WHEN RIGHTS COLLIDE: IN A BATTLE BETWEEN PHARMACISTS' RIGHT OF FREE EXERCISE AND PATIENTS' RIGHT TO ACCESS CONTRACEPTION, WHO WINS? — A POSSIBLE SOLUTION FOR NEVADA

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I. INTRODUCTION

Almost two decades ago, an 18-year-old Nevada woman, requiring relief from gynecologic problems, suffered the humiliation of having her legal prescription for oral contraceptives denied by a pharmacist unless she produced a note from her parents authorizing him to fill it.[1] On July 22, 2006, a hospital emergency room physician in Pennsylvania refused to provide emergency contraception to a rape victim, claiming it would be against his religious beliefs.[2]

During the years between these two incidents, and continuing, increasing numbers of pharmacists have invoked their "right" to refuse to fill legal prescriptions for emergency contraception and even for oral contraceptives because it conflicts with their own moral and ethical beliefs.[3] Most recently, three pharmacists in New York state were accused of refusing to fill emergency contraceptive prescriptions because "they objected to the idea that a woman might need emergency contraception more than once."[4] In January 2004, three pharmacists from one store refused, on religious grounds, to fill an emergency

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[1] Nev. State Bd. of Pharmacy Working Group (October 27, 2005) [hereinafter Chapman] (testimony of Lisa Lynn Chapman) (on file with author).

[2] Tom Bowman & Diana Fishlock, *Rape Victim Denied Morning-after Pill*, PATRIOT-NEWS (Harrisburg, Pa.), July 25, 2006, at A01.

[3] This problem reaches across borders. In Canada, pharmacists may refuse to sell contraceptives as a matter of conscience if they refer the patient elsewhere. Emergency contraception is available without a prescription, but it is kept behind the counter, so patients must request the product from the pharmacist. Some pharmacists refuse to dispense the product unless the patient answers screening questions. Dianne Rinehart, *Do Religious Beliefs Trump Women's Health Care Needs?*, HAMILTON SPECTATOR (Ontario, Can.), Feb. 2, 2006, at A9.

[4] Michele Morgan Bolton, *Pharmacy Refusals Lead to Complaint*, TIMES UNION (Albany, N.Y.), Aug. 16, 2006, at A1.

contraception prescription for a rape victim.[5] In April 2004, another Texas woman was refused her oral contraceptive refill because a pharmacist believed the pills were "not right" and "cause cancer."[6] A New Hampshire woman received similar treatment and a lecture from a pharmacist, who not only refused to fill her emergency contraception prescription, but also refused to transfer it.[7] In Wisconsin a mother of six was verbally chastised by a pharmacist when she presented her prescription for emergency contraception. This woman never filled her prescription and subsequently had an abortion.[8] The FDA's recent approval of "over-the-counter" (OTC) access to Plan B®, emergency contraception,[9] will not extinguish incidents of this nature or the issues discussed in this Note. Women under age eighteen will still require prescriptions to obtain the medication.[10] Further, while the FDA conditioned the OTC sales of the product, "moral questions must be dealt with in state law."[11] Some pharmacists and pharmacist organizations have indicated that they still intend to refuse to dispense the product based on their own moral decisions.[12] At least one California pharmacist indicated he would still require a prescription for Plan B®.[13] If pharmacists are allowed to refuse to fill or dispense medically and legally valid prescriptions and medications based on their personal beliefs, then women needing emergency contraception, and even non-emergency contraception, may be denied their fundamental right to access contraception.[14]

State "conscience clauses" typically allow physicians and other health care providers to abstain from performing medical procedures which conflict with

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[5] NATIONAL WOMEN'S LAW CENTER, Pharmacy Refusals 101 (2005), http://www.nwlc.org / pdf/11-05Update_PharmacyRefusal101.pdf [hereinafter *Pharmacy Refusals 101*].

[6] *Id.*

[7] *Id.* at 2.

[8] *Id.*

[9] On August 24, 2006, the FDA announced its approval of Plan B® emergency contraception for sale without a prescription to women eighteen years of age and older. Younger women would still require a prescription. Because of the age restriction, Plan B® may only be sold to consumers at retail stores with pharmacy services and at "clinics with licensed healthcare providers." The product must be stocked behind the pharmacy counter to ensure the customer either has proof of age or a prescription. Press Release, U.S. Food & Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older (Aug. 24, 2006), (hereinafter FDA Press Release), http://fda.gov/bbs/topics/NEWS/ 2006/ NEW01436.html.

[10] *Id.*

[11] *Plan B Approval Smoothes Von Eschenbach Confirmation, Gets FDA Sued Again*, 5 DRUG INDUSTRY DAILY 167 (Wash. Bus. Info. Daily), Aug. 25, 2006.

[12] Claudia Rowe, *Need Plan B? He's Not Selling New FDA Rule Not Changing Morals of Pharmacists*, SEATTLE POST-INTELLIGENCER, Aug. 30, 2006, at A1; Robert Stein, *FDA Approves Plan B's Over-the-Counter Sale*, WASH. POST, Aug. 25, 2006, at A4. As previously noted, even when emergency contraception is available without a prescription from behind the counter, some pharmacists may interject their own screening process before deciding to dispense the product. *See* Rinehart, *supra* note 3.

[13] Michael Fisher, *Morning-After Pill Now Easier to Acquire*, PRESS ENTERPRISE (Riverside, Cal.), Aug. 25, 2006, at A1.

[14] National Women's Law Center, *The Pharmacy Refusal Project*, http://www.nwlc.org / details.cfm?id=2185&sectionOalth (last visited Aug. 22, 2006). Because of the FDA's recent approval of Plan B®'s status from prescription only to regulated "over-the-counter" status, wherever this Note refers to pharmacists' refusal to fill prescriptions, the author intends to include dispensing or selling Plan B® also.

their own beliefs.[15] Many state conscience clauses and opt-out legislation resulted from state reaction to either legalized abortion[16] or concern with Oregon's Death with Dignity statute, legalizing physician assisted suicide.[17] At least two states currently have formal laws requiring pharmacists to fill all legal prescriptions and four states have formal laws allowing pharmacists to refuse to fill prescriptions if they have religious, moral, or ethical objections.[18]

In 2005, Illinois adopted a rule attempting to alleviate the conflict between its liberal conscience clause provision and the burden it places on patient access to emergency contraception.[19] Concerned about restrictions by states that inhibit women's access to contraception, Republican New York Congresswoman Carolyn Maloney and Democrat New Jersey Senator Frank Lautenberg, both with bi-partisan sponsorship, introduced the Access to Legal Pharmaceuticals Act in April 2005.[20] California recently adopted a broad duty-to-fill regulation, specifically stating that the health-care professional's moral, ethical, and religious objections do not provide a reason to refuse.[21]

As the debate heats up over what rights individual pharmacists have and what rights patients have, Nevada has been struggling with the issue for the past two legislative sessions without success.[22] The Nevada State Board of Pharmacy considered adopting its own regulation allowing pharmacists to refuse to fill prescriptions based on individuals' ethical or moral opinions. However, after open workshops to discuss the proposed regulation, the State Board of Pharmacy removed the conscience clause language from its proposed regulation. Further, rather than pass any regulation concerning conditions when pharmacists can refuse to fill, they chose instead to send the regulation to the appropriate legislative committee for review.[23] While the legislative com-

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[15] Jason Green, Commentary, *Refusal Clauses and the Weldon Amendment*, 26 J. LEGAL MED. 401, 404 (2005).

[16] Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 180 (1993).

[17] OR. REV. STAT. § 127.885(4) (2003); Audio tape: Nev. State Bd. of Pharmacy Working Group (Oct. 27, 2005) (commentary of Larry Pinson, Executive Secretary) [hereinafter Pinson] (on file with author).

[18] *Day to Day: Target Pharmacists Can Refuse Plan B Prescriptions* (National Public Radio broadcast Nov. 18, 2005) [hereinafter *Day to Day*]. According to the National Women's Law Center, states explicitly permitting pharmacist refusal include: Arkansas, Mississippi, and South Dakota; Georgia's regulation may permit pharmacists to refuse to fill; and states explicitly requiring pharmacists or pharmacies to fill all legal prescriptions are Massachusetts and North Carolina. *Pharmacy Refusals 101*, *supra* note 5. Nevada recently adopted a new regulation specifying when pharmacists may decline to fill prescriptions. *See infra* Part III D.

[19] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005); 745 ILL. COMP. STAT. ANN. 70/1–70/14 (West 2001).

[20] 151 CONG. REC. E658 (daily ed. Apr. 14, 2005) (statement of Rep. Maloney); H.R. 1652, 109th Cong. (1st Sess. 2005); S. 809, 109th Cong. (1st Sess. 2005).

[21] CAL. BUS. & PROF. CODE § 733 (West 2006).

[22] Proposed amendments to NEV. ADMIN. CODE § 639, A Pharmacist's Exercise of Conscience (Nov. 11, 2005) [hereinafter A Pharmacist's Exercise of Conscience]; Audio tape: Nev. State Bd. of Pharmacy Working Group (Oct. 27, 2005) (statement of State Senator Maggie Carlton) [hereinafter Carlton] (all listed sources on file with author).

[23] Audio tape: Nev. State Bd. of Pharmacy Working Group (Oct. 27, 2005); Minutes, Nev. State Bd. of Pharmacy Workshop (Dec. 8, 2005), https://nvbop.glsuite.us/renewal/ glsweb/

mittee did adopt standards for refusing to fill prescriptions, the regulation did not impose a concomitant duty to fill prescriptions for or dispense contraceptives.[24] These actions leave Nevada's consumers without a clear indication whether any given pharmacy or pharmacist will fill a prescription for emergency contraception.

