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## Pharmacist Knows Best - Enacting Legislation in Oklahoma Prohibiting Pharmacists from Refusing to Provide Emergency Contraceptives

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# COMMENT

## PHARMACIST KNOWS BEST? ENACTING LEGISLATION IN OKLAHOMA PROHIBITING PHARMACISTS FROM REFUSING TO PROVIDE EMERGENCY CONTRACEPTIVES

*No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.*

—Margaret Sanger, 1920<sup>1</sup>

### I. INTRODUCTION

In January 2004, a woman in Texas survived a brutal rape, sought medical attention, and received a prescription for emergency contraceptives.<sup>2</sup> However, when she went to have the prescription filled, the pharmacist refused on the ground that he did not morally believe in birth control.<sup>3</sup> In Wisconsin, a pharmacist not only refused to fill a college student's prescription for oral contraceptives but also refused to return the prescription so she could have it filled elsewhere.<sup>4</sup> She became pregnant after being unable to receive her prescription.<sup>5</sup> In yet another state, a married mother of four was denied emergency contraceptives by her pharmacist when she tried to fill a prescription her doctor had prescribed after the birth control method she and her husband were using failed.<sup>6</sup> These women were from different geographic areas and had different reasons for needing emergency contraceptives, but in each scenario the patient was turned away because of the "conscience" of the pharmacist upon whom the woman relied to provide her medication.<sup>7</sup> Unfortunately, these cases are far from rare and signify a blooming

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1. Margaret Sanger, *Women and the New Race* (Truth Pub. Co. 1920).

2. Sexuality Info. & Educ. Council of the U.S., *Judge Rules Pharmacist Violated Code of Ethics—Shines New Light on Pharmacist Refusal Debate*, <http://www.siecus.org/policy/PUupdates/pdate0163.html> (updated Mar. 2005).

3. *Id.*

4. *In re Disc. Proc. against Noesen*, <http://drl.wi.gov/dept/decisions/docs/0405070.htm> (Wis. Pharm. Examining Bd. Apr. 13, 2005).

5. *Id.* at Analysis of the Evidence (E).

6. Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, Wash. Post A01 (Mar. 28, 2005).

7. While laws allowing the refusal to perform certain medical acts due to one's personal beliefs have typically been referred to as "refusal clauses," these have recently been redefined by pro-life movements as "conscience" clauses or rights of conscience. Sexuality Info. & Educ. Council of the U.S., *supra* n. 2.

legal issue in the United States.<sup>8</sup>

While the debate concerning the need for contraceptives dates back to the works of Margaret Sanger,<sup>9</sup> it was not until 1965 that the United States Supreme Court provided constitutional protection for their use.<sup>10</sup> Women's rights were further defined in *Roe v. Wade*,<sup>11</sup> which put an end to many of the questions concerning what reproductive freedoms a woman has legally.<sup>12</sup> Yet, as is shown through the situations discussed, there is an alarming and increasing trend of pharmacists taking it upon themselves to limit women's reproductive rights by refusing to provide them emergency contraceptives.<sup>13</sup> A recent FDA ruling making emergency contraceptives available over the counter, but requiring that they be kept behind the pharmacist's counter,<sup>14</sup> has given even more control to pharmacists when deciding whether or not to give the drug to a requesting party. The publicity these refusals have garnered<sup>15</sup> has led numerous state legislatures to examine the issue.<sup>16</sup> A few, but growing, number of states have enacted laws allowing pharmacists to follow their personal beliefs and refuse to provide emergency contraceptives.<sup>17</sup> However, the majority of states have not enacted legislation protecting the rights of the pharmacists or the patients,<sup>18</sup> arguably leaving confusion as to whether pharmacists can legally refuse to provide emergency contraceptives. In Illinois, this confusion led Governor Blagojevich to enact an emergency rule prohibiting pharmacists from using moral grounds as a basis for refusing to provide contraceptives.<sup>19</sup> Unfortunately, many states are still inconclusive on the issue of pharmacists putting their own personal beliefs above a patient's need to receive emergency contraceptives.<sup>20</sup> As a

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8. See generally Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bi-Partisan Abortion Politics in the United States*, 29 Rutgers L. Rec. 1, 8–9 (2005).

9. Margaret Sanger, also known as the "mother of birth control" was one of the first advocates of women's control over their own reproductive lives. Angie Vineyard, *Where Are All the Feminists When You Need Them?* <http://www.beverlylahayeinstitute.org/articledisplay.asp?id=2085&department=BLI&categoryid=femfacts> (Sept. 18, 2002).

10. *Griswold v. Conn.*, 381 U.S. 479 (1965). *Griswold* held that married individuals have the right to privately decide the methods of birth control they want to use. *Id.* at 485–86.

11. 410 U.S. 113 (1973).

