Kentucky Law Journal

Volume 97 | Issue 3 Article 5

2009

What the Doctor Ordered: Balancing Religion and Patient Rights in U.S. Pharmacies

Rachel T. Caudel
University of Kentucky

NOTES

What the Doctor Ordered: Balancing Religion and Patient Rights in U.S. Pharmacies

Rachel T. Caudel[1]

"An individual employee's personal beliefs cannot be allowed to trample on women's constitutionally protected civil rights."[2]

"The United States was founded on the idea that people act on their conscience—that they have a sense of right and wrong and do what they think is right and moral . . . . Every pharmacist has the right to do the same thing."[3]

INTRODUCTION

Two of the fundamental rights guaranteed by the U. S. Constitution are the right to freely exercise one's religion and the right of personal autonomy for all citizens.[4] As early as 1923, the Supreme Court applied the right to personal autonomy to decisions regarding marriage and family.[5] The Court has since extended this right to include the concept of individual privacy, which, as has been described by a lower court, "encompasses decisions concerning the integrity and autonomy of one's body."[6]

---

1 B.A. Foreign Language / International Economics, *magna cum laude*, 2005, University of Kentucky; J.D. expected May 2009, University of Kentucky College of Law.

2 American Association of University Women, *AAUW's Position on Reproductive Rights*, www.aauw.org/advocacy/issue_advocacy/actionpages/reprorights.cfm (last visited Oct. 5, 2008).

3 Rob Stein, *'Pro-Life' Drugstores Market Beliefs; No Contraceptives For Chantilly Shop*, WASHINGTON POST, June 16, 2008, at A01 (quoting Tom Brejcha).

4 The Supreme Court has long held that the Bill of Rights protects certain liberties that, though unspecified, are fundamental to an individual's ability to function in society. These rights include a right to privacy and autonomy over one's own body. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972); Roe v. Wade, 410 U.S. 113, 152 (1973).

5 *See generally* Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *Meyer*, along with *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), marked the beginning of a period of more liberal interpretation of due process.

6 Johnson v. San Jacinto Jr. College, 498 F.Supp. 555, 574 (D.C.Tex. 1980); *See also*

The tension between the right of autonomy over one's own body and the right to freely practice one's religion came into sharp focus with the debate surrounding pharmacists' refusals to distribute emergency contraception. Today, these rights are clashing in courts and state legislatures across the United States. This note examines the competing rights of the women who are prescribed and the pharmacists who dispense emergency contraception and other sexual health pharmaceuticals. It also proposes a solution that protects the rights of both parties.

Part I of this Note begins with a discussion of the recent controversy pertaining to the delicate balance of a woman's right to privacy with a pharmacist's right to free exercise of religion.[7] Next, Part II focuses on the rights of privacy and autonomy afforded these women as citizens of the United States.[8] Part III considers the rights of pharmacists and the impact of mandatory dispensation laws on these rights.[9] Finally, Part IV proposes a workable solution to balance the protected interests of women and pharmacists alike.[10]

I. BACKGROUND

For several decades, women in the United States and throughout Europe have taken emergency contraceptives, sometimes referred to as the "morning after pill," to reduce the risk of pregnancy after unprotected sexual intercourse.[11] Emergency contraceptive pills (ECPs) are hormonal drugs that are intended for use when other means of contraception have failed. ECPs, taken up to 72 hours after coitus, work by preventing the release of an egg (ovulation) and changing the womb and cervical mucus to make it more difficult for an egg to meet sperm (fertilization).[12] ECPs are not medically considered to be an abortion method, because, unlike abortifacients, ECPs work prior to implantation.[13]

Lawrence v. Texas, 539 U.S. 558, 562 (2003).

7 *See infra* text accompanying notes 11–35.

8 *See infra* text accompanying notes 36–54.

9 *See infra* text accompanying notes 55–74.

10 *See infra* text accompanying notes 75–111.

11 Charlotte Ellertson, *History and Efficacy of Emergency Contraception: Beyond Coca-Cola*, 28 FAMILY PLANNING PERSPECTIVES, Mar.–Apr. 1996, at 44, 44.

12 *See, e.g.*, Plan B Patient Pamphlet *available at* http://www.go2planb.com/PDF/PatientPamphlet.pdf (last visited Oct. 5, 2008).

13 *See, e.g., id.* The U.S. government and leading medical societies define pregnancy as beginning at implantation, not fertilization, therefore, a contraceptive that works prior to implantation is not medically considered to be abortion. *'Plan B' Gets FDA's Over-Counter Approval*, National Public Radio broadcast, Aug. 24, 2006, *available at* http://www.npr.org/templates/story/story.php?storyId=5705260.

"The roots of modern emergency contraception date back to the 1920s,"[14] but until 1998 no post–coital emergency contraceptive method had been approved by the Food and Drug Administration (FDA). Women relied on off–label use of regular contraceptives and other medications to achieve a similar result.[15] In 1998 when the FDA first approved a post–coital emergency contraceptive method, Preven,[16] it was met with little controversy. However, with the FDA approval of an additional post–coital emergency contraceptive method[17] and an increase in the number of prescriptions for emergency contraceptives, controversy developed around emergency contraceptive dispensation.

