

## CRUSHED AT THE COUNTER: PROTECTION FOR A PHARMACIST’S RIGHT OF CONSCIENCE

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## INTRODUCTION

Increasingly, lawmakers are passing legislation hostile to the freedom of a pharmacist to act according to her conscience. This legislation forces the professional health care provider to check her conscience at the pharmacy's door and abdicate her responsibility to provide her patients the most complete care possible.<sup>1</sup> A pharmacist's "right of conscience" must be adequately protected in accordance with respect for her profession and for the welfare of her patients. Other medical professionals' right of conscience receives adequate protection, but that of a pharmacist's does not, perhaps because the issue did not surface until recently.<sup>2</sup>

The issue of protecting a pharmacist's right of conscience did not fully emerge until emergency contraceptives were approved by the Food and Drug Administration ("FDA") and made available by prescription in pharmacies.<sup>3</sup> A few years later, the FDA approved over-the-counter ("OTC") sales of the emergency contraceptive "Plan B."<sup>4</sup> Now, regardless of the drug's availability, many pharmacists decline to fill or dispense emergency contraceptives for moral reasons.<sup>5</sup> In response, hostile legislation has been implemented in violation of a pharmacist's right of conscience and, in turn, pharmacists have brought lawsuits requesting protection of their rights.<sup>6</sup> The result is a checkered approach to the protection of pharmacists' conscience rights.

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1. See Judith A. Cahill et al., *Pharmacist Critique Woefully Outdated and Uninformed* (May 2006), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=May8&template=/CM/ContentDisplay.cfm&ContentFileID=3034>.

2. See *infra* Part IV.A.

3. See U.S. FDA Center for Drug Evaluation and Research, *Plan B: Questions and Answers* (Dec. 14, 2006), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm> (announcing FDA approval of Plan B).

4. *Id.*

5. See *infra* Part II.A.

6. See *infra* Part II.B.

States deal with pharmacists' conscience rights in a variety of ways. For example, some states protect a pharmacist's right of conscience to the same degree as that of other medical professionals.<sup>7</sup> Three states refuse to recognize the right of conscience and demand that pharmacies fill prescriptions for emergency contraceptives or face punitive measures.<sup>8</sup> Most states have pending legislation regarding this right, some protective, others dismissive.<sup>9</sup> One case decided in the Central District of Illinois appears to open the path for judicially mandated protection for a pharmacist's right of conscience, in the face of legislation that is dismissive of that right.<sup>10</sup>

This Note adopts the position that the pharmacist's right of conscience is not adequately protected and that uniform protection for that right may begin with implementation of the "stepping away" policy advocated by the American Pharmacists Association ("APhA").<sup>11</sup> Under this approach, policymakers must appropriately balance affirmative rights and negative liberties to protect pharmacists' conscience rights. Alternatively, a free market approach may prove effective.

In a six-part analysis, this Note explores the crisis of conscience at the counter and explains potential solutions for pharmacist conscience protection. Part I provides a case study of *Menges v. Blagojevich*, a federal district court case from Illinois, which demonstrates case-in-point the violation of pharmacists' conscience rights.<sup>12</sup> Part II supplies pertinent background information on both the emergency contraceptive at issue, Plan B, and the right of conscience on state and federal levels. Part III explains the moral basis for rights of conscience in general, and specifically the position of Catholic pharmacists in

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7. *E.g.*, TENN. CODE ANN. § 68-34-104(5) (West 2007); COLO. REV. STAT. § 25-6-102(9) (West 2007); FLA. STAT. ANN. § 381.0051(6) (West 2000), ME. REV. STAT. ANN. tit. 22, § 1903 (2004). For a recent and comprehensive list of states with legislation protecting conscience rights, see the National Conference of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation (Mar. 2007), <http://www.ncsl.org/programs/health/conscienceclauses.htm>.

8. CAL. BUS. & PROF. CODE § 733(a) (West 2007); ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2006); WASH. REV. CODE ANN. § 70.41.350 (West 2007); *see infra* note 103 and accompanying text.

9. *See infra* note 100 and accompanying text.

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

11. ACADEMY OF STUDENT PHARMACISTS, AMERICAN PHARMACISTS ASS'N, POLICY BOOK: ADOPTED RESOLUTIONS 1973-2006, at 83, 90 (rev. 2006) (resolutions 1998.11 and 2006.3 comprise APhA's "stepping away" policy, applicable to both student pharmacists and pharmacists) [hereinafter APhA-ASP ADOPTED RESOLUTIONS].

12. *Menges*, 451 F. Supp. 2d at 995.

peril of cooperating in wrongdoing by dispensing Plan B. Part IV sets forth the argument that like other health care professionals, pharmacists have a conscience right that should be protected. Part V addresses specific counterarguments and defends the Note's position by asserting the public policy reason for safeguarding each pharmacist's right of conscience: United States law supports negative liberties and promotes tolerance of rights. The affirmative "right to treatment" should not be promoted at the expense of a pharmacist's right to be free from state coercion. Lastly, Part VI details two alternative proposed solutions: APhA's "stepping away" policy and a free market approach.

### I. *MENGES V. BLAGOJEVICH*: A CASE STUDY

The argument within *Menges v. Blagojevich* and its outcome offer insight into the impact of inadequate protection of a pharmacist's right of conscience.<sup>13</sup> Despite the Illinois Health Care Right of Conscience Act ("Illinois Conscience Act"), the Governor of Illinois strong-armed into legislation the mandatory dispersal of emergency contraceptives at pharmacies.<sup>14</sup> This blatant disregard for the individual pharmacist's right demonstrates that without adequate federal protection, it is open season on health care professionals' sacred right and valued ability to act in accordance with their consciences.

#### A. *Exploration of the Emergency Rule and Its Effect on Illinois*

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13. *See id.*

14. *Id.* at 996. Specifically, the Emergency Rule applies to Division I (public) pharmacies, defined in the Illinois Administrative Code as: "any pharmacy that engages in general community pharmacy practice and that is open to, or offers pharmacy service to, the general public." ILL. ADMIN. CODE tit. 68, § 1330.5 (2006). The Illinois Conscience Act provides the following:

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.

*Pharmacists*

Losing their jobs or experiencing sanctions at work as a result of following their consciences, at least five pharmacists suffered a violation of their rights of conscience by the enactment of the Emergency Rule (“the Rule”) pushed forward by Illinois Governor Rod Blagojevich.<sup>15</sup> The Rule prohibits pharmacies from handling sensitive prescriptions or drug requests in accordance with their employees’ conscientious objections. Enacted by the Governor in April 2005, the Rule requires that pharmacies act according to the following:

j) Duty of Division I Pharmacy to Dispense Contraceptives

1) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy 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. *If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy’s standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient’s choice under the pharmacy’s standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.*

2) For the purposes of this subsection (j), the term “contraceptive” shall refer to all FDA-approved drugs or devices that prevent pregnancy.

3) Nothing in this subsection (j) shall interfere with a pharmacist’s screening for potential drug therapy problems due to therapeutic

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15. *Menges*, 451 F. Supp. 2d at 995-96; Press Release, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women’s Access to Contraceptives (Apr. 1, 2005) [hereinafter Blagojevich Emergency Action]. The Emergency Amendment to section 1330.91 of title 68 of the Illinois Administrative Code was made permanent as a rule on August 25, 2005. See ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).

duplication, drug-disease contraindications, drug-drug interactions (including serious interactions with nonprescription or over-the-counter drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions, or clinical abuse or misuse, pursuant to 225 ILCS 85/3 (q).<sup>16</sup>

Thus, the pharmacy must fill the prescription, order it, transfer it, or return it, with the last two options exercised only at the request of the patient. A later rule also requires signs to be hung in the pharmacy area containing information regarding the State's emergency contraceptive policies along with a phone number and web address where people may file complaints of pharmacies acting out of compliance with the Rule.<sup>17</sup> A pharmacy must set policies to ensure compliance with these Rules, which could include requiring its pharmacists to sign an agreement whereby they will dispense emergency contraceptives upon request.<sup>18</sup> In *Menges*, Walgreens issued an agreement of this nature to its employees.<sup>19</sup>

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16. ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005) (emphasis added). The Rule was initially adopted on April 1, 2005. Blagojevich Emergency Action, *supra* note 15. Governor Blagojevich went on to file a permanent rule on April 18 with the Joint Committee on Administrative Rules; this rule requires the same as the emergency rule: no hassles, no lectures, and no delays on birth control prescriptions. Press Release, Office of the Governor, Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005) [hereinafter Blagojevich Rule Permanent]. At the end of a review process, the committee approved the Rule. *Id.* The Rule came about because a pharmacist twice refused to fill prescriptions for emergency contraceptives and was reported to the Illinois Department of Financial and Professional Regulation which, in turn, filed a formal complaint against the pharmacy because its employee failed to provide appropriate care to a patient. Blagojevich Emergency Action, *supra* note 15. The pharmacy was charged with lacking an appropriate procedure to dispense contraceptive prescriptions. *Id.* Initially, the Rule did not allow for pharmacists to "conduct prospective drug utilization review," which is a requirement of the Illinois Practice Act. Letter from Patton, Executive Dir., Ill. Pharmacists Association, et al., to Rod Blagojevich, Governor, State of Ill. (Apr. 5, 2005), <http://www.aphanet.org> [hereinafter Letter from Patton]. The result could be a "possible drug interaction, overdose, underdose or conflict with the patient's other health conditions." Press Release, American Pharmacists Association, Statement of the American Pharmacists Association & the Illinois Pharmacists Association: Illinois Governor Denigrates Pharmacy Profession (Dec. 2, 2005), *available at* <http://www.aphanet.org> [hereinafter APhA Press Release]. But the Governor amended the Rule to include appropriate pharmacist discretion in the drug treatment area. Blagojevich Rule Permanent *supra*.

17. Press Release, Office of the Governor, Gov. Blagojevich Urges the FDA to Approve Plan B as an Over-the-Counter Contraceptive (Aug. 9, 2006), *available at* <http://www.il.gov/pressreleases/ShowPressRelease.cfm?RecNum=5165&SubjectID=3>.

18. *See* ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).

19. *Menges*, 451 F. Supp. 2d at 1000.

Prior to the Governor's declaration of the Rule, the Illinois Conscience Act was already in effect, allowing for both patients and health care professionals to act as directed by their consciences.<sup>20</sup> The Illinois Conscience Act prohibited employers from discriminating against health care workers who refused to provide any type of health care because of conscience-related objections.<sup>21</sup> The Rule not only contradicts this Act, but arguably contradicts a host of other Illinois statutes, as a case being appealed to the Illinois Supreme Court asserts.<sup>22</sup>

According to the Plaintiffs in *Menges*, after the adoption of the Rule, each pharmacist was required to agree in writing to dispense emergency contraceptives.<sup>23</sup> John Menges, one of the dedicated pharmacists who lost his job and livelihood as a result of the Rule's implementation, was fired when he failed to agree in writing to dispense emergency contraceptives.<sup>24</sup> Notably, this was not because he actually refused to fill a prescription.<sup>25</sup> Rather, he suffered discrimination based on a hypothetical situation, without regard to his excellent record as a health care provider.

In promulgating the Rule, Governor Blagojevich stated that "[b]ecause the pharmacist refused to fill the prescription. . . . I have a sneaking suspicion that in all likelihood, this is part of a concerted effort to deny women access to birth control."<sup>26</sup> The Executive Director of the Illinois Pharmacy Association rebutted this notion of a pharmacist conspiracy and instead denounced the Rule as requiring pharmacists and pharmacies to be of one belief system, robbing

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20. 745 ILL. COMP. STAT. ANN. 70/1-70/14 (West 2002).