12. *Roe* held that women have the right to choose to terminate a viable pregnancy. *Id.* at 164.

13. Stein, *supra* n. 6.

14. FDA, *FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older Prescription Remains Required for Those 17 and Under*, <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html> (Aug. 24, 2006).

15. For instance, there have been numerous articles in the Christian Science Monitor, Washington Post, and from major news broadcasters such as CNN. See CNN, *Pharmacists Fired for Denying 'Morning After' Pill*, <http://www.cnn.com/2004/US/Southwest/02/12/pharmacy.firing.ap/> (Feb. 12, 2004); Marilyn Gardner, *Pharmacists' Moral Beliefs v. Women's Legal Rights*, <http://www.csmonitor.com/2004/0426/p11s01-usju.html> (Apr. 26, 2004); Stein, *supra* n. 6.

16. See e.g. Ark. Code Ann. 20-16-304 (Lexis 2000); see also Holly Teliska, Student Author, *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, 241–44 (2005).

17. See Gardner, *supra* n. 15.

18. See Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 Clev. St. J.L. & Health 77, 98 (2002).

19. Off. of the Gov., *Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives*, <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=1&RecNum=3805> (Apr. 1, 2005).

20. See Herbe, *supra* n. 18, at 98.

result, many pharmacists have made their own decisions and refuse to provide such medication in spite of the major consequences to the patient.<sup>21</sup>

Oklahoma is one of the many states without a firm position on a pharmacist's right to refuse to provide emergency contraceptives.<sup>22</sup> While the state's statutes allow a health care provider to refuse to perform services that result in an abortion,<sup>23</sup> it is silent on the right to refuse to dispense contraceptives.<sup>24</sup> This lack of clarity in the law leaves Oklahoma in need of guidance. This comment argues Oklahoma should enact a law similar to the emergency order enacted in Illinois, adding language specifically prohibiting pharmacists the right to question a patient's use of contraceptive medication. Legislation should explicitly prohibit pharmacists from refusing to provide legal medication based on moral objections because doing so violates the rights of patients. It forces patients to adhere to the morals of the pharmacists, often causing the patients extreme hardships.

Part II of this comment discusses background information concerning chemical abortions, emergency contraceptives, and their effects. Part III reviews the evolution of refusal clauses, applicable statutes currently in force in Oklahoma, the law as it has been enacted in Illinois, and the Pharmacists' Code of Ethics. Part IV analyzes *The Matter of the Disciplinary Proceedings against Neil T. Noesen*, an administrative decision on behalf of the State of Wisconsin Pharmacy Examining Board, ordering the discipline of a pharmacist for refusing to fill or transfer a prescription for contraceptives.<sup>25</sup> Finally, Part V analyzes patients' rights to receive medication, concluding that not only does the United States Constitution not excuse pharmacists' refusals to dispense contraceptives but that it may actually require them to provide such medication. This comment also argues that a patient's right to receive emergency contraceptives should be based upon the patient's age or relationship with the doctor giving the prescription and that this right is superior to the right of the pharmacist to refuse. This priority may be achieved through enacting legislation similar to that of Illinois, only adding that the pharmacist may not question the patient's use of contraceptive medication. Such legislation would make it clear to pharmacists that they are not allowed to refuse to provide emergency contraceptives, thus protecting the rights of patients until some further time when a case works its way to the United States Supreme Court. At that point, the Court will decide whether it is unconstitutional for any state to allow pharmacists to refuse to provide contraceptives.

## II. ABORTIFACIENTS AND CONTRACEPTIVES: DIFFERENCES AND MISCONCEPTIONS

Much of the confusion on the issue of emergency contraceptives centers upon what

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21. See generally Schaper, *supra* n. 8; Teliska, *supra* n. 16.

22. While there are statutes concerning similar issues, none directly authorize a pharmacist's use of conscience to decide whether to fill prescriptions for contraceptives. See e.g. Okla. Stat. Ann. tit. 63, § 1-741 (West 2004)

23. *Id.* at § 1-741(B).

24. Emergency contraceptives are not a form of abortion, but contraception. See Schaper, *supra* n. 8, at 8.

25. *In re Noesen*, *supra* n. 4.

the drugs actually do.<sup>26</sup> There is widespread confusion on whether such drugs prevent a pregnancy or terminate an existing one.<sup>27</sup> Emergency contraceptives are different from drugs that chemically induce abortions, also called abortifacients.<sup>28</sup> The most commonly known abortifacient is RU-486.<sup>29</sup> Abortifacients can be taken within the first nine weeks of pregnancy to chemically terminate a pregnancy.<sup>30</sup> Abortifacients work by blocking progesterone receptors in a woman's body.<sup>31</sup> Because high progesterone levels are necessary for pregnancy, this blocking can result in the termination of the pregnancy.<sup>32</sup> Abortifacients are not prescribed by a doctor and then filled by a pharmacist.<sup>33</sup> They are actually dispensed directly by the physician caring for the patient.<sup>34</sup> Thus, pharmacists are never involved in filling prescriptions for chemical abortions.<sup>35</sup>