This Note explores the history and background of emergency contraception and conscience clause legislation. It also looks at emerging legislation and the constitutional issues of trying to balance allowing pharmacists to refuse and patients' fundamental right to contraception.[25] Finally, this Note will recommend a possible solution for the ongoing debate taking place in Nevada.

II. BACKGROUND AND HISTORY

A. The Drugs Involved – Emergency Contraception (Plan B®) and Oral Contraceptives

The FDA approved oral contraceptives over forty years ago, in 1960.[26] The FDA approved "Plan B®," for emergency contraception in 1999.[27] On August 24, 2006, the FDA approved Plan B® for sale without a prescription to women aged eighteen and older; younger women still require a prescription.[28] Emergency contraception, as defined by the FDA, "is a method of preventing pregnancy to be used after a contraceptive fails or after unprotected sex."[29]

Oral contraceptives prevent pregnancy by preventing ovulation.[30] Both hormones used in oral contraceptives, estrogen and progestin, contribute to preventing ovulation.[31] Additionally, should ovulation occur, the progestin component of combined oral contraceptives also slows the progress of the egg through the fallopian tubes, inhibits penetration of sperm through the cervix, and makes the endometrium less than ideal for implantation of a fertilized ovum.[32] Plan B® uses progestin to prevent pregnancy.[33]

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homeframe.aspx; Nev. State Bd. of Pharmacy Workshop, Mar. 1, 2006. *See infra* notes 156-157 and accompanying text regarding new regulation adopted May 4, 2006.

[24] *See infra* note 157 and accompanying text regarding new regulation adopted May 4, 2006.

[25] The author recognizes that many areas of law are affected by this issue, including employment law, rights against prior restraint of trade, and equal protection. However this Note does not address those areas. Additionally, the author recognizes the Weldon Amendment (right of religious institutions not to provide contraception) but does not address this issue directly, as the author assumes that patients are notified of these institutions' right to free exercise and will seek services elsewhere. The Weldon Amendment was further addressed by Green, *supra* note 15. This Note focuses on patients' rights at non-religious clinics and pharmacies where prescriptions for contraceptives are regularly filled.

[26] ROBERT HATCHER ET AL., CONTRACEPTIVE TECHNOLOGY 223 (Deborah Kowal ed., 16th ed. 1994).

[27] FDA's Decision Regarding Plan B: Questions and Answers (2004, updated 2006), http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm.

[28] FDA Press Release, *supra* note 9.

[29] *Id.*

[30] HATCHER ET AL., *supra* note 26, at 223.

[31] *Id.* at 224.

[32] *Id.*

[33] FDA's Decision Regarding Plan B: Questions and Answers, *supra* note 27.

The use of oral contraceptives as emergency contraception was not a new concept in 1999. As far back as the 1960s physicians used high doses of estrogen to prevent post-coital implantation.[34] Serious side effects led researchers to develop better methods, resulting in what is now known as the "Yuzpe method," introduced in 1982.[35] In 1993, a study showed using progestin-only oral contraceptives to be effective in providing emergency contraception.[36] This regimen, the same as in Plan B®,[37] became the treatment of choice because of its high efficacy and low incidence of side effects.[38] Finally, in 1996, the American College of Obstetricians and Gynecologists (ACOG) published guidelines for using emergency contraception.[39]

A great deal of the controversy over Plan B® involves individuals stating that Plan B® does not prevent ovulation, but merely inhibits implantation of a fertilized egg.[40] However, as noted above, there are times when even combined oral contraceptives may not inhibit ovulation.[41] The FDA clearly states:

> Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization). If fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation). *If a fertilized egg is implanted prior to taking Plan B, Plan B will not work.*[42]

However, there is scientific evidence that levonogestrel, as administered in Plan B®, does not affect the uterine lining.[43] In other words, Plan B® acts "mainly to inhibit or delay ovulation but does not prevent fertilization or implantation.[44] Therefore, according to the American Medical Association, the National Institutes of Health, and the American College of Obstetricians and

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[34] LEON SPEROFF ET AL., CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY 929 (Charles Mitchell ed., 6th ed. 1999).

[35] *Id.* at 929 n.361.

[36] *Id.* at 929 n.362.

[37] *Compare* LEON SPEROFF ET AL., *supra* note 34, at 929, *with* FDA's Decision Regarding Plan B: Questions and Answers, *supra* note 27, *and* Donald F. Downing, RPh, *Emergency Contraception CME*, MEDSCAPE FROM WEBMD (2001), http://www.medscape.com/viewarticle/418536.

[38] LEON SPEROFF ET AL., *supra* note 34, at 929 n.362.

[39] Downing, *supra* note 37.

[40] Cynthia L. Cooper, *Suit Claims Using Birth Control Pills is Abortion*, WOMEN'S ENEWS, April 24, 2001, http://www.womensenews.org/article.cfm?aid=527; *Rx for controversy*, CHI. TRIB., Mar. 23, 2005, § 1, at 5 (Redeye Ed.); Holly Teliska, Recent Development, *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, 235 (2005).

[41] HATCHER ET AL., *supra* note 26, at 227.

[42] FDA's Decision Regarding Plan B: Questions and Answers, *supra* note 27 (emphasis added); *see also* Judy Peres & Jeremy Manier, *'Morning-After Pill' Not Abortion, Scientists Say*, CHI. TRIB., June 20, 2005, Zone CN, at 1 (Chicagoland Final Ed.).

[43] Peres & Manier, *supra* note 42 (citing K. Gemzell-Danielsson & L. Marions, *Mechanisms of Action of Mifepristone and Levonorgestrel When Used for Emergency Contraception*, 10 HUM. REPROD. UPDATE 341, 344 (2004)); *see also*, M.E. Ortiz et al., *Post-Coital Administration of Levonorgestrel Does Not Interfere with Post-Fertilization Events in the New-World Monkey Cebus Apella*, 19 HUM. REPROD. 1352 (2004).

[44] Gemzell-Danielsson & Marions, *supra* note 43, at 346. Another study from Catholic University of Chile also supports this premise. Philip G. Peters, Jr., Editorial, *New Research Shifts Ideas About Plan B: It Prevents Conception, Not Implantation*, ST. LOUIS POST DISPATCH, Mar. 7, 2006, at B9.

Gynecologists definition of pregnancy (an implanted fertilized egg)[45], Plan B® is not an abortifacient.

Plan B® should not be confused with mifepristone (RU 486 or MIFEPREX®) which is "indicated for the medical termination of intrauterine pregnancy through 49 days' pregnancy."[46] Misfepristone is an abortifacient and is not at issue here, because it is only administered by physicians directly to patients and not through prescriptions at pharmacies.[47]

B. Conscience Clause Legislation

Conscience or refusal clauses permit health professionals, usually physicians, to abstain from performing a service which would require them to act against their religious or moral standards.[48] In the late 1960's and early 1970's, many states began reforming their strict statutes criminalizing abortion, making them less stringent.[49] At the same time, some states had laws permitting hospitals and doctors to refuse to admit and perform abortions based on religious and moral grounds.[50] This may well have been the genesis of the current conscience clause legislation.

After the 1973 *Roe v. Wade*[51] decision, forty-six states passed statutes allowing health care professionals to refuse to participate in abortion services without fear of employment discrimination or retaliation.[52] However, since the genesis of refusal clauses, some states have expanded their conscience clause statutes from merely covering abortion to many other procedures involving reproductive technologies and research.[53] Still, the vast majority of these laws did not include allowing pharmacists to refuse to fill legal prescriptions for contraceptives.[54] In 1998, South Dakota became the first state to specifically afford its pharmacists that right.[55]

As the FDA considered approving RU-486 for use in the United States, pharmacy organizations debated the role of pharmacists and whether they would be covered by existing abortion refusal clauses.[56] However, pharmacists were excised from the loop with mifepristone, because it was available only though physicians.[57] In the late 1990's, with the approval of pre-packaged

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[45] Cooper, *supra* note 40; Teliska, *supra* note 40, at 235; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 123 (1990).

[46] MIFEPREX® PACKAGE INSERT, at Indications and Usage, *available at* http://www.fda.gov/cder/foi/label/2005/020687s013lbl.pdf.

[47] *Id.* at "How Supplied."

[48] Green, *supra* note 15, at 404.

[49] TRIBE, *supra* note 45, at 42.

[50] *See* Doe v. Bolton, 410 U.S. 179, 202-05 (1973) (holding that unduly restrictive requirements in Georgia's abortion statute were unconstitutional); *see also* TRIBE, *supra* note 45, at 42.

[51] 410 U.S. 113 (1973).

[52] Teliska, *supra* note 40, at 233-34.

[53] *Id.* at 234.

[54] *Id.*

[55] *Id.*; S.D. CODIFIED LAWS § 36-11-70 (1999).

[56] Teliska, *supra* note 40, at 234.

[57] MIFEPREX® PACKAGE INSERT, *supra* note 46, at "How Supplied."

emergency contraception, available by prescription,[58] the debate again heated up.[59]

Currently, four states – Arkansas, Georgia, Mississippi and South Dakota – have statutes or regulations explicitly granting a pharmacist the right to refuse to fill prescriptions based on religious or personal moral beliefs.[60] There is no express duty to refer or transfer prescriptions in these states: therefore all burden falls to the patient upon refusal.[61]

Five states—North Carolina, Massachusetts, Indiana, Illinois, and California—expressly require either pharmacies or pharmacists to fill prescriptions (either for all legal prescriptions or for contraceptives specifically).[62] In these states, the burden to insure that patients' needs are met is put squarely on the shoulders of the pharmacists or the pharmacies. Indiana's statute explicitly states that a "pharmacist has a duty to honor all prescriptions from a practitioner . . . ."[63] The statute grants immunity from criminal and civil action only if the pharmacist refuses to honor a prescription based on his judgment that the prescription is either illegal, against the best interest of the patient, aids an addiction, or is contrary to the health and safety of the patient.[64] Of course, this language is somewhat vague. Therefore pharmacists could impose their own sense of morality onto the "best interest of the patient."[65] For example, if pharmacists believed Plan B® to be an abortifacient, under this language, they may refuse to fill because, in their judgment, an abortion would not be in the patient's best interest.

