

Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience

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Recommended Citation

Erica S. Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. Health Care L. & Pol'y 402 (2006).

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TIME FOR PLAN B: INCREASING ACCESS TO EMERGENCY CONTRACEPTION AND MINIMIZING CONFLICTS OF CONSCIENCE[†]

ERICA S. MELLICK*

INTRODUCTION

A woman waits patiently at the pharmacy to pick up her prescription. When she reaches the counter, rather than receiving the medication, she is informed that the pharmacist personally objects to dispensing emergency contraception. Shocked, embarrassed, and scared, she leaves, saying nothing. Back outside, she frantically tries to think of other pharmacies that are open, accessible via public transportation, accept her health insurance, and have the medication in stock. Wondering if the pharmacist on duty will be willing to fill her physician's valid and potentially medically necessary prescription and what she will do if refused again, her fear turns to frustration. This woman could be married, a mother, a college student, a teenager, or a rape victim. This woman could be you.

Various obstacles are limiting access to emergency contraception, something that should be accessible equally to all women. Inaction on the part of the United States Food and Drug Administration (FDA) and protection for pharmacists refusing to fill valid prescriptions for emergency contraception have resulted in varying levels of access to emergency contraceptives for women across the country. For example, while access to contraceptives is limited in some states with strong pharmacist conscience clauses,¹ such access is enhanced in other states that allow pharmacists with proper training to dispense emergency contraceptives without physician prescriptions.²

[†] On August 24, 2006, after this Comment was written, the FDA announced approval for over-the-counter (OTC) access for Plan B for women eighteen and older. Even though Plan B is classified as OTC, it will be stocked behind the counter at pharmacies and will not be dispensed without proof of age. Prescriptions are still required for women seventeen and under. The FDA's approval of dual-status for Plan B does not affect the main arguments made in this article regarding access to emergency contraception or conscience clauses.

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1. See discussion *infra* Part II.C.2.a.iv.

2. See discussion *infra* Part III.B.3.a. Some states even allow physicians to dispense medications themselves, thus avoiding pharmacists' refusals but not physicians' conscience clauses. See *infra* Part III.B.1.

This Comment addresses the need for emergency contraception, the obstacles to such access, and the possibilities for increasing access for American women. Part I provides background information about the necessity of having access to emergency contraception in the United States. Part II discusses obstacles to accessing emergency contraception in the United States, including the FDA's handling of Plan B and objecting health care providers who refuse to fill valid prescriptions for emergency contraceptives. This part also discusses the legal and professional ramifications for pharmacists who refuse to fill valid prescriptions for emergency contraceptives. Part III considers possible means to maximize access to emergency contraception uniformly across the United States while minimizing conflicts of conscience between patients and providers. This part also argues that FDA approval of over-the-counter (OTC) status for Plan B would be the most effective means to achieve these goals by establishing a political and social compromise that gives American women the same access to emergency contraception that other women around the world enjoy.³ Part IV concludes with some closing remarks about the need for clearer policies nationwide for pharmacist refusal clauses and clearer repercussions for pharmacists' failure to fulfill ethical and professional duties, even if OTC status is eventually granted for Plan B.

I. ACCESS TO EMERGENCY CONTRACEPTION IS NECESSARY

Emergency contraception has the potential to decrease unwanted pregnancies, diminish their societal effects, and lower the abortion rate. A majority of American women use contraceptives during their reproductive years. No method of contraception is fail-proof; there will always be a need for emergency contraception.

A. Consequences of Not Having Access to Emergency Contraception

Many societal problems can be traced back to unwanted pregnancy⁴: teenage pregnancy, single parenthood, incomplete education of women, welfare dependency, poverty, lack of prenatal care, substance abuse in early pregnancy, low birth weight, infant mortality, and child abuse.⁵ Without access to safe and legal abortions, dangerous abortions can turn an unwanted pregnancy deadly.⁶

3. See discussion *infra* Part III.A.

4. Philip Stubblefield, Editorial, *Self-Administered Emergency Contraception – A Second Chance*, 339 NEW ENG. J. MED. 41, 41 (1998).

5. *Id.* (citing THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES (Sara S. Brown & Leon Eisenberg eds., 1995) (Washington D.C. National Academy Press 1995)).

6. Phillip G. Stubblefield and David A. Grimes, *Septic abortion*, 331 NEW ENG. J. MED. 310, 310-11 (1994).

Emergency contraception has the potential to prevent unwanted pregnancies before abortion is the only remaining option for termination. Use of emergency contraception could potentially lower the abortion rate and reduce social problems resulting from unwanted pregnancies.⁷

B. Why Access to Emergency Contraception is Necessary

Ninety-eight percent of American women fifteen to forty-four years of age use contraception, and 82% use prescription methods such as the birth control pill.⁸ Contraception failures are inevitable and ensure there will always be a need for emergency contraception. Emergency contraception is only effective within seventy-two hours after a contraception failure.⁹ Due to this short period of effectiveness, timely access to emergency contraception is crucial for American women and the general public health.

1. The Right to Contraceptives

In its 1965 decision in *Griswold v. Connecticut*, the United States Supreme Court struck down state laws limiting the right to contraception as unconstitutional infringement on the right to marital privacy.¹⁰ The Court later extended this “right of access to contraception” to unmarried people in *Eisenstadt v. Baird*.¹¹ The Court clarified in *Carey v. Population Services International* that the “right of access to contraceptives” is not an independent fundamental right, but that access to contraception is necessary for exercising the fundamental constitutional right of making childbearing decisions.¹² Without a right to access, the right to contraception cannot be exercised.¹³ Additionally, several employer insurance

7. Jane E. Boggess, *How can Pharmacies Improve Access to Emergency Contraception?*, 34 PERSP. SEXUAL & REPROD. HEALTH 162, 162 (2002); see also Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 PERSP. SEXUAL & REPROD. HEALTH 294, 300 (2002).

8. WILLIAM D. MOSHER ET AL., U.S. DEPT. HEALTH & HUM. SERVS., CENTERS FOR DISEASE CONTROL & PREVENTION, NAT'L CENTER HEALTH STAT., USE OF CONTRACEPTION AND USE OF FAMILY PLANNING SERVICES IN THE UNITED STATES: 1982-2002, at 15 (2004), available at <http://www.cdc.gov/nchs/data/ad/ad350.pdf>.

9. KAISER DAILY WOMEN'S HEALTH POLICY REPORT, Mar. 30, 2006, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=36324.

10. 381 U.S. 479 (1965).

11. 405 U.S. 438 (1972).

12. 431 U.S. 678, 688-89 (1977); see also Cristina Arana Lumpkin, Comment, *Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?*, 60 U. MIAMI L. REV. 105, 109-10 (2005).

13. *Id.* at 114.

cases requiring payment for oral contraceptives suggest some right to oral contraceptives.¹⁴

2. Contraceptive Usage Rate in the United States

The average American woman wants two children.¹⁵ Accordingly, she must use contraceptives for approximately thirty years.¹⁶ During their reproductive years, 98% of American women use contraception.¹⁷ Prescription methods of birth control are used by about 40% of women using contraception.¹⁸ Oral contraceptive pills constitute roughly 30% of prescription birth control methods.¹⁹ Fifteen percent of contraceptive users use dual methods of contraception, most frequently condoms combined with another method.²⁰ A broken condom is the most common contraceptive failure necessitating the use of emergency contraception.²¹ Emergency contraception pills, such as Plan B, can be used as emergency contraception to prevent an annual estimate of 1.7 million unintended pregnancies and 800,000 abortions.²² There will always be a need for emergency contraception because no method of contraception is 100% effective.²³

II. OBSTACLES TO EMERGENCY CONTRACEPTIVE ACCESS

Emergency contraception should be accessible to all women equally. Obstacles such as inaction on the part of the FDA and protections for health care providers, pharmacies, and hospitals that conscientiously object to filling valid prescriptions for emergency contraception prevent American women from having uniform access to emergency contraception. The legal protections and disciplinary action for refusing pharmacists also vary from pharmacy to pharmacy and state to

14. *Id.*; see *Rocky Mt. Hosp. & Medical Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153 (N.J. Super. Ct. 1982); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141 (5th Cir. 1982).

15. GUTTMACHER INST., GET "IN THE KNOW": 20 QUESTIONS ABOUT PREGNANCY, CONTRACEPTION AND ABORTION, <http://www.guttmacher.org/in-the-know/index.html> (last visited Sept. 21, 2006).

16. *Id.*

17. See MOSHER, *supra* note 8.

18. GUTTMACHER INST., *supra* note 15.

19. *Id.*

20. *Id.*

21. David A. Grimes, *Switching Emergency Contraception to Over-the-Counter Status*, 347 NEW ENG. J. MED. 846, 848 (2002) (citing S. Rowlands, *A Two-Year Audit of Emergency Contraception in a General Practice*, 17 BRIT. J. FAM. PLAN. 23 (1991)).

22. Anna Glasier & David Baird, *The Effects of Self-Administering Emergency Contraception*, 339 NEW ENG. J. MED. 1, 1 (1998).

23. S. Marie Harvey et. al., *Women's Experience and Satisfaction with Emergency Contraception*, 31 FAM. PLAN. PERSP. 240, 240 (1999).

state. Consequently, a woman's access to emergency contraception depends on the health care provider she encounters and the applicable state law.

A. The History Behind Plan B and the FDA

The FDA regulates all drugs sold in interstate commerce and has the authority to determine OTC status for drugs sold in the United States.²⁴ Plan B received FDA approval as an emergency contraceptive available by prescription in 1999.²⁵ The manufacturer applied to switch Plan B to OTC status in 2003.²⁶ Despite its own advisory committee's recommendation, the FDA did not approve the application but instead gave conditions that must be met before it will be approved.²⁷ While the FDA has yet to make a final decision on OTC status, controversy has surrounded the issue, including claims that the FDA was influenced by political pressure and resignation of powerful agency officials.²⁸

1. Plan B and Emergency Contraceptives

a. Emergency Contraception: The Morning-After Pill

Emergency contraception refers to drugs used soon after intercourse to prevent the development of pregnancy.²⁹ Like regular birth control pills, emergency contraception works before fertilization by delaying ovulation,

24. The Pure Food and Drug Act of 1906, ch. 3915, §§ 1-13, Pub. L. No. 59-384, 34 Stat. 768, repealed by The Food, Drug and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301-399 (2000)). The FDA's authority was established by the Pure Food and Drug Act of 1906, which established purity standards and labeling requirements for drugs. *Id.* Minimal requirements and lax enforcement resulted in tragedy in 1938, when one-hundred children ingested an untested, lethal concoction of Elixir Sulfanilamide. Mark A. Hernandez, *RU-486: Safe? Effective? Banned! Why would the Food and Drug Administration Ban a Drug with Such Potential?*, 11 DICK. J. INT'L. L. 653, 657-58 (1993). Congress eventually repealed the Food and Drug Act, replacing it with the Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301-92 (2000). This act gave the FDA the authority to "regulate all drugs and vaccines sold in interstate commerce." Hernandez, *supra* note 29, at 658. The act also established requirements for drug approval. 21 U.S.C. §§ 301-92 (2000). The FDA, through the Secretary of Health and Human Services, has the statutory authority to make drugs available over the counter if a prescription is unnecessary. 21 U.S.C. § 353 (b)(3) (2000).

25. U.S. FOOD AND DRUG ADMINISTRATION: DRUG APPROVALS FOR JULY 1999, available at <http://www.fda.gov/cder/da/da0799.htm> (last visited Sept. 21, 2006); see also U.S. FOOD AND DRUG ADMINISTRATION: FDA'S DECISION REGARDING PLAN B: QUESTIONS AND ANSWERS, available at <http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm> (last visited Sept. 21, 2006).

26. *Id.*

27. *Id.*

28. See *infra* Part II.B.2.

29. AM. PHARM. ASS'N, EMERGENCY CONTRACEPTION: THE PHARMACIST'S ROLE 1 (2000), available at http://www.pharmacist.com/pdf/emerg_contra.pdf.

preventing fertilization by inhibiting the movement of the sperm or the egg,³⁰ or preventing a fertilized egg from implanting.³¹ An established pregnancy cannot be disrupted by emergency hormonal contraception.³² While there is disagreement regarding what signifies the beginning of pregnancy, medical organizations³³ and the federal government³⁴ agree that pregnancy commences upon implantation.³⁵

Emergency contraception is most effective within seventy-two hours after unprotected intercourse.³⁶ After implantation occurs approximately six to seven days after intercourse, emergency contraception is ineffective in preventing pregnancy.³⁷ Timely access to emergency contraceptives is essential for women to obtain the benefits of emergency contraception.

b. Off-Label Use of Birth Control Pills

For the past twenty years, oral contraceptive pills have been available and used as emergency contraception by American women.³⁸ Before, non-emergency birth control pills were used off-label as emergency contraception in emergency rooms, health clinics and university health centers.³⁹ To use the pills off-label as emergency contraception, physicians instructed patients to take larger dosages of their regular birth control pills.⁴⁰ For example, some patients seeking emergency contraception have been told to take four instead of one of their regular birth control pills and then another dose twelve hours later.⁴¹ The *New York Times* published an article in 1997 listing available brands of birth control pills and the dosages that could be taken for use as emergency contraception, which suggests that some women may have been self-medicating.⁴² Clinics also repackaged oral contraceptive pills to be used as emergency contraception.⁴³ Planned Parenthood and student health centers would remove the pills from their regular packaging,

30. *Id.* at 3; see also Jane E. Brody, *Pregnancy Prevention, the Morning After*, N.Y. TIMES, Apr. 10, 2001, at F8.