21. *Id.*

22. See *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164, 117173 (Ill. App. Ct. 2007) (Turner, J., dissenting) (arguing that plaintiffs' claim was ripe for consideration as to whether their rights under the Health Care Right of Conscience Act and the Illinois Religious Freedom Restoration Act had been violated), *leave to appeal granted* 225 Ill. 2d 638 (2007); Steven Ertelt, *Illinois Pharmacist Will Appeal Decision over Governor, Morning After Pill*, LIFE NEWS.COM, Mar. 27, 2007, <http://www.lifenews.com/state2191.html>. Although Vander Bleek's lawsuit against the Governor was dismissed by the Fourth District Appellate Court in a 2-1 vote, he is pursuing his claim with the State Supreme Court. *Id.* His claims include violations of the Illinois Administrative Procedures Act, the Illinois Pharmacy Practices Act, the Illinois Human Rights Act, and the Illinois Religious Freedom Restoration Act. Complaint at ¶ 47, *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164 (Ill. App. Ct. 2007) (No. 4-05-1050).

23. *Menges*, 451 F. Supp. 2d at 998.

24. *Id.*

25. *Id.*

26. *Blagojevich Emergency Action*, *supra* note 15.

individuals of choice and failing to recognize that neither pharmacies nor pharmacists are automatons.<sup>27</sup> APhA criticized the Governor's characterization of pharmacists as grocery cashiers and responded with a policy of its own. This "stepping away" policy is an option that does not imperil patients' health or a pharmacist's right to not partake in an objectionable activity.<sup>28</sup>

The pharmacists brought suit against the Governor in the United States District Court for the Central District of Illinois.<sup>29</sup> The causes of action included the violation of the pharmacists' First Amendment rights to religious freedom and freedom of conscience, and of Title VII protection from employment discrimination based on religious beliefs.<sup>30</sup> The complaint alleged that the purpose of the Rule was to target pharmacists with religious objections to emergency contraceptives in an effort to force them to compromise their consciences or leave their vocation.<sup>31</sup> The Governor immediately filed a motion to dismiss but the court denied it, holding that the pharmacists did raise sufficient doubt about the neutrality of the law toward religion and that the Rule might conflict with Title VII by requiring employers to discriminate on the basis of religion.<sup>32</sup>

The enactment of the Rule serves as but one example of a state legislature removing prior protection, replacing it with inadequate protection for pharmacists, and dismissing the importance of the health care services a pharmacist provides for patients. In an

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27. Letter from Patton, *supra* note 16, at 2. Mr. Patton sharply rebukes the idea that pharmacists are mere check-out persons:

Further, the order requires pharmacists and pharmacy operators to comply with one specific set of beliefs. Our profession is composed of individuals, not automatons. Prohibiting pharmacists from stepping away from certain activity because of their personal moral beliefs requires each pharmacist practicing in Illinois to abide by one set of beliefs. Not only is this approach inconsistent with the idea that individuals should have a choice in the activities in which they participate, it is a recipe for disaster.

*Id.*

28. APhA Press Release, *supra* note 16. The Governor's office retorted that theoretically "[the Illinois] rule was not intended to—nor does it—pertain to health care right of conscious [sic] legislation or encroach on an individual pharmacist exercising his or her beliefs." *Freedom of Conscience for Small Pharmacies: Hearing Before the H. Small Business Comm.*, 109th Cong. 50 (2005) [hereinafter *Small Business Comm.*] (prepared statement of Sheila Nix, Senior Policy Advisor, Office of Governor Blagojevich).

29. *Menges*, 451 F. Supp. 2d at 995.

30. *Id.*

31. *Id.* at 1000.

32. *Id.* at 995.

environment where the state refuses protection for a medical professional's conscience, the pharmacist must turn to alternate means of protection.<sup>33</sup> Leaving resolution of this issue in the hands of the judiciary could result in inconsistent and insufficient protective measures.

B. *Repercussions of the Emergency Rule for Rights Under the Free Exercise Clause and Title VII*

To force the breach of a pharmacist's conscience violates her First Amendment right to free exercise of religious beliefs and her right to be free from religious discrimination by her employer under Title VII of the Civil Rights Act.<sup>34</sup> Strict scrutiny is the standard for assessing whether a state law discriminates on the basis of religion.<sup>35</sup> This standard requires a demonstration that the law in question serves a compelling state interest and is narrowly tailored to serve that interest.<sup>36</sup>

Because strict scrutiny of every law that affects a person's religious exercise in some way would prove overly burdensome, the United States Supreme Court has narrowed the scope of laws subject to strict scrutiny.<sup>37</sup> In *Employment Division v. Smith*, the Court held that in the event that a religiously neutral state law affects a person's religious beliefs or practices, such a law of general applicability will not be subject to strict scrutiny.<sup>38</sup> This standard of neutrality and general applicability has been reaffirmed many times, notably in two Supreme Court cases addressing religious practices in the 1990s. Both *City of Boerne v. Flores* and *Church of the Lukumi Babalu Aye, Inc.* applied the *Smith* standard to reaffirm that religious beliefs do not relieve individuals of the duty to comply with laws considered otherwise neutral and generally applicable.<sup>39</sup> In the first case, the Religious Freedom Restoration Act was declared unconstitutional in

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33. When the states refuse to protect pharmacists' consciences by passing rules like section 1330.91(j) of title 68 of the Illinois Administrative Code, they make it impossible for pharmacies to accommodate their moral and professional convictions.

34. U.S. CONST. amend. I; 42 U.S.C. § 2000e-2(a) (2000).

35. *Menges*, 451 F. Supp. 2d at 999.

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

37. *Menges*, 451 F. Supp. 2d at 999.

38. *Employment Div. v. Smith*, 494 U.S. 872, 887-89 (1990).

39. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32; *City of Boerne v. Flores*, 521 U.S. 507, 513, 533-34 (1997).

its effort to reinstate the strict scrutiny test for laws that substantially burden religious practices.<sup>40</sup> In the second case, a Florida ordinance against the religious practice of ritualistic animal sacrifice was found unconstitutional.<sup>41</sup> Thus, the Court applies First Amendment protections over the enforcement of a neutral and generally applicable law only when another freedom, such as freedom of speech or of the press, are implicated.<sup>42</sup>

In order for the Plaintiffs in the *Menges* case to receive protection of their religious beliefs under the Free Exercise Clause, it is necessary for them to establish both that “the Rule is not a neutral regulation of general applicability, and [that] . . . the Rule fails to meet the standard of strict scrutiny.”<sup>43</sup> In evaluating the Rule, which on its face is religiously neutral, as it makes no religious references, the district court looked beneath the facial neutrality to determine whether there was “governmental hostility which is masked” and “to eliminate . . . religious gerrymanders.”<sup>44</sup> In search of government hostility, the court needed to look no further than Governor Blagojevich himself. By his own statements, he made it clear that the Rule’s purpose is to “force individuals who have religious objections to Emergency Contraceptives to compromise their beliefs or to leave the practice of pharmacy. . . . He later allegedly stated that the Rule was directed at individual pharmacists who object to dispensing certain drugs on moral grounds and that such individuals should find another profession.”<sup>45</sup> The governor cited the pharmacists who declined to provide Plan B to patients for religious and moral reasons as the impetus for the Rule’s inception.<sup>46</sup> The Rule is punitive and directed at all pharmacists whose lives are guided by certain religious beliefs. This object is not religiously neutral.

In light of this government hostility, the court held that the Plaintiffs sufficiently alleged that the Rule was not generally applicable and could fail strict scrutiny.<sup>47</sup> The Rule was not generally

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40. See *City of Boerne*, 521 U.S. at 533–36.

41. See *Church of the Lukumi Babalu Aye*, 508 U.S. at 546.

42. See *Smith*, 494 U.S. at 881, *superseded by statute*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, (codified as amended, 42 U.S.C. § 2000bb (2000)).

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

44. *Id.* at 999–1000 (quoting *Church of the Lukumi Babalu Aye*, 508 U.S. at 534) (internal quotation marks omitted).

45. *Id.* at 1000.

46. *Id.*

47. *Id.* at 1001.

applicable because it was directed only toward Division I pharmacies that allowed pharmacists to refuse to dispense the drug based on religious or moral grounds, and not toward hospitals or emergency rooms—even Division I pharmacies that refuse to dispense the drug for reasons other than moral or religious conscience.<sup>48</sup> Regarding strict scrutiny, although the court did not conduct a full analysis at this stage of the litigation, it noted that the Rule might fail the test because it seemed insufficiently narrowly tailored to meet the professed purpose of the Rule: to ensure propagation of emergency contraceptives.<sup>49</sup> That is, a law that selectively discriminates against conscientiously objecting pharmacists in Division I pharmacies probably cannot qualify as “narrowly tailored to advance . . . [the state’s] compelling interest.”<sup>50</sup> In short, because the Plaintiffs did successfully state a claim that the Rule violates the Free Exercise Clause, the court did not dismiss their complaint.<sup>51</sup>

The fundamental right to freely exercise one’s religion was taken away from these pharmacists by the Rule. “Duty to dispense” legislation singles out pharmacists who hold specific religious beliefs.<sup>52</sup> Governor Blagojevich specifically targeted pharmacists who could not, in good conscience, fill emergency contraceptive prescriptions. Astoundingly, he overrode the protective measures provided by the Illinois Conscience Act to do so.<sup>53</sup> In the event that a governor will go to such drastic measures, no amount of state legislative protection could suffice to safeguard pharmacists. Therefore, alternative measures must be implemented for more complete protection.

After addressing the First Amendment complaints, the district court turned to the claim that the Rule is preempted by Title VII, which bars employers from discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>54</sup> Title VII essentially transfers the prohibition on

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48. *Id.*

49. *Id.* at 1001–02.

50. *Id.* at 999 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

51. *Id.* at 1002.

52. *See id.* at 997–1000.

53. *See* 745 ILL. COMP. STAT. ANN. 70/1–70/14 (West 2002).

54. 42 U.S.C. § 2000e-2(a) (2000).

discrimination by the state to private individuals.<sup>55</sup> State laws and regulations are void through preemption in the event of their conflict with valid federal law;<sup>56</sup> the Supremacy Clause establishes that federal law is supreme over state law.<sup>57</sup> The Plaintiffs argued that the Rule mandates religious discrimination by employers, conflicts with Title VII, and therefore should be preempted.<sup>58</sup> The court dissected this claim by examining the nature of religious discrimination.<sup>59</sup> In this context, religion encompasses “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.”<sup>60</sup> The Plaintiffs argued that employers would necessarily be forced to discriminate against employees based on their religious beliefs under legislation like the rule.<sup>61</sup> In fact, Walgreens had shifted its policy toward pharmacists’ rights after the Rule was promulgated.<sup>62</sup> After considering the varying degrees of accommodation necessary for pharmacists’ consciences, the court agreed with the Defendants that it would be difficult for the Plaintiffs to demonstrate that accommodating their beliefs would impose only a *de minimis* burden on the employers.<sup>63</sup> But because the case was only at the pleading stage, the court looked past this potential difficulty and

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55. *See id.*

56. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987).

57. U.S. CONST. art. VI.

58. Menges v. Blagojevich, 451 F. Supp. 2d 992, 1003 (C.D. Ill. 2006).

59. *Id.* at 1002.

60. 42 U.S.C. § 2000e(j) (2000).