A number of states permit collaborative agreements between physicians, clinics, and pharmacists that give pharmacists the ability to prescribe and dispense emergency contraception directly to patients.[66] In those states, patients can receive their prescription for emergency contraception from a participating pharmacist, thus bypassing the need to see a physician and avoiding unnecessary delays, which is always a concern when a woman has been exposed to unprotected intercourse or contraception failure.[67] Physicians set up protocols

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[58] FDA's Decision Regarding Plan B: Questions and Answers, *supra* note 27.

[59] Teliska, *supra* note 40, at 234.

[60] JILL MORRISON, NAT'L WOMEN'S LAW CTR., DON'T TAKE "NO" FOR AN ANSWER: A GUIDE TO PHARMACY REFUSAL LAWS, POLICES AND PRACTICES 5 (2005), http://www.nwlc.org/pdf/8-2005_DontTakeNo1.pdf; *see also* GUTTMACHER INST., STATE POLICIES IN BRIEF, REFUSING TO PROVIDE HEALTH SERVICES (2006), http://www.agi-usa.org/pubs/spib_RPHS.pdf.

[61] MORRISON, *supra* note 60.

[62] *Id.*; ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005); IND. CODE ANN. § 25-26-13-16(b) (LexisNexis 2005); CAL. BUS. & PROF. CODE § 733 (West 2006).

[63] IND. CODE ANN. . § 25-26-13-16(b).

[64] Id.

[65] *Id.* at § 25-26-13-16(b)(2).

[66] In Alaska, California, Hawaii, Maine, Massachusetts, New Hampshire, New Mexico, Washington, and Vermont, pharmacists may provide emergency contraception directly to a patient without a prior doctor or clinic visit. Emergency Contraception Pharmacy Program, EC-Help, http://www.ec-help.org (last visited Oct. 10, 2006). *See also* U.S. Small Business Committee on Freedom of Conscience for Small Pharmacies (2005) [hereinafter Maclean] (Testimony of the American Pharmacists Association offered by Linda Garrelts MacLean, RPh, CDE,) *available at* http://www.aphanet.org/AM/Template.cfm?Section=Federal_Government_Affairs&CONTENTID=3582&TEMPLATE=/CM/ContentDisplay.cfm.

[67] Maclean, *supra* note 66, at 5.

and train pharmacists to screen patients.[68] Patients meeting the clinical criteria for Plan B® receive prescriptions from the pharmacists and those needing additional care are referred to physicians.[69] Washington State first enacted this type of law in 1997.[70] It is estimated that 1,200 emergency contraceptive prescriptions are dispensed quarterly by pharmacists in over forty locations statewide.[71]

In states not addressed above, regulations and statutes usually include guidance as to when pharmacists can refuse to fill a prescription.[72] Usually the underlying reasons are harm to the patient or when the legitimacy of the prescription is questionable.[73] In other words, pharmacists may refuse for valid medical or legal reasons, not moral, religious, or ethical reasons.[74]

In Nevada there is no express duty to fill prescriptions but there is guidance as to when to refuse.[75] Because the statute limited its guidance, the Nevada State Board of Pharmacy attempted to develop specific regulations setting forth medical and legal grounds for refusing to fill, similar to those mentioned above.[76] But if there is no duty to fill, then what is a pharmacist's role?

While few states have taken the issue of pharmacists' rights to refuse head on, some pharmacy chains have developed their own policies.[77] The Target Corporation recently made headlines when its policy allowing pharmacists in its 1,150 stores to refuse to dispense emergency contraception became public.[78] Target's policy includes requiring the refusing pharmacist to ask another pharmacist in the store to fill the prescription or to refer patients to other pharmacies when the store cannot accommodate the patient.[79] Wal-Mart only recently began carrying Plan B® in its pharmacies nationwide.[80] Both Target and Wal-

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] MORRISON, *supra* note 60, at 5.

[73] *Id.*

[74] *Id.*

[75] "Practice of Pharmacy" defined, NEV. REV. STAT. § 639.0124 (2003); NEV. ADMIN. CODE § 639.752 (2004); Pinson, *supra* note 17; *see also infra* Part III.D.

[76] Proposed Amendment to NEV. ADMIN. CODE § 639, Conditions for a Pharmacist Declining to Fill a Prescription, Nev. Bd. of Pharmacy Workshop (Mar. 1, 2006) (on file with author). On May 4, 2006, an interim legislative committee adopted a new regulation discussed in Part III D *infra*.

[77] Teliska, *supra* note 40, at 239-41; *Day to Day*, *supra* note 18.

[78] Jo Mannies, *Stance on 'Morning-After' Pill Costs Pharmacist Her Job*, ST. LOUIS POST-DISPATCH, (St. Louis, Mo.) Jan. 27, 2006; *Day to Day supra* note 18; *Target Gets PPFA Thumbs Down*, (Planned Parenthood® Federation of America, SaveRoe.com), http://www.saveroe.com/campaigns/target/targetthumbsdown (last visited Oct. 10, 2006).

[79] *Day to Day, supra* note 18.

[80] Wal-Mart began carrying Plan B® after Illinois and Massachusetts required it by law. Wal-Mart states it changed its policy because it anticipates other states to follow suit. Wal-Mart continues to allow pharmacists to refuse to fill Plan B® based on individual moral or ethical beliefs. *See* 68 ILL. ADMIN. CODE tit. 68, § 1330.6 (2005); Bruce Mohl, *All Wal-Marts to Stock Plan B Starting March 20*, BOSTON GLOBE, Mar. 4, 2006, at A9; Kevin Zelaya, *Wal-Mart Pharmacies Offer More Access to Plan B*, DAILY NEBRASKAN (Lincoln, Neb.), Mar. 10, 2006, *available at* http://www.dailynebraskan.com, follow "Back Issues" hyperlink; select the March 10, 2006 hyperlink; select the hyperlink for this article); Associ-

Mart were targeted for protests and picketing by Planned Parenthood Federation of America.[81] The concern expressed by Planned Parenthood is that the patient still bears the burden if she must go to another store to get her prescriptions filled.[82] In contrast, other chains, such as Costco and Kmart, shoulder the burden to accommodate the patient by filling in-store or dispensing from another location and delivering the prescription directly to the patient.[83]

C. *The Professional Societies Weigh In*

The Pharmacist Code of Ethics requires that pharmacists respect the rights and dignity of patients.[84] The Code also requires that pharmacists respect personal and cultural differences among patients.[85] However, the American Pharmacists Association (APhA), in 1998, adopted a policy stating that the "APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."[86] The APhA believes this policy "supports a pharmacist 'stepping away' from participating but not 'stepping in the way' of the patient accessing the therapy."[87]

In response to growing concerns about the clash between pharmacists wanting a right to refuse and ensuring that patients' medical needs are met, the APhA issued a news release encouraging pharmacists to be proactive.[88] The problem, from the AphA's perspective, is that patients are being blindsided when their prescriptions are refused.[89] Also, pharmacists ensure that any patient they refuse will have timely access to medication when the pharmacist walks away.[90] However, some pharmacists do not even want to provide that modicum of care, stating that to refer a patient for emergency contraception would require just as much a breach of their personal beliefs as filling the

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ated Press, *Wal-Mart Must Stock Contraception in Mass.*, FORBES.COM, Feb. 14, 2006, *available at* http://forbes.com/business/energy/feeds/ ap/2006/02/14/ap2525603.html.

[81] *Day to Day*, *supra* note 18; Megan Daley, *U. Massachusetts-Area Groups Band Together To Protest Wal-Mart*, MASS. DAILY COLLEGIAN VIA U-WIRE, Nov. 21, 2005, http://www.dailycollegian.com/vnews/display.v/ART/2005/11/21/438136189d080?in_archive=1.

[82] *Target Gets PPFA Thumbs Down*, *supra* note 78.

[83] Kaisernetwork.org, Contraception & Family Planning, Planned Parenthood Denounces Retailer Target's Policy on Pharmacist Refusals to Fill Plan B Prescriptions (Nov. 14, 2005), http://www.kaissernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=33699.

[84] American Pharmacists Association, Code of Ethics for Pharmacists, *available at* http://www.aphanet.org/AM/Template.cfm?Section=About_APhA&CONTENTID=2654&TEMPLATE=/CM/HTMLDisplay.cfm.

[85] *Id.*

[86] MacLean, *supra* note 66.

[87] *Id.*

[88] Press Release, John A. Gans, Executive Vice President and CEO American Pharmacists Association, Pharmacists & Physicians: Not Just a Matter of Conscience (June 23, 2005) *available at* http://www.aphanet.org/AM/Template.cfm?Section=Home&CONTENTID=3687&TEMPLATE=/CM/ContentDisplay.cfm.

[89] *Id.*

[90] *Id.*

prescription.[91] This leaves patients without access to a medication whose efficacy depends upon timely administration.