31. AM. PHARM. ASS'N, *supra* note 29, at 3; Boggess, *supra* note 7, at 162.

32. Grimes, *supra* note 21, at 847.

33. RACHEL BENSON GOLD, GUTTMACHER INSTITUTE, *THE IMPLICATIONS OF DEFINING WHEN A WOMAN IS PREGNANT* 7-8 (2005).

34. Protection of Human Subjects, 45 C.F.R. § 46.202(f) (2005).

35. Grimes, *supra* note 21, at 847.

36. AM. PHARM. ASS'N, *supra* note 29, at 7.

37. Boggess, *supra* note 7, at 162.

38. AM. PHARM. ASS'N, *supra* note 29, at 1.

39. *Id.* at 1.

40. Renee C. Wyser-Pratte, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception*, 79 OR. L. REV. 1121, 1135-36 (2000).

41. *Id.*

42. Jane E. Brody, *Personal Health*, N.Y. TIMES, Sept. 23, 1997, at F9 (listing available brands of birth control pills and the dosages that could be taken for use as emergency contraception).

43. Wyser-Pratte, *supra* note 40, at 1135.

divide the pills, and repackage them by hand to provide emergency contraception to students.⁴⁴ While doctors can prescribe drugs for off-label use, some states still prohibit this repackaging of pills.⁴⁵

B. *The FDA Considers Plan B*

Plan B, an emergency contraceptive, was approved by the FDA for prescription use in 1999.⁴⁶ Plan B consists of two tablets containing the hormone levonorgestrel, a synthetic progestin.⁴⁷ This distinguishes Plan B from other forms of emergency contraception available in the United States, which contain a combination of estrogen and progestin.⁴⁸ Preven is a combination pill that is no longer being manufactured.⁴⁹ One tablet is to be taken as soon as possible after intercourse, but within seventy-two hours, and the second tablet is taken twelve hours later.⁵⁰ Plan B reduces the expected number of pregnancies by 89%.⁵¹ When Plan B is taken within twenty-four hours the rate of pregnancy is 0.4%, but when it is taken within forty-eight to seventy-two hours the rate increases to 2.7%.⁵²

1. *Application of Plan B for OTC Status*

In April 2003, four years after Plan B was approved for prescription use, its manufacturer Barr Pharmaceuticals submitted an application to switch Plan B to OTC status.⁵³ In December 2003, the FDA's Nonprescription Drugs Advisory Committee and Advisory Committee for Reproductive Health Drugs met to discuss Barr's application⁵⁴ and recommended approval.⁵⁵ The members of the joint advisory committee were experts in obstetrics-gynecology and in over-the-counter

44. *Id.*

45. Center for Reproductive Rights, Briefing Paper, *Emergency Contraception, Common Legal Questions About Prescribing, Dispensing, Repackaging and Advertising* 1, 5 (2002), available at http://www.reproductiverights.org/pdf/pub_bp_ec_commonlegal.pdf.

46. See *supra* note 25 and accompanying text.

47. DURAMED PHARMACEUTICALS, INC., PRESCRIBING INFORMATION 1 (2004), available at <http://www.go2planb.com/PDF/PlanBP1.pdf>.

48. Ass'n of Reprod. Health Professionals, What You Need to Know: The Facts About Emergency Contraception 2 (2005) available at <http://www.arhp.org/files/ecfactsheet.pdf>.

49. *Id.*

50. *Id.*

51. *Id.*

52. Robert Steinbrook, *Waiting for Plan B – The FDA and Nonprescription Use of Emergency Contraception*, 350 NEW ENG. J. MED. 2327, 2327 (2004).

53. Marc Kaufman, *Plan B Battles Embroil States*, WASH. POST, Feb. 27, 2006, at A1. A subsidiary of Barr Pharmaceuticals, Duramed, currently manufactures Plan B.

54. Steinbrook, *supra* note 52, at 2327.

55. *Id.*; Letter from Steven Galson to Barr Research, Inc., Acting Dir., Ctr. for Drug Evaluation and Research, to Joseph A. Corrado, Senior Dir., Barr Research, Inc. (May 6, 2004), available at http://www.fda.gov/cder/drug/infopage/planB/planB_NALetter.pdf.

drug availability, and they voted twenty-three to four in favor of granting OTC status to Plan B.⁵⁶ Despite this recommendation, the FDA rejected the application in May 2004.⁵⁷ The acting director of the Center for Drug Evaluation and Research, Dr. Steven Galson, signed the “Not Approvable” letter,⁵⁸ citing concerns about adolescent use and the effects of OTC status on the sexual behavior of teenage girls.⁵⁹

In the letter, the FDA provided Barr Pharmaceuticals with two options: 1) to provide additional data on adolescent use or 2) to outline and support marketing plans for dual status, whereby nonprescription access to Plan B would be available to women sixteen and older and prescription access to Plan B would be available to women younger than sixteen.⁶⁰ Barr opted for the second option and submitted a supplemental new drug application for dual status.⁶¹ This application was also rejected.⁶² Although dual status has never been allowed by the FDA and may not be permissible,⁶³ it is “unusual for the agency to suggest a means of approval to an application only to decide later that its own suggestion might not be appropriate.”⁶⁴

2. Political Pressure and Resignations at the FDA

Forty-nine Republican members of the House of Representatives sent a letter to President Bush in January 2004 urging the President to order the FDA to reject Barr’s application to switch Plan B’s status from prescription-only to OTC.⁶⁵ The letter stated that the FDA advisory panels only considered the safety and effectiveness of Plan B in preventing pregnancy and did not consider the “significant impact” that greater access will have on the “sexual health of adolescents and young people.”⁶⁶ It also stated that granting nonprescription status to Plan B could result in more risky adolescent sexual behavior and asserted that

56. Alastair J.J. Wood et al., *A Sad Day for Science at the FDA*, 353 NEW ENG. J. MED. 1197, 1197 (2005).

57. See Letter from Steven Galson to Joseph A. Corrado, *supra* note 55.

58. Steinbrook, *supra* note 52, at 2327.

59. See Letter from Steven Galson to Joseph A. Corrado, *supra* note 55; see also Wood, *supra* note 56, at 1198.

60. See Letter from Steven Galson to Joseph A. Corrado, *supra* note 55.

61. See Letter from Lester M. Crawford, Comm’r of Food and Drugs, to Joseph A. Corrado, Senior Dir., Duramed Research, Inc. (Aug. 26, 2005), available at http://www.fda.gov/cder/drug/infopage/planB/Plan_B_letter20050826.pdf.

62. *Id.*

63. Wood, *supra* note 56, at 1198.

64. Gardiner Harris, *Report Details F.D.A. Rejection of Next-Day Pill*, N.Y. TIMES, Nov. 15, 2005, at A1.

65. KAISERNETWORK.ORG, THE HENRY J. KAISER FAMILY FOUND., FDA OFFICIAL REJECTED OTC STATUS FOR EC PLAN B AGAINST ADVICE OF OWN STAFF, SAYS DECISION NOT BASED ON POLITICS (hereinafter FDA OFFICIAL REJECTED OTC STATUS) (May 10, 2004), at http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=23607.

66. *Id.*

easier access to emergency contraception “may ultimately result in significant increases in cancer, infertility and HIV/AIDS.”⁶⁷ Although Galson’s concerns over making Plan B available over the counter “echoed” concerns raised in the letter from the congressmen, Galson said that he made his decision not to approve OTC status for Plan B independently and was unaware of Bush administration meetings held to discuss the issue.⁶⁸ A spokesperson for the Bush administration confirmed that the FDA made the decision to reject Barr’s application independently.⁶⁹

The FDA’s decision to reject Barr’s application compelled some FDA officials to resign in protest. On August 31, 2005, Dr. Susan F. Wood resigned from her position as Assistant Commissioner for Women’s Health and Director of the Office of Women’s Health at the FDA.⁷⁰ Wood disagreed with the 2004 decision because dual status had never been required for OTC medications sold to adolescents.⁷¹ But what really troubled Wood was the decision on August 26, 2005, to seek public comment and begin a new rule-making procedure to allow dual status, an unusual process that could take years.⁷² According to Wood, the FDA’s “decision, which left women of all ages without appropriate and timely access to emergency contraception, was a clear rejection of recommendations that had been based on extensive review and evaluation of the pertinent data.”⁷³ Wood did not want to remain at the FDA and sanction such behavior that compromises women’s health.⁷⁴

3. *Consequences of the FDA’s Refusal to Approve OTC Status for Plan B:
Non-Uniformity of Emergency Contraceptive Access Across the United States*

FDA inaction in the case of Plan B has created a regulatory void at the federal level that has caused states to determine their own policies on emergency contraception and created varying levels of access across the nation. For example, not all states adhere to the federal definition of the beginning of pregnancy and therefore disagree as to what constitutes pregnancy prevention. The Alan Guttmacher Institute reviewed state laws in April 2005 and found that twenty-two states have enacted one or more laws defining “pregnancy.”⁷⁵ These states have defined pregnancy as beginning either with fertilization, conception, or

67. *Id.*

68. *Id.*; Vicki Kemper, *FDA Drug Chief Says He Made ‘Morning After’ Pill Decision*, L.A. TIMES, May 8, 2004, at A17.

69. FDA OFFICIAL REJECTED OTC STATUS, *supra* note 65.

70. Susan F. Wood, *Women’s Health and the FDA*, 353 NEW. ENG. J. MED. 1650, 1650 (2005).

71. *Id.* at 1651.

72. *Id.*

73. *Id.*

74. *Id.*

implantation. State definitions can be explicit or implicit in state legal codes and sometimes include different definitions within the same section of law.⁷⁶ Alabama's abortion code has several definitions, some referring to conception and others to fertilization.⁷⁷ Some statutes use these terms interchangeably, such as Louisiana's abortion code and statutes concerning assault on pregnant women.⁷⁸ While some inconsistencies might be due to lack of knowledge on the part of state lawmakers as to how various methods of contraception work, others might be deliberate attempts to regulate hormonal contraception.⁷⁹

C. Health Care Providers Who Refuse to Fill Valid Prescriptions for Emergency Contraceptives

State conscience clauses protect health care providers who morally object to performing certain services. Recent statutes that have not yet been interpreted by the courts create confusion and wide discrepancies in access. These discrepancies among states can be avoided if the underlying issues are resolved at the federal level.

1. Instances of Providers Refusing to Fill Valid Prescriptions for Emergency Contraceptives

a. Pharmacist Refusals

Examples of pharmacists who have refused to fill prescriptions for oral contraceptive pills include a pharmacist in Georgia who refused to fill a prescription for birth control pills because she did not believe in contraception.⁸⁰ A CVS pharmacist in North Richland Hills, Texas, refused to fill a prescription for birth control pills, telling the customer Julee Lacey and her husband that she did not "personally believe in birth control," that birth control was not morally correct, and that "[birth control] pills cause cancer."⁸¹ In New Hampshire, a Brooks

75. GOLD, *supra* note 33, at 7. States defining pregnancy include Alabama, Arizona, California, Colorado, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming. *Id.* at 8.

76. *Id.* at 7-8.