In many instances across the United States, pharmacists have refused to dispense emergency contraceptives,[18] which is particularly problematic for the women impacted by such refusals given the nature of the drug. Emergency contraception, unlike regular hormonal birth control, must be taken within seventy–two hours of intercourse to be effective.[19] Because emergency contraceptive pills only prevent pregnancy and cannot terminate an existing pregnancy, any delay in taking the pills results in a greater risk of becoming pregnant.[20] According to the *New England Journal of Medicine*, the total number of pharmacists' refusals is unknown, but reports of pharmacists' refusals date back to 1991 and have seen a steady increase since the FDA approval of emergency contraceptives in 1998.[21] Estimates indicate that there have been 180 refusals in the United States in just six months' time.[22]

In 2004, a rape victim took her prescription for emergency contraception to an Eckerd's pharmacy in Texas, where she was told by each of the three pharmacists on duty that she could not have this medication because it

14 A.A. Haspels & R. Andriesse, *The Effect of Large Doses of Estrogens Post Coitum in 2000 Women*, 3 EUR. J. OF OBSTETRICS & GYNECOLOGY AND REPROD. BIOLOGY 113–17 (1973); P. F. A. Van Look & H. von Hertzen, *Emergency Contraception*, 49 BRITISH MED. BULL. 158, 159–60 (1993).

15 Planned Parenthood Affiliates of California, *A Brief History of Emergency Contraceptives*, http://www.ppacca.org/site/pp.asp?c=kuJYJeO4F&b=139489 (last visited Oct. 5, 2008).

16 FDA, *Preven approval package*, http://www.fda.gov/cder/foi/nda/98/20946.pdf (last visited Oct. 10, 2008).

17 In 1999, the FDA approved a second post–coital emergency contraception package, Plan B (Levonorgestrel). FDA, *Plan B approval packakage*, http://www.fda.gov/cder/foi/nda/99/21–045_PlanB.htm (last visited Sept. 1, 2008).

18 Access to Birth Control Act, H.R. 2596, 110th Cong. § 2(9) (referred to the House Committee on Energy and Commerce, June 6, 2007).

19 *See* sources cited *supra* notes 12, 14, and 16.

20 *See* sources cited *supra* notes 12, 14, and 16.

21 Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?* 19 NEW ENG. J. MED. 351, 2008–12 (2004).

22 *See* Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005, §4, at 12.

"violated [the pharmacist's] morals."[23] The victim was only able to fill her prescription at a Walgreen's pharmacy later that evening, thereby delaying ingestion and increasing her risk of pregnancy.[24] Similarly, a woman in New Hampshire was denied emergency contraceptives by a Brooks pharmacist, who claimed moral objections to both dispensing and transferring the prescription.[25] By the time the managers at this Brooks Pharmacy resolved the situation, a substantial amount of time had passed and the woman had become pregnant.[26]

Often, the refusal to fill this type of prescription comes not only with a decreased risk of efficacy and an unplanned pregnancy, but also a moral "scolding" or misinformation about potential side effects and how the drug works. For example, when a woman and her husband took her prescription for birth-control pills to a CVS pharmacy in Texas, the pharmacist refused to fill her prescription.[27] The pharmacist told the couple "birth control was not right" and "[birth-control] pills cause cancer."[28]

State legislatures have been quick to respond to pharmacists' refusals to fill birth-control prescriptions. Some states have enacted statutes expressly authorizing pharmacists to refuse to fill birth control or emergency contraception. While the Arkansas statute on family planning requires that all medically acceptable contraceptive procedures be made available without discrimination, it also provides, in part, that:

> [n]othing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information; and [n]o 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.[29]

---

23 Lyndsay Knecht & Margaret Myrick, *Protesters Fight Pharmacy: Groups Target Eckerd's for Violating Rights*, N. TEX. DAILY, Feb. 3, 2004, *available at* http://media.www.ntdaily.com/media/storage/paper877/news/2004/02/03/UndefinedSection/Protesters.Fight.Pharmacy-1889880.shtml.

24 Liz Austin, *Friend Recounts Rape Victim's Search for Morning-After Pill*, ASSOCIATED PRESS, Feb. 21, 2004; Angela K. Brown, *Woman Said Pharmacist Denied Her Birth-Control Prescription.* ASSOCIATED PRESS, Mar. 31, 2004; Knecht & Myrick, *supra* note 23.

25 *Pharmacist Denies Woman's Request for Morning-After Pill*, N.H. UNION LEADER (Manchester, N.H.), Sept. 27, 2004, at C7.

26 *Id.*

27 Brown, *supra* note 24.

28 *Id.*

29 ARK. CODE ANN. § 20-16-304 (West 2006); *see also, e.g.*, S.D. CODIFIED LAWS § 36-11-70 (2008); TENN. CODE ANN. § 68-34-104 (West 1971); ME. REV. STAT. ANN. tit. 22, § 1903 (1981).

