty to Serve Patients

A pharmacist may claim that a common law or statutory duty to serve all patients violates his right to free religious exercise under both federal and state law. The Free Exercise Clause of the First Amendment bars Congress from making laws that prohibit the free exercise of religion.[104] While the Clause affords absolute freedom from governmental regulation of religious beliefs, the protection it provides for religious acts is limited.[105] In order for a conduct restriction to violate the Free Exercise Clause, it must impose a burden on the citizen's free exercise of religion significant enough to outweigh the state's interest in the regulation. Current free exercise jurisprudence does not mandate strict scrutiny of generally applicable laws, requiring only rational basis review.[106] However, some state constitutions[107] and religious exemption statutes[108] may mandate strict scrutiny of free exercise claims.

In the pharmacist refusal context, courts may be reluctant to grant pharmacists relief from their duty of service to customers via a federal or state

104. U.S. CONST. amend. I.

105. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("[T]he [First] Amendment embraces . . . freedom to believe and freedom to act. The first is absolute but . . . the second cannot be.").

106. *See* Employment Div. v. Smith, 494 U.S. 872, 885 (1989); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). *Smith* formally abandoned the strict scrutiny standard applied to free exercise claims in *Sherbert v. Verner*, 374 U.S. 398 (1963), and subsequent cases. In response to *Smith*, the U.S. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2000), the purpose of which was to restore the compelling interest test as laid out in *Sherbert*. However, the Supreme Court invalidated the statute as it applies to state laws in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

107. *See* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–84 (Alaska 1994); Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 90–91 (Cal. 2004).

108. *See, e.g.*, ARIZ. REV. STAT. § 41-1493.01 (2005); CONN. GEN. STAT. ANN. § 52-571b (West 2005); 775 ILL. COMP. STAT. ANN. 35/10 (2004); R.I. GEN. LAWS § 42-80.1-3 (1998); S.C. CODE ANN. § 1-32-40 (2004); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001-012 (Vernon 2005). These laws are commonly called state RFRAs because they were modeled after the federal legislation. *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 597 (1999); *supra* note 106.

religious freedom clause. A statute, common law tort duty, or pharmacy board regulation that explicitly or implicitly obligates a pharmacist to fill valid prescriptions may be viewed as a generally applicable law,[109] and therefore would be subject only to rational basis review under the federal Constitution. Moreover, even under the strict scrutiny standard that may apply if the law is not viewed as generally applicable, or if the case is litigated under a state religious exemption law or state constitution, a pharmacist may be unable to show that the law initially imposes a substantial burden on his religious belief. Even if that hurdle could be overcome, a court may find that the law is nonetheless necessitated by a compelling state interest in the well-being of its citizens.

1. Substantial Burden

Throughout its free exercise jurisprudence, the U.S. Supreme Court has often focused on whether the individual seeking an exemption can avoid the religious burden in question without violating his religious beliefs.[110] This has

109. Laws are considered generally applicable if they do not refer to a religious practice on their face and are not crafted to impede a particular conduct, *Lukumi*, 508 U.S. at 533–34. A law requiring pharmacists to fill all prescriptions does not facially refer to a religion. However, a pharmacist challenging a duty-to-fill law may argue that the law is not generally applicable because its true object is to target religious pharmacists. In *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006), the plaintiffs advocated this position in opposing defendant's motion to dismiss, arguing that the Illinois rule requiring them to fill all prescriptions for EC was not generally applicable because the purpose of the rule was not to make EC available, but to impede the conduct of individual pharmacists with religious objections to EC. *Id.* at 999–1002. Specifically, the plaintiffs pointed out that the rule in question applied only to stand-alone pharmacies, not hospitals or emergency rooms, and allowed pharmacies to choose not to stock EC, undermining the governor's assertion that the purpose of the law was to make EC available. The court held that while these allegations could be interpreted to support either plaintiffs' or defendant's position, it had to view all inferences in favor of the plaintiffs at the summary judgment stage, and therefore found that the law could be viewed as not generally applicable. *Id.* at 1001–02. *But see* NAT'L WOMEN'S LAW CTR., *supra* note 5, at 12 (arguing that the Illinois law is "neutral and generally applicable"); Lumpkin, *supra* note 12, at 121–22 (arguing that most duty-to-fill laws should be neutral and generally applicable).

Note also that even if a court found that a duty-to-fill law was generally applicable, strict scrutiny might still apply if a pharmacist successfully argued that another constitutional right was at issue in addition to the free exercise of religion because then the case would be viewed as a hybrid-rights situation. *Smith*, 494 U.S. at 881–82. I address the strict scrutiny test in the free exercise context regardless, since it may be relevant under a state constitution or religious exemption law; therefore, I do not spend extensive time on the issues surrounding whether duty-to-fill laws warrant strict scrutiny under the federal Constitution.

110. The strict scrutiny test developed in *Sherbert v. Verner*, 374 U.S. 398 (1963), first asks whether the plaintiff has a claim involving a sincere religious belief and whether the law in question substantially burdens that belief; it then asks whether the law in question serves a compelling interest and is narrowly tailored. *Id.* at 402–03. Even before *Sherbert* was decided, however, the question of whether the law at issue in fact burdens the religious beliefs of the plaintiff, was an important element in the free exercise analysis. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 923

led the Court to be more skeptical of claims where the religious activity in question is not directly criminalized but is only inconvenienced and made more expensive by a regulation. For example, in *Braunfeld v. Brown*,[111] the Court refused to grant Jewish shopkeepers an exemption from a mandatory Sunday closing law because the shopkeepers "were not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution."[112] Instead, the law merely "operate[d] so as to make the practice of [the shopkeepers'] religious beliefs more expensive."[113] In *Tony & Susan Alamo Foundation v. Secretary of Labor*,[114] the Court rejected the free exercise claim of religious associates who worked for a nonprofit religious organization in exchange for food, clothing, and shelter, but received no cash salaries. The associates sought an exemption from minimum wage laws, but the Court held that no burden existed because the associates could have simply returned their wages to their employer via donation.[115]

Several state supreme court cases also present issues of voluntary commercial entry in the free exercise context. For example, in *Smith v. Fair Employment & Housing Commission*,[116] the California Supreme Court found that the plaintiff landlord could not prove her religious exercise was burdened by antidiscrimination housing laws because she could have avoided the religious conflict by "redeploying [her] capital in other investments."[117] The Alaska Supreme Court confronted the same issue in *Swanner v. Anchorage Equal Rights Commission*,[118] and also questioned whether the antidiscrimination statute burdened the plaintiff's religion, holding that "[v]oluntary commercial activity does not receive the same status accorded to directly religious activity."[119]

(Cal. 1996). Accordingly, some of the cases described in this Subpart do not specifically rely on *Sherbert*—either because they were handed down before *Sherbert*, because they do not reach the issue of whether to apply the *Sherbert* test, or because they rely on a state constitution that mandates a slightly different test—but they nonetheless address the basic question of whether the plaintiff's religious beliefs are burdened by the law in question.