77. ALA. CODE §§ 26-21-2, 26-22-2, 26-23-2, 26-23A-3 (LexisNexis 2005).

78. See LA. REV. STAT. ANN. § 40:1299.35.1 (2001).

79. GOLD, *supra* note 33, at 8. An example of such a deliberate attempt would be to define pregnancy as fertilization. *Id.*

80. Editorial, *Our Opinions: The 50 States of Denial; Pharmacists' Ability to Reject Prescriptions on Personal Grounds Violates Consumers' Rights*, ATL. J.-CONST., Oct. 14, 2004, at 18A. The prescription was transferred and filled at a later date. *Id.*

81. Angela K. Brown, *Woman Said Pharmacist Denied Her Birth-Control Prescription*, ASS. PRESS, Mar. 30, 2004, <http://www.ppinw.org/pages.php?p=news&id=9>. The prescription was filled and delivered to Lacey's home the next evening. *Id.*

pharmacist raised a moral objection to dispensing and transferring the prescription.⁸² By the time managers at Brooks resolved the situation, it was too late for emergency contraception to be effective.⁸³ Gene Herr, an Eckerd pharmacist, refused to dispense emergency contraception to a sexual assault victim in Texas for moral reasons.⁸⁴ When the other two pharmacists on duty also refused to dispense the medication, the woman had her prescription filled at a Walgreens later that evening.⁸⁵ All three Eckerd pharmacists were subsequently fired for violating the patient's rights.⁸⁶ In Wisconsin, Kmart pharmacist Neil T. Noesen refused to fill and transfer a prescription for birth control because he did not want to commit a sin.⁸⁷

i. Company Policies on Pharmacist Refusals

According to the American Pharmacists Association (APhA) Principles of Pharmaceutical Care,⁸⁸ the “[i]nteraction between the pharmacist and the patient must occur to assure that a relationship based upon caring, trust, open communication, cooperation, and mutual decision making is established and maintained.”⁸⁹ Before state legislatures were faced with the issues of pharmacist refusal clauses, pharmacies addressed the issue through company policies.⁹⁰ Most large pharmacy chains today have policies in place to respond to customer complaints regarding pharmacist refusals.⁹¹ The APhA advises pharmacies to instruct dissenting pharmacists to make the referral process seamless for patients.⁹²

82. *Pharmacist Denied Woman's Request for Morning-After Pill*, UNION LEADER, Sept. 27, 2004, at C7.

83. *Id.*; John Seager, *Stopping Contraception*, SCRIPPS HOWARD NEWS SERV., July 29, 2005, at Commentary.

84. Brown, *supra* note 81; Lyndsay Knecht & Margaret Myrick, *Protestors Fight Pharmacy: Groups Target Eckerd's for Violating Rights*, N. TEX. DAILY, Feb. 3, 2004.

85. Brown, *supra* note 81.

86. *Id.*

87. Anita Weier, *Rx License is on the Line in Abortion Fight; Pharmacist Refused Pill Order Due to Faith* (First Edition) / *Rx License is on the Line in Birth Pill Fight; Pharmacist Refused to Fill Woman's Order* (Second Edition), CAP. TIMES, Oct. 12, 2004, at 1A. The prescription was filled two days later. *Id.*

88. See AMERICAN PHARMACISTS ASSOCIATION, PRINCIPLES OF PRACTICE FOR PHARMACEUTICAL CARE, available at <http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2618> (last visited Sept. 21, 2006).

89. *Id.*

90. Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. OF GENDER, L. & JUST. 229, 239 (2005).

91. *Id.*

92. Kristen Gerencher, *Debate over Contraception Access Reignites*, CBS MARKETWATCH, May 13, 2004, at Personal, Finance; Life & Money; Vital Signs.

“The pharmacist should be able to step away, but there should be systems in place to assure patients access,” explains APhA spokeswoman Susan Winckler.⁹³

ii. Commercial Drug Store Policies on Pharmacist Refusals

Most commercial drugstores seem to follow the APhA recommendations. Walgreens’s store policy is similar to these recommendations; according to spokesman Michael Polzin, prescription refusals have been “rare” in Walgreens’s 4,400 drugstores, which employ 15,000 pharmacists in the United States.⁹⁴ “If a pharmacist has a moral objection to dispensing any medication, they should have another pharmacist fill the prescription,” explains Polzin.⁹⁵ “If another pharmacist is not available, they should refer the patient to the closest Walgreen’s to have it filled there.”⁹⁶

CVS does have a “refuse and refer” policy, which allows pharmacists to refer patients to another store to have their prescriptions filled.⁹⁷ However, this policy may not be adequately enforced since pharmacists like the one who refused Julee Lacey faced no serious repercussions.⁹⁸

Eckerd Pharmacy has a policy that offers customers more protection from refusals.⁹⁹ According to the Eckerd employment manual, pharmacists are never allowed to refuse to fill a prescription for moral or religious reasons.¹⁰⁰ Although some Eckerd drugstores do not stock emergency contraception, Eckerd spokeswoman Joan Gallagher has explained that “[i]f an individual comes to our pharmacy counter with a legal and valid prescription, it is our policy that the prescription be filled You can’t say ‘Go and find it yourself.’ You have to locate it and verify that the product is there.”¹⁰¹

b. Pharmacy Refusals to Stock Emergency Contraception

In addition to individual pharmacists’ refusals to fill prescriptions, the pharmacy itself plays an important role in a woman’s access to contraception. In mid-1999 Wal-Mart decided it would not sell Preven, an emergency contraception

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Gloria Feldt, *Whose Conscience?*, TomPaine.com, Oct. 8, 2004, http://www.tompaine.com/articles/whose_conscience.php.

98. *Id.*

99. See Teliska, *supra* note 90, at 240.

100. *Id.*; see also Liz Austin, *Pharmacist’s Refusal Stirs Debate: Rules Vary on Moral Choice Not to Provide Morning-After Pill*, HOUS. CHRON., Feb. 29, 2004, at A34.

101. Gerencher, *supra* note 92. Gene Herr and his pharmacist colleagues were terminated as a result of violating this policy. See *supra* notes 84-86 and accompanying text.

pill.¹⁰² According to a *New York Times*, Wal-Mart issued the following statement: "At this time Wal-Mart has made the business decision not to sell Preven (a combination of progestin and estrogen). However, in the interest of serving and meeting the needs of customers, our pharmacists will refer any request for this product to a pharmacy that does carry it."¹⁰³

Wal-Mart is the largest retailer in the United States and the fifth largest provider of pharmaceuticals.¹⁰⁴ In many areas, Wal-Mart pharmacies are the only option available to consumers, because smaller, independently owned pharmacies face difficulties competing against Wal-Mart and are often forced out of business.¹⁰⁵ When one large pharmacy controls the access to drugs, a significant percentage of rural customers do not have much choice as to which pharmacy to patronize.¹⁰⁶ Susan Scrimshaw, Dean of the University of Illinois-Chicago School of Public Health, has explained how pharmacist refusals affect low-income and rural women disproportionately:

You can buy your way out of things if you're middle or upper class
You can get in your car and drive to the next pharmacy. But if you don't have a car and you're in a neighborhood with few pharmacies, you're in trouble.

Here we have a drug that is legal and also a situation where there's this incredibly narrow window where it can be used To deny woman access to this drug is very problematic.¹⁰⁷

Recently Wal-Mart announced it will provide emergency contraception in all of its pharmacies.¹⁰⁸ Wal-Mart was already required to carry emergency contraception in Massachusetts, where state law requires pharmacies to carry all "commonly prescribed medications."¹⁰⁹ In February 2006, three Massachusetts women sued Wal-Mart for violating this law, and the Massachusetts State Board of Registration in Pharmacy voted unanimously to require Wal-Mart to stock and dispense Plan B.¹¹⁰ After this decision, Wal-Mart stated that it would begin selling

102. Patricia Miller, *Morning-After Pill Ban*, NATION, June 21, 1999.

103. Dana Canedy, *Wal-Mart Decides Against Selling a Contraceptive*, NY TIMES, May 14, 1999, at C1.

104. Stephen Labaton, *Rose Law Firm, Arkansas Power, Slips as It Steps Onto a Bigger Stage*, N.Y. TIMES, Feb. 26, 1994; Ont. Consultants on Religious Tolerance, *Wal-Mart's Refusal to Stock the "Morning-After" Pill* (March 6, 2006), http://www.religioustolerance.org/abo_walm.htm.

105. Ont. Consultants on Religious Tolerance, *supra* note 104.

106. Teliska, *supra* note 90, at 240.

107. Gerencher, *supra* note 92.

108. Press Release, Wal-Mart, Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006), available at <http://www.walmartfacts.com/newsdesk/article.aspx?id=1732>.

109. 247 MASS. CODE REGS. 6.02(4) (2006).

110. Bruce Mohl, *State Orders Wal-Mart to Sell Morning-After Pill*, BOSTON GLOBE, Feb. 15, 2006, at F1.

Plan B at its forty-four Massachusetts stores.¹¹¹ Beginning on March 20, 2006, Wal-Mart began to carry Plan B nationwide in its over 3700 pharmacies.¹¹²

But Wal-Mart was not alone in not carrying emergency contraception. Twenty-five percent of pharmacies surveyed in New York City in 2004 did not carry emergency contraception.¹¹³ None of these pharmacies had posted signs required by law to alert women that they did not carry emergency contraception.¹¹⁴ Consequently, even in the absence of legislation restricting access to emergency contraceptives, women nationwide face obstacles in finding pharmacies carrying them and pharmacists willing to dispense them.¹¹⁵

c. Hospital Refusals

Hospitals have also refused emergency contraception to women in emergency rooms, and most often these women are survivors of sexual assault.¹¹⁶ Each year it is estimated that 25,000 unintended pregnancies result from sexual assault.¹¹⁷ If all rape victims were provided with emergency contraception, an estimated 22,000 of these pregnancies could be prevented.¹¹⁸ Yet studies have shown that less than a quarter of sexual assault victims at risk for pregnancy were given emergency contraceptives.¹¹⁹ Some emergency room physicians do not offer emergency contraception to rape survivors due to lack of awareness, while others refuse due to religious beliefs.¹²⁰

111. *Id.*

112. Jyoti Thottam, *A Big Win For Plan B: Wal-Mart's About-Face Expands Access to the "Morning After" Pill*, TIME, Mar. 13, 2006, at 41; Press Release, *supra* note 108.

113. Jill Filipovic, *Whose Conscience Counts?*, WASH. SQUARE NEWS, Oct. 20, 2004, http://www.nyunews.com/vnews/display.v/ART/2004/10/20/ARCHIVE71889?in_archive=1.

114. *Id.*

115. Teliska, *supra* note 90, at 240.

116. See, e.g., Nat'l Sexual Violence Res. Ctr. et al., *Preventing Pregnancy from Sexual Assault: Four Action Strategies to Improve Hospital Policies on Provision of Emergency Contraception* 5 (2003), <http://www.nsvrc.org/resources/docs/ECtoolkit.pdf> (indicating the scope of the problem, where no more than 20% of rape victims nationally were offered Plan B in emergency room situations); Cathryn L. Hazouri, *Twice Victimized*, Denver Voice, June 2005 (reporting that over 65% of Colorado hospitals do not provide Plan B to rape survivors); Molly M. Ginty, *Some Hospitals Withhold Plan B After Rape*, WOMEN'S ENEWS, Dec. 27, 2005, <http://www.womensnews.org/article.cfm/dyn/aid/2584>; *infra* notes 131-32.

117. Nat'l Sexual Violence Res. Ctr. et al., *supra* note 116, at 5.

118. *Id.*; Felicia H. Stewart & James Trussell, *Commentary, Prevention of Pregnancy Resulting from Rape: A Neglected Prevention Health Measure*, 19 AM. J. PREVENTIVE MED. 228, 229 (2000).

119. Annette L. Amey & David Bishai, *Measuring the Quality of Medical Care for Women Who Experience Sexual Assault With Data From the National Hospital Ambulatory Medical Care Survey*, 39 ANNALS EMERGENCY MED. 631, 636 (2002).

120. Deborah Friedman, *Refusal Clauses: A Threat to Reproductive Rights*, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/refusal-clauses-6544.htm> (last visited Sept. 21, 2006).

i. Catholic Hospitals and Religious Directives

Additionally, the *Ethical and Religious Directives for Catholic Health Care Services*, which govern Catholic hospitals,¹²¹ include provisions on the treatment of victims of sexual assault:

Compassionate and understanding care should be given to a person who is the victim of sexual assault. . . . A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose of direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.¹²²

There is no medical test that can detect the presence of a fertilized egg.¹²³ Pregnancy tests detect established pregnancies, which are present after the pre-embryo implants eight to nine days after ovulation.¹²⁴ Thus, the testing called for by the *Directives* does not exist.¹²⁵ After this time period passes, the pre-embryo is implanted. Abortion is the only remaining option to terminate the pregnancy, and abortion is not permissible under the *Directives*.

As more non-religiously affiliated hospitals merge with Catholic ones, women's access to reproductive health care is diminished.¹²⁶ Thirteen percent of the hospitals in the United States with emergency rooms are Catholic, and in many states 30-40% of people who need emergency care visit a Catholic hospital.¹²⁷ Mergers significantly decrease access to emergency contraception. Although all Catholic hospitals in the United States must follow the *Directives*, they are not interpreted consistently regarding emergency contraception.¹²⁸ As a result, each Catholic hospital interprets the *Directives* independently and determines when to

121. Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 MERCER L. REV. 1087, 1100 (1996).

