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COMMENTS

CAN A PHARMACIST REFUSE TO FILL BIRTH CONTROL PRESCRIPTIONS ON MORAL OR RELIGIOUS GROUNDS?

I. INTRODUCTION

Imagine that you are thirty-two years old and a married mother and teacher. On a Sunday evening, you go to your local pharmacy for an immediate refill of your birth control pill prescription. However, the pharmacist on duty refuses to fill your prescription because she does not believe in birth control. Although such a scenario may be hard to believe, this is exactly what happened to Julee Lacey at a CVS pharmacy in Texas.¹

If you were Ms. Lacey, how would you feel? Would you be angry with the pharmacist or would you respect the pharmacist's decision? How would you get your prescription filled? Would you ask if there is another pharmacist on duty willing to fill your prescription? If another pharmacist is not available, would you wait until a pharmacist who is willing to fill the prescription is on duty? Or would you request that the pharmacist transfer the prescription to another pharmacy? What if there is not another nearby pharmacy or alternative pharmacist willing to fill the prescription? Alternatively, what if the pharmacist refused to transfer the prescription to another pharmacist or another pharmacy?

Now imagine that you are the pharmacist who refused to fill the prescription. How would you feel if you were facing disciplinary action for standing up for your beliefs? Moreover, what if your refusal to fill the prescription resulted in termination of your employment?

These situations are not merely hypothetical scenarios. For example, a Wisconsin pharmacist was disciplined by the Wisconsin State Pharmacy Examining Board for refusing to fill a prescription for oral contraceptives and for refusing to transfer the prescription to an-

1. Gretel C. Kovach, *Pharmacist Refuses to Refill Birth Control; North Texas Woman Denied Pill Because of Moral Conflict*, DALLAS MORNING NEWS, Mar. 31, 2004, at 1A.

other pharmacy.² Additionally, an Indiana pharmacist was fired because she refused to fill a birth control prescription.³

The conflict between a woman's right to birth control and a pharmacist's right to conscientiously object to filling a birth control prescription is an issue increasingly facing women and pharmacists across the nation. In response, many states either have passed or are considering legislation that would allow a pharmacist to refuse to fill contraceptive prescriptions, based on the pharmacist's moral or religious objections. Such legislation is known as "conscience legislation."⁴ Conscience legislation "refers to any statute or regulation providing explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs."⁵ The protection the legislation provides varies by state, but frequently includes civil immunity, criminal immunity, protection against discrimination, and protection against adverse employment actions.⁶

Despite the recent increase and broadening of conscience legislation, pharmacists should not be allowed to conscientiously object to filling a woman's birth control prescription.⁷ Such a prohibition

2. Disciplinary Proceedings Against Noesen, Case No. LS0310091PHM (State of Wis. Pharmacy Examining Bd. Apr. 13, 2005), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm> (finding that pharmacist Neil Noesen violated the standard of care and ordering him to attend ethics training and pay the complainant's costs).

3. Jeff McDonald, *More Health Professionals Balk at Giving Birth Control; Refusal to Prescribe, Dispense Increases; Moral Grounds Cited*, SAN DIEGO UNION-TRIB., Aug. 8, 2004, at A1.

4. See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 177 (1993). Lynn Wardle refers to this type of legislation as "conscience clause legislation;" however, it will be referred to as "conscience legislation" throughout this Comment.

5. *Id.* at 178. Wardle defines "health care providers" as including:

individuals (such as physicians, nurses, technicians, counselors, interns, students, or trainees) . . . that directly or indirectly provide, assist, or participate in providing health services to patients. "Health services" include medical services or procedures to diagnose, maintain, or treat a physical condition, as well as services that are intended to preserve patient health or prevent disease or undesired medical conditions. For instance, family planning services are "health services."

Id. Wardle does not explicitly include pharmacists in his definition of health care providers. See *id.*

6. See, e.g., LA. REV. STAT. ANN. § 1299:31(A) (2004) ("No physician, nurse, student or other person or corporation shall be held civilly or criminally liable, discriminated against, dismissed, demoted, or in any way prejudiced or damaged because of his refusal for any reason to recommend, counsel, perform, assist with or accommodate an abortion."). As each statute is discussed, the level of protection the statute provides is also indicated.

7. The scope of this Comment is limited to filling birth control prescriptions (oral contraceptives). As such, this Comment does not address whether a pharmacist has a right to

should exist because the pharmacist chose the pharmacy profession with the knowledge that such prescriptions are commonplace. Moreover, as health care professionals, pharmacists should not pass judgment nor impose their personal beliefs on their patients. Finally, because birth control prescriptions have medical purposes beyond the prevention of pregnancy, by refusing to fill a birth control prescription, the pharmacist may be denying the woman treatment for a medical condition.

This Comment examines the current state of conscience legislation regarding a pharmacist's right to refuse to fill birth control prescriptions because of the pharmacist's moral or religious objections. Part II describes what oral contraceptives are and how they work to prevent pregnancy. Part II also discusses the rationale for objecting to the use of oral contraceptives on moral or religious grounds. Part III examines the current state of conscience legislation among the states, including pending legislation. Part IV examines the position of the American Pharmacists Association. Part V argues that a pharmacist should not be able to conscientiously object to filling a woman's birth control prescription. Part VI concludes that the expansion of conscience legislation needs to cease, and the existing statutes allowing a pharmacist to conscientiously object to filling a birth control prescription need to be repealed.

II. ORAL CONTRACEPTIVES

Oral contraceptives, more commonly referred to as birth control pills (BCPs), were introduced in the United States in 1960.⁸ In 1965, the United States Supreme Court held that the use of contraceptives by a married couple is within the couple's right to privacy and is therefore "protected from governmental intrusion."⁹ Seven years later, the

conscientiously object to filling other prescriptions, such as prescriptions for assisted suicide, RU-486 (the abortion pill), or emergency contraception (the morning-after pill). For a discussion of these topics, see Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2002-03) (arguing for a pharmacist's right of conscience) and Wardle, *supra* note 4 (calling for and proposing a model conscience clause to protect all persons).

8. RICHARD D. BLACKBURN ET AL., *Background, in* ORAL CONTRACEPTIVES (2000), available at <http://www.inforhealth.org/pr/a9/a9chap1.shtml>.

9. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (declaring a state statute that prohibited the use of contraceptives unconstitutional). "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86.

Court extended the right to privacy to include the use of contraceptives by unmarried individuals.¹⁰ Today, eighty percent of American women born after 1945 have used BCPs.¹¹

In 2002,¹² nineteen percent of women in the United States were taking BCPs, totaling 11.6 million women.¹³ This made BCPs the most popular form of birth control in the United States.¹⁴ The second most popular method of contraception was female sterilization, used by seventeen percent of women, or 10.3 million women, in the United States.¹⁵ For women under thirty years of age, BCPs were the most popular form of birth control.¹⁶

Women with BCP prescriptions take one pill per day.¹⁷ Each pill contains synthetic hormones, namely estrogen and progestin.¹⁸ The hormones prevent ovulation, the process whereby an egg is released from a woman's ovary.¹⁹ Should ovulation occur, the hormones also alter the cervical secretions, thereby preventing sperm from reaching the egg and fertilization from occurring.²⁰ In the rare instance when an egg is fertilized, BCPs also "prevent [the] fertilized egg from implanting in the uterus."²¹

In addition to preventing pregnancy, BCPs are prescribed to treat certain medical conditions and to provide other beneficial effects.²² For example, BCPs cause lighter and shorter menstrual cycles and decrease pelvic inflammatory disease, ovarian cysts, benign breast tu-

10. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (declaring a state statute that prohibited the use of contraceptives by unmarried individuals unconstitutional). "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." *Id.* at 453.

11. RICHARD D. BLACKBURN ET AL., *Oral Contraceptive Use Worldwide*, in ORAL CONTRACEPTIVES (2000), available at <http://www.inforforhealth.org/pr/a9/a9chap2.shtml> [hereinafter *Oral Contraceptives Worldwide*].