The APhA recognizes that pharmacists may "navigate personal objections" to types of therapy by "choosing where to practice."[92] Those with objections to dispensing hormonal contraceptives (either non-emergency or emergency) could choose to practice in institutions that are exempt or avoid practicing in Title X clinics.[93]

The American Society of Health-System Pharmacists (ASHP) recently adopted a new policy attempting to balance a pharmacist's right of conscience and a patient's right of access to therapy.[94] The new policy recognizes a pharmacist's right to refuse to "participate personally" in any therapy she finds morally, religiously or ethically "troubling," while supporting the proactive establishment of systems to safeguard a patient's right to obtain therapy. Further, the new policy "support[s] the principle that a pharmacist exercising the right of conscience must respect and serve the legitimate health care needs and desires of the patient and must provide a referral without any actions to persuade, coerce, or otherwise impose on the patient the pharmacist's values, beliefs, or objections."[95]

The American Medical Association (AMA) has issued numerous policy positions on emergency contraception.[96] The AMA policy states that all healthcare professionals should provide education about emergency contraception and should expand access.[97] At the 2005 annual meeting, in response to the issue of pharmacist refusals, the AMA House of Delegates adopted a resolution that: (1) "reaffirm[s] its policies supporting responsibility to [ ] patients . . . and access to medical care for all people;" (2) supports duty to fill legislation; and (3) promotes working with professional societies and legislatures to enssure that where pharmacies and pharmacists may restrict access to emergency contraception, they be required to refer patients to providers who will fill

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[91] Teliska, *supra* note 40, at 229; Mannies, *supra* note 78; *Pharmacy Refusals 101*, *supra* note 5.

[92] Letter from John A. Gans, PharmD, Executive Vice President of American Pharmacists Association, to James Oliphant, Editor in Chief of LEGAL TIMES (August 22, 2005), *available at* http://www.aphanet.org (follow "public Relations" hyperlink; then follow "News Releases" hyperlink; then follow "2005 News Releases" hyperlink; then follow "APhA Responds to Legal Times 'Dispensing Morality'" hyperlink).

[93] MacLean, *supra* note 66.

[94] *States Look at Pharmacist 'Conscience' Laws Regarding EC*, DRUG FORMULARY REV., Aug. 1, 2006; American Society of Health System Pharmacists, Pharmacist's Right of Conscience and Patient's Right of Access to Therapy, ASHP Policy Positions 0610 (2006), at 8, http://www.ashp.org/aboutashp/PolicyGovernance/policypositions.pdf.

[95] BOARD OF DIRECTORS REPORT ON THE COUNCIL ON LEGAL AND PUBLIC AFFAIRS, *supra* note 87, at 15. This policy supersedes a 2002 policy that recognized the pharmacist's right of conscience and of systems protecting a patient's right of access without the added protection the new policy offers the patient from lectures and coercion. *See also* American Society of Health System Pharmacists, *supra* note 94, at 8. (noting the ASHP's recognition of the balance between a pharmacist's right of conscience and a patient's right of access).

[96] *See* policies listed at http://www.ama-assn.org/apps/pf_new/pf_online (search "Policy Finder" for "emergency contraception")(last visited Oct. 10, 2006).

[97] AMER. MED. ASS'N., H-75.985 - ACCESS TO EMERGENCY CONTRACEPTION (2005), *available at* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=Policyfiles/HnE/H-75.985.HTM.

the prescriptions.[98] Additionally, the AMA has a policy to initiate action by whatever means to bring a halt to the interference in medical practice by pharmacy benefit managers and others who deny patients access to prescribed medications.[99]

There are a few national organizations that provide information to patients on the availability of emergency contraception in their areas.[100] Examples include the Association of Reproductive Health Professionals hotline number (1-888-not-2-late) and website (http://not-2-late.com), and run in conjunction with Princeton University's Office of Population Research.[101]

The results of a recent survey of 859 U.S. pharmacists indicated that almost 70% believe they should have the authority to refuse to fill emergency contraceptive prescriptions.[102] Only 23% believed that patients' rights should prevail over pharmacists' rights for legal prescriptions (not specific to contraception).[103] Fewer than 40% believed they should be required to refer when exercising their right to refuse.[104] Conversely, in an earlier survey, an overwhelming majority of physicians, almost 80%, supported a pharmacist duty to fill.[105]

Pharmacy refusal and conscience clause legislation has been explored in many law review articles.[106] Much of the controversy to date has been with protecting the pharmacists' right to refuse and not over the patients' right to access contraception.[107]

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[98] Amer. Med. Ass'n. House of Delegates, Resolution: 6, Preserving Patients' Ability to Have Legally Valid Prescriptions Filled 380 (2005), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/469/a-05res.pdf.

[99] Amer. Med. Ass'n., D-125.997 – Interference in Practice of Medicine, (2004), *available at* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=Policyfiles/DIR/D-125.997.HTM.

[100] MacLean, *supra* note 66.

[101] *Id.*

[102] HCD Research; Pharmacists believe They Should Have Authority To Refuse Emergency Contraceptive Prescriptions, MED. & L. WKLY. 105, Jan. 6, 2006, at 105.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See, e.g.*, Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221 (2002); Katherine A. White, Note, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999); Bryan A. Dykes, Note, *Proposed Rights Of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002); Green, *supra* note 15; Tony J. Kriesel, *Recent Developments, Pharmacists and the "Morning-After Pill": Creating Room for Conscience Behind the Counter*, 7 MINN. J. L. SCI. & TECH. 337 (2005); Staci D. Lowell, Note, *Striking A Balance: Finding A Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 CLEV. ST. L. REV. 441 (2004-5); Teliska, *supra* note 40, at 229.

[107] *See, e.g.*, Wardle, *supra* note 16; Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacists' Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2002-3); Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & SOC. JUST. 327 (2006); Jessica J. Nelson, Comment, *Freedom of Choice for Everyone: The Need for Conscience Clause Legislation for Pharmacists*, 3 U. ST. THOMAS L.J. 139 (2005); Dennis

III. RECENT AND EMERGING LEGISLATION

Legislation was introduced in a number of states this past year to protect pharmacists who refuse to honor legal prescriptions based on moral and religious grounds.[108] Both Illinois and California recently enacted regulations providing a duty to fill. Illinois' regulation is narrowly confined to emergency contraception, while California's broadly encompasses all prescriptions. Additionally, duty to fill legislation is pending in Congress. Nevada has struggled between duty to fill and right to refuse regulations for almost five years.

A. *Illinois*[109]

Illinois has one of the broadest conscience clause statutes in the country,[110] the Health Care Right of Conscience Act.[111] The statute states that physicians and other healthcare professionals "shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience."[112] However, the law also requires these same professionals to perform all duties required by law.[113] Illinois, in response to several refusal incidents,[114] amended its pharmacy regulations to include a provision that any pharmacy receiving a legal prescription for contraceptives must dispense without delay.[115] The state went so far as to define contraceptive to include "all FDA-approved drugs or devices that prevent pregnancy."[116] This ensures that Plan B® is included under the definition of contraceptive for purposes of the law.

Two independent pharmacists filed suit challenging the new regulation. An Illinois district court dismissed their case as unripe for failure to exhaust administrative measures.[117] Walgreens drugstore chain suspended four of its East St. Louis, Illinois pharmacists for refusing to fill Plan B® prescription in

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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).

Recently, however, a limited number of articles have provided the alternative view. *See, e.g.*, Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006); Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (With) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073 (2006); Katherine A. James, Note, *Conflicts of Conscience*, 45 WASHBURN L.J. 415 (2006).

[108] Pharmacy Refusals 101, *supra* note 5.

[109] *See* Sarah J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 LAW & INEQ. 399, (2006) (analyzing in depth Illinois' Emergency Rule).

[110] Wardle, *supra* note 16, at 179.

[111] 745 ILL. COMP. STAT. ANN. 70/1 – 70/14 (West 1977).

[112] 745 ILL. COMP. STAT. ANN. 70/6.

[113] *Id.*

[114] Editorial, *The Governor's Prescription*, CHI. TRIB., Apr. 6, 2005, § 1, at 24.

[115] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).

[116] *Id.*

[117] Doug Finke, *Circuit Court Denies Relief for Pharmacists; Druggist Must Adhere to Governor's Rule on Emergency Contraception*, ST. J.-REG. (Springfield, Ill), Sept. 23, 2005, § City/State, at 11.

direct violation of Illinois law.[118] The chain fired the pharmacists after they refused Walgreens' offer to assist the pharmacists to obtain state licenses and transfer them to stores in Missouri, where there is no duty to fill statute.[119] The pharmacists instead chose to file suit in U.S. District Court challenging Walgreens' action, claiming that the company violated the Illinois Health Care Right of Conscience Act.[120] Undoubtedly, more litigation over Illinois' new regulation will follow.[121]

B. California

On September 29, 2005, California's governor approved legislation prohibiting health care professionals, including pharmacists, from obstructing patients from "obtaining a prescription drug . . . that has been legally prescribed" despite the "[pharmacist's] objection to dispensing the drugs . . . on ethical, moral, or religious grounds."[122] The amendment to the Business and Professions Code permits the pharmacist to "refuse[ ] on ethical, moral, or religious grounds" *only* with prior written notice to the employer and the employer can, "without creating undue hardship, provide a reasonable accommodation of the licentiate's objection."[123] "Undue hardship" is defined in other sections of the code relating to religious accommodation.[124] At all times, any prescription must be filled, ordered, transferred to a nearby site, or returned to the patient with a referral to another pharmacy, unless there is a legal or medical reason to refuse.[125] Except as provided above, the California regulation provides only two valid reasons for refusing to fill or refer a patient: (1) the prescription is illegal, and (2) if the prescribed drug would "cause a harmful drug interaction or would otherwise adversely affect the patient's medical condition."[126] Further, the regulation provides penalties for non-compliance.[127]

C. Federal Legislation: The ALPhA

The ongoing battles led to action by the federal government, with bi-partisan sponsors introducing the Access to Legal Pharmaceuticals Act in April, 2005 (ALPhA).[128] Congresswoman Carolyn B. Maloney (N.Y.), stated that the

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[118] Olga Pierce, *Plan B: Walgreens Pharmacist Flap Dissected*, UNITED PRESS INT'L. (Wash.), Feb. 1, 2006.

[119] *Id.*

[120] *Id.*; *see also* Complaint and Demand for Jury Trial at 6, Quayle v. Walgreens, No. N/A (3rd Cir. Ill. Cir. Ct.) *available at* 2-8 MEALEY'S EMPLOY. L. PLEADINGS 3 (2006) (LexisNexis).