Although some states have chosen to authorize refusals, other states have imposed sanctions on individual pharmacists who refuse to dispense contraceptives. A Kmart pharmacist in Wisconsin, Neil Noesen, refused to fill or transfer a birth–control prescription because he thought birth control was sinful.[30] The Wisconsin Department of Regulation and Licensing brought a disciplinary proceeding against Noesen, alleging that Noesen failed to fulfill his professional obligations.[31] The administrative judge made a recommendation to the Wisconsin State Pharmacy Examining Board regarding the proper response to Mr. Noesen's conduct.[32] In her order, the judge found that Mr. Noesen's refusal "constitute[d] a danger to the health, welfare, or safety of a patient," and that in so doing, Mr. Noesen "has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist . . . ."[33] In her recommendations to the Wisconsin Pharmacy Examining Board, the Administrative Law Judge wrote, this pharmacist "clearly needs training in the ethics of his profession," and ordered that he be required to take ethics courses for pharmacists.[34]

Still other states have taken a third approach and enacted statutes requiring pharmacists to fill any legal prescription, regardless of moral convictions. The New Jersey statute on pharmacy practice requires a pharmacy "to properly fill lawful prescriptions for prescription drugs or devices that it carries for customers, without undue delay, despite any conflicts of employees to filling a prescription and dispensing a particular prescription drug or device due to sincerely held moral, philosophical or religious beliefs."[35]

Each of the measures outlined above has sparked controversy among political groups on the grounds that each measure infringes on someone's

30 Nonparty Brief of American Civil Liberties Union and The American Civil Liberties Union of Wisconsin Foundation, Noeson v. State, No. 2005CV212, at 6 (Wis. Ct. App. 2007), *available at* http://www.aclu-wi.org/wisconsin/rights_of_women/Pharm_Refusal_Amicus.shtml.

31 Press Release, Center for Law & Religious Freedom, Christian Legal Society, Center for Law & Religious Freedom Files Brief in Support of Catholic Pharmacist Prosecuted for Refusing to Dispense Contraceptives (Nov. 18, 2004), *available at* http://www.clsnet.org/clrfPages/pr_WisconsinvNoesen2.php?mode=print; In the Matter of the Disciplinary Proceedings Against Neil Noeson, No. LS–031009–PHM (State of Wisconsin Pharmacy Examining Board, Apr. 13, 2005) (final decision and order).

32 In the Matter of the Disciplinary Proceedings Against Neil Noeson, No. LS–031009–PHM (State of Wisconsin Pharmacy Examining Board Apr. 13, 2005) (final decision and order).

33 *Id.* at 3.

34 *Id.* at 23.

35 N.J. STAT. ANN. § 45:14–67.1 (West 2008); *see also, e.g.*, CAL. BUS. & PROF. § 733 (West 2007); ILL. ADMIN. CODE tit. 68 § 1330.91 (2008).

constitutionally protected rights—either the rights guaranteeing freedom of religion or the rights of personal autonomy, privacy, and equal protection.

II. Constitutional Rights and Sexual Health

State laws that specifically allow pharmacists the right to refuse to dispense prescribed medications are in direct conflict with women's rights of personal autonomy, privacy, and equal protection. The U.S. Constitution does not expressly provide for a right of privacy, but courts have long recognized that this right exists.[36] In 1961 the Supreme Court stated that privacy rights exist, at least in some contexts, and acknowledged that they were no less important than any other right guaranteed by the Constitution.[37] In *Griswold v. Connecticut*,[38] the Court stated that multiple provisions of the Constitution—the first, third, fourth, fifth, and ninth amendments—create zones of privacy, protecting "against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"[39] Then, in 1973, the Supreme Court's landmark decision in *Roe v. Wade*[40] reiterated and reaffirmed that the right of privacy extends to decisions involving marriage,[41] procreation,[42] contraception,[43] and child rearing.[44]

Four years after the decision in *Roe v. Wade*, the Court went further in stating that restrictions on the distribution of contraceptives are clear intrusions on protected rights of privacy.[45] Indeed, the Court said that regulations that "burden an individual's right to decide to prevent conception . . . by substantially limiting access to the means of effectuating that decision" should be viewed with the same scrutiny as regulations prohibiting the use of contraceptives altogether.[46] That is, the regulations should only be upheld when justified by a compelling state interest and narrowly tailored.[47] Based on this precedent, it is clear that the Court not only views contraceptive use as a protected liberty interest, but also protects access to contraceptives.

The Court has found state regulation limiting contraceptive sale to licensed pharmacists to be unduly burdensome on the individual right

36 *See supra* note 4.

37 Mapp v. Ohio, 367 U.S. 643, 656 (1961).

38 Griswold v. Connecticut, 381 U.S. 479 (1965).

39 *Id.* at 484 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

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

41 *Id.* at 152 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

42 *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942)).

43 *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972)).

44 *Id.* at 153 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).

45 Carey v. Population Servs., Int'l, 431 U.S. 678, 687–88 (1977).

46 *Id.* at 688.

47 *Id.*

of privacy and, therefore, subject to strict scrutiny.[48] Certainly, then, a regulation that not only limits access to, but allows complete denial of contraceptives at the discretion of a third party is also unduly burdensome and should be a regulation subject to strict scrutiny.

In addition to raising issues with respect to privacy rights, statutes regulating contraceptives may raise Equal Protection concerns. Regulations are generally held to violate the Equal Protection Clause when they purposefully discriminate against a certain class.[49] In other words, the Equal Protection Clause prohibits regulations that are enacted because of their consequences on a particular class. *Roe v. Wade* has been applied to hold violative of the Equal Protection Clause, absent a compelling rationale, the denial of certain contraceptive services when other services, similar in risk and difficulty, are routinely performed.[50] In *Hathaway v. Worchester City Hospital,* the First Circuit struck down a city hospital's prohibition on consensual sterilization operations, because other non–therapeutic procedures of equal risk that were equally demanding on the hospital's staff and resources were available.[51]

Regulations that allow for refusal to dispense one type of contraceptive, i.e. emergency contraceptives, and not others, seem to present an even better case for clear discrimination against a certain class. Morning after pills and standard birth–control pills are similar in risk and certainly application, particularly given that standard birth–control pills can be taken in such a manner to achieve the same post–coital pregnancy prevention provided by emergency contraceptives.[52] It is not, then, a stretch to see that courts would apply *Roe v. Wade* to hold invalid regulations allowing for the refusal to dispense a validly prescribed emergency contraceptive by a pharmacist who fills other contraceptives or sexual health pharmaceuticals with similar risks and costs.