111. 366 U.S. 599 (1961).

112. *Id.* at 605.

113. *Id.*

114. 471 U.S. 290 (1985).

115. *Id.* at 303–04; *see also* United States v. Lee, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct [are not] binding on others . . . .").

116. 913 P.2d 909.

117. *Id.* at 925 (applying the strict scrutiny test mandated by the then-applicable federal RFRA). Evelyn Smith refused to rent her properties to unmarried couples because it offended her religion; she argued that the California statute, which barred discrimination on the basis of marital status, violated her right to free exercise of her religious beliefs.

118. 874 P.2d 274 (Alaska 1994).

119. *Id.* at 283 (applying the strict scrutiny test mandated by the Alaska constitution).

Given the foregoing case law, a pharmacist may be unable to initially establish that a duty-to-fill rule imposes a substantial burden on his religious exercise. Like the landlords in *Smith* and *Swanner* who chose to enter a field regulated by antidiscrimination laws, pharmacists choose to enter a commercial field regulated by health codes and other laws. Their choice of profession is purely secular. Although the particular conduct of dispensing EC or birth control might conflict with their religion, the pharmacists could avoid the burden without violating their religion by choosing not to work in the field. Though it might be expensive and inconvenient for pharmacists to enter a different profession in order to avoid conflicts between religion and work, *Braunfeld* stands for the notion that generally applicable laws that merely make the practice of religion more expensive do not trigger constitutional protection under the Free Exercise Clause. Moreover, pharmacists' duty to fill prescriptions need not even imply minimal contact with objectionable behavior; many women take contraceptive medications not to prevent pregnancy, but for various other medical conditions.[120] Thus, when pharmacists are faced with women seeking to have birth control prescriptions filled, they are not necessarily confronted with behavior that conflicts with their religious beliefs,[121] further minimizing the burden on their religion.

2. Compelling Interests and Third-Party Rights

Though courts consider a variety of factors in analyzing a state's compelling interest in the statute at issue, the impact on third parties[122] is particularly relevant in the pharmacist refusal context. The California Supreme Court stated that it is "unaware of any decision in which . . . the United States Supreme Court . . . has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."[123]

120. Women may use the pill for reasons other than birth control—for example, to regulate the menstrual cycle, decrease menstrual cramps, and improve acne—and, even in the case of EC, purposes could vary. *See* Anita L. Nelson, *Whose Pill Is It, Anyway?*, FAMILY PLANNING PERSPECTIVES, Mar./Apr. 2002, at 89, *available at* http://www.guttmacher.org/pubs/journals/3208900.pdf.

121. This point led law professor Anita Allen to question whether pharmacists will begin asking women to explain the purpose for their contraceptive prescription. *See* Ellen Goodman, *Dispensing Morality*, WASH. POST, Apr. 9, 2005, at A23 ("If [a pharmacist is] parsing his conscience with each prescription, can he ask if the morning-after pill is for carelessness or rape?").

122. *See generally* Seth H. Salinger & Neil G. Warrenbrand, *Does a Sincerely Held Religious Belief Provide a Right to Discriminate?*, BOSTON B.J., Jan./Feb. 1995, at 5.

123. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 93 (Cal. 2004).

In the influential free exercise discrimination case *Bob Jones University v. United States*,[124] the Supreme Court upheld the Internal Revenue Service determination to rescind the 501(c)(3) status of Bob Jones University because its ban on interracial dating violated antidiscrimination principles.[125] Applying strict scrutiny to the statute in question, the Court found that the government had a compelling interest in eradicating the racial discrimination the university practiced, and that granting an exemption would be inconsistent with protecting third parties.[126] In *United States v. Lee*,[127] the Court considered the burden on other employees in its refusal to grant a religious employer an exemption from payment of social security taxes.[128] It held that if the religious employer were allowed nonpayment of taxes, it would interfere with the government's compelling interest in providing a comprehensive insurance system for all employees.[129]

The California Supreme Court expressed similar concern in *Catholic Charities of Sacramento, Inc. v. Superior Court*.[130] In considering the state's compelling interest in eradicating gender discrimination via the contraceptive equity law at issue,[131] the court weighed heavily the fact that an exemption for a religious employer would compromise the right of women to receive equitable treatment with respect to health benefits.[132] The Alaska Supreme Court in *Swanner* also recognized that exempting a landlord from an antidiscrimination housing statute would burden third parties.[133] The court viewed the state's interest in the antidiscrimination statutes as twofold: a derivative interest in

124. 461 U.S. 574 (1983).
125. *Id.* at 603–04.
126. *Id.* at 604.
127. 455 U.S. 252 (1982).
128. *Id.* at 261.
129. *Id.* at 258, 261. More generally, the Court cautioned that where religious objectors enter a commercial activity, "the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972). The majority in *Yoder* held that the Free Exercise Clause allowed Amish parents an exemption from compulsory school attendance laws, *id.* at 234, but Justice Douglas dissented because of the holding's implications for third parties, *id.* at 242 (Douglas, J., dissenting) ("If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children.").
130. 85 P.3d 67 (Cal. 2004).
131. The law in question—the Women's Contraceptive Equity Act—requires certain health and disability-insurance contracts to cover prescription contraceptives. *Id.* at 73.
132. *Id.* at 93 (noting that the detrimental effect that any exemption from the Women's Contraceptive Equity Act would have on women "[s]trongly enhanc[ed] the state's interest" in furthering the law"). After determining that the law represented the least restrictive means of accomplishing the goal of eliminating gender discrimination, the court upheld it as required by the strict scrutiny test applicable under the California Constitution. *Id.* at 93–94.
133. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 282–83 (Alaska 1994).

ensuring access to housing, and a transactional interest in preventing individual acts of discrimination.[134] Because of the transactional component, the court found that the state had a compelling interest even if prospective tenants found housing elsewhere, and that the interest would suffer if exemptions were granted to accommodate religious practices: "Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination."[135]

These courts' consistent concern that an exemption would burden third parties in free exercise cases may prove problematic for a pharmacist seeking a constitutional exemption from a duty-to-fill law. A state imposing an obligation to fill all prescriptions may argue that it has a compelling interest in protecting third parties from the impact of a pharmacist's refusal.[136] A pharmacist's refusal to dispense medication is like a landlord's refusal to rent to unmarried couples or an employer's refusal to provide contraception coverage; exemptions in each case jeopardize the well-being of others.[137] Indeed, the impact upon female patients denied their medication may be more significant than upon unmarried couples seeking housing or female employees seeking equal insurance coverage of contraceptives; when EC is involved, which may work for up to 120 hours but is most effective for the first twelve to twenty-four,[138] a pharmacist's refusal to dispense the drug in a timely manner could result in an unwanted pregnancy.[139]

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134. *Id.* at 282.

135. *Id.* at 283.

136. For example, Illinois Governor Rod Blagojevich justified his duty-to-fill rule on the ground that pharmacist refusals were restricting women's access to contraception. *See supra* note 68 and accompanying text.