Emergency contraceptives, however, are approved as preventing pregnancy rather than inducing abortion.<sup>36</sup> They work to inhibit the egg from implanting in the uterus within the first seventy-two hours after intercourse.<sup>37</sup> Emergency contraceptives are ineffective if the egg has already implanted; therefore, the longer it takes to receive the contraceptive the less likely it is to prevent pregnancy.<sup>38</sup> Preven and Plan B are the most common emergency contraceptives.<sup>39</sup> These "morning-after pills"<sup>40</sup> work by preventing ovulation, preventing fertilization, or preventing implantation of the fertilized egg into the uterus.<sup>41</sup> Morning-after pills are simply higher doses of the same hormones

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26. In the media, emergency contraception often makes one think of RU-486, stirring up opinions about the abortion debate. See generally Schaper, *supra* n. 8, at 7.

27. See *id.* at 7.

28. *Id.* at 7.

29. See generally Gwendolyn Prothro, *RU 486 Examined: Impact of a New Technology on an Old Controversy*, 30 U. Mich. J.L. Reform 715 (1997) (discussing how RU 486 fits into the overarching debate concerning abortion); but see Renee C. Wyser-Pratte, Student Author, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient under the Law of Contraception*, 79 Or. L. Rev. 1121 (2000) (arguing that RU-486 should not just be viewed as an abortifacient but also as a contraceptive, which would, in turn, receive broader legal protections).

30. Irving M Spitz, C. Wayne Bardin, Lauri Benton & Ann Robbins, *Early Pregnancy Termination with Mifepristone and Misoprostol in the United States*, 338 New Eng. J. Med. 1241, 1242 (Apr. 30, 1998). Abortifacients are most effective if taken within forty-nine days. *Id.* at 1246.

31. *Id.* at 1241.

32. Peyron et al., *Early Termination of Pregnancy with Mifepristone (RU 486) and the Orally Active Prostaglandin Misoprostol*, 328 New Eng. J. Med. 1509, 1509 (1993); see generally Beatrice Couzinnet, et al., *Termination of Early Pregnancy by the Progesterone Antagonist RU 486 (Mifepristone)*, 315 New Eng. J. Med. 1566 (1986); Richard Hausknecht, *Methotrexate and Misoprostol to Terminate Early Pregnancy*, 333 New Eng. J. Med. 537, 537-40 (1995).

33. Herbe, *supra* n. 18, at 82.

34. *Id.*

35. *Id.*

36. See generally 62 Fed. Reg. 8610 (Feb. 25, 1997); see also Schaper, *supra* n. 8, at 8.

37. Isabel Rodrigues et al., *Effectiveness of Emergency Contraceptive Pills between 72 and 120 Hours after Unprotected Sexual Intercourse*, 184 Am. J. of Obstetrics and Gynecology 531 (2001).

38. *Id.* at 536.

39. Heather M. Field, Student Author, *Increasing Access to Emergency Contraceptive Pills through State Law Enabled Dependant Pharmacist Prescribers*, 11 UCLA L.J. 141, 150 (2000).

40. The terms "emergency contraceptive" and "morning-after pill" will be used synonymously throughout this paper.

41. Heather Rae Skeeles, Student Author, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?* 60 Wash. & Lee L. Rev. 1007, 1013 (2003).

found in the common oral contraceptives<sup>42</sup> used routinely to avoid pregnancy<sup>43</sup> but are ingested in higher doses for use after intercourse.<sup>44</sup> This method of preventing pregnancy evolved from the Yuzpe Method.<sup>45</sup> A woman using the Yuzpe method simply took multiple doses of the daily oral contraceptive pills, typically taken individually throughout a woman's ovulation cycle.<sup>46</sup> Thus, higher doses of oral contraceptives were used after intercourse as emergency contraceptives long before such higher doses were specifically packaged and marketed for that purpose.<sup>47</sup>

### III. LEGAL BACKGROUND

#### A. Refusal Clauses

In 1965, *Griswold v. Connecticut*<sup>48</sup> held the choice to use birth control is a personal choice rather than one mandated by outsiders.<sup>49</sup> *Roe* extended the reproductive rights provided by *Griswold* by holding that a woman's right to choose whether to carry a pregnancy to term was a fundamental right.<sup>50</sup> Following *Roe*, there was great outcry from physicians opposed to abortion who were concerned they would be forced to help perform such procedures.<sup>51</sup> As a result, many states enacted refusal clauses allowing physicians to abstain from such actions.<sup>52</sup> While these clauses commonly applied specifically to physicians refusing to perform abortions, cases of prescription-based suicide invoked debate about whether rights to refuse should be extended to

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42. Although emergency contraceptives are taken orally, the phrase "oral contraceptives" is used throughout this paper to refer specifically to those contraceptives taken for non-emergency purposes (e.g., as a form of routine birth control or a means of regulating hormones).