12. The most recent year for which data is available is 2002. See WILLIAM D. MOSHER ET AL., CENTERS FOR DISEASE CONTROL & PREVENTION, USE OF CONTRACEPTION AND USE OF FAMILY PLANNING SERVICES IN THE UNITED STATES: 1982-2002 (2004), available at <http://www.cdc.gov/nchs/data/ad/ad350.pdf> [hereinafter CENTERS FOR DISEASE CONTROL].

13. *Id.* at 7.

14. *Id.* at 1.

15. *Id.* at 7.

16. *Id.* at 1.

17. PLANNED PARENTHOOD, FACTS ABOUT BIRTH CONTROL: REVERSIBLE PRESCRIPTION METHODS (2004), <http://www.plannedparenthood.org/bc/bcfacts11.html>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

mors, and anemia.²³ BCPs also protect against uterine and ovarian cancers and osteoporosis.²⁴

Despite the widespread use of BCPs,²⁵ some individuals, including some pharmacists, oppose the use of BCPs. The most common rationale for opposition is that because BCPs occasionally prevent pregnancy by preventing a fertilized egg from implanting in a woman's uterus, BCPs cause early abortions.²⁶ Therefore, BCP opponents argue that BCPs are in fact abortifacients, not contraceptives.²⁷

The focus of the anti-BCP argument centers on the debate over when conception occurs: when the egg is fertilized or when the egg implants in the uterus. According to individuals who consider BCPs to be abortifacients, conception occurs when the egg is fertilized.²⁸

In contrast, the medical community, including the American Medical Association, defines conception as occurring at implantation.²⁹ Because the medical community equates conception with implantation, even if the fertilized egg passes through the uterus without implanting, contraceptives do not cause an abortion because conception has not yet occurred.

23. *Id.*

24. *Id.*

25. See CENTERS FOR DISEASE CONTROL, *supra* note 12.

26. CHRIS KAHLENBORN & ANN MOELL, WHAT A WOMAN SHOULD KNOW ABOUT CONTRACEPTIVES, <http://www.omsoul.com/pamview.php?idnum=160> (last visited Oct. 20, 2005). Opponents of BCPs claim that for each year a woman takes BCPs, she will have "at least one very early abortion." *Id.* An early abortion occurs when the sperm has fertilized the egg, but the egg passes through the uterus without implanting in the uterine wall. See TERESA MENART, THE CHALLENGE OF CONTRACEPTION FOR THOSE WHO RESPECT LIFE, <http://www.omsoul.com/pamview.php?idnum=105> (last visited Oct. 20, 2005). Therefore, an early abortion is defined as one occurring after fertilization but before implantation. *Id.*

27. See LLOYD J. DUPLANTIS, JR., DISCONTINUING CONTRACEPTIVES: ONE PHARMACIST'S INSIGHTS, <http://www.omsoul.com/pamview.php?idnum=103> (last visited Oct. 20, 2005). "An abortifacient is a substance that causes an abortion . . ." CHRIS KAHLENBORN, HOW THE PILL AND OTHER CONTRACEPTIVES WORK, <http://www.omsoul.com/pamview.php?idnum=126> (last visited Oct. 20, 2005). As an alternative form of contraception, opponents of BCPs frequently promote abstinence for unmarried individuals and natural family planning for married couples. KAHLENBORN & MOELL, *supra* note 26. "Natural family planning, also called periodic abstinence, requires users to practice abstinence during the fertile period of a woman's menstrual cycle." Reproductive Health Outlook, Natural Family Planning, <http://www.rho.org/html/cont-nfp.htm> (last visited Oct. 20, 2005).

28. See MENART, *supra* note 26; see also DUPLANTIS, *supra* note 27.

29. Elizabeth Spahn & Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F. L. REV. 261, 294 (1998).

III. CURRENT STATE OF CONSCIENCE LEGISLATION

As previously stated, conscience legislation “refers to any statute or regulation providing explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs.”³⁰ Such protection may include civil immunity, criminal immunity, protection against discrimination, or protection against adverse employment actions.³¹

States began to pass conscience legislation in the 1970s.³² Following the Supreme Court’s decision in *Roe v. Wade*,³³ many states feared “discrimination against individuals who, for religious or other moral reasons, objected to participating in providing abortion services.”³⁴ As a result, many states passed conscience legislation relating to health or medical services.³⁵

Today, forty-five states have some form of conscience legislation.³⁶ Additionally, several states have legislation pending either to implement or to modify existing conscience legislation.³⁷ However, such legislation is not uniform. This section examines existing and pending conscience legislation throughout the United States.

A. Statutes that do not apply to contraception or to pharmacists

Twenty-four states have statutes providing for conscientious objection only to “abortion.”³⁸ These statutes provide that conscientious

30. Wardle, *supra* note 4, at 178.

31. *See, e.g.*, LA. REV. STAT. ANN. § 1299:31(A) (2004) (“No physician, nurse, student or other person or corporation shall be held civilly or criminally liable, discriminated against, dismissed, demoted, or in any way prejudiced or damaged because of his refusal for any reason to recommend, counsel, perform, assist with or accommodate an abortion.”).

32. Wardle, *supra* note 4, at 180.

33. *Roe v. Wade*, 410 U.S. 113 (1973).

34. Wardle, *supra* note 4, at 180.

35. *Id.*

36. *See infra* Parts III.A-D. The three states that do not have any form of conscience legislation, either existing or pending, are Alabama, Connecticut, and New Hampshire. Texas and Vermont do not currently have conscience legislation statutes; however, both states are considering such legislation. *See infra* Part III.E.

37. *Id.*

38. ALASKA STAT. § 18.16.010(b) (2004); ARIZ. REV. STAT. § 36-2151 (LexisNexis 2004); CAL. HEALTH & SAFETY CODE § 123420(a) (Deering 2004); HAW. REV. STAT. § 453-16(d) (2003); IDAHO CODE ANN. § 18-612 (2004); IND. CODE § 16-34-1-5 (2004); IOWA CODE § 146.1 (2002); KY. REV. STAT. ANN. § 311.800(4) (LexisNexis 2004); LA. REV. STAT. ANN. § 1299:31(A) (2004); MICH. COMP. LAWS ANN. § 333.20181 (West 2004); MINN. STAT. § 145.414(a) (2003); MO. REV. STAT. § 197.032(1) (2004); MONT. CODE ANN. § 50-20-111(2) (2004); NEB. REV. STAT. § 28-337 (2003); NEV. REV. STAT. § 632.475(1) (2004); N.Y. CIV.

objectors are not liable for their refusal to participate in an abortion,³⁹ prohibit discrimination or disciplinary action because of an individual's refusal to participate in an abortion procedure,⁴⁰ or provide both of these types of protection.⁴¹

Four states have statutes that only allow conscientious objection to the "termination of pregnancy."⁴² These statutes provide civil immunity for the refusal to participate,⁴³ and prohibit disciplinary⁴⁴ or negative employment actions against such refusals.⁴⁵ However, Ore-

RIGHTS LAW § 79-i(1) (Consol. 2004); N.C. GEN. STAT. § 14-45.1(e) (2004); N.D. CENT. CODE § 23-16-14 (2003); OHIO REV. CODE ANN. § 4731.91(D) (LexisNexis 2004); OKLA. STAT. tit. 63, § 1-741(B) (2004); 18 PA. CONS. STAT. § 3213(d) (2004); S.C. CODE ANN. § 44-41-40 (2003); UTAH CODE ANN. § 76-7-306(1) (2004); VA. CODE ANN. § 18.2-75 (2004). Many state statutes only apply to abortion because the statutes were enacted in response to *Roe v. Wade*. See Wardle, *supra* note 4, at 180-81.

39. See e.g., ALASKA STAT. § 18.16.010(b) (2004); HAW. REV. STAT. § 453-16(d) (2003); KY. REV. STAT. ANN. § 311.800(4) (LexisNexis 2004). Similarly, Idaho's statute provides that "[n]o refusal to . . . perform, assist or participate in any such abortion . . . shall form the basis of any claim for damages or recriminatory action . . ." IDAHO CODE ANN. § 18-612 (2004). Michigan's statute provides that "[t]he refusal shall be with immunity from any civil or criminal liability or penalty." MICH. COMP. LAWS ANN. § 333.20181 (West 2004). Nebraska and South Carolina's statutes provide that "[n]o cause of action shall arise" for the refusal to participate in an abortion. NEB. REV. STAT. § 28-337 (2003); S.C. CODE ANN. § 44-41-40 (2003).