137. One court noted the potential harm of pharmacist refusals on the public in its decision not to extend strict liability to pharmacists for inaccurately filling prescriptions: "[I]t would ill-serve the needs of the public to impose a duty on pharmacists under which, to avoid potential liability, they might refuse to fill prescriptions, notwithstanding decisions by licensed physicians that a particular drug was necessary and appropriate for their patients' medical treatment." Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1387 (Pa. 1991).

138. *See* Nat'l Women's Law Ctr., *supra* note 8, at 1.

139. *See* Dahlia Lithwick, *Martyrs and Pestles*, SLATE, Apr. 13, 2005, http://www.slate.com/id/2116688 ("So, one pharmacist's refusal to dispense [EC] can rapidly morph into an unwanted pregnancy.").

Even if the woman is able to procure her medication elsewhere, the "transactional interest" language in *Swanner* suggests that the state may still have a compelling interest, furthered by its duty-to-fill legislation, in eliminating each act of pharmacist refusal to avoid "degrad[ing] individuals [and] affront[ing] human dignity." *Swanner*, 874 P.2d at 283. Women who have been refused their medication by pharmacists have reported experiencing humiliation and embarrassment at the pharmacy counter as they are denied their valid prescriptions and even lectured about their decision to use birth control or EC. *See* Dailard, *supra* note 25, at 10; Laura Lambert, Pharmacist Refusals: Women Tell All (June 10, 2005), http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/ birth-control-access-prevention/pharmacy-refusals-6510.htm.

In sum, though federal and state religious freedom clauses prohibit the state from infringing upon the religious exercise of its citizens, they may not exempt pharmacists from their general duty to serve patients. A pharmacist may have a difficult time even initially establishing that a duty-to-fill statute substantially burdens his religion, and the potential impact on third parties from pharmacist refusals further weakens the case for a religious exemption from the law.[140]

III. INTERPRETING PHARMACIST REFUSAL CLAUSES CONSISTENTLY WITH ABORTION CONSCIENCE CLAUSE PRECEDENT TO PROTECT THIRD-PARTY INTERESTS

Part II demonstrates that pharmacist refusal clauses provide pharmacists with far more protection than either Title VII religious discrimination law or religious freedom clauses. If a pharmacist seeks to protect himself from employer discipline or a patient tort suit by relying on a refusal clause, courts will have to interpret these statutes. I argue that courts should read these laws narrowly to minimize third-party burdens unless legislative intent is clearly to the contrary.

A. The California Law: A Closer Look at a Model Statute

California's new statute demonstrates that substantial protection of a pharmacist's right to his personal beliefs need not burden established employer rights or a patient's access to basic healthcare. The law allows pharmacists to refuse to dispense drugs on ethical, moral or religious grounds, but only if the

140. I do not discuss whether a duty-to-fill law might be narrowly tailored to a compelling state interest in this Subpart, partly because there are a number of forms the law might take that may or may not reflect characteristics of narrow tailoring. More importantly, the purpose of Part II.C is not to predict whether or not a duty-to-fill law would survive a free exercise challenge, but to illustrate that in this area of law courts have shown concern for the effect that religious exemptions have on third parties. It is worth pointing out, however, that in refusing to dismiss the free exercise claim against Governor Blagojevich for instituting the Illinois duty-to-fill rule, the court suggested that if strict scrutiny applies to the rule requiring pharmacists to dispense EC, the law may be invalidated for lack of narrow tailoring. Judge Scott focused on the fact that the law applies only to pharmacies that stock contraceptives, not hospitals, emergency rooms, or those pharmacies that do no stock contraceptives, implying underinclusiveness. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 1001–02 (C.D. Ill. 2006). Because this case was only at the summary judgment stage, it cannot be relied upon for the proposition that the Illinois law violates a pharmacist's right to free exercise under the First Amendment; the court's very brief analysis of the strict scrutiny standard, which does not consider whether the pharmacists have in fact established that their religion is substantially burdened by the law, or the nature of the defendant's compelling interest in the law, underscores this point. *See id.*; *see also* NAT'L WOMEN'S LAW CTR., *supra* note 5, at 12 (arguing that the Illinois law serves the compelling interests of "reducing unintended pregnancies and eliminating sex discrimination," and is narrowly tailored because it "permits pharmacies to comply in a variety of ways, and allows employee accommodations that satisfy Title VII").

pharmacist has notified his employer in advance in writing, and only if the employer can accommodate the refusal without undue hardship. The statute further requires the pharmacy to establish protocols in situations of a pharmacist's advance refusal to ensure a patient's timely access to her medication. By combining the procedural protection of advance warning with the substantive balancing test of Title VII, and further implementing specific protection for patients by imposing upon the pharmacy a duty to ensure timely access to drugs, the California statute represents a compromise between the conscience of healthcare workers and the established rights of third parties.[141]

B. A Narrow Approach Can Replicate the California Law in Other States

The California law's successful balancing points the way for courts in other jurisdictions as they attempt to interpret refusal statutes. An interpretation consistent with the California statute will circumscribe the group of people that a refusal will impact, and will allow patients and employers to guard against such behavior. Although other refusal statutes are not worded as carefully as the California law, precedent in the abortion conscience clause context suggests that courts have room to interpret the statutes in such a way as to induce a regime in which pharmacists take precautions to preserve the rights of employers and patients.

1. Case Law From the Abortion Conscience Clause Context

Though no court has yet interpreted a pharmacist refusal clause, legal precedent in the abortion refusal clause context illustrates that courts have available a variety of techniques to reduce the burden of conscience clauses on third parties. Where invocation of a statute is inconsistent with tort law and employer prerogatives, courts have employed modes of analysis that integrate these statutes into the larger pattern of preexisting law, limiting their application to situations in which employer and patient rights are not at risk.

For example, in *Erzinger v. Regents of the University of California*,[142] a California appellate court rejected plaintiffs' argument that the Church

141. *See* S. 644, 2005 Leg., Reg. Sess. (Cal. 2005); *see also* CAL. BUS. & PROF. CODE § 733(b)(3) (West Supp. 2006) ("A licentiate may decline to dispense a prescription drug or device on [an ethical, moral, or religious 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."); *id.* § 4314 (West 2003 & Supp. 2006) (establishing applicable fines for violations of § 733); *id.* § 4315 (establishing applicable admonishments for violations of § 733).

142. 187 Cal. Rptr. 164 (Cal. Ct. App. 1982).