43. See generally Field, *supra* n. 39, at 149.

44. *Id.*

45. See generally *id.* at 150.

46. See generally *id.*

47. *Id.* at 150.

48. 381 U.S. 479.

49. *Id.* (allowing privacy rights to married couples making decisions concerning birth-control.); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1970) (extending the holding of *Griswold* to include privacy rights concerning the use of contraception by unmarried individuals).

50. 410 U.S. at 164.

51. With the controversial effects of *Roe*, many organizations formed and sought to clarify exemptions from participating in performing abortions. See generally Skeeles, *supra* n. 41, at 1022.

52. Herbe, *supra* n. 18, at 97 (noting Alaska Stat. § 18-16.010 (Lexis 2004); Ariz. Rev. Stat. Ann. § 36-2151 (West 2003); Ark. Code Ann. § 20-16-304 (Lexis 2005); Cal. Health & Safety Code Ann. § 123420 (West 2006); Colo. Rev. Stat. § 25-6-102(9) (Lexis 2006); Del. Code Ann. tit. 24, § 1791 (Lexis 2005); Fla. Stat. Ann. § 381.0051(6) (West 2002); Ga. Code Ann. § 49-7-6 (2006); Haw. Rev. Stat. § 453-16 (1993); Idaho Code Ann. § 18-612 (Lexis 2004); Ind. Code Ann. § 16-34-1-4 (Lexis 1993); Iowa Code Ann. § 146.1 (West 2005); Kan. Stat. Ann. § 65-443 (2002); Ky. Rev. Stat. Ann. § 311.800 (Lexis 2001); La. Stat. Ann. § 40:1299.31 (2001); 22 Me. Rev. Stat. Ann. § 1903(4) (2004); Md. Health Gen. Code Ann. § 20-214 (2005); Mich. Comp. Laws Ann. § 333.20181 (West 2001); Minn. Stat. Ann. § 145.414 (West 2005); Mo. Rev. Stat. Ann. § 197.032 (West 2004); Mont. Code Ann. § 50-20-111 (2005); Neb. Rev. Stat. § 28-337 (1995); Nev. Rev. Stat. § 632.475 (2005); N.J. Stat. Ann. § 2A:65A-1 (West 2000); N.M. Stat. Ann. § 30-5-2 (Lexis 2005); N.Y. Civ. Rights Law § 79-1 (McKinney 1992); N.C. Gen. Stat. § 14-45.1 (Lexis 2005); N.D. Cent. Code § 23-16-14 (2002); Ohio Rev. Code Ann. § 4731.91 (West 2004); Okla. Stat. Ann. tit. 63, § 1-741 (West 2004); Or. Rev. Stat. § 435.225 (2005); Pa. Stat. Ann. tit. 18, § 3213 (West 2000); S.C. Code Ann. § 44-41-40 (2002); Tenn. Code Ann. § 68-34-104 (Lexis 2006); Tex. Occ. Code Ann. §§ 103.001-003 (2004); Utah Code Ann. § 76-7-306 (Lexis 2003); Va. Code Ann. § 18.2-75 (Lexis 2004); W. Va. Code Ann. § 16-2b-4 (Lexis 2006); Wis. Stat. Ann. § 253.09 (West 2004); Wyo. Stat. Ann. § 42-5-101 (2005)).

pharmacists.<sup>53</sup> Pharmacists with moral objections to assisted suicide realized how the prescriptions were being used and protested that they should not be made to assist in these suicidal acts.<sup>54</sup> Thus, they lobbied in Oregon to relieve pharmacists from filling such prescriptions through a conscience clause,<sup>55</sup> opening the floodgates for pharmacists to object to providing medications on moral grounds.<sup>56</sup>

Although the refusal sought by pharmacists in Oregon would protect them from being forced to fill certain prescriptions, there were no reasons to conclude Oregon pharmacists would have a blanket license to refuse to provide any medication found morally objectionable.<sup>57</sup> Nevertheless, many pharmacists, perhaps aware of the refusal clauses granted to physicians and considered for pharmacists in the aforementioned circumstances, have taken the liberty of expanding these rights to accommodate their own personal beliefs.<sup>58</sup> In hundreds of reported cases around the United States, pharmacists have refused to provide emergency contraceptives because they morally object to the effects of the medication.<sup>59</sup> Few states have statutes allowing pharmacists to refuse such medications for reasons of conscience.<sup>60</sup> However, so long as the majority of states do not explicitly prohibit pharmacists from using moral grounds to refuse to provide medications, pharmacists are apt to continue to presume a right to refuse and to make moral choices for women.