40. For example, Iowa's statute provides that an objector "shall not [be] discriminate[d] against . . . in any way, including but not limited to employment, promotion, advancement, transfer, licensing, education, training or the granting of hospital privileges or staff appointments, because of the individual's . . . refusal to participate in . . . an abortion procedure." IOWA CODE § 146.1 (2002). Nevada's statute provides that an "employer shall not penalize or discipline the employee for declining to participate directly in the induction or performance of an abortion." NEV. REV. STAT. § 632.475(2) (2004). See also KY. REV. STAT. ANN. § 311.800(5)(b) (LexisNexis 2004); N.D. CENT. CODE § 23-16-14 (2003).

41. LA. REV. STAT. ANN. § 1299:31(A) (2001) ("No physician, nurse, student or other person or corporation shall be held civilly or criminally liable, discriminated against, dismissed, demoted, or in any way prejudiced or damaged because of his refusal for any reason to recommend, counsel, perform, assist with or accommodate an abortion."); see also MINN. STAT. §§ 145.414(a), 145.42 (2003); MO. REV. STAT. §§ 197.032(1)-(2) (2004); MONT. CODE ANN. § 50-20-111(2) (2004); N.Y. CIV. RIGHTS LAW § 79-i (Consol. 2004); N.C. GEN. STAT. § 14-45.1(e) (2004); OHIO REV. CODE ANN. § 4731.91(D) (LexisNexis 2004); OKLA. STAT. tit. 63, § 1-741(B) (2004); 18 PA. CONS. STAT. § 3213(d) (2004); UTAH CODE ANN. § 76-7-306(1) (2004); VA. CODE ANN. § 18.2-75 (2004).

42. DEL. CODE ANN. tit. 24, § 1791(a) (2004); KAN. STAT. ANN. § 65-443 (2003); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2004); OR. REV. STAT. § 435.485 (2003). Oregon also has a second statute that applies to "birth control services." See OR. REV. STAT. § 435.225 (2003); see also *infra* Part III.C.

43. DEL. CODE ANN. tit. 24, § 1791(a) (2004); KAN. STAT. ANN. § 65-443 (2003).

44. DEL. CODE ANN. tit. 24, § 1791(a) (2004); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2004).

45. KAN. STAT. ANN. § 65-443 (2003).

gon's statute is silent as to what level of protection the law provides for a conscientious objector.⁴⁶

Three more states, as well as a federal statute, allow conscientious objection to abortion or sterilization.⁴⁷ Wisconsin only permits conscientious objection to "a sterilization procedure or removing a human embryo or fetus."⁴⁸ Maryland has conscience legislation allowing an objection to "artificial insemination, sterilization, or termination of pregnancy."⁴⁹ These statutes protect the objector from civil liability,⁵⁰ criminal liability,⁵¹ disciplinary actions,⁵² and discrimination.⁵³

Therefore, thirty-three states, as well as the federal government, have existing conscience legislation that does not apply to either contraceptives, including BCPs, or pharmacists.

B. Statutes that apply to contraception but do not apply to pharmacists

Six states have conscience legislation that applies to contraception, but does not allow a pharmacist to conscientiously object to filling BCP prescriptions.

46. See OR. REV. STAT. § 435.485 (2003).

47. 42 U.S.C. § 300a-7(b)(1) (2004); MASS. GEN. LAWS ch. 112, § 12I (2004); N.J. STAT. ANN. § 2A:65A-1 (West 2004); R.I. GEN. LAWS § 23-17-11 (2004). New Jersey also has a statute that prohibits the state from "requir[ing] any hospital to practice or permit . . . birth control . . ." N.J. STAT. ANN. § 30:11-9 (West 2004). However, this statute only applies to hospitals, not to individuals, such as pharmacists. The federal conscientious objection statute provides that:

[t]he receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.

48. 42 U.S.C. § 300a-7(b) (2004).

49. WIS. STAT. § 253.09(1) (2003).

50. *Id.* § 20-214(a)(2)(i) (2003); MASS. GEN. LAWS ch. 112, § 12I (2004); N.J. STAT. ANN. § 2A:65A-3 (West 2004); R.I. GEN. LAWS § 23-17-11 (2004); WIS. STAT. § 253.09(1) (2003).

51. N.J. STAT. ANN. § 2A:65A-3 (West 2004).

52. MD. CODE ANN., HEALTH-GEN. § 20-214(a)(2)(ii) (LexisNexis 2003); MASS. GEN. LAWS ch. 112, § 12I (2004); N.J. STAT. ANN. § 2A:65A-3 (West 2004); R.I. GEN. LAWS § 23-17-11 (2004); WIS. STAT. § 253.09(1) (2003).

53. 42 U.S.C. § 300a-7(c) (2004); MASS. GEN. LAWS ch. 112, § 12I (2004); N.J. STAT. ANN. § 2A:65A-3 (West 2004).

Colorado allows a “private institution or physician, [or] any agent or employee of such institution or physician” to “refus[e] to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection.”⁵⁴ The refusal cannot be the basis for liability.⁵⁵ Accordingly, although Colorado’s statute applies to BCPs, the statute does not provide a pharmacist with the right to conscientiously object because a pharmacist is neither a “private institution [n]or [a] physician.”⁵⁶ Moreover, because the majority of pharmacists are not employed by a “private institution or physician,” but rather are employed in neighborhood drugstores, the majority of pharmacists will not be allowed to conscientiously object under this statute.⁵⁷

Colorado has a second statute providing that:

[a]ny county employee or city and county employee may refuse to accept the duty of offering family planning and birth control services to the extent that such duty is contrary to his personal religious beliefs, and such refusal shall not be grounds for any disciplinary action, for dismissal, for any interdepartmental transfer, for any other discrimination in his employment, for suspension from employment with the county or city and county, or for any loss in pay or other benefits.⁵⁸

This section is to “be liberally construed to protect the rights of all individuals to pursue their religious beliefs, [and] to follow the dictates of their own consciences.”⁵⁹ However, as with the first statute, this statute does not apply to pharmacists unless the pharmacist is a county or city employee.⁶⁰

Similar to Colorado’s statute, Georgia’s statute provides that “[a]ny employee of the agencies engaged in the administration of this chapter may refuse to accept the duty of offering family-planning services to the extent that such duty is contrary to such employee’s personal religious beliefs.”⁶¹ A refusal “shall not be grounds for any disciplinary action, for dismissal, for any interdepartmental transfer, for

54. COLO. REV. STAT. § 25-6-102(9) (2003).

55. *Id.*

56. *Id.*

57. A diligent search did not reveal any cases in which the Colorado courts have decided whether the statute applies to pharmacists.

58. COLO. REV. STAT. § 25-6-207 (2003).

59. *Id.* § 25-6-201.

60. A diligent search did not reveal any cases in which the Colorado courts have decided whether the statute applies to pharmacists.

61. GA. CODE ANN. § 49-7-6 (2004).

any other discrimination in his employment, for suspension from employment, or for any loss in pay or other benefits.”⁶²

“Family-planning services” include “prescriptions for the purposes of birth control . . . and . . . the distribution of . . . contraceptive devices.”⁶³ Therefore, Georgia’s statute applies to filling BCP prescriptions. However, “agencies” are defined as “the department, county boards of health, health districts, county departments of family and children services, and district departments of family and children services.”⁶⁴ Therefore, the statute does not apply to pharmacists if the pharmacist is not an employee of one of the abovementioned institutions.⁶⁵

Maine’s conscience statute provides that “[n]o private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection.”⁶⁶ The statute is silent as to what type of protection is provided for a conscientious objector.⁶⁷ “Family planning services” include prescriptions for contraceptives.⁶⁸ Accordingly, although Maine’s statute applies to BCPs, the statute does not appear to provide pharmacists the right to conscientiously object because pharmacists are not physicians, nor are they usually employees of a private institution.⁶⁹

Oregon’s conscience statute provides that “[a]ny employee of the Department of Human Services may refuse to accept the duty of offering family planning and birth control services to the extent that such duty is contrary to the personal or religious beliefs of the employee.”⁷⁰ The “refusal shall not be grounds for any disciplinary action, for dismissal, for any interdepartmental transfer, for any other discrimination in employment, or for suspension from employment, or for any loss in pay or other benefits.”⁷¹ Moreover, Oregon’s conscience statute should be “liberally construed to protect the rights of all individuals,”

62. *Id.*

63. *Id.* § 49-7-2(2).

