Saint Louis University Journal of Health Law & Policy

Volume 1
Issue 2 *New Perspectives on Familiar Issues*

Article 5

2008

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Recommended Citation

Jennifer E. Spreng, *Conscientious Objectors Behind the Counter: Statutory Defenses to Tort Liability for Failure to Dispense Contraceptives*, 1 St. Louis U. J. Health L. & Pol'y (2008).
Available at: https://scholarship.law.slu.edu/jhlp/vol1/iss2/5

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CONSCIENTIOUS OBJECTORS BEHIND THE COUNTER: STATUTORY DEFENSES TO TORT LIABILITY FOR FAILURE TO DISPENSE CONTRACEPTIVES

JENNIFER E. SPRENG*

I. INTRODUCTION

The United States Food and Drug Administration's decisions in the past decade to approve both RU-486 and Plan B have created crises of conscience for some religious pharmacists.[1] RU-486 induces abortion in the first trimester of pregnancy without surgical intervention[2] and Plan B is a two-pill "emergency contraceptive" regimen[3] that may have abortifacient

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I owe a great debt to Katrina Zeno for introducing me to Pope John Paul II's dynamic theology of the body and to Adam Stephenson for assisting me with several points of Mormon practice. I am also grateful for the support of my loyal research assistants, especially Becky Cholewka and Niki Swank who performed very productive research on this project as well as Javier Leija and Roberto Escobar, whose efforts on others allowed me to focus on this one.

Any errors are obviously my own.

1. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 997-99 (C.D. Ill. 2006) ("Plaintiffs allege that they hold certain religious beliefs that prohibit them from dispensing Emergency Contraceptives."); *Freedom of Conscience for Small Pharmacies: Hearing Before the H. Comm. on Small Business*, 109th Cong. 2 (2005) [hereinafter *Freedom of Conscience Hearing*].

2. U.S. Food & Drug Admin., Ctr. for Drug Eval. & Res., Medication Guide: Mifeprex, at What is Mifeprex? (July 7, 2005), *available at* www.fda.gov/cder/drug/infopage/mifepristone/mifeprexMedguide20050719.pdf (last visited Aug. 9, 2008); *see also* Region v. Taft, 444 F.3d 502, 505 (6th Cir. 2006).

3. U.S. Food & Drug Admin., Ctr. for Drug Eval. & Res., Plan B: Questions and Answers, at What is Plan B? (Dec. 14, 2006), *at* www.fda.gov/CDER/DRUG/infopage/planB/planBQandA20060824.htm (last visited Aug. 9, 2008); *see also* Tummino v. Von Eschenbach, 427 F. Supp. 2d 212, 216 (E.D.N.Y. 2006).

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properties.[4] Some religious pharmacists prefer not to dispense the drugs because their religious scruples forbid them from participating in abortions.[5] Some also object to dispensing daily oral contraceptives[6] on the same basis.[7]

Some religious pharmacists'[8] refusals to dispense these drugs, especially in Illinois,[9] have created a firestorm of controversy.[10] Both the federal government[11] and most states have long protected healthcare professionals from participating in abortions,[12] which probably would protect pharmacists from any negative consequences of refusing to dispense RU-486. Recently,

4. *See* Frank Davidoff & James Trussell, *Plan B and the Politics of Doubt*, 296 JAMA 1775, 1777 (2006); Chris Kahlenborn, Joseph B. Stanford, & Walter L. Larimore, *Postfertilization Effect of Hormonal Emergency Contraception*, 36 ANNALS PHARMACOTHERAPY 465 (2002).

5. *See, e.g.*, *Freedom of Conscience Hearing*, *supra* note 1, at 4-6 (statement of Luke Vander Bleek, Pharmacist, Fitzgerald & Eggleston Pharmacies).

6. *Compare* Matthew White, Comment, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights with the Rights of Patients and Institutions*, 2005 WIS. L. REV. 1611, 1611-12 (2005) (discussing Neil Noesen's story, which has received considerable notoriety, that while working at a pharmacy store on a day when no other pharmacist was in the store, he refused to fill or transfer numerous customers' prescriptions for "pills [that] were being taken for contraceptive purposes" on the basis that "'it would be a sin to induce another to sin.'") (quoting Anita Weier, *Rx License Is on the Line in Abortion Fight; Pharmacist Refused Pill Order Due to Faith*, CAP. TIMES (Madison, Wis.), Oct. 12, 2004, at 1A), *with* Jim Suhr, *Pharmacist Has No Apologies for His Stand*, BELLEVILLE NEWS-DEMOCRAT, Dec. 18, 2005, at B1 (discussing Rich Quayle, a southern Illinois pharmacist and plaintiff in one of the most significant challenges to what is known colloquially as a "must fill" regulation, who says he has no problem dispensing daily contraceptive pills, but that emergency contraception, "is not your typical birth control," and instead can operate as an early abortion).

7. Research differs on the point, but evidence supports a conclusion that oral contraceptives can have an abortifacient effect in some parts of a woman's cycle. *See, e.g.*, Walter L. Larimore & Joseph B. Stanford, *Postfertilization Effects of Oral Contraceptives and Their Relationship to Informed Consent*, 9 ARCHIVES FAM. MED. 126, 131 (2000).

8. This article will, for the most part, refer to pharmacists who refuse to dispense various contraceptive or abortifacient drugs based on religious scruples as "dissenting" or "refusing" pharmacists in order to distinguish them from otherwise religious pharmacists who do not feel bound to refuse.

9. *See Freedom of Conscience Hearing*, *supra* note 1, at 2; Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 470-71 (2006); *Illinois Reaches Tentative Compromise on Dispensing of 'Morning After' Pill*, ST. LOUIS POST-DISPATCH, Oct. 11, 2007, at B7; Editorial, *Look Where Governor Got Us*, BELLEVILLE NEWS-DEMOCRAT, Oct. 12, 2007, at A4.

10. *See generally* Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83, 84-95 (2006).

11. 42 U.S.C. § 300a-7(b) (2000).

12. JODY FEDER, CONG. RESEARCH SERV., THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS 2 (2005), *available at* www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf (last visited Aug. 9, 2008).

some state legislators have rushed to protect pharmacists refusing to dispense contraception.[13] Other states already have statutes on the books that arguably relieve pharmacists from employment consequences,[14] professional ethics violations,[15] criminal liability,[16] and civil liability[17] for refusing to dispense. Other statutory provisions simply prohibit healthcare professionals "from refusing to provide family planning services when such refusal is based upon religious or conscientious objection."[18] Professional pharmacist associations beefed up their endorsements of conscience protections for pharmacists that would not impede customer access to prescription drugs.[19] Even Pope Benedict XVI recently weighed in on the

13. These states include Arkansas, Georgia, Mississippi, and South Dakota. *See* National Conference of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation (Nov. 2007), *at* www.ncsl.org/programs/health/ConscienceClauses.htm (last visited Aug. 9, 2008). In 2004, Mississippi enacted an extremely broad "Health Care Rights of Conscience Act" that specifically names a pharmacist among the professionals protected from a broad range of consequences "for declining to participate in a health care service that violates his or her conscience." MISS. CODE. ANN. §§ 41-107-3(b) & 41-107-5 (2004).

14. *E.g.*, CAL. BUS. & PROF. CODE § 733(b)(3) (West 2007).

15. *E.g.*, GA. COMP. R. & REGS. 480-5-.03(n) (2001), *available at* http://rules.sos.state.ga.us/docs/480/5/03.pdf (last visited Aug. 9, 2008) ("It shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs.").

16. *E.g.*, 745 ILL. COMP. STAT. 70/4 (1998).

17. *See, e.g.*, FLA. STAT. § 381.0051(6) (2007) (protects "a physician or other person" from liability for "refusing to furnish any contraceptive or family planning service . . . for medical or religious reasons"); *cf.* GA. CODE ANN. § 16-12-142(b) (2007) (distinguishing between "a drug which purpose is to terminate a pregnancy" and "birth control medication" and protecting pharmacists who refuse to fill prescriptions for the former but not the latter).

18. *E.g.*, ME. REV. STAT. ANN. tit. 22, § 1903(4) (2007). The Maine provision is similar to that of many states: "[n]o private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection." *Id.* The provision could be construed to protect pharmacies as institutions and pharmacists as employees from many consequences of refusing to dispense.

19. *E.g.*, Am. Pharmacists Ass'n, *Official Policy of the American Pharmacists Association*, *Pharmacist Conscience Clause*, (Sept./Oct. 2004) ("1. APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal. 2. APhA shall appoint a council on an as needed basis to serve as a resources for the profession in addressing and understanding ethical issues."); AM. COLL. OF CLINICAL PHARMACY, AMERICAN COLLEGE OF CLINICAL PHARMACY POSITION STATEMENT: PREROGATIVE OF A PHARMACIST TO DECLINE TO PROVIDE PROFESSIONAL SERVICES BASED ON CONSCIENCE (2005), *available at* www.accp.com/position/pos31_200508.pdf (last visited Aug. 9, 2008); Letter from leaders of professional pharmacists' groups to the editor of Obstetrics and Gynecology, Pharmacist Critique Woefully Outdated and Uninformed (May 2006), *available at* www.go2ec.org/pdfs/RPh_rebuttal_May2006.pdf (last visited Aug. 9, 2008) (supporting conscience protections for pharmacists with backing of American Society of

side of conscientious objection, telling the 25th International Congress of Catholic Pharmacists that pharmacists have both a right and obligation not to dispense emergency contraception: "Pharmacists must seek to raise people's awareness so that all human beings are protected from conception to natural death, and so that medicines truly play a therapeutic role." [20]

But sympathy for dissenting pharmacists is hardly unanimous. Pro-choice activist groups have mobilized against refusing pharmacists and their lawmaker allies.[21] The American Medical Association condemned the pharmacists' position.[22] Even though conscience supporters won the early legislative and regulatory battles, especially with regard to state pharmacy board ethics codes,[23] efforts to require pharmacists to dispense contraception regardless of conscience have had more traction and success.[24] In the past few months, both New Jersey[25] and Washington

Health-System Pharmacists, the Academy of Managed Care Pharmacists, and the American College of Clinical Pharmacy).

20. *Pope: Druggists Can Object to Emergency Contraception*, BELLEVILLE NEWS-DEMOCRAT, Oct. 30, 2007, at A2; *Pope Backs Right to Conscientious Objection*, CATH. WORLD REP., Dec. 2007, at 9.

21. *E.g.*, SONDRA GOLDSCHEIN, AM. CIVIL LIBERTIES UNION FOUND., RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACCESSING BIRTH CONTROL AT THE PHARMACY 2, 17 (2007), *available at* www.aclu.org/images/asset_upload_file576_29402.pdf (last visited Aug. 9, 2008) (urging "advocates to pursue policies that ensure that women are able to obtain birth control at the same pharmacy without added delay while, wherever possible, accommodating individual religious belief").

22. *See* AM. MED. ASS'N, H-120.947: PRESERVING PATIENTS' ABILITY TO HAVE LEGALLY VALID PRESCRIPTIONS FILLED, *at* www.ama-assn.org/apps/pf_new/pf_online?f_n=resultLink&doc=policyfiles/HnE/H-120.947.HTM&s_t=H+120.947&catg=AMA/HnE&catg=AMA/BnGnC&catg=AMA/ (last visited Aug. 9, 2008) (supporting "legislation that requires individual pharmacists or pharmacy chains to fill legally valid prescriptions or to provide immediate referral to an appropriate alternative dispensing pharmacy without interference").

23. Beginning in 1998, several states have clarified pharmacists' protections from professional discipline. *E.g.*, S.D. CODIFIED LAWS § 36-11-70 (2007) (enacted in 1998); GA. COMP. R. & REGS. 480-5-.03(n) (2001); N.C. BD. OF PHARMACY, CONSCIENCE CONCERNS IN PHARMACIST DECISIONS (2005), *available at* www.ncbop.org/LawsRules/ConscienceClause.pdf (last visited Aug. 9, 2008).

24. *E.g.*, ILL. ADMIN. CODE tit. 68, § 1330.91 (2006); *see also* Sarah J. Vokes, *Just Fill the Prescription: Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context*, 24 LAW & INEQ. 399, 417-20 (2006). Also, in 2005, California enacted a statute requiring pharmacists who refuse to dispense on religious or other grounds to protect a patient's access to the drug, CAL. BUS. & PROF. CODE § 733(b)(3) (West 2007). In 2006, California amended its statutes to require pharmacies where refusing professionals work to post signs informing customers of the refusal and their rights to timely access to contraception, CAL. BUS. & PROF. CODE §§ 733(f) & 4122(a) (West 2007). *See* Sophia Rowlands, *Chapter 417: Contraceptives and Conscience Find Compromise in California*, 37 MCGEORGE L. REV. 166 (2006) (discussing the California legislation).

state[26] promulgated such regulations. Some states adopted rules requiring providers, regardless of religious scruples, to inform rape victims seeking medical attention about emergency contraception and to dispense it upon request.[27] Court challenges to "must-fill" statutes and rules have produced mixed results.[28] Academicians and student commentators have overwhelmingly condemned dissenting pharmacists' refusals to dispense.[29] Many pharmacies have terminated refusing pharmacists,[30] and at least one pharmacist has suffered professional discipline.[31]

25. N.J. STAT. ANN. § 45:14-67.1 (West 2007); National Conference of State Legislatures, *supra* note 13.

26. Wash. Admin. Code 246-863-095, 246-869-010 (2007); *see also* Curt Woodward, *Plan B Rule Sparks Lawsuit*, SEATTLE TIMES, July 27, 2007, at B4 (explaining that under the new regulation, "druggists who believe emergency contraceptives are tantamount to abortion can't stand in the way of a patient's right to the drugs"). The Ninth Circuit Court of Appeals recently upheld a preliminary injunction against enforcement of Washington's regulations pending appeal of the district court's injunction order. Steven M. Ellis, *Court Upholds Injunction Against Washington 'Plan B' Pill Rules*, METROPOLITAN NEWS-ENTERPRISE, May 5, 2008, at 1, *available at* www.metnews.com/articles/2008/plan050508.htm (last visited Aug. 9, 2008).

27. *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 70E(o) (West 2008); Tom Davis, *An 'A' Plan for Plan B: Connecticut's Cautionary Tale*, NAT'L CATH. REG., Nov. 11-17, 2007.

28. *E.g.*, Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164 , 1171 (Ill. App. Ct. 2007) (upheld dismissal in suit challenging Illinois regulation that required pharmacists to dispense morning after pills for lack of ripeness), *leave to appeal allowed by* 875 N.E.2d 1113; *'Morning-After' Pill Suit is Settled: Pharmacists May Have Someone Else Dispense It*, BELLEVILLE NEWS-DEMOCRAT, Oct. 11, 2007, at A1 (describing the settlement in a case challenging the constitutionality of an Illinois regulation that only merely permits refusing pharmacists to "stand aside" as another pharmacist fills contraceptive prescriptions). Ongoing litigation in Washington state over the constitutionality of its regulations appeared to favor the pharmacists; a federal district judge entered a preliminary injunction on November 8, 2007, against the operation of must-fill regulations. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1248 (W.D. Wash. 2007). The decision is on appeal to the Ninth Circuit. On May 1, 2008, the Ninth Circuit denied the defendants' motion for a stay pending appeal of the district court's preliminary injunction. Stormans, Inc. v. Selecky, 526 F.3d 406 (9th Cir. 2008).

29. Among the more strident works are the following: R. Alta Charo, *The Celestial Fire of Conscience – Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471 (2005); Leslie C. Griffin, *Conscience and Emergency Contraception*, 6 HOUS. J. HEALTH L. & POL'Y 299 (2006); Smearman, *supra* note 9; Jason Green, Commentary, *Refusal Clauses and the Weldon Amendment: Inherently Unconstitutional and a Dangerous Precedent*, 26 J. LEGAL MED. 401 (2005); Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists' Consciences and Women's Access to Contraception*, 16 HEALTH MATRIX 237 (2006); Minh N. Nguyen, Comment, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves from Them?*, 8 SCHOLAR 251 (2006); Dennies Varughese, Comment, *Conscience Misbranded!: Introducing the* Performer v. Facilitator *Model for Determining the Suitability of Including Pharmacists Within Conscience Clause Legislation*, 79 TEMP. L. REV. 649 (2006).

30. *E.g.*, Menges v. Blagojevich, 451 F. Supp. 2d 992, 995 (C.D. Ill. 2006); Noesen v. Med. Staffing Network, Inc., No. 06-C-071-S, 2006 WL 1278823, *1 (W.D. Wis. May 5,

More recently, the focus in academic circles has shifted from advocating for must-fill rules that require pharmacists to dispense contraceptives and abortifacients to teasing out support in tort law for wrongful conception and other common law actions against refusing pharmacists.[32] The possibility of tort liability is not trivial; a court has already held a pharmacist liable for wrongful conception under different circumstances.[33] Moreover, pharmacists' legal duties to their customers have expanded considerably during the past few decades, making eventual recognition of liability more realistic.[34]

This Article examines the viability of statutory conscience provisions as defenses for pharmacists who would otherwise be liable for personal injuries for failing to dispense contraceptives. Part II describes the circumstances as well as the legal and professional trends that could convince a court to find a common law duty to dispense. Part III explains some religious teachings that would make such a development a catch-22 for many religious pharmacists. Part IV shows why federal constitutional law may still have prospects after *Employment Division v. Smith* to protect religious pharmacists from tort liability, especially in light of recent decisions challenging must-fill laws, but asserts that pharmacists still need more short-term lines of defense. Part V describes the deeply rooted American system of statutory conscience protections and assesses their viability for protecting religious pharmacists. Part VI defends statutory conscience protections for pharmacists from Establishment Clause attacks. The Article concludes that in the still-unlikely

2006) (Plaintiff alleged "he was terminated as a pharmacist because he sought to avoid the distribution of contraceptive articles . . . ."); *see also* Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999) (explaining that the pharmacy manager "decided not to pursue the Plaintiff's application for employment" because "the Plaintiff refused to sell condoms due to his religious beliefs").

31. *See* Misty Cooper Watt, Comment, *Pharmacist Knows Best? Enacting Legislation in Oklahoma Prohibiting Pharmacists from Refusing to Provide Emergency Contraceptives*, 42 TULSA L. REV. 771, 780-84 (2007) (describing the disciplinary proceedings against Neil Noesen).

32. *E.g.*, Kristen Marttila Gast, *Cold Comfort Pharmacy: Pharmacist Tort Liability for Conscientious Refusals to Dispense Emergency Contraception*, 16 TEX. J. WOMEN & L. 149, 176-83 (2007); Heather A. Weisser, Note, *Abolishing the Pharmacist's Veto: An Argument in Support of a Wrongful Conception Cause of Action Against Pharmacists Who Refuse to Provide Emergency Contraception*, 80 S. CAL. L. REV. 865, 891-93 (2007).

33. *See* Troppi v. Scarf, 187 N.W.2d 511, 520 (Mich. Ct. App. 1971) (permitting plaintiffs to maintain an action for the cost of raising their child after the pharmacist negligently provided the wife with tranquilizers instead of the prescribed oral contraceptive), *overruled in part by* Rouse v. Wesley, 494 N.W.2d 7, 10 (Mich. Ct. App. 1992) (holding that in Michigan parents may not recover customary cost of raising a child where the conception and birth occurred as a result of negligence of doctor or other responsible person).

34. *See infra* Part II; *see also* Jennifer E. Spreng, *Pharmacists and the "Duty" to Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215 (2008).

event that a woman could prove what would otherwise be a pharmacist's liability in tort, properly drafted statutory conscience clauses could serve as a complete defense.[35]

II. PROSPECT OF TORT LIABILITY FOR FAILURE TO DISPENSE

The concern that pharmacists might face exposure for professional malpractice arising from any conduct other than failure to dispense *accurately*[36] is a comparatively new one.[37] In an unpublished 1996 decision concerning a pharmacist who turned away a long-term customer due to concerns about the genuineness of a prescription, the Fifth Circuit held that "professionals do not owe a duty to exercise their particular talents, knowledge, and skill on behalf of every person they encounter in the course of the day."[38] As to duties to warn, which make up the bulk of pharmacist duty cases, courts have often held that pharmacists had no duty to customers based on the learned intermediary doctrine.[39] In those situations,

35. *See infra* Part VII.

36. *E.g.*, Pharmcare Okla., Inc. v. State Health Care Auth., 152 P.3d 267, 273 (Okla. Civ. App. 2006) (holding that if a prescription appears valid on its face, a pharmacist's duty to the patient is to accurately fill and dispense the prescription); Huggins v. Longs Drug Stores Cal., Inc., 862 P.2d 148, 149, 154 (Cal. 1993) (rejecting the plaintiffs' "claim as 'direct victims' based on a limited duty of care owed by the pharmacist to persons other than the patient for whom the prescription is filled" because it "would inevitably enlarge the potential liabilities of practically all providers of medical goods and services obtained by parents solely for the treatment of their children, or by other caregivers").

37. *See* David B. Brushwood, *The Pharmacist's Duty to Warn: Toward a Knowledge-Based Model of Professional Responsibility*, 40 DRAKE L. REV. 1, 18-24 (1991) [hereinafter Brushwood, *Duty to Warn*] (noting that a majority of successful lawsuits against pharmacists stem from the "failure . . . to accurately perform a mechanical task, resulting in . . . the wrong drug, wrong dose, or wrong directions"); David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should "Can" Imply "Ought"?*, 44 DRAKE L. REV. 439, 444 (1996) (stating that "traditionally pharmacists have not been found liable if the prescription was correctly filled"); Alison G. Myhra, *The Pharmacist's Duty to Warn in Texas*, 18 REV. LITIG. 28, 33-59 (1999) (describing the traditional and narrow paradigm of professional responsibility for pharmacists).