[121] *See* Vokes, *supra* note 109, at 410 (stating that, currently, actions have been filed on behalf of Illinois pharmacists by Pat Robertson's Center for Law and Justice, Americans United for Life, the Center for Law and Religious Freedom with one suit being dismissed for administrative reasons and all others pending).

[122] CAL. BUS. & PROF. CODE § 733(b)(3) (West 2006).

[123] *Id.*

[124] CAL. GOV'T CODE § 12940(l) (West 2006).

[125] CAL. BUS. & PROF. CODE § 733.

[126] *Id.*

[127] *Id.* at § 733(a).

[128] 151 CONG. REC. E658 (daily ed. April 15, 2005)(statement of Rep. Maloney); H.R. 1652, 109th Cong. (1st Sess. 2005); S 809, 109th Cong. (1st Sess. 2005).

purpose of the ALPhA is to "ensure that a woman's access to birth control cannot be denied by pharmacists who have personal objections to certain legal prescriptions."[129] The sponsors found it "incomprehensible" that in this century "women are having to fight for their right to obtain birth control pills."[130] The ALPhA explicitly recognizes an individual's fundamental right to free exercise of religion, and an individual's fundamental right to access legal contraception. An individual's right to free exercise "cannot impede an individual's access to . . . contraception."[131]

Like the Illinois regulation, ALPhA puts the burden on the pharmacy to ensure that patients will have their prescriptions filled "without delay" by another pharmacist employed by the store.[132] If the product is not in stock, then it will be ordered immediately unless the pharmacy "does not keep in stock any product for such condition."[133] This final language makes the provision similar to that part of the Illinois law which requires pharmacies to dispense Plan B® if they dispense any type of contraceptive.[134] ALPhA includes civil penalties and recognizes private causes of action by persons aggrieved by pharmacies violating the Act, including "actual and punitive damages, injunctive relief, and . . .attorney's fee[s] . . ."[135] The bill is currently referred to the House Committee on Energy and Commerce, Subcommittee on Health.[136]

D. Nevada

The State of Nevada has been wrestling with its own version of pharmacist refusal legislation. According to members of the State Board of Pharmacy, Oregon's Death With Dignity statute initially caused them to consider conscience clause legislation.[137] The Oregon Death With Dignity law permits physicians to prescribe lethal doses of Schedule II drugs[138] for patients suffering from terminal disease with less than six months to live.[139] Pharmacists then fill the prescriptions and the patients administer the drugs themselves.[140] Oregon pharmacists may refuse to fill prescriptions written for this purpose.[141]

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[129] 151 CONG. REC. E658 (daily ed. April 15, 2005)(statement of Rep. Maloney).

[130] *Id.*

[131] H.R. 1652, 109th Cong. (2005); S 809, 109th Cong. (2005).

[132] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006); H.R. 1652; S. 809.

[133] H.R. 1652; S. 809.

[134] ILL. ADMIN. CODE tit. 68, § 1330.91(j); H.R. 1652; S. 809.

[135] H.R. 1652; S. 809.

[136] Bill tracking is available online through the Thomas.gov website. The status of H.R. 1652 is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01652:@@@X (last visited Oct. 10, 2006). *See also* 2005 Bill Tracking H.R. 1652 at LexisNexis.

[137] Pinson, *supra* note 17.

[138] The most commonly used drugs are pentobarbital and secobarbital. OR. DEP'T OF HUMAN SERVS., SEVENTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 5 (2005), http://oregon.gov/DHS/ph/pas/docs/year7.pdf.

[139] OR. REV. STAT. § 127.800 & § 1.01(12) (2006).

[140] OR. DEP'T OF HUMAN SERVS., *supra* note 138, at 5.

[141] OR. REV. STAT. § 127.885 § 4.01(4).

Oregon is the only state with legalized physician-assisted suicide.[142] Nevada expressly prohibits the practice.[143]

The Nevada legislature took up the issue of pharmacist right of refusal for the second time during the 2005 session.[144] Nevada imposes no affirmative duty on pharmacists to fill any prescriptions,[145] which leaves the laws open to interpretation and ambiguity. One proposal prohibited pharmacists from refusing to fill prescriptions unless the pharmacists knew or had reasonable cause to believe the prescription was illegal or contraindicated by the FDA.[146] During committee hearings, concerns were raised about pharmacists' personal opinions and prejudices "tak[ing] precedence over patient health care."[147] Other issues which supported imposing a duty to fill on pharmacists included time sensitivity of some medications and limited access to pharmacies in rural communities.[148] However, after the committee hearings concluded, no consensus was reached on balancing access and moral rights.

The legislature's lack of progress led the State Board of Pharmacy to consider amending its regulations to include a refusal clause.[149] The proposed amendment allowed pharmacists to refuse to fill for three reasons:

> (a) The filling of the prescription would violate a genuine principle or tenet of conscience held by the pharmacist; (b) . . . filling of the prescription would be unlawful or potentially harmful to the patient; or (c) [belief that] a prescription is fraudulent or not for a legitimate medical purpose.[150]

Further, prior to exercising the right to refuse, the pharmacist would have to inform the employer in writing and must arrange "without delay" either to have another pharmacist fill the prescription or transfer it.[151] The proposed regulation also prohibited the pharmacist from discussing the underlying principle or tenet with the patient.[152]

Physicians, patients, state legislators, and representatives of interest groups all testified against the regulation.[153] The "potentially harmful to the

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[142] Hawaii introduced legislation in 2005 to permit assisted suicide but to date, it has not passed. *See* Bill Status Report, H.B. 1454, 109th Cong., (Haw. 2005); Bill Status Report, S.B. 1308, 109th Cong., (Haw. 2005).

[143] NEV. REV. STAT. § 449.670 (2005).

[144] Carlton, *supra* note 22; S.B. 163, 2005 Leg., 73d Sess. (Nev. 2005), *available at* http://leg.state.nv.us/73rd/bills/Amendments/A_SB163_R1_972.pdf.

[145] Pinson, *supra* note 17.

[146] Nev. S.B. 163.

[147] *Changes Relating to Certain Regulatory Bodies Which Administer Occupational Licensing: Hearing on S.B. 163 Before the Nev. Assemb. Comm. on Commerce and Labor*, (hereinafter *Changes*, May 9) 2005 Leg., 73d Sess. 6 (May 9, 2005) (statement of Edward Fishman, private citizen, Las Vegas, Nev.), http://leg.state.nv.us/73rd/Minutes/Assembly / CMC/Final/4401.pdf; *see also Changes Relating to Certain Regulatory Bodies Which Administer Occupational Licensing: Hearing on S.B. 163 Before the Nev. Assemb. Comm. on Commerce and Labor*, (hereinafter *Changes*, May 18) 2005 Leg., 73d Sess. 7-8 (May 18, 2005), http://leg.state.nv.us/73rd/Minutes/Assembly/CMC/Final/4544.pdf.

[148] *Changes*, May 9 (statement of Edward Fishman, private citizen, Las Vegas, Nev.), *supra* note 147; *see also Changes*, May 18, *supra* note 147.

[149] Pinson, *supra* note 17.

[150] A Pharmacist's Exercise of Conscience, *supra* note 22.

[151] *Id.*

[152] *Id.*

[153] Chapman, *supra* note 1.

patient" language, without defining "harm" provides a possible loophole for a pharmacist to refuse to fill without notifying the employer prior to refusing as they would if exercising the conscience provision of the regulation.[154] Also, nothing in the regulation provides penalties for violating its provisions.[155] Because this regulation affects public policy, it was a bold move for the pharmacy board to attempt to do by regulation what the state senate and assembly had been unable to do by statute. In fact, at an open meeting in December, 2005, the Nevada State Board of Pharmacy chose to remove all language concerning "tenet of conscience" from the proposed regulation. Instead, the proposed regulation will focus on legal and medical grounds for refusal. The pharmacy board determined that any conscience language should come from statute, via the legislature, rather than the regulatory board.[156]

On May 4, 2006, the legislative subcommittee adopted the new proposed regulation.[157] A pharmacist may refuse to fill a prescription only if, in the pharmacist's professional judgment, she believes the prescription to be illegal, potentially medically harmful, fraudulent, or not for a legitimate medical purpose.[158] According to the Pharmacy Board's general counsel, "a pharmacist who tries to sidestep a new regulation by not filling a birth control prescription based on a conscientious objection will answer to the board."[159] However, unlike regulations in California and Illinois, this regulation imposes no duty to assist a patient on how to obtain the product if the requested prescription is out of stock or the pharmacy does not normally carry it. Therefore, a patient in need of emergency contraception may find herself racing against time while trying to fill a prescription.

IV. THE CONSTITUTIONAL CLASH

When fundamental rights are in direct conflict, what determines the winner? The conflicting fundamental rights at issue in this debate are the right of individuals to free exercise of religion and the fundamental right to access legal contraception.[160] Some have made this a fight over when life begins. Those that have claim emergency contraception is not the same as preventative contraception because fertilization may have taken place before the patient takes the drugs.[161] They believe that life begins at fertilization.[162] Of course, the longer a woman is delayed in receiving the drugs, the more likely that conse-

[154] *Id.*

[155] *See* A Pharmacist's Exercise of Conscience, *supra* note 22.

[156] Audio tape: Nev. State Bd. of Pharmacy Workshop (Dec. 8, 2005) (on file with author); Minutes of the Nev. State Bd. of Pharmacy Workshop (Mar. 1, 2006), http://bop.nv.gov/Minutes/March%202006.pdf.

[157] NEV. ADMIN. CODE, Adopted Regulation R036-06 (on file with author); *see also* Cy Ryan, *Pharmacy Asked to Withhold Judgment*, LAS VEGAS SUN, May 6, 2006, at 3.

[158] Ryan, *supra* note 157, at 3.