#### B. *Illinois' Patient-Centered Approach*

Illinois was like the majority of states, which had not set a clear statutory standard of what pharmacists may or may not do based on their morals. Like most states, Illinois did have a statute including an exemption from providing some medical care due to conscience.<sup>61</sup> However, after Governor Blagojevich received complaints that pharmacists had denied two women emergency contraceptives,<sup>62</sup> he set into motion an emergency order that commanded pharmacists to provide contraceptives without delay.<sup>63</sup> This order, which has since been enacted into law, states:

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

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

54 *Id.* at 11.

55 See generally *id.* at 14.

56 *Id.* at 11.

57 See *id.* at 14.

58 See e.g. *In re Noesen*, *supra* n. 4.

59 Stein, *supra* n. 6.

60 See e.g. Ark. Code Ann. § 20-16-304.

61 Ill. Comp. Stat. Ann. 70.1-70.14 (West Supp. 2001); see also Bryan A. Dykes, Student Author, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 Ga. L. Rev. 565, 569-71 (2002) (providing a detailed analysis of the former conscience clause in Illinois).

62 Off. of the Gov., *supra* n. 19.

63 *Id.*

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 either be transferred to a local pharmacy of the patient's choice or returned to the patient, as the patient directs.

2) For the purposes of this subsection . . . the term "contraceptive" shall refer to all FDA approved drugs or devices that prevent pregnancy.<sup>64</sup>

This order, instead of focusing on the pharmacist's rights, focuses on the rights of the patient.<sup>65</sup> Thus, it does not address a pharmacist's individual issues with a drug, providing only that the pharmacy has a duty to supply the medication without inconveniencing the patient.<sup>66</sup> The order does not state that a pharmacist is required to provide the medication when another pharmacist is available as long as another pharmacist can provide the medication promptly.<sup>67</sup> However, this law also does not prevent the pharmacist from quizzing the patient about the medication, which pharmacists frequently do in such situations.<sup>68</sup> While the law is meant to protect the patient, allowing pharmacists to quiz the patient may still cause the patient undue hardship by embarrassing her and violating her privacy rights.<sup>69</sup>

### C. *Oklahoma Statutes*

Like Illinois before it enacted its emergency order, Oklahoma lacks a statute making it clear whether a pharmacist may refuse to provide medication for emergency contraceptives. Some may argue that Oklahoma's Public Health and Safety Act pertains to a pharmacist's right to refuse to provide contraceptives.<sup>70</sup> This statute's Abortion Refusal Clause explicitly states "no person" is required to do anything that results in an abortion unless it is necessary to save the pregnant woman's life.<sup>71</sup> However, as was shown above, emergency contraceptives do not result in what is medically defined as abortion.<sup>72</sup> Thus, the legal protection to individuals refusing to perform abortions under the Oklahoma Pharmacy Act is not applicable to those refusing to provide emergency contraceptives.

Nevertheless, the uncertainty of whether the Abortion Refusal Clause applies to pharmacists administering emergency contraceptives is exacerbated by Oklahoma's definition of abortion.<sup>73</sup> Oklahoma Statute title 63, section 1-730 states, "[a]bortion" means the purposeful termination of a human pregnancy, by any person with an intention

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64. Off. of the Gov., *Gov. Blagojevich Moves to Make Emergency Contraceptives Rule Permanent*, <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?RecNum=3862> (Apr. 18, 2005).

65. *Id.*

66. *Id.*

67. *Id.* (focusing on not burdening the patient by making sure the prescription takes no longer to be filled than would any other prescription).

68. *Id.*

69. *See generally Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

70. *See e.g.* Okla. Stat. tit. 63, § 1-741.

71. *Id.*

72. Schaper, *supra* n. 8, at 8.

73. Okla. Stat. tit. 63, § 1-730 (2004).



other than to produce a live birth or to remove a dead unborn child.”<sup>74</sup> The statute goes on to explain that “[n]othing contained [in the article on abortion] shall be construed in any manner to include any birth control device or medication.”<sup>75</sup> Nevertheless, even though emergency contraceptives are medically defined as birth control,<sup>76</sup> there is a rampant belief that they are a form of abortion instead.<sup>77</sup> Based on that belief, pharmacists may easily interpret this statute to mean that they are not required to dispense contraceptives used for emergencies.