122. U.S. CONFERENCE OF CATHOLIC BISHOPS, *ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES* 21 (4th ed. 2001), available at <http://www.uscb.org/bishops/directives.shtml>.

123. GARY F. CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 23 (21st ed. 2001).

124. *Id.* at 27.

125. Friedman, *supra* note 120.

126. See Lucette Lagnado, *Religious Practice: Their Role Growing. Catholic Hospitals Juggle Doctrine and Medicine – They Make 'Fine Distinctions' On Issues Like Abortion: Consulting 'The Moralists' – 'Off-Site' Birth-Control Service*, WALL ST. J., Feb. 4 1999, at A2.

127. IBIS REPROD. HEALTH FOR CATHOLICS FOR A FREE CHOICE, *SECOND CHANCE DENIED: EMERGENCY CONTRACEPTION IN CATHOLIC HOSPITAL EMERGENCY ROOMS* 8 (2002), available at http://www.catholicsforchoice.org/topics/healthcare/documents/2002secondchancedenied_001.pdf.

128. See LIZ BUCAR, *CATHOLICS FOR A FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH* 8 (1999), <http://www.catholicsforchoice.org/topics/healthcare/documents/1998cautioncatholichealthrestrictions.pdf>.

provide emergency contraception, thereby causing access to vary from place to place.¹²⁹ If a rape survivor goes to a Catholic hospital in California, she will be offered information about and access to emergency contraception.¹³⁰ In at least one Chicago hospital, however, the same woman would not be offered emergency contraception.¹³¹ Moreover, if this woman had consensual intercourse, she would not be offered emergency contraception at a Catholic Hospital in any state.¹³² If this woman sought emergency contraception after a contraception failure during consensual intercourse, it is likely she could not obtain it in a Catholic hospital.¹³³

ii. The Impact of Hospital Mergers on Access to Emergency Contraception

Access to emergency contraception is significantly decreased as a result of mergers between non-religiously affiliated hospitals and Catholic hospitals.¹³⁴ Indigent women who rely predominately on hospitals for medical care are disproportionately impacted by Catholic hospital mergers¹³⁵ and the restrictions Catholic hospitals may place on access to emergency contraceptives. Moreover, even non-indigent women seeking access to emergency contraception may inadvertently seek treatment from a Catholic hospital: hospital names such as Community Health Partners in Lorain, Ohio, or Northridge Hospital Medical Center in Los Angeles, California, do not make the religious affiliation of these hospitals apparent.¹³⁶

2. Different Legal Protections for Refusing Pharmacists in Different States

In addition to health care providers who refuse to provide certain services such as emergency contraception, various legal protections given to such objecting providers pose another obstacle to access to emergency contraception in the United States. Particularly problematic for access to emergency contraception are the pharmacist refusal clauses in various states, which lack clear standards for referrals or transfers of prescriptions and are too lenient to ensure sufficient access to emergency contraception. Although the employment-at-will doctrine provides recourse for employer-pharmacies that want to protect customers from objecting pharmacists, it is limited by protections afforded to employee-pharmacists such as

129. *See id.*

130. *Id.*

131. Vincent J. Schodolski, *Catholic Policies Inconsistent on Rape Victim Care*, CHI. TRIB., Aug. 29, 1999, at C1.

132. BUCAR, *supra* note 128, at 10.

133. *Id.* at 8.

134. *See* Lagnado, *supra* note 126.

135. *See id.*

136. Planned Parenthood Federation of America, Inc., *Opposing Dangerous Hospital Mergers* (1999), <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/ec/fact-991001-mergers.xml>.

wrongful discharge and the prohibition against religious discrimination.¹³⁷ Disciplinary action by professional associations does not generally carry severe repercussions.¹³⁸

a. State Conscience Clause Statutes

Virtually every state has a policy explicitly allowing some health care providers or institutions to refuse to provide or participate in abortion, contraceptive services, or sterilization services.¹³⁹ Thirteen states allow some health care providers to refuse to provide services related to contraception;¹⁴⁰ these laws vary as to whether pharmacists can explicitly refuse to dispense contraceptives and what entities are covered. Other states are expanding access to emergency contraception by requiring that emergency contraceptive services be provided to sexual assault victims in hospital emergency rooms, allowing pharmacists to dispense emergency contraception without a prescription, or requiring pharmacies that stock contraceptives to dispense emergency contraceptives.¹⁴¹

137. Lumpkin, *supra* note 12; 42 U.S.C. § 2000e-2(a)(1) (2000) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion[.]”).

138. See e.g., National Ass’n of Boards of Pharmacy, *Disciplinary Actions Defined*, <http://www.nabp.net/index.asp?target=/ppad/individualSearch.asp&menutype=individual> (last visited Sept. 21, 2006).

139. GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (Mar. 1, 2006) [hereinafter STATE POLICIES IN BRIEF], http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf. Following the 1973 Supreme Court decision *Roe v. Wade*, 410 U.S. 113 (1973), Congress passed the Church Amendment, 42 U.S.C. § 300a-7(b) (2000). The amendment, named after sponsor Senator Frank Church of Idaho, amended the Health Programs Extension Act of 1973. Leora Eisenstadt, *Separation of Church and Hospital: Strategies to Protect Pro-Choice Physicians in Religiously Affiliated Hospitals*, 15 YALE L.J. & FEMINISM 135, 145 (2003). The Church Amendment is a type of conscience clause that allows health care professionals to refuse to provide abortion or sterilization on religious grounds. The Church Amendment states that the receipt of federal funds does not authorize a court or other public official to require public employees to perform or assist in sterilization or abortion procedures if doing so would conflict with an employee’s religious or moral convictions. 42 U.S.C. § 300a-7(b)(1)(2000). This amendment was the prototype for many state healthcare provider “conscience clauses” that were enacted in the 1970s. See Eisenstadt, *supra*.

140. STATE POLICIES IN BRIEF, *supra* note 139. The states are Arkansas (ARK. CODE ANN. § 20-16-304(4) (2005)); Colorado (COLO. REV. STAT. ANN. § 25-6-102(9) (2001)); Florida (FLA. STAT. ANN. § 381.0051(6) (2006)); Georgia (GA. CODE ANN. § 49-7-6 (2002)); Maine (ME. REV. STAT. ANN. tit. 22, § 1903(4) (1964)); Massachusetts (MASS. GEN. LAWS ANN. ch. 272, § 21B (2000)); Mississippi (MISS. CODE ANN. § 41-41-215 (1972)); New Jersey (N.J. STAT. ANN. §§ 45:14-66 (2000)); South Dakota (S.D. CODIFIED LAWS § 36-11-70 (1999)); Tennessee (TENN. CODE ANN. § 68-34-104(5) (2001)); and Washington (WASH. REV. CODE ANN. § 48.43.065 (1999)).

141. GUTTMACHER INST., STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION (Mar. 1, 2006), http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf.

i. The History of Conscience Clauses

According to one source, “conscience clauses are the time-honored method of allowing both individuals and religious institutions to opt out of public policy in conflict with their religious beliefs.”¹⁴² The purpose of conscience clauses as well as their ramifications is important to appreciate the conflict between pharmacists’ consciences and women’s access to emergency contraception.

ii. Broad Interpretation of Refusal Clauses

In addition to being used to refuse abortion or sterilizations, refusal clauses have been interpreted broadly enough to encompass contraception and emergency contraception, fetal research, assisted reproductive technologies, *in vitro* fertilization, and stem cell research.¹⁴³ Refusal clauses vary in terms of what services can be refused and what justifications are necessary for the refusal. Refusal clauses can also apply to non-medical personnel and institutions such as insurance providers and universities.¹⁴⁴ The broader the refusal clause is interpreted, the more difficult it can be for patients to gain access to medical treatments and make choices about their health care.¹⁴⁵ This is especially problematic for women seeking emergency contraception, effective only during a short period of time. The pharmacists’ right to exercise their consciences needs to be balanced with the physicians’ medical diagnoses and the patients’ needs for prescription drugs.

iii. Reasons for Refusals

Although oral contraceptives and emergency contraceptives prevent ovulation and fertilization,¹⁴⁶ some people believe that they are abortifacients that interfere with pregnancy.¹⁴⁷ Pharmacists play a critical role in health care delivery and they are responsible for dispensing prescription medication, educating patients to promote health and prevent disease, and maximizing patients’ “health-related

142. CAROL HOGAN, CALIFORNIA CATHOLIC CONFERENCE, CONSCIENCE CLAUSES AND THE CHALLENGE OF COOPERATION IN A PLURALISTIC SOCIETY (Feb. 2003) (internal quotation marks omitted), <http://www.cacatholic.org/rfconscience.html>.

143. Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider ‘Conscience,’ Patient Needs*, 7 GUTTMACHER REP. ON PUB. POL’Y 1 (2004).

144. George J. Bryjak, *The Right to Refuse Service*, SAN DIEGO UNION-TRIB., Aug. 24, 2005, http://www.signonsandiego.com/uniontrib/20050824/news_lz1e24bryjak.html.

145. See Sonfield, *supra* note 143, at 2-3.

146. Mavis N. Schorn, *How Does Oral Emergency Contraception Work?*, 36 NURSING 31, 31 (2006).

147. See Am. Life League, *Emergency Contraception: The Morning-After Pill*, <http://www.all.org/article.php?id=10130> (last visited Apr. 16, 2006) (stating that one way emergency contraception works is by irritating the lining of the uterus, so if “the woman does become pregnant, the tiny baby boy or girl will die before he or she can actually attach to the lining of the uterus.”).

quality of life.”¹⁴⁸ Annually, 60,000–120,000 prescriptions for emergency contraceptives are written.¹⁴⁹ However, a 2003 Pennsylvania study found that 65% of pharmacists have negative feelings about emergency contraceptive pills, and 13% believe that emergency contraceptive pills are abortifacients.¹⁵⁰ The total number of pharmacist refusal incidents is unknown, but reports of pharmacists refusing to dispense contraception date back to 1991.¹⁵¹

iv. States Protecting Refusals

Forty-five jurisdictions in the United States offer some statutory protection to the consciences of health care professionals.¹⁵² Arkansas,¹⁵³ Georgia,¹⁵⁴ Mississippi,¹⁵⁵ and South Dakota¹⁵⁶ are four states that permit pharmacist refusals by law or regulation. Refusals have been documented in twelve states: California, Georgia, Illinois, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Pennsylvania, Texas, West Virginia, and Wisconsin.¹⁵⁷ Most conscience clauses protect a right to refuse to participate in “abortion.”¹⁵⁸ A few states, including

148. Am. Pharmacists Ass’n, *Principles of Practice for Pharmaceutical Care*, <http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2906> (last visited Sept. 21, 2006).

149. Friedman, *supra* note 120; see Marc Kaufman, *Plan B Won’t Be Sold Over Counter; FDA: Contraceptive Needs More Testing*, WASH. POST, May 7, 2004, at A1.

150. Wendy Bennett, et al., *Pharmacists’ Knowledge and the Difficulty of Obtaining Emergency Contraception*, 68 CONTRACEPTION 261, 265-66 (2003).

151. Matthew Sauer, *Pharmacist To Be Fired in Abortion Controversy*, ST. PETERSBURG TIMES, Dec. 19, 1991, at 1B.

152. R. Alta Charo, Perspective, *The Celestial Fire of Conscience – Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2471 (2005).

153. ARK. CODE ANN. § 20-16-304 (2005) (“Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedure, supplies, or information.”).

154. The Georgia Code of Professional Conduct states that “[i]t shall not be considered unprofessional conduct for any pharmacist to refuse to fill a prescription based on his or her . . . ethical or moral beliefs.” GA. CODE ANN. § 480-5-03(n).

155. MISS. CODE ANN. § 41-107-5 (2005) (“A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient’s race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.”).

156. S.D. CODIFIED LAWS § 36-11-70 (1999) (“No pharmacist may be required to dispense medication” if “there is reason to believe that the medication would be used to: (1) cause abortion; or (2) destroy an unborn child . . .”).

157. SaveRoe.com, *Refusal Laws at a Glance*, <http://www.saveroe.com/fillmypillsnow/glance> (last visited Sept. 21, 2006).