Amendment protected them from paying health fees that were used to fund abortions.[143] The plaintiffs were University of California students who argued that they should not have to pay the portion of the university registration fee used to subsidize abortion services.[144] The students relied upon section (d) of the Church Amendment, which provides that no educational entity may discriminate because of the applicant's unwillingness to participate in the performance of abortions or sterilizations.[145] The court easily dismissed the argument. It held that the language "performance of abortion" was far too narrow to include the plaintiffs' role as participants in a healthcare plan, reasoning that "Congress did not intend to prevent the University from requiring its students to participate in a comprehensive health insurance program which includes cost benefits for persons desiring abortions or sterilizations."[146]

In *Tramm v. Porter Memorial Hospital*,[147] the court also read the refusal clause narrowly to exclude the plaintiff's activities. Plaintiff Elaine Tramm was a nurse's aide who refused to clean instruments used for abortions. The hospital discharged her for her refusal to participate in her job duties.[148] Tramm argued that the hospital terminated her employment in violation of the Indiana conscience clause statute, which provided in part that no member of a hospital staff shall be required to perform or assist in an abortion that violates her beliefs.[149] The court found that those provisions of the statute did not include the conduct required by Tramm's employment: "[Preparing and cleaning instruments] do not encompass the 'performance' of procedures resulting or intended to result in an abortion."[150]

In *Shelton v. University of Medicine & Dentistry of New Jersey*,[151] the court took a slightly different approach. Plaintiff Shelton, a labor and delivery nurse, refused to participate in abortion procedures and was subsequently fired.[152] In her appeal of the district court's dismissal of her Title VII case,

143. *Id.* at 167–68.
144. *Id.* at 165.
145. *Id.* at 187 & n.1.
146. *Id.* at 168.
147. No. H 87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989).
148. *Id.* at *1, *3.
149. *Id.* at *28.
150. *Id.* at *30. In contrast to its narrow reading of the first part of the Indiana conscience clause, however, the *Tramm* court read the third provision very broadly, which provided that no hospital may discipline any employee based on his or her beliefs. *Id.* at *31. Because the hospital administrators knew of Tramm's beliefs and fired her for refusing to perform duties inconsistent with those beliefs, the court held that they violated this third provision. *Id.* The court's interpretation of the statute was notably expansive, for one could argue that the hospital did not discipline Tramm for her beliefs, but instead for her failure to cooperate with the hospital's regulations.
151. 223 F.3d 220 (3d Cir. 2000).
152. *Id.* at 222–23.

Shelton argued that she was protected by the New Jersey conscience statute, which read that "refusal to perform [or] assist in the performance of . . . abortion services . . . shall not constitute grounds for . . . disciplinary action."[153] Because Shelton did not properly plead the claim that the hospital's actions violated the conscience clause in her original pleadings, the court did not directly decide whether the statute applied, but it did note that the conscience clause would likely not protect Shelton. The court reasoned that Shelton's termination stemmed not from her refusal to participate in abortions, but from her unwillingness to work with the hospital in resolving her religious conflict.[154]

The court in *Kenny v. Ambulatory Center of Miami*[155] adopted the balancing test dictated by Title VII to protect an employer's rights, even though the Florida abortion refusal clause's language did not compel such analysis.[156] Margaret Kenny was a full-time nurse who was demoted to part-time status when she refused to participate in abortion procedures.[157] She argued that her demotion was in violation of Florida's abortion refusal clause, which prohibited hospitals from disciplining or discriminating against employees for their refusal to participate in abortion procedures.[158] The Florida appellate court applied the Title VII standard of reasonable accommodation on the part of the employer in the absence of undue hardship, rejecting a broad reading of the statute that would have given the employee an unqualified right to refuse.[159]

However, at least one court has refused to recognize the impact on third parties. In *Swanson v. St. John's Lutheran Hospital*,[160] plaintiff Marjorie Swanson, a nurse, refused to participate in a sterilization procedure and was subsequently terminated.[161] She claimed that she had been wrongfully discharged for asserting her rights under the Montana abortion refusal clause, which prohibited termination of an employee as a result of refusal to participate in such a

153. *Id.* at 228.

154. *Id.* at 229 n.11 ("Even had Shelton properly pled the statutory violation, it appears doubtful from the record that she could have established her claim, given the evidence that her termination was caused by her refusals to cooperate with the Hospital.").

155. 400 So. 2d 1262 (Fla. Dist. Ct. App. 1981).

156. *Id.* at 1264–67.

157. *Id.* at 1263.

158. *Id.* at 1264.

159. *Id.* at 1266 ("Our evaluation of the alternatives . . . whether to apply the federal standard requiring reasonable accommodation unless undue hardship exists, or to apply the more stringent standard of disallowing discrimination regardless of the cost, impels us to accept the former."). The court ultimately found that the hospital did not meet its burden of proving that accommodating Kenny would have resulted in an undue hardship. *Id.* at 1267.

160. 597 P.2d 702 (Mont. 1979).

161. *Id.* at 703.

procedure.[162] The appellate court found that Swanson's right of refusal was outweighed by the right of the hospital to "maintain its standards as an effective employer and operator of the only hospital in an isolated geographic area," and by the detrimental effect that the refusal would have on patients.[163] However, the Montana Supreme Court overturned the appellate court's ruling, finding that the legislature intended an unqualified right to refuse for employees, regardless of the burden on the employer or patients, and that the lower court could not qualify or limit that right once it accepted the statute as constitutional.[164]

The above analysis of refusal clauses involves private actors, but cases in which state actors rely upon refusal clauses further demonstrate how the rights of third parties can inform the interpretation of a refusal clause. For example, in *Valley Hospital Ass'n v. Mat-su Coalition for Choice*,[165] a coalition of women and doctors sued Valley Hospital, arguing that its policy of only providing abortions in limited situations violated Alaska's constitution.[166] The Alaska Supreme Court held that the quasi-public hospital's abortion policy violated a woman's right to privacy under the Alaska constitution,[167] and rejected the hospital's reliance on Alaska's abortion refusal clause.[168] The court held that the hospital could not defer to the state legislature when a constitutional right was threatened,[169] and that the legislature could not balance statutory rights against constitutional ones.[170] While this case involves a public actor, it nonetheless demonstrates courts' willingness to limit the breadth of refusal clauses when they conflict with important third-party rights.

162. *Id.* at 703–04.

163. *Id.* at 709.

164. *Id.* at 710 ("By accepting the statute as constitutional, the hospital must accept the statute in the way it is written, which in this case means it applies to 'all persons' irrespective of their geographic location and the discomfitures that might result from the exercise of the statutory right.").

165. 948 P.2d 963 (Alaska 1997).

166. *Id.* at 965.

167. *Id.* at 968–71. The court did not reach a conclusion as to whether the hospital's policy violated the federal Constitution by creating an undue burden on a woman's right to privacy. *Id.*

168. *Id.* at 972.

169. *Id.* ("Constitutional rights 'cannot be allowed to yield simply because of disagreement with them.'" (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955))).

170. *Id.* ("VHA has no constitutional right at issue; it has at most a statutory right. The legislature . . . may not balance statutory rights against constitutional ones, like the right to an abortion."). In reaching its holding, the Alaska court relied upon a New Jersey Supreme Court decision reached nearly twenty years earlier, in which the court rejected a nearly identical statute in a similar situation. *See* Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976).