38. Williams v. Albertsons, Inc., No. 95-50473, 1996 WL 167215, at *1 (5th Cir. Mar. 13, 1996) (per curiam) (finding that the professional pharmacist did not owe a duty to serve all customers even in light of a longstanding relationship and sales history with the customer); *cf.* J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY & LITIGATION § 25:117 (2d ed. Supp. 1996).

39. *E.g.*, Walls v. Alpharma USPD, Inc., 887 So. 2d 881, 886 (Ala. 2004) (deciding, as an issue of apparent first impression, that the pharmacist does not have a duty to warn and stating that "[t]he learned-intermediary doctrine forecloses any duty upon a pharmacist filling a physician's prescription . . . to warn . . . of the risks or potential side effects of the prescribed medication except insofar as the prescription orders, or an applicable statute or regulation expressly requires, that an instruction or warning be included on the label of the dispensed medication or be otherwise delivered"); Nichols v. Cent. Merch., Inc., 817 P.2d 1131, 1133

courts decided that the prescribing physician, not the pharmacist, was the learned intermediary with the duty to warn.[40] Courts considered the physician-patient relationship virtually inviolate[41] and did not want pharmacists to interfere in any way.

> [A] pharmacist has no duty to warn the customer or notify the physician that the drug is being prescribed in dangerous amounts, that the customer is being over medicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the customer. It is the duty of the prescribing physician to know the characteristics of the drug he is prescribing, to know how much of the drug he can give his patient, to elicit from the patient what other drugs the patient is taking, to properly prescribe various combinations of drugs, to warn the patient of any dangers associated with taking the drug, to monitor the patient's dependence on the drug, and to tell the patient when and how to take the drug. Further, it is the duty of the patient to notify the physician of the other drugs the patient is taking. Finally, it is the duty of the drug manufacturer to notify the physician of any adverse effects or other precautions that must be taken in administering the drug. *Placing these duties to warn on the pharmacist would only serve to compel the pharmacist to second guess every prescription a doctor orders in an attempt to escape liability*.[42]

As of the early 1990s,[43] most jurisdictions still refused to hold pharmacists liable for failing to warn customers of a medication's dangerous side effects[44] or filling dangerous prescriptions or quantities of drugs otherwise

(Kan. Ct. App. 1991) (stating that "the cases extending the learned intermediary doctrine to pharmacists reason that imposing a duty to warn on the pharmacist would intrude on the doctor-patient relationship and would force the pharmacist to practice medicine without a license"); Cottam v. CVS Pharmacy, 764 N.E.2d 814, 819-820 (Mass. 2002) (explaining the rationale of the learned intermediary doctrine is that physicians have the duty to warn their patients in light of the patient's history and needs); McKee v. Am. Home Prod., Corp., 782 P.2d 1045, 1050 (Wash. 1989) (analyzing the Illinois and North Carolina courts' adoption of the learned intermediary doctrine).

40. *See, e.g.*, Kirk v. Michael Reese Hosp. & Med. Ctr., 513 N.E.2d 387, 393 (Ill. 1987); *McKee*, 782 P.2d at 1051.

41. *See Walls*, 887 So. 2d at 885.

42. Walker v. Jack Eckerd Corp., 434 S.E.2d 63, 67-68 (Ga. Ct. App. 1993) (quoting Jones v. Irvin, 602 F. Supp. 399, 402 (S.D. Ill. 1985) (emphasis added).

43. *See generally* David B. Brushwood, *The Pharmacist's Duty Under OBRA-90 Standards*, 18 J. LEGAL MED. 475, 493-97 (1997) [hereinafter Brushwood, *OBRA-90*] (noting that a finding of no duty for a pharmacist to warn of an adverse drug effect was common in 1980s pharmacist malpractice appellate opinions).

44. *E.g.*, Leesley v. West, 518 N.E.2d 758, 763 (Ill. App. Ct. 1988) (holding that the pharmacist had no duty to warn patient of drug effects); *McKee*, 782 P.2d at 1051 (holding that the duty to warn "is best left with the physician" rather than to impose the duty on the pharmacist).

properly prescribed by a licensed physician.[45] Even in the past decade, courts have hesitated to hold pharmacists liable in tort for more than a narrow set of infractions.[46]

In egregious situations prior to the twenty-first century, courts did hold pharmacists responsible for not intervening on behalf of patient safety even when presented with an otherwise correct, valid prescription, but these cases were both compelling and rare. For example, a 1999 Missouri case held that a pharmacist could be liable for failure to warn if a prescription was clearly incorrect on its face.[47] In 1994, the Indiana Supreme Court held a pharmacy liable when it failed to stop filling prescriptions for an addictive drug that the pharmacy knew the customer was consuming too fast, and the customer died as a result.[48] The previous year, another court took a pharmacist to task for not providing a manufacturer's warnings with a

45. Eldridge v. Eli Lilly & Co., 485 N.E.2d 551, 554-55 (Ill. App. Ct. 1985) (holding that the pharmacist has no duty to refuse to fill a prescription because it is for a quantity more than usually prescribed and no duty to warn the customer's physician of that fact); Guillory v. Dr. X, 679 So. 2d 1004, 1010 (La. Ct. App. 1996) (holding that the pharmacist is not liable for failing to warn or refusing to dispense when a prescription does not contain excessive dosages or known contraindications); Gassen v. E. Jefferson Gen. Hosp., 628 So. 2d 256, 259 (La. Ct. App. 1993) (holding that "a pharmacist has a limited duty to inquire or verify from the prescribing physician clear errors or mistakes in the prescription"); Adkins v. Mong, 425 N.W.2d 151, 154 (Mich. Ct. App. 1988) (holding that the pharmacist has "no legal duty . . . to monitor and intervene with customer's reliance on drugs prescribed by a licensed treating physician").

46. *E.g.*, Gennock v. Warner-Lambert Co., 208 F. Supp. 2d 1156, 1160 (D. Nev. 2002) ("At a minimum, a pharmacist must be held to a duty to fill prescriptions as prescribed and properly label them (including warnings) and be alert for plain error." (citing Heredia v. Johnson, 827 F. Supp. 1522, 1525 (D. Nev. 1993))); Cottam v. CVS Pharmacy, 764 N.E.2d 814, 821, 823 (Mass. 2002) (holding that a pharmacist has no duty to warn customers of dangers of which he has no specific knowledge, but if he supplies information about some dangers, he "thereby undertake[s] a duty to provide complete warnings and information").

47. Horner v. Spalitto, 1 S.W.3d 519, 524 (Mo. Ct. App. 1999).

48. Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 519 (Ind. 1994) (holding that a pharmacist has duty to cease refilling of a prescription for a dangerous drug where there is actual knowledge of prescription history and apparent abuse). Other courts have accepted this result since *Hooks SuperX*. *E.g.*, Powers v. Thobhani, 903 So. 2d 275, 280 (Fla. Dist. Ct. App. 2005) (acknowledging that certain facts could support a claim of negligence against a pharmacist who filled and dispensed a prescription written by a physician).

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drug,[49] and in the mid-1980s, a court held a prison pharmacist liable for failing to fill a prisoner's prescription for no discernable reason.[50]

While other courts of the 1980s and 1990s did hold that pharmacists owed legal duties to their customers in specialized situations, the most definitive opinions are more recent. For example, once pharmacies began to advertise computer systems to check for drug interactions, courts held them liable for negligence in failing to identify and warn of such dangers.[51] In a leading 2002 case, the Illinois Supreme Court used three factors consistent with mainstream tort principles to reverse a summary judgment in favor of a pharmacy for failing to warn in such circumstances: first, the pharmacist should have foreseen the customer's injury given its prescription records; second, by asking customers about medical history and allergies, the pharmacy engendered the customer's reliance on its policy of checking for contraindications; and, third, the burden on the pharmacy to warn was minimal given testimony that failure to do so in the case was a true error and inconsistent with the pharmacy's policies.[52] In 2002, a federal district court held open the possibility that pharmacists could be held liable for failing to warn about alleged dangers of over-the-counter medications, assuming that the plaintiff could prove that these FDA-approved drugs were actually dangerous and caused harm.[53] These cases, however, are rare, and the bulk of precedent sent the message that suing a pharmacist was a waste of time.[54]

49. *Heredia*, 827 F. Supp. at 1525 (finding a pharmacist strictly liable where he failed to include warnings provided by the manufacturer with the prescribed drug); *see also* Riff v. Morgan Pharmacy, 508 A.2d 1247, 1251-52 (Pa. Super. Ct. 1986) (holding that the pharmacy breached its professional duties "by failing to warn the patient or notify the prescribing physician of the obvious inadequacies [of the instructions] appearing on the face of the prescription which created a substantial risk of serious harm to the plaintiff").

50. France v. State, 506 N.Y.S.2d 254, 255 (N.Y. Ct. Cl. 1986) (holding a pharmacist negligent for failing to fill a prison inmate's prescription without reason).

51. *E.g.*, Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 731 (Mich. Ct. App. 1996) (finding that the pharmacy "voluntarily assumed a duty of care when it implemented [a computer] system and then advertised that this system would detect harmful drug interactions for its customers"); Frye v. Medicare-Glaser Corp., 605 N.E.2d 557, 560-61 (Ill. 1992) (holding that a pharmacy did not assume a duty to warn where it simply labeled a medication bottle and included a single warning stating that the drug might cause drowsiness).

52. Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1123-25 (Ill. 2002).

53. Morales v. Am. Home Prods. Corp., 214 F. Supp. 2d 723, 726 (S.D. Tex. 2002) (remanding the issue of "whether Plaintiffs can ultimately prove that Alka Seltzer is really a dangerous product or whether it proximately caused any harm to these Plaintiffs").

54. *See* Walls v. Alpharma USPD, Inc., 887 So. 2d 881, 886 (Ala. 2004) (stating that, based on precedent, "[t]he learned-intermediary doctrine forecloses any duty upon a pharmacist filling a physician's prescription, valid and regular on its face, to warn the physician's patient, the pharmacist's customer, or any other ultimate consumer of the risks or potential side effects of the prescribed medication except insofar as the prescription orders, or

But things change, particularly in the pharmacy profession. During the twentieth century, the pharmacist's role underwent three foundational changes:[55] from that of compounders of drugs to dispensers of drugs,[56] and now, to providers of "pharmaceutical care."[57] In practical terms, pharmaceutical care means that "pharmacists work with patients as well as with physicians and other health-care providers, to promote drug therapy" that contributes to a patient's well-being.[58] By the mid-1990s, pharmacists in many professional settings had morphed into drug therapy managers, patient educators, and physicians' treatment partners.[59] Recent changes in statutory[60] and administrative[61] requirements mandate that pharmacists obtain information from customers about their health history and maintain prescription records to facilitate counseling and identification of contraindications.[62] The American Pharmacists Association, whose policies

an applicable statute or regulation expressly requires, that an instruction or warning be included on the label of the dispensed medication or be otherwise delivered").

55. *See generally* Myhra, *supra* note 37, at 61 (stating that "the contemporary practice paradigm requires professional responsibility in that pharmacists are responsible for therapeutic outcomes"); Matthew J. Seamon, *Plan B for the FDA: A Need for a Third Class of Drug Regulation in the United States Involving a "Pharmacist-Only" Class of Drugs*, 12 WM. & MARY J. WOMEN & L. 521, 537-41 (2006) (describing the legislation and historical milestones in the evolution of drug regulation); Erica L. Norey, Note, *Duty to Fill? Threats to Pharmacists' Professional and Business Discretion*, 52 N.Y.L. SCH. L. REV. 95, 97-105 (2007-2008) (describing the "history and development of the modern day pharmacist").

56. Gary G. Cacciatore, *Computers, OBRA 90 and the Pharmacist's Duty to Warn*, 5 J. PHARMACY & L. 103, 104 (1996).

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

58. David B. Brushwood, *From Confrontation to Collaboration: Collegial Accountability and the Expanding Role of Pharmacists in the Management of Chronic Pain*, 29 J.L. MED. & ETHICS 69, 71 (2001).

59. Brushwood, *OBRA-90*, *supra* note 43, at 475-76.

60. *E.g.*, CAL. BUS. & PROF. CODE § 4050(b) (West 2007) ("Pharmacy practice is continually evolving to include more sophisticated and comprehensive patient care activities.").

61. Jannet M. Carmichael & Janice A. Cichowlas, *The Changing Role of Pharmacy Practice – A Clinical Perspective*, 10 ANNALS HEALTH L. 179, 187-88 (2001) (discussing OBRA-90, which "requires states to promulgate regulations to expand the scope and standard of pharmacy practice as a condition for receiving federal funds for Medicaid patients"); Dora A. Gonzalez, Note & Comment, *A Prescription for Litigation: In Pursuit of the Pharmacist's "Duty to Warn" of the Adverse Effects of Prescription Drugs*, 1 J. LEGAL ADVOC. & PRAC. 53, 73-74 (1999) (discussing the California State Board of Pharmacy).

62. The catalyst was the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, 151-52 (codified at 42 U.S.C. § 1396r-8(g) (2000)) (requiring each state to implement drug utilization reviews when pharmacists serve Medicaid patients, which would include reviews of drug therapy before filling prescriptions, limited duties to warn, screening for contraindications and other dangers, and counseling if the customer wants it).

are the gold standard for the profession, actively endorses pharmaceutical care.[63]

Normally, more responsibility and discretion in patient care would imply more legal duties,[64] but the pharmacy profession is in a "transitional period"[65] when aspirations are outrunning the reality of day-to-day pharmacy practice.[66] Independent community pharmacists, superficially the most vulnerable to tort actions, still spend most of their time "licking, sticking, counting, and pouring"[67] and rushing to keep up with a recent deluge in the number of prescriptions each year.[68] These pharmacists work as many as seventy hours per week, most of which are spent on their feet, and virtually all of them struggle to find almost any time for significant patient interaction and their counseling duties.[69] Community and retail pharmacists, the majority subspecialty, are the least likely to model the pharmaceutical-care vision.[70]

See also Steven W. Huang, *The Omnibus Reconciliation Act of 1990: Redefining Pharmacists' Legal Responsibilities*, 24 AM. J.L. & MED. 417, 433-35 (1998) (explaining that after Congress passed OBRA 1990, a majority of states extended the requirements for all prescriptions, regardless of whether or not they are reimbursable by Medicaid).

63. AM. PHARMACISTS ASS'N, PRINCIPLES OF PRACTICE FOR PHARMACEUTICAL CARE (1995), *at* www.pharmacist.com/AM/Template.cfm?Section=Home&CONTENTID=2906&TEMPLATE=/CM/HTMLDisplay.cfm (last visited Aug. 9, 2008) (outlining various elements to achieve the goal of pharmaceutical care); *see also* Gonzalez, *supra* note 61, at 73 (discussing the 1979 "Standards of Practice for the Profession of Pharmacy" by the American Pharmacists Association and the American Association of Colleges of Pharmacy).

64. *See* Robert A. Gallagher, Comment, *Pennsylvania Pharmacists Should No Longer Assume That They Have No Duty to Warn*, 45 DUQ. L. REV. 59, 80-81 (2006) ("Today, the clinical pharmacist provides services well beyond just warning patients and ensuring that they heed their doctor's advice. The clinical practitioners interview patients and explain the importance of drug therapy. They also work with physicians during rounds and help make decisions on therapeutic alternatives. This increased collaboration with doctors and involvement with patients has produced a new approach to pharmacy practice known as pharmaceutical care.").

65. *See* PULP FICTION (Miramax Films 1994) (quoting Jules).

66. *See* Carmichael & Cichowlas, *supra* note 61, at 184-85. The difference in the day-to-day activities of pharmacists in jurisdictions that recognize and encourage collaborative partnerships with physicians compared with the traditional pharmacy environment is dramatic. Pharmacists in the former jurisdictions spend less than one-half of their time on distributive functions, while pharmacists in more traditional settings spend almost three-fourths of their time on those activities. *Id.*

67. Terence C. Green, Casenote, *Licking, Sticking, Counting, and Pouring – Is That All Pharmacists Do?* McKee v. American Home Products Corp., 24 CREIGHTON L. REV. 1449 (1991).

68. Huang, *supra* note 62, at 418.

69. Smearman, *supra* note 9, at 517-22.

70. *See id.* at 517-18.

Whether a court believes the pharmacy profession or a particular pharmacist is more like a "pharmaceutical care practitioner" or more like a "licker, sticker, counter, and pourer" makes a difference in that court's likelihood to hold that a pharmacist has a tort duty, all other things being equal.[71] In dicta, the Tennessee Supreme Court indicated that the "trend toward patient-oriented clinical pharmacy practice . . . [that] appears to have firmly taken hold" might have convinced it, in an appropriate case, to hold that a defendant pharmacist owes a duty of care to the plaintiff.[72] The Missouri Court of Appeals refused to affirm entry of summary judgment in a wrongful death case arising from a pharmacist's duty to warn, because "in other cases, a pharmacist's education and expertise will require that he or she do more to help protect . . . patrons from risks which pharmacists can reasonably foresee."[73] The court explained that "the pharmacist may be in the best position to determine how the medication should be taken to maximize the therapeutic benefit to that patient, to communicate that information to the customer or his physician, and to answer any of the customer's questions regarding consumption of the medication."[74]

Statutory and regulatory duties consistent with pharmaceutical care also form a basis for tort duties. For example, the Florida District Court of Appeal was very impressed by regulations internalizing changes in pharmacy care, stating that "Florida pharmacists are already specifically charged with general knowledge of prescription medication and the risks presented by taking particular prescription drugs, such that they should be able to evaluate and explain the operative risks of taking a medication."[75] The Indiana Supreme Court held that the state's Pharmacy Act did not mandate a duty to warn, but that, "by empowering pharmacists to exercise their professional judgment, the statute does demonstrate that public policy concerns about proper dispensing of prescription drugs and preventing drug

71. *See* Brushwood, *OBRA-90*, *supra* note 43, at 476; Barry R. Furrow, *Enterprise Liability for Bad Outcomes from Drug Therapy: The Doctor, the Hospital, the Pharmacy, and the Drug Firm*, 44 DRAKE L. REV. 377, 405-06 (1996); Brian L. Porto, Annotation, *Civil Liability of Pharmacists or Druggists for Failure to Warn of Potential Drug Interactions in Use of Prescription Drug*, 79 A.L.R.5th 414 (2000) (summarizing the courts' rationale for not requiring pharmacists to warn customers of potential drug interactions: (1) "pharmacists are not obliged to intervene in physicians' prescription decisions"; (2) "the duty to warn about potential drug interactions should be the physician's alone"; and (3) "it would be burdensome and against public policy to impose such a duty on pharmacists.").

72. Pittman v. Upjohn Co., 890 S.W.2d 425, 434-35 (Tenn. 1994) (quoting David B. Brushwood, *The Informed Intermediary Doctrine and the Pharmacist's Duty to Warn*, 4 J. LEGAL MED. 349, 351 (1983)) (using modern regulations as guidance for this statement).

73. Horner v. Spalitto, 1 S.W.3d 519, 522 (Mo. Ct. App. 1999).

74. *Id*. at 524.

75. Powers v. Thobhani, 903 So. 2d 275, 279 (Fla. Dist. Ct. App. 2005).

addiction might be paramount to policy concerns about interfering with the physician-patient relationship."[76]

The universe of "tort duties" as to emergency contraception is not confined to a duty to dispense or none at all. *Happel v. Wal-Mart Stores, Inc.* illustrates the potential subtleties in the context of warning duties.[77] In *Happel*, the Illinois Supreme Court found that the pharmacy had a duty to check its prescription records of an established customer for medical conditions that would render the medication contraindicated.[78] The court explained that the customer's relationship with the pharmacy made her aware that the pharmacy routinely reviewed prescription records before dispensing a drug; thus, it was reasonably foreseeable that the customer would rely on the pharmacy's records-review practice, rendering resulting injuries reasonably foreseeable.[79] Ergo, the pharmacy has a duty to warn.

Analogously, many women expect a pharmacist to help them if they need Plan B. Americans hold the pharmacy profession in very high esteem,[80] which, in turn, benefits pharmacists. Pharmacists stock a wide range of mainstream medications as "gatekeepers" to the nation's drug supply.[81] Some women may have even closer relationships with their pharmacists than they do with their doctors,[82] creating expectations of mixed personal and professional responsibility. Additionally, emergency contraception's seventy-two hour efficacy window[83] must enhance both parties' sense of urgency. These are facts that describe relationships giving rise to legal duties.[84]

A pharmacist's legal duties, however, may not encompass a duty to fill. As *Happel* implies, the extent of a pharmacist's duty is a function of the customer's expectations arising from her relationship with the pharmacist.[85]

76. Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 518 (Ind. 1994).

77. 766 N.E.2d 1118 (Ill. 2002).

78. *Id.* at 1123-25.

79. *Id.* at 1124.

80. *See* Brushwood, *Duty to Warn*, *supra* note 37, at 4-5, 55-57; Gonzalez, *supra* note 61, at 53. In the 1930s, pharmacists' knowledge and sophistication earned them the reputation as "the scientist on the corner." Norey, *supra* note 55, at 96 (quoting ROBERT A. BUERKI & LOUIS D. VOTTERO, ETHICAL RESPONSIBILITY IN PHARMACY PRACTICE 3 (2d ed. 2002)).