64. *Id.* § 49-7-2(1).

65. A diligent search did not reveal any cases in which the Georgia courts have decided whether the statute applies to pharmacists.

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

67. *See id.*

68. *Id.* § 1902(4).

69. A diligent search did not reveal any cases in which the Maine courts have decided whether the statute applies to pharmacists.

70. OR. REV. STAT. § 435.225 (2003).

71. *Id.*

including their “religious beliefs” and “moral standards.”⁷² Therefore, although Oregon allows conscientious objection to filling BCP prescriptions, the right only extends to an “employee of the Department of Human Services.”⁷³ Unless a pharmacist is such an employee, Oregon pharmacists will not be able to conscientiously object to filling a BCP prescription.⁷⁴

Similar to Maine’s statute, Tennessee’s statute states that:

[n]o private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection, and no such institution, employee, agent, or physician shall be held liable for such refusal.⁷⁵

This statute applies to filling BCP prescriptions, but arguably does not apply to pharmacists because pharmacists are not physicians. A pharmacist would only be able to conscientiously object under this statute if the pharmacist is an “agent or employee” of either a “private institution or physician.”⁷⁶

Finally, West Virginia’s statute provides:

[a]ny employee of the State of West Virginia or any of its agencies or political subdivisions, including, but not limited to, local health or welfare agencies, may refuse to accept the duty of offering family planning services to the extent that such duty is contrary to his personal religious beliefs and such refusal shall not be grounds for any disciplinary action, for dismissal, for any interdepartmental transfer, or any other discrimination in his employment, or for suspension from employment, or for any loss in pay or any other benefits.⁷⁷

West Virginia has not defined “family planning services.” However, if other states’ statutes are any indication, “family planning ser-

72. *Id.* § 435.235.

73. *Id.* § 435.225.

74. A diligent search did not reveal any cases in which the Oregon courts have decided whether the statute applies to pharmacists.

75. TENN. CODE ANN. § 68-34-104(5) (2004).

76. *Id.* A diligent search did not reveal any cases in which the Tennessee courts have decided whether the statute applies to pharmacists.

77. W. VA. CODE ANN. § 16-2B-4 (LexisNexis 2003).

vices” would likely include BCP prescriptions.⁷⁸ Despite such coverage, because the statute only applies to “[a]ny employee of the State of West Virginia or any of its agencies or political subdivisions,”⁷⁹ the right to conscientiously object would not apply to a pharmacist unless the pharmacist was such an employee.⁸⁰

In sum, six states have statutorily extended the right to conscientiously object to apply to BCP prescriptions. However, these states have limited the right to conscientiously object to private institutions, physicians, or government employees. Therefore, unless a pharmacist falls into one of these categories, pharmacists will not have the right to conscientiously object to filling a BCP prescription under these statutes.

C. Statutes that apply to contraception and likely apply to pharmacists, although pharmacists are not specifically named in the statute

Two states, Florida and Illinois, have broad conscience legislation statutes that apply to BCPs and likely apply to pharmacists, although pharmacists are not specifically named in the statutes.⁸¹

Florida’s conscience legislation provides that no “physician or other person” shall be prevented “from refusing to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons; and the physician or other person shall not be held liable for such refusal.”⁸² Although the Florida courts have not yet decided the issue, a pharmacist would likely qualify as an “other person” under the statute, thereby entitling a Florida pharmacist to conscientiously object to filling a BCP prescription.⁸³

Similar to Florida’s statute, Illinois’s conscience statute provides:

No physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particu-

78. For example, the statutes of Georgia, Maine, and Oregon all include BCP prescriptions within the definition of “family-planning services.” See GA. CODE ANN. § 49-7-2(2) (2004); ME. REV. STAT. ANN. tit. 22, §1902(4) (2003); OR. REV. STAT. § 435.225 (2003).

79. W. VA. CODE ANN. § 16-2B-4 (LexisNexis 2003).

80. A diligent search did not reveal any cases in which the West Virginia courts have decided whether the statute applies to pharmacists.

81. See FLA. STAT. § 381.0051(6) (2003) (“physician or other person”); 745 ILL. COMP. STAT. 70/4 (2004) (“physician or health care personnel”).

82. FLA. STAT. § 381.0051(6) (2003).

83. A diligent search did not reveal any cases in which the Florida courts have decided whether the statute applies to pharmacists.

lar form of health care service which is contrary to the conscience of such physician or health care personnel.⁸⁴

“[H]ealth care” includes “the use or procurement of contraceptives.”⁸⁵ Although the definition of “health care personnel” does not specifically name pharmacists, “health care personnel” does include any “professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services.”⁸⁶ As a pharmacist is a professional, the courts would likely consider a pharmacist to be covered by the statute.⁸⁷ Therefore, because the statute applies to contraceptives and likely applies to pharmacists, the Illinois statute would probably protect a conscientiously objecting pharmacist who refuses to fill a BCP prescription from liability. Moreover, such a right would likely exist because the Illinois General Assembly specifically stated that their purpose in enacting this legislation was “to respect and protect the right of conscience of all persons.”⁸⁸

In sum, both the Florida and Illinois statutes probably allow a pharmacist to conscientiously object to filling a BCP prescription.

D. Statutes that apply to contraception and to pharmacists

Five states have statutes that specifically apply to pharmacists who conscientiously object to filling a BCP prescription.

Arkansas allows a pharmacist to refuse to provide birth control.⁸⁹ Arkansas’ statute provides that “[n]othing in this subchapter shall prohibit a . . . pharmacist . . . from refusing to furnish any contraceptive

84. 745 ILL. COMP. STAT. 70/4 (2004).

85. *Id.* § 70/3(a).

86. *Id.* § 70/3(c).

87. A diligent search did not reveal any cases in which the Illinois courts have decided whether the statute applies to pharmacists.

88. 745 ILL. COMP. STAT. 70/2 (2004). The section, in its entirety, states:

The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

Id.

89. ARK. CODE ANN. § 20-16-304(4) (2003).

procedures, supplies, or information.”⁹⁰ Additionally, the pharmacist cannot “be held liable for the refusal.”⁹¹

Like Arkansas, Mississippi has enacted the Mississippi Health Care Rights of Conscience Act.⁹² This Act provides that “[a] health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience.”⁹³ Conscience is defined as “the religious, moral or ethical principles held by a health care provider.”⁹⁴ The Act further provides that “[n]o health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.”⁹⁵ Moreover, the conscientiously objecting health care provider cannot be discriminated against as a result of the conscientious objection.⁹⁶

Mississippi’s Act defines “health care provider” to include pharmacists.⁹⁷ Moreover, the Act defines “health care service” to include “prescribing, dispensing or administering any device, drug, or medication.”⁹⁸ Therefore, the Mississippi Health Care Rights of Conscience Act allows Mississippi pharmacists to conscientiously object to filling BCP prescriptions.

Third, South Dakota’s statute provides that “[n]o pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: (1) [c]ause an abortion; or (2) [d]estroy an unborn child as defined in subdivision 22-1-2(50A).”⁹⁹ An “unborn child” is defined as “an individual organism of the species homo sapiens from fertilization until live birth.”¹⁰⁰ The pharmacist’s refusal to fill a prescription cannot “be the basis for any claim for damages

90. *Id.*

91. *Id.* § 20-16-304(5).

92. MISS. CODE ANN. § 41-107-1 (2005).

93. *Id.* § 41-107-5(1).

94. *Id.* § 41-107-3(h).