158. See ALASKA STAT. § 18.16.010 (Michie 1997); ARIZ. REV. STAT. § 36-2151 (1993); CAL. HEALTH & SAFETY CODE § 123420 (West 1996); DEL. CODE ANN., tit. 24, § 1791 (2000); HAW. REV. STAT. ANN. § 453-16 (Michie 2001); IDAHO CODE ANN. § 18-612 (2004); IND. CODE ANN. § 16-34-1-4 (LexisNexis 1993); IOWA CODE ANN. § 146.1 (West 2005); KAN. STAT. ANN. § 65-443 (2002); KY. REV. STAT. ANN. § 311.800 (West 2005); LA. REV. STAT. ANN. § 40:1299.33 (2001); MD. CODE ANN.,

Arkansas, Colorado, Florida, Georgia, Maine, Tennessee, West Virginia, and Wyoming, include a specific right to refuse to participate in contraceptive services in their conscience clause statutes.¹⁵⁹ Arkansas Code Section 20-16-304 states: “[N]othing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information.”¹⁶⁰ A bill considered by the Indiana Senate in 2005 states: “No person shall be required, as a condition of training, employment, pay, promotion, or privileges . . . [to dispense a] drug that may result in, or that is intended to result in, an abortion; [or] artificial birth control.”¹⁶¹

b. Employment Law

The employment-at-will doctrine offers additional protection to customers seeking emergency contraceptives in that a pharmacy may discharge a pharmacist who refuses to fill a valid prescription for emergency contraceptives in violation of the pharmacy’s company policy.¹⁶² Although the employment-at-will doctrine has been eroded by tort doctrine, one justification for regulation through tort law is the protection of third parties.¹⁶³ Wrongful discharge in violation of public policy is a potential cause of action for a pharmacist who is terminated for a refusal based on a conscientious objection. This has yet to be recognized as contrary to public policy, because the employee’s conduct cannot be motivated solely by personal values; instead, there must be some adverse impact on a third party.¹⁶⁴ Religious discrimination in violation of Title VII does not give much practical protection to

HEALTH-GEN. § 20-214 (LexisNexis 2005); MASS. GEN. LAWS ANN. Ch. 112, § 121 (West 2003); MICH. COMP. LAWS ANN. §§ 333.20181-333.20184 (West 2001); MINN. STAT. ANN. §§ 145.414, 145.42 (West 2005); MO. ANN. STAT. § 197.032 (West 2004); MONT. CODE ANN. § 50-20-111 (2005); NEB. REV. STAT. §§ 28-337-28-341 (1995); NEV. REV. STAT. ANN. § 632.475 (Michie 2004); N.J. STAT. ANN. §§ 2A:65A-1–2A:65A-3 (West 2000); N.M. STAT. ANN. § 30-5-2 (Michie 1978); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); N.C. GEN. STAT. § 14-45.1(e) (2005); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (Anderson 2003); OKLA. STAT. ANN. tit. 63, § 1-741 (West 2004); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000); R.I. GEN. LAWS § 23-17-11 (2001); S.C. CODE ANN. §§ 44-41-40 (Law Co-op. 2001); TEX. OCC. CODE ANN. §§ 103.001 (Vernon 2002); UTAH CODE ANN. § 76-7-306(1) (2003); VA. CODE ANN. § 18.2-75 (2004); WIS. STAT. ANN. § 253.09(1) (West 2004); 42 U.S.C. § 300a-7(b) (2000).

159. See ARK CODE ANN. 20-16-304(4)-(5) (Michie 2000); COLO. REV. STAT. § 25-6-102(9) (West 2001); FLA. STAT. ANN. § 381.0051(6) (West 1997); GA. CODE ANN. § 49-7-6 (2001); ME. REV. STAT. ANN. tit. 22, § 1903(4) (West 1992); OR. REV. STAT. § 435.225 (1999); TENN. CODE ANN. § 68-34-104(5) (2001); W. VA CODE § 16-2B-4 (2000); WYO. STAT. ANN. § 42-5-101 (Michie 2001).

160. ARK. CODE ANN. § 20-16-304 (2005).

161. Indiana Senate Bill No. 48 (2005).

162. 82 AM. JUR. 2d, Wrongful Discharge §1 (2003).

163. See STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 147 (2002).

164. See *id.* at 150.

pharmacist refusals since accommodations for an employee's religious beliefs cannot result in undue hardship for the employer.¹⁶⁵

i. Employment at Will

Unless there is a contract stating otherwise, an employment relationship is "at will" and either the employee or employer may end the relationship at any time for any or no reason without being subject to legal liability.¹⁶⁶ In 1884, the Supreme Court of Tennessee articulated a classic description of this doctrine: "[Employers] must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*."¹⁶⁷

The employment-at-will doctrine gives employers leeway in terminating or demoting pharmacists for any or no reason.¹⁶⁸ However, pro-life pharmacists such as Karen L. Brauer, who was fired by her employer-pharmacy, think the doctrine creates a problem of conscience.¹⁶⁹ Brauer, president of Pharmacists for Life,¹⁷⁰ was fired from a Delhi, Ohio, Kmart pharmacy for refusing to fill a valid prescription for Micronor, a progestin-only birth control.¹⁷¹ During her employment at Kmart, Brauer frequently turned away prescriptions for progestin-only birth control.¹⁷² Pharmacists should have the right to refuse to refer or transfer prescriptions, according to Brauer.¹⁷³ After Brauer refused to fill the prescription,¹⁷⁴ the customer complained. When Brauer informed her employer she would continue to refuse to fill valid prescriptions in the future, Kmart fired her.¹⁷⁵

165. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 65, 75 (1976); see also *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146-47 (5th Cir.1982).

166. Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 (2000).

167. *Payne v. Western & A. R.R. Co.*, 81 Tenn. 507, 518 (1884) (overruled on other grounds).

168. See Ballam, *supra* note 166.

169. Karen Brauer, *Pharmacy Has a Conscience Problem* (1998), <http://www.gargaro.com/kmart> (last visited Apr. 10, 2006).

170. Pharmacists for Life International, <http://www.pfli.org/main.php?pfli=directors> (last visited Sept. 21, 2006).

171. See Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse To Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A01, available at www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html; Brauer, *supra* note 169. As previously mentioned, Plan B is a progestin-only emergency contraceptive. See *supra* note 47 and accompanying text.

172. Brauer, *supra* note 169.

173. Stein, *supra* note 171.

174. Brauer, *supra* note 169.

175. *Id.*

ii. *Wrongful Discharge as Against Public Policy*

It is possible that a pharmacist who is terminated for conscientiously objecting may have a common law tort or wrongful discharge claim.¹⁷⁶ Wrongful discharge is an exception to the employment-at-will doctrine when the discharge conflicts with public policy.¹⁷⁷ To establish a *prima facie* case of wrongful discharge in violation of public policy, an employee must show that “[t]he action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee’s” rights as a worker.¹⁷⁸ This cause of action is recognized in most states, but it is difficult for courts to determine which sources of public policy support it.¹⁷⁹ The Supreme Court of Colorado has held that a professional code of ethics may be considered a source of public policy¹⁸⁰ by declaring that “to qualify as public policy, the ethical provision must be designed to serve the interests of the public rather than the interests of the profession . . . [T]he viability of ethical codes as a source of public policy must depend on a balancing between the public interest served by the professional code and the need of an employer to make legitimate business decisions.”¹⁸¹ However, not all jurisdictions recognize non-legislative determinations of public policy.¹⁸²

A wrongful discharge claim was raised in a recent case by health care providers terminated for refusing to provide a service. Four pharmacists filed suit against Walgreens in Madison County, Illinois, on January 27, 2006, and claimed that they were wrongly fired for refusing to dispense the morning-after pill.¹⁸³ Represented by the American Center for Law and Justice, a conservative legal group Christian evangelist Pat Robertson founded, the pharmacists allege that Walgreens violated the Illinois Health Care Right of Conscience Act.¹⁸⁴ The Act allows health care providers to opt out of procedures that they morally object to performing.¹⁸⁵ Walgreens spokesman Michael Polzin said that the pharmacists were not terminated, but placed on unpaid leave in November and offered jobs in

176. 82 AM. JUR. 2d, *Wrongful Discharge* §1 (2003).

177. *Id.*

178. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992).

179. Genna H. Rostem, *Wrongful Discharge Based on Public Policy Derived From Professional Ethics Codes*, 52 A.L.R. 5th 405, 405 (1997).

180. *Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 524 (Colo. 1996) (en banc).

181. *Id.* at 525. Similarly, a New Jersey appellate court has held that a code of ethics governing pharmacists qualifies as public policy and could be used in an action for wrongful discharge. *Kalman v. Grand Union Co.*, 443 A.2d 728, 730 (N.J. Super. Ct. 1982).

182. *See Mariani*, 916 P.2d at 524.

183. *Pharmacists sue Walgreen over contraceptives*, MSNBC.com, Jan. 28, 2006, <http://www.msnbc.msn.com/id/11076621/>.

184. *Id.*; 745 ILL. COMP. STAT. ANN. 70/1-70/14 (West 2002).

185. *Pharmacists Sue Walgreen Over Contraceptives*, *supra* note 183; 745 ILL. COMP. STAT. ANN. 70/2 (West 2002).

stores nearby in Missouri, where they would not be subject to the Illinois law requiring pharmacists to make Plan B available to customers “without delay.”¹⁸⁶

The probability of success for an objecting pharmacist's claim of wrongful discharge depends on whether terminating employees based on their consciences is considered to be against public policy. So far this has not been recognized, and it does not seem to meet the requirement that the employee's conduct be motivated by public policy rather than personal values.¹⁸⁷ Moreover, legitimate business concerns of the employer, such as co-worker resentment, customer complaints, and lower profits, are potential bars to recovery.¹⁸⁸ If the courts consider state conscience clauses to be adequate statements of public policy, they could offer the most support for employee objections.¹⁸⁹

iii. Religious Discrimination Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on religious beliefs.¹⁹⁰ Practically, Title VII does not guarantee protecting a pharmacist's conscience.¹⁹¹ Accommodations for a pharmacist's beliefs cannot place undue hardship on the employer's business. In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court defined undue hardship as “greater than *de minimus* cost or imposition upon” the employer's business, including the imposition on co-workers.¹⁹²

In *Brener v. Diagnostic Center Hospital*, an Orthodox Jewish pharmacist claimed he was discharged because of his faith, which prevented him from working on the Sabbath and various religious holidays.¹⁹³ The United States Court of Appeals for the Fifth Circuit noted that under the 1972 Amendment to Title VII of the Civil Rights Act of 1964, an employer commits an unfair employment practice when the employer “discriminates against an employee because of any aspect of his ‘religious observance and practice’ unless the employer meets the burden of showing ‘that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the

186. *Pharmacists Sue Walgreen Over Contraceptives*, *supra* note 183. The plaintiff pharmacists worked overnight shifts at twenty-four hour stores; as the only ones on duty, prescriptions could not be filled without delay as required by Illinois law. *Id.*

187. See *Kalman v. Grand Union Co.*, 443 A.2d 728, 729 (N.J. Super. Ct. 1982).

188. See Donald W. Herbe, Note, *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, 96-97 (2002-03).

189. *Id.* at 97.

190. 42 U.S.C. §§ 2000a(a); 2000e-2(a)(1) (2000).

191. Herbe, *supra* note 188, at 94.

192. 432 U.S. 63, 84 (1977).

193. *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 141-43 (5th Cir. 1982).

employer's business."¹⁹⁴ According to the Fifth Circuit, the district court had found that "an employee has a duty to cooperate with an employer's efforts to reconcile his work schedule with the practice of his religion."¹⁹⁵ Efficiency was decreased and the burden on other pharmacists was increased when Brener was absent from work.¹⁹⁶ Moreover, the quality of patient care declined due to the increased workload for the other pharmacists.¹⁹⁷ The appeals court explained that the use of the term "reasonable" in Title VII suggests "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."¹⁹⁸ The Fifth Circuit also found that the plaintiff's suggested accommodations (e.g., hiring another pharmacist and directing other employees to trade shifts with Brener) were undue hardships on the employer and justifiably rejected.¹⁹⁹

Pharmacists' refusal to fill prescriptions and potential accommodations that can be made are analogous to the ones suggested and rejected by the Fifth Circuit in *Brener*.²⁰⁰ If the policy of an employer-pharmacy requires dispensing all legal, valid prescriptions, accommodating an objecting pharmacist would likely cause the employer an undue burden.²⁰¹ Having an additional pharmacist on duty during the objecting pharmacists' shifts would cause an economic loss for the employer-pharmacy.²⁰² While this is especially true when there is only one pharmacist scheduled for a particular shift, co-workers' work schedules could be disrupted or their morale could be decreased, resulting in undue burdens regardless of the number of pharmacists on duty.²⁰³

Although many pharmacist refusals are based on religious beliefs, it is unclear that a pharmacist is protected under Title VII. The statute does not provide any protection for pharmacists against civil suits or professional discipline.²⁰⁴ Even if Title VII applied to pharmacist refusals, accommodating objecting pharmacists will result in an undue burden for the employer in most circumstances.²⁰⁵

194. *Id.* at 143 (citing 42 U.S.C. § 2000e(j)).