*D. Pharmacists' Code of Ethics*

Currently, most state laws provide little guidance regarding any rights pharmacists may have to refuse to provide medication they find morally objectionable.<sup>78</sup> It is, therefore, necessary to look beyond the black-letter law to determine the duties implicit in being a pharmacist. Two sources provide some guidance: the pharmacist's oath<sup>79</sup> and the Pharmacists' Code of Ethics of the American Pharmacists Association.<sup>80</sup> Pharmacists may take an oath, as do physicians. However, unlike the Hippocratic Oath,<sup>81</sup> the pharmacist's oath is not binding upon them when facing ethical quandaries.<sup>82</sup> It is in no way mandated that pharmacists must follow the oath, leaving them free to do as they individually see fit.<sup>83</sup>

The Pharmacists' Code of Ethics may be considered by judges or administrative boards hearing disciplinary proceedings of pharmacists,<sup>84</sup> but this does not provide solid answers because pharmacists cannot be punished for not adhering to rules that are not meant to be concrete. For courts and pharmacists who choose to follow the Pharmacists' Code of Ethics, there are three paragraphs relevant to whether a pharmacist may use conscience as a justification for not providing medications.<sup>85</sup> First, the conscience

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74. *Id.*

75. *Id.*

76. See generally 62 Fed. Reg. at 8610; see also Schaper, *supra* n. 8, at 8.

77. Schaper, *supra* n. 8, at 7.

78. See Allen & Brushwood, *supra* n. 53, at 6.

79. *Oath of a Pharmacist*, [http://spahp.creighton.edu/spahp/student\\_affairs/Professionalism/OathPharmacy.doc](http://spahp.creighton.edu/spahp/student_affairs/Professionalism/OathPharmacy.doc) (accessed Oct. 12, 2005).

At this time, I vow to devote my professional life to the service of all humankind through the profession of pharmacy. I will consider the welfare of humanity and relief of human suffering my primary concerns. I will apply my knowledge, experience, and skills to the best of my ability to assure optimal drug therapy outcomes for the patient I serve. I will keep abreast of developments and maintain professional competency in my profession of pharmacy. I will maintain the highest principles of moral, ethical, and legal conduct. I will embrace and advocate change in the profession of pharmacy that improves patient care. I take these vows voluntarily with the full realization of the responsibilities with which I am entrusted by the public.

*Id.*

80. Am. Pharmacists Assoc., *Code of Ethics for Pharmacists*, <http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2809> (Oct. 27, 1994).

81. NOVA Online, *Hippocratic Oath—Classical Version*, [http://www.pbs.org/wgbh/nova/doctors/oath\\_classical.html](http://www.pbs.org/wgbh/nova/doctors/oath_classical.html) (last updated Mar. 2001).

82. See generally Teliska, *supra* n. 16.

83. *Id.*

84. *E.g. In re Noesen*, *supra* n. 4, at Analysis of the Evidence (C).

85. See Am. Pharmacists Assoc., *supra* n. 80.

clause, which explains how a pharmacist should act in matters of conscience,<sup>86</sup> provides:

A pharmacist has a duty to tell the truth and to act with conviction of conscience. A pharmacist avoids discriminatory practices, behavior or work conditions that impair professional judgment, and actions that compromise dedication to the best interests of patients.<sup>87</sup>

However, this clause does not take a very firm stance.<sup>88</sup> It says to act with "conviction of conscience"<sup>89</sup> but then focuses on the patient.<sup>90</sup> Thus, this is unlikely to mean a pharmacist has the right to base professional action on personal beliefs. Instead, it is more likely to mean that the pharmacist must conscientiously consider the patient's interests.

Second, a paragraph in the Pharmacists' Code of Ethics that deals specifically with the autonomy of the patient states:<sup>91</sup>

A pharmacist respects the autonomy and dignity of each patient. A pharmacist promotes the right of self-determination and recognizes individual self-worth by encouraging patients to participate in decisions about their health. A pharmacist communicates with patients in terms that are understandable. In all cases, a pharmacist respects personal and cultural differences among patients.<sup>92</sup>

This paragraph definitely applies to pharmacists who refuse to provide medication because it states that pharmacists are required to respect the self-determination of patients.<sup>93</sup> Pharmacists who turn patients away and refuse to provide medication obviously fail to respect this right of self-determination.<sup>94</sup> The paragraph also states that respect must be given to the patient "[i]n all cases," even when there are personal differences.<sup>95</sup> It is reasonable to interpret personal differences to include moral differences.

Finally, there is a paragraph in the Pharmacists' Code of Ethics that focuses upon the well-being of the patient, including protecting the patient's dignity and serving the patient's desires if they are congruent with health science.<sup>96</sup> This paragraph provides:

A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner. A pharmacist places concern for the well-being of the patient at the center of professional practice. In doing so, a pharmacist considers needs stated by the patient as well as those defined by health science. A pharmacist is dedicated to protecting

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86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.*

90. *See* Am. Pharmacists Assoc., *supra* n. 80.