61. *Menges*, 451 F. Supp. 2d at 1003.

62. *Id.*

63. If accommodation of an employee’s religious beliefs would put more than a *de minimis* burden (financial or otherwise) on the employer, then the employer is under no federal legal obligation to accommodate that employee’s religious belief. This is so because anything exceeding a *de minimis* burden on the employer qualifies as an “undue hardship”—and thus Title VII would pose no obstacle to the employer’s policy or practice. *See Reed v. Great Lakes Cos.*, 330 F.3d 931, 935 (7th Cir. 2003). For an interesting commentary on the intersection of employer’s interests and the employee’s autonomy, see James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 238–39 (2007) (“[T]his article contends that no protection of employee conscience is proper without a due consideration of the countervailing employer interests in at-will authority. . . . [I]t examines the relevant values at stake and strives to strike a balance that maximizes the rights and duties of both the individual and the community . . .”).

presumed that the Plaintiffs could substantiate their *de minimis* burden claim.<sup>64</sup>

A pharmacist's refusal to dispense Plan B is most frequently based upon religious beliefs,<sup>65</sup> and employers would not suffer undue hardship by accommodating these beliefs.<sup>66</sup> As explored later in this Note, practical *de minimis* accommodations can be made by employers to ensure that pharmacists on duty are able to provide Plan B at the request of patients.<sup>67</sup> For example, before the Rule, Walgreens operated under a referral policy, acceptable to pharmacists because it sufficiently accommodated their religious beliefs, and acceptable to Walgreens because it involved a minimal burden.<sup>68</sup> But after the imposition of the Rule, Walgreens was forced to abandon its well-functioning policy and require all employees to agree in writing to dispense all emergency contraceptives.<sup>69</sup> According to Governor Blagojevich and others, pharmacists must choose between their religious beliefs and their profession.<sup>70</sup> The result is a "religiously hostile" workplace where pharmacists can be placed on "unpaid

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64. *Menges*, 451 F. Supp. 2d at 1003.

65. Generally, Catholic pharmacists concur with the sentiments of Catholic pharmacist Erik A. McClave:

I am a Catholic pharmacist currently working for a large chain pharmacy. I am struggling with moral issues at work daily and seeking a more Catholic friendly position. There are mainly three types of drugs that are causing me to feel a tremendous amount of guilt after I have dispensed them. These three are misoprostol, birth control pills, and "morning after pills."

....

... [A]ll types of birth control pills cause changes to the lining of the woman's uterus making it very difficult for a fertilized egg to attach and develop. Therefore, the fertilized egg (a real baby) is expelled from the uterus and dies. This is the mechanism which I find most objectionable because this is actually an abortion.

....

Even though I did not prescribe the medication or force the woman to take it, I still feel guilty for providing it. . . . I feel as though I am causing these women to sin by providing them the means to do so.

Erik A. McClave, *A Catholic Pharmacist's Struggle* (2002) (on file with the Ave Maria Law Review).

66. See note 63 and accompanying text.

67. See *infra* Part VI.A.

68. *Menges*, 451 F. Supp. 2d at 998.

69. *Id.*

70. See *id.* at 1003-04.

indefinite suspension,<sup>71</sup> suffer berating by fellow employees,<sup>72</sup> and in general, suffer religious discrimination.<sup>73</sup>

An analysis of these claims demonstrates the unjust and unconstitutional effect of legislation that mandates violation of a pharmacist's conscience. Execution of the Rule in *Menges* translates to state-sanctioned religious discrimination. This violation of both the Free Exercise Clause of the Constitution and Title VII is unacceptable. Yet violations of this nature could become, and indeed will become, commonplace in pharmacies across the United States in the absence of the implementation of proper protection.

## II. BACKGROUND ON PLAN B AND RIGHT OF CONSCIENCE

### A. *Plan B: What It Is and Why It Is Controversial*

Emergency contraception is a method of preventing pregnancy after sexual intercourse, although it is not for routine use.<sup>74</sup> It consists of two pills taken orally up to seventy-two hours after intercourse.<sup>75</sup> It works by preventing one of three occurrences: the release of the egg from the ovary, the fertilization of the egg, or the attachment of the fertilized egg to the uterus.<sup>76</sup> Barr Pharmaceuticals manufactures Plan B, the emergency contraceptive that received FDA approval for prescription use in July 1999.<sup>77</sup> Barr applied for OTC status in April 2003, but initially did not receive approval based on unresolved questions of the effect of the drug's OTC availability on young women's health and sexual behavior.<sup>78</sup> After much hesitation, the FDA did approve the dual labeling proposed by Barr in August 2006

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71. *Id.* at 998, 1003.

72. *See, e.g.,* Noesen v. Med. Staffing Network, Inc., No. 06-C-071-S, 2006 U.S. Dist. LEXIS 36918, at \*6 (W.D. Wis. 2006).

73. *See, e.g., id.; see also Menges*, 451 F. Supp. 2d at 998, 1003.

74. *See* Plan B: Questions and Answers, *supra* note 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. Memorandum from the Office of Congresswoman Carolyn B. Maloney on Plan B Timeline 1 (Nov. 2005), available at <http://www.house.gov/shays/news/2005/november/PlanBTimeline.pdf> [hereinafter Plan B Timeline].

and OTC sales began November 1, 2006.<sup>79</sup> Dual labeling provides two distinctly labeled products, one for OTC sales and one for prescription sales.<sup>80</sup> Women and men eighteen years of age and older may purchase the drug by presenting valid identification to a pharmacist who dispenses it from behind the counter.<sup>81</sup> Sales to women under eighteen years of age require a prescription, although collaborative practice programs enable specially trained pharmacists to dispense Plan B without a prescription from a physician.<sup>82</sup>

Plan B appears to be just another contraceptive method capable of preventing a pregnancy, but the reason for its controversy rests in the fact that it may actually terminate a pregnancy.<sup>83</sup> Barr Pharmaceuticals lists one of its possible effects as preventing the attachment of the fertilized egg to the uterus.<sup>84</sup> Although the American College of Obstetricians and Gynecologists defines pregnancy as beginning when a fertilized egg is implanted in the lining of a woman's uterus,

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79. See Press Release, U.S. Food and Drug Admin., FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older: Prescription Remains Required for Those 17 and Under (Aug. 24, 2006) [hereinafter FDA Press Release], available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>. It should be noted that enormous pressure was brought to bear on the FDA to approve Plan B for OTC distribution: the Center for Reproductive Freedom filed a suit, and Senators Hillary Clinton (D-NY) and Patty Murray (D-WA) placed a hold on the nomination of Lester Crawford for Commissioner of the FDA. Plan B Timeline, *supra* note 78, at 2. In fact, a political watch dog group, Judicial Watch, filed a suit "to compel the FDA to comply with its August 2006 FOIA request seeking communications between the FDA and [Senator] Clinton" regarding the hold on the nomination. Steven Ertelt, *Group Files Lawsuit Against FDA, Hillary Clinton Over Morning After Pill*, LIFENEWS.COM, Mar. 28, 2007, <http://www.lifenews.com/nat3005.html>; Complaint at 2, *Judicial Watch, Inc. v. U.S. Food and Drug Admin.*, No. 1-07-cv-00561 (D. D.C. Mar. 21, 2007).

80. FDA Press Release, *supra* note 79; Barr Pharmaceuticals, Key Marketed Proprietary Products: Plan B, <https://www.barrlabs.com/proprietary/keyproducts/planb.php> (last visited Aug. 22, 2007).

81. FDA Press Release, *supra* note 79.

82. California passed legislation legalizing this process in 2001. CAL. BUS. & PROF. CODE § 4052(a)(8) (West 2003). Hawaii enacted similar legislation in 2003. HAW. REV. STAT. ANN. § 461-1 (LexisNexis 2005). Maine did likewise in 2004. ME. REV. STAT. ANN. tit. 12, §§ 13821-25 (West 2006). New Hampshire made it available without prescription in 2005. N.H. REV. STAT. ANN. § 318:47-e (LexisNexis 2005). In the fall of 2005, the Massachusetts legislature, in defiance of Governor Mitt Romney, permitted the dispensing of Plan B without a prescription. Scott S. Greenberger, *Lawmakers Override Governor's Contraception Veto*, BOSTON GLOBE, Sept. 16, 2005, at B4.

83. Plan B: Frequently Asked Questions, [www.go2planb.com/ForConsumers/TakingPlanB/faqs.aspx](http://www.go2planb.com/ForConsumers/TakingPlanB/faqs.aspx) (last visited Nov. 16, 2007).

84. *Id.*

other medical and religious groups define it differently.<sup>85</sup> For example, the American Heritage Medical Dictionary defines pregnancy as the period of development “from conception until birth”<sup>86</sup> and Langman’s Medical Embryology textbook defines it as beginning at fertilization of the egg by the sperm.<sup>87</sup> The Catholic Church defines human life as beginning at the moment of conception.<sup>88</sup> On account of the potential abortifacient results of Plan B, some pharmacists seek protection from a “duty to dispense” the drug.<sup>89</sup> Other concerns about Plan B involve the yet unknown health risks, especially on younger women, and the inefficiency of Plan B in slowing abortion rates.<sup>90</sup>

Plan B’s OTC status does not alleviate the need for protection of a pharmacist’s right of conscience. “Over-the-counter” means to be available without prescription,<sup>91</sup> yet because Plan B is *behind* the counter and to purchase it requires valid photographic identification for purposes of proof of age, a pharmacist acts as an intermediary between the drug and the patient.<sup>92</sup> Several unresolved questions arise with the recent OTC status of the drug: Does a pharmacist’s act of checking identification and passing the nonprescription drug over the counter qualify as dispensing or filling, insofar as that language is used in the Rule?<sup>93</sup> Are decisions about OTC Plan B protected or mandated under current legislation? Will pharmacies be required to protect an employee’s right of conscience with equal resolve if the

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85. See COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 347: USING PREIMPLANTATION EMBRYOS FOR RESEARCH 2, 10–11 (2006), available at [http://www.acog.org/from\\_home/publications/ethics/co347.pdf](http://www.acog.org/from_home/publications/ethics/co347.pdf); 45 C.F.R. § 46.202(f) (2006) (“Pregnancy encompasses the period of time from implantation until delivery.”).

86. THE AMERICAN HERITAGE MEDICAL DICTIONARY 660 (2007).

87. T.W. SADLER, LANGMAN’S MEDICAL EMBRYOLOGY 3 (8th ed. 2000).

88. CATECHISM OF THE CATHOLIC CHURCH ¶ 2322 (2d ed. 1997) [hereinafter CATECHISM OF THE CATHOLIC CHURCH].

89. *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 997 (C.D. Ill. 2006); see McClave, *supra* note 65.

90. Susan E. Wills, Commentary, *‘Plan B’ Pill: Winners and Losers*, NATIONAL CATHOLIC REGISTER, Oct. 15–21, 2006, at 9. Other concerns include the financial benefit to Barr Pharmaceuticals, a projected \$38,000,000 in Plan B sales for 2006 and anticipating close to \$80,000,000 in 2007, as well as an average profit of \$20 per pack for Planned Parenthood in a deal with Barr, the lack of long-term data studies on the effects of repeated use, the increased risk of ectopic pregnancies, and no decrease in abortion rates, coupled with an increase in sexually transmitted diseases. *Id.*

91. AMERICAN HERITAGE DICTIONARY 1256 (4th ed. 2000).

92. FDA Press Release, *supra* note 79.

93. *Blagojevich Rule Permanent*, *supra* note 16.

drug no longer requires a prescription, regardless of the patient's age? Only time will tell how OTC Plan B will fare in relationship to various states' "duty to dispense" legislation as well as the current constitutional claims in the courts.<sup>94</sup> Regardless of Plan B's availability as an OTC or a prescription drug, so long as a pharmacist must act as a conduit between drug and patient, her right of conscience deserves adequate protection.