195. *Id.* at 144.

196. *Id.*

197. *Id.*

198. *Id.* 145-46.

199. *Id.* at 146-47.

200. Herbe, *supra* note 188, at 94.

201. *Id.*

202. *Id.* at 94-95.

203. *Id.* at 95.

204. *See id.* at 94 ("Title VII does not offer guaranteed protection in the context of protecting a pharmacist's conscience.")

205. *Id.* at 94-95.

3. *Different Disciplinary Action Against Refusing Pharmacists in Different States*

Professional standards and codes of ethics dictate the confines of many professional relationships. Professionals should not be required to act against their conscience; rather their rights should be balanced with the rights of women seeking emergency contraception so that neither right is denied. By “opting-out” rather than “obstructing,” both pharmacists’ religious beliefs and women’s rights can be respected.

a. *Ethical and Professional Duties*

Pharmacists’ standards of care and ethical obligations are critical to access to drugs such as emergency contraception. Conflicting standards of care, which vary state-by-state, hinder access. Leaving a right as basic as health care to local control does not adequately protect the right in all areas. Professional responsibilities and obligations are found in professional codes of ethics, some of which are codified in law.²⁰⁶

In the health care profession and bioethics field, the core values of beneficence, justice, and respect for autonomy guide the professional standards.²⁰⁷ Similar to nonmaleficence (obligation not to harm), beneficence is the requirement that “the provider act in the best interest of the patient and her welfare.”²⁰⁸ The justice principle encompasses non-discrimination and working for the public good.²⁰⁹ Doctrines such as informed consent and confidentiality are incorporated in respecting the autonomy of the patient.²¹⁰ When patients’ autonomy conflicts with the pharmacists’ right of conscience, the pharmacists’ code of ethics provides some guidance in resolving the conflict. Without any enforcement mechanism, adhering to the code of ethics is merely aspirational.

The practice of pharmacy is a profession that involves a duty to assure and promote the best interest of the patient.²¹¹ Pharmacists are expected to give priority to patients’ interests over their own interests.²¹² It is expected that

206. Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, THE GUTTMACHER REP. ON PUB. POL’Y 7, 7 (2005); see also American Pharmaceutical Association, *Code of Ethics for Pharmacists* (1996), available at http://www.ashp.org/bestpractices/ethics/Ethics_End_Code.pdf (defining the professional responsibilities and obligations of pharmacists).

207. Sonfield, *supra* note 206, at 7.

208. *Id.*

209. *Id.*

210. *Id.*

211. William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist’s Right of Conscience*, 5 J. PHARM. & L. 1, 1 (1996).

212. See William E. Fassett & Andrew C. Wicks, *Is Pharmacy a Profession?*, in ETHICAL ISSUES IN PHARMACY 1, 4 (Bruce D. Weinstein ed., 1996) (stating that “professionals are expected . . . to place the interests of their clients above their own . . .”).

pharmacists will not withhold medications from people who have the authority to use them.²¹³ The APhA and other professional organizations support the position that refusal clauses are acceptable if they include an adequate plan for referral.²¹⁴ This gives the pharmacist a right to withdraw from providing services such as abortion, contraception, and end of life care without disrupting or delaying access to health care.²¹⁵ This does not give the pharmacist a right of obstruction.²¹⁶ The APhA's policy regarding pharmacist conscience clauses states:

APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of a system to ensure [the] patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.²¹⁷

In her testimony to the United States House of Representatives, Small Business Committee, Linda Garrelts MacLean explained that the APhA's policy "supports a pharmacist 'stepping away' from participating but not 'stepping in the way' of the patient accessing the therapy."²¹⁸

The APhA guidelines indicate that pharmacists should inform their employers and clientele in advance of their objections and act in a consistent manner. When prescriptions are transferred they should be transferred to a pharmacy located within a reasonable distance. However, "[s]hould the alternate means provided by the employer fail to operate . . . in a timely fashion . . . then the pharmacist has a duty to the patient to dispense the medication."²¹⁹ This becomes problematic in rural areas where a large chain drives out the competition and becomes the only pharmacy within a reasonable distance. Associations such as Planned Parenthood "believe[s] it is an act of discrimination to refuse to provide legal and medically prescribed [oral and emergency contraceptive pills,]" and that "it is unethical for health care providers to stand in the way of a woman's access to safe, effective, legal, and professional health care."²²⁰ Requiring referrals is one solution, but in addition to the distance, the other pharmacy might not take the customer's insurance or have the stock, and there is no guarantee the second pharmacy will not

213. Allen & Brushwood, *supra* note 211, at 2.

214. Friedman, *supra* note 120, at 3.

215. Sonfield, *supra* note 206, at 7.

216. *Id.*

217. *Freedom of Conscience for Small Pharmacies Before the House Small Business Comm.*, 108th CONG. 2 (2005) (statement of Linda Garrelts MacLean, American Pharmacists Association).

218. *Id.*

219. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS 3-4 (2004), <http://www.ppfa.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-041217-refusal-reproductive.pdf>. (quoting and citing AM. PHARMACISTS ASS'N, 1997-1998 POLICY COMMITTEE REPORT: PHARMACIST CONSCIENCE CLAUSE (1998) [hereinafter AM. PHARMACISTS ASS'N]).

220. *Id.* at 4.

refuse to fill the prescription.²²¹ If the prescription is valid and for legal medicine, and the patient is aware of the risks involved in taking the medication, and the medication is reasonably safe, the pharmacist has an ethical duty to fill and dispense the prescription.²²²

b. State Licensing Boards and Statutes that Protect Access to Emergency Contraception

The profession of pharmacy is regulated and controlled by the states through statutes and regulations.²²³ Enforcing state pharmacy regulations is often delegated to a statutorily created board, which may grant licenses to practice pharmacy and also discipline pharmacists for certain acts or omissions.²²⁴ The disciplinary decisions of state pharmacy boards are often not available or indexed.²²⁵ The reported decisions rarely deal with standard of care issues and tend to focus on issues of misconduct with drug diversion and pharmacist impairment.²²⁶ However, in the disciplinary hearing of Kmart pharmacist Neil Noesen for violating Wisconsin's Regulation and Licensing Department's standards of care, the Wisconsin Pharmacy Examining Board found that Noesen had "engaged in practice which constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist and which harmed or could have harmed a patient, in violation of Wis. Adm. Code § Phar 10.03(2)."²²⁷ As a result of this finding, the Board placed limitations on Noesen's license and ordered Noesen to take six credit hours of continuing education in Ethics for pharmacy practice.²²⁸

c. States with Conscience Clauses that Protect Access to Emergency Contraceptives

Some states have laws requiring pharmacists to fill prescriptions. The president of the Massachusetts Board of Registration in Pharmacy said in February of 2003, "a Massachusetts licensed pharmacist providing services in the Commonwealth is required to fill a prescription that has been determined by the

221. Sonfield, *supra* note 206, at 7-8.

222. AM. PHARMACISTS ASS'N, *supra* note 219.

223. See e.g., CONN. GEN. STAT. ANN. §§ 20-576 & 20-579 (West 1999 & Supp. 2006); DEL. CODE ANN. tit. 24, § 2509 (2005).

224. See, e.g., OHIO REV. CODE ANN. § 729.16 (LexisNexis 2003).

225. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., STATE DISCIPLINE OF PHARMACISTS 7 (1990), available at <http://oig.hhs.gov/oei/reports/oi-01-89-89020.pdf>.

226. *Id.* at 11.

227. Order No. LS0310091PHM, State of Wisconsin Before the Pharmacy Examining Board, In the Matter of the Disciplinary Proceedings Against Neil T. Noesen (April 13, 2005), Conclusions of Law ¶ 3, available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>.

228. *Id.* The judge stated, "Respondent clearly needs training in the ethics of his profession." *Id.*

pharmacist [] to be a valid prescription. . . . No statutory or regulatory exception exists for any particular drug or class of drugs.”²²⁹ In Illinois, an emergency rule enacted by Governor Blagojevich requiring pharmacists to fill a patient’s prescription without delay was made permanent by the Joint Committee on Administrative Rules in August 2005.²³⁰ California,²³¹ Missouri,²³² New Jersey,²³³ and West Virginia²³⁴ have passed or are considering legislation that protects women from objecting pharmacists. Consequently, a woman’s access to emergency contraception differs depending on the statutes of the state in which she resides.

d. The Different Approaches by the States

The FDA’s inaction has resulted in varying protections and restrictions for access to emergency contraception at the state level. American women’s access to emergency contraception should not be based on their geographical location. At the federal level, health care providers and institutions may refuse to participate in abortion services on the basis of their religious or moral beliefs.²³⁵ Nearly every state has a policy allowing some health care providers or institutions to refuse to

229. Planned Parenthood, *State by State Action, Summary of State Actions Related to Pharmacist Refusals*, <http://www.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-050418-pharmacist-refusals.xml>; see also MASS. GEN. LAWS ch. 94C, §19(a) (2006), available at <http://www.mass.gov/legis/laws/mgl/94c-19.htm>; see also COMMONWEALTH OF MASS., DEP’T OF PUBLIC HEALTH, PHARMACY BOARD POLICY NO. 2006-1, available at http://www.gotoec.org/pdfs/MA_PharmacistDispensing.pdf.

230. ILL. ADMIN. CODE tit. 68, §1330.91(j)(1) (2005).

231. CAL. BUS. & PROF. CODE § 733(b) (West Supp. 2006). A pharmacist “shall dispense drugs and devices” unless it is contraindicated for the patient or not in stock at the pharmacy. If the prescribed product is not in stock, the pharmacist must take steps to try to ensure that the patient has timely access to the prescribed medication at another pharmacy. *Id.*

232. S. 458, 93rd Gen. Assem., 1st Reg. Sess. § A (Mo. 2005) (amending Chapter 338, RSMo, by adding section 338.012, which reads in relevant part: “Pharmacists have a duty to fill all lawful prescriptions properly. If a pharmacist holds sincere religious beliefs that are inconsistent with filling any lawful prescription, such pharmacist shall . . . [f]ill the prescription unless his or her employer can accommodate the belief without undue hardship to the employer or customers.”).

233. N.J. Stat. Ann. 45:14-66(c)(West Supp. 2006) (“A pharmacist shall exercise independent professional judgment as to whether or not to dispense or refill a prescription or medication order. In determining to dispense or refill a prescription or medication order, the decision of the pharmacist shall not be arbitrary but shall be based on professional experience, knowledge or available reference materials.”).

234. H.B. 2807, 2005 Leg., Reg. Sess. § (W.Va. 2005) (amending the Code of West Virginia, 1931, as amended, by adding section 30-5-26, which provides in relevant part that a pharmacist may not refuse to dispense a lawful prescription unless it is contraindicated for the patient or it is not in stock).

235. 42 U.S.C.A. § 300a-7(b) (West 2003) (stating that public officials and public authorities are prohibited from imposing certain requirements contrary to the religious beliefs or moral convictions of individuals receiving federal monies under certain federal programs); 42 U.S.C. § 300a-7(d) (West 2003) (upholding an individual’s right to refuse to participate in a health service program or research activity that would be contrary to his different religious beliefs or moral convictions).

provide or participate in services such as abortion, contraceptive services, or sterilization services.²³⁶ Some state statutes are increasing protections for pharmacists' refusals, while other state statutes are expanding access to emergency contraception.²³⁷

Protections for pharmacist refusals are necessary for pharmacists to exercise their professional judgment and not be forced into acting against their beliefs. However, pharmacists have choice in deciding to enter the profession and in terms of the setting in which they work. Women have personal autonomy and exercise choice in making medical decisions, but if their choice involves taking Plan B within a small time frame, their options for exercising their choice may be more limited than pharmacists' choice of working environment. Pharmacists should also have the obligation to inform their employers of their objections in advance. With proper notice and "refer and refuse" policies, pharmacists can act in accordance with their conscience and without restricting women's access to medical treatments.

Women also need protections to ensure their prescriptions are ultimately filled. The employment-at-will doctrine enables employer-pharmacies to discharge employee-pharmacists for any reason or no reason at all.²³⁸ Violations of the pharmacies' company policy may be grounds for terminating pharmacists.²³⁹ Yet wrongful discharge in violation of public policy doctrine and Title VII offer some protection against the employment-at-will doctrine.²⁴⁰ Refusing pharmacists may face disciplinary action from professional associations, but these professional codes of ethics lack enforcement and are not legally binding.²⁴¹ State licensing boards have the authority to discipline pharmacists for certain acts or omissions and some of the professional codes of ethics are codified in state law. Unfortunately, these decisions are rarely available or indexed, which undermines the deterrent effect of such decisions relating to the discipline of pharmacists who refuse to fill valid prescriptions for emergency contraceptives. Unless the FDA approves nonprescription status, the battle for Plan B will continue to be fought under state employment law, state licensing boards, and state statutes.