2. A Proposed Approach to Pharmacist Refusal Statutes

The above cases vary considerably in the interpretive techniques they utilize, but collectively they suggest that, as in the Title VII and free exercise contexts, courts generally recognize and try to protect the preexisting rights of third parties when confronted with conscience clauses, absent the clearest intent of the legislature to disregard those interests. The same approaches used to minimize impact on third parties in abortion refusal clause cases may be used in the pharmacist refusal clause context.

a. Limiting the Act of Conscience

For courts confronted with pharmacist refusal clauses, the key to minimizing third-party harm is to view the protected act of conscience as limited to the actual refusal to dispense medication. To illustrate how this approach would work, consider the simplest statutory scenario: a hypothetical refusal clause that only protects pharmacists who object to dispensing EC, but specifically immunizes them from employer discipline and tort action. The law is thus narrow in scope, but broad in terms of the protection it provides.

Now further assume that a pharmacist's employer has two procedural rules in place, requiring a dissenting pharmacist to notify the employer in advance of an intention to refuse to dispense any medications,[171] and mandating that a pharmacist return or transfer any prescription he refuses to dispense.[172] A pharmacist working for this employer refuses to dispense EC, with no advance warning of his refusal to dispense, and also fails to return or transfer the prescription to the patient. The employer subsequently disciplines the pharmacist for insubordination. When the pharmacist brings a lawsuit relying upon the hypothetical refusal clause, a court should find that the conscience clause does not immunize the pharmacist against the employer's ensuing disciplinary action. This is because noncooperation with the advance warning rule, or with the return or transfer rule, is separate from the refusal to dispense medication, and the refusal itself is the only act of conscience protected by

171. For example, CVS Pharmacy has a policy requiring its pharmacists to give advance warning of a refusal to dispense. *See* Letter from CVS Pharmacy to Planned Parenthood (May 20, 2005), *available at* http://www.saveroe.com/media/104_cvsmay2005fax.pdf.

172. This entire example could be replicated with virtually any employer procedural rules, even those more specifically designed to protect patients than employers. For example, an employer might have a policy prohibiting pharmacists from discussing their personal views with patients. *See, e.g.*, *id.* Alternatively, an employer might require that pharmacists who object to dispensing certain medications do so notwithstanding advance notice to their employer if the patient would otherwise be denied timely access to her medication. *See, e.g.*, Letter from Kmart, *supra* note 89.

the statute. Thus, even though the hypothetical law specifically protects the pharmacist against employer discipline, it only protects him from discipline that stems directly from the refusal.

A similar scenario could arise involving a dispute between the pharmacist and the patient. Assume the same statute as above, but with no employer procedural rules in place this time. The pharmacist refuses to dispense a patient's EC prescription, refuses to transfer or return the prescription to the patient, and then lectures her about her decision to use the drug. The patient sues the pharmacist for conversion,[173] or for intentional infliction of emotional distress,[174] and the pharmacist invokes the refusal clause to protect himself from the ensuing tort action. A court should again find that the conscience clause does not protect the pharmacist in this lawsuit, because the tort stems not from the refusal to dispense the medication, but from the refusal to return or transfer the patient's private information or from the unsolicited lecture. Even though the statute protects against tort action as a result of the refusal, the lawsuit is the consequence of failing to return the prescription, not the result of the refusal.[175]

These two examples demonstrate how, simply by limiting the protection of conscience clauses to the actual act of refusing to dispense medication, courts can reduce the harm to employers and patients from pharmacist refusals, even where a refusal statute is in place. This approach is consistent with most of the abortion conscience clause case law, and it is specifically supported by *Shelton*, in which the Third Circuit Court of Appeals suggested that the employer's disciplinary action was not prohibited by the refusal clause because it did not result from the refusal itself, but from the pharmacist's insubordination or failure to cooperate. *Kenny v. Ambulatory Center of Miami* is also relevant authority: In *Kenny*, the court found that a balancing test that considered the effect of a nurse's refusal upon her employer was appropriate even though the statute itself gave the nurse an unqualified right to refuse.

The advantage of adopting a narrow view of the act of conscience is that to a large degree, it replicates what the California statute accomplishes. It encourages

173. "Conversion" is defined as "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." BLACK'S LAW DICTIONARY 332 (6th ed. 1990).

174. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1977) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . .").

175. If the pharmacist returned the prescription to the patient without any lecture, however, and the patient still attempted to sue the pharmacist for his failure to dispense her prescription, the refusal clause would presumably protect the pharmacist. In that case, the patient would be attempting to hold the pharmacist liable only for his refusal to dispense the medication, and even a narrow reading of the refusal clause would protect the pharmacist from tort liability resulting only from the refusal to dispense.

employers to enact rules that protect both themselves and patients,[176] and it sends a message to pharmacists that failing to warn employers or return or transfer prescriptions is not acceptable behavior. Moreover, this proposal requires only minor interpretative work on the part of the court, yet it may have a tangible benefit for patients. Some of the most disconcerting reports of pharmacist refusals are those involving a failure to transfer or return prescriptions to patients;[177] an approach that recognizes and encourages procedural precautions could significantly minimize the impact of pharmacist refusals upon patients without requiring drastic legal or legislative measures.

b. The Necessity of a Narrow Approach

The arguments for such a judicial approach are strong in the context of the hypothetical statute narrowly focused on EC, but become even more compelling in the context of some of the expansive statutes that some states have adopted, as discussed in Part I. Both the broad scope of the pharmacist refusal statutes and the constitutional questions they may present demonstrate the necessity for an interpretive approach that narrows the potential scope of these laws.

(1) Broad Scope of the Statutes at Issue

While the examples above assumed a statute that only protected refusals to dispense EC, in fact the refusal statutes fall into three basic categories: (1) statutes that cover only EC, as in the hypotheticals; (2) statutes that cover contraception, both emergency and traditional; and (3) statutes that cover all medications.

Because pharmacist refusal clauses can be so much broader in scope than the abortion conscience clauses discussed in the case law above, judicial narrowing

176. Pharmacies should be interested in implementing procedural rules such as advance notice, or return or transfer requirements, because at least some of the refusal clauses protect only individuals—not institutions—and pharmacies will likely want to avoid patient litigation and to retain their established goodwill. For example, Georgia and Mississippi protect pharmacists, but not pharmacies, from liability stemming from refusals. *See* GA. COMP. R. & REGS. 480-5-.03 (2005); MISS. CODE ANN. § 41-107-5 (2005). Employers have already demonstrated that they will protect themselves by responding to legislative changes in this developing legal field. When the Illinois governor instituted the rule—now a permanent part of Illinois law—requiring all prescriptions for EC to be filled, Walgreens responded by firing pharmacists who refused to dispense the medication. *See supra* note 70 and accompanying text.