### B. *Status of a "Right of Conscience"*

Awareness of the need for protection of health care professionals' right of conscience became prevalent after the United States Supreme Court legalized abortion in *Roe v. Wade*.<sup>95</sup> Over the decades, federal law has developed protections for the right of medical professionals to refrain from participation in abortion procedures or sterilization treatments on the grounds of religious beliefs or moral convictions.<sup>96</sup> Most recently, state legislatures have introduced bills to protect a pharmacist's right to obey the dictates of her moral beliefs regarding dispensing emergency contraception.<sup>97</sup> Also, a federal district court decision in September 2006 indicates the possibility of judicial protection of pharmacists' right of conscience.<sup>98</sup> Legislation in this area, however, remains inconsistent from state to state, and federal legislation does not conclusively include pharmacists as medical professionals whose consciences deserve protection.<sup>99</sup> The courts have yet to determine with finality the extent of protection for pharmacists' decisions based on moral beliefs.

State legislative bodies have approached protecting pharmacists' right of conscience in a variety of ways, without any guarantee of consistency or adequacy of protection for the pharmacist. A few state governments provide or are attempting to provide complete protection for pharmacists.<sup>100</sup> Arkansas, Georgia, Mississippi, and

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94. See *Menges*, 451 F. Supp. 2d at 992.

95. 410 U.S. 113 (1973).

96. *E.g.*, 42 U.S.C. § 300a-7(b) (2000); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(a), (d)(1)-(2), 118 Stat. 2809 (2004).

97. See National Conference of State Legislatures, *supra* note 7.

98. *Menges*, 451 F. Supp. 2d at 1005.

99. See *infra* text accompanying notes 100-103.

100. See, *e.g.*, *id.*; see also CENTER FOR REPRODUCTIVE RIGHTS, 2006 MID-YEAR LEGISLATIVE SUMMARY 10-12 (2006) (reporting sixteen bills in eight states that proposed to give conscience protection to health care providers; the Governor of Wisconsin vetoed one and another is still

South Dakota have passed laws protecting the right of a pharmacist to decline to dispense emergency contraceptives.<sup>101</sup> Others provide more general protection. For instance, Colorado, Florida, Maine, and Tennessee have passed legislation providing broad conscience protection for health care providers without specifically mentioning pharmacists.<sup>102</sup> Selective protection is provided in California by a bill that prohibits a pharmacist from obstructing the acquisition of a prescription drug and requires the pharmacist to dispense all legal prescriptions, but exempts interfacing with the drug if the employee has previously expressed ethical, moral, or religious objections to her employer.<sup>103</sup> The Governor of Illinois altogether disregarded preexisting protection for the right of conscience by enactment of the Rule, as previously discussed in this Note.<sup>104</sup> To reiterate, the Rule requires all pharmacists to fill legal prescriptions for contraceptive drugs or, if the drug is not in stock, follow the patient's request to order it, transfer the prescription, or return the prescription to the patient.<sup>105</sup> State governments will not adequately protect a pharmacist's right to work and act in her profession according to her moral conscience. The disjointed approach demonstrated by state legislatures reinforces the need to adopt APhA's policy in conjunction with awareness of the need for an overall shift in the perspectives of rights and liberties to respect the individual pharmacist's rights, without excuse.

Federal legislation recognizes and actively protects the right of conscience of medical professionals under certain circumstances.<sup>106</sup>

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pending in Michigan; twenty-nine bills in fourteen states sought to protect all conscience-based refusals to fill prescriptions for contraceptives; one was enacted in Georgia, another left pending in Oklahoma, while Tennessee and North Carolina proposed rights for both pharmacy and pharmacist to refuse to dispense emergency contraception; one bill was introduced in Minnesota to permit pharmacies the right to refuse to stock emergency contraception; pharmacist refusal bills are still pending in California, Illinois, Massachusetts, and Ohio; eleven bills were introduced to prohibit a pharmacist from refusing to dispense or transfer a valid prescription because of moral beliefs in Michigan, Minnesota, Missouri, New Jersey, Pennsylvania, and Wisconsin; three are pending in Michigan, New Jersey, and Pennsylvania).

101. See National Conference of State Legislatures, *supra* note 7.

102. *Id.*

103. CAL. BUS. & PROF. CODE § 733 (West 2007).

104. Compare ILL. ADMIN. CODE tit. 68, § 1330.91 (2006), with 745 ILL. COMP. STAT. ANN. 70/1-70/14 (West 2002).

105. Blagojevich Rule Permanent, *supra* note 16. See *supra* Part I for a broader overall perspective on the events surrounding the Emergency Rule.

106. See *supra* Part IV.A.

The United States Code specifies the safeguards for this “right of conscience” in §§ 300a-7(b) and (d) under the discussion of sterilization and abortion.<sup>107</sup> Section (b) prohibits public officials and public authorities from imposing certain requirements on medical professionals contrary to religious beliefs or moral convictions; even the reception of federal financial aid does not dispel the right to act according to religious beliefs or moral convictions.<sup>108</sup> Likewise, under § (d), individual conscience rights are protected where the individual is conducting research under or assisting in a program funded by the Secretary of Health and Human Services.<sup>109</sup> Federal statutes pertinent to health care professionals’ right of conscience also include the Hyde-Weldon Amendment<sup>110</sup> and Title 42 of the United States Code, §§ 2000e-2 and 2000e(j).<sup>111</sup> Despite this comprehensive protection pertaining to sterilization and abortion, pharmacist conscience rights pertaining to emergency contraceptives are not explicitly included in the statutory language of the United States Code and are not guaranteed the protection granted to medical doctors and other health care professionals.

In 2005, United States Senators Boxer and Lautenberg proposed two different bills that would essentially prohibit pharmacists from acting according to conscience. Senator Boxer’s proposed Act, the Pharmacy Consumer Protection Act of 2005, mirrored the Rule imposed on pharmacists by Governor Blagojevich.<sup>112</sup> With similar language, the Act proposes to treat the pharmacist simply as an

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107. 42 U.S.C. §§ 300a-7(b), (d) (2000).

108. *Id.*

109. *Id.*

110. The Hyde-Weldon Conscience Protection Amendment prohibits the disbursement of certain federal funding to federal, state, and local governmental agencies that “discrimin[ate] on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)–(2), 118 Stat. 2809, 3163 (2004).

111. 42 U.S.C. § 2000e-2(a)(1) (2000) makes it an unlawful employment practice “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . religion . . .” Thus the statute could prevent an employer from refusing to hire a pharmacist or other medical professional who might conceivably object to a practice based on conscience. This is so because “[t]he term ‘religion’ includes *all aspects of religious observance and practice, as well as belief*, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (2000) (emphasis added).

112. The Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. § 2 (2005).

automated teller of emergency contraceptives, without any consideration given to individual moral convictions.<sup>113</sup> Senator Lautenberg sponsored a similar bill aimed at pharmacies. His proposed Access to Legal Pharmaceuticals Act would require pharmacies to dispense all legal prescriptions and not to hire pharmacists who would refuse to return the prescription or to transfer the prescription to another pharmacy.<sup>114</sup> This mandatory stocking could present an economic burden and a potential moral conflict for pharmacy owners.<sup>115</sup> Neither bill has left its respective committee or subcommittee.<sup>116</sup> Unless amendments are proposed and accepted, neither bill will provide adequate protection for the individual pharmacist, and instead will further violate her right to act according to her conscience.

### III. MORAL IMPLICATIONS OF THE LAW FOR CATHOLIC PHARMACISTS

#### A. *Freedom of Conscience as a Moral Right*

The freedom to act according to a properly formed conscience is a fundamental moral right, necessary to the well-being of man and society.<sup>117</sup> The Catechism of the Catholic Church defines the moral conscience in a chapter addressing the dignity of the human person, as conscience plays an integral role in the understanding of this

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113. *Id.* Senator Boxer would require a timely dispensing of prescriptions by pharmacists, if the pharmacy receives payments from or has contracts under the Medicaid and Medicare programs. *Id.* If the pharmacy does not have the drug in stock, the patient may require the pharmacy to either order it, transfer the prescription to a pharmacy that has stocked it, or return the prescription. *Id.*

114. Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. § 3 (2005).

115. An in-depth discussion of this issue exceeds the scope of this Note. Economic hardship in stocking a treatment infrequently requested could drive small pharmacies to bankruptcy or force them to move. Already in place to help direct women to pharmacies that do stock emergency contraception is a hotline, 1-888-not-2-late, operated by the Association of Reproductive Health Professionals and a website, <http://not-2-late.com>. On a local level, pharmacies can work collaboratively to educate the community about availability, risks, and moral implications of emergency contraceptives.

116. See <http://thomas.loc.gov> for recent legislative action. Senate bill S. 778 was referred to the Committee on Finance on April 13, 2005, and S. 809 was referred to the Committee on Health, Education, Labor, and Pensions on April 14, 2005.

117. See Donald W. Wuerl, *The Bishop, Conscience and Moral Teaching*, in CATHOLIC CONSCIENCE FOUNDATION AND FORMATION 123, 127–28 (Russell E. Smith ed., 1991).

dignity.<sup>118</sup> The definition of a moral conscience is that which “enjoins [a person] at the appropriate moment to do good and to avoid evil.”<sup>119</sup> The application of conscience is “a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform.”<sup>120</sup> This inner conviction that warns the subject of an inclination or decision to act upon that which she knows is wrong emerges from “practical reason applied to the moral status of an act performed in the past, or yet to be performed.”<sup>121</sup> It is not a capacity to discern right from wrong, but the ringing of a bell when a wrong decision is made.<sup>122</sup> Conscience can only act as a well from which to draw if and when it brings up imperative moral truths to drink. As philosopher and scholar Dr. Damian Fedoryka put it: “Conscience stands within the subject of a moral obligation and speaks in the name of the source of that obligation.”<sup>123</sup>

In the Catholic tradition, an act of conscience is a “judgment of reason deduced from natural law[,] . . . that portion of divine law accessible to human reason.”<sup>124</sup> Each individual shoulders the responsibility of formation of her conscience through education.<sup>125</sup> The conscience acts as the “*law of our intellect*.”<sup>126</sup> The question of whether to defy one’s conscience presents an ethical quandary; such an act is a potentially grave sin against God.<sup>127</sup> It is a moral principal that individuals are endowed with freedom of conscience and that

118. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 88, ¶¶ 1777, 1780.

119. *Id.* ¶ 1777.

120. *Id.* ¶ 1778.

121. Edmund D. Pellegrino, *The Physician’s Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 226 (2002) (citing ST. THOMAS AQUINAS, *On Conscience: Disputed Questions on Truth* 17, reprinted in THOMAS AQUINAS SELECTED WRITINGS 217, 221–23 (Ralph McNerny ed. & trans., 1998) [hereinafter AQUINAS, *On Conscience*]).

122. Dr. Damian Fedoryka explained and explored this notion of the “primacy of conscience” when he wrote about the “personal aspect of the conscience” and its necessary anchor in God’s laws. Letter from Damian Fedoryka, Ph. D., Center for Personalistic Ethics and Anthropology, to Nell O. Kromhout (Apr. 3, 2007) (on file with the Ave Maria Law Review).