81. Allen & Brushwood, *supra* note 57, at 2-4; *see supra* notes 16-17 and accompanying text.

82. Michele L. Hornish, *Just What the Doctor Ordered – Or Was It?: Missouri Pharmacists' Duty of Care in the 21st Century*, 65 MO. L. REV. 1075, 1091-92 (2000).

83. *See* CTR. DRUG EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., PLAN B LABELING (2006), *available at* www.fda.gov/cder/foi/label/2006/021045s011lbl.pdf (last visited Aug. 9, 2008); AM. PHARMACISTS ASS'N, EMERGENCY CONTRACEPTION: THE PHARMACIST'S ROLE 7 (2000) (discussing the efficacy of oral emergency contraception).

84. *See* Spreng, *supra* note 34, at 250-60.

85. *See* Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1123-25 (Ill. 2002).

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Loosely, the greater the expectations, the greater the duty is. However, a greater duty may also be a more objectionable duty from the pharmacist's perspective because it requires greater participation in the woman's morally suspect potential act.[86] Therefore, the quanta of care theoretically due to women seeking emergency contraception under various circumstances can be defined in terms of the growing size of the moral footprint they leave on the pharmacist, creating an increasingly burdensome continuum of duties.

Near the "less burdensome" end of the continuum is avoiding conduct states already forbid. For example, pharmacists cannot refuse to return a prescription to,[87] harass, or insult potential customers.[88] That a woman will not face these behaviors is a minimal expectation of the pharmacy profession. Furthermore, these rules are consistent with the disinclination in American law to protect civil disobedience—active, public conduct to change the law or otherwise legal behavior of others[89]—from legal consequences.[90] To state that a pharmacist has a duty not to engage in

86. *See* Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, Pt. III (prom. Feb. 22, 1987), *available at* www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (last visited Aug. 9, 2008)(explaining the Catholic Church's teaching on respect for human life and the dignity of procreation: "The inviolable right to life of every innocent human individual and the rights of the family and of the institution of marriage constitute fundamental moral values, because they concern the natural condition and integral vocation of the human person; at the same time they are constitutive elements of civil society and its order.").

87. *E.g.*, CAL. BUS. & PROF. CODE § 733(b)(1)(C) (West 2007); OKLA. STAT. ANN. tit. 59, § 354(A) (West 2007) ("A prescription is the property of the patient for whom it is prescribed."). For over a century, courts have recognized the well-established principle that the prescription belongs to the customer; therefore, keeping it is theft. *E.g.*, White v. McComb City Drug Co., 38 So. 739, 740 (Miss. 1905) (holding that a prescription may not be used as security for payment).

88. *See* Gast, *supra* note 32, at 173 (noting that no refusal clauses allow the pharmacist to harass or insult the customer). However, sometimes explaining the reasons for moral objections to medical treatment, if done with respect, may be appropriate. Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 242-43 (2002) [hereinafter Pellegrino, *Physician's Conscience*].

89. Kevin H. Smith, Essay, *Essay –Therapeutic Civil Disobedience: A Preliminary Exploration,* 31 U. Memphis L. Rev. 99, 115 (2000) (citing CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS AND THE LAW 39-40 (1971)).

90. Gast, *supra* note 32, at 173-74. This is not to say that civil disobedience is not a respected means of pursuing legal change. However, in furtherance of effecting change, its practitioners affirmatively want or accept punishment, unlike conscientious objectors, such as pharmacists refusing to sell emergency contraception, who avoid punishment. *See* COHEN, *supra* note 89, at 39-40 (1971). Quintessential "civil disobedients" were the participants in the Freedom Rides of the 1960s who affirmatively intended to "fill the jails" and create other law enforcement crises that would coerce civil authorities to enforce laws banning racial

such conduct, especially in light of mainstream legal rules about patient confidentiality and moral concepts of personal dignity, is practically to state a truism.

Even before reaching the "duty to dispense" at the other end of the moral continuum, many religious pharmacists will encounter unacceptable statutory and regulatory duties such as "transferring" prescriptions[91] or "referring" patients to pharmacies that sell emergency contraception.[92] From a dissenting pharmacist's perspective, these requirements, as a balancing of pharmacist and customer needs, are the practical equivalents of duties to dispense because both involve cooperation in what the pharmacist deems a wrongful act.[93] As Karen Brauer, President of Pharmacists for Life, colorfully described, transferring or referring in the Plan B context is "like saying, 'I don't kill people myself[,] but let me tell you about the guy down the street who does.'"[94] But even compliantly transferring prescriptions and referring patients may not satisfy the ultimate standard of due care.[95] Information about another pharmacist who will sell a woman the drug may save her search time, but she still must travel to

segregation on interstate busses. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 286 (1988) (quoting Pat Stephens, a "jail-in" participant, in reference to a civil rights movement strategy she attributed to Martin Luther King, Jr.).

Conscientious objectors seek to avoid participation in what they deem immoral or unethical conduct of another but without active imposition on others. *See* Pellegrino, *Physician's Conscience*, *supra* note 88, at 242-43. Conscientious objectors and civil disobedients can be difficult to distinguish. The Freedom Riders insisted on "passive [meaning non-violent] resistance" toward those responding violently to their protest, while the Roman Catholic Church speaks of "passive resistance" as "refu[sing] to take part in committing an injustice." *See* POPE JOHN PAUL II, THE GOSPEL OF LIFE [EVANGELIUM VITAE] ¶ 74 (March 25, 1995) [hereinafer EVANGELIUM VITAE]; Congregation for the Doctrine of the Faith, *supra* note 86.

91. *E.g.*, NEV. REV. STAT. § 639.2357(1) (2007); OKLA. STAT. tit. 59, § 354(C) (2007); 22 TEX. ADMIN. CODE § 291.34(e)(6) (2007).

92. *E.g.*, *Item 2061- Conscience Concerns in Pharmacist Decisions*, N.C. BOARD OF PHARMACY, NATIONAL PHARMACY COMPLIANCE NEWS (N.C. Bd. of Pharmacy & the Nat'l Assoc. of Bds. of Pharmacy Found., Inc., Mount Prospect, IL), Jan. 2005, at 1, *available at* www.ncbop.org/newsletters/jan2005.pdf (last visited Aug. 9, 2008).

93. *See* Jessica J. Nelson, Comment, *Freedom of Choice for Everyone: The Need for Conscience Clause Legislation for Pharmacists*, 3 U. ST. THOMAS L.J. 139, 166 (2005) ("These pharmacists recognize that moral culpability does not just attach to direct participation in X, it also attaches to facilitating the provision of X by someone else.").

94. Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A1.

95. Everyone must exercise "due care" at all times; the difficult question is, "What care is due?" As this Article reflects, I take the position that the difference between the existence of a duty and the standard of care needed to meet that duty is mostly semantic. *See generally* Nicolas P. Terry, *Collapsing Torts*, 25 Conn. L. Rev. 717, 718 (1993)("arguing that cyclical collapsing and uncollapsing of tort doctrines are standard techniques used by judges as they continually adjust the degree of loss reallocation and deterrence").

obtain it and discuss her intimate needs with a stranger to whom she may hesitate to provide the information needed to maximize the drug's benefits.

The expectations-burden continuum illustrates how dissenting pharmacists can productively order their relationships to avoid morally objectionable duties by notifying customers what they will and will not sell.[96] Notice provides established customers, who are otherwise most likely to have a claim against the pharmacist's assistance, with the proper expectations.[97] Some jurisdictions even require notice of the drugs available,[98] though some have a punitive gloss.[99]

The August 2006 Food and Drug Administration decision to permit women aged eighteen or older to purchase Plan B without a prescription from a pharmacist "behind-the-counter" will also adjust the expectations/burdens continuum.[100] Prescription transfer, for example, likely will be much rarer. Limited existing precedent shows over-the-counter drugs give rise to different duties from pharmacists to customers resulting in

96. One leading ethicist recommends that physicians provide patients with leaflets about the services and treatments she will not provide. Pellegrino, *Physician's Conscience*, *supra* note 88, at 242-43. Others suggest posting signs stating whether the store sells emergency or daily contraceptives. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection – May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2011 (2004).

97. *See* Pellegrino, *Physician's Conscience*, *supra* note 98, at 242-43 (suggesting that "physicians should prepare a leaflet outlining what they can, and cannot, in good conscience do"). Another arguable benefit of providing information up front to potential customers about what products a pharmacy will and will not sell is that it allows markets to work and sort out moral questions. *See* Vischer, *supra* note 10, at 86 ("The pharmacy must answer to the employee and the consumer, not the state, and employees and consumers must utilize market power to contest (or embrace) the moral norms of their choosing.").

98. *E.g.*, NEW YORK , NY, ADMIN. CODE § 20-713 (2007).

99. *E.g.*, ILL. ADMIN. CODE tit. 68, § 1330.91(k)(2) (2006).

100. Approval Letter from Steven Galson, Dir., Ctr. for Drug Evaluation & Research, U.S. Food & Drug Admin., to Joseph A. Carrado, Vice President of Clinical Regulatory Affairs, Duramed Research, Inc., at 2 (Sept. 15, 2006), *available at* www.fda.gov/cder/foi/appletter/2006/021045s011ltr.pdf (last visited Aug. 9, 2008) (approving revised application for Plan B over-the-counter status). *See generally* Brittany L. Grimes, Note, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact upon Pharmacists, Consumers, and Conscience Clauses*, 41 GA. L. REV. 1395, 1414-1416 (2007). Plan B obtained similar status as pseudoephedrine, see 21 U.S.C. § 830(b)(3) (2000), a key ingredient for methamphetamine, a highly addictive stimulant and illegal drug, that is the source of physical danger both to users and bystanders. Patricia Stanley, Comment, *The Combat Methamphetamine Epidemic Act: New Protection or New Intrusion?*, 39 TEX. TECH L. REV. 379, 380-89 (2007). Women younger than eighteen still need a prescription. Approval Letter from Steven Galson, *supra*, at 2.

potentially more liability exposure,[101] but customers will no longer be entitled to expect a pharmacist to have an over-the-counter drug available or to obtain it. For one thing, the numerous legal authorities requiring pharmacists to fill "prescriptions"[102] may no longer apply to Plan B.

Therefore, the law defining pharmacists' duties to distribute emergency contraceptives is in a state of flux with the potential for burdensome regulatory and tort law on the horizon. As discussed below in Part IV, the protections the United States Constitution provides to refusing pharmacists are uncertain at this time. Therefore, statutory conscience protections from legal liability could be crucial to dissenting pharmacists' futures in the profession.

III. RELIGIOUS BASES FOR SEEKING CONSCIENCE DEFENSES FROM LIABILITY FOR FAILURE TO DISPENSE

The basis for a constitutional and, usually, a statutory religious liberties defense for failure to sell emergency contraception is a sincere religious belief that doing so would place a substantial burden on the claimant's religious beliefs.[103] Proving such a burden can be difficult because many do not understand what either a "sincere religious belief" or substantial burden is. "There are many people, including many lawyers and judges," says religious liberties expert Douglas Laycock, "whose image of religion is of a great school marm in the sky who makes rules, and believers have to obey the rules, and that is religion."[104] From this view, Laycock explains, "[i]t follows . . . that you do not have a religious liberty claim unless you can point to a particular religious rule and say that you are being required to violate that rule."[105] But the Supreme Court has not required that sort of doctrinal purity when evaluating religious liberties claims—as long as a claimant believes her faith makes certain demands, she can show that she has a sincere religious belief.[106]

101. *E.g.*, Morales v. Am. Home Prods. Corp., 214 F. Supp. 2d 723, 726 (S.D. Tex. 2002); Krueger v. Knutson, 111 N.W.2d 526, 532 (Minn. 1961); Fuhs v. Barber, 36 P.2d 962, 964 (Kan. 1934).

102. *E.g.*, CAL. BUS. & PROF. CODE § 733 (West 2007) (describing the duty as a "duty to dispense prescribed or ordered drugs and devises"); GA. CODE ANN. § 16-12-142(b) (2007); ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1) (2006) (stating that "[u]pon receipt of a valid, lawful *prescription* for a contraception, a pharmacy must dispense the contraceptive . . . .") (emphasis added).

103. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); United States v. Ballard, 322 U.S. 78, 87 (1944).

104. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 46 (2000) [hereinafter Laycock, *Supreme Court*].

105. *Id.*

106. *See Thomas*, 450 U.S. at 716.

Nevertheless, Professor Laycock advises religious liberties attorneys: "Never be conclusory in your litigation of the burden issue. It may be obvious to you why the religious claimant has been burdened, but it is quite likely not obvious to the judge."[107] Building the factual record is only one reason to pay attention to the religious burden issue; it also provides an opportunity to humanize the defending pharmacist. After all, having sympathy for someone who appears to have disadvantaged another for no sensible reason is difficult.

Therefore, this Article begins the discussion of a pharmacist's religious rights with why she might refuse to sell emergency contraception and focuses on Catholic moral teaching, a lightening rod for burdens on religious conduct and criticism of conscientiously objecting healthcare professionals.[108] Academic commentators on emergency contraception law focus disproportionately on Roman Catholic pharmacists' inclination not to dispense,[109] even though many refusers are not Catholic.[110] Catholic teaching arises from concrete doctrinal principles, which, by their nature,

107. Laycock, *Supreme Court*, *supra* note 104, at 47.

108. *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 75 (Cal. 2004) (characterizing the defendant, Catholic Charities, as not offering "insurance for prescription contraceptives because it considers itself obliged to follow the Roman Catholic Church's religious teachings, because the Church considers contraception a sin, and because Catholic Charities believes it cannot offer insurance for prescription contraceptives without improperly facilitating that sin").

109. *E.g.*, Smearman, *supra* note 9, at 484-92; Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 44-47 (2006); Griffin, *supra* note 29, at 300; Natalie Langlois, Note, *Life-Sustaining Treatment Law: A Model for Balancing a Woman's Reproductive Rights with a Pharmacist's Conscientious Objection*, 47 B.C. L. REV. 815, 830-31 (2006); Erica S. Mellick, Comment, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 416-17 (2006) (arguing that women's access to reproductive medical care is jeopardized as non-religiously affiliated hospitals merge with Catholic hospitals and healthcare systems); Holly Teliska, Recent Development, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 235, 246 (2005); Varughese, *supra* note 29, at 696 (referring to the Ethical and Religious Directives for Catholic Health Care Services as "disingenuous motives and misleading tactics" and "cleverly veiled attempts to disguise a hidden agenda that seeks to coerce others to conform to sectarian views rather than to genuinely protect conscience").

110. For example, Rich Quayle, an Illinois pharmacist who was terminated from his $100,000 per year employment at an Illinois Walgreen's store for refusing to dispense emergency contraception, is Baptist. Suhr, *supra* note 6; *see also* Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1360-61 (S.D. Fla. 1999) (examining an employment discrimination case brought by an Orthodox Jewish pharmacist who informed his potential employer that he would not sell condoms due to his religious beliefs); Alison Dayani, *The Pill Refused - Over Religion*, BIRMINGHAM EVENING MAIL, Aug. 26, 2006, at 1 (discussing a Muslim pharmacist in Great Britain refusing to dispense based upon her religious and moral beliefs).

facilitate informing conscience, illustrate why adherents refuse to sell contraceptives, and invite reasoned critique.[111] Because the viability of pharmacists' defenses to a tort action for failure to dispense may boil down to balancing the benefits of the defense to the pharmacist and the burdens on third parties,[112] accurately characterizing the religious beliefs the defense protects is vital to assessing pharmacists' legal rights. Catholic teaching provides a particularly relevant case study.

A. Abortion: "An Almost Absolute Value in History"[113]

The Catholic Church's teaching on abortion is "an almost absolute value in history" and "cannot be detached from the religious tradition which has borne it."[114] Pope John Paul declared in his encyclical, *The Gospel of Life*, that "*direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder*, since it is the deliberate killing of an innocent human being."[115] All Catholics must adhere to this teaching.[116]

The "devil" in the abortion teaching is in the details,[117] such as those related to emergency contraception and its potential abortifacient effects.

111. POPE PAUL VI, HUMANAE VITAE [ENCYCLICAL LETTER OF HIS HOLINESS POPE PAUL VI ON THE REGULATION OF BIRTHS] 15 (Ignatius Press 1998) (explaining that contraception is morally wrong because it separates the procreative and the unitive meanings of the marital act) [hereinafter HUMANAE VITAE].

112. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (recognizing the need of courts to consider "the burdens a requested [religious] accommodation may impose on nonbeneficiaries"); *see infra* Part VI (I argue that weighing burdens is not part of analyzing statutory conscience protections' constitutionality because the nature of the "benefit" to pharmacists does not give rise to a weighing analysis.). However, other commentators dispute this view. *See* Smearman, *supra* note 9, at 530-34 (discussing the substantial burdens placed on women by pharmacist refusal clauses that do not "provide exceptions for special circumstances"); Melissa Duvall, Note & Comment, *Pharmacy Conscience Clause Statutes: Constitutional Religious "Accommodations" or Unconstitutional "Substantial Burdens" on Women?*, 55 AM. U. L. REV. 1485, 1504-21 (2006) ("[T]he Court should . . . protect women's personal autonomy interests against burdens imposed by legislative religious accommodations.").

113. John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1 (John T. Noonan, Jr. ed., 1970) (noting that Christian teachings regarding abortion and early fetal life were developed by the indifference to protect the human embryo as displayed by the Greco-Roman world).

114. *Id.* at 1, 3.

115. EVANGELIUM VITAE, *supra* note 90, ¶ 62.

116. *See* BENEDICT M. ASHLEY, JEAN K. DEBLOIS, & KEVIN D. O'ROURKE, HEALTH CARE ETHICS: A CATHOLIC THEOLOGICAL ANALYSIS 81 (5th ed. 2006).

117. For example, Catholic teaching in these areas is often presented as very simplistic, without citation to an authoritative source. *E.g.*, Griffin, *supra* note 29, at 309 (citing to a newspaper article to explain that "[b]ecause Catholicism teaches that life begins at conception, Plan B's possible prevention of implantation can be viewed as an abortion under church teaching, and therefore distributing Plan B is immoral").

What constitutes "direct abortion" or even "abortion willed as an end or as a means" is not always clear. The term "direct abortion" distinguishes "between a direct attack on the life of the unborn and [medical] treatment for the mother that results indirectly in the death of the unborn."[118] Catholic doctrine permits the latter, including such routine medical procedures as removing the cancerous uterus of a pregnant woman, even though it kills the unborn child in the process.[119]

A second doctrinal minefield is care for rape victims. In no way can a woman who has been raped be said to have voluntarily taken responsibility to use the sexual act only for its unitive or procreative purposes, the principle that drives the Catholic Church's teaching on contraception.[120] Hopefully, the victim will be post-menopausal, in the long infertile period of her cycle, or the beneficiary of rape's crude anti-ovulatory effect,[121] rendering conception unlikely.[122] Nevertheless, procedures developed by local rape treatment task forces or mandated in state statutes[123] frequently urge

118. Raymond Byrne & William Binchy, ANNUAL REVIEW OF IRISH LAW 1992, at 166 (Round Hall Press 1994). For an outline of the specific analysis necessary to evaluate the propriety of action according to the doctrine of double effect, see ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 122, at 54-55.

119. ASHLEY, DEBLOIS & O'ROURKE, *supra* note 116, at 54-55. The doctrine of double effect renders statements such as "the Catholic Church opposes abortion even to save a mother's life" incorrect.

120. *See infra* Part III.B (discussing Church teaching on the purposes of sexual intercourse).

121. I use "hopefully" with some reservation because rape's anti-ovulatory effect is hardly something to "hope" for due to its immense trauma. *See* ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 83-84.

122. *Id.* at 83; *see also* TONI WESCHLER, TAKING CHARGE OF YOUR FERTILITY: THE DEFINITIVE GUIDE TO NATURAL BIRTH CONTROL AND PREGNANCY ACHIEVEMENT 48-49, 101 (Harper Collins 1995) (explaining that severe stress may delay ovulation).

123. *E.g.*, CAL. PENAL CODE § 13823.11(e)(1) (West 2007) (requiring hospitals to provide a rape victim with the option of receiving emergency contraception); 410 ILL. COMP. STAT. 70/2.2-b (2008) (requiring hospitals that provide care for sexual assault victims to develop a protocol so that each victim receives information about emergency contraception); S.C. CODE ANN. § 16-3-1350(B) (2007) (requiring medical treatment for victims of criminal sexual conduct to "include medication for pregnancy prevention if indicated and if desired"); WASH. REV. CODE § 70.41.350(1)(a) (2008) (requiring every hospital to "[p]rovide the victim with medically and factually accurate and unbiased written and oral information about emergency contraception"). *See generally* Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Abortion Politics in the United States*, 29 RUTGERS L. REC. 1, 16-17 (2005) (comparing various state hospital emergency contraception provisions); Heather Rae Skeeles, Note, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1017-27 (2003) (analyzing various state statutes and proposed federal and state legislation).

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provision of emergency contraception that could have an abortifacient effect.[124]

Catholic teaching on whether a healthcare professional may provide or a woman use emergency contraception after rape is unclear. The issue turns primarily on whether the drug could act as an abortifacient if the woman has conceived.[125] The President of the Pontifical Academy for Life, Bishop Elio Sgreccia, recently told the media that prior teaching on emergency contraception made clear that Catholic doctors should not prescribe Plan B even in rape cases because of the drug's possible abortifacient effect.[126]

However, not all Catholic ethicists are sure the prohibition is absolute because, if there is little or no chance that the woman conceived a child prior to administering the drug, the drug's chances of having only a contraceptive effect are very high.[127] Rape is one of the few situations where the Church teaching has sometimes accepted a "self-defense" ethic in the child-bearing context,[128] and significant evidence shows that emergency contraception works "primarily by inhibiting ovulation or disrupting fertilization and mainly employs prefertilization mechanisms in their contraceptive effectiveness."[129] Given this backdrop, the United States Conference of Catholic Bishops' *Ethical and Religious Directives for Catholic Health Care Services* permit hospitals to administer Plan B if "there is no evidence that conception has occurred."[130] No definitive test exists to prove

124. *See* ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 83-84.