The foregoing discussion illustrates that a woman's right to choose whether or not to receive and take emergency contraception is protected by more than one amendment of the Constitution and is supported by a history of case law. Although case law suggests that historically many, if not most, regulations restricting reproductive freedom have been struck down,[53] the Court has made it clear that limitations and restrictions on

48 *Id.* at 689.

49 *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682–83 (1973); Batson v. Kentucky, 476 U.S. 79, 85 (1986); Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1992).

50 Hathaway v. Worchester City Hosp., 475 F.2d 701, 705–06 (1st Cir. 1973).

51 *Id.*

52 Plan B Patient Pamphlet, *supra* note 12.

53 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down law prohibiting sale, prescription or use of contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (striking down law that allowed dispensation of contraceptives only to married couples); Roe v. Wade, 410 U.S. 113, 164–66 (1973) (striking down Texas law prohibiting all but lifesaving

contraceptive use and sale will only be overturned absent a compelling state interest.[54] In the case of emergency contraception, the limitation is justified by the rights of pharmacists to exercise their religious and moral beliefs—an interest that is not only an arguable compelling state interest, but is also protected by the Constitution.

III. Free Exercise Among Medical Professionals

As urged by the plaintiffs in one pending emergency contraceptive lawsuit that challenges the validity of Illinois's mandatory dispensation law,[55] *Menges v. Blagojevich*, laws requiring pharmacists to dispense emergency contraceptives may violate pharmacists' rights under the Free Exercise Clause, the Equal Protection Clause and Title VII of the Civil Rights Act of 1964.[56]

The Supreme Court's current interpretation of the Free Exercise Clause[57] allows for neutral laws of general applicability to stand and finds only those statutes whose purpose is to hinder a particular religion to violate the Free Exercise Clause.[58] Even under this interpretation, however, the Supreme Court struck down a city ordinance banning all animal sacrifice and adversely affecting a religious group whose principal form of devotion was sacrifice.[59] Even if the state is deemed to have compelling justifications

abortions); Belloti v. Baird 443 U.S. 622, 651 (1979) (striking down regulation that requires minors to obtain parental or judicial consent before having abortions). *But see e.g.*, Maher v. Roe, 432 U.S. 464, 479–80 (1977) (upholding state law that limited state Medicaid benefits for first–trimester abortions to those that were "medically necessary"); Harris v. McRae, 448 U.S. 297, 326–27 (1980) (holding that States that participated in Medicaid were not required to fund medically necessary abortions for which federal reimbursement was unavailable as a result of the Hyde Amendment); Webster v. Reproductive Health Services, 492 U.S. 490, 511–13 (1989) (upholding law that forbids use of public facilities for abortions and imposing other restrictions); Rust v. Sullivan, 500 U.S. 173, 179, 203 (1991) (upholding regulation forbidding clinic staff from discussing all options available to women facing unintended pregnancies); Gonzales v. Carhart, 127 S. Ct. 1610, 1638–39 (2007) (upholding the Partial–Birth Abortion Ban Act of 2003 and holding that it did not impose an undue burden on the Due Process right of women to obtain an abortion).

54 Carey v. Population Servs. Intl., 431 U.S. 678, 686 (1977) (citing Roe v. Wade, 410 U.S. 113, 154 (1973)).

55 Ill. Admin. Code tit. 68 §1330.91(j) (2008).

56 Menges v. Blagojevich, 451 F.Supp.2d 992, 999 (C.D.Ill. 2006).

57 The Supreme Court has taken varied views on the protections afforded by the Free Exercise Clause of the First Amendment since its first interpretation in *Reynolds v. United States*, 98 U.S. 145, 162–67 (1879). The Free Exercise Clause has been given a narrow interpretation, as in *Reynolds*, then a broad interpretation that required accommodation of religious conduct; *see, e.g., Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963), and once again given a narrow interpretation; *see, e.g., Employment Division v. Smith*, 494 U.S. 872, 878–79 (1990).

58 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

59 *Id.* at 526, 546–47.

for the statute—protecting public health and preventing animal cruelty—the Court found the statute violated the First Amendment, because it was not narrowly tailored to the state's interest in protecting public health and animal welfare.[60]

The turning point in determining whether or not a mandatory dispensation law can withstand constitutional scrutiny rests with its neutrality and the means of achieving the state interest. The Supreme Court has determined that the Free Exercise Clause affords no right to a religious exemption from neutral laws that happen to burden religious practices.[61] Facially, broad mandatory dispensation statutes seem neutral and thus able to stand. The Illinois statute is an example. It provides as follows:

> Upon receipt of a valid, lawful prescription for a contraceptive, a retail pharmacy serving the general public must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription . . . Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.[62]

But, as in the *Menges* case discussed above, when the statute is enacted in response to current religious activity, it may not be viewed as neutral, despite being generally applicable. Statutes, therefore, that apply generally to all pharmacists and all medications may violate the Free Exercise Clause, under its current interpretation, even though they do not target any specific religious group or practice, since they were enacted in response to religious behavior. Furthermore, although an express accommodation is not required by the Free Exercise Clause, broad mandatory dispensation statutes are likely to be deemed too broad, and thus not narrowly tailored. In order for a statute to be narrowly tailored there must be no other, less restrictive alternative available.[63]

Mandatory dispensation statutes are broad—requiring pharmacists to dispense all lawful prescriptions. A typical mandatory dispensation statute does not make exceptions or suggest alternative methods of compliance for workers with strong religious beliefs or moral convictions against dispensing certain drugs. States could achieve their goals of protecting women's health and rights to privacy by less restrictive means.[64] Because

60 *Id.* at 546–47.