[159] *Id.* In the same article, Larry Pinson, executive director of the Pharmacy Board, reaffirmed the Board's earlier decision (*see supra* note 149) by stating that "It's up to the Legislature . . . to decide whether there should be a law to allow pharmacists to object based on religious or conscientious objections, not the pharmacy board."

[160] H.R. 1652, 109th Cong. § 2 (2005); S. 809, 109th Cong. § 2 (2005).

[161] Green, *supra* note 15, at 405-06.

[162] *Id.*

quence will occur. This delay could ultimately force a woman who is trying to prevent pregnancy into having to make a much more difficult decision: to continue with an unplanned pregnancy or terminate it by abortion.

To analyze the contest between the rights it helps to know from where the right originates. Then one must determine what test to apply when analyzing if government can intrude upon that right. Finally, applying the test to the rights involved, one may predict which right trumps the other.

A. *The Fundamental Right of Free Access to Contraception*

In *Griswold v. Connecticut*[163] and *Eisenstadt v. Baird,*[164] the Supreme Court recognized the need to protect any person's fundamental right to privately decide "whether to bear or beget a child",[165] no matter what his or her marital status. The right to "engage in sexual intercourse without having a child" is what those cases truly protect.[166] Even when attempting to "undo" *Roe* (as in *Webster*), the attorney arguing against abortion made a point of noting that he thought that the Court had correctly upheld the right to birth control and his fight was not against that right.[167] The problem, however, is that on rare occasions birth control pills and devices[168] may not prevent fertilization, but rather prevent implantation.[169] ACOG and the AMA consider implantation to be the defining moment of pregnancy.[170] Emergency contraception (Plan B®) will not work once a fertilized egg implants.[171] As noted previously, some studies demonstrated that Plan B® does not interfere with fertilization or implantation.[172] Herein lies the controversy surrounding pharmacist refusal and patient right to purchase and use contraceptives. Opponents of *Roe v. Wade*,[173] who choose to equate emergency contraception with abortion, put *Griswold* and its progeny at risk.[174]

In *Roe v. Wade*, the Court held that a state or local government could not circumvent a woman's right to abortion by adopting the theory that life begins at conception (or fertilization).[175] In *Eisenstadt*, the Court stated that the state could have no legitimate government interest in prohibiting contraceptive use and distribution because "[i]t would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . ."[176] In *Carey v. Population Services International* the Court explicitly stated that deciding whether or not to get pregnant or have

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[163] 381 U.S. 479 (1965).
[164] 405 U.S. 438 (1972).
[165] *Id.* at 453.
[166] TRIBE, *supra* note 45, at 94.
[167] *Id.* at 95.
[168] Specifically, Intrauterine Devices or I.U.D.'s. HATCHER ET AL., *supra* note 26, at 223-24.
[169] TRIBE, *supra* note 45, at 95; HATCHER ET AL., *supra* note 26, at 223-24.
[170] Cooper, *supra* note 40; Teliska, *supra* note 40, at 235; TRIBE, *supra* note 45, at 123.
[171] FDA's Decision Regarding Plan B: Questions and Answers, *supra* note 27.
[172] Gemzell-Danielsson & Marions, *supra* note 43, at 346.
[173] 410 U.S. 113 (1973).
[174] *See* TRIBE, *supra* note 45, at 95.
[175] *Roe*, 410 U.S. at 162.
[176] Eisenstadt v. Baird, 405 U.S. 438, 448 (1972).

children is a fundamental right, and that in order to restrict access to contraceptives, the government must meet the strict scrutiny standard.[177] Thus, "regulations imposing a burden on [access to contraceptives] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[178] The right to avoid pregnancy should not be impeded by an individual like a pharmacist. Pharmacy refusal clauses put the power of impeding another's rights firmly in the control of a single individual.

B. The First Amendment Right to Free Exercise of Religious Beliefs

The Free Exercise Clause of the First Amendment prohibits Congress from making any law "prohibiting the free exercise" of religion.[179] The Free Exercise Clause applies to the States by incorporation into the Fourteenth Amendment.[180] Some may consider that in passing conscience or refusal clause legislation, the state is protecting an individual pharmacist's right to free exercise of religion. However, the free exercise clause "does not provide absolute protection for religiously motivated conduct."[181]

1. Employment Division, Department of Human Resources v. Smith

In *Employment Division, Department of Human Resources v. Smith,*[182] the Court recognized that the Free Exercise Clause prevents the government from regulating "religious *beliefs* as such[,] . . . impos[ing] special disabilities on the basis of religious views . . . , or lend[ing] its power to one or the other side in controversies over religious authority . . . ."[183] The issue in *Smith* was whether the Free Exercise Clause permitted the State of Oregon to deny unemployment benefits to individuals fired for religious use of peyote, when the State criminalized peyote use and provided no exception for religious use of the substance.[184]

While the freedom to believe as one chooses is absolute, the freedom to act is qualified.[185] Religious beliefs do not excuse an individual from complying with valid laws regarding conduct which the State may regulate.[186] Religious convictions and conscientious scruples do not exempt individuals from obeying general laws not directly concerned with promoting or restricting religious beliefs.[187] A law is considered neutral so long as it does not prohibit actions solely because the actions are religiously motivated.[188] A law is gener-

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[177] 431 U.S. 678, 686 (1977).
[178] *Id.*
[179] U.S. CONST. amend. I.
[180] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
[181] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1200 (Aspen Pub. 2d ed. 2002).
[182] 494 U.S. 872 (1990).
[183] *Id.* at 877 (internal citations omitted) (emphasis in original).
[184] *Id.* at 874.
[185] CHEMERINSKY, *supra* note 181, at 1200.
[186] *Employment Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 878-79 (1990).
[187] *Id.* at 879.
[188] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (holding ordinance regulating animal slaughter unconstitutional because it was aimed specifically at religious practice).

ally applicable so long as it does not "impose burdens only on conduct motivated by religious belief . . . ."[189] If a valid law is neutral and of general applicability, then the free exercise clause cannot be used to challenge the law, even if the law incidentally imposes a burden on an individual's free exercise rights.[190]

2. *The* Catholic Charities *Cases – the Balancing Test*

Where the government has a fundamental and overriding interest in protecting certain individuals' rights, if that government interest substantially outweighs the burden on other individuals' rights to exercise their religious beliefs, the government will prevail.[191] In the *Catholic Charities* cases, the courts analyzed Free Exercise challenges using just such a balancing test.[192] In both cases, laws requiring employers to provide contraception coverage in their prescription benefits plan were challenged.[193] The laws exempted "religious employers" but not religious organizations which did not meet the definition of "religious employer" under the statutes.[194] After holding that under the *Smith* test, the laws in question did not violate the Free Exercise Clause, the courts went on to analyze the challenges under the balancing test.[195] The test requires first determining if the law, in fact, burdens freedom of worship or religious beliefs.[196] If so, then the State must have a compelling interest to do so and use the least restrictive means to achieve its end.[197] In both cases, the courts recognized that the laws requiring Catholic Charities to provide contraceptive coverage in its prescription benefits package did burden the employers' religious beliefs.[198] However, the courts recognized as compelling the states' interests in providing for the health of its citizens and eliminating gender discrimination in so doing.[199] Thus, both courts held the laws constitutional under the balancing test.[200] As the New York court stated, "[w]hile plaintiffs' free exercise rights are not diminished by this fact, the rights—including the paramount right of personal health—of many employees who do not share plaintiffs' views on contraceptives would be subordinated to plaintiffs' right to freely exercise their beliefs."[201]

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[189] *Id.* at 543.

[190] *Smith*, 494 U.S. at 885.

[191] *See, e.g*, CHEMERINSKY, *supra* note 181, at 1209; Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[192] *See* Catholic Charities of Sacramento, Inc. v. Super. Ct. of Sacramento County, 85 P.3d 67 (2004), *cert. denied*, 125 S. Ct. 53 (2004) [hereinafter *Sacramento*]; Catholic Charities of the Dioceses of Albany v. Serio, 808 N.Y.S.2d 447 (N.Y. App. Div. 2006) [hereinafter *Albany*].

[193] *Sacramento*, 85 P.3d at 73; *Albany*, 808 N.Y.S.2d at 451.

[194] *Sacramento*, 85 P.3d at 75-76; *Albany*, 808 N.Y.S.2d at 452.

[195] *Sacramento*, 85 P.3d at 91-94; *Albany*, 808 N.Y.S.2d at 455-59.

[196] *Sacramento*, 85 P.3d at 91; *Albany*, 808 N.Y.S.2d at 456.

[197] *Sacramento*, 85 P.3d at 91; *Albany*, 808 N.Y.S.2d at 457.

[198] *Id.*

[199] *Sacramento*, 85 P.3d at 92-94; *Albany*, 808 N.Y.S.2d at 457 n.4.

[200] *Sacramento*, 85 P.3d at 94; *Albany*, 808 N.Y.S.2d at 459.

[201] *Albany*, 808 N.Y.S.2d at 458.

C. *Duty to Fill and Refusal Clauses Under* Smith *and* Catholic Charities

Laws imposing a duty to fill emergency contraception prescriptions easily satisfy both the *Smith* and *Catholic Charities* tests. The Illinois and California statutes and the proposed ALPhA certainly qualify as neutral and of general applicability under *Smith* because the intent of those laws is to ensure that all pharmacists or pharmacies allow women free access to contraception. When analyzed using the balancing test, the compelling state interests recognized in the Illinois and California statutes and ALPhA are similar to those recognized by the *Catholic Charities* courts: preventing gender discrimination and providing for the public health.

Conversely, refusal clauses which place too great a burden on the patient may not pass the strict scrutiny test for interfering with the fundamental right of access to contraception.[202] Because the FDA, the AMA, and ACOG all consider Plan B® to be emergency contraception, the analysis is not the undue burden test set forth for limiting access to abortion. Rather, any law limiting access to contraception is subject to strict scrutiny. Actions based on religious belief may be infringed upon, under the analyses discussed *supra*; therefore, States would be hard pressed to show that protecting those actions far outweighs protecting an individual's right to contraception, as required to pass strict scrutiny.