95. *Id.* § 41-107-5(2).

96. *Id.* § 41-107-5(3).

For purposes of this [Act], discrimination includes, but is not limited to: termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, disciplinary or retaliatory action.

Id.

97. *Id.* § 41-107-3(b).

98. *Id.* § 41-107-3(a).

99. S.D. CODIFIED LAWS § 36-11-70 (2003).

100. *Id.* § 22-1-2(50A).

against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.”¹⁰¹

The South Dakota judiciary has not yet decided whether South Dakota’s statute gives a pharmacist the right to conscientiously object to filling a BCP prescription. On one hand, because the primary method by which BCPs prevent pregnancy is to prevent ovulation (thereby preventing fertilization from ever occurring),¹⁰² the court could rule that the statute does not apply to pharmacists who conscientiously object to filling BCP prescriptions because preventing ovulation could not be construed as causing an abortion. The more likely scenario, however, is that because the statute specifically defines conception as occurring at “fertilization,”¹⁰³ and because BCPs occasionally prevent pregnancy by preventing an egg from implanting into the uterus after fertilization has occurred,¹⁰⁴ the court may rule that the statute allows a pharmacist to conscientiously object to filling BCP prescriptions. Further, because the statute specifically applies to a “pharmacist,”¹⁰⁵ the court could find that the legislature intended to allow pharmacists to conscientiously object to filling BCP prescriptions.

Washington is the fourth state that allows a pharmacist to conscientiously object to filling a BCP prescription. Washington’s statute provides that:

[n]o individual health care provider . . . may be required by law or contract in any circumstances to participate in the provision of . . . a specific service if they object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.¹⁰⁶

A “health care provider” is defined as “[a] person regulated under Title 18 . . . to practice health or health-related services.”¹⁰⁷ Pharmacists are regulated by Title 18¹⁰⁸ and are therefore health care providers, as defined by the statute.

Washington defines “health care service” as “that service offered or provided by . . . health care providers relating to the prevention,

101. *Id.* § 36-11-70.

102. *See* PLANNED PARENTHOOD, *supra* note 17.

103. S.D. CODIFIED LAWS § 22-1-2(50A) (2003).

104. PLANNED PARENTHOOD, *supra* note 17.

105. S.D. CODIFIED LAWS § 36-11-70 (2003).

106. WASH. REV. CODE §§ 48.43.065(2)(a), 70.47.160(2)(a) (2004).

107. *Id.* § 48.43.005(16)(a).

108. *See id.* § 18.64.001.

cure, or treatment of illness, injury, or disease.”¹⁰⁹ Although BCPs are used to prevent pregnancy, pregnancy is not an “illness, injury, or disease.” However, because BCPs can be used to treat medical conditions,¹¹⁰ and because BCPs require a doctor’s visit and a prescription, Washington would likely consider BCPs to be a health care service under the statute.¹¹¹ Therefore, a pharmacist likely has the right to conscientiously object to filling a BCP prescription in Washington.¹¹²

Wyoming is the final state with a statute that explicitly allows a pharmacist to conscientiously object to filling a BCP prescription. Wyoming’s conscience statute provides that:

[a]ny person may refuse to accept the duty of offering family planning and birth control services to the extent the duty is contrary to his personal or religious beliefs. The refusal shall not be grounds for:

- (i) Any disciplinary action;
- (ii) Dismissal;
- (iii) Any departmental transfer;
- (iv) Any other discrimination in employment;
- (v) Suspension from employment; or
- (vi) Any loss in pay or other benefits.¹¹³

As the statute applies to “any person” and to “birth control services,”¹¹⁴ Wyoming allows a pharmacist to conscientiously object to filling a BCP prescription.

Therefore, five states have statutorily given pharmacists the explicit right to conscientiously object to filling a BCP prescription.

E. Pending Legislation

In addition to the many existing conscience statutes, several states have pending conscience legislation. This section examines the conscience legislation bills pending in various state legislatures.

109. *Id.* § 48.43.005(17).

110. See PLANNED PARENTHOOD, *supra* note 17.

111. A diligent search did not reveal any cases in which the Washington courts have decided whether the statute applies to BCPs.

112. A diligent search did not reveal any cases in which the Washington courts have decided whether the statute applies to pharmacists.

113. WYO. STAT. ANN. § 42-5-101(d) (2003).

114. *Id.*

1. *Proposed bills that apply to pharmacists but do not apply to contraception*

Two states have bills pending that would give pharmacists the right to conscientiously object. However, these bills do not appear to allow a pharmacist to conscientiously object to filling a BCP prescription.

The Texas Legislature is currently considering House Bill 16.¹¹⁵ House Bill 16 proposes that “[a] . . . pharmacist . . . who objects to directly or indirectly . . . dispensing an emergency contraceptive may not be required to directly or indirectly . . . dispense or participate in the dispensing of the contraceptive.”¹¹⁶ As pharmacists are explicitly named in the bill, pharmacists would have the right to conscientiously object. However, whether the statute applies to dispensing BCPs for their traditional contraceptive purposes is unclear. The introduced bill would only allow conscientious objection to emergency contraception.¹¹⁷ Because the proposed statute limits conscientious objection to emergency contraception,¹¹⁸ a pharmacist does not appear to have the right to conscientiously object to BCP prescriptions used for traditional contraceptive purposes. However, any amendments to the bill could change the scope of the right to conscientiously object for pharmacists in Texas.¹¹⁹

Wisconsin is also considering conscience legislation during the 2005-2006 Legislative Session. Assembly Bill 285 proposes that “[n]o pharmacist may be required to dispense a prescribed drug or device if the pharmacist believes that the drug or device would be used . . . [to c]aus[e] an abortion.”¹²⁰ For purposes of this bill, “‘abortion’ is defined as the use of an instrument, medicine, drug, or other substance or device with the intent to terminate the pregnancy of a woman known to be pregnant or for whom there is reason to believe that she

115. H.B. 16, 79th Leg., 2d Sess. (Tex. 2005).

116. *Id.*

117. *Id.* House Bill 16 defines emergency contraception as “a prescription drug containing an elevated dose of hormones that is used to prevent pregnancy.” *Id.*

118. *See id.*

119. House Bill 16 is pending in the House Committee on State Affairs. *See id.*

120. Assemb. B. 285, 97th Leg., Reg. Sess., § 3(2) (Wis. 2005),

<http://www.legis.state.wi.us/2005/data/AB-285.pdf>. While the Wisconsin State Assembly considers Assembly Bill 285, the Wisconsin State Senate is considering Senate Bill 155, a verbatim copy of Assembly Bill 285. *See id.*; S.B. 155, 97th Leg., Reg. Sess. (Wis. 2005), <http://www.legis.state.wi.us/2005/data/SB-155.pdf>.

may be pregnant.”¹²¹ Because the bill requires a woman to “know[] . . . or . . . [have] reason to believe that she may be pregnant,”¹²² the bill, if passed, likely will not allow pharmacists to conscientiously object to filling BCP prescriptions because BCPs are taken to prevent pregnancy, before a woman knows or has reason to believe that she is pregnant.¹²³

Therefore, two states have pending legislation that applies to pharmacists but does not allow them to conscientiously object to filling BCP prescriptions.

2. Proposed bills that apply to contraception and likely apply to pharmacists, although pharmacists are not specifically named in the statute

Two states, Indiana and Washington, are currently considering bills that would apply to contraception and would likely apply to pharmacists, although pharmacists are not explicitly named in the proposed legislation.

The Indiana General Assembly is currently considering Senate Bill 48.¹²⁴ Senate Bill 48 would amend Indiana’s statute to provide that “[n]o person shall be required, as a condition of training, employment, pay, promotion, or privileges, to . . . [d]ispense . . . artificial birth control.”¹²⁵ As the proposed statute applies to a “person,”¹²⁶ pharmacists would be protected under the statute. Moreover, because the statute explicitly states, “[n]o person shall be required . . . to . . .

121. Wisconsin Legislative Reference Bureau, *History of Assembly Bill 285*, <http://www.legis.state.wi.us/2005/data/AB-285.pdf> (last visited Oct. 20, 2005).