236. STATE POLICIES IN BRIEF, *supra* note 139.

237. *See supra* Part II.C.2.iv, Part II.C.3.c.

238. *See* Part II.C.2.b.i.

239. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 508-09 (N.J. 1980).

240. *See* Parts II.C.2.b.ii. and II.C.2.b.iii.

241. *See* Part II.C.3.a; *see also* Marcia D. Greenberger & Rachel Vogelstein, *Pharmacist Refusals: A Threat to Women's Health*, 308 *SCIENCE* 1557, 1557-58 (2005) ("[The APhA] articulates a standard of professionalism in its Code of Ethics that is not legally binding.").

III. RECOMMENDED SOLUTIONS TO INCREASE ACCESS TO EMERGENCY CONTRACEPTION AND MINIMIZE CONFLICTS OF CONSCIENCE

Options for women needing emergency contraception pills have increased in recent years. Starting with the FDA's approval of Preven in 1998 (no longer manufactured as of 2004) and the commercial advertising of emergency contraception to American women, knowledge and availability of contraception has increased in the United States.²⁴² The current controversy over Plan B has increased awareness of the debate over access to emergency contraceptives in the United States, but confusion and differences of opinion continue to surround the debate.

Educational campaigns are necessary to inform the public and lawmakers about the public health benefits of emergency contraception. More importantly, access needs to be improved so all American women can utilize emergency contraception within its tight window of opportunity. Plan B's short time frame of effectiveness creates inherent obstacles in obtaining the drug. At the same time, health care providers have the right to exercise their conscience. However, a provider's right to conscience must be balanced against physicians' medical diagnosis and the patients' need for prescription drugs.

A number of options have the potential to increase access to emergency contraception: advance and telephone prescriptions, access in hospitals, pharmacy provisions, and nonprescription OTC status for emergency contraceptives such as Plan B. OTC status for Plan B, without age restrictions, provides the most access to emergency contraceptives across the United States and minimizes conflicts of conscience between patients and health care providers.

A. FDA Approval of OTC Status for Plan B

An alternative that would not implicate physicians, pharmacists, or their consciences is FDA approval for OTC status for Plan B. There are at least twenty-six countries where emergency contraception is obtainable without a prescription, including Albania, Belgium, Denmark, Finland, France, Israel, Ivory Coast, Lithuania Norway, Portugal, South Africa, Sri Lanka, Sweden, Switzerland and the United Kingdom.²⁴³ In France, school nurses were granted the right to dispense

242. Susan K. McCarthy, et al., *Availability of Services for Emergency Contraceptive Pills At High School-Based Health Centers*, 37 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 70, 70-71 (2005), available at <http://www.guttmacher.org/pubs/journals/3707005.pdf>; Planned Parenthood, *A Brief History of Emergency Hormonal Contraception*, available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/ec/fact-emergency-contraception-history.xml>.

243. GUTTMACHER INSTITUTE, EMERGENCY CONTRACEPTION: IMPROVING ACCESS (Dec. 2002), available at http://www.guttmacher.org/pubs/ib_3-03.pdf.

emergency contraceptive pills in junior and high schools.²⁴⁴ France has one of the lowest abortion rates in the world, and one-third the teenage abortion rate of the United States.²⁴⁵

Nonprescription status may be the most effective method of increasing access to emergency contraception in the United States, and avoiding the problems of conscience. Because women would be able to obtain emergency contraceptives without the involvement of any health care provider if the FDA were to approve OTC status for Plan B, the moral values of health care provider would not be implicated in the decision to use emergency contraception, and women could have “an extra level of control over their reproductive futures, [such as] deciding whether and when to have children.”²⁴⁶ The FDA, under President Bush’s administration, is unlikely to give OTC status to Plan B.²⁴⁷ Since December 2003, the FDA has found that Plan B meets the criteria to qualify as an OTC drug and two FDA advisory panels recommended Plan B be available OTC without a prescription. Yet, the FDA has denied OTC status for Plan B and has expressed concerns regarding promiscuity and use by adolescents. Some members of Congress have called for the resignation of FDA members who did not base their decisions on scientific reasoning.²⁴⁸ The FDA has been asked to reconsider its position by forty-one members of Congress.²⁴⁹ Recent studies rebut the FDA’s concerns regarding promiscuity; increased access to emergency contraception does not increase or alter sexual behaviors.²⁵⁰ However, the FDA has continued to stall and has failed to increase options for women by making Plan B available over the counter for all ages, suggesting that the FDA is under political pressure to maintain the *status quo* for Plan B.

244. Suzanne Daley, *France Provides Morning-After Pill to Schoolgirls*, N.Y. TIMES, Feb. 8, 2000, at A1.

245. Heather Boonstra, *Promoting Contraceptive Use and Choice: France’s Approach to Teen Pregnancy and Abortion*, GUTTMACHER REPORT ON PUB. POLICY, June 2000, at 3-4, available at <http://www.guttmacher.org/pubs/tgr/03/3/gr030303.pdf>.

246. Heather M. Field, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN’S L.J. 141, 147 (2000).

247. See *id.* at 204 (“[S]witching ECPs to OTC status [is] a politically unpopular move.”); Jeffrey M. Drazen et al., *The FDA, Politics, and Plan B*, 350 NEW ENG. J. MED. 1561, 1561 (2004) (suggesting that the FDA’s decision-making process is being influenced by political considerations).

248. Marc Kaufman, *2 FDA Officials Urged to Resign Over Plan B; Law Makers Call Decision Political*, WASH. POST, May 13, 2004, at A3.

249. *Id.*

250. See Cynthia C. Harper et al., *The Effect of Increased Access to Emergency Contraception Among Young Adolescents*, 106 OBSTETRICS & GYNECOLOGY 483 (2005).

1. *The Safety of Plan B*

The FDA has acknowledged that “Plan B is extraordinarily safe.”²⁵¹ This is especially true when compared to other OTC drugs. For example, if taken inappropriately, acetaminophen and aspirin can cause death.²⁵² Data has shown 56,680 emergency department visits, 26,256 hospitalizations, and 458 deaths in the United States result from acetaminophen ingestion each year.²⁵³ Studies have also shown that access to emergency contraception does not result in less effective use of regular contraception, more high-risk sexual behavior, more promiscuity, or increased rates of pregnancy or sexually transmitted diseases.²⁵⁴ These findings disprove claims made by the FDA that were never substantiated.²⁵⁵

If emergency contraception is used inappropriately, it does not result in serious harm.²⁵⁶ An overdose could result in relatively non-serious complications such as nausea, vomiting, or menstrual irregularity.²⁵⁷ There are also no known health risks associated with repeatedly using emergency contraceptives.²⁵⁸ While women can independently decide whether they need an emergency contraceptive, OTC status does not prevent women from having contact with health care providers if they so desire.²⁵⁹

2. *Implications of Dual-Status Age Requirements*

The FDA’s suggestion that Plan B be given dual-status lends support to age restrictions on access to Plan B, even though it is not clear that the FDA can legally give dual-status to the same drug.²⁶⁰ Age requirements would require women seeking emergency contraception to show proof of age, most likely through a driver’s license or government-issued identification.²⁶¹ This requirement would reduce access to emergency contraception for women of all ages who do not have identification on them.²⁶² This requirement would also disproportionately impact poor women and women in the inner-city who do not have driver’s licenses.²⁶³ Age restrictions could result in Plan B being “behind the counter,” resulting in

251. Wood, *supra* note 70, at 1198.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. Grimes, *supra* note 21, at 847.

257. *Id.*

258. DEP’T OF REPROD. HEALTH AND RESEARCH, WHO, LEVONORGESTREL FOR EMERGENCY CONTRACEPTION 2 (2005).

259. Grimes, *supra* note 21, at 847.

260. See discussion *supra* note 12.

261. Wood, *supra* note 70, at 1198.

262. *Id.* at 1199.

263. *Id.*

women having to explain their need for Plan B in public. This increases the potential of embarrassment and humiliation, and decreases privacy.²⁶⁴

Some states have already considered requiring minors to have parental consent before receiving contraceptive services supported by state funds.²⁶⁵ If the FDA approves OTC status for Plan B in the future, some states may require parental consent for minors to receive such OTC emergency contraceptives.²⁶⁶ A double-standard in access to contraception would be most pronounced in this situation, given that emergency contraception is sought most frequently from failures of contraceptive methods such as a torn condom,²⁶⁷ available without parental notification or consent.²⁶⁸

3. *Compelling the FDA to Act*

The FDA's refusal to approve OTC status for Plan B has already come under legal challenge. A complaint has been filed against the FDA in the United States District Court for the Eastern District of New York alleging that the agency did not follow its procedures when it first denied the application to switch Plan B from prescription-only status to OTC status.²⁶⁹ The complaint also alleges that by not approving nonprescription sales, the FDA violated the constitutionally guaranteed rights to equal protection and privacy of women seeking access to emergency contraception.²⁷⁰ On February 24, 2006 a federal judge in Brooklyn, New York denied the FDA's motion for a protective order and ruled that discovery should proceed.²⁷¹ If the case goes to trial, senior FDA officials may be required to testify about the FDA's decision to deny the application for OTC status for Plan B.

264. *Id.* at 1198-99.

265. See Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, THE GUTTMACHER REPORT ON PUB. POLICY Aug. 2000, at 4-5, available at <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

266. Grimes, *supra* note 21, at 848. Such state legislation will probably result in legal battles over the constitutionality of age restrictions and parental notification for receiving OTC emergency contraceptives. *Id.*

267. *Id.*

268. *Id.*

269. Compl. at ¶1, *Tummino v. Crawford* (E.D.N.Y. Jan. 21, 2005), available at http://www.reproductiverights.org/pdf/crt_012105_fdacomplaint.pdf.

270. *Id.*

271. Decision and Order at 39, *Tummino v. Von Eschenbach*, Case 1:05-cv-00366-ERK-VVP (E.D.N.Y. Feb. 24, 2006), available at <http://www.reproductiverights.org/pdf/104OrderDenyingMotionProtectiveOrder.pdf>.

B. Alternative Solutions to Increase Access to Plan B

1. Proactive Physicians: Advance and Telephone Prescriptions

The American Medical Women's Association and the American College of Obstetricians and Gynecologists recognize that all sexually active women are at risk of contraceptive emergencies.²⁷² As a result, they are encouraging their physician members to discuss emergency contraception and offer advance prescriptions to sexually active women during their routine office visits.²⁷³ Women would be able to fill their prescriptions and save the pills in case the need for emergency contraception arises.²⁷⁴

Telephone prescriptions are also suggested to eliminate the need for office visits.²⁷⁵ A physical examination is not required to prescribe Plan B because Plan B consists of the same hormones found in traditional birth control pills, and because the duration of exposure is short, Plan B is considered to be safe for almost all women.²⁷⁶ In North Carolina a toll-free telephone that women can call to receive counseling and a prescription was established in February 2001.²⁷⁷

Proactive measures by physicians can potentially increase timely access to emergency contraception. Yet, the most difficulties arise over filling prescriptions for Plan B. Issues arise over pharmacist refusals to fill a prescription and pharmacies that do not carry emergency contraceptives or do not have them in stock.²⁷⁸ Demand may have been low for Plan B initially due to a lack of awareness of its availability on the part of women and physicians.²⁷⁹ State law also determines if physicians can dispense emergency contraceptives directly to patients. In that case, the patient would be able to bypass the pharmacist but not the doctor, who may also object. Generally it is more complicated to get an appointment and see a physician, especially in the short time frame that emergency contraception is effective.