125. *See, e.g.*, John-Henry Westen, *Head of Pontifical Academy for Life Reconfirms Morning After Pill Cannot be Used Even in Cases of Rape*, LIFESITENEWS.COM, Feb. 29, 2008, *at* www.lifesitenews.com/ldn/2008/feb/08022906.html (last visited Aug. 9, 2008) (Bishop Elio Sgreccia stated, "The morning after pill . . . is an abortifacient when there is a conception and so illicit to prescribe by doctors.").

126. Westen, *supra* note 125.

127. ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 84. Bishop Sgreccia did not take questions on how hospitals might proceed after testing for fertility, for example.

128. According to the United States Conference of Catholic Bishops' *Ethical and Religious Directives*, "[c]ompassionate and understanding care should be given to a person who is the victim of sexual assault. Health care providers should cooperate with law enforcement officials and offer the person psychological and spiritual support as well as accurate medical information. *A female who has been raped should be able to defend herself against a potential conception from the sexual assault.*" U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 21, ¶ 36 (4th ed. 2001) [hereinafter ETHICAL AND RELIGIOUS DIRECTIVES] (emphasis added); Leonard J. Nelson, III, *God and Woman in the Catholic Hospital*, 31 J. LEGIS. 69, 92-93 (2004) [hereinafter Nelson, *God and Woman*].

129. ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 85; Nelson, *God and Woman*, *supra* note 128, at 96 (noting that there is some "uncertainty over whether emergency contraceptive medications could have an abortifacient effect").

130. ETHICAL AND RELIGIOUS DIRECTIVES, *supra* note 128, at 21, ¶ 36.

conception,[131] but the *Ethical and Religious Directives* allow Catholic hospitals to administer Plan B if an ovulatory phase test for "imminent or ongoing ovulation and increased risk" of conception shows that conception most likely has not occurred.[132] Otherwise, neither the woman nor a third party, such as a hospital pharmacist, could ethically disrupt the pregnancy.[133]

People who directly and intentionally participate in procuring an abortion are, by the very act, excommunicated from the Catholic Church,[134] and by no means does the blame fall solely or primarily on the woman.[135] From a pharmacist's perspective, excommunication resulting from selling a woman an emergency contraceptive when it could have an abortifacient effect is actually more harmful than a state impeding her attendance at

131. *See* Mellick, *supra* note 109, at 416; Tricia K. Fujikawa Lee, Comment, *Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy*, 27 U. HAW. L. REV. 65, 75-76 (2004). Medical researchers are using new cytogenetic techniques to test for pre-implantation pregnancy loss and the relevant tests may become more widely available in the near future. Nick S. Macklon et al., *Conception to Ongoing Pregnancy: The 'Black Box' of Early Pregnancy Loss*, 8 HUM. REPROD. UPDATE 333, 336 (2002).

132. Davis, *supra* note 27; ETHICAL AND RELIGIOUS DIRECTIVES, *supra* note 128, at 21, ¶ 36. "[W]hen honest *doubt* exists as to whether conception has in fact taken place, the probability should favor the certain rights of the woman." ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 84; *see also* DAVID F. KELLY, CONTEMPORARY CATHOLIC HEALTH CARE ETHICS 98, 106-07 (2004) (agreeing "completely" with the use of contraceptives in cases of rape, but also claiming the Catholic Church's teaching on contraception is inconsistent). Another group advocates for a more rigorous test to determine if administering emergency contraception to rape victims is permitted when a woman is taking anti-fertility drugs because such drugs are sometimes are only efficacious by preventing implantation. *See* ASHLEY, DEBLOIS, & O'ROURKE, *supra* note 116, at 85.

133. ETHICAL AND RELIGIOUS DIRECTIVES, *supra* note 128, at 2, 21, ¶ 36 (stating that while a victim of rape "should be able to defend herself against a potential conception…[i]t is not permissible . . . to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum").

134. 1983 CODE c.1398 ("A person who actually procures an abortion incurs a latae sententiae excommunication."); *see also* Nora O'Callaghan, *Lessons from Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 CREIGHTON L. REV. 561, 574 (2006) (reviewing Catholic Church's doctrine and the consequences of being excommunicated and quoting canon 1398 of the 1983 code of Canon Law).

135. Although Pope John Paul II condemned abortion, he urged compassion and understanding for women whose other values or fears, such as the needs of other family members, serious health concerns, or financial hardship, or pressures from the father, family, friends, and healthcare professionals compel her to seek an abortion. EVANGELIUM VITAE, *supra* note 90, ¶¶ 58, 59.

Mass or banning the use of communion wine in a dry jurisdiction.[136] In the latter circumstances, a Catholic may be absolved of the obligation to attend Mass, but the Church will not reverse an excommunication unless the pharmacist can resolve not to commit the sin again, which she cannot do if her profession requires it.[137] Few Catholic pharmacists who appreciate these stakes would lightly sell emergency contraception.

B. Contraception: "Man Can Fully Discover His True Self Only in a Sincere Giving of Himself"[138]

The Church's teaching on contraception is more complex and of a different moral imperative than its teaching on abortion, but it is no less central to the Catholic faith.[139] During the papacy of John Paul II, the Church's periodic clarifications of the doctrine[140] culminated in a comprehensive understanding of how perfect spousal love[141] constitutes a complete gift of self between married persons and reveals the love that unites Christ with the Church.[142] This duality of physical and spiritual dimensions is a sacrament[143] that artificial contraception undermines. A Catholic who has internalized even one dimension of this rich teaching would tarry long before distributing any contraceptive drugs or devices.

In his 1930 encyclical letter *Casti Connubii* (*On Christian Marriage*),[144] Pope Pius XI implicitly adopted the view that sexuality within marriage should

136. *See* O'Callaghan, *supra* note 134, at 573-74 (discussing the consequences of these actions for physicians).

137. *See id.* at 574-75(discussing how doctors "could not receive absolution if his or her medical practice made abortions mandatory and so would be excluded from all Catholic worship services for as long as he or she obeyed the civil law").

138. Vatican Council II, *Gaudium et Spes*, *in* THE CONCILIAR AND POST CONCILIAR DOCUMENTS 925, ¶ 24 (Austin Flannery ed., 1981) [hereinafter *Gaudium et Spes*].

139. EVANGELIUM VITAE, *supra* note 90, ¶ 13 (explaining that contraception "contradicts the full truth of the sexual act as the proper expression of conjugal love" and abortion "destroys the life of a human being").

140. *See* JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 1-6 (1966) [hereinafter NOONAN, CONTRACEPTION].

141. "Spousal" love does not apply solely to married couples nor does it necessarily imply sexual intimacy. It stands for any sincere gift of self from one person to another. POPE JOHN PAUL II, ON THE DIGNITY AND VOCATION OF WOMEN 93, ¶ 25 (Vatican City 1988) [hereinafter *Mulieris Dignitatem*].

142. *Id.* at 93-94, ¶ 25; POPE JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY 525-27 (Michael Waldstein, ed. & trans., 2006) [hereinafter THEOLOGY OF THE BODY].

143. *See* THEOLOGY OF THE BODY, *supra* note 142, at 632; Katrina J. Zeno, Coordinator, John Paul II Res. Cr. for Theology of the Body and Culture for the Diocese of Phoenix, Ariz., The Body Reveals God: A Guided Study of Pope John Paul II's "Theology of the Body" (Feb. 10, 2007).

144. POPE PIUS XI, ON CHRISTIAN MARRIAGE [CASTI CONNUBII] (Am. Press 1936) (1930).

be a union of love,[145] while also insisting that "[a]ny use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature."[146] Over the next forty years, however, Catholic theologians teaching on sexuality increasingly emphasized "the *personal or human dimensions of acts in their circumstances*."[147] The effects reached the highest levels of the Catholic hierarchy. For example, in 1951, Pope Pius XII endorsed what is known as natural family planning, which permits spacing of births by avoiding intercourse during the fertile period of the woman's menstrual cycle.[148]

In 1960, Father Karol Józef Wojtyla, the future Pope John Paul II, published *Love and Responsibility*,[149] a personalist work based on the principles "that the person is a good towards which the only proper and adequate attitude is love" and "the person is the kind of good which does not admit of use and cannot be treated as an object of use."[150] He argues that conjugal love is an expression of love in a loving relationship,[151] but it also involves men and women in the work of creation.[152] Without love, sex partners simply use each other selfishly for their own pleasure.[153]

Love and Responsibility also introduced the concept of "reciprocal self-giving," the highest aspiration of marriage[154] and the only path to true "unification."[155] Natural family planning allows couples to plan for responsible parenthood while not interfering with their sexual satisfaction,[156] thereby facilitating true union. In the absence of *any* possibility of

145. *Id.* at 22 (referring to the "virtues . . . demanded by conjugal faith, namely, the chaste honor existing between man and wife, the due subjection of wife to husband, and the true love which binds both parties together").

146. *Id.* at 17.

147. KELLY, *supra* note 132, at 94.

148. Pope Pius XII, Pope, Vatican, Address to Midwives on the Nature of Their Profession (Oct. 29, 1951), *available at* www.catholicculture.org/library/view.cfm?recnum=3462 (last visited Aug. 9, 2008); *see* NOONAN, CONTRACEPTION, *supra* note 140, at 445-46 (arguing that the notable aspects of Pope Pius XII's statements were most notable for their practically invitational tone).

149. KAROL WOJTYLA, LOVE AND RESPONSIBILITY (H. T. Willetts, trans., Ignatius Press 1993).

150. *Id.* at 41.

151. *Id.* at 274.

152. *Id.* at 54-55.

153. *Id.* at 39.

154. WOJTYLA, *supra* note 149, at 99.

155. *Id.* at 126-27.

156. *Id.* at 281.

procreation, however, sexual activity, even between spouses, would degenerate into utilitarianism.[157]

Wojtyla's concepts, known as the "Law of the Gift," quickly penetrated theology at the top of the Catholic hierarchy. The Vatican II document, *The Pastoral Constitution on the Church in the Modern World: Gaudium et Spes*,[158] internalized Wojtyla's Law of the Gift.[159] It observed that "if man is the only creature on earth that God has wanted for its own sake, man can fully discover his true self only in a sincere giving of himself"[160] and that perfect conjugal love both arises from and enhances mutual self-giving.[161]

Soon after Vatican II released *Gaudium et Spes*, Pope Paul VI clarified the Church's teaching on contraception in his encyclical *Humanae Vitae*.[162] He condemned artificial birth control as "intrinsically wrong" along with abortion and other sexual conduct contrary to the unitive and procreative purpose of marriage.[163] The encyclical adopted the gift of self concept, explaining that "[w]hoever truly loves his spouse, does not love her only for what he receives from her but for herself, happy to be able to enrich her with the gift of himself"[164] and linking the purpose of conjugal love to self-giving love.[165] Yet, it failed to present a positive, responsible ethic of sexuality transcending theological and denominational borders.[166] Nevertheless, the encyclical is the bottom line of Church teaching on artificial contraception. Many Catholic pharmacists will try to comply and will need legal protection to do so.

Soon after Karol Wojtyla became Pope John Paul II in 1978, he embarked on a five-year project of converting his short weekly general-audience addresses into a systematic catechesis of marriage and sexual love

157. *Id.* at 239. This argument has a weakness if the intent of using artificial contraception is functionally the same as natural family planning, namely, to avoid pregnancy. Wojtyla condemned artificial birth control because it removed *all* possibility of pregnancy, but modern natural family planning methods are actually *more effective* than barrier methods of birth control. WESCHLER, *supra* note 122, at 312-13. One important difference, however, is that natural family planning simply takes advantage of a woman's cycle of fertility while artificial family planning seeks to change it for the couple's own use. WOJTYLA, *supra* note 149, at 240-44.

158. *Gaudium et Spes*, *supra* note 138, at 925, ¶ 24.

159. *See* GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 166-69 (1999) (explaining that then Bishop Wojtyla almost certainly drafted key sections of *Gaudium et Spes*).

160. *Gaudium et Spes*, *supra* note 138, at 925, ¶ 24.

161. *Id.* ¶ 49.

162. HUMANAE VITAE, *supra* note 111, at 12-13, 16-19.

163. *Id.* ¶ 12, at15, ¶ 14, at 18.

164. *Id.* at 12, ¶ 9.

165. *Id.* at 15, ¶ 12.

166. WEIGEL, *supra* note 159, at 209-10.

he called *Man and Woman He Created Them*.[167] He argues that God created humankind for a spousal relationship with Him, manifested in the mutual self-giving of Christ's redemptive sacrifice of the Mass and the Church's loving receipt of the Eucharist.[168] In that process of mutual self-giving, Christ and Church create something new, namely love.[169] Analogously, where the roots of conjugal love are human spouses' mutual gifts of self, they reenact God's plan of redemption through their bodies.[170] Therefore, they must also be open to creating something new, namely another human being.[171]

Theology of the Body filled in *Humanae Vitae*'s philosophical foundation.[172] In mutually self-giving conjugal love, spouses are truly unified, like Christ and the Church, as one body filled with gifts of love from the Holy Spirit.[173] If a couple seeks to avoid having more children, abstaining from sexual intercourse during a woman's fertile period shows respect for God's plan of creation and redemption in which the couple is participating.[174] Artificial contraception undermines sincere and mutual self-giving because it encourages use of another as opposed to self-giving.[175]

To believers who have internalized even a mere slice of this teaching, contraception is a very serious moral and theological disorder with grave consequences to users, facilitators, and humankind.[176] This teaching

167. Michael Waldstein, *Introduction* to THEOLOGY OF THE BODY, *supra* note 142, 2; *see also* CHRISTOPHER WEST, THEOLOGY OF THE BODY EXPLAINED 4 (Pauline Books & Media 2003). Pope John Paul II doubted that the potential of Vatican II could be fulfilled unless Church doctrine reconnected to lived Christian consciousness, especially in ways that would allow humans to live enthusiastically in their sexuality. In that spirit, he wrote, in 1974, of a need for a "special theology of the body." WEST, *supra* at 37 (quoting Karol Wojtyla, *Person and Community: Selected Essays*, *in* 4 CATHOLIC THOUGHT FROM LUBLIN 326 (A.N. Woznicki, ed. & Theresa Sandok, trans., 1993)).

168. THEOLOGY OF THE BODY, *supra* note 142, at 500-03, 525-27 (noting that the Pauline image of marriage describes Christ as the "Bridegroom" and the Church His "Bride").

169. *Id.* at 528-29; *see also Mulieris Dignitatem, supra* note 141, ¶ 29, at 105-08.

170. THEOLOGY OF THE BODY, *supra* note 142, at 502; *see also Mulieris Dignitatem*, *supra* note 141, ¶¶ 23-24, at 86-93.

171. THEOLOGY OF THE BODY, *supra* note 142, at 630-32.

172. *Id.* at 617-30.

173. *Id.* at 653-55.

174. *Id.* at 635.

175. HUMANAE VITAE, *supra* note 111, ¶ 13, at 16.

176. POPE JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR ¶ 103, at 125 (St. Paul Books and Media 1993) (explaining that "what is at stake" when man sins is "the *reality* of Christ's redemption"). There are other theological bases for refusing to sell contraception, but I rely on *Theology of the Body* to show that at least one significant mainstream belief set is not arbitrary, based on disrespect for women, or merely confused about whether oral contraception is abortifacient, and is, therefore, more than entitled to legal respect as a sincere religious belief. *Cf.* Thomas v. Review Bd., 450 U.S. 707, 713-17 (1981) ("[R]eligious

illustrates why conscience protection for pharmacists is not simply a new front in the abortion wars.[177] Refusing pharmacists do not need conscience protection because some contraceptives could be abortifacients. They need it because they believe selling abortifacients and contraceptives is direct participation in the intrinsically evil act of another and, therefore, morally illicit.[178] Any legal requirement to sell would undermine how they conceive their relationships with a higher authority,[179] and American law both does[180] and should protect those relationships.[181]

beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

177. *Cf.* Collins, *supra* note 109, at 58 ("[T]here is the tremendous potential that refusal of care due to faith-based practice will result in the purposeful obstruction of legal, beneficial health care."); Smearman, *supra* note 9, at 491 (noting the difficulty in persuading those who believe that life begins at conception that emergency contraception has no abortifacient effects but not addressing teaching related to contraception itself); Katherine A. James, Note, *Conflicts of Conscience*, 45 WASHBURN L.J. 415, 421 (2006) ("Opponents view the pharmacists' refusals to fill contraceptive prescriptions as simply another way to limit abortions.").

178. *See, e.g.*, Pontifical Academy for Life, Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses 5 (prom. Jun. 9, 2005), *available at* www.cogforlife.org/vaticanresponse.pdf (last visited Aug. 9, 2008) (explaining the classical moral doctrine of "*cooperation in evil*," which "arises every time . . . a moral agent perceives the existence of a link between his own acts and a morally evil action carried out by others," and applying it to the use of cells from aborted fetuses).

179. Planned Parenthood v. Casey, 505 U.S. 833, 851-52 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

180. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."); *Planned Parenthood*, 505 U.S. 833.

181. *See* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 547-50 (1991) (arguing from a communitarian perspective that the religious liberties clauses should be read together to protect the activities of religious groups); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996) [hereinafter Laycock, *Religious Liberty*] (arguing, from a libertarian perspective, that religion is neither substantively bad or good and that the Constitution makes no inherent statement, but chipping away at religious liberties does violence to individual liberty more generally); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466-76 (developing a historical argument for free exercise exemptions and the constitutionality of statutory accommodations) [hereinafter McConnell, *Free Exercise of Religion*]; O'Callaghan, *supra* note 134, at 573-74 (discussing the severe burden of sin on religious adherents, including, for Catholics, excommunication from the Church).

IV. LIMITS OF CONSTITUTIONAL FREE EXERCISE PROTECTIONS TO PROTECT PHARMACISTS FROM FAILING TO DISPENSE

One way federal law protects Americans' conceptions of their relationships with higher authorities is through First Amendment jurisprudence. After the Supreme Court held that the Free Exercise Clause of the United States Constitution applies to the states via the Fourteenth Amendment in 1940,[182] it held in several cases that the clause requires states to exempt religious practitioners from legal requirements that burdened the exercise of their faith.[183] For example, the Court held that states could not deny unemployment benefits to claimants who would not accept employment requiring them to work on their Sabbath[184] or who were terminated from their jobs for that reason.[185] The Court also held that parents of fourteen- and fifteen-year-old Amish teenagers were exempt from enrolling their children in state-certified schools based on their religious beliefs that salvation required a community life separate from the rest of society.[186] In general, the Court required states to justify substantial burdens on free exercise by showing their necessity to achieve compelling state interests or else the Court would find the burdened party entitled to an exemption.[187]

A court's determination that strict scrutiny applies is usually dispositive in favor of a plaintiff's claim,[188] but in 1980s free exercise cases, the Supreme Court honored that principle mostly in the breach.[189] In 1982, the Court held against an Amish claimant seeking an exemption from paying social security taxes because his faith demanded that he provide for his and his employees' retirements independently of the government.[190] The Court

182. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

183. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218, 234 (1972); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

184. Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 830, 835 (1989).

185. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 146 (1987); *Sherbert*, 374 U.S. at 398, 410.

186. *Yoder*, 406 U.S. at 207, 209, 234.

187. *Id.* at 214; *see* McConnell, *Free Exercise of Religion*, *supra* note 181, at 1416-17 (explaining the basic framework and burden shifting of the free exercise doctrine).

188. Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("scrutiny that was 'strict' in theory" will routinely prove "fatal in fact"). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (providing a doctrinal examination of strict scrutiny in the federal courts to disprove the common myth that applying strict scrutiny is fatal for a statute).

189. For the author's contribution on this topic, see Jennifer E. Spreng, Comment, *Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion*, 38 ST. LOUIS U. L.J. 837, 854-57 (1994).