122. *Id.*

123. PLANNED PARENTHOOD, *supra* note 17. Assembly Bill 285 is currently pending in the House Committee on Labor. Wis. Assemb. B. 285. The analogous bill, Senate Bill 155, is currently awaiting scheduling following the recommendation of the Senate Committee on Labor and Election Process Reform to pass the bill. Wis. S.B. 155; *see also* Assemb. B. 207, 97th Leg., Reg. Sess., (Wis. 2005), <http://www.legis.state.wi.us/2005/data/AB-207.pdf> (proposing additional procedures to which certain individuals may conscientiously object, but specifically excluding contraceptives). The Wisconsin Legislature is also considering legislation that would *require* all licensed pharmacists to fill every FDA-approved birth control prescription unless it is “contraindicated for a particular patient.” Assemb. B. 532, 97th Leg., Reg. Sess. § 7 (Wis. 2005), <http://www.legis.state.wi.us/2005/data/AB-532.pdf>; *see also infra* Part III.E.4.

124. S.B. 48, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005), <http://www.in.gov/legislative/bills/2005/IN/IN0048.1.html>.

125. *Id.* § 1. Indiana’s current statute provides that “[n]o person shall be required, as a condition of training, employment, pay, promotion, or privileges, to agree to perform or participate in the performing of abortions.” IND. CODE ANN. § 16-34-1-5 (2005).

126. Ind. S.B. 48 § 1.

dispense . . . artificial birth control,”¹²⁷ an Indiana pharmacist would be able to conscientiously refuse to fill a BCP prescription.¹²⁸

The Washington Legislature is also considering a bill that would likely give pharmacists the right to conscientiously object to filling BCP prescriptions. Washington House Bill 1654 provides that:

[n]o physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer, or participate in any way in any particular form of health care service that is contrary to the conscience of such physician or health care personnel.¹²⁹

“Conscience” is defined as “a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths.”¹³⁰

Although pharmacists are not specifically named in the definition of “[h]ealth care personnel,” the term includes “any . . . professional . . . or any other person who furnishes, or assists in the furnishing of, health care services.”¹³¹ “Health care” includes “any phase of patient care, including . . . family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives.”¹³² As a pharmacist is a professional who dispenses contraceptives, House Bill 1654 would likely allow a pharmacist in Washington to conscientiously object to filling a BCP prescription.¹³³

127. *Id.*

128. Senate Bill 48 is currently pending in the Senate Committee on Health and Provider Services. *See* Ind. S.B. 48.

129. H.B. 1654, 59th Leg., Reg. Sess. § 3 (Wash. 2005), <http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/House%20Bills/1654.htm>. In addition to civil and criminal immunity, the bill would also protect the conscientiously objecting pharmacist from discrimination resulting from the objection. *Id.* § 4.

130. *Id.* § 2(5).

131. *Id.* § 2(3).

132. *Id.* § 2(1).

133. House Bill 1654 is currently pending in the House Committee on Health Care. Wash. H.B. 1654. There is an analogous bill, Senate Bill 5851, pending in the Senate Committee on Health and Long-Term Care. S.B. 5851, 59th Leg., Reg. Sess. (Wash. 2005), <http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/Senate%20Bills/5851.htm>. Additionally, under Washington’s existing statutes, pharmacists can likely already conscientiously object to filling a BCP prescription. *See* WASH. REV. CODE §§ 48.43.065(2)(a), 70.47.160(2)(a) (2005); *supra* Part III.D. However, the proposed bill is much broader than Washington’s existing statutes.

In conclusion, if passed, the bills of both Indiana and Washington will allow a pharmacist to conscientiously object to filling BCP prescriptions.

3. *Proposed bills that apply to contraception and to pharmacists*

Several states are considering legislation that would allow a pharmacist to conscientiously object to filling BCP prescriptions.

First, the Michigan Legislature is currently considering House Bill 4741.¹³⁴ House Bill 4741, which, if passed, would be entitled Conscientious Objector Accommodation Act,¹³⁵ proposes that “[a] health care provider may object as a matter of conscience to providing or participating in a health care service on ethical, moral, or religious grounds.”¹³⁶ Under the bill, pharmacists are “health care provider[s]” because they are “licensed or registered under article 15 of the public health code, [section 333.17711].”¹³⁷ Participating includes the act of dispensing.¹³⁸ Finally, a “[h]ealth care service” includes “the provision . . . of . . . [a] medication [or] drug.”¹³⁹ Therefore, under House Bill 4741, a Michigan pharmacist would be able to conscientiously object to filling a BCP prescription.¹⁴⁰

Similar to Mississippi’s enacted Health Care Rights of Conscience Act,¹⁴¹ the Rhode Island General Assembly is considering the Health

134. H.B. 4741, 93rd Leg., Reg. Sess. (Mich. 2005), <http://www.legislature.mi.gov/mileg.asp?page=getObject&objName=2005-HB-4741>. House Bill 4741 is currently pending before the House Committee on Health Policy. *Id.*

135. *Id.* § 1.

136. *Id.* § 5(1).

137. *Id.* § 3(a); *see also* MICH. COMP. LAWS § 333.17711 (2005).

138. Mich. H.B. 4741 § 3(e).

139. *Id.* § 3(b).

140. Under the proposed bill, a conscientious objection could not result in civil liability, criminal action, or administrative discipline. *Id.* § 11(1)(a)-(c). However, the proposed statute would allow the employer to terminate the employment of the conscientiously objecting employee if the employee objects to an act that composes at least ten percent of the objector’s work on a daily or weekly basis and the employer gives the conscientiously objecting employee a minimum of sixty days notice of the employment termination. *Id.* §§ 9(3), 3(i). Additionally, in order to conscientiously object, the conscientious objector must “notify his or her employer in writing of a conscientious objection.” *Id.* § 5(2). A conscientious objector will not be protected by the act under certain circumstances, including if the objection is first made “contemporaneously to a patient’s requiring or requesting the objectionable health care service and no other health care provider is available to provide the health care service” or if the objection is based on the patient’s gender, familial status, or marital status. *Id.* § 9(1)(c), (d).

141. *See* MISS. CODE ANN. §§ 41-107-1 to 41-107-11 (2005).

Care Rights of Conscience Act.¹⁴² The proposed Health Care Rights of Conscience Act provides that “[a] health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience.”¹⁴³ Conscience is defined as “the religious, moral or ethical principles held by a health care provider.”¹⁴⁴ The proposed Act would provide a qualifying conscientious objector with immunity from liability and protection from discrimination.¹⁴⁵

Rhode Island’s proposed conscience legislation defines a “health care provider” to include a pharmacist.¹⁴⁶ “Health care service” includes “prescribing, dispensing or administering any device, drug, or medication.”¹⁴⁷ Therefore, if Rhode Island’s conscience legislation

142. See H.B. 5085, 2005 Leg., Reg. Sess. (R.I. 2005), <http://www.rilin.state.ri.us/Bill-text/BillText05/HouseText05/H5085.pdf>.

143. *Id.* § 2.

144. *Id.*

145. *Id.* New section 23-17.20-4(b) of the General Laws of Rhode Island would provide that “[n]o health care provider shall be civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience.” R.I. H.B. 5085 § 2. New section 23-17.20-4(c) would provide:

It shall be unlawful . . . to discriminate against any health care provider in any manner based on his or her declining to participate in a health care service that violates his or her conscience. For purposes of this chapter, discrimination includes, but is not limited to, termination, transfer, refusal of staff privileges, refusal of board certification, adverse administrative action, demotion, loss of career specialty, reassignment to a different shift, reduction of wages or benefits, refusal to award any grant, contract, or other program, refusal to provide residency training opportunities, or any other penalty, disciplinary or retaliatory action.

R.I. H.B. 5085 § 2.

146. *Id.*

“Health care provider” means any individual who may be asked to participate in any way in a health care service, including, but not limited to: a physician, physician’s assistant, nurse, nurses’ aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty, student or employee, counselor, social worker, or any professional, paraprofessional, or any other person who furnishes, or assists in the furnishing of health care services.