61 Employment Div. v. Smith, 494 U.S. 872, 878–82 (1990).

62 ILL. ADMIN. CODE tit. 68, §1330.91(j)(1) (2008).

63 Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1981) (citing U.S. v. Albertini, 475 U.S. 675, 689 (1985)).

64 *See infra* text accompanying notes 75–111.

such less restrictive means exist, current state legislation is not narrowly tailored and will likely fail strict scrutiny analysis.

However, even if mandatory dispensation statutes are upheld as neutral and narrowly tailored, statutes requiring dispensation regardless of moral convictions still face problems in overcoming challenges based on other constitutional guarantees and provisions of federal law. Mandatory dispensation statutes may also be problematic under the Equal Protection Clause of the Constitution. The same Equal Protection principals that invalidate statutes permitting denial of certain type of pharmaceuticals and not others, also render problematic those statutes that require persons, regardless of religious convictions, to dispense contraceptives indiscriminately.

Additionally, Title VII of the Civil Rights Act of 1964[65] makes it unlawful for an employer to discriminate against any individual on the basis of his race, color, sex, national origin or religion.[66] Courts have recognized that there are two theories under which an employer may exercise religious discrimination:[67] through disparate treatment[68] or through failure to accommodate.[69] State and local statutes requiring mandatory dispensation of all valid prescriptions present a problem under the second theory as discussed below.

The religious accommodation theory requires an employer to "actively attempt to accommodate an employee's religious expression or conduct even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge."[70] In an instance where a pharmacist is opposed to filling a certain prescription based on his or her religious convictions, or because doing so is proscribed by his religion, the employer must make an accommodation to allow this pharmacist not to fill the prescription. Failure to accommodate by requiring the pharmacist to dispense the medication would constitute unlawful discrimination under Title VII.

The competing interests of legislation and religious accommodation put the employer in a sort of "catch 22," requiring him to either force the religious objector to dispense medication through disciplinary action in violation of Title VII, or allow the pharmacist not to fill the prescription and violate the state statute requiring dispensation. Courts have reconciled this

65 42 U.S.C. § 2000e–2 (2008).

66 *Id.*

67 *See, e.g.*, Mann v. Frank, 7 F.3d 1365, 1368–70 (8th Cir.1993) (analyzing discrimination suit as involving two separate theories).

68 *Id.* at 1370.

69 *See, e.g.*, Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 75 (1977).

70 Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1018 (4th Cir. 1996).

issue by recognizing that when making an accommodation would present an undue hardship, the employer will not be in violation of Title VII for failing to make an accommodation.[71] In *Trans World Airlines, Inc. v. Hardison*,[72] the Supreme Court defined "undue hardship" as any act that would require an employer to bear greater than a "*de minimis* cost" in accommodating an employee's religious beliefs,[73] and stated that "'*de minimis* cost' entails not only monetary concerns, but also the employer's burden in conducting its business."[74] Certainly, violating a state law imposes more than a *de minimis* cost on the employer and failure to accommodate would likely not constitute a Title VII violation. Despite this possibility that failure to accommodate may technically comply with Title VII, it seems unlikely that courts would be willing to uphold a state statute that provides for regular religious discrimination in the face of a federal statute that prohibits it.

Pharmacists' rights are clearly protected by several areas of law that make mandatory dispensation statutes problematic. However, as explained above, patients' rights are protected by similarly problematic statutes. Therefore, it is imperative that a more balanced solution be found.

IV. A Workable Balance

A. The Problem with Current "Solutions"

Recently, several solutions have been proposed to address the difficulty in balancing the protected interests.[75] All of them, however, prove problematic, either facially or in practice. In 2005, Senator Barbara Boxer introduced the Pharmacy Consumer Protection Act[76] to amend Titles XVIII and XIX of the Social Security Act.[77] The Act would require all pharmacies accepting federal Medicare and Medicaid funding to fill all valid prescriptions "without unnecessary delay or other interference, consistent with the normal timeframe for filling prescriptions."[78] The Act would also require the pharmacy either to order any medication not

71 *See* E.E.O.C. v. Ilona of Hungary, Inc., 108 F.3d 1569, 1576 (7th Cir. 1997) (holding that an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship).

72 432 U.S. 63 (1977).

73 *Id.* at 84.

74 Beadle v. City of Tampa, 42 F.3d 633, 636 (11th Cir. 1995) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)), *cert. denied*, 515 U.S. 1152 (1995).

75 *See, e.g.*, Access to Birth Control Act, H.R. 2596, 110th Cong. (referred to House Committee on Energy and Commerce, June 6, 2007).