177. *See* John Seager, Op-Ed., *Stopping Contraception*, MODESTO BEE (Cal.), July 29, 2005 (providing an example of a woman whose pharmacist refused to fill or transfer her prescription for EC until it was too late for the drug to be effective). Pharmacist Neil Noesen was disciplined for his refusal partly because of his refusal to transfer the prescription to a different pharmacy. *See* Patricia Simms, *Board: Patient Need Ignored by Pharmacist*, WIS. ST. J., Apr. 14, 2005, at B1.

becomes all the more necessary. As conscience clauses increase in scope, the moral weight of the conscience claim grows significantly weaker, and the statute's potential impact on third parties becomes more burdensome. I begin with abortion conscience clauses as a starting point to demonstrate how far some of the pharmacist refusal clauses have strayed from both the purpose and effect of these "original" conscience clauses.

Abortion conscience clauses protect healthcare workers who object to performing or assisting in the performance of abortions.[178] For several reasons, these laws achieve a balance between respecting the consciences of the healthcare professional providing the abortion and the woman seeking the abortion.[179] First, because the objection to performing an abortion is grounded in a moral and religious claim—the protection of a third-party fetus[180]—and because a doctor's duties in performing an abortion require such close involvement with the procedure, the protection of these conscience claims can be viewed as an understandable compromise between two conflicting views in the highly charged abortion debate. Perhaps more importantly, abortion conscience clauses are not as burdensome on third parties as broader statutes because they protect a very narrow range of services. As described above, abortion conscience clauses do not protect workers who object to cleaning instruments in preparation for an abortion or students who pay for a healthcare plan that subsidizes abortions.[181] They are also inapplicable to those who object to providing EC services or information.[182] In general, they are largely limited to doctors and nurses actually performing abortions. Because of their narrow scope, these abortion laws affect fewer patients than broader conscience

178. *See, e.g.*, 42 U.S.C. § 300a-7 (2000).

179. *See* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) ("The abortion decision may originate within the zone of conscience and belief . . . ."); *see also id.* at 916 (Stevens, J., dissenting) ("[A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience.").

180. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 324 (1992) (noting that contemporary arguments against abortion concern themselves almost exclusively with protection of the unborn).

181. *See supra* Part III.B.1.

182. *See* Brownfeld v. Daniel Freeman Marina Hosp., 256 Cal. Rptr. 240, 245 (Cal. Ct. App. 1989) (holding that the term "abortion" in the state abortion refusal clause did not include EC) ("Abortion, as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills."); Herbe, *supra* note 6, at 98 (arguing that abortion refusal clauses are deficient because they will not protect pharmacists who object to dispensing EC). *But see* Brauer v. Kmart, No. C-1-99-618 (S.D. Ohio Jan. 23, 2001) (suggesting that an abortion conscience clause might be interpreted broadly enough to include even traditional birth control because what mattered was not the objective reality that contraception is not equivalent to an abortion, but the pharmacist's subjective belief that the medication caused an abortion); NAT'L WOMEN'S LAW CTR., *supra* note 5, at 13.

clauses.[183] As a result, a healthcare worker's refusal to provide an abortion is more predictable than an objection to other services because patients realize that abortion is an issue that deeply divides the nation,[184] and they may not expect that abortion services will be widely available.

In contrast to an abortion conscience clause, consider the narrowest possible pharmacist refusal clause—a statute that would allow a pharmacist to object only to dispensing EC. None of the enacted pharmacist refusal statutes are this narrow, though South Dakota's is the closest.[185] Note that even with this circumscribed example, we have already crossed into territory quite different from in the abortion conscience clause. While some may assert that EC acts as an abortifacient,[186] both the law[187] and medicine[188] treat the drug as traditional birth control because it acts only preimplantation and therefore cannot terminate a pregnancy.[189] Moreover, the differing duties of a pharmacist and a doctor suggest that the pharmacist's claim does not warrant the same protection as the doctor or nurse's claim.[190]

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183. As a matter of comparison, ten times more women seek prescriptions for the pill than seek abortions services. About 1.3 million abortions were performed in America in 2005, including repeat abortions. This translates to about a 2 percent abortion rate among women ages fifteen to forty-four, whereas about 11.7 million women use the pill, and 26 million women rely on other contraceptive methods. *See* ALAN GUTTMACHER INST., FACTS IN BRIEF, CONTRACEPTIVE USE 1 (2005), *available at* http://www.agi-usa.org/pubs/fb_contr_use.pdf; Guttmacher Inst., Get "In the Know": Questions About Pregnancy, Contraception and Abortion (2005), http://www.guttmacher.org/in-the-know/incidence.html.

184. *See Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

185. *See supra* notes 43–47 and accompanying text.

186. *See* Pharmacists for Life Int'l, *supra* note 6 (including numerous links to articles contending that contraceptive medications act as abortifacients); Press Release, Am. Ctr. for Law & Justice, ACLJ Not Deterred by Entry of Planned Parenthood into Lawsuit Against Kmart Involving Abortion Producing Drugs (Oct. 11, 2001), *available at* http://www.acljlife.org/news/pr_011111_kmart_planned_parenthood.asp ("We intend to prove that . . . all . . . so-called 'emergency contraceptives,' work by ending the life of a distinct, separate human being. . . . [Pharmacists] should have a right to choose not to dispense medication that ends a life." (quoting Francis J. Manion, Senior Counsel, ACLJ)); Cohen, *supra* note 25, at 1 ("In isolated cases nationwide, individual pharmacists have refused to fill prescriptions for these emergency contraceptive pills (ECPs), presumably on the grounds that to do so is to facilitate abortion."); Herbe, *supra* note 6, at 87 ("Some pharmacists believe life begins at fertilization, and thus find EC to be an early form of abortion."). Note that though pharmacists may also object to the abortion pill, RU-486, it is not available at pharmacies in the United States. *See* Manier & Brotman, *supra* note 22, at N1.

187. *See supra* note 28.

188. *See supra* note 27.

189. EC acts to prevent fertilization—and possibly implantation—and is ineffective once a fertilized egg is implanted in the womb. It cannot terminate a pregnancy as defined by the medical profession. *See supra* note 27.

190. Some pharmacists and other advocates argue that an exemption for pharmacists from dispensing EC is no different from the protection for doctors and other healthcare professionals

Notwithstanding the above points, a conscience clause that protects only refusals to dispense EC is preferable to broader clauses, such as the Arkansas, Colorado, Florida, Maine, Tennessee, and Washington statutes, which may protect pharmacists who object to dispensing any contraceptive drugs or devices.[191] Unlike opposition to abortion, which involves a claim of third-party harm to the fetus,[192] or even EC, which may prevent implantation,[193] opposition to regular contraception involves no risk to third parties and is thus outside the realm of utilitarian and deontological morality, instead implicating private preferences or the views of certain organized religions.[194] And even religious opposition to contraceptive use may not obviously implicate a serious claim of conscience on the part of a person who merely dispenses contraception. The relationship between the dispenser of contraception and the purchaser of the drug is little different from the hotel employee who rents to or cleans hotel rooms for unmarried couples, or the person who installs bathroom vending machines that sell condoms; all of these individuals may be faced with behavior that they abhor, but they are not in any way forced to

provided by abortion conscience clauses. *See* Dykes, *supra* note 6, at 586 (Like other healthcare professionals protected by conscience clauses, "pharmacists also face threats to their moral and ethical integrity."); Herbe, *supra* note 6, at 97 ("As nearly all conscience statutes were enacted without regard to pharmacists, these statutes are deficient in the context of pharmaceutical distribution of reproductive medications in both their scope and protection."). However, patients' rights advocates counter that there is an important difference between forcing a doctor to perform an abortion surgery where his religious beliefs oppose harming a fetus, and requiring a pharmacist to fill a prescription, in terms of the nature of the imposition on the healthcare professional and the risk to the patient. *See* NAT'L WOMEN'S LAW CTR., *supra* note 5, at 2; Anita L. Allen, *Pharmacists' "Conscience Clauses" Are Rx for Trouble*, RELIGION NEWS SERVICE, May 9, 2005; Lithwick, *supra* note 139.