Additionally, allowing individual pharmacists to refuse to fill contraceptive prescriptions of any kind based on moral, ethical or religious grounds, may put the states in direct conflict with the directive set forth in *Roe*: that state or local government cannot circumvent a woman's right to abortion by adopting the theory that life begins at conception (or fertilization).[203] The only reasons put forth thus far, by pharmacists wanting to refuse to fill Plan B® prescriptions, is that it may prevent a fertilized egg from implanting in the uterine wall and is, therefore, perceived by those pharmacists as an abortifacient rather than a conception preventative. If the state cannot impose the theory that life begins at fertilization upon the populace and place an undo burden on access to abortion, then how can it justify permitting an individual or business that receives its license to operate from the state to adopt such a theory and impose it on the general public, thus denying a woman her fundamental right of access to contraception? It cannot. If states want to permit pharmacists to refuse to dispense contraception, then they must provide a means to ensure that a woman is not burdened in accessing that contraception.

A recent U.S. district court decision from Wisconsin highlights the precarious balance between accommodating both pharmacist and patient rights.[204] Noesen, a Catholic pharmacist, was disciplined by the Wisconsin Pharmacy Examining Board after he refused to fill or refer contraceptive prescriptions.[205] The Board found that his actions "constitut[ed] a danger to the health, welfare or safety of a patient."[206] The Board required Noesen to provide written notice

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[202] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876-77 (1992).
[203] Roe v. Wade, 410 U.S. 113, 162 (1973).
[204] Noesen v. Med. Staffing Network, Inc., No. 06-C-071-S, 2006 WL 1529664 (W.D. Wis. June 1, 2006).
[205] *Id.* at *1.
[206] *Id.*

to any employer specifying, with detail, what "pharmacy practices he [would] decline to perform as a result of his conscience[,]" as well as provide details as to the steps he would take to "ensure that a patient's access to medication [would] not [be] impeded by his failure to perform a service."[207] Subsequently, Noesen provided the required notice to his employer, MSN. MSN placed Noesen at Wal-mart, who accepted him knowing his limitations, and agreeing to accommodate him.[208] Noesen specifically refused to "transfer, refer, renew, dispense, verify or touch prescriptions for birth control."[209] Wal-mart ensured that another pharmacist would always be on duty with Noesen, and simply asked Noesen to signal that a customer needed assistance.[210] Noesen, rather than ensure that patients received this modicum of respect and service, would simply walk away from customers at the counter or leave phone-in customers on indefinite hold.[211] Wal-mart fired Noesen, and he filed Title VII, §1983, and § 1985 actions against MSN, Wal-mart, and the State of Wisconsin.[212] The district court found that Noesen's employers had made reasonable accommodations for his religious beliefs.[213] The court further found that Noesen's actions in abandoning customers went beyond the accommodation agreed upon or necessary under Title VII.[214] Signaling the other pharmacist "did not require him to provide contraceptive articles."[215] The court dismissed Noesen's §1983 and § 1985 claims, his claims against the State of Wisconsin, and granted summary judgment on behalf of the defendant employers.[216] Noesen's behavior illustrates the need for state intervention to ensure a patient's rights are not trampled in attempting to accommodate an individual pharmacist's conscience.

Illinois has both a broad right to refuse law as well as a very narrowly defined duty to fill rule.[217] Thus far, the Illinois duty to fill reaches only the contraception issue and does not impose a duty to fill on any other types of medication on pharmacists.[218] Even in its duty to fill rule, however, Illinois does not impose the duty on the individual pharmacist, but on the pharmacy.[219] Therefore, it is the decision of the business as to how to best implement procedures to comply with the rule. Presumably, under this type of duty to fill law, the state does not directly interfere with anyone's free exercise rights. Pharmacies could comply by ensuring, through staffing, that another pharmacist in the same store would fill the prescription.[220] Pharmacies could also comply by

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207 *Id.*
208 *Id.* at *2.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id.* at *1.
213 *Id.* at *4.
214 *Id.*
215 *Id.*
216 *Id.* at *3-5.
217 745 ILL. COMP. STAT. ANN. 70/1-14 (West 1977); ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).
218 ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).
219 *Id.*
220 *Id.*

referring or transferring the prescription to a different pharmacy in the area.[221] So long as a patient can receive Plan B® in a timely manner, no constitutional violation will occur.

The proposed federal duty to fill law, the ALPhA, is much more broadly written than Illinois' rule. While the ALPhA specifically discusses the fundamental right to contraception in its introduction, the actual language of the law encompasses all legitimate prescriptions.[222] Because the proposed legislation was so broad, it invited challenges based on restraint of trade and concern about pharmacists' ability to use their professional judgment as to whether dispensing according to a written prescription is actually in the patient's best interest. Even Illinois' rule invites the question of whether the rule permits pharmacists to protect patients from dosing errors, possible fatal drug interactions, or from other contraindicated uses.[223] Therefore, narrowing the language and providing that pharmacists exercise their judgment for possible medical harm (not harm based on their moral or religious beliefs), makes this argument less persuasive.

The California duty to fill regulation is also broadly written, encompassing all prescriptions, not just contraception.[224] It, like the ALPhA, may result in more substantive challenges because it does not simply protect a fundamental right but infringes on Free Exercise for more sweeping state interests.

Another argument against duty to fill laws involves the impact on the pharmacy business.[225] The Illinois rule requires any pharmacy that sells any type of contraceptive to fill a legitimate prescription for any contraceptive or order it if it is not in stock.[226] In 2000, there were over 50 brands of oral contraceptives marketed.[227] There are many more today.[228] No pharmacy could be expected to stock them all; nor should they be required to. However, with non-emergency contraception, the pharmacy may have time to order the product or consult with the prescribing physician about acceptable substitutes, or allow the patient to go elsewhere. Because hormonal contraception is used regularly, patients can order over the internet or buy multiple packs at a time to avoid delays. With Plan B®, however, there is no prepackaged alternative available and patients lack the luxury of time. The Illinois rule puts pharmacies on notice that this is a product they should keep on the shelf, or be prepared to obtain immediately or know where to refer patients to for immediate service.[229]

ALPhA and the California regulation, because they are so broadly written to encompass medications for all types of disease states, present a much bigger problem for pharmacies that need to control inventory for business purposes.

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[221] *Id.*

[222] H.R. 1652, 109th Cong. (2005); S.B. 809, 109th Cong. (2005).

[223] MacLean, *supra* note 66, at 6.

[224] CAL. BUS. & PROF. CODE § 733, *supra* note 21.

[225] MacLean, *supra* note 66 at 7.

[226] ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).

[227] Association of Reproductive Health Professionals, Oral Contraceptives: Contraceptive Formulations (2000), http://www.arhp.org/healthcareproviders/onlinepublications/clinical-proceedings/rhupdatecp/graphics4.cfm?ID=182.

[228] See www.fda.gov and search for "oral contraceptives for newly approved dosage forms."

[229] ILL. ADMIN. CODE tit. 68, § 1330.91(j).

Therefore, the ALPhA needs to be more narrowly drafted, so that it achieves its stated goal of insuring that women will not be denied their fundamental right to contraceptive access. The California regulation will most likely be challenged as overreaching and requiring pharmacies to have knowledge concerning what store carries what products and name brands when they do not normally carry a particular product. When considered across all classes of prescription drugs, this imposes no small burden.

V. RECOMMENDATIONS FOR NEVADA (AND OTHER STATES CONTEMPLATING REGULATION)

A. *Duty to Fill Regulation*

In Nevada, both the duty to fill and right to refuse regulations debated by the legislature and the State Board of Pharmacy had problems, both functionally and constitutionally. Like California's regulation, the proposal debated in the last Nevada legislative session was broad, requiring pharmacists to fill all legal prescriptions and placed the duty on the pharmacist and not the pharmacy.[230] Because in many cases distinguishing between the pharmacist and the pharmacy is impossible, this proposal, like the federal law, is too broad. A duty to fill statute should be narrow enough to ensure that the fundamental right to access and use contraception is not abridged without imposing duties beyond that right. Pharmacists must be free to use their professional judgment to determine if a prescription is both legal and medically valid, as the newly adopted regulation provides. However, as noted *supra*, without the duty to fill or refer to another pharmacy, a patient may still find herself fighting time to find a pharmacy that carries Plan B®. If the legislature chooses to expand the regulation and provide a conscience clause, then it must ensure that the patient can obtain her prescription without delay, such as having another pharmacist fill either at the same pharmacy or at another pharmacy.[231] With transfer, however, the burden to travel to another pharmacy still falls onto the patient. The policy adopted by Costco, delivering the prescription to the patient,[232] removes the burden from the patient while accommodating individual pharmacists' beliefs. Such a policy could be included in any refusal regulation. In fact, delivery is one option provided in the California regulation.[233]

A hybrid of the Illinois and California regulations provide a workable solution for Nevada and those states considering how to balance the rights of pharmacists' and patients' rights. The California regulation should serve as the template, but should be limited to contraceptive drugs and devices. The history and legislative intent of the regulation must make clear that patients' rights come first. Pharmacists may refuse to fill based on moral, ethical, or religious grounds, but only with prior notice to the employer and only if the employer can accommodate the pharmacist's objection without undue hardship to the employer or patient. If unable to fill a prescription, the regulation should pro-

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[230] S. 163 R1 972, 73d Sess. (Nev. 2005).
[231] A Pharmacist's Exercise of Conscience, *supra* note 22.
[232] Kaisernetwork.org., *supra* note 83.
[233] CAL. BUS. & PROF. CODE § 733 (West 2006).

vide a number of ways to accommodate the patient, for example: (1) arranging for timely delivery to the patient, (2) transferring the prescription to a nearby site to ensure timely access for the patient, or (3) returning the prescription to the patient with a referral to a nearby site in order to ensure timely access for the patient.