76 S.778, 109th Cong. (2005).

77 *Id.*

78 *Id.* § 1898(a)(1).

in stock, or transfer the prescription to another pharmacy that carried the medication in question.[79]

The Pharmacy Consumer Protection Act almost passes as permissible exercise of the Congress's power to condition federal funding. As iterated by the Court in *South Dakota v. Dole*,[80] constitutional conditional spending requires that: (1) the condition promote "the general welfare;" (2) the condition be unambiguous; and (3) the condition relate "to the federal interest in particular national projects or programs."[81]

The Pharmacy Consumer Protection Act clearly meets these three requirements. However, the Court also noted in *Dole* that Congress cannot use its spending power to induce unconstitutional acts.[82] The Pharmacy Consumer Protection Act cannot stand up to this restriction—it requires pharmacists to dispense drugs without interference regardless of their personal religious views. There is no room in this bill for accommodations for pharmacists whose religion prohibits them from prescribing contraceptives or other sexual health medications. As noted in the discussion of state mandatory dispensation statutes, statutes that force pharmacists to engage in acts contrary to their religion may violate the Free Exercise Clause and the Equal Protection Clause.[83] Similarly, then, a statute that in essence induces a pharmacy to disregard their pharmacists' religious convictions and forces dispensation of all pharmaceuticals, i.e. violates the Free Exercise Clause and Equal Protection Clause, is an unconstitutional condition on spending.

The Pharmacy Consumer Protection Act never became law, but it would not have been a workable solution because it failed to balance both parties' interests. Another bill, the Access to Birth Control Act,[84] goes further in attempting to balance both parties' interests. The Access to Birth Control Act, introduced in June of 2007 by Representative Carolyn Maloney, prohibits pharmacists from: intimidating or harassing customers who request contraception,[85] interfering with the delivery of contraception,[86] providing misinformation about the contraceptive's mechanism of action,[87] and refusing to return a valid prescription to the customer upon request.[88] But, the Access to Birth Control Act adds an additional provision that state

79 *Id.* § 1898 (a)(2).

80 South Dakota v. Dole, 483 U.S. 203 (1987).

81 *Id.* at 207.

82 *Id.* at 210.

83 *See supra* text accompanying notes 55–74.

84 Access to Birth Control Act, H.R. 2596, 110th Cong. (referred to House Comm. on Energy and Commerce, June 6, 2007).

85 *Id.* § 249(a)(3)(A).

86 *Id.* § 249(a)(3)(B).

87 *Id.* § 249(a)(3)(C).

88 *Id.* § 249(a)(3)(E).

mandatory dispensation statutes and the Pharmacy Consumer Protection Act fail to consider, a right of conscience accommodation for religious objectors.[89] The Access to Birth Control Act contemplates an option whereby religious objectors can avoid filling a prescription by asking another pharmacist to fill the prescription instead, or by transferring the prescription to another pharmacy.[90]

On its face, the Access to Birth Control Act seems to strike a workable balance between the patient's and the pharmacist's rights. Under the Act, women would be able to get the contraceptives prescribed to them without misinformation, harassment, or a moral scolding. In addition, women would receive the prescribed contraceptive in a timely manner. In this way, the Act preserves women's protected rights of privacy, allowing them the freedom to choose to procreate or not. Equal Protection concerns, like those in *Hathaway*,[91] that prohibit denial of one class of medication or procedure, when others of similar risk and cost are available, would also vanish because patients would no longer be denied access to one particular class of pharmaceuticals. Not only are the patient's rights preserved, but also the pharmacists who are opposed to contraception for religious reasons could avoid participating in dispensing and distributing the drug through an express religious accommodation. Thus, Title VII rights, as well as Free Exercise rights and Equal Protection rights of the pharmacists are also considered and protected by the Access to Birth Control Act.

Judy Waxman, Vice President for Health and Reproductive Rights at the National Women's Law Center, says the bill ensures that "every woman who goes to a pharmacy for contraception will leave with her medication in hand and her dignity in tact [sic]."[92] In its practical application, however, the Access to Birth Control Act may not prove to be the perfect solution. In fact, in practice the act may be no more effective in protecting the rights of women or pharmacists than mandatory dispensation statutes or express refusal regulations.

Representative Jay Inslee (D–WA) notes that "Women in need of birth control or emergency contraception should never have to go on a wild goose chase to get FDA–approved medication from a licensed pharmacist,"[93] and the Act will ensure this will not happen. Women, however, may still end up on a wild goose chase. Patients' rights become a concern when the Act is looked at from a practical and not a strict textual viewpoint. The Act contemplates an objecting pharmacist notifies the patient, in a

89 *Id.* § 249(c).

90 *Id.*

91 Hathaway v. Worchester City Hosp., 475 F.2d 701 (1st Cir. 1973).

92 *Women's Groups Rally behind Bipartisan Bill to Stop Pharmacy Birth Control Refusals*, June 6, 2007, http://maloney.house.gov/index.php?option=content&task=view&id=1363&Itemid=61.

93 *Id.*

non-harassing, threatening or condescending manner, that he or she is opposed to the medication, and asks another pharmacist on duty to fill the prescription or volunteer to transfer the prescription to another pharmacy.[94] But, the reality is that many religious objectors are not only concerned with having to physically dispense the medication themselves.[95] On the contrary, for many religious objectors the medication presents such a problem they may actually try to actively hinder dispensation.[96]

Furthermore, because the bill contemplates that every woman will get her medication in a timely manner, though pharmacists may opt out of actually filling the prescription themselves, it is even more problematic. In order for compliance with the act to be feasible, a pharmacy would be required to have at least two pharmacists on duty for every single shift. If a pharmacy is staffed with only the objecting pharmacist, who has the right to opt out of filling the prescription, then assuming the pharmacist is able to put aside his objections and ask another pharmacist to fill the prescription, he must call another pharmacist and ask him or her to come to the pharmacy and fill the prescription. At a minimum, the patient is likely delayed at least an hour in getting her medication. Thus, the pharmacy has not been able to comply with the Access to Birth Control Act, and the woman faces an increased risk that the medication will not be effective because of the delay. The only way to comply, therefore, with both provisions of the act is for a pharmacy to always staff another pharmacist to cover the religious objector who refuses to participate in filling the prescription.