123. *Id.*

124. Pellegrino, *supra* note 121, at 226–27.

125. Benedict Ashley, *Elements of a Catholic Conscience, in* CATHOLIC CONSCIENCE FOUNDATION AND FORMATION 39, 48–52 (Russell E. Smith ed., 1991); see also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 88, ¶¶ 1783–85.

126. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I, Q. 79, Art. 13 (Fathers of the English Dominican Province trans., Christian Classics 1981) (emphasis added).

127. See AQUINAS, *On Conscience, supra* note 121, at 228–33; see also Wuerl, *supra* note 117, at 127–28.

freedom should be accordingly protected. Indeed, Pope Benedict XVI encouraged the faithful in a continual development of the indispensable but difficult undertaking of forming a true conscience “without contradictions, without betrayal and without compromises.”<sup>128</sup> Thus, a Catholic pharmacist who has studied and reflected upon the teachings of the Church regarding contraception and abortion most likely would be unable to distribute Plan B as a matter of conscience, and should be protected from compulsion.<sup>129</sup>

A pharmacist’s properly formed conscience could never advise her to compromise her understanding of the Church’s teaching on abortion and contraceptives. Obviously, the decision to act contrary to these teachings is possible, but cannot flow from a properly formed conscience. As discussed, conscience is defined by its choice of good over evil. Although “good” and “evil” appear to be subjective in today’s morally relative culture (after all, is not “evil” an outdated concept?), the teachings of the Church, whose tradition transcends the fashion of the times, prohibits the prevention of life and the causation of death.<sup>130</sup> Dr. Fedoryka explained the repercussions of moral relativism’s devaluation of pharmacists’ rights: “What is on the one hand the legislative protection in the positive execution of a private decision . . . becomes, on the other hand, the coercion and implication of others in the carrying out of actions they consider unjust and immoral.”<sup>131</sup> The obvious inconsistency of protection breeds a further problem: inner freedom and morality cannot be legislated from the exterior. The enforcement through external sanctions and punishments of an inner moral position is metaphysically impossible, and

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128. Pope Benedict XVI, Statement of Pope Benedict XVI to the 13th General Assembly of the Pontifical Academy of Life (Feb. 24, 2007), in *L'OSSERVATORE ROMANO* (English ed.), Mar. 7, 2007, at 3.

129. See *supra* Part II.A; CATECHISM OF THE CATHOLIC CHURCH, *supra* note 88, ¶ 1790.

130. *Evangelium Vitae* affirms this sacred value of life, from womb to tomb:

Even in the midst of difficulties and uncertainties, every person sincerely open to truth and goodness can, by the light of reason and the hidden action of grace, come to recognize in the natural law written in the heart the sacred value of human life from its very beginning until its end, and can affirm the right of every human being to have this primary good respected to the highest degree. Upon the recognition of this right, every human community and the political community itself are founded.

Pope John Paul II, *Evangelium Vitae* [*Encyclical Letter on the Value and Inviolability of Human Life*] ¶ 2 (1995) (citation omitted).

131. Letter from Damian Fedoryka, *supra* note 122.

the attempt “is itself intrinsically unjust.”<sup>132</sup> Living out one’s moral position according to the conscientious choice of good over evil cannot and should not be prevented by positive law. Such law would be a violation of the very dignity of the human person.

B. *Imperative Protection Against Formal or Material Cooperation in Wrongdoing*

Inadequate protection for pharmacists could result in forced formal or material cooperation in abortion, a particular concern for Catholic pharmacists.<sup>133</sup> The Catholic Church teaches that formal cooperation in abortion is a grave sin resulting in excommunication from the Church.<sup>134</sup> Classic distinctions in morality cite formal cooperation as a situation in which a cooperator consents to evil by a wrongdoer and shares the intention of the wrongdoer. This consent may be explicit or implicit.<sup>135</sup> Implicit formal cooperation emerges under circumstances “when, even though the cooperator denies intending the wrongdoer’s object, no other explanation can distinguish the cooperator’s object from the wrongdoer’s object.”<sup>136</sup>

Material cooperation occurs when a person enables another to perform an evil act, and can be divided into “immediate” and “mediate”<sup>137</sup> cooperation. According to the National Catholic Bioethics Center, “[t]heologians maintain that in the objective order, immediate material cooperation is equivalent to implicit formal cooperation because the object of the moral act of the cooperator is indistinguishable from that of the principal agent. Those who use the term ‘immediate material cooperation’ have understood this as ethically unacceptable behavior.”<sup>138</sup> Mediate material cooperation takes place in circumstances in which the cooperator’s moral *object* is not that of the wrongdoer.<sup>139</sup> Further, material cooperation may be characterized as either “necessary” or “contingent.”<sup>140</sup> Necessary

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132. *Id.*

133. *See, e.g.,* Noesen v. Med. Staffing Network, Inc., No. 06-C-071-S, U.S. Dist. LEXIS 36918 (W.D. Wis. 2006); McClave, *supra* note 65.

134. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 88, ¶ 2272.

135. Russell Smith, *Formal and Material Cooperation*, 20 ETHICS & MEDICS, June 1995, at 1.

136. *Id.*

137. *Id.*

138. *Id.* at 1–2.

139. *Id.* at 2.

140. *Id.*

material cooperation is an act without which the wrongdoer could not achieve her end, while contingent material cooperation is not crucial to the execution of the wrongful act.<sup>141</sup>

In evaluating a pharmacist's act of distributing Plan B under these guidelines, the act could qualify as mediate material cooperation, either necessary or contingent. In such an event, the objecting pharmacist has been forced to cooperate in wrongdoing; in essence, she has been forced to violate her conscience. The spark for this evaluation is the ethical consideration of use of Plan B because of its potential termination of a pregnancy.<sup>142</sup> Catholic teaching requires respect for the life that exists from the moment of fertilization.<sup>143</sup> In the event that Plan B prevents the implantation of a fertilized egg, a pharmacist's distribution of the drug could qualify as cooperation in that abortion.<sup>144</sup> Specifically, the cooperation would most likely be deemed material, not formal. The wrongful act of abortion itself would be procured by the ingestion of Plan B on the part of the potentially pregnant woman. Unlike the doctor who performs an abortion, the pharmacist does not "perform" the ingestion of the drug that could result in an abortion. The act of distribution by the pharmacist is not necessarily immediate cooperation because the object of the pharmacist may well be different from the object of the woman. Under laws that require a pharmacist to fill or distribute any legal drug, the pharmacist's object may be to avoid penalization. The woman's object in requesting Plan B is to prevent or possibly terminate her pregnancy. While the pharmacist's act qualifies as mediate material cooperation, it could be characterized as either

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141. *Id.*

142. *See supra* Part II.A.

143. The Church made clear her position on respect for life in the womb in the following statement issued by the Congregation for the Doctrine of the Faith:

From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already.

... [M]odern genetic science brings valuable confirmation. It has demonstrated that, from the first instant, there is established the programme of what this living being will be: a man, this individual man with his characteristic aspects already well determined. The adventure of a human life begins right from fertilization and each of its capacities requires time—a rather lengthy time—to find its place and to be in a position to act.

CONGREGATION FOR THE DOCTRINE OF THE FAITH, LET ME LIVE: DECLARATION ON PROCURED ABORTION 8, ¶¶ 12–13 (Catholic Truth Society 1975) (Nov. 18, 1974).

144. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 88, ¶ 2272.

“necessary” under circumstances in which no other pharmacist could supply the drug, or as “contingent.” Contingent mediate material cooperation would take place in a situation in which other pharmacists were available to distribute Plan B.

The Pontifical Academy for Life, following an International Congress on “Christian Conscience in Support of the Right to Life,”<sup>145</sup> specifically addressed emergency contraception and reminded health care professionals at various levels who make its use possible of their need for conscientious objection.<sup>146</sup> Also, the Academy expressed hope that Article 18 of the Universal Declaration of Human Rights, declaring the right to conscientious objection, would be further extended into legislation truly protecting those who respect life at all stages.<sup>147</sup>

In her day-to-day work, culpability for material cooperation on the part of the pharmacist depends upon proximity and proportionality.<sup>148</sup> In terms of proximity, a Catholic pharmacist working in a pharmacy that stocks and sells Plan B would not be culpable for its potential abortifacient results. A Catholic pharmacist asked to distribute the drug out of necessity, in a situation in which only she was working and no other pharmacies were open, would face a difficult situation. In terms of proportionality as a justification, fear of punishment or even employment termination must be weighed against the possibility of enabling an abortion.<sup>149</sup> Regardless of penalties inflicted by an employer, a pharmacist must follow her conscience and not participate in the distribution of the drug. Note that in the event of rape, a woman may be treated at a Catholic hospital “with medications that would prevent ovulation, sperm capacitation, or fertilization,” after appropriate testing reveals that conception has not already occurred.<sup>150</sup>

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145. Pontifical Academy for Life, *Final Declaration by the 13th General Assembly*, Feb. 23, 2007, available at [http://www.vatican.va/roman\\_curia/pontifical\\_academies/acdlife/documents/rc\\_pont-acd\\_life\\_doc\\_20070315\\_xiii-gen-assembly-final\\_en.html](http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pont-acd_life_doc_20070315_xiii-gen-assembly-final_en.html).

146. *Id.* ¶ 6.

147. *Id.* ¶ 7.

148. William P. Saunders, Commentary, *Straight Answers: Cooperation with Evil*, ARLINGTON CATHOLIC HERALD, Sept. 5, 2002, at 6.

149. See *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006); see *infra* note 174 and accompanying text.

150. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 21* (4th ed. 2001).

Moral considerations should be carefully evaluated in the event of legislation that affects pharmacists' ability to live in accordance with their consciences. The dignity of the pharmacist's person requires respect for her deepest held beliefs: those of her conscience. Coercive or forced violation of that conscience is unjust and demands a cognitive dissonance within the pharmacist. In any circumstances, adequate protection of a pharmacist's right to follow her conscience would prevent cooperation, formal or material, in the wrongful act of abortion.

#### IV. AS HEALTH CARE PROVIDERS, PHARMACISTS HAVE A RIGHT OF CONSCIENCE

##### A. *Protection Provided for Other Health Care Providers*

Federal laws already protect individual health care professionals<sup>151</sup> and institutional health care providers from forced participation in medical procedures that violate their consciences.<sup>152</sup> At the state government level, according to recent data, health care professionals may decline to provide abortions in forty-six states, contraception-related services in thirteen states, and sterilization services in seventeen states.<sup>153</sup> The most comprehensive federal protection is ensured by the Hyde-Weldon Amendment ("Amendment"), which Congress passed into law on December 8, 2004.<sup>154</sup> The Amendment protects against forced participation in abortion contingent upon reception of federal funding. It defines those protected as "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."<sup>155</sup> The Amendment

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151. See *supra* Part II.B; see also statutes cited, *supra* note 111.

152. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)-(2), 118 Stat. 2809 (2004).

153. Family Research Council, Conscience Protection Clause, <http://www.frc.org/get.cfm?i=CH06G09> (last visited Oct. 24, 2007).

154. See National Right to Life, *Congress Approves Broad Shield to Protect Pro-Life Health Care Providers*, NATIONAL RIGHT TO LIFE, Dec. 8, 2004, <http://www.nrlc.org/federal/ANDA/HydeWeldonwebnrlnews.html>.