Id. This is the same definition as used in the Mississippi Health Care Rights of Conscience Act except that the Mississippi definition substituted “health care procedure” for “health care services” at the end of the statute. See MISS. CODE ANN. § 41-107-3(a) (2005).

147. R.I. H.B. 5085 § 2.

“Health care service” means any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.

Id. This is the exact same definition as the Mississippi Health Care Rights of Conscience Act. See MISS. CODE ANN. § 41-107-3(a) (2005).

passes,¹⁴⁸ the Act would allow a Rhode Island pharmacist to conscientiously object to filling a BCP prescription.¹⁴⁹

The Vermont General Assembly also has proposed An Act Relating to Health Care Rights of Conscience.¹⁵⁰ The purpose of the Act “is to protect the fundamental rights of conscience of all individuals who provide health care services.”¹⁵¹ To advance this purpose, the bill proposes that “[a] health care provider has the right not to participate, and no health care provider shall be required to participate, in a health care service that violates his or her conscience.”¹⁵² A “[h]ealth care provider” includes a pharmacist.¹⁵³ “Health care service” includes “prescribing, dispensing, or administering any device, drug, or medication.”¹⁵⁴ “Conscience” means the religious, moral, or ethical principles held by a health care provider¹⁵⁵ Therefore, if Vermont’s bill passes,¹⁵⁶ a pharmacist will be able to conscientiously object to filling a BCP prescription based on the pharmacist’s moral or religious beliefs.¹⁵⁷

148. Rhode Island House Bill 5085 is pending in the House Committee on Health, Education, and Welfare. R.I. H.B. 5085.

149. The Legislative findings and purposes behind Rhode Island’s Health Care Rights of Conscience Act support this conclusion. For example, new section 23-17.20-2(c) of the General Laws of Rhode Island would provide:

It is the purpose of this chapter to protect as a basic civil right, the right of all health care providers . . . to decline to counsel, advise, pay for, provide, perform, assist, or participate in providing or performing health care services that violate their consciences. Such health care services may include, but are not limited to, abortion, *artificial birth control*, artificial insemination, assisted reproduction, human cloning, euthanasia, human embryonic stem cell research, fetal experimentation, physician-assisted suicide, and sterilization.

R.I. H.B. 5085 § 2 (emphasis added).

150. H.B. 183, 68th Gen. Assemb., Biennial Sess. (Vt. 2005), <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2006/bills/intro/H-183.HTM>.

151. *Id.* § 1.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. The bill is currently in the House Committee on Human Services. *Id.*

157. If a pharmacist is not allowed to refuse to fill a prescription, the bill provides that “[a] civil action for damages or injunctive relief or both may be brought.” *Id.* § 1. Additionally,

[u]pon finding a violation under this part, the aggrieved party shall be entitled to recover treble the actual damages, including pain and suffering, . . . and reasonable attorney’s fees. In no case shall recovery be less than \$5,000.00 for each violation in addition to costs and reasonable attorney’s fees.

Id. Injunctive relief may “includ[e] ordering reinstatement of a health care provider to his or her prior job position.” *Id.*

In sum, three states are currently considering legislation that would explicitly expand conscience legislation to apply to a pharmacist who conscientiously objects to filling BCP prescriptions.

4. Proposed bills that would prohibit pharmacists from conscientiously objecting to filling contraceptive prescriptions

Despite the widespread consideration of conscience legislation allowing pharmacists to conscientiously object to filling contraceptive prescriptions, at least two states are considering legislation to *prohibit* pharmacists from refusing to fill a woman's BCP prescription.

The Missouri Legislature is considering the Birth Control Protection Act.¹⁵⁸ If passed, this Act will "[p]rohibit[] governmental actors or entities from interfering in a consenting individual's right to the benefits, facilities, services, or information concerning safe methods of contraception."¹⁵⁹ The State of Missouri will not be able to "unreasonably hinder[] the public's access to contraceptives."¹⁶⁰ The premise behind the Act is that "consenting individuals have a protected interest from unreasonable governmental intrusions into their private lives in regards to obtaining and using safe and effective methods of contraception."¹⁶¹ Therefore, if passed, the Act will prohibit government actors (for example, pharmacists who work for the state, county, or town), but not the everyday pharmacist at the corner drugstore, from refusing to fill BCP prescriptions.

A bill that goes further is Wisconsin's Assembly Bill 532.¹⁶² If passed, this bill would require all pharmacists "to administer, distribute, and dispense all federal-food-and-drug-administration-approved contraceptives, unless contraindicated for a particular patient."¹⁶³ Additionally, the bill would amend Wisconsin's definition of abortion to specifically exclude "the use, administration, delivery, prescribing, or

158. H.B. 621, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), <http://www.house.state.mo.us/bills051/bills/hb621.htm>. See also S.B. 40, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), <http://www.senate.mo.gov/05info/billtext/intro/SB40.htm> (similar to H.B. 621 and currently pending in the Senate Committee on Financial and Governmental Organizations and Elections); H.B. 6, 93rd Gen. Assemb., 1st Reg. Sess. (Mo. 2005), <http://www.house.state.mo.us/bills053/bills/HB6.HTM> (including the proposed Birth Control Protection Act among other provisions and currently pending in the House Committee on Children and Families).

159. Mo. H.B. 6.

160. *Id.*

161. *Id.*

162. Assemb. B. 532, 97th Leg., Reg. Sess. (Wis. 2005), <http://www.legis.state.wi.us/2005/data/AB-532.pdf>. Assembly Bill 532 is currently pending in the House Committee on Health. *Id.*

163. *Id.* § 7.

dispensing of any federal-food-and-drug-administration-approved contraceptive.”¹⁶⁴ As a result, pharmacists would have a duty to fill BCP prescriptions and would be subject to disciplinary action if they failed to do so.¹⁶⁵

IV. THE REACTION OF THE AMERICAN PHARMACISTS ASSOCIATION

In addition to many of the states, the American Pharmacists Association (APhA) has responded to the growing conflict between a woman’s right to birth control and a pharmacist’s right to conscientiously object. In 1998, the APhA House of Delegates adopted an official policy regarding a pharmacist’s right to conscientiously object.¹⁶⁶ The policy states that the “APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.”¹⁶⁷ In other words, the APhA officially recognized the pharmacist’s right to conscientiously object. However, the APhA refused to encourage the “adoption of state laws and regulations authorizing a pharmacist’s conscience clause.”¹⁶⁸

Moreover, despite the APhA’s recognition of the pharmacist’s right to conscientiously object, the APhA requires an objecting pharmacist to inform the pharmacist’s employer of the pharmacist’s objection.¹⁶⁹ Additionally, if one pharmacist objects to filling a particular prescription, a second non-objecting pharmacist must fill the prescription.¹⁷⁰ Therefore, although the APhA recognizes the pharmacist’s right to conscientiously object, an objecting pharmacist still has a “responsibility to the patient.”¹⁷¹

The APhA’s attempt to resolve the conflict between a woman’s right to birth control and the pharmacist’s right to conscientiously ob-

164. *Id.* §§ 1-6, 8.

165. *Id.*, at Analysis by the Legis. Reference Bureau.

166. AMERICAN PHARMACISTS ASSOCIATION, 1998 REPORT OF THE HOUSE OF DELEGATES (1998), <http://www.aphanet.org/lead/hod.html> [hereinafter HOUSE OF DELEGATES].

167. *Id.* Prior to the adoption of this policy, the APhA’s policy allowed “pharmacist[s] to refuse to participate in certain activities which conflict[ed] with their *professional* judgment, but there [was] no policy that address[ed] decisions based on personal, moral opinions.” AMERICAN PHARMACISTS ASSOCIATION, 1997-98 POLICY COMMITTEE REPORT: PHARMACIST CONSCIENCE CLAUSE (1998), <http://www.aphanet.org/lead/committee2.html> [hereinafter APhA COMMITTEE REPORT].