Requiring a pharmacy to staff two pharmacists at one time is also problematic. In *Noesen v. Medical Staffing Network*,[97] the court, in recognizing that employers are not required to grant an accommodation if it will impose an undue hardship,[98] held that a Roman Catholic pharmacist who was opposed to filling prescriptions for birth control and refused to have contact with the patients requesting it, was not entitled to relief of his counter or telephone duties.[99] The court pointed out that a reasonable accommodation is one that "eliminates the conflict between employment requirements and religious practices,"[100] but not one that would work an undue hardship on the employer or other employees.[101] In that case, the Seventh Circuit decided that relieving the pharmacist of counter duties would create an undue hardship, because it not only creates a burden in scheduling, but it also creates a disproportionate workload for other

94 *Id.*

95 *See supra* text accompanying notes 21–28.

96 *Id.*

97 Noesen v. Medical Staffing Network, 232 Fed.App. 581 (7th Cir. 2007).

98 *Id.* at 584.

99 *Id.*

100 *Id.* (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70 (1986)).

101 *Id.* at 584.

employees.[102] The Seventh Circuit came to a similar conclusion, in *Endres v. Indiana State Police*[103] with an employee who sought to be excused only from those tasks to which he had objection. Again, the court reasoned, this created an unreasonable hardship by placing a strain on managers in scheduling and assigning tasks consistent with employee beliefs. Further, it created an undue burden on other employees, who suffered an increase in workload and distraction from their normal tasks, in order to fill in for the objectors. [104]

Accordingly, courts likely would not require an accommodation to be made for pharmacists with objections to filling certain types of prescriptions. Certainly, it would place a strain on managers to ensure the schedule is such that someone else is always there to fill the prescription should a patient need contraceptives, during an objector's shift. Further, increased staffing to cover for the objector creates increased costs for the pharmacy in the form of wages, and increased costs to other employees, who will be pulled from their normal tasks to fill in for the religious objector will be similarly high. In light of such high costs to employer and other employees, it is doubtful that any court would find the pharmacist entitled to an accommodation, which basically leaves pharmacies back at square one—with a mandatory dispensation statute.

The forms of proposed legislation fail to adequately comply with federal and constitutional guarantees such that they offer little solution to the delicate balance that must be found between the pharmacists' rights and the patients' rights. A workable solution will still need to be created.

B. Striking a Balance

Perhaps the best method of protecting the conflicting rights and interests at stake here is one that allows for personal choice on behalf of all parties. One such possibility contemplates allowing each individual pharmacy to determine its own policy with regard to contraceptives, emergency contraceptives and sexual health medications. States should create a system requiring pharmacies to develop a detailed policy on dispensing sexual health medicines, i.e., what sexual health medications they will distribute and whether or not they will impose restrictions on any sort of access. In addition to requiring individual policy development, states should create a registry or directory, wherein pharmacies will list their policy and whether or not a patient will be able to obtain a particular sexual health medication from the pharmacy. In addition to submitting their policy to the directory, pharmacies who refuse to dispense should be required to post their policy

102 *Id.*

103 Endres v. Indiana State Police, 349 F.3d 922 (7th Cir. 2003).

104 *Id.* at 925.

at their doorway in a clear, easy to understand format including information about how to obtain the directory of pharmacy policies. Failure to comply with the terms of their own published policy or failure to post their policy to the directory or at their door should result in a fine.

For example, X Pharmacy may decide that it will fill all prescriptions for birth–control and sexual health medications but refuse to fill prescriptions for emergency contraceptive pills. X Pharmacy will outline its policy in detail and submit it to the state directory, which will notify patients that X will fill prescriptions for birth–control pills and sexual health medications, but not emergency contraceptives. X Pharmacy will also hang a sign at its door that states that X Pharmacy will not dispense emergency contraceptives. Should X Pharmacy subsequently refuse to dispense a birth–control prescription, X Pharmacy would be subject to fines.

Such a statute would serve to protect the interests of all parties involved. Individual pharmacies would be free to choose a policy that fits with their beliefs, morals and company philosophy. Women's rights would also be protected. Women will have access to an easy to understand directory outlining where they may obtain different forms of sexual health medications and contraceptives. Because sanctions would be imposed on pharmacies who fail to comply with their stated policies, women would be able to rely reasonably on the information contained in the directory or posted at the pharmacy door and would not find themselves subjected to shame, a moral scolding, or a denial of their prescription.

Ultimately, the right of privacy and autonomy seeks to ensure that women (and families) have the personal right to choose whether or not to procreate or use contraceptives.[105] A statute providing women the opportunity to learn a pharmacy's policy in advance allows women this choice. She can obtain the policies of pharmacies in advance, determine which one matches with her choices about procreation and contraception and exercise these choices, free from pharmacist interference.