91. *See id.*

92. *Id.*

93. *Id.*

94. *See e.g.* Stein, *supra* n. 6.

95. *See* Am. Pharmacists Assoc., *supra* n. 80.

96. *See id.*

the dignity of the patient. With a caring attitude and a compassionate spirit, a pharmacist focuses on serving the patient in a private and confidential manner.<sup>97</sup>

This paragraph, once more, puts the patient's needs at the forefront of what is important when evaluating a pharmacist's conduct.<sup>98</sup>

As a whole, the Pharmacists' Code of Ethics is not very specific.<sup>99</sup> It does, however, make clear that a patient's needs and desires are to be the bases of a pharmacist's actions.<sup>100</sup> When pharmacists refuse to provide medication because of their own beliefs, it is evident that the Pharmacists' Code of Ethics is violated.<sup>101</sup> However, because the Code establishes only what a pharmacist should do, and not what a pharmacist must do, it does not provide a concrete solution to the problem of pharmacists refusing to fill prescriptions.<sup>102</sup>

#### IV. THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST NEIL T. NOESEN

Currently, no court has decided whether a pharmacist has the right to refuse to provide emergency contraceptives. Nevertheless, there has been an administrative hearing in Wisconsin on the issue of a pharmacist refusing to provide oral contraceptives.<sup>103</sup> Neil T. Noesen was the only pharmacist working at the Menomonie, Wisconsin, K-Mart on the weekend of July 6 and 7, 2002, when a patient requested a refill of her prescription for the contraceptive Loestrin FE 1/20,<sup>104</sup> which was on file at the pharmacy.<sup>105</sup> The patient did not have any pills left from her previous prescription and was due to start the next cycle of pills on the following day.<sup>106</sup> Mr. Noesen asked the patient if she would be using the prescription for contraceptive purposes.<sup>107</sup> When she answered affirmatively, he expressed his religious objections to the use of birth control and refused to fill the prescription.<sup>108</sup> Mr. Noesen also refused, when asked by the patient, to tell her where she could go to get the prescription filled because he wanted to entirely abstain from helping her obtain contraceptives.<sup>109</sup> When a pharmacist at Wal-Mart contacted Mr. Noesen for the prescription information, which was on K-Mart's

97. *Id.*

98. *Id.*

99. *Id.*

100. See Am. Pharmacists Assoc., *supra* n. 80.

101. See generally *id.*

102. See Teliska, *supra* n. 16, at 236.

103. *In re Noesen*, *supra* n. 4.

104. *Id.* at Findings of Fact ¶ 21.

Loestrin FE 1/20 is a medication used to prevent pregnancy or to regulate the menstrual cycle. It is a combination of an estrogen hormone (ethinyl estradiol) and progestin hormone (norethindrone acetate), which prevents pregnancy by blocking ovulation, and thickens the cervical mucus and changes the endometrial lining, thereby reducing the likelihood of sperm entry and implantation. Loestin FE 1/20 is also used to adjust hormone levels that may be contributing to irregular menstrual cycles or acne.

*Id.* at Findings of Fact ¶ 22.

105. *Id.* at Findings of Fact ¶ 21.

106. *Id.* at Findings of Fact ¶ 24.

107. *In re Noesen*, *supra* n. 4, at Findings of Fact ¶ 25.

108. *Id.* at Findings of Fact ¶ 26.

109. *Id.* at Findings of Fact ¶ 28.

computer, Mr. Noesen refused to transfer it, reasoning that in transferring the prescription he would be causing another to sin.<sup>110</sup> The next day the patient again tried to get the prescription filled and even went back to the pharmacy escorted by two police officers.<sup>111</sup> However, Mr. Noesen, still the only pharmacist on duty, again refused to fill the prescription.<sup>112</sup> The patient finally received her pills the next morning from another pharmacist at K-Mart.<sup>113</sup> However, she had missed the first day of the new cycle of her pills and was advised to take a double dose on the second day.<sup>114</sup> She was also advised to use alternative methods of protection when engaging in intercourse for the entire month.<sup>115</sup> The patient testified at the hearing that she was currently pregnant and that the pregnancy had resulted from the complications of not receiving her prescription in a timely manner.<sup>116</sup>

In Wisconsin, there is no state statute explicitly addressing the issue of whether a pharmacist may refuse to provide medication due to moral objections.<sup>117</sup> Because this case dealt with disciplinary proceedings against a pharmacist, Wisconsin Statute section 450.10(4) dictated that the case fell under the jurisdiction of the Pharmacy Examining Board.<sup>118</sup> The case was given an administrative hearing which rendered an opinion that primarily discussed whether Mr. Noesen provided the standard of care required by pharmacists to prevent harm to the patient.<sup>119</sup> Mr. Noesen's conduct in refusing to help the patient receive her prescription through transfer was argued to have been a violation of Wisconsin Administrative Code section 10.03, which requires a pharmacist to abstain from actions that have the potential to harm the patient.<sup>120</sup> Mr. Noesen argued that no violation occurred because he was not required to participate in any way with providing contraceptives in violation of his moral beliefs.<sup>121</sup> He also argued that no harm was done to the patient and, therefore, the Pharmacy Examining Board should protect his

110. *Id.* at Findings of Fact ¶ 32.