168. HOUSE OF DELEGATES, *supra* note 166.

169. APhA COMMITTEE REPORT, *supra* note 167.

170. *Id.*

171. *Id.*

ject has not been strong enough, nor does it appear to be consistent. In hopes of not offending either the APhA's member pharmacists or the patients whom those pharmacists serve, the APhA has taken a middle-of-the-road position by officially recognizing a pharmacist's right to conscientiously object, yet refusing to support state statutes protecting that right.¹⁷² If the APhA truly supports the pharmacist's right to conscientiously object, why would the APhA not encourage the adoption of legislation protecting that right?

The APhA's middle-of-the-road position is further evidenced by its policy that a conscientiously objecting pharmacist has the "professional dut[y]" to refer the patient to another pharmacist or pharmacy willing to fill the prescription.¹⁷³ Because the conscientiously objecting pharmacist is required to refer the patient to either another pharmacy or pharmacist willing to fill the prescription,¹⁷⁴ the objecting pharmacist is still required to participate in filling the prescription, albeit indirectly. Consequently, why not just require the objecting pharmacist herself to fill the prescription?

V. PHARMACISTS SHOULD NOT HAVE THE RIGHT TO CONSCIENTIOUSLY OBJECT TO FILLING CONTRACEPTIVE PRESCRIPTIONS

Although the recent trend among states is to institute or expand existing conscience legislation, a pharmacist should not be able to conscientiously object to filling a woman's BCP prescription.¹⁷⁵ Legislation, such as Wisconsin's Assembly Bill 532,¹⁷⁶ needs to be enacted to protect a woman's access to BCP prescriptions.

First, a pharmacist should not be able to conscientiously object to filling a BCP prescription because the pharmacist selected his or her profession knowing that such prescriptions are commonplace. Eighty percent of American women born after 1945 have used BCPs.¹⁷⁷ In order to obtain BCPs, all of these women had to take a BCP prescription to a pharmacist to have the prescription filled. With such a high prevalence of BCP prescriptions, a pharmacist with an existing or po-

172. HOUSE OF DELEGATES, *supra* note 166.

173. APhA COMMITTEE REPORT, *supra* note 167.

174. *Id.*

175. *But cf.* Herbe, *supra* note 7 (arguing in favor of the rights of conscience of pharmacists); Wardle, *supra* note 4 (calling for and proposing a model conscience clause to protect all persons).

176. Assemb. B. 532, 97th Leg., Reg. Sess. (Wis. 2005), <http://www.legis.state.wi.us/2005/data/AB532hst.html>.

177. *Oral Contraceptives Worldwide*, *supra* note 11.

tential objection to BCPs should have anticipated how frequently BCPs would be encountered in a pharmacy practice. A pharmacist should consider the potential conflict before committing to a profession in which his or her personal beliefs impose restraints on the patient's access to medications.¹⁷⁸

Second, when the individual chose to become a member of the pharmacy profession, the pharmacist "forfeit[ed] certain rights and accept[ed] certain responsibilities."¹⁷⁹ The pharmacist relinquished his or her right to refuse to fill a patient's prescription because of the pharmacist's moral or religious objections.¹⁸⁰ Additionally, the pharmacist accepted a responsibility to provide for the patient without imposing the pharmacist's own beliefs on the patient.¹⁸¹ Pharmacists are health care providers who should not pass judgments their patients. As such, pharmacists should not be able to conscientiously object to filling BCP prescriptions based on their religious or moral beliefs.¹⁸²

Third, a pharmacist should not be able to conscientiously object to filling a BCP prescription because BCPs are used for medical pur-

178. The Michigan Legislature identified this problem by including a clause in their proposed conscience legislation bill that would allow an employer to terminate the employment of the conscientiously objecting employee if the employee objects to a practice that composes at least ten percent of the objector's work on a daily or weekly basis and the employer gives the conscientiously objecting employee a minimum of six months notice of employment termination. See S.B. 972, 92nd Leg., Reg. Sess. § 11(2) (Mich. 2004).

179. Bruce D. Weinstein, *Do Pharmacists Have a Right to Refuse to Fill Prescriptions for Abortifacient Drugs?*, 20 LAW, MED. & HEALTH CARE 220, 222 (1992).

180. This is not to say that the pharmacist does not have a right to refuse to fill a prescription for other reasons, such as the pharmacist's professional judgment about dangerous drug interactions.

181. *But see* Edmund D. Pellegrino, *Patient and Physician Autonomy: Conflicting Rights and Obligations in the Physician-Patient Relationship*, 10 J. CONTEMP. HEALTH L. & POL'Y 47, 58 (1994) ("[The physician] cannot impose his values on the patient, just as the patient cannot impose hers on the physician.")

182. In response to the conflict between a patient's right to have her prescription for BCPs filled and the pharmacist's right to refuse to fill prescriptions to which the pharmacist morally or religiously objects, companies such as Walgreens have instituted policies that allow pharmacist employees to refuse "to fill prescriptions to which they object." James F. Sweeney, *May a Pharmacist Refuse to Fill a Prescription?*, PLAIN DEALER, May 5, 2004, at E1. Another pharmacy chain, CVS, requires that "customers promptly receive all medications for which they have a lawfully written prescription." Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11 (internal quotations omitted) (quoting store policy). Still other corporations do not stock certain prescriptions. For example, Wal-Mart pharmacies do not carry (and therefore do not fill prescriptions for) emergency contraception. *Id.*

poses other than pregnancy prevention.¹⁸³ If a pharmacist refuses to fill a woman's BCP prescription because of the pharmacist's conflicting moral or religious beliefs, the pharmacist may be denying the woman treatment for a medical condition.

Finally, if states continue to pass legislation allowing pharmacists to conscientiously object, where will the right to object end? Pharmacists are already conscientiously objecting to prescriptions for assisted suicide,¹⁸⁴ RU-486,¹⁸⁵ and emergency contraception.¹⁸⁶ If we extend conscientious objection rights to cover BCPs, will pharmacists soon be refusing to fill prescriptions for sexual enhancement drugs, antidepressants, or even traditional antibiotics? Will such objections lead to rural citizens being unable to obtain medications for which they have a prescription solely because the only pharmacist in town refuses to fill the prescription based on personal beliefs?¹⁸⁷

VI. CONCLUSION

An increasing number of states are enacting or broadening their conscience legislation to include individuals such as pharmacists and actions such as refusing to fill BCP prescriptions. As this trend continues, increasing numbers of women will likely face conflicts with pharmacists who refuse to fill BCP prescriptions. Such pharmacists should not be permitted to conscientiously object to filling a BCP prescription. Therefore, the current expansion of conscience legislation needs to end, and existing statutes allowing a pharmacist to conscien-

183. For example, BCPs are prescribed for pelvic inflammatory disease, ovarian cysts, benign breast tumors, and anemia, among other conditions. PLANNED PARENTHOOD, *supra* note 17.

184. See generally William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & L. 1 (1996) (arguing in favor of a pharmacist's right to conscientiously refuse to fill a prescription intended for assisted suicide).

185. See generally Bryan A. Dykes, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565 (2002) (examining conscience legislation as it relates to pharmacists and RU-486).

186. See generally *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 412 (1989) (holding that "the [woman's] right to control her treatment must prevail over [the institution's] moral and religious convictions"); Heather Rae Skeeles, Comment, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007 (2003) (arguing that individuals, but not institutions such as religious hospitals, should have a right to conscientious objection regarding the morning-after pill).

187. See Weinstein, *supra* note 179, at 222 (suggesting that in a rural area with only one pharmacist, the patient's right to the prescription may trump the pharmacist's right to conscientious objection).

tiously object to filling BCP prescriptions need to be repealed.¹⁸⁸ More states must consider and pass legislation, such as Wisconsin's Assembly Bill 532, imposing a duty on pharmacists to fill all FDA-approved contraceptive prescriptions.¹⁸⁹ Until such actions are taken, some pharmacists will continue to impose their personal beliefs on their patients, thereby denying the patient access to the medication they rightfully deserve.

*Karissa Eide**

188. *But cf.* Dykes, *supra* note 185 (calling for states to enact expansive conscience legislation for pharmacists and other health care providers).

189. Assemb. B. 532, 97th Leg., Reg. Sess. (Wis. 2005), <http://www.legis.state.wi.us/2005/data/AB532hst.html>.

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