191. Note that it is unclear whether all of these statutes apply to pharmacists. Only the Arkansas law unambiguously protects pharmacists. *See supra* Part I.C.

192. *See supra* note 180 and accompanying text.

193. For those religions that believe life begins at fertilization—notwithstanding medical consensus to the contrary—EC could theoretically implicate fetal life because it may prevent fertilization or implantation. *See* Conard & Gold, *supra* note 46, at 391; *supra* notes 27, 186.

194. While Catholicism does object to contraception, a majority of Catholics ignore the church's teachings on contraception in practice. A recent church document revealed that Catholics use birth control to the same extent as other Americans and that only 4 percent of Catholics use natural planning, the type of birth control approved by the Church. *See* Neela Banerjee, *U.S. Bishops Adopt Guidelines on Gays*, N.Y. TIMES, Nov. 15, 2006, at A23. Note also that the Catholic Church has expressed far deeper disapproval for abortion than birth control. Catholicism's ban on abortion is a "definitive" teaching, meaning that Catholics must obey it as an act of faith and can be excommunicated for violating it, whereas, the Church's opposition to birth control is generally viewed only as authoritative, because believers may bring reason to bear on the issue. *See* David Van Biema, *Does Abortion Trump All Other Issues?*, TIME, June 21, 2004, at 37; Robert J. McClory, *Bishop Takes Issue with Late Predecessor*, NAT'L CATHOLIC REP., May 7, 2004, at 37; A.W. Richard Sipe, Sex and the Catholic Church: Where Did We Go Wrong (Oct. 5, 1993), *available at* http://www.richardsipe.com/Lectures/sex_and_the_church.pdf.

engage in the behavior themselves, and are not unilaterally excused from their job duties by conscience clauses or employment law protections. Moreover, statutes that protect this claim affect third parties significantly because of the sheer number of women and men who would be subject to refusals—tens of millions of American families rely on some type of contraception every year.[195] Equally important, expanded statutes make refusals more unpredictable. The practical[196] and legal approbation[197] of contraceptive use means that women do not expect procuring their contraception from a pharmacy to be subject to opposition, and therefore typically do not guard against refusal.[198]

The most expansive pharmacist statute is one that protects pharmacists who refuse to dispense any number of drugs that violate their conscience. The Mississippi, Georgia, and possibly Illinois refusal clauses may be interpreted this broadly.[199] Statutes that permit these claims are troublesome both because the claims themselves are not based upon any recognizable moral or religious claim, and because their broad application invites abuse. While objections to abortion and contraception may have a basis in religion, objections to other drugs seldom do.[200] Moreover, protecting a right to refuse that encompasses all medications may lead to questionable behavior. A pharmacist may

195. More than 43 million women in the United States are sexually active and in their childbearing years, and nine in ten of those women—approximately 38 million—use some type of contraception. Of those, approximately 11.7 million women used the pill—the most popular contraceptive method—in 2002. The same year, 10.3 million women relied on tubal sterilization, 6.8 million on the male condom, and 3.5 million on a vasectomy. The pill is the most widely used contraceptive by women in their teens and twenties, women who have never been married, and women with at least a college degree. *See* ALAN GUTTMACHER INST., *supra* note 183, at 1. In contrast, though it is difficult to determine the specific number of women using EC in a given year, the number who received the drug via Planned Parenthood was less than one million in 2005. *See* Planned Parenthood, Emergency Contraception (2006), http://www.plannedparenthood.org/birth-control-pregnancy/emergency-contraception-4363%20.htm. Though presumably the total number is larger, it is likely many times less than the 11.7 million women who take the pill on a yearly basis. *See* ALAN GUTTMACHER INST., *supra* note 183, at 1.

196. *See supra* note 195 and accompanying text.

197. The law has recognized a constitutional right to birth control for over forty years. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (articulating a right to privacy broad enough to encompass married individuals' decision to use contraception); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending that right to unmarried individuals); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (extending that right to the sale and distribution of contraceptives).

198. In comparison to the widespread acceptance of birth control use, the scandal over the FDA's rejection of Plan B's application for over-the-counter status as well as the recent lawsuit against Wal-Mart for failing to carry the drug, suggest that the public is aware that the use of EC is a contested issue. *See* Michael Barbaro, *In Reversal, Wal-Mart Will Sell Contraceptive*, N.Y. TIMES, Mar. 4, 2006, at C4; Gardiner Harris, *Report Details F.D.A. Rejection of Next-Day Pill*, N.Y. TIMES, Nov. 15, 2005, at A1.

199. *See supra* notes 35–42, 49–50 and accompanying text. Note that South Dakota's statute may also cover a number of medications, *see supra* notes 43–47 and accompanying text, but it is not as open ended as the statutes listed above.

200. Though life-ending drugs may be an exception.

deny medication simply because he believes that its use somehow reflects an unethical lifestyle, such as HIV drugs for a gay man; antibiotics for a woman with a postabortion infection or a gun user with an infection from a gun wound; or Viagra for an unmarried man.[201] Statutes that protect claims this broad could potentially allow a Christian Scientist to work at a pharmacy and then refuse to undertake any of his job duties.[202] No other type of employee is singled out for this kind of protection—even refusal clauses for doctors are limited to the abortion, sterilization, and contraception services. Statutes that protect this claim burden third parties to the greatest extent because there is no limit to medications that may be refused, and patients have no ability to predict when a pharmacist might refuse to dispense these drugs.

In sum, as statutes depart further and further from the original abortion conscience clause, judicial narrowing becomes more and more critical. The expansive statutes create an unpredictable regime for patients that the abortion conscience clauses avoid through careful language and narrow court interpretation. Moreover, broad statutes may protect pharmacists who refuse to perform duties that do not necessarily conflict with claims of conscience or—worse—may open the door to abusive behavior.

(2) Presence of Constitutional Questions

The impetus for narrow tailoring by judicial interpretation becomes especially important in light of constitutional considerations. *Valley Hospital Association*, though involving a state actor, nonetheless shows that judges must consider the possibility that a refusal statute protecting one party's religious exercise could infringe upon another's constitutional right to privacy.[203]

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201. *See* Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2010 (2004) (discussing the potential for discriminatory refusals).