155. Consolidated Appropriations Act, 2005, Pub. L. No. 108-1447, § 508(d)(2), 118 Stat. 2809 (2004).

filled in the gaps of protection for health care entities that were subject to a nationwide campaign of coerced abortion, led by pro-abortion organizations.<sup>156</sup> Examples of these strategies of coercion included compelling a “quasi-public” community hospital to provide abortions,<sup>157</sup> forcing a private hospital to leave a cost-saving consortium that followed a pro-life policy set by member hospitals,<sup>158</sup> and preventing hospitals from ensuring that property sold would not facilitate abortions.<sup>159</sup> Because these gaps left health care entities without the necessary protection to follow their moral convictions, a comprehensive federal law was necessary.

While the Amendment particularizes physicians’ protection against coerced involvement in abortion, no parallel federal protection exists to prevent pharmacists’ forced involvement in distribution of Plan B. Pharmacists sit uneasily in a no-man’s land without conscience protection, while other health care professionals receive protection against forced involvement in medical procedures that violate their consciences. Pharmacists, too, ought to be safeguarded so that they may follow their moral convictions. Many pharmacists are compelled by their consciences not to act as intermediaries for a contraceptive that is also a potential abortifacient.<sup>160</sup> In that regard, they too, like other health care professionals, should be protected against being required to do what they consider moral wrongdoing.

#### B. *Pharmacists Are Members of the Health Care Profession*

According to the definition of “health care provider,” pharmacists should be included with the other health care professionals who benefit from federal protection in matters of conscience. “Health care” is defined as the “prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health

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156. See Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L.J. 783, 784–89 (2004).

157. See *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 963 (Alaska 1997).

158. See Wes Allison, *City, Bayfront Settle Suit*, ST. PETERSBURG TIMES, Apr. 11, 2001, at A1.

159. CAL. CORP. CODE § 5917.5 (West 2007).

160. See *infra* Part II.A.

professions."<sup>161</sup> One meaning of "provider" is "one that makes something, such as a service, available."<sup>162</sup> The work of pharmacists fits these definitions. Pharmacists provide the service of drug and therapy treatments available to prevent, treat, and manage illness and preserve mental and physical well-being.<sup>163</sup> Illinois's Conscience Act defines "health care personnel" as "any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services."<sup>164</sup> Like medical doctors, pharmacists undergo extensive academic and in-the-field training.<sup>165</sup> Pharmacists are required to complete a pre-pharmacy undergraduate degree with a focus on one of the "hard sciences," earn a doctorate of pharmacy, complete internship requirements, and pass the North American Pharmacist Licensure Examination and a state exam before obtaining a license to practice.<sup>166</sup> Pharmacists collaborate with physicians daily to improve patient health through careful medication practices and merit the same conscience protections.<sup>167</sup> The two professions stem from the same basic vocation of health care, and as Linda G. MacLean proposed to the House Small Business Committee, "Just like physicians, pharmacists abide by a Code of Ethics for the delivery of health care. Just as physicians are not required to provide all medical services, pharmacists should not be required to provide all pharmacy

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161. AMERICAN HERITAGE DICTIONARY, *supra* note 91, at 808–09. Also, the Illinois Health Care Right of Conscience Act defines health care as "any phase of patient care, including but not limited to . . . instructions; family planning, counseling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; [or] medication." 745 ILL. COMP. STAT. 70/3 (2002).

162. AMERICAN HERITAGE DICTIONARY, *supra* note 91, at 1411. Similarly, the South Carolina Pharmacy Practice Act defines health care provider to include a "pharmacist who provides health care services within the pharmacist's scope of practice." S.C. CODE ANN. § 40-43-30(23) (2001).

163. Cahill et al., *supra* note 1.

164. 745 ILL. COMP. STAT. ANN. 70/3 (West 2002).

165. Cahill et al., *supra* note 1.

166. *Id.*

167. Case law suggests the courts view a strong link and parallel vocation between doctors and pharmacists. In one case from California, the court explained:

A pharmacist must not only use skill and care in accurately filling and labeling a prescribed drug, but he must be aware of problems regarding the medication, and on occasion he provides doctors as well as patients with advice regarding such problems. In counseling patients, he imparts the same kind of information as would a medical doctor about the effects of the drugs prescribed.

Murphy v. R. Squibb & Sons, Inc., 710 P.2d 247, 251 (Cal. 1985).

services.”<sup>168</sup> At the point of first contact with many patients, health care providers such as pharmacists deserve respect for the services they provide to the community, and accordingly their conscience rights should be protected.

Today, pharmacists must carefully consider whether to practice in Illinois, California, and Washington due to coerced distribution of Plan B.<sup>169</sup> Given the inadequate conscience protection, it is probable that pharmacists will be forced to fill a prescription or dispense a drug to which their conscience objects.<sup>170</sup> Opponents of protection of conscience urge pharmacists to leave the field if they are not prepared to offer any and every medical service.<sup>171</sup> Governor Blagojevich, according to the amended complaint of the aggrieved pharmacists in Illinois, stated that pharmacists who object to distributing particular drugs on moral grounds should “find another profession.”<sup>172</sup> This position has been sharply criticized. American Center for Law and Justice Senior Counsel and Lead Counsel Frank Manion defended his clients’ rights in the *Menges* case and addressed their freedom to follow their vocation when he explained, “Telling our clients, as the Governor has repeatedly done, that they should ‘find another profession’ is not the way to show respect for their rights.”<sup>173</sup> Dedicated pharmacists should not feel driven from their communities and vocations. Luke Vander Bleek, pharmacist and owner of four pharmacies in Illinois, feels compelled to no longer own and operate pharmacies in Illinois in an environment where he is “legally

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168. See *Small Business Comm.*, *supra* note 28, at 69 (prepared statement of Linda G. MacLean, Clinical Assistant Professor of Pharmacotherapy at Washington State University).

169. See ILL. ADMIN. CODE tit. 68, § 1330.91 (2006); CAL. BUS. & PROF. CODE § 733 (West 2007); WASH. REV. CODE ANN. § 70.41.350 (West 2007). Also, a pharmacist before the Ohio House of Representatives Health Committee testified that she had been limited in her ability to choose work because she would be fired at many places for declining to dispense drugs in violation of her “conscience and religious convictions.” *Proponent Testimony on Ohio House Bill 469 Before the Ohio H. Health Comm.*, 126th Gen. Assembly, Regular Session 2 (Ohio 2006) (statement of Kristine M. Severyn, pharmacist). Due to the lack of protection for beliefs, she has been forced to seek employment in places where her conscience would not be violated, such as the Dayton Correctional Institution and the Dayton Heart Hospital. *Id.*

170. See generally *Small Business Comm.*, *supra* note 28, at 60–69 (prepared statement of Linda G. MacLean, Clinical Assistant Professor of Pharmacotherapy at Washington State University).

171. *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1000 (C.D. Ill. 2006).

172. *Id.*

173. American Center for Law and Justice, *ACLJ Hails Victory for Right of Conscience in Illinois Case Involving Pharmacists & Dispensation of the Morning-After Pill* (Sept. 7, 2006), <http://www.aclj.org/news/Read.aspx?ID=2390> [hereinafter *ACLJ Hails Victory*].

obligated to be involved in the destruction of human life.”<sup>174</sup> By excluding pharmacists from the protection afforded other health care providers’ consciences, “duty to dispense” legislation threatens to drive pharmacists—health care professionals—from their vocations.

### C. *Pharmacists’ Right of Conscience Should Receive Protection*

Pharmacists have the right to follow their consciences in the workplace.<sup>175</sup> A pharmacist is a professional trained in health care who conducts her professional life according to an ethical code.<sup>176</sup> APhA promulgated a Code of Ethics for Pharmacists and is an active proponent for protection of a pharmacist’s right of conscience.<sup>177</sup> The Code of Ethics states that while avoiding any behavior that compromises their “dedication to the best interests of patients,” pharmacists have a duty to “act with conviction of conscience.”<sup>178</sup> APhA’s official stance on pharmacist conscience, adopted in 1998, states that “APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure [the] patient’s access to legally prescribed therapy

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174. See *Small Business Comm.*, *supra* note 28, at 6 (statement of Luke Vander Bleek, pharmacy owner). Vander Bleek explained his difficult situation:

Joan and I are the parents of four small school-aged daughters. We have already decided that we will not continue to pursue ownership opportunities in pharmacies in Illinois and in an environment where licensure requires us to stock and dispense abortifacient drugs, whether it is this one or others that come to the market later on.

Though it has required significant sacrifice, time and effort, Joan and I have enjoyed having the opportunity to own a small business in the State of Illinois. But even so, we have resolved that we will not invest and I will not practice in an environment in which we are legally obligated to be involved in the destruction of human life.

*Id.* at 5–6.

175. See 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, 564–66 (2006).

176. See generally AMERICAN PHARMACISTS ASSOCIATION, CODE OF ETHICS FOR PHARMACISTS (1994), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903> [hereinafter CODE OF ETHICS] (articulating principles of professional conduct intended to guide pharmacists in their relationships with patients and practitioners).

177. See *id.*

178. *Id.*

without compromising the pharmacist's right of conscientious refusal."<sup>179</sup>

The American Society of Health-System Pharmacists ("ASHP") has issued a policy statement on a pharmacist's right of conscience as well. The policy states that the ASHP recognizes a pharmacist's right to conscientiously object to "morally, religiously, or ethically troubling" therapies and supports the establishment of systems that protect the "patient's right to obtain legally prescribed and medically indicated treatments" while reasonably accommodating the pharmacist's right of conscientious objection."<sup>180</sup>

Prominent leaders involved with the pharmaceutical community strongly support conscience protection as well. The Chairman of the Small Business Committee in the House of Representatives advocates the freedom of health care providers from violation of their consciences.<sup>181</sup> The Executive Director of the Illinois Pharmacists Association also stands by the right of a pharmacy to be free from fear and alienation based on its decision to not stock emergency contraceptives.<sup>182</sup> Also, the Executive Vice President and Chief Operating Officer of the ASHP advocates implementation of APhA's "stepping away" policy for pharmacists.<sup>183</sup> From the standpoint of the leaders of the pharmaceutical community, as a matter of professional dignity, pharmacists deserve an assurance of respect for their choices informed by convictions of conscience.

Although some tensions exist in the health care community as to the exact protocols and procedures pharmacists should be subject to, overall, the community supports pharmacists opting out of personally objectionable practices.<sup>184</sup> The APhA handbook specifies the following conscience policy for both pharmacists and student pharmacists:

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179. *Small Business Comm.*, *supra* note 28, at 61 (prepared statement of Linda G. MacLean, Clinical Assistant Professor of Pharmacotherapy at Washington State University).

180. AMERICAN SOCIETY OF HEALTH-SYSTEM PHARMACISTS, ASHP POLICY POSITIONS 1982–2006 8 (2006), *available at* [http://www.ashp.org/s\\_ashp/docs/files/About\\_policypositions.pdf](http://www.ashp.org/s_ashp/docs/files/About_policypositions.pdf) [hereinafter ASHP POLICY].

181. *Small Business Comm.*, *supra* note 28, at 3 (statement of Donald A. Manzullo, chair of the Committee).

182. *Id.* at 3, 9–10 (statement of J. Michael Patton, Executive Dir., Ill. Pharmacists Ass'n).

183. Letter from Patton, *supra* note 16, at 3.

184. *See generally* Cahill et al., *supra* note 1. The American Medical Association, however, has adopted a non-protective policy toward pharmacists. It passed a resolution stating "responsibility to the patient [is] paramount in all situations," and 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

1. APhA-ASP [Academy of Student Pharmacists] recognizes a pharmacist's and student pharmacist's right to refuse to dispense a medication or provide a service for various reasons including, but not limited to, conscientious objection and clinical judgment. APhA-ASP also supports the establishment of systems that protect the patient's right to obtain legally-prescribed and therapeutically appropriate treatment while reasonably accommodating the pharmacist's or student pharmacist's right to refuse.