190. United States v. Lee, 455 U.S. 252, 259 (1982).

based its decision on concerns that an exemption would "radically restrict the operating latitude of the legislature."[191] The next year the Court held that the religiously affiliated Bob Jones University was not entitled to § 501(c)(3) tax-exempt status[192] because it refused to admit persons of color on the basis of church teaching.[193] The Church of Scientology also was not entitled to tax-exempt status for its "auditing sessions" and other services.[194]

Tax cases were not the only ones to communicate the Court's skepticism of free exercise exemptions from the demands of large government institutions or obligations of citizenship. In 1986, the Court deferred to military expertise in holding that an Orthodox Jewish Air Force physician could not wear a discreet yarmulke that would otherwise violate service dress regulations.[195] That same year, the Court deferred to the professional judgment of prison officials in evaluating regulations that imposed on inmates' ability to attend religious services central to their faith.[196] In another case, a plurality deferred to legislative and administrative findings in holding that a state agency could require that beneficiaries of Aid to Families with Dependent Children, despite religious objection, present a social security number to receive benefits[197] and a majority agreed that the Court could not enjoin the Social Security Administration from assigning a unique numerical identifier to a child for its internal use, despite her parents' claim that, according to their religious faith, doing so would "rob [their daughter's] spirit."[198] On the basis that religious adherents could not tell the government what to do with "what is, after all, *its* land," in 1988 the Court upheld an Interior Department road building project that would destroy sacred lands essential to a Native American faith.[199] To the extent that the Court sometimes used the vocabulary of strict scrutiny, its scrutiny of the burdens on the individuals' religious faiths plainly was not very strict,[200] and in most cases, the Court abandoned strict scrutiny for rational review.[201]

191. *Id.* (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).
192. 26 U.S.C. § 501(c)(3) (2000).
193. Bob Jones Univ. v. United States, 461 U.S. 574, 580-81, 604-05 (1983).
194. Hernandez v. Comm'r, 490 U.S. 680, 683-85 (1989).
195. Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986).
196. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-50 (1987).
197. Bowen v. Roy, 476 U.S. 693, 707, 709-10 (1986).
198. *Id.* at 696, 699-700.
199. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453-54 (1988).
200. *E.g.*, *Bob Jones Univ.*, 461 U.S. at 604 ("The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental

In the 1990 case, *Employment Division v. Smith*, the Court concluded the gradual process of crafting the rule that the Free Exercise Clause did not require states to grant exemptions from facially neutral, generally applicable laws.[202] The decision came as a surprise to those on both sides of the free exercise exemption policy debate, and most assumed the demise of the constitutionally mandated free exercise exemption as articulated in the unemployment compensation cases for most burdens on religious liberty.[203] *Smith* did leave open two "exceptions" that might mandate constitutional exemptions, however: (1) where a law was not actually facially "neutral" or "generally applicable"[204] and (2) where a claimant linked a free exercise claim with another fundamental rights claim.[205]

The first exception is most likely to help pharmacists seeking First Amendment protection for refusing to sell contraception. Common law tort duties carry the veneer of general applicability, but they actually are riddled with the sorts of individualized, case-by-case assessments that make them more analogous to exemptions from unemployment compensation rules than across-the-board bans on ingestion of peyote, the issue in *Smith*.[206] The *Happel v. Wal-Mart Stores, Inc.* case, where the existence of a duty turned on the burden to the pharmacy relative to the customer's expectations,[207] is an example. In fact, this sort of burden-benefit analysis is precisely what the *Smith* decision tried to avoid.[208]

interest, and no 'less restrictive means,' are available to achieve the governmental interest." (internal footnote and citations omitted)).

201. *E.g.*, *Roy*, 476 U.S. at 707-08.

202. 494 U.S. 872, 878-79 (1990).

203. *E.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-13 (1991); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137-40 (1992) [hereinafter McConnell, *Crossroads*].

204. *Smith* categorized the unemployment compensation cases as qualifying under this exception because they required individualized assessments of eligibility for benefits. *Smith*, 494 U.S. at 881, 884-85. Later, the Court held that government discrimination against a religious sect or religious believers could not, by definition, be neutral or generally applicable. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

205. Commentators originally assumed the exception's purpose was to distinguish *Smith* from *Yoder*, 406 U.S. 205, 234-36 (1972), but it has created its own intriguing jurisprudential enclave. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703-07 (9th Cir. 1999), *vacated as not ripe en banc*, 220 F.3d 1134, 1142 (9th Cir.); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 587-88 (2003); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 87-95 (2004).

206. *Smith*, 494 U.S. at 874.

207. *See* 766 N.E.2d 1118, 1124 (Ill. 2002).

208. *Smith*, 494 U.S. at 883-84.

The few district judges who have confronted must-fill regulations so far have performed probing analysis of their general applicability. For example, in response to a motion to dismiss, the judge in *Menges v. Blagojevich*, a challenge to Illinois' must-fill regulation, held that the plaintiff pharmacists stated a federal free exercise claim that might require strict scrutiny based on its numerous exceptions:

> The Rule only applies to Division I pharmacies. The Rule, therefore, does not apply to hospitals and, in particular, emergency rooms. The Rule also allows Division I pharmacies to refuse to dispense Emergency Contraceptives or to delay dispensing them for reasons other than the pharmacist's personal religious beliefs. These allegations, at least, create an issue of fact regarding whether the Rule is generally applicable. If not, the Rule may again be subject to strict scrutiny.[209]

A Washington district court in *Stormans v. Selecky* employed a similar analysis on a motion for a preliminary injunction against enforcement of that state's must-fill regulation.[210] The state claimed that the regulation was "the [Pharmacy] Board's best judgment about how to deal with its overriding concerns for the health and safety of all patients who need valid prescriptions filled in a timely fashion,"[211] but the court observed that the rulemaking process had focused almost solely on Plan B, despite virtually no evidence that access to Plan B was a problem.[212] The regulation also contained several exceptions, such as a pharmacist's duty to refuse to fill erroneous prescriptions.[213] The court entered the preliminary injunction, holding that the regulation "does nothing to increase access to lawful prescription medicines generally" and was "aimed only at a few drugs and the religious people who find them objectionable."[214]

Assuming the Ninth Circuit upholds the district court on appeal, the Washington litigation could be a boon to pharmacists' free exercise rights. The pharmacist's duty not to dispense in cases of "error or contraindication" is well accepted.[215] If that exception to a must-fill requirement supports a finding that a must-fill requirement lacks general applicability, such regulations will always be subject to strict scrutiny.

Unfortunately for pharmacists, more courts focus on the analysis from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, suggesting that a

209. 451 F. Supp. 2d 992, 1001 (C.D. Ill. 2006).
210. 524 F. Supp. 2d 1245, 1260 (W.D. Wash. 2007).
211. *Id*. at 1258.
212. *Id*. at 1260.
213. *Id*. at 1253, n.2.
214. *Id*. at 1262.
215. *See* Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1123 (Ill. 2002); Horner v. Spalitto, 1 S.W.3d 519, 523 (Mo. Ct. App. 1999); Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514, 519 (Ind. 1994).

pharmacist must show that a duty burdening her religious liberties resulted from religious bigotry to qualify for constitutional protection.[216] *Lukumi Babalu Aye* confirmed that the Free Exercise Clause still bars states from targeting or persecuting religious believers after *Smith*, while overturning a group of resolutions and ordinances banning animal slaughter, a practice central to the Santeria faith, because they "exclude[d] almost all killings of animals except for religious sacrifice, and . . . exempt[ed] kosher slaughter."[217] The Supreme Court labeled the regulatory regime an effort to "target . . . Santeria worshippers"[218] and a mechanism "designed to persecute or oppress a religion or its practices."[219]

However, within what was otherwise the majority opinion,[220] Justice Kennedy developed a purposeful discrimination theory of the case based on eye-opening evidence of the subjective motives of various city council and community members similar to that used to show invidious race discrimination in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[221] He reported that a crowd at one city council meeting cheered when council members made comments critical of the Santeria faith.[222] One eruption occurred after a councilman reminded the room that the Cuban government had once jailed Santeria adherents.[223] Another councilman claimed Santeria adherents were "in violation of everything this country stands for."[224] One justified kosher slaughter while condemning Santerian animal slaughter, and another asked, "What can we do to prevent the Church from opening?"[225] Other city officials called the Santeria faith "a sin, 'foolishness,' 'an abomination to the Lord,' and the worship of 'demons.'"[226] The Supreme Court has upheld findings of purposeful discrimination in equal protection cases with much less evidence.[227]

216. Laycock, *Supreme Court*, *supra* note 104, at 27-28. Professor Laycock represented the plaintiffs before the Supreme Court.

217. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 536 (1993).

218. *Id*. at 542.

219. *Id*. at 547.

220. Only Justice Stevens joined this part (Part II.A.2) of Justice Kennedy's opinion. *See id*. at 523, 540-42.

221. 429 U.S. 252, 266-72 (1977) (confirming purposeful invidious race discrimination in housing with crowd comments at a "Plan Commission" meeting, inferences from the history of zoning decisions in the region, the text of the Commission's zoning recommendation, and the impact of the zoning decision on residents of minority races).

222. *Lukumi Babalu Aye*, 508 U.S. at 541.

223. *Id*.

224. *Id*. (quoting taped excerpts of Hialeah City Council Meeting, June 9, 1987).

225. *Id*. (quoting taped excerpts of Hialeah City Council Meeting, June 9, 1987).

226. *Id*. (quoting taped excerpts of Hialeah City Council Meeting, June 9, 1987).

227. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 626-27 (1982) (discussing the evidence and factors of purposeful discrimination that the district court considered).

The *Menges* court also considered purposeful discrimination evidence, including Governor Blagojevich's statements indicating "that the objective of the Rule was to force individuals who have religious objections to Emergency Contraceptives to compromise their beliefs or to leave the practice of pharmacy."[228] But, just as Justice Kennedy's motive discussion primarily reinforced the majority's holding on "targeting,"[229] the *Menges* court used Governor Blagojevich's statements in the context of "promulgation, interpretation, application, and enforcement of the Rule."[230] Other such evidence supported a conclusion that the regulation targeted religious pharmacists: it forced many pharmacies to stop accommodating religious employees; it excepted many institutions while imposing on individual religious believers; and it permitted pharmacists not to dispense for reasons other than religious scruples.[231]

Similarly, the *Stormans* court specifically stated that "[r]elevant evidence in the inquiry" as to whether the law is religiously neutral is of the types named in *Arlington Heights*, "including contemporaneous statements made by members of the decision-making body."[232] The court singled out statements that access to emergency contraception was the true purpose of the regulation, the role of pro-choice activist groups in the rule-making process, the governor's opposition to a rule permitting conscience-based refusals to dispense, and administration threats to replace members of the Pharmacy Board if it accommodated dissenting pharmacists.[233]

Equal protection's "purposeful discrimination" is not the same as free exercise's "targeting"—purposeful discrimination relies on government officials' subjective intent while targeting focuses on the effects of laws on religious exercise[234]—and the California Supreme Court's recent decision upholding a state mandate that private health insurance plans cover contraceptives[235] shows that evidence of both is definitely in the eye of the beholder. The legislation's drafters openly explained that they had crafted a

228. 451 F. Supp. 2d 992, 1000 (C.D. Ill. 2006).

229. The Seventh Circuit does not read *Lukumi Babalu Aye* to require an inquiry into government officials' subjective motives or do some other purposeful discrimination analysis in a free exercise case. Grossbaum v. Indianapolis-Marion County Bldg. Auth., 100 F.3d 1287, 1292 n.3 (7th Cir. 1996).

230. 451 F. Supp. 2d at 1000 n. 2.

231. *Id.* at 1000-01.

232. 524 F. Supp. 2d 1245, 1258 (W.D. Wash. 2007) (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977)).

233. *Id.* at 1259.

234. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 558-59 (1993) (Scalia, J. with Rehnquist, C.J., concurring) (distinguishing between subjective intent or purpose and the effect of the laws).

235. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 76, 95 (Cal. 2004).

very limited religious exemption so the statute would "specifically . . . cover targeted Catholic religious institutions within the four corners of the mandate statute, namely, Catholic hospitals, colleges and universities, and 'other possible situations.'"[236] Proponents of the legislation repeatedly cited "Catholic hospitals" for having "'particularly objectionable'" positions as to contraceptive coverage.[237] Despite apparent similarity with *Lukumi Babalu*, the California Supreme Court upheld the law under both the United States and California Constitutions.[238]

Plainly, the Free Exercise Clause can serve as a stick in cases that refusing pharmacists file to obtain relief from must-fill requirements,[239] but cases such as *Catholic Charities* are sobering reminders that federal constitutional law is not broad enough to protect pharmacists from all common law and regulatory duties to sell emergency contraceptives. Several states do have statutory "conscience clauses" to assist pharmacists caught in the crossfire of duties to fill and religious scruples, and more states can enact such clauses.[240] So far, conscience clauses are underutilized in direct challenges to must-fill requirements.[241] But with good drafting and in light of recent Supreme Court Establishment Clause precedent, they could be more productive protection than the Free Exercise Clause or, at minimum, provide an additional line of attack against a liability suit[242] in an area where federal constitutional law is increasingly complicated.

236. O'Callaghan, *supra* note 134, at 630 (citing Brief for Petitioner at 9 n.5, Catholic Charities of Sacramento, Inc., v. Super. Ct., 85 P.3d 67 (Cal. 2004) (No. S099822), 2001 WL 1700664 (quoting Senator Jackie Speier's statement at a committee hearing)).

237. *Id.* (quoting Brief for Petitioner at 8 n.4, Catholic Charities of Sacramento, Inc., v. Super. Ct., 85 P.3d 67 (Cal. 2004) (No. S099822), 2001 WL 1700664).

238. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 76, 82-84.

239. The full potential of First Amendment protections for dissenting pharmacists is beyond the scope of this Article.

240. While the rush to enact conscience clauses appears to have slowed, the more states that adopt must-fill requirements and the more challenges they create, the longer the issue will remain in the public eye, encouraging state legislators to press for such protections. *See* National Conference of State Legislatures, *supra* note 13 (listing bills filed in 2005-2007).

241. In the must fill case, *Menges v. Blagojevich*, for example, the plaintiff pharmacists pled federal constitutional and state statutory claims. *See generally* Complaint for Declaratory and Injunctive Relief, Menges v. Blagojevich, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (No. 05-3307), 2005 WL 3675928. But on Illinois' motion to dismiss, neither the state nor the pharmacists briefed the state law claims. Defendants' Memorandum of Law in Support of Motion to Dismiss, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307), 2006 WL 656996; Plaintiffs' Response to Defendants' Motion to Dismiss, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307), 2006 WL 1642916.

242. Not only may they serve as an additional defense against liability, but as I discuss elsewhere, conscience clauses may also be persuasive evidence of a state's public policy as to a pharmacist's duty to fill contraceptive prescriptions where either a court must determine the

V. STATUTORY CONSCIENCE PROTECTIONS FROM LIABILITY FOR FAILURE TO DISPENSE

Conscience clauses, or more correctly, religious accommodations, are as fixed a star in American law as *McCulloch v. Maryland*[243]—or maybe even more so. Statutory exemptions from otherwise generally applicable laws—attendance at the services of the relevant state's established church—existed as early as 1675.[244] Prior to the Revolutionary War, many of the colonies extended exemptions from oath taking, tax collection for the established church, and military conscription.[245] Three key modern free exercise cases are not actually free exercise cases at all—they are statutory construction cases in which the Supreme Court determined whether the protections for conscientious objectors in the Selective Service Act applied to various claimants.[246] In the early 1990s, at least 2,000 federal and state statutes contained religious exemptions of some type.[247] Among them were exemptions for food preparation in accord with religious practices, from tax payments by religious groups, from employment discrimination laws, and from compulsory military dress regulations.[248] Ironically, given the Supreme Court Free Exercise jurisprudence of the past two decades, religious use of peyote now also is exempted from drug laws.[249] The *Smith* opinion that denied constitutional protection to religious use of peyote also discouraged statutory accommodation.[250]

Therefore, though *Roe v. Wade*[251] did not usher statutory conscience protections into the law, it did provoke legislatures to enact the first such provisions related to abortion and family planning. Just prior to *Roe*, the United States District Court for the District of Montana entered a preliminary injunction to enjoin St. Vincent's Hospital from prohibiting a woman's physician from performing a sterilization procedure on her.[252] Concerned

existence of a common law duty or perform statutory construction. *See* Spreng, *supra* note 34, at 261.

243. 17 U.S. (4 Wheat.) 316 (1819).

244. *See generally* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1803 (2006) [hereinafter Laycock, *Regulatory Exemptions*].

245. *Id.* at 1804-08.

246. Gillette v. United States, 401 U.S. 437 (1971); Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

247. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445 (1992).

248. *Id.* at 1446.

249. 21 C.F.R. § 1307.31 (2007).

250. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

251. 410 U.S. 113 (1973).

252. Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 950 n.1 (D. Mont. 1973).

that overzealous hospital administrators might read Roe and its companion case *Doe v. Bolton*[253] too broadly,[254] Congressman Frank Church (D-ID) proposed legislation[255] to exempt health programs receiving federal funds from being required to perform sterilizations or abortion.[256] Based on the Church Amendments, the Montana district court lifted the preliminary injunction and dismissed the case.[257] In *Doe v. Bolton*,[258] the Supreme Court also endorsed statutory protections for healthcare providers refusing to perform abortions for moral or religious reasons.[259]

By late 2006, forty-seven states and the District of Columbia had conscience protections for some or all healthcare professionals related to provision of abortion, sterilization or contraception.[260] Among them are protections against civil liability, employment discrimination, professional discipline, denial of admission to professional training programs, and denial of public funds.[261] In 2004, Congress passed the Hyde-Weldon Amendments to protect healthcare providers receiving federal funds, either directly or through state/local entities, from discrimination based on their refusal to participate in abortions.[262]

253. 410 U.S. 179 (1973).

254. O'Callaghan, *supra* note 134, at 628 (quoting 119 CONG. REC. 9595 (1973) (statement of Sen. Church); *see also* Doe v. Bolton, 410 U.S. at 197-98.

255. Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b), 87 Stat. 91, 95 (codified at 42 U.S.C. § 300a-7 (2000)); Jeannie I. Rosoff, *Is Support of Abortion Political Suicide?*, 7 FAM. PLAN. PERSP. 13, 15 (1975) (stating that "Senator Frank Church (D.-Idaho) and 19 Senate cosponsors introduced an amendment permitting individuals and institutions to refuse to perform abortions or sterilizations which conflicted with their conscience").

256. 87 Stat. at 95.

257. *Taylor*, 369 F. Supp. at 949, 951.

258. 410 U.S. 179 (1973).

259. *Id.* at 197-98.

260. Smearman, *supra* note 9, at 476-78.

261. Kentucky's statute is an example of a comprehensive scheme, including virtually all of these protections. *See* KY. REV. STAT. ANN. § 311.800 (LexisNexis 2007).

262. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)-(2), 118 Stat. 2809, 3163; *see* Judith C. Gallagher, Note, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 530 (2007).

Approximately fifteen states[263] have conscience legislation[264] that may protect religious pharmacists from legal consequences if they refuse to dispense contraceptives: Arkansas,[265] California,[266] Colorado,[267] Florida,[268] Georgia,[269] Illinois,[270] Maine,[271] Mississippi,[272] New York,[273] North Carolina,[274] Oregon,[275] South Dakota,[276] Tennessee,[277] West Virginia,[278] and Wyoming.[279] The reality is far more obscure, however, and as the *Catholic Charities* case exemplifies, the judicial record for construing conscience clauses broadly is not a good one.[280] Some clauses may require legislative attention to ensure they provide the intended protection. For example, some statutes protect pharmacists filling prescriptions while others

263. The number and nature of conscience protections change regularly because new protections are adopted as state statute, administrative regulation, or pharmacy board policy and also because states adopt must fill requirements. *See* National Conference of State Legislatures, *supra* note 13 (listing states that have implemented conscience protection clauses).

264. Many states also have "Religious Freedom Restoration Acts" modeled after the federal act that the Supreme Court held Congress lacked power to enact under Section 5 of the Fourteenth Amendment. *See infra* text and note at 335. These acts may also protect pharmacists. *See, e.g.*, Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164, 1172-73 (Ill. App. Ct. 2007) (Turner, J. dissenting).

265. ARK. CODE ANN. § 20-16-304(4) & (5) (2005).

266. CAL. BUS. & PROF. CODE § 733(b)(3) (West Pocket Pt. 2008).

267. COLO. REV. STAT. § 25-6-102(9) (2007).

268. FLA. STAT. . ANN. § 381.0051(6) (West 2007); *cf.* GA. CODE ANN. § 49-7-6 (providing broad conscience protection for some government workers refusing to distribute family planning services).

269. GA. CODE ANN. § 16-12-142(b) (2007); GA. COMP. R. & REGS. 480-5-.03(n).

270. 745 ILL. COMP. STAT 70/4 (2004).

271. ME. REV. STAT. ANN. tit. 22, § 1903(3) & (4) (2007).

272. MISS. CODE ANN. § 41-107-5(1) – (3) (2005).

273. Memorandum from Lawrence H. Mokhiber, Executive Sec'y, N.Y. State Educ. Dep't, State Bd. of Pharmacy, to Supervising Pharmacists, Policy Guideline Concerning Matters of Conscience (Nov. 18, 2005), *at* www.op.nysed.gov/pharmconscienceguideline.htm (last visited Aug. 9, 2008).

274. N.C. BD. OF PHARMACY, *supra* note 23.

275. OR. REV. STAT. § 435.225 (2001); OR. BD. OF PHARMACY, POSITION STATEMENT: CONSIDERING MORAL AND ETHICAL OBJECTIONS (2006), *available at* www.oregon.gov/Pharmacy/M_and_E_Objections_6-06.pdf (last visited Aug. 9, 2008).

276. S.D. CODIFIED LAWS § 36-11-70 (2004).

277. TENN. CODE ANN. § 68-34-104(5) (2006).

278. W. VA. CODE § 16-2B-4 (2007).

279. WYO. STAT. ANN. § 42-5-101(d) (2007).

280. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004); Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 226 (1993) ("Such judicial hostility underscores the need for clearer, stronger statutory protections.").

protect pharmacists "refusing to provide"[281] or "refusing to furnish"[282] emergency contraception.[283] The distinction matters now that Plan B is available from behind the counter.