202. Christian Scientists believe in prayer-based healing in place of traditional medicine. *See generally* The Church of Christ, Scientist, http://www.tfccs.com (last visited Dec. 28, 2006).

203. *See* Valley Hosp. Ass'n v. Mat-su Coal. for Choice, 948 P.2d 963, 972 (Alaska 1997); Doe v. Bridgeton Hosp. Ass'n, 366 A.2d 641, 647 (N.J. 1976). Some articles focusing on pharmacist refusal clauses have suggested that these laws violate a woman's right to privacy. *See, e.g.*, Afif, *supra* note 12, at 268; James, *supra* note 12, at 425; Miller, *supra* note 12, at 253; Nguyen, *supra* note 12, at 269. Others have suggested they violate rights under the Equal Protection Clause, James, *supra* note 12, at 427, or the Establishment Clause, *id.* at 428; *see also* Duvall, *supra* note 12, at 1504 (claiming that conscience clauses may, though do not automatically, conflict with the Establishment Clause). While I argue *infra* notes 205–208 and accompanying text that these laws present privacy questions, I do not argue that they are per se unconstitutional from a privacy perspective. Moreover, I contend that it is highly unlikely that they would be found to violate the Equal Protection Clause or Establishment Clause. An equal protection challenge would likely fail due to the requirement of discriminatory intent, the exclusion of pregnancy from sex classifications, and the application of intermediate scrutiny. *See* Elizabeth

In *Carey v. Population Services International*,[204] the Supreme Court made clear that a statute need not completely prohibit the use or sale of contraceptive devices to infringe upon a person's right to privacy. Instead, merely limiting access may impose a significant burden: "[T]he same [strict scrutiny] test must be applied to state regulations that burden an individual's right to decide to prevent conception . . . by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely."[205] Prescription contraceptives are already highly regulated and subject to limited distribution by the FDA. By granting pharmacists, the gatekeepers of regulated medications, conscience-based exemptions from dispensing contraceptives, refusal clauses create unpredictable access to the drugs; the supply of medication depends entirely on the arbitrary encounter with a particular pharmacist. If a woman seeks to have her contraception prescription filled and is denied her medication by a pharmacist relying on a state conscience clause, this substantially limits her access to contraception. She may be forced to find another pharmacy to supply her medication, potentially a costly

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M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 143 ("Constitutional frameworks of equality have been inadequate to grapple with many core issues of gender discrimination."); Siegel, *supra* note 180, at 272 ("No meaningful review of reproductive regulation is possible within [the Supreme Court's] equal protection framework."). The requirement of discriminatory intent for facially neutral statutes is particularly problematic. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("Even if a neutral law has a disproportionately adverse effect upon a [suspect class], it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."). And there still remains the broader challenge of framing reproductive-rights restrictions as an equal protection issue; current protections for contraception and abortion were decided on privacy grounds, and the Court has held that opposition to abortion is not tantamount to discrimination against women as a class. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward . . . women as a class."). Finally, even if a court found that a pharmacist refusal statute discriminated against women as a class, it would probably survive the intermediate scrutiny that applies in gender-discrimination cases.

Similarly, the case law suggests that an Establishment Clause challenge would not be successful. The Court has long recognized that the government may accommodate religious practices without offending the First Amendment. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987); Employment Div. v. Smith, 494 U.S. 872, 912 (1990). The Ninth Circuit Court of Appeals held in *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974), that the Church Amendment, which provides healthcare workers with a right to refuse to perform abortions, was constitutionally permissible under the Establishment Clause. *Id.* at 311. Like the Church Amendment, neither existing nor proposed pharmacist refusal clauses favor any one particular religion over another, and most of the pharmacist refusal clauses do not solely grant exemptions for religious beliefs, but also allow pharmacists to refuse to fill prescriptions based on ethical or moral grounds. Therefore, it is unlikely that any of the pharmacist refusal clauses would be found to violate the Establishment Clause. *See* Kriesel, *supra* note 12, at 352 (making a similar observation).

204. 431 U.S. 678 (1977).

205. *Id.* at 688.

and time-consuming endeavor that might reduce the effectiveness of the drug, especially if it is EC. This state-sanctioned interruption in procuring the medication, without procedural protections, could, like the law in *Carey*, circumscribe a woman's "means of effectuating" the decision to prevent conception, thereby burdening her privacy right.[206] Moreover, a law that burdens the privacy right is subject to strict scrutiny, and even if a court finds that these statutes serve a compelling state interest—protecting the religious freedom of pharmacists[207]—it may find that they do not accomplish the goal by using the least restrictive means possible.[208] As discussed earlier, none of the statutes require that pharmacists notify their employer of any intention to refuse to dispense, or obligate the pharmacist to transfer the refused prescription to another pharmacy, which would be consistent with protecting pharmacists while providing proper patient care, and would make the laws more likely to pass a narrow tailoring inspection. Though I do not argue that pharmacist refusal clauses necessarily violate a woman's right to privacy, the mere presence of constitutional questions inherent in these refusal statutes should influence courts to interpret them narrowly to minimize their effect on third-party rights.

CONCLUSION

Pharmacist refusal clauses are fraught with tension between employers' rights, patients' rights, and religious freedoms. The statutes provide protection for pharmacists above and beyond the constitutional exemptions dictated by the First Amendment and the employment discrimination safeguards embedded in Title VII. They may also legalize behavior that would otherwise breach a pharmacist's duty of care. Considering the sizable debate pharmacist refusal clauses have engendered, the resolution of the conflicting rights of the parties involved will likely occur in the courts, especially given that litigation has already been initiated on both sides of the debate.[209]

In this Comment, I advocate a narrow judicial interpretation of pharmacist refusal clauses. Specifically, I encourage judges to view the protected

206. *See* Miller, *supra* note 12, at 259–61 (arguing that the refusal clauses infringe on the privacy right "by encouraging otherwise obedient pharmacists to act on their consciences and refuse to dispense or to refer prescriptions for contraception").

207. For an interesting discussion of why the refusal clauses may not serve a compelling state interest, see *id.* at 261–68.

208. *See Carey*, 431 U.S. at 688 (holding that regulations burdening an individual's right to prevent conception must be narrowly drawn to express only the legitimate state interests at stake); *see also* Miller, *supra* note 12, at 268–69 (claiming that even if the refusal clauses serve a compelling state interest, they are not narrowly tailored to that interest).

209. *See supra* notes 9–11.

act of conscience in a refusal clause as limited to the actual refusal to dispense medication. This method leaves the door open for employer discipline or tort liability if a pharmacist engages in practices at odds with his duty to patients or his employer's rules, but protects the pharmacist with a legitimate objection who takes care to ensure his conscience does not infringe upon the rights of others. Such an approach is consistent with existing law governing healthcare professionals, employers, and religious dissenters, which has demonstrated a careful concern for third-party interests. Moreover, a narrow view of these statutes is demanded by the extremely broad scope of some pharmacist refusal clauses, which evidence no concern for patient or employer rights and present troubling constitutional questions.

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