2. APhA-ASP opposes legislation, regulation, and other policies that compromise a pharmacist's and student pharmacist's right to refuse.<sup>185</sup>

Pharmacists dedicate their professional careers to serving the community and to helping patients understand their medication. Requiring them to "check their personal beliefs at the door compromises their ability to work with patients to make the best use of prescription and over-the-counter medications," and accordingly, would be illogical and dangerous for patient health.<sup>186</sup> Inclusion of pharmacists with those other health care personnel whose rights of conscience are protected would reflect the important role pharmacists play in community health.

## V. COUNTER POSITIONS

Opponents of a pharmacist's right of conscience argue that protection of a patient's right to treatment should take precedence over protection of conscience rights<sup>187</sup> and have argued for conscience exemptions that provide no real protection.<sup>188</sup> Conscience opponents assert the "right to treatment" to be a positive right and one that they

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interference." American Medical Association, H-120.947 Preserving Patients' Ability to Have Legally Valid Prescriptions Filled, available at [http://www.ama-assn.org/apps/pf\\_new/pf\\_online?f\\_n=browse&doc=policyfiles/HnE/H-120.947.HTM&&s\\_t=&st\\_p=&nth=1&prev\\_pol=policyfiles/HnE/H-115.997.HTM&nxt\\_pol=policyfiles/HnE/H-120.943.HTM&](http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-120.947.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/H-115.997.HTM&nxt_pol=policyfiles/HnE/H-120.943.HTM&).

185. APhA-ASP ADOPTED RESOLUTIONS, *supra* note 11, at 90.

186. Cahill et al., *supra* note 1.

187. See Kramlich, *supra* note 156, at 789 (discussing the purported "right of access" to abortion).

188. *Id.* at 786-87.

claim to be superior to other rights.<sup>189</sup> The existence and viability of positive rights rests at the heart of the argument that patients have a right to “basic reproductive health care.”<sup>190</sup> The negative liberties set forth by the United States Constitution and protected in Supreme Court jurisprudence, however, do not metamorphose into positive rights, such as unfettered access to Plan B, at the cost of a pharmacist’s right of conscience.<sup>191</sup>

### A. *Negative Liberty*

The Constitution establishes many negative rights and very few positive rights.<sup>192</sup> Examples of the negative liberties include the First, Fourth, and Fifth Amendments: protection from prohibition of free exercise of religion and free speech, protection from unreasonable and warrantless searches and seizures, and protection from self-incrimination.<sup>193</sup> A negative liberty is one that provides protection *from* interference, but does not mandate compulsory action.<sup>194</sup> For example, the First Amendment does not compel exercise of religion, but provides protection from its prohibition. Frank Manion, attorney for the Plaintiffs in *Menges*, commented, “There’s nothing in the Constitution that says everybody has a right to any medical procedure they want, whenever they want, in the very convenient way that they want.”<sup>195</sup> Liberties are ordered to require people to refrain from actions, rather than to compel them to perform particular actions.<sup>196</sup> A typical example of the establishment of a negative liberty

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189. See Laura Lambert, *Pharmacy Refusals: Women Tell All*, PLANNED PARENTHOOD, June 10, 2005, <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/birth-control-access-prevention/pharmacy-refusals-6510.htm>.

190. *Id.*

191. See generally Kramlich, *supra* note 156 (disagreeing with legal arguments that abortion access is a positive right which forces unwilling health care practitioners to participate in abortions).

192. See, e.g., U.S. CONST. amends. I, IV, V. Maureen Kramlich addresses two exceptions to the constitutional norm of protecting rights in the negative: “Almost all of the Bill of Rights’ provisions protect rights in the negative. Two exceptions are the right to counsel and the right to a speedy trial and a trial by a jury.” Kramlich, *supra* note 156, at 796.

193. See, e.g., U.S. CONST. amends. I, IV, V.

194. Kramlich, *supra* note 156, at 783.

195. Tresa Baldas, *The Push to Protect Pro-Life Medical Providers*, NAT’L L. J., Feb. 7, 2005, available at <http://www.aclj.org/news/Read.aspx?ID=1185>.

196. Kramlich, *supra* note 156, at 784.

is the Supreme Court's decision in *Roe v. Wade*.<sup>197</sup> This negative liberty consists in freedom from interference by the government in a woman's decision regarding an abortion.<sup>198</sup> Many Supreme Court decisions involve negative liberties<sup>199</sup> but do not establish positive liberty interests whose effect would be compulsory provision of a treatment.<sup>200</sup> Indeed, in the instance of the pharmacist whose conscience dictates that because Plan B could be an abortifacient and thereby cause the death of a child, compulsory involvement in distribution of the drug "may be so objectionable that it takes on constitutional dimensions, such that protections against this injustice are 'implicit in the concept of ordered liberty.'"<sup>201</sup> To sustain the health care system and the legal system as a whole, no one should ever be compelled to kill, or participate in what their consciences believe to be murder.<sup>202</sup>

Professor Robert Vischer approaches the issue from a philosophical perspective:

In the current dispute, the predominance of positive liberty is evident in the advocacy of both the consumers and the pharmacists. On the consumer side, the cause of reproductive rights has evolved from one of negative liberty—seeking to prevent the state from criminalizing abortion or contraception—to an extreme form of positive liberty—asking not only to have the full range of legal

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197. 410 U.S. 113 (1973).

198. *See id.* at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.").

199. Kramlich, *supra* note 156, at 795–96 nn.87–92.

200. Pellegrino explores the history of compulsory medical treatments in the following discussion:

All of this is occurring against the recent historical experience of past and present totalitarian governments subverting the uses of medical knowledge to political and economic purposes. We need not recite again the way the Soviet Union distorted the Hippocratic Oath to make it serve the purposes of Communism, the Nazi physicians' acquiescence in using their knowledge in the service of genocide, or the participation of physicians as instruments of torture or terrorism by so many petty dictators and war lords.

Pellegrino, *supra* note 121, at 224 (internal citations omitted).

201. Kramlich, *supra* note 156, at 798 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

202. *Id.*

pharmaceuticals available at every pharmacy, but to insist on their availability with “no hassle, no delay, no lecture.”<sup>203</sup>

Vischer distinguishes the ideological shift from a negative liberty to a positive right that guarantees the immediate, unimpeded availability of drugs without regard for circumstances, individual choices, and consciences. The imposition of this positive “right to treatment” upon pharmacists shoves their right to choose out the door at which they had to check their consciences, while the respect and protection of negative liberties permits all parties involved to have their rights safeguarded.

### B. *Intolerance of Rights*

Those who object to the protection of conscience are opposed to pharmacists’ rights. The concern of conscience opponents appears valid on its surface: protection of pharmacists’ consciences will open the floodgates of irrational, religious psychopathy and result in refusals for medications as simple as insulin for a diabetic.<sup>204</sup> In reality, however, pharmacists whose consciences object to dispensing Plan B are dedicated, moral people who simply want to be free from mandated distribution of drugs.<sup>205</sup> Pharmacists face the prospect that mandated emergency contraceptive distribution could begin the slide toward mandated filling of a prescription for something as morally repugnant as euthanasia.<sup>206</sup> It is the pharmacists who are asking for the protection of their negative right to be free *from* the imposition of another’s value system. The conscience opponents, on the other hand, demand total conformation *to their viewpoint*.<sup>207</sup> Instead of pursuing confirmation of their negative right of access, one free *from* interference, they choose to head down the path of demanding *provision* of treatments. This demand finds no basis in the Constitution, nor can it be sustained by current jurisprudence and

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203. Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL’Y REV. 83, 96 (2006) (internal citations omitted).

204. See Minh N. Nguyen, Comment, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves From Them?*, 8 SCHOLAR 251, 275–76 (2005).

205. See, e.g., *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 1003 (C.D. Ill. 2006).

206. *Small Business Comm.*, *supra* note 28, at 9 (statement of J. Michael Patton, Executive Dir., Ill. Pharmacists Ass’n) (“If it is oral contraceptives today, what might the prescription be that will be mandated tomorrow?”).

207. See *supra* note 116 and accompanying text.

recent statutory provisions regarding health care professionals.<sup>208</sup> To adequately quell concerns about the imposition of one's viewpoint on another, both the right to access and the right to conscience should be properly protected. Proponents of conscience rights deserve tolerance of their rights in the way that they have respected patients' right to choose treatment.

## VI. PROPOSED SOLUTIONS

### A. *Implementation of APhA's "Stepping Away" Policy*

Federal implementation of the APhA policy would provide partial protection across the nation for a pharmacist's right of conscience. This policy respects patients' rights to access legal drugs and pharmacists' right of conscience.<sup>209</sup> The "stepping away" policy works by allowing a pharmacist not to interface with a drug to which she has a religious or moral objection, leaving the particulars of meeting patient needs to pharmacy protocols.<sup>210</sup> A pharmacist can quietly remove herself from a morally questionable situation while the pharmacy accommodates the patient's requested drug treatment. Referring patients to other pharmacies is only one option among many. Some pharmacies structure staffing so that one non-objecting pharmacist will always be available to dispense controversial drugs.<sup>211</sup> Others may schedule pharmacists for shifts according to the likely influx of patient requests for emergency contraception.<sup>212</sup>

To these ends, the National Association of Boards of Pharmacy aids in the development, implementation, and enforcement of uniform standards for the purpose of protecting public health.<sup>213</sup> The "stepping away" policy works to provide adequate protection, yet allows flexibility and freedom for state pharmacy boards to work with

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208. See generally Kramlich, *supra* note 156; Judith C. Gallagher, Note, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 528 (2007) (arguing that the Hyde-Weldon Amendment is "an important step in protecting the rights of health care workers who refuse to act contrary to the dictates of their consciences").

209. APhA-ASP ADOPTED RESOLUTIONS, *supra* note 11, at 83, 90; Cahill et al., *supra* note 1.

210. APhA-ASP ADOPTED RESOLUTIONS, *supra* note 11, at 83, 90.

211. See *Small Business Comm.*, *supra* note 28, at 62 (prepared statement of Linda G. MacLean, Clinical Assistant Professor of Pharmacotherapy at Washington State University).

212. *Id.*

213. The National Association of Boards of Pharmacy, Preamble and Mission Statement, <http://www.nabp.net/whoweare/preamble.asp> (last visited Jan. 27, 2007).

their pharmacies in developing specific guidelines.<sup>214</sup> An individual pharmacy working in conjunction with its state pharmacy board should determine the best approach to conscience protection when implementing the terms and conditions of “stepping away.”

Partial protective measures for a pharmacist’s right of conscience have been implemented by pharmacies across the nation and set forth in APhA policy guidelines, yet disregarded by legislative measures like those in Illinois, California, Washington, and perhaps other states in the near future.<sup>215</sup> But both patient and pharmacist needs can be met by the implementation of this “stepping away” policy, confirming rejection of conscience-limiting legislation.

APhA has taken a full-scope view on the clash of conscience at the counter and determined that this policy best balances pharmacist and patient rights. It has had to combat misinformation about its stance over the last few years as the issue of pharmacists’ conscience rights has become more prevalent.<sup>216</sup> APhA has made its position clear on pharmacist conscience protection:

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 resource for the profession in addressing and understanding ethical issues.<sup>217</sup>

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214. See, e.g., APHA-ASP ADOPTED RESOLUTIONS, *supra* note 11, at 83, 90; 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, 236 (2005) (describing the process of pharmacy regulation).