The "gold standard" in pharmacist conscience protection is the 2004 Mississippi Health Care Rights of Conscience Act.[284] The Act applies to any "[h]ealth care provider," defined to specifically include pharmacists.[285] The Act also defines "[h]ealth care service" as:

> any phase of patient medical care, treatment or procedure, including, but not limited to, the following: patient referral, counseling, therapy, testing, diagnosis or prognosis, research, instruction, prescribing, dispensing or administering any device, drug, or medication, surgery, or any other care or treatment rendered by health care providers or health care institutions.[286]

A healthcare provider in Mississippi "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."[287] A healthcare provider also shall not be held "civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience."[288]

Broader protection for pharmacists as to civil liability, if even possible, is difficult to imagine. The catch-all clause of "any other care or treatment rendered by health care providers or health care institutions" appears to cover virtually all of a pharmacist's professional conduct as to abortion and contraceptives that "instruction . . . dispensing or administering any device, drug or medication" does not.[289] Therefore, the provision almost certainly sweeps broadly enough to encompass behind-the-counter Plan B.

Illinois' conscience provision also sweeps broadly, taking in a huge range of "[h]ealth care personnel . . . [:] any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who

281. *E.g.*, COLO. REV. STAT. § 25-6-102(9) (2007); ME. REV. STAT. ANN. tit. 22 § 1903(4) (2004); TENN. CODE ANN. § 68-34-104(5).

282. *E.g.*, ARK. CODE ANN. § 20-16-304(4) (2005); FLA. STAT. ANN. § 381.0051(6) (West 2007).

283. *See also, e.g.*, 745 ILL. COMP. STAT. 70/4 (2004) (defining protected activity as the "refusal to perform"); MISS CODE ANN. § 41-107-5(2) (2005) (defining protected action as "declining to participate in a health care service"); S.D. CODIFIED LAWS § 36-11-70 (2004) (defining protected activity as "refusal to dispense medication").

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

285. *Id.* § 41-107-3(b).

286. *Id.* § 41-107-3(a).

287. *Id.* § 41-107-5(1).

288. *Id.* § 41-107-5(2).

289. MISS. CODE ANN. § 41-107-3(a).

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furnishes, or assists in the furnishing of, health care services."[290] "Health care" is defined as:

> any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons.[291]

The statute further states:

> No physician or health care personnel shall be civilly or criminally liable to any person, estate, public or private entity or public official by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel.[292]

Whether the Health Care Right of Conscience Act reaches pharmacists is a legal flashpoint in light of Illinois' regulations requiring pharmacists to dispense contraceptives. The plain language[293] does not use the word "pharmacist," but the term does fit comfortably within the catch-all portions of the definition of health care personnel: "professional . . . or any other person who furnishes, or assists in the furnishing of, health care services."[294] A court could conclude, however, that the definition of "health care" creates an ambiguity that the text itself cannot resolve. While the provision concerning family planning superficially seems to describe dispensing and selling contraceptives, the precise words reach only "advice."[295]

Canons of construction favored in Illinois courts, such as considering the statute as a whole and the policies it manifests to discern the legislature's overall purpose,[296] support reading the statute to include pharmacists. According to the statute's section of findings and policies:

290. 745 ILL. COMP STAT. 70/3(c).

291. *Id.* at 70/3(a).

292. *Id.* at 70/4.

293. When ascertaining the legislature's intent for purposes of statutory construction, Illinois courts rely first on the plain language of the statute as a whole in an attempt to determine its plain meaning. People v. Patterson, 721 N.E.2d 797, 800-01 (Ill. App. Ct. 1999).

294. 745 ILL. COMP STAT. 70/3(c).

295. *Id.* At first glance this interpretation is counterintuitive: providing contraceptives must be more burdensome to the conscience than advising about procuring them, regardless of whether the provision applies to pharmacists. On the other hand, advising might be viewed as especially intrusive because it implies advocacy.

296. *See* Harvel v. City of Johnston City, 586 N.E.2d 1217, 1220 (Ill. 1992) (stating that courts assume the legislature has a definite purpose when enacting a statute, and "[i]f the

> The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. *It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons* who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and *to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons* or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.[297]

Pharmacists' refusals to dispense or sell contraception is "a situation which is within the object, spirit and the meaning of a statute" and, therefore, should be "regarded as within the statute, even though it may not fall within the letter."[298] The Illinois Court of Appeals is also still open to reading the Act to cover pharmacists,[299] which, though not conclusive, is suggestive.

South Dakota's statutory conscience protection for pharmacists is deceptively simple in its language but potentially complex in application:[300]

> No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to:
>
> (1) Cause an abortion; or
>
> (2) Destroy an unborn child as defined in subdivision 22-1-2(50A); . . . .

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language of a statute is susceptible to two constructions, one of which will carry out its purpose and another which will defeat it, the statute will receive the former construction").

297. 745 ILL. COMP STAT. 70/2 (emphasis added).

298. *Harvel*, 586 N.E.2d at 1220. By contrast, applying the maxim of *expressio unius est exclusio alterius* could leave pharmacists outside the statute's reach. *See* Vokes, *supra* note 24, at 417-19. In Illinois, however, the maxim does not apply where there is a strong indication of legislative intent. Sulser v. Country Mut. Ins. Co., 591 N.E.2d 427, 429 (Ill. 1992). Also, only limited conclusions are appropriate from failed legislative efforts to add pharmacists to the list of included professions in the past. *Cf.* Vokes, *supra* note 24, at 418 n.124 (quoting a member of the legislature who opined that, because these efforts had failed, pharmacists were not covered by the statute's protections). *But see, e.g.*, NORMAN J. SINGER, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 48:20 (7th ed.) ("Post-enactment views of those involved with the legislation should not be considered when interpreting the statute.").

299. Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164, 1171 (Ill. App. Ct. 2007) (deciding case on ripeness grounds though mentioning possibility that the Health Care Right of Conscience Act might apply). The dissent concluded the plaintiff pharmacists "have stated a compelling case under the Right of Conscience Act." *Id.* at 1172.

300. South Dakota is apparently less enamored of purposive statutory interpretation than is Illinois. *See* SINGER, *supra* note 298, § 45:9 (not citing a South Dakota statute supporting purposive analysis).

> No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.[301]

An "unborn child" is "an individual organism of the species homo sapiens from fertilization until live birth."[302] By distinguishing between "abortion" and "destroy[ing] an unborn child," the statute theoretically protects refusing to dispense any drug that could destroy a fertilized egg.

But what is sauce for the goose is sauce for the other goose in South Dakota. The South Dakota Supreme Court has chosen to define an "unborn child" for purposes of wrongful death torts as "an individual organism of the species homo sapiens from fertilization until live birth."[303] Therefore, the same definition probably would apply in wrongful conception cases.[304] If it did, the clause would protect a pharmacist from liability because the pharmacist would have "reason to believe" Plan B would be used to "destroy an unborn child," given the scientific dispute over Plan B's mechanism of action.[305] On the other hand, the statutory language almost invites a battle of experts on whether an emergency contraceptive interferes with the implantation of a fertilized egg.[306] If a fact finder accepted expert testimony that no reasonable pharmacist could believe emergency contraception could interfere with implantation,[307] the pharmacist would not have conscience protection from tort liability.

301. S.D. CODIFIED LAWS § 36-11-70 (2007).

302. *Id.* § 22-1-2(50A).

303. Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 790 (S.D. 1996) (quoting S.D. CODIFIED LAWS § 22-1-2(50A)).

304. *Cf. Wiersma*, 543 N.W.2d at 790 (stating that the definition applies in a wrongful death suit). That definition would undermine an argument a plaintiff in a wrongful conception suit might have arising from her own privacy rights.

305. Davidoff & Trussell, *supra* note 4, at 1775, 1777 (stating that "all women should be informed that the ability of Plan B to interfere with implantation remains speculative, since virtually no evidence supports that mechanism and some evidence contradicts it" and "that the best available evidence indicates that Plan B's ability to prevent pregnancy can be fully accounted for by mechanisms that do not involve interference with postfertilization events").

306. Ingrid Dries-Daffner et al., *Access to Plan B Emergency Contraception in an OTC Environment*, 11 J. NURSING L. 93 (2007).

307. Davidoff & Trussell, *supra* note 4, at 1777 (indicating there is an "absence of absolute proof about Plan B's mechanisms of action"); David A. Grimes & Elizabeth G. Raymond, *Emergency Contraception*, 137 ANNALS INTERNAL MED. E-180, E-182 (2002) ("Whether the endometrial changes that have been observed would be sufficient to inhibit implantation remains unclear."); *cf.* Kahlenborn, Stanford, & Larimore, *supra* note 4, at 468 (identifying potential for post-fertilization effect from other studies' evidence "that use of EC does not always inhibit ovulation even if used in the preovulatory phase").

The South Dakota statute is also ambiguous as to what facts the pharmacist must know about the ultimate user to qualify as having a "reason to believe" a particular customer may use the drug to destroy an unborn child. The customer or user may intend only a contraceptive effect. If the customer or user's intent is not relevant, objective facts may be such that the drug may have only a contraceptive effect.

The Arkansas Code contains a provision that provides some protection for refusing pharmacists and another more generic provision that may offer further protection. The "Arkansas Family Planning Act"[308] states as follows:

> It shall be the policy and authority of this state that:
>
> (1) All medically acceptable contraceptive procedures, supplies, and information shall be available through legally recognized channels to each person desirous of the procedures, supplies, and information regardless of sex, race, age, income, number of children, marital status, citizenship, or motive;
>
> . . . ;
>
> (4) Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information; and
>
> (5) No private institution or physician, nor any agent or employee of the institution or physician, nor any employee of a public institution acting under directions of a physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when the refusal is based upon religious or conscientious objection. No such institution, employee, agent, or physician shall be held liable for the refusal.[309]

The interplay of subsections 4 and 5 is not completely clear. The limiting language, "[n]othing in this subchapter shall prohibit," in subsection 4 allows for the possibility that legal principles not contained in the Act could prohibit a pharmacist from furnishing contraceptives. A common law duty to dispense would be such an external legal principle. On the other hand, reading the Act in its entirety reveals a broader public policy to provide conscience protection in the dissemination of contraception that should inform a court's interpretation.[310]

308. ARK. CODE ANN. § 20-16-301 (2005).

309. *Id*. § 20-16-304.

310. The state's constitution contains an even stronger statement of public policy to inform an Arkansas Court that finds that emergency contraception has abortifacient properties. "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." ARK. CONST. of 1874, amend. 68, § 2 (1988).

The Arkansas Supreme Court recently relied on similar evidence of public policy in analogous circumstances. It held that a legislative amendment changing the definition of "person" in a homicide statute to include a viable fetus was a sufficient statement of public policy to overrule prior precedent interpreting the undefined term "person" in the state's wrongful death statute as including only born persons.[311] Therefore, the Arkansas Code should provide pharmacists a defense from tort liability for failing to sell emergency contraception.

Colorado,[312] Maine,[313] and Tennessee[314] have provisions virtually identical to Arkansas' subsection 5 in their family planning legislation, but they do not have a subsection 4 that, on its face, applies to pharmacists. The language of subsection 5 is ambiguous as to whether it applies to pharmacists. A pharmacist could be an "agent or "employee" of an "institution"—a pharmacy—and enjoy the Act's protection. An owner-operator herself can still be an "employee" as long as her business is incorporated. Unfortunately, no case in any of the four jurisdictions adopting this language has confirmed its applicability to pharmacists.

Florida's statute, on the other hand, is more clearly applicable to pharmacists:

> The provisions of this section shall not be interpreted so as to prevent a physician or other person from refusing to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons; and the physician or other person shall not be held liable for such refusal.[315]

The language "other person" appears to sweep broadly enough to include pharmacists just as it appears intended to include a variety of healthcare professionals. Unfortunately, no Florida case[316] or regulation[317] confirms that interpretation.

Court interpretation of Florida's abortion conscience clause supports the conclusion that the contraception conscience clause protects pharmacists.[318] The Florida abortion clause states:

311. Aka v. Jefferson Hosp. Ass'n, Inc., 42 S.W.3d 508, 516-17 (Ark. 2001).

312. COLO. REV. STAT. § 25-4-102(9) (2007).

313. ME. REV. STAT. ANN. tit. 22 § 1903(4) (2004).

314. TENN. CODE ANN. § 68-34-104(5) (2006).

315. FLA. STAT. ANN. § 381.0051(6) (West 2007).

316. *But see* 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, 123 (2005) ("The phrase 'or other person' is sufficiently ambiguous to discourage reliance by pharmacists.").

317. The definitions provision of the relevant section of the Florida Administrative Code does not include one for "other person." *See* FLA. ADMIN. CODE ANN. r. 64F-7.001 (2007).

318. Kenny v. Ambulatory Ctr. of Miami, Fla., Inc., 400 So. 2d 1262, 1267 (Fla. Dist. Ct. App. 1981).

> Nothing in this section shall require any hospital or any person to participate in the termination of a pregnancy, nor shall any hospital or any person be liable for such refusal. No person who is a member of, or associated with, the staff of a hospital, nor any employee of a hospital or physician in which or by whom the termination of a pregnancy has been authorized or performed, who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of pregnancy. The refusal of any such person or employee to participate shall not form the basis for any disciplinary or other recriminatory action against such person.[319]

In 1981, the Florida court of appeals held that this provision applied to protect an operating room nurse from termination by her employer, an ambulatory care center, when she refused to participate in abortion procedures.[320] The court did not specifically say the nurse was "any person," but it did say that "[t]he legislature has seen fit to afford citizens a right to choose, that is, to refrain from assisting in performing abortions in accordance with the dictates of their religion."[321] This dictum supports a broad reading of "any person," and, by extension, "other person," in the contraception statute.[322]

The applicability of remaining states' statutory conscience protections to pharmacists facing tort liability for failure to sell emergency contraceptives is conjectural at best. Like Illinois, Washington state recently promulgated a new rule creating an almost airtight requirement that pharmacists distribute Plan B either by prescription or from behind the counter.[323] But, unlike Illinois, Washington already had a broad statute protecting healthcare providers refusing to distribute contraception:

> No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they

319. FLA. STAT. ANN. § 390.0111(8).

320. *Kenny*, 400 So. 2d at 1263, 1267.

321. *Id.*

322. FLA. STAT. ANN. § 381.0051(6) (West 2007). The court may have considered the statute applicable to Nurse Kenny as an "employee," but her case still indicates that Florida courts construe their healthcare provider conscience clauses broadly.

Tennessee's abortion conscience clause leaves open a similar interpretive door. It states: "No physician shall be required to perform an abortion and no person shall be required to participate in the performance of an abortion. No hospital shall be required to permit abortions to be performed therein." TENN. CODE ANN. § 39-15-204 (2006). "Private institution" is a broader term than "hospital," indicating a broader interpretation. Colorado's abortion conscience clause is sufficiently narrow compared to the family planning clause to show that the latter sweeps more broadly, but whether that includes pharmacists is still unclear. *See* COLO. REV. STAT. § 18-6-104 (2007).

323. WASH. ADMIN. CODE 246-869-010(1) (2007).

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> object to so doing for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objection.[324]

The statute states a strong public policy about conscience protection, but, even so, it does not create a religious defense from tort liability.

Georgia law is perhaps the most confusing. On one hand, pharmacists stating "in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to fill a prescription for a drug which purpose is to terminate a pregnancy" and are protected from legal liability for refusing.[325] On the other hand, "[n]othing in [the same] subsection shall be construed to authorize a pharmacist to refuse to fill a prescription for birth control medication, including any process, device, or method to prevent pregnancy and including any drug or device approved by the federal Food and Drug Administration for such purpose."[326]

The statute, like the rest of Georgia law, is tricky. The statute does not create a duty to dispense; it simply distinguishes between a pharmacist's duties as to abortifacients and contraceptives so that, on its own terms, it does not create a right of refusal as to the latter.[327] The Georgia State Board of Pharmacy only confirms that a refusing pharmacist is not unprofessional for that reason;[328] its code does not provide a defense from tort liability. Therefore, whether the statutory conscience provision protects pharmacists refusing to sell emergency contraception from tort liability depends in part on whether Georgia courts will ultimately categorize it as an abortifacient or contraception.[329]

Other states' conscience clauses are too narrow to protect a pharmacist from tort liability.[330] California's provides only protection from employment

324. WASH. REV. CODE ANN. § 48.43.065(2)(a) (West 1999); *id.* § 70.47.160(2)(a) (West 2002).

325. GA. CODE ANN. § 16-12-142(b) (2007).

326. *Id.*

327. One commentator argues that the statute may create a right to refuse to sell Plan B in light of its new behind-the-counter status. Grimes, *supra* note 100, at 1420. However, just because the clause may no longer take away a right of refusal to sell Plan B based on its being a prescription drug does not mean it creates a right to refuse to sell the drug on a non-prescription basis.

328. GA. COMP. R. & REGS. 480-5-.03(n) (2007).

329. Georgia does provide other protections. For example, employees of state and local agencies connected to the provision of contraceptives under the Family Planning Act receive protection from negative employment consequences for failing to dispense on the basis of "personal religious beliefs." GA. CODE ANN. § 49-7-6; *see also* Grimes, *supra* note 100, at 1404.

330. The states discussed above also protect pharmacists from employment discrimination and professional discipline.

discrimination.[331] The Oregon, West Virginia, and Wyoming statutes only cover employees of state agencies distributing contraceptives from adverse employment actions.[332] North Carolina limits its protections to professional discipline.[333] New York has promulgated a very lukewarm guidance document from its state Office of the Professions.[334]

Nevertheless, this review shows that legislation drafted with sensitivity to the universe of pharmacists' legal needs as well as Plan B's behind-the-counter status can protect pharmacists from tort liability. The Mississippi Health Care Rights of Conscience Act is a particularly strong model. Arkansas, Illinois, and South Dakota all have statutes that should reach pharmacists seeking a defense to tort liability for refusing to sell emergency contraception. Despite potential ground for ambiguity, Colorado, Maine, and Tennessee courts should interpret their relevant statutes to extend protection to pharmacists. For those fortunate enough to reside in these and other states with applicable conscience clauses, the clauses may serve as a legal haven in a litigation-frenzied world.

VI. STATUTORY CONSCIENCE PROTECTIONS FOR FAILURE TO DISPENSE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

Federal constitutional protection for religious liberty has waxed and waned in the past few decades, but the Supreme Court has consistently upheld federal[335] and state *statutory* accommodations of religious practice and belief, including some analogous to pharmacist conscience clauses.[336]

331. CAL. BUS. & PROF. CODE § 733(b)(3) (West 2007).

332. OR. REV. STAT. § 435.225 (2007); W. VA. CODE § 16-2B-4 (2007); WYO. STAT. ANN. § 42-5-101(d) (2007). The language of the Wyoming statute is open to a broader interpretation, but its structural placement within the code suggests that its application is limited to public employees. *See id.* Oregon's professionalism standards require pharmacies to adopt written procedures to protect employees' choices not to distribute certain drugs while preserving customers' access to lawfully prescribed medications. OR. BD. OF PHARMACY, *supra* note 275.

333. N.C. BD. OF PHARMACY, *supra* note 23.

334. Memorandum from Lawrence H. Mokhiber, Executive Sec'y, N.Y. State Educ. Dep't, State Bd. of Pharmacy, to Supervising Pharmacists, *supra* note 273.

335. The Religious Freedom Restoration Act requires that federal courts apply strict scrutiny to federal burdens on religious freedom found in facially neutral, generally applicable laws. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). The Supreme Court held the Act inapplicable to the states as an exercise of congressional power under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507, 534-36 (1997), but it continues to apply to the federal government. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 4 (2000).

336. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 731-32 (2005) (holding that the section of the Religious Land Use and Institutionalized Persons Act that increased the level of protection of prisoners' and other incarcerated persons' religious rights does not violate the

Nevertheless, a number of commentators insist statutory conscience protections for pharmacists violate the United States Constitution's Establishment Clause.[337] This Part shows that these claims need not deter state legislatures seeking to expand statutory conscience protections or judges seeking to apply them.

The theory that the Establishment Clause does not permit accommodation of religious practice burdened by facially neutral, generally applicable laws arises from what can most generously be described as a state of utter confusion concerning the relationship between the two religion clauses.[338] Many cases identify a "tension" between the two clauses,[339] namely that, at times, "the Establishment Clause is said to require what the Free Exercise Clause forbids."[340] Despite a variety of theories that might have allowed the Court to navigate between the two clauses more productively,[341] when evaluating what accommodations the Free Exercise

Establishment Clause); Doe v. Bolton, 410 U.S. 179, 197-98 (1973) (endorsing statutory protections for healthcare providers who refuse to perform abortions for moral or religious reasons).

337. *E.g.*, Smearman, *supra* note 9, at 530-34 ("[B]road refusal clauses such as the Mississippi statute . . . violate the Establishment Clause."); Griffin, *supra* note 29, at 313-17.

338. *See* Laycock, *Regulatory Exemptions*, *supra* note 244, at 1842; McConnell, *Crossroads*, *supra* note 203, at 117-18.

339. *E.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004); Lynch v. Donnelly, 465 U.S. 668, 672 (1984) ("In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible."); Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting) ("I cannot see how an 'official religion' is established by letting those who want to say a prayer say it.").

340. McConnell, *Crossroads*, supra note 203, at 118; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in the judgment) ("The Free Exercise Clause suggests that a special exemption for [sales taxation of] religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden.").