Pharmacists should be encouraged and allowed to use their professional judgment to determine the legality and medical soundness of any prescription presented to them, as the new Nevada regulation provides.[234] Therefore, the regulation must specify use of "professional judgment" to avoid any pharmacist from injecting personal instead of professional judgment. Borrowing from the Illinois regulation, the hybrid regulation should include the definition of contraceptive,[235] thus alleviating any ambiguity caused by individual opinions as to what constitutes a contraceptive and what constitutes an abortifacient. Additionally, the Illinois regulation requires the pharmacy, upon approval of the prescriber, to provide a suitable alternative if the contraceptive is not in stock.[236] This provision should also be included. If a pharmacy does not carry Plan B®, but does carry progestin-only contraceptives, a physician could conceivably ask the pharmacist to substitute the latter with appropriate directions for taking the product. Thus, a patient could receive the medication she needs in a timely manner without having to wait for delivery or transfer of the original prescription.

At least one scholar, Robert Vischer, has suggested allowing the free market, rather than government regulation, to determine whether pharmacists can refuse to fill prescriptions based on their individual beliefs.[237] Under the "moral marketplace" scheme, consumers would choose the pharmacy they wish to patronize based on the choices the pharmacies/pharmacists make.[238] The biggest problem with allowing the free market to work is that there are many areas, both in Nevada and in other states, where the community is too small to support more than one pharmacy. Thus, there will be no competition. Vischer suggests that the state may regulate in such areas, after the "moral marketplace" fails to protect a patient's rights.[239] However, his proposal requires documented market failure before state action.[240] Therefore, a patient would have to demonstrate that she was denied access to contraceptives, inviting unacceptable consequences, before the state could step in. The patient should not bear the risks and consequences of the free market, especially when her right to access contraception is compromised. Thus, allowing the "moral marketplace" to determine the outcome of this clash of rights would not be the ideal solution for Nevada, with its large rural population. State regulation of how and when pharmacists may exercise right of conscience, as discussed in the preceding paragraphs, will be the best alternative for Nevada.

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234 NEV. ADMIN. CODE, Adopted Regulation R036-06 (on file with author).

235 "[T]he term 'contraceptive' shall refer to all FDA-approved drugs or devices that prevent pregnancy." ILL. ADMIN. CODE tit. 68, § 1330.91(j)(2) (2005).

236 ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1).

237 Vischer, *supra* note 107, at 113.

238 *Id.* at 103.

239 *Id.* at 113.

240 *Id.*

Any regulation must provide penalties for non-compliance, including but not limited to fines, suspension of state licensure, and any other means providing for discipline by the state licensing agency. This hybrid regulation should provide the greatest protection for patients attempting to access contraception, while at the same time, providing pharmacists with a means to exercise their conscience in the majority of situations.[241]

B. *Alternative and Compatible Options*

1. *Public Notice*

Communication may be one method to overcome the following problems: (1) women not knowing where they can get their emergency contraceptive prescriptions filled; (2) women being ambushed by overzealous pharmacists not only refusing to fill but subjecting patients to lectures on their morals and ethics; and (3) women being delayed in taking this time sensitive medication. New York City requires the posting of notice that a pharmacy does not carry Plan B® .[242] Since the city council enacted the provision, the number of pharmacies stocking emergency contraception rose by twenty percent.[243] The State of Nevada should adopt an expanded version of the policy. Unless Nevada enacts legislation or regulations similar to Illinois', then any store either electing not to carry emergency contraception or having pharmacists who refuse to fill some prescriptions on duty should be required to advertise these facts prominently in their windows and in their print advertising. Thus, stores could maintain their policies, pharmacists could maintain their right to refuse, and consumers could make informed decisions when choosing to frequent those establishments. Until recently, it would be reasonable to assume that most consumers did not know Target's or Wal-Mart's policies concerning emergency contraception. Time will tell if market forces change those policies, or if federal or state governments will continue to step in.

2. *Pharmacist Prescribing Laws*

Another means Nevada could adopt to insure access to Plan B® would be to set up a program similar to Washington's, where pharmacists can prescribe and dispense Plan B® directly. Under such a plan, some means to direct the patient to a participating pharmacy would need to be in place. A state-wide hotline along with giving all physicians, clinic, and emergency rooms the information for referrals would help provide the information to patients in a timely manner.

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[241] One major concern in Nevada was the distance some patients must travel to find another pharmacy. One pharmacist, Adam Katschke, owns a pharmacy in Caliente, Nevada. The nearest pharmacy is 110 miles away, in St. George, Utah. Mr. Katschke acknowledges the conflict between his personal beliefs and his professional duty to his patients. "My religion is against it, but as a professional, I feel I can't be." Molly Ball, *No Remedy In Sight, State Unlikely to Revisit Pharmacy Issue*, LAS VEGAS SUN, Jan. 30, 2006, at A1. This author appreciates Mr. Katschke's dedication to his profession and his community.

[242] *Pharmacy Refusals 101*, *supra* note 5, at 1-2; N.Y. CITY ADMIN. CODE § 20-713.1 (2003).

[243] *Pharmacy Refusals 101*, *supra* note 5, at 3.

VI. Is Federal Legislation Needed?

An overarching question to this controversial issue is whether federal regulation should be implemented. Traditionally, regulation of medicine and pharmacy practices has been left to the states.[244] However, where states begin to enact legislation that impinges on individual fundamental rights, Congress has stepped in.[245] While it would be nice to believe that the states will ensure that no woman is denied access to emergency contraception, the trend appears to be moving more towards introducing refusal legislation than legislation limiting refusals. During the past year, fifteen states introduced refusal laws.[246] The governors of both Arizona and Wisconsin vetoed legislation that passed both houses of their respective legislatures.[247] Therefore, while the number of refusals at this time may be few, it appears that some type of intervention may be needed.

However, as the APhA suggested during its testimony before a Congressional subcommittee, if legislation is written too broadly, unexpected consequences could arise, such as pharmacies refusing to stock certain products so as to avoid forcing the pharmacists to dispense.[248] Therefore, ALPhA should be much narrower and confined to contraception, and require pharmacies to either carry the medication or provide access to the medication without delay. While it seems reasonable that pharmacists should have to fill all legitimate prescriptions presented to them, few prescriptions that would be denied for moral, ethical, or religious reasons are as time sensitive as emergency contraception. The slippery slope argument, such as pharmacists refusing to dispense medications to HIV/AIDS patients on moral grounds,[249] while persuasive, does not address the issue that there is no fundamental constitutional right at risk, nor is the time element as dire. While it may be somewhat burdensome for a patient to go to another pharmacy or order medications online, the consequences of waiting to fill most prescriptions are not as compelling as forcing a woman to risk pregnancy and be faced with the decision to become a parent or obtain an abortion.

The APhA counseled against "unintended consequences" of duty to fill laws.[250] The APhA and its member pharmacists should do the same when attempting to exercise their conscience in refusing to fill emergency, or any, contraception prescription; increasing unintended pregnancies and abortions. The AMA resolution calls for dialogue with the APhA to discuss the issue of pharmacist refusal clauses.[251] Such collaboration between the two organizations could result in language that meets the needs of all concerned: the physicians who do not want to have their doctor-patient relationship undermined; the

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[244] MacLean, *supra* note 66, at 9.

[245] *See e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[246] *Pharmacy Refusals 101*, *supra* note 5, at 2.

[247] *Id.*; David Callender, *Doyle Again Vetoes 'Conscience Clause*,' The Capital Times (Madison, WI), Oct. 15, 2005, at 3A.

[248] MacLean, *supra* note 66, at 9.

[249] Chapman, *supra* note 1.

[250] MacLean, *supra* note 66, at 9.

[251] Amer. Med. Ass'n., *supra* note 97.

pharmacists who want their individual beliefs respected; and, most importantly, the patients who "should receive their medications without harassment and interference."[252]

VII. CONCLUSION

"One individual's rights should not outweigh another's."[253] A noble sentiment, but impractical. There are many examples of when certain rights are greater than others. The First Amendment gives us the right to free speech, but one cannot yell "fire" in a crowded theater, where no fire exists.[254] Business owners have the right to refuse to serve anyone for any reason, unless that business owner discriminates specifically because of race.[255] Here, individual pharmacists, who are licensed by the state to work in pharmacies, licensed by the state, want to impose their moral, ethical, and religious values on women by denying them access to legal contraceptives. Access to contraceptives is a fundamental right. The state cannot impose a burden on that right without a compelling interest. The state can, however, regulate against religiously motivated conduct if the regulation is neutral and one of general application. Therefore, states can, and should, enact regulations ensuring that no individual pharmacist may interfere with the fundamental right to access contraceptives.

If the State of Nevada or any state is currently considering duty to fill or refusal clause legislation, it should look to California's and Illinois' regulations for guidance; taking the best pieces of those regulations would provide patients with insurance that their needs are met, while recognizing pharmacists' right to Free Exercise in most instances. Regulations can be strengthened by adopting a notification regulation similar to New York City's and providing a hotline directing patients to pharmacies that do fill emergency contraception prescriptions. Enacting legislation giving pharmacists the authority to prescribe emergency contraception directly to patients, as in Washington State, would further address the needs of patients while still allowing individual pharmacists the ability to exercise their own beliefs without burdening patients.

Finally, unless measures such as these are adopted throughout the country, the need for federal regulation of this aspect of pharmacy practice may be indicated.

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252 MacLean, *supra* note 66, at 9.

253 *Id.*

254 Schenck v. United States, 249 U.S. 47, 52 (1919).

255 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 284 (1964) (Douglas, J., concurring).