272. Heather Boonstra, *Emergency Contraception: Steps Being Taken to Improve Access*, THE GUTTMACHER REPORT ON PUB. POLICY, Dec. 2002, at 11, available at <http://www.guttmacher.org/pubs/tgr/05/5/gr050510.pdf>.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

2. Emergency Contraception in Hospitals

According to the AMA, pregnancy prevention is an essential component of treatment for women who have been sexually assaulted.²⁸⁰ Legislation requiring hospital emergency rooms to provide services related to emergency contraception exists in nine states.²⁸¹ Seven states require emergency rooms to provide information about emergency contraception,²⁸² and seven states require emergency rooms to dispense emergency contraception to sexual assault victims upon request.²⁸³

Connecticut's Attorney General Richard Blumenthal said on March 6, 2006, that the state's Catholic hospitals may be required to prescribe emergency contraception to rape victims.²⁸⁴ Leslie Gabel-Brett, executive director of the state's Permanent Commission on the Status of Women, explained it is an unfair burden to require women seeking access to emergency contraception to be transferred from hospital to hospital, and that "[e]veryone has the right to expect a hospital to act like a hospital."²⁸⁵ On March 2, 2006, Blumenthal issued a legal opinion to the state Comptroller stating that she has the authority and a legal obligation to remove Wal-Mart, or any pharmacy, that refuses to fill covered prescriptions such as Plan B from the state's health insurance provider network.²⁸⁶ "Wal-Mart's unjustifiable and unacceptable refusal to provide a prescription clearly warrants removal from the state's provider network," Blumenthal stated.²⁸⁷ Furthermore:

280. American Medical Association, *Strategies for the Treatment and Prevention of Sexual Assault* 15 (1995), available at <http://www.ama-assn.org/ama1/pub/upload/mm/386/sexualassault.pdf>; American Medical Association, *American Medical Association Policy Compendium Women Physicians Congress 1* (1995), available at http://www.ama-assn.org/ama1/pub/upload/mm/19/policycompendium_2005.pdf.

281. CAL. PENAL CODE §13823.11(e) & (g)(4)(A) (2002); 410 ILL. COMP. STAT. ANN. 70/2.2 (b) (West 2005); MASS. GEN. LAWS ANN. ch. 111, §70E(o) (West 2006); N.J. STAT. ANN. §26:2H-12.6c (West 2005); N.M. STAT. ANN. §24-10D-3 (A) (Michie 2003); N.Y. PUBLIC HEALTH LAW §2805-p (2) (McKinney 2006); S.C. CODE ANN. §16-3-1350 (B) (Law. Co-op. 1997); TEX. HEALTH AND SAFETY CODE ANN. §171.012(C) (Vernon 2005); WASH. REV. CODE ANN. §70.41.350 (1) (West 2006).

282. 410 ILL. COMP. STAT. ANN. §70/2.2 (B) (West 2005); MASS. GEN. LAWS ANN. ch. 111 §70E(O) (West 2006); N. J. STAT. ANN. §26:2H-12c (West 2005); N.M. STAT. ANN. §24-10D-3 (A) (Michie 2003); N.Y. PUBLIC HEALTH LAW §2805-P (2) (McKinney 2006); TEX. HEALTH AND SAFETY CODE ANN. §171.011 (Vernon 2005); WASH. REV. CODE ANN. §70.41.350 (1) (West 2006).

283. CAL. PENAL CODE §13823.11 (e)(2) & (g)(4)(B) (2002); MASS. GEN. LAWS ANN. ch. 111 §70E (West 2006); N. J. STAT. ANN. §26:2H-12.6c(c) (West 2005); N.M. STAT. ANN. §24-10D-3 (A)(3) (Michie 2003); N.Y. PUBLIC HEALTH LAW §2805-p (2)(c) (McKinney 2006); S.C. CODE ANN. §16-3-1350 (B) (Law. Co-op. 2006); WASH. REV. CODE ANN. §70.41.350(1)(C) (West 2006).

284. Hilary Waldman, *Hospitals' Plan B Policies Argued*, HARTFORD COURANT, Mar. 7, 2006 at B1.

285. *Id.*

286. *State Health Providers Must Provide Plan B*, CONN. LAW TRIBUNE, Mar. 6, 2006, at 8.

287. *Id.*

This denial of a medically necessary prescription means that the comptroller not only can—but must—remove Wal-Mart from the program. Being in the pharmacy network means following the plan terms in full—not selectively. These prescription plans have the force of law—and must be enforced. Our state comptroller has a right and responsibility to remove Wal-Mart, or any pharmacy, that refuses to provide medically necessary drugs, as required by law.²⁸⁸

Private corporations could require participants to provide emergency contraception to participate in their health plans, but companies may fear consumer boycotts.

3. *Pharmacists Dispensing Emergency Contraception Without Prescriptions*

Despite the existing access problems surrounding contraception in pharmacies, some states are implementing legislation seeking to make emergency contraception available primarily through pharmacists.²⁸⁹ Contraceptive emergencies are most likely to occur on evenings, weekends, and holidays, times pharmacies are open.²⁹⁰ Pharmacies also tend to be conveniently located.²⁹¹ Thus, allowing pharmacists to dispense emergency contraceptives without a prescription is one proposed method of increasing access to emergency contraception. While this would speed up access to emergency contraception when the pharmacist does not have an objection, it would not increase access in the case of objecting pharmacists or pharmacies that do not carry Plan B.

a. States Allowing Pharmacists to Dispense Plan B Without a Prescription

The ability to dispense drugs is regulated by the states.²⁹² States with pharmacy provisions either have collaborative practice agreements or state-approved protocols.²⁹³ Collaborative practice agreements permit prescribers to authorize pharmacists to engage in specified activities, including adjusting or initiating drug therapy.²⁹⁴ In states with state-approved protocol, collaborative practice agreements or similar agreements between physicians and pharmacists are

288. *Id.* There are 166,000 state employees, retirees, and dependants who participate in Connecticut's health insurance plan. *Id.*

289. Boonstra, *supra* note 272, at 11.

290. *Id.*

291. *Id.*

292. PHARMACY ACCESS PARTNERSHIP, WHY EC AND PHARMACIES? (2006), <http://www.go2ec.org/WhyECAndPharmacies.htm>.

293. KAISER FAMILY FOUND., PHARMACIST PROVISION OF EMERGENCY CONTRACEPTION TO WOMEN WITHOUT A DOCTOR'S PRESCRIPTION, AS OF JANUARY 1, 2006 (2006), <http://www.statehealthfacts.kff.org/cgi-bin/healthfacts.cgi?action=comparebin/healthfacts.cgi?action=compare&category=Women%27s+Health&subcategory=Emergency+Contraception&topic=Pharmacist+Provision+of+EC>.

294. PHARMACY ACCESS PARTNERSHIP, COLLABORATIVE PRACTICE AGREEMENTS (2006), <http://www.go2ec.org/CollabPracticeAgreements.htm>.

allowed, but modification of existing statutes or regulations is required to allow pharmacists to dispense emergency contraception.²⁹⁵

Currently there are eight states (Alaska, California, Hawaii, Maine, Massachusetts, New Hampshire, New Mexico, and Washington) that allow pharmacists to dispense emergency contraceptives without a prescription.²⁹⁶ In these states, patients can bypass physicians in their quest for emergency contraception, but objecting pharmacists can still block access to medications like the morning-after pill.²⁹⁷

b. Proposed Maryland Legislation Allowing Pharmacists to Dispense Emergency Contraceptives Without a Prescription

In Maryland, bills have been introduced to authorize licensed pharmacists to dispense emergency contraception to women without prescriptions.²⁹⁸ On January 26, 2006, Senator Sharon M. Grosfeld (D) introduced Senate Bill 297,²⁹⁹ which would establish a contraception dispensing program for licensed pharmacists. Delegate James Hubbard (D) introduced an identical bill, House Bill 828, in the House of Delegates on February 8, 2006.³⁰⁰ The legislation is supported by women's rights groups and others who believe that legislation should allow women to obtain Plan B during the time period after sexual intercourse when it is most effective.³⁰¹ This could potentially decrease unintended pregnancies.³⁰² Opponents of the bills believe such a law would approve a practice that is in essence abortion.³⁰³ The bill proposed by Grosfeld does not state who would be able to get emergency contraception at the pharmacy and under what conditions,³⁰⁴

295. KAISER FAMILY FOUND., *supra* note 293.

296. ALASKA ADMIN. CODE tit.12, §52.240(a) (2004); CAL. BUS. & PROF. CODE §4052 (8)(A) (West 2006); HAW. REV. STAT. §461-1 (1) (C) (Michie 2005); Me. Rev. Stat. Ann. tit. 32, §13822 (West 2005); N.M. ADMIN. CODE tit. 16, §19.26.10 (C) (2004); WASH. REV. CODE ANN. §69.41.030(1) (West 2006).

297. As part of the battle over scope of practice fought between physicians and non-physicians, some physicians raise concerns over having pharmacists dispense medications without physician oversight. See Boonstra, *supra* note 272, at 11.

298. PHARMACY ACCESS PARTNERSHIP, MARYLAND STATE PROFILE (2006), <http://www.go2ec.org/ProfileMaryland.htm>.

299. S.B. 297, 2006 Leg., 421st Sess. (Md. 2006).

300. H.B. 828, 2006 Leg., 421st Sess. (Md. 2006).

301. Jill Rosen, *Bill Targets Plan B Access Contraception would not need prescription*, BALTIMORE SUN, Feb. 16, 2006 at 1B.

302. *Id.*

303. *Id.*

304. *Id.*; see also S.B. 297, 2006 Leg., 421st Sess. § 1 (Md. 2006).

a protocol would be developed by the Maryland Department of Health and Mental Hygiene and licensed pharmacists.³⁰⁵

The Honorable John F. Fader II, Pharm. D., a professor of pharmacy law at the University of Maryland School of Pharmacy, personally opposes the bill.³⁰⁶ Judge Fader cautions that pharmacists will need malpractice insurance if they dispense medications or perform services such as blood pressure exams and vaccinations as allowed in some states.

Regarding conscience clauses, Judge Fader tells his pharmacy law students that “if you can’t dispense certain medications [such as emergency contraception], then you have a right not to do that, but it is not a legally recognized right.”³⁰⁷ Judge Fader cautions that pharmacists only have this right if they are willing to immediately pick up the phone and find a pharmacist who will dispense the medication. According to Judge Fader, if every pharmacist picked up the phone and found a pharmacy with the medication in stock and willing to dispense it, then we would not need legislation.

Judge Fader estimates that only three to four pharmacy students, out of one hundred students at the University of Maryland School Pharmacy, approach him about conscience clauses and feel concerned about dispensing certain medications. Moreover, Judge Fader suggests that people who feel they cannot dispense certain medications should practice in Catholic hospitals; otherwise they do not belong in the profession.³⁰⁸

Judge Fader also points out that state statutes allowing pharmacists to dispense Plan B without a physician’s prescription do not create uniform access to Plan B state-to-state or pharmacy-to-pharmacy. While the number of refusing pharmacists appears to be small, allowing pharmacists to dispense Plan B does not address situations where pharmacists do object and possibly exposes non-objecting pharmacists to additional liability. State legislation authorizing Plan B to be dispensed without a physician seems to support the position that Plan B is appropriate for nonprescription status. If the FDA would approve nonprescription status for Plan B, the problem of access would be solved at the federal level, rendering state legislation unnecessary. Thus, FDA approval of OTC status for Plan B would provide the greatest level of access across the United States without implicating providers’ conscience.

305. S.B. 297, 2006 Leg., 421st Sess. § 1 (Md. 2006).

306. Interview with the Honorable John F. Fader II, Professor of Law and Pharmacy, University of Maryland at Baltimore in Baltimore, Md. (Feb. 23, 2006) (on file with author).

307. *Id.*

308. *Id.*

IV. CONCLUSION

Access to emergency contraception is a highly charged political issue, and emergency contraceptives are frequently the subject of a pharmacist's conscientious objection. Any viable solution needs to balance the rights of the patient with those of the pharmacists; policies protecting one interest may do so by harming the other interest. Fortunately a consensus on the issues is not necessary. This is a controversy where a regulatory alternative to litigation exists, which would protect both interests. Providing Plan B over the counter is a political and social compromise that gives American women the same access to emergency contraception that women enjoy across the world.

Imagine a woman has a contraceptive failure at two o'clock on a Saturday morning. She runs across the street to her neighborhood drug store, conveniently open twenty-four hours. After finding the aisle with Plan B, she heads to the checkout counter and grabs a pack of gum. Returning home, she is able to take her first dose of Plan B within an hour. Better yet, imagine she sends her partner out to the drug store. This woman would not need to have an imagination if she lived in thirty-eight other countries besides America.

The regulatory solution of the FDA's approval of OTC status for the morning after-pill may be a model for solving one aspect of the refusal clauses; however, not every objectionable medication is suitable for OTC status. Even if there are alternative methods to increase a woman's access to birth control and emergency contraception, as long as these broad refusal clauses exist, certain medications may be difficult to obtain depending on the political climate and the states in which patients attempt to obtain prescription drugs. Ultimately, in a democracy, the decision rests not with individual pharmacists or patients, but with the people collectively. Consequently, the need for clearer nationwide policies for pharmacist refusal clauses and clear repercussions for pharmacists' failure to fulfill ethical and professional duties are needed.