341. *See, e.g.*, Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (stating that religion clauses should primarily protect against discrimination on the basis of religion); Glendon & Yanes, *supra* note 181, at 541-47 (stating that clauses may be read together as protection for religious associations and their activities consistent with interpreting the Bill of Rights as primarily protecting local civic institutions); Laycock, *Religious Liberty*, *supra* note 181, at 349 (stating that "substantive neutrality" as to religion "is sometimes achieved by special treatment for religion and sometimes by identical treatment"); Marshall, *supra* note 203, at 317 (stating that we should permit no exemptions in defense of "belief system equality"); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM.& MARY BILL RTS. J. 303, 332 (2001) (arguing that religion clauses should be read together to balance power of government and organized faiths; enable disempowered groups to organize and increase their power; produce values neither market-driven nor government-controlled; and allow individuals to live with purpose and dignity). I do not take

Clause requires for religious believers, the Supreme Court has tended to construe the clause narrowly to avoid butting heads with the Establishment Clause.[342] As the size and scope of government regulatory activity and the inevitable burden on religious practice increase, government may have to "take religion into account"[343] in order to avoid very heavy handed burdens on religious liberty that threaten to obliterate it all together.[344]

The relationship between the clauses relaxes when statutory accommodations are on the table. The Court has repeatedly held that "there is room for play in the joints"[345] between the clauses so that the Establishment Clause permits some state actions accommodating religion that the Free Exercise Clause might not require.[346] As discussed in Part IV, the Free Exercise Clause may protect dissenting pharmacists because tort duties are not neutral and generally applicable; they contain numerous secular exceptions, for example.[347] Even if it does not, the Establishment Clause does not necessarily invalidate statutory conscience protections for pharmacists otherwise facing tort liability for failure to dispense.

The Court's recent cases sort "accommodations" into two categories: statutes alleviating believers from the burdens of otherwise facially neutral, generally applicable statutes, which the Court tends to uphold;[348] and statutes providing extra benefits for religious practice in light of an otherwise facially neutral, generally applicable legal landscape, of which the Court tends to be more circumspect.[349] Distinguishing the two categories is

the view that all of these disparate views are correct but merely point out that the Supreme Court could have proceeded differently with no less logical consistency than the approach it chose.

342. Glendon & Yanes, *supra* note 181, at 481.

343. McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring).

344. *Compare* McConnell, *Crossroads*, *supra* note 203, at 181 (arguing that it is far more important that government take religion into account now that "regulation has penetrated so much more deeply into both private life and the operations of the non-profit sector") *with* John W. Whitehead, *Accommodation and Equal Treatment of Religion: Federal Funding of Religiously-Affiliated Child Care Facilities*, 26 HARV. J. ON LEGIS. 573, 581 (1989) (arguing that government and religion clash more frequently, requiring more extensive accommodation, because the role and scope of both have expanded considerably).

345. *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

346. Locke v. Davey, 540 U.S. 712, 718-19 (2004).

347. *See supra* notes 206-208 and accompanying text.

348. *E.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

349. *E.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

difficult,[350] but the fine points reveal that a statutory conscience protection for pharmacists such as Mississippi's would pass constitutional muster.

An early leading "extra benefits" case is *Estate of Thornton v. Caldor*.[351] In *Thornton*, the Supreme Court struck down a Connecticut statute because it provided an "extra" benefit for religious practitioners.[352] The Connecticut statute provided: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[353] The statute also forbade an employer from asking whether a job applicant recognized a Sabbath day.[354]

The Court held that the statute had "a primary effect that impermissibly advances a particular religious practice."[355] The Court saw that the statute potentially created huge burdens on employers—e.g., accommodating a schoolteacher who is a Friday Sabbath observer needing Friday off or complications of organizing other employees' work schedules to accommodate Sabbatarians[356]—but the "absolute and unqualified right not to work on whatever day [employees] designate as their Sabbath" particularly disturbed the Court, not only because it took no account of the economic impact or convenience to either the employer or other employees, but because it forced employers "*to conform their business practices to the particular religious practices of the employee* by enforcing observance of the Sabbath the employee unilaterally designates."[357]Not only were these third parties subsidizing Sabbath observers' religious practices in terms of time and money, but the State was demanding they do so. The demand, the Court decided, went too far; such a statute imposes too great a burden on other private individuals and, therefore, violates the Establishment Clause.[358]

Two years later, the Supreme Court upheld a conscience clause that alleviates a burden on the Mormon Church from the application of an otherwise facially neutral, generally applicable statute.[359] In *Corp. of the*

350. *See, e.g.*, Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 821 (2006) (applying *Thornton* to conscience clauses).

351. 472 U.S. at 703.

352. *Id.* at 710.

353. CONN. GEN. STAT. § 53-303e(b) (1985), *declared unconstitutional by Estate of Thornton*, 472 U.S. 703.

354. *Estate of Thornton*, 472 U.S. at 706 n.3.

355. *Id.* at 710.

356. *Id.* at 709-10.

357. *Id.* at 709 (emphasis added).

358. *Id.* at 710-11.

359. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330-31, 339-40 (1987).

Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,[360] the plaintiff brought a claim against the Deseret Gymnasium in Salt Lake City, a nonprofit facility, open to the public and run by religious entities associated with the Mormon Church, for terminating his employment, because he had "failed to qualify for a temple recommend," loosely meaning he could not attend services.[361] The plaintiff relied on section 703 of the Civil Rights Act,[362] which bars employment discrimination on the basis of religion.[363] The defendants moved to dismiss based on section 702,[364] which exempts religious organizations from section 703's requirements.[365] The plaintiff returned fire, arguing "that if construed to allow religious employers to discriminate on religious grounds in hiring for nonreligious jobs," the exemption in section 702 violated the Establishment Clause.[366]

The United States Supreme Court disagreed with the plaintiff. It relied on the "play in the joints" concept: "There is ample room under the Establishment Clause for 'benevolent neutrality[,] which will permit religious exercise to exist without sponsorship and without interference,'"[367] as long as such accommodation does not "devolve into 'an unlawful fostering of religion.'"[368] The Court differentiated between laws that allow churches to advance religion, which it labeled constitutional, and laws pursuant to which the government is advancing religion, which are very often unconstitutional.[369] The Mormon "Church's ability to propagate its religious

360. *Id.* at 327.

361. *Id.* at 330. A temple recommend is a document given by the LDS church to a member recommending him or her as worthy to enter one of the world's 128 LDS temples, which are more sacred than mere local meetinghouses. Multiple lay leaders interview members seeking temple recommends to confirm that their conduct conforms to strict standards of worthiness so that they are properly prepared to receive spiritual and temporal blessings from God. *See generally* Howard W. Hunter, *The Message: Your Temple Recommend*, NEW ERA, April 1994, at 6, *available at* www.lds.org/ldsorg/v/index.jsp?vgnextoid=024644f8f206c010VgnVCM1000004d82620aRCRD&locale=0&sourceId=346e88a85f2fb010VgnVCM1000004d82620a____&hideNav=1 (last visited Aug. 9, 2008). The *Amos* plaintiff had voluntarily chosen to not qualify for a temple recommend, but he remained welcome to attend services in his local meetinghouse each week and could have qualified at another time. I am indebted to Adam Stephenson for helping me understand this factual context of the *Amos* case.

362. Civil Rights Act of 1964 §703, 42 U.S.C. § 2000e-2(a) (2000).

363. *Amos*, 483 U.S. at 331.

364. 42 U.S.C. § 2000e-2(e).

365. *Amos*, 483 U.S. at 331.

366. *Id.*

367. *Id.* at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

368. *Id.* at 334-35 (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 145 (1987)).

369. *Amos*, 483 U.S. at 337.

doctrine through the Gymnasium"[370] had not improved pursuant to section 702, and, therefore, the section conferred on the Church no government benefit.[371] Under these circumstances, section 702 did not violate the Establishment Clause. *Amos* specifically distinguished *Thornton* on the basis that the section 702 exemption did not create the same sort of judicially cognizable "burden" on the terminated employee as the Sabbath exemption in *Thornton* did on Connecticut employers.[372] Two differences are crucial. The first is that private action burdened third parties in *Amos*, while public action did so in *Thornton*. In *Amos*, the Mormon Church, a private actor, had required the employee to behave consistent with Church requirements to keep his job. The employee could have said "no" without legal consequences.[373] In *Thornton*, the state imposed the requirement on employers by statute:

> This is a very different case than *Estate of Thornton v. Caldor* . . . . In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden . . . that constituted for the employer or other employees. . . . In the present cases, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend [entitlement to attend Mormon services], and his discharge was not required by statute.[374]

In other words, if there is no state action, then there will be no Establishment Clause problem.

An additional difference is how the two statutes affected religion and, particularly, their impact on third parties in so doing. Section 702 extended no special benefit to religious employers. For example, the Mormon Church's ability to propagate its doctrine was not greater since the 1964 Civil Rights Act was passed.[375] Instead, the exemption simply alleviated the burden of complying with federal employment discrimination laws. The employee-plaintiff's "freedom of choice in religious matters was impinged upon," but by the Mormon Church, not by the federal government and not

370. *Id.*

371. *Id.* at 338.

372. *Id.* at 337 n.15.

373. The Court also observed that even though section 702 burdened the plaintiff's own "freedom of choice in religious matters," the Church, not the government, created "the choice of changing his religious practices or losing his job." *Id.*

374. *Amos*, 483 U.S. at 337 n.15 (citations ommitted).

375. *Id.* at 337.

even by the federal government through the Mormon Church's efforts to comply with the Civil Rights Act of 1964.[376]

By contrast, the Connecticut statute "arm[ed] Sabbath observers with an absolute and unqualified right not to work" on their Sabbath that relieved them of no other government-imposed burden but, in turn, imposed a specific burden on employers: requiring them to conform to "the particular religious practices" of another.[377] "The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace,"[378] the *Thornton* Court said, thereby finding that "[t]he *statute* has a primary effect that impermissibly advances a particular religious practice."[379]

Conscience protections for pharmacists described in Part V above are more analogous to the exemption from Title VII in *Amos* than the Connecticut Sabbath statute in *Thornton*. As Title VII did to the Mormon Church in *Amos*, a tort duty to sell emergency contraception would burden a dissenting pharmacist's religious liberty by leaving her open to liability. A statutory conscience accommodation alleviates that burden, but it gives pharmacists no additional legal benefit by virtue of being religious. Moreover, a statutory accommodation hardly advances religion by encouraging other pharmacists to adopt beliefs that would discourage them from selling emergency contraception; instead, others would probably realize that with dissenting pharmacists out of the business, their own profits would rise.[380]

Thornton is inapposite to pharmacists' conscience protections. The dispute in *Thornton* arose just after Connecticut mostly abandoned its Sunday-closing laws,[381] so the Connecticut legislature was writing on a clean slate as to Sabbatarians' employment rights and duties when it passed the offending statute.[382] The Connecticut statute did not alleviate a government-imposed burden on free exercise; the burden was an incident of employment itself.[383] By contrast, where pharmacists seek a defense from tort liability, the duty to dispense or sell is already on the legal slate or, at least, preliminary to the defense by virtue of other state action. That is, the burden of a requirement to sell emergency contraception is not an incident of being a pharmacist but for the state-imposed requirement to sell.

376. *Id.* at 337 n.15.
377. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985).
378. *Id.*
379. *Id.* at 710 (emphasis added).
380. *See* Vischer, *supra* note 10, at 112-16; Duvall, *supra* note 112, at 1508.
381. *Estate of Thornton*, 472 U.S. at 705-07.
382. *Id.* at 705 n.2.
383. Analogously, an employer may require a pharmacist to dispense emergency contraception, but that would create different legal issues from a common law tort duty.

The Court's subsequent statutory accommodation cases uphold this dividing line between *Amos* and *Thornton*,[384] even if the Court has struggled with its precise location at times. In *Texas Monthly, Inc. v. Bullock*, for example, the Court fragmented in the process of concluding that exempting religious publications from having to pay sales tax pursuant to generally applicable law violated the Establishment Clause.[385] A three-Justice plurality indicated that the sales tax exemption was more analogous to the Sabbath exemption in *Thornton*, which extended a benefit to religious adherents while imposing a substantial burden on third parties, than to the employment discrimination exemption in *Amos* and overturned the Texas law under the Establishment Clause.[386]

The plurality's opinion in *Texas Monthly* focused on the sales tax exemption's tendency to endorse religion by creating a "subsidy" for religious publishers "that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'"[387] The law would have passed Establishment Clause muster had "Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life" and made a tax exemption "available to an extended range of associations,"[388] though *Amos* had stated that religious accommodations need not "come[] packaged with benefits to secular entities."[389]

On the other hand, the plurality noted two other causes for concern. First, the exemption entangled the Texas taxing authorities and religious publishers in the process of determining which publishers would qualify for the exemption.[390] Second, the exemption not only burdened third parties, but it did so for the most "impermissibl[e]" reason under *Thornton*: to subsidize "writings that *promulgate* the teachings of religious faiths."[391]

Justice Scalia objected in his dissent that *Texas Monthly* was actually an *Amos* case because the sales tax exemption removed a state-imposed burden, i.e., the tax, from religious publications,[392] as had property tax exemptions for "houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations[,] which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic

384. *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687 (1994).

385. 489 U.S. 1, 25 (1989).

386. *Id.* at 14-16.

387. *Id.* at 14 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) (internal quotation marks omitted)).

388. *Id.* at 16.

389. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987).

390. *Texas Monthly*, 489 U.S. at 20.

391. *Id.* at 15.

392. *Id.* at 33, 36 (Scalia, J., dissenting).

groups," upheld in *Walz v. Tax Commission*.[393] *Walz* relied on two key points. First, the exemption served to avoid entanglement of religion and government inevitable in the processes of taxing church buildings, such as property valuation, imposition of tax liens, and tax foreclosures.[394] Second, and more important to the *Amos/Thornton* distinction, the Court concluded that the tax exemption did not actively confer a benefit on religious groups but was merely passive relief from a government burden.[395]

The ultimate distinction between *Walz* and *Texas Monthly* is the entanglement analysis. Requiring churches to pay the property tax in *Walz* would have resulted in "excessive entanglement" between religious and government entities, so the exemption furthered separation of the two.[396] *Exempting* faith publishers from the sales tax in Texas fostered entanglement by requiring Texas to determine which publishers did and did not qualify for the exemption.[397] Avoiding entanglement, a key Establishment Clause goal, was a principled reason for upholding the exemption in *Walz* but overturning it in *Texas Monthly*, as the Court did.

The two cases diverge as to whether the relevant exemption confers a benefit on religion without substantially burdening third parties. The *Walz* Court accepted that the exemption conferred a passive benefit on religious groups—it "simply abstains from demanding that the church support the state"[398]—as a trade-off for avoiding entanglement and hostility toward religion.[399] Avoiding hostility to religion benefits third parties, as opposed to burdening them, by giving them access to the "stabilizing influences [of religious institutions] in community life."[400] *Texas Monthly* characterized the sales tax exemption as a "subsidy" the state "directs" to religious groups for proselytization.[401] The "abstinence" versus "subsidy" distinction makes functional sense in a religious context: a property tax taxes the value of an asset even in the absence of income generation, a very intrusive activity for a church that might have to redirect resources from other faith activities in order to pay the tax, while the sales tax exemption subsidizes the sales that

393. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

394. *Id.* at 674. In *Texas Monthly*, the plurality also noted that the need for taxing authorities to determine which publications were and were not religious would itself constitute excessive entanglement. 489 U.S. at 20.

395. *Walz*, 397 U.S. at 675. The *Texas Monthly* Court found that the Texas statute was a subsidy for promulgating the teachings of various faiths and therefore benefited religious groups at the expense of every non-believing taxpayer. 489 U.S. at 14.

396. *Walz*, 397 U.S. at 674-75.

397. *Texas Monthly*, 489 U.S. at 20.

398. *Walz*, 397 U.S. at 675.

399. *Id.* at 673, 675.

400. *Id.* at 672-73.

401. *Texas Monthly*, 489 U.S. at 15, 15 n.5.

generate the cash that could have paid the tax and, instead, creates an incentive to engage in the sales.[402] In other words, the property tax exemption benefits-burdens analysis probably comes out a wash, while the sales tax exemption hits all the bad notes: a subsidy of the very activity of promulgating the faith paid by third parties.

With that distinction between the two exemption schemes in mind, both cases recognize that an exemption from an otherwise generally applicable tax scheme can be a constitutional accommodation of religion without extending the exemption to non-religious contexts.[403] *Walz* never equates "sponsorship," which implies actively promoting (or "endorsing") religion, with "accommodation," a more passive concept.[404] *Walz*'s holding relies not on the New York statute embedding the property tax exemption for religious buildings among those for other non-profits as removing the unconstitutional taint of endorsement, but rather on the purpose of the exemption as avoiding hostility to religion, a concern most other non-profits would not face.[405] Most importantly, however, *Walz* speaks loudest when it whispers: it implies both that the purpose of the property tax exemption was

402. This view would be consistent with *Amos*, which noted that "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (emphasis in original).

403. *See* Michael McConnell, *Crossroads*, *supra* note 203, at182.

404. The *Texas Monthly* plurality takes the view that the Court in *Walz* expressly stated that the legislative purpose of the property tax exemption "was *not* to accommodate religion." *Texas Monthly*, 489 U.S. at 13 n.3. This reading of *Walz* is too much like statutory construction to persuade. More correctly, the Court said:

> New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.

Walz, 397 U.S. at 672. On the very next page, the *Walz* Court discusses the extent of "permissible state accommodation to religion." *Id.* at 673.

405. *Cf. Texas Monthly*, 489 U.S. at 15 n.5 (distinguishing *Walz* on the basis that the tax exemption for houses of worship in that case extended exemptions to non-religious groups). Only five years after *Texas Monthly*, the Supreme Court had already retreated from the "endorsement" and embedding interpretations of *Walz* to say that in *Walz*, "the Court sustained a property tax exemption for religious properties *in part* because the State had 'not singled out one particular church or religious group or even churches as such,' but had exempted 'a broad class of property owned by nonprofit, quasi-public corporations.'" *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 704 (1994) (emphasis added) (quoting Walz, 397 U.S. at 673).

to accommodate religion and that New York was constitutionally justified in doing just that.[406]

These jurisprudential strands united in the 2005 decision, *Cutter v. Wilkinson*, which upheld the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[407] as a permissible accommodation of institutionalized persons' religious liberties.[408] The Act forbids state and federal prisons from substantially burdening inmates' religious liberty unless necessary to achieve a compelling state interest, thereby "overturning" the decision in *Smith* as to this more limited group of fact situations.[409] In *Cutter*, several inmates of Ohio prisons sued under the RLUIPA claiming that prison officials had failed to accommodate their religious exercise as the Act required.[410] Ohio responded that RLUIPA violated the Establishment Clause,[411] and the Sixth Circuit agreed, partly on the basis that the effect of affording religious prisoners more rights than non-religious prisoners would be to advance religion because more prisoners might convert to such faiths to take advantage of additional privileges.[412]

Justice Ginsburg's majority opinion appeared to synthesize the two categories of accommodations cases by summarizing them: By requiring strict scrutiny of prison regulations burdening a prisoner's exercise of his or her religion, the Court observed that RLUIPA "alleviates exceptional government-created burdens on private religious exercise," which is a

406. *Walz*, 397 U.S. at 673.

407. 42 U.S.C. § 2000cc-1(a)(1) & (2) (2000).

408. 544 U.S. 709 (2005). The Act avoided the Religious Freedom Restoration Act's fate by invoking federal authority under the Spending and Commerce Clauses, thereby making it applicable to the states. *Id*. at 715.

409. 42 U.S.C. § 2000cc-1. In essence, this statute "overturns" the *Smith* standard in prison cases. *Cf.* 42 U.S.C. § 2000bb (congressional findings from broader predecessor Religious Freedom Restoration Act stating that the purpose is to restore compelling interest analysis to governmental burdens on free exercise). Like the Catholic Church's teaching on abortion, however, the devil of RLUIPA is in the details of how courts will ultimately apply it. Pre-*Smith* courts were fairly hard-hearted to prisoners in religious liberties cases, usually finding excuses to apply rational review, not strict scrutiny, the standard imposed under the statute's terms. *E.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

410. *Cutter*, 544 U.S. at 712. The Act states as follows:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

411. *Cutter*, 544 U.S. at 717.

412. *Id*. at 717-18.

constitutionally permissible legislative purpose under *Amos*.[413] However, the Court also said that the Establishment Clause does limit legislatures' accommodation efforts. First, an accommodation has to "be administered neutrally among different faiths,"[414] and, second, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[415] On the other hand, in dicta, the Court endorsed a regime of statutory accommodations in which "[t]he state provides inmates with chaplains 'but not with publicists or political consultants,' and allows 'prisoners to assemble for worship, but not for political rallies.'"[416] The Court was not intimating that a statutory accommodation of religion had more legal authority than a constitutionally mandated accommodation of free speech, but this section does hint at the extent of the states' discretion to make accommodations from generally applicable laws.[417]

Applying *Cutter* to Mississippi's Health Care Right of Conscience Act shows that properly drafted conscience statutes are viable statutory religious liberties defenses to tort liability even if a pharmacist does not otherwise have the benefit of Free Exercise Clause protection.[418] First, the Mississippi statute extends to a pharmacist a statutory right not to participate or be required to participate in a healthcare service that violates her conscience.[419] A tort duty to dispense or sell contraception is a legal requirement to participate in a healthcare service, so the statute "alleviates" the pharmacist of that that burden.[420]

413. *Id*. at 720.

414. *Id*. This principle is the foundation of *Board of Education v. Grumet*, 512 U.S. 687 (1994). New York legislation had carved out a special school district for "a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism." *Id.* at 690. The Supreme Court overturned the New York statute creating the district, but insisted that "we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special burdens." *Id*. at 705. Instead, the Court held that the "proposed accommodation singles out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored." *Id*. at 706-07 (footnotes and citations omitted) (comparing *Texas Monthly* and *Amos*).