This policy alone does not, however, ensure that all women have easy access to emergency contraception. Because pharmacies are still free to develop their own policies, there will undoubtedly be pharmacies that choose not to dispense. For women in urban areas this will likely not pose a problem. A woman in need of emergency contraception will consult the directory, see that one pharmacy does not dispense the pills and simply take her prescription to the next nearest pharmacy. But for women in rural areas, this process might not be so easy. A woman in a rural area might find that the only pharmacy in her town does not dispense emergency contraception and may have to travel to the nearest city in order to have her prescription filled. In a situation in which a woman is looking to fill her prescription for normal hormonal birth–control pills, this would be an

105 *See supra* note 53.

inconvenience. But, in a situation in which a woman needs to have her prescription for emergency contraceptives filled, the difference between towns may mean the difference between an unplanned pregnancy and an effective contraceptive.

Such a situation could be avoided by adopting a policy urging physicians and gynecologists to offer to provide a prescription for emergency contraception to any woman as part of her annual examination. The woman could then take her prescription to a pharmacy promising to dispense emergency contraceptives, have it filled and keep it on hand for when it is needed. This way, she is able to gain quick and easy access to emergency contraceptives while the rights of pharmacists and pharmacies rights are still preserved.

Under such a plan, assuming a woman's doctor could provide an emergency contraceptive prescription at her annual exam, pharmacists would not be subject to a mandatory dispensation statute that forces them to fill prescriptions that violate their religious and moral ethics. The most likely situation under this plan would entail a pharmacist with religious objections working at a pharmacy with a non–dispense policy. In that scenario a pharmacist would never be forced to dispense against his will. Unfortunately, in some instances a religious objector may find himself subject to a mandatory dispensation policy at his pharmacy. This situation, while perhaps unfortunate, is not a violation of protected federal or constitutional rights.

Pharmacists are protected against state or federal mandatory dispensation statutes because of their Free Exercise, Equal Protection and Title VII, rights. As the court noted in the *Civil Rights Cases*,[106] the acts of private individuals do not fall within the provisions of the Free Exercise Clause and the Equal Protection Clause.[107] Since here we have individual pharmacies establishing their own private policies, they do not fall within the provisions of the Free Exercise Clause and the Equal Protection Clause. Only those pharmacists forced to dispense at a state sponsored pharmacy with a dispensation policy would be able to make a claim under these constitutional guarantees.

Additionally, pharmacists would find themselves without Title VII protection for their refusals at a pharmacy with a dispensation policy. As described above,[108] Title VII requires employers to provide an accommodation to employees who cannot complete an assigned task based on religious beliefs,[109] except when doing so would place an unreasonable burden on the employer or on other employees.[110] The same concerns are

106 Civil Rights Cases, 109 U.S. 3 (1883).

107 *Id.* at 21.

108 *See supra* text accompanying notes 58–77.

109 *See supra* text accompanying notes 70–76.

110 *See supra* text accompanying note 37.

present under this plan, as were present under the Access to Birth Control Act[111]—allowing pharmacists to divert their tasks or requiring employers to staff at least two pharmacists at all times would create a considerable hardship, financially and physically, on the employer and other employees. As such, the pharmacists would likely not be entitled to an accommodation.

The fact that a pharmacist is not likely to get an accommodation does not, however, suggest that the pharmacist is without recourse. On the contrary, the proposed system of a directory of dispensation policies serves not only to advance patient rights, but pharmacists' rights as well. New pharmacists can consult the directory to find a potential employer whose policies regarding sexual health medications are in line with their own. Pharmacists finding themselves at a pharmacy that has adopted a mandatory dispensation policy of a drug the pharmacist is opposed to will be able to utilize the directory to find more suitable employment, which is more in line with that pharmacists' religious ideals.

CONCLUSION

As the foregoing discussion has illustrated, both pharmacists whose religious norms clash with patients' demands and patients themselves have clear and established rights which are not in harmony. Although state legislatures have seen the need to further protect these rights, a workable solution that protects the interests of both groups has yet to be found. In fact, nearly every measure proposed has left one group's rights unaccounted for.

Mandatory dispensation statutes, which are becoming more popular and more controversial, overstep a pharmacist's rights of Free Exercise, Equal Protection, and his rights under Title VII of the Civil Rights Act,[112] while express refusal statutes allow the patient's fundamental right of privacy and autonomy to go completely unaccounted. These rights conflict so much that there is no absolutely perfect solution that guarantees every patient her medicine without any delay or inconvenience such that no pharmacist is ever faced with a situation where he may have to dispense a medication to which he is morally opposed.

A statute that requires pharmacies to select their own policies regarding contraceptives and sexual health medication, to publish that policy, and to be required to adhere to the stated policy, however, is a near perfect solution to the delicate balance of protected rights. With cooperation from physicians and compliance within the pharmacies, women will be able to access the pharmaceuticals prescribed to them without delay, hassle, misinformation, or shame. Women will be able to find a pharmacist who

111 *See supra* text accompanying notes 89–100.

112 *See supra* text accompanying notes 58–78.

will allow them to exercise their choice to use or not to use contraceptives. Pharmacists, on the other hand, will more easily schedule their careers to line up with their moral and religious convictions. A pharmacist will easily be able to determine a pharmacy's policy on sexual health medications and contraceptives and therefore more easily find employment with a pharmacy that shares his value system.

An individualized sexual health medication policy, when accompanied by a directory program, policy publication and compliance supervision, is the best, and possibly only method of insuring all rights at stake are protected.