215. ILL. ADMIN. CODE tit. 68, §1330.91 (2006); CAL. BUS. & PROF. CODE § 733 (West 2007); WASH. REV. CODE ANN. § 70.41.350 (West 2007).

216. See Letter from John A. Gans, Executive Vice President, American Pharmacists Association, to James Oliphant, Editor in Chief, *Legal Times* (Aug. 22, 2005), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=August6&template=/CM/ContentDisplay.cfm&ContentFileID=679>; APhA Press Release, *supra* note 16; Memorandum from Adele H. Pietrantonio, Speaker of the APhA House of Delegates and John A. Gans, Secretary of the APhA House of Delegates, to the 2005 APhA House of Delegates (Aug. 9, 2005), available at <http://www.aphanet.org> [hereinafter Memo from Adele Pietrantonio]; Cahill et al., *supra* note 1.

217. Memo from Adele Pietrantonio, *supra* note 216, at n.1. APhA has adopted equally protective resolutions for student pharmacists. APHA-ASP ADOPTED RESOLUTIONS, *supra* note

As lawmakers across the country determine legislative measures, the inconsistent approaches to conscience prove to break what had already been mended, not only by APhA standards, but also by similar positions held by ASHP, the American College of Clinical Pharmacy, and the Academy of Managed Care Pharmacists.<sup>218</sup>

Unfortunately, even the “stepping away” policy leaves room for pharmacists’ consciences to be violated by individual pharmacy policies.<sup>219</sup> Despite this potential, pharmacies generally respect and cooperate with the moral and professional judgment of their pharmacist-employees. For example, Walgreens strove to respect pharmacist rights and meet patient needs through implementation of a policy called the Referral Pharmacist Policy.<sup>220</sup> The pharmacy would simply schedule the objecting pharmacist to never work a shift alone, always providing for an alternate pharmacist to handle such prescriptions.<sup>221</sup> Under this policy, pharmacists were permitted to decline to fill a prescription based on moral or religious objections so long as another pharmacist or pharmacy could fill it.<sup>222</sup> In *Noesen v. Medical Staffing Network, Inc.*, a recent conscience case involving a pharmacist who declined to fill contraceptives prescriptions, Wal-Mart had initially cooperated with a pharmacist who voiced conscience objections to performing any activity related to contraceptives, including transfers and referrals.<sup>223</sup> In both of these examples, pharmacies have demonstrated, to an extent, a willingness to work with the individual pharmacist’s particularized needs and conscience-related requests.

Because not all pharmacies choose to stock emergency contraceptives, various groups have set up a network of information informing patients of the location of providers of emergency

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11, at 83, 90 (“APhA-ASP recognizes a pharmacist’s and student pharmacist’s right to refuse to dispense a medication or provide a service for various reasons including, but not limited to, conscientious objection and clinical judgment.”).

218. Cahill et al., *supra* note 1.

219. Absolute protection of conscience is not possible, but “stepping away” provides the most protection and accommodation for all parties involved. *Menges* discussed the inadequacies of the Walgreens protective provisions in the face of the Illinois Rule. *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006).

220. *Id.*

221. *Id.*

222. Cahill et al., *supra* note 1.

223. *Noesen v. Med. Staffing Network, Inc.*, No. 06-C-071-S, 2006 U.S. Dist. LEXIS 36918, at \*2-6 (W.D. Wis. 2006). Upon further complicating circumstances, the pharmacist and Wal-Mart were unable to continue working together. *Id.*

contraceptives.<sup>224</sup> Difficulties arise in rural pharmacies where referrals down the street are impossible, or smaller pharmacies where only one pharmacist is on staff at a time. For a Catholic pharmacist, any interfacing with the drug, behind the counter, referring, or even passing the phone along to a coworker, in the event that such a partner existed, poses a crises of conscience. “Stepping away” would not fully solve this crisis. But in comparison with the bills pending in committee in the United States Senate,<sup>225</sup> implementation of the less than perfect “stepping away” policy looks to be far more protective of conscience rights.<sup>226</sup>

### B. *Free Market Solution*

An alternative response to state implementation of APhA’s “stepping away” policy is that of allowing the market to decide: instead of turning to the state to acknowledge or deny the privileges of moral conscience, individuals can choose to patronize and work at pharmacies of their choice, informed by their moral consciences. In a society comprised of many people of varying faiths and creeds, the moral convictions of a sincere conscience deserve respect and the utmost protection. Yet both positions in the dispensing of Plan B can argue from a perspective of “conscience-informed decisions,” decisions closely tied to the moral fiber of one’s being. To act contrary to those most deeply held beliefs undermines one’s very sense of self. In a pluralistic society, much deference is shown to the individual by protecting the individual’s sense of self. An example of recent jurisprudence on the matter is the United States Supreme Court’s plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:<sup>227</sup> “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.”<sup>228</sup> Robert Vischer expounds on this

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224. See Cahill et al., *supra* note 1. The Association of Reproductive Health Professionals operates a national hotline and website informing patients of a listing of providers of emergency contraceptives. See *supra* note 115.

225. See *supra* Part II.B.

226. Compare the bills discussed *supra* Part II.B with APhA’s “stepping away” policy as described in the Memo from Adele Pietrantoni, *supra* note 216, at 1 and APhA-ASP ADOPTED RESOLUTIONS, *supra* note 11, at 83, 90.

227. 505 U.S. 833 (1992).

228. *Id.* at 851.

notion of the autonomous individual and examines the individual's relationships in a marketplace of ideas and positions:

Our own autonomy consists, in large part, of our relationships with other individuals and communities.

For the social dimension of humanity to have traction in the legal sphere, one key is to recognize and protect political pluralism, which sees social life as comprising "multiple sources of authority—individuals, parents, civil associations, faith-based institutions, and the state, among others—no one of which is dominant in all spheres, for all purposes, on all occasions." *This recognition requires more state inaction than action*, for political pluralism is a "politics of recognition rather than construction;" indeed, as it "respects the diverse spheres of human association, it does not understand itself as creating or constructing those activities."<sup>229</sup>

Vischer stresses that state inaction will permit the optimal ebb, flow, and mutual understanding between the two positions.<sup>230</sup> Indeed, protection of pharmacists does not preclude protection of a patient's choice of Plan B. The one protection is not mutually exclusive of the other.

The free market approach allows the public's decision to patronize certain pharmacies to determine how successful those pharmacies will be. A concerned member of the public can choose not to support a pharmacy that stocks Plan B. A concerned pharmacist can choose not to work at a pharmacy that requires pharmacists to dispense Plan B. The trouble with this proposal lies in the looming specter of state intervention. Given the amount of attention the issue receives by special interest groups, it is likely that the state, at the local or federal level, will choose to intervene in some way, on behalf of either pharmacists or reproductive rights groups. Either way, this artificial black and white view precludes an individual's choice in the matter. Increasingly, the state's legislative decisions bar any individual actions on the subject.

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229. Vischer, *supra* note 203, at 98–99 (emphasis added) (internal citations and footnotes omitted).

230. *See generally id.* (arguing that state should allow all sides in the pharmacist controversy to live out their convictions in the marketplace, thus maintaining a forum in which pharmacies craft their own particular conscience policies in response to the demands of their employees and customers).

Absent this artificial intervention on the part of the state, various pharmacies have instituted seamless and invisible methods of responding to a patient's Plan B request while protecting pharmacists' consciences, attempting to respect both persons' decisions.<sup>231</sup> As Linda MacLean offered in her statement before the House Small Business Committee, "When alternative systems are established proactively, the patient is unaware of the pharmacist's actions and both the patient's right to care and the pharmacist's need to step away from certain activity are accommodated."<sup>232</sup> Dr. Rebekah E. Gee, one of three women who filed a lawsuit against Wal-Mart in February 2006 because it had chosen not to stock Plan B, believes that "[t]his agenda [protection of conscience] sets women back decades, threatening their right to achieve equally in society by robbing them of options for planning their childbearing."<sup>233</sup> Her sentiments are echoed by a pronouncement of the National Organization for Women ("NOW"). Regarding pharmacists' right to act according to their consciences, NOW's statement asserts those pharmacists to be perpetrating a cycle of "their biased and intolerant treatment of patients."<sup>234</sup> Attorney Frank Manion stated that the pharmacists in *Menges*, "have never sought to prevent anyone from gaining access to these drugs."<sup>235</sup> Later, he reiterated that "there is no good reason why both sides of this controversial issue cannot be accommodated if the State is willing to recognize and respect the interests of all its citizens—including objecting pharmacists."<sup>236</sup> Both patient and pharmacist rights can be accommodated and respected with proactive communication and planning. In the end, neither the proffered solution of "stepping away" nor that of permitting the market to take its natural course is perfect, but a solution can be formed through the

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231. Appropriate policies should be set ahead of time, ensuring that pharmacists can step away, but not "step in the way" of the patient's drug access. Press Release, Cahill et al., *supra* note 1. Examples of such systems include staffing the pharmacy appropriately so another pharmacist may step in and fill the prescription. Late-Breaker Resolution, *supra* note 11, at 8. See also Marsha N. Cohen, Editorial, *Pharmacists, Conscience and Freedom*, JURIST, Sept. 26, 2005, <http://jurist.law.pitt.edu/forumy/2005/09/pharmacists-conscience-and-freedom.php>.

232. *Small Business Comm.*, *supra* note 28, at 63 (prepared statement of Linda G. MacLean, Clinical Assistant Professor of Pharmacotherapy at Washington State University).

233. Rebekah E. Gee, *Plan B, Reproductive Rights, and Physician Activism*, 355 NEW ENG. J. MED. 4, 4 (2006).

234. National Organization for Women, *Access for All?*, [http://www.now.org/issues/reproductive/ec\\_action\\_plan.html](http://www.now.org/issues/reproductive/ec_action_plan.html) (last visited Sept. 30, 2006).

235. *ACLU Hails Victory*, *supra* note 173.

236. *Id.*

cooperative efforts of legislators, pharmacy owners, pharmacists, patients, and religious leaders.

### CONCLUSION

The pharmacist's right of conscience needs adequate protection in the face of inconsistency by legislators across the nation. Pharmacists are health care professionals, not automatic tellers, who deserve equal respect and conscience protection equal to that of their fellow professionals. Mandatory dispensation or acting in any way as a conduit for a drug in violation of their consciences will drive pharmacists from the industry, or in extreme cases, force them to cooperate materially in wrongdoing. The jurisprudence and laws of this country provide for the negative liberty for protection from interference with medical treatments, such as Plan B. No established "right of access" should be substantiated as a greater liberty than that of the freedom to act in accord with one's conscience. Similarly, *Menges* serves as an example of the train-wreck-result of laws that dismiss pharmacists' right of conscience for the sake of a "duty to dispense" a prescription or drug. Plaintiffs in that case are pressing forward to the appellate level. APhA has sorted through the crisis at the pharmaceutical counter and carefully come up with a policy to address the rights of pharmacists and the needs of patients. From a different perspective, by leaving it to the public to support those pharmacies which appeal to their consciences, the laissez faire proposal attempts to mitigate the damages done by the state when it acts as judge, jury, and executioner in the relationship between pharmacies and pharmacists. In the end, amendments and specific measures of protection can and should be prepared by individual state pharmacy boards and pharmacies and legislators should turn to policy groups for concrete applications to balance the precarious position of Catholic pharmacists. Only through such cooperative measures does a pharmacist's freedom to act according to her conscience stand a chance of not being crushed at the counter.