415. *Cutter*, 544 U.S. at 720.

416. *Id*. at 724-25 (quoting Reply Brief for the United States as Respondent Supporting Petitioners at 5, Cutter v. Wilkinson, 544 U.S. 709 (2005) (No. 03-9877), 2005 WL 593064).

417. *Cf.* Steven Goldberg, Cutter *and the Preferred Position of the Free Exercise Clause*, 14 WM. & MARY BILL RTS. J. 1403, 1412 (2006). Professor Goldberg finds it "remarkable to see the Court give religious exercise greater freedom than political speech and assembly." *Id*. at 1413. But the Court did not give religious exercise greater freedom over rights of expression: Congress did in the RLUIPA.

418. *See infra* notes 423-34 and accompanying text.

419. MISS. CODE ANN. § 41-107-5(1) (2005).

420. *Cutter*, 544 U.S. at 719-20. This Article is analyzing the applicability of the statute to religious pharmacists only, but, to the extent that the statute applies to a broader group, the

While the Mississippi statute does not require that the burden of selling emergency contraception on a pharmacist's conscience be either substantial or extensive, the theological stakes of compliance with a duty to sell, in particular, would be the sort of "special"[421] or "exceptional . . . burden[] on private religious exercise"[422] the Court has long endorsed alleviating.[423] As discussed in Part III, a Catholic pharmacist dispensing emergency contraception would face excommunication or the sin of complicity in an assault on principles that run to the very heart of her faith.[424] The risk of honoring her beliefs by not dispensing or selling in the absence of a tort defense would also be also quite exceptional; even one lawsuit might bankrupt a pharmacist because malpractice insurance is unlikely to cover an intentional act. A claimed burden that might appear "political" to a non-believer might merit accommodation.[425]

There is no reason to conclude that the Mississippi statute would not be applied neutrally. The breadth of the statutory definition of "conscience"—"religious, moral or ethical principles held by a health care provider"[426]—extends the accommodation to the non-religious, avoiding the pitfalls of *Texas Monthly* and (the claimed ones) of *Walz* over impermissible endorsement of religion.[427] In fact, the statute seems designed to satisfy the modern Supreme Court's fascination with religion when it is least meaningful: when it is diluted by association with somewhat odd collections of philosophical and historical symbols or "tamed, cheapened, and secularized."[428]

interplay of *Walz* and *Texas Monthly* suggests that Mississippi's broader statute is more likely to pass constitutional muster because it "embeds" the protection for pharmacists dissenting due to religious scruples among those dissenting because of secular ethical concerns. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 12-13 (1989).

421. Bd. of Educ. v. Grumet, 512 U.S. 687, 705 (1994).

422. *Cutter*, 544 U.S. at 720.

423. *See* Laycock, *Regulatory Exemptions*, *supra* note 244, at 1840-42.

424. *See supra* notes 134-137 and accompanying text.

425. Conscientious objectors to the Selective Service Act found this to be true during the Vietnam War. *E.g.*, Welsh v. United States, 398 U.S. 333, 342 (1970) (holding that statutory provision barring conscientious objection status to those of persons with "essentially political, sociological, or philosophical views or a merely personal moral code" did not eliminate registrant from entitlement simply because that person held "strong beliefs about our domestic and foreign affairs" (quoting Universal Military Training and Service Act of 1951 §6(j), 50 U.S.C. app. § 456(j) (2000))). *But see* Gillette v. United States, 401 U.S. 437, 443 (1971) (conscientious objector exemption construed to include only those objecting "to participating personally in any war and all war" so that Roman Catholics objecting only to unjust wars could not qualify).

426. *Id.* § 41-107-3(h).

427. *See supra* text and notes at 396-406.

428. McConnell, *Crossroads*, *supra* note 203, at 126-27. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 681 (2005) (Establishment Clause permits display of monument of Ten

Nothing in the plain language of the Mississippi statute suggests the statute would not reach members of many faith groups with scruples about selling emergency or daily oral contraceptives.[429] At minimum, Christianity, Judaism, and Islam all have members who prefer not to dispense contraceptives due to religious beliefs.[430] The statute certainly does not protect only Roman Catholics, for example, even though they are identifiable by their strict and concrete moral teaching on abortion and contraception.[431]

The key to *Cutter* is whether it requires analysis of third-party burdens that a statutory accommodation for pharmacists facing tort liability for failing to sell emergency contraception might create for purposes of determining conformity with the Establishment Clause. Several commentators assume it does based on *Cutter*'s comment that, in application, "courts must take *adequate account* of the burdens a requested accommodation may impose on nonbeneficiaries,"[432] but *Cutter* does not say what "account" is "adequate." Teasing out what *Cutter*'s analytical framework requires for an *Amos* accommodation is fraught with difficulty because *Cutter was a Thornton case, not an Amos case*! The prisoners were suing because they wanted a state institution, the prison, to provide access to more religious literature and ceremonial items, opportunities to participate in group worship granted to inmates of more mainstream faith groups, the privilege of dressing consistent with the mandates of their faiths, and chaplains trained in their faiths.[433] In other words, the *Cutter* plaintiffs wanted

Commandments displayed with "17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity.'" (quoting H.R. Con. Res. 38, 77th Leg., Reg. Sess. (Tex. 2001)); County of Allegheny v. ACLU, 492 U.S. 573, 598 (1989) (holding a crèche scene displayed on public property at Christmas unconstitutional as an endorsement of religion, because no equivalent secular symbol "detracts from the crèche's religious message"); Lynch v. Donnelly, 465 U.S. 668, 671, 683, 685-86 (1984) (crèche displayed with Santa Claus house, reindeer, candy-striped poles, Christmas tree, carolers, toys, lights and "Seasons Greetings" banner was not a government advancement of religion sufficient to make the display unconstitutional when done by city).

429. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 706-07 (1994).

430. *See supra* note 110.

431. *Grumet*, 512 U.S. at 705-06 (accommodations may not create a "special franchise" for one faith group or single out a particular religious sect for special treatment); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993) (condemning "religious gerrymanders" and citing Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

432. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (emphasis added). For commentary applying *Cutter* to conscience protection, see, for example, Smearman, *supra* note 9, at 531-34; Duvall, *supra* note 112, at 1506-21 (section that applies "the 'religious accommodation' framework to pharmacy conscience clause legislation").

433. *Cutter*, 544 U.S. at 713.

additional "benefits" from the state by virtue of their religious faiths, just as the Connecticut statute had provided in *Thornton*.[434]

Cutter, however, was a facial challenge to RLUIPA, so the Court never indicated what taking "adequate account" of third-party burdens might mean in the prison context, though it left open the possibility that the always-sensitive security concerns cases might sometimes constitute a substantial burden on prison officials and other inmates.[435] One approach to "accounting for" third-party burdens would be to turn the "absolute and unqualified right" language of *Thornton* around to suggest that in the absence of exceptions, a statutory accommodation is not constitutional.[436] What *Thornton*, *Texas Monthly*, and a future "as applied" RUILPA challenge based on prison safety have in common, however, is that subsidizing religious activity through the power of the state will face close judicial scrutiny.[437] The involuntary taking from one to give to another drives whether "burden" analysis is relevant at all.[438] But even if it is, the cases do not rule out the possibility that a third-party burden will not be substantial or that benefits will outweigh burdens.[439]

Who imposes the burden distinguishes the *Thornton* line from the *Amos* line. If Ohio accommodates prisoners' desires to attend certain religious services, any safety risks to other inmates will be burdens that the state's accommodation, not a religious prisoner, imposes. When Connecticut requires employers to give employees their Sabbath day off work, the necessity of complying with state requirement, not the requesting employee, burdens the employer. When the state of Texas exempts religious publications from paying sales tax, it is really accommodating —or, more correctly, "choosing"—certain types of religious activity to prefer, and in so

434. One might argue that by imprisoning the *Cutter* plaintiffs, the state of Ohio had imposed on their religious liberties, converting the case to an *Amos*-style alleviation of a state-created burden. I am inclined to think, however, that the more persuasive view is that by virtue of committing serious crimes meriting imprisonment, the *Cutter* plaintiffs stood in the shoes of religious "employees" in *Thornton*, such that the underlying burden on their religious practice was primarily an incident of incarceration arising from their own actions. This would not make accommodation inappropriate (indeed, it was only inappropriate in *Thornton* because of the extent of the burden imposed on third parties), but it would make a more searching analysis of third-party burdens justified.

435. *Cutter*, 544 U.S. at 722-23.

436. *E.g.*, Smearman, *supra* note 9, at 532-33.

437. The *Thornton* statute's lack of "exceptions" simply showed that it conferred its benefit through the power of the state, not individual choice, an "exception" would have allowed the individual employer to exercise.

438. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 14 (1989).

439. *Id.* at 18 (noting that Texas had no evidence that paying the sales tax would offend any religious publishers' beliefs or inhibit their activities).

doing, every other taxpayer will foot the cost of that choice.[440] Because a property tax was at issue in *Walz*, the same is not precisely true: the property tax exemption in that case simply left churches to decide for themselves whether and how to advance religion,[441] and though other citizens had to fund the government, the exemption at least relieved those citizens of the burdens inherent in taxing churches.[442]

Amos cases are different. No law required the Mormon Church to terminate its employee in *Amos* and no law required that the employee make his religious observance consistent with Church requirements.[443] Church teaching and the employee's free decision prompted the termination.

Therefore, in an *Amos* pharmacist-accommodation case, "adequate account" could be essentially no account at all because the pharmacist herself, not the state's accommodation statute, burdens third parties such as customers. Nothing in Mississippi's law mandates that any pharmacist turn away any potential customer for emergency contraception. Either a woman's voluntary conduct or the physical/psychological force of another party when she is unwilling puts her at risk of potential pregnancy. Trying to obtain emergency contraception is her choice; the law does not require her by virtue of being a woman or engaging in sexual conduct to purchase emergency contraception.[444] *Amos* specifically rejected any notion that the Title VII exemption for religious employers constituted an "endorsement" of religion.[445] *Thornton*[446] and *Cutter*[447] only condemn state-imposed burdens, and *Amos* holds, while *Cutter* confirms, that accommodations that alleviate special or exceptional state-imposed burdens on religious practice are consistent with the Establishment Clause.[448]

440. In fact, this is precisely the sort of "active involvement of the sovereign in religious activity" that *Texas Monthly*'s nemesis, *Walz*, condemns. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

441. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987); *see supra* text and notes at 398-400.

442. *Walz*, 397 U.S. at 674-75.

443. *Amos*, 483 U.S. at 337 n.15.

444. *Cf.* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985) (involving Sabbath observers who had to worship on a certain day).

445. *Amos*, 483 U.S. at 337 n.15.

446. *Estate of Thornton*, 472 U.S. at 709. Even though the employee requests the day off, the *Thornton* Court insists the State, not the employee, imposes the burden: "The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee." *Id.*

447. *See* Cutter v. Wilkinson, 544 U.S. 709, 720-22 (2005) (discussing burdens from accommodation laws and citing *Thornton*).

448. *See supra* notes 413-417 and accompanying text.

This view of *Cutter*'s impact on the relationship between statutory protection for pharmacists refusing to sell emergency contraception and third party burdens is consistent with another line of "private choice" Establishment Clauses cases that culminated in the recent *Zelman v. Simmons-Harris*.[449] The plaintiffs in *Zelman* challenged an Ohio education reform program that allowed students to choose to use state-funded school vouchers in religious schools.[450] The Supreme Court upheld the program based on longstanding precedent. Where a government aid program is "neutral with respect to religion" and "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,"[451] the independent and private choices of the recipients of government funds snap the connection between the government and the religious use to which the recipient put the money, thereby sanitizing the expenditure of any impermissible establishment taint.[452]

Similarly, once a pharmacist chooses to invoke an appropriately drafted statutory conscience accommodation, the connection between the state providing the accommodation and pharmacist snaps so that any imposition on a woman's access to emergency contraception is a result of the pharmacist's private choice, not state action.[453] The Mississippi statute is such a statute because it is neutral among sects and broad enough to protect religiously and non-religiously based conscience objections to selling emergency contraception.[454] To the extent that it is an "advancement" of religion, the pharmacist, not the state, is advancing religion by claiming the

449. 536 U.S. 639 (2002).

450. *Id.* at 646, 652.

451. *Id.* at 652; *see also* Mueller v. Allen, 463 U.S. 388, 397 (1983). Here is where *Zelman* distinguishes *Nyquist*, not simply by virtue of labels such as "endorsement" or "advancing religion," but because broad-based programs such as those upheld in *Zelman* and *Mueller* demonstrate their secular effect by being broad-based, while the narrowness of the program in *Nyquist* revealed its unmistakable function of supporting fiscally challenged private, religious schools. *Compare Zelman*, 536 U.S. at 661, *with Mueller*, 463 U.S. at 397, *and* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973).

452. *Zelman*, 536 U.S. at 652-53; *see also Mueller*, 463 U.S. at 399; *cf. Nyquist*, 413 U.S. 756 (overturning a system of direct benefits to private schools and private-school enrollees' parents that were not based on the amount expended to attend the schools).

453. McConnell, *supra* note 335, at 41; *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974) (there must be a "sufficiently close nexus between the state and the challenged action of [a] regulated entity so that the action of the latter may be fairly treated as that of the State itself" for a regulated entity to be deemed a state actor for 14th Amendment purposes).

454. *See supra* text and notes at 284-289; *cf. Zelman*, 536 U.S. at 655-57, 661-62.

statute's protections.[455] Therefore, no state-imposed burden on third-parties exists to take into "adequate account" under *Cutter*.

For similar reasons, the mere fact that a pharmacist has a statutory right to refuse to sell emergency contraception does not violate a woman's constitutional rights related to access to contraception. Only state statutes substantially limiting access to contraception violate a woman's fundamental right "to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child"[456] because such statutes substantially limit her access to the means of effectuating that decision, whether through contraception or abortion.[457] The Supreme Court differentiates between "substantial" and merely "incidental" governmental burdens on the right to decide whether to bear a child:

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[458]

A statutory conscience protection for pharmacists may impose an incidental burden on women in that for some, obtaining emergency contraception is

455. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987). If all pharmacists are prepared to sell emergency contraception, then religion cannot be advanced under the Mississippi statute; the state of Mississippi cannot do so itself by virtue of the statute just as the state of Ohio cannot funnel public funds to religious schools without parents choosing to send their children to them.

456. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

457. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977). In fact, *Carey* explains that the abortion cases are instructive when scrutinizing regulations that substantially limit access to contraceptives "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold, Esenstadt v. Baird*, and *Roe v. Wade*." *Carey*, 431 U.S. at 688-89. The later case "recogni[zed] . . . the State's 'important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life,'" which meant that the woman's right to make the decision could not be absolute. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875-76 (1992) (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)). Most recently, the Court held that a state's compelling interest in the integrity of the medical profession might justify refusing a woman's or her doctor's choice of abortion method, without an exception to protect the woman's health. Gonzales v. Carhart, 127 S. Ct. 1610 (2007). The Court now recognizes a set of state interests sufficient to justify regulation of abortion and contraception that is broad enough to include accommodation of healthcare professionals' religious liberties and conscientious objection. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

458. *Casey*, 505 U.S. at 874.

more difficult.[459] But the purpose is to protect a few pharmacists' religious liberties, not to deny women access to the drug, which would remain available from pharmacists willing to sell it. To the extent any burden exists, it emanates from the pharmacist herself, not the state. Thus, a customer's Fourteenth Amendment substantive due process rights do not protect her anyway because a pharmacist does not qualify as a "state actor."[460] Finally, a conscience protection statute is hardly the equivalent of the statute in *Carey v. Population Services International*, for example, which prohibited distribution of non-prescription contraceptives to the entire class of women under age sixteen.[461]

Even to the extent that the existence of a statutory accommodation of religion led to actual limits on access to contraception, these limits are unlikely to be sufficiently substantial in degree to warrant constitutional scrutiny.[462] There is no reason to think a woman has a right to have access to a particular *type* of contraception[463] or even to any contraception in any particular moment if all a regulation limiting access does is make her decision about whether to bear a child "more difficult or more expensive."[464]

Even if courts apply a *Thornton* "substantial burden" standard to pharmacist conscience clauses, women seeking to hold pharmacists liable for wrongful conception will struggle to meet it. In urban areas with twenty-four-hour big-chain pharmacies on every corner, if one particular pharmacist refuses to sell, the woman can drive a few blocks to another. Such a burden will rarely be "substantial."[465]

459. *See infra* text and notes at 466-471.

460. For a useful overview of the problem, see generally Aaron Rozenek, Note, *Whose Conscience Is It Anyway? The State's Role in Conscience Clause Creation and the Denial of Contraception*, 40 SUFFOLK U. L. REV. 215 (2006).

461. *Carey*, 431 U.S. at 691-92.

462. *See id.* at 688; *see also* Wardle, *supra* note 280, at 210-11 (questioning whether abortion rights would provide a "defense to a defense" of conscience protection based on stronger precedent in that area). Conscience protection for dissenting pharmacists may not limit access substantially. The statute overturned in *Carey* prohibited sales of contraceptives to minors under sixteen years of age. *See supra* text at 461.

463. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1637 (2007).

464. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

465. "Women, including those living in rural areas," often purchase emergency contraception in metropolitan areas and at pharmacies they do not regularly frequent, "to preserve and protect [their] privacy and anonymity." *Freedom of Conscience Hearing*, *supra* note 1, at 9 (statement of Michael Patton). Abortion seekers also tend to avoid their usual haunts when seeking providers. *See* Jason M. Kellhofer, Note, *The Misperception and Misapplication of the First Amendment in the American Pluralistic System: Mergers Between Catholic and Non-Catholic Healthcare Systems*, 16 J.L. & HEALTH 103, 139-40 (2001-2002).

Some women's situations may permit them to show that a pharmacist's refusal to sell emergency contraception is a substantial burden. Studies also show teenagers, African Americans, and Latinas tend, on average, to take longer to obtain emergency contraception, which decreases its efficacy, thus creating what may be a substantial burden in particular cases.[466] For women living in rural areas where pharmacies are few and far between, access is unavoidably limited[467] and even one dissenting pharmacist can cut down on practical access dramatically. Yet again, particularized analysis may undermine some of these claims.[468] Two commentators argued that traveling thirty-three miles was an excessive burden on women seeking reproductive healthcare;[469] but if courts followed the *Texas Monthly* plurality's implicit lead and weighed benefits and burdens, pharmacists facing burdens such as excommunication would come out winners. For low-income women lacking access to a vehicle during business hours, the argument is more compelling than for women who choose to live in the country for peace and quiet after commuting into the city for work.[470] Many women living in South Dakota with its quite comprehensive conscience clause and small, isolated communities might scale the substantial burden wall,[471] if it even applies.

Thornton's vision of a third-party burden included "an absolute duty to conform . . . to the particular religious practices" of the beneficiary party.[472] Even a minimal burden may raise Establishment Clause concerns if it

466. *See* Dries-Daffner et al., *supra* note 306, at 94 (citing evidence that African American, Latina, and adolescent women experience more delays in obtaining emergency contraception than white women).

467. *See* Teliska, *supra* note 109, at 229-31, 238, 244-46.

468. For example, women are perfectly capable of planning ahead—many do so with pre-intercourse contraceptives—and suggesting otherwise is somewhat insulting. *See* Lynne Marie Kohm, *From* Eisenstadt *to Plan B: A Discussion of Conscientious Objections to Emergency Contraception*, 33 WM. MITCHELL L. REV. 787, 802-03 (2007); Katherine D. Spitz, Note, *Sex, Drugs, and Federalism's Role: Regulation of the Morning After Pill on Public College and University Campuses*, 33 J.C. & U.L. 191 (2006).

469. Susan Berke Fogel & Lourdes A. Rivera, *Saving* Roe *Is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 725-26 (2004).

470. My observation from having lived and practiced law in such areas is that rural dwellers tend to be very organized and they "lump in together" simply because they *cannot* run to the corner store for that forgotten bottle of milk. Women who want extra contraceptive protection and do not otherwise have easy transport of their own may not be as disadvantaged as they appear. *See supra* note 465.

471. *See* Teliska, *supra* note 109, at 245.

472. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709 (1985). Admittedly, *Texas Monthly* appeared to decrease the burden needed to show an Establishment Clause violation, but the case offered no majority opinion and was more clearly a "benefit" case than a "burden" case in which the Court concluded that the state of Texas was giving religious publishers a direct subsidy. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989).

imposes on everyone,[473] but a statutory accommodation for a pharmacist actually limits a customer's ability to use the power of the state to force a pharmacist to conform to *her* beliefs. Plus, a woman can leave a dissenting pharmacist's place of business and go elsewhere; she is not "forced" to accommodate the pharmacist's beliefs. The pharmacist may be able to alleviate the potential burden by posting signage that warns regular customers to obtain emergency contraception by other means, thereby accommodating all.[474]

VII. CONCLUSION

Pharmacists are already involved in litigation over conscience clauses; it is probably only a matter of time before a woman sues a pharmacist for wrongful conception. Changes in the pharmacy profession and correlative tort duties mean a common law or statutory duty to dispense or sell emergency or daily oral contraceptives is not outside the realm of possibility. Many religious pharmacists have compelling reasons to refuse to sell, but federal Free Exercise protections are currently uncertain. State statutory conscience clauses offer some protection and do not violate the Establishment Clause. Therefore, more states should not hesitate to provide this protection to all healthcare providers.

473. *Texas Monthly*, 489 U.S. at 15.

474. *See* Kohm, *supra* note 468, at 802; Spitz, *supra* note 468, at 191.