111. *Id.* at Findings of Fact ¶ 39.

112. *See In re Noesen, supra* n. 4, at Findings of Fact ¶¶ 35–43.

113. *Id.* at Findings of Fact ¶ 43.

114. *Id.* at Findings of Fact ¶ 41.

115. *Id.* at Findings of Fact ¶ 42.

116. *Id.* at Analysis of the Evidence (E).

117. *In re Noesen, supra* n. 4, at Analysis of the Evidence (C).

118. Wis. Stat. § 450.10 (4)(a)–(b) (2005).

The secretary may, in case of the need for emergency action, issue general and special orders necessary to prevent or correct actions by any pharmacist under this section that would be cause for suspension or revocation of a license. Special orders may direct a pharmacist to cease and desist from engaging in particular activities.

*Id.*

119. *In re Noesen, supra* n. 4, at Opinion.

120. Wis. Admin. Code, Pharm. Examining Bd. § 10.03(2) (2005).

The following, without limitation . . . are violations of standards of professional conduct and constitute unprofessional conduct . . . [e]ngaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient.

*Id.*

121. *In re Noesen, supra* n. 4, at Analysis of the Evidence (F).

interests over that of the patient.<sup>122</sup>

The judge concluded that Mr. Noesen had violated the standards of care due by pharmacists and presented a danger to the patient by actively refusing to refer her to another pharmacy, as well as by refusing to transfer her prescription.<sup>123</sup> The judge reasoned that for objections by pharmacists to be accommodated, the pharmacist must make sure that notice is given to the pharmacy prior to the pharmacist refusing to fill a legal prescription so that the pharmacy may accommodate situations such as the one in this case.<sup>124</sup> The administrative judge regulated Mr. Noesen's professional code of conduct by Wisconsin Administrative Code section Pharmacy 10.03,<sup>125</sup> the American Pharmacists Association Conscience Clause,<sup>126</sup> and the rest of the Code of Ethics for Pharmacists.<sup>127</sup> These all focus on the reasonableness of the pharmacist's actions and put the rights of the patient at the forefront of importance.<sup>128</sup> The administrative judge found that Mr. Noesen put his beliefs above the medical needs of the patient.<sup>129</sup> By refusing to fill the prescription, Mr. Noesen did harm because unwanted pregnancy is harm.<sup>130</sup> Further, even if the patient did not really become pregnant because of missing her pill, the potential of that harm was still present at the time Mr. Noesen acted.<sup>131</sup> The judge ruled this sufficiently established the harm.<sup>132</sup>

At the end of the hearing, the administrative judge recommended the Pharmacy Examining Board reprimand Mr. Noesen, force him to take ethics classes, and limit his license.<sup>133</sup> His license was limited so that:

- a. Prior to providing pharmacy services at any pharmacy, Respondent shall prepare a written notification *specifying in detail*
  - i. The pharmacy practices he will decline to perform as a result of his conscience; and
  - ii. The steps he will take to ensure that a patient's access to medication is not impeded by his declination(s).
- b. The written notification . . . shall be provided to a potential pharmacy employer at least five . . . business days prior to Respondent commencing practice at the pharmacy.<sup>134</sup>

The judge also recommended that the limitations upon Mr. Noesen's license be subject to review "no earlier than two years from the date of this order."<sup>135</sup> The Pharmacy Examining Board reviewed the ruling of the administrative judge at the

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122. *Id.* at Analysis of the Evidence (E).

123. *Id.* at Opinion.

124. *Id.* at Analysis of the Evidence (B).

125. *Id.* at Opinion (noting Wis. Admin. Code, Pharm Examining Bd. § 10.03).

126. Am. Pharmacists Assoc., *supra* n. 80.

127. *Id.*

128. *See* Wis. Admin. Code, Pharm. Examining Bd. § 10.03; Am. Pharmacists Assoc., *supra* n. 80.

129. *See generally In re Noesen, supra* n. 4, at Analysis of the Evidence (F).

130. *Id.* at Analysis of the Evidence (E).

131. *Id.*

132. *Id.*

133. *Id.* at Analysis of the Evidence (G).

134. *In re Noesen, supra* n. 4, at Order.

135. *Id.*

hearing and ordered that it be followed.<sup>136</sup>

## V. ANALYSIS

### A. First Amendment Extended Too Far—Slippery Slope Argument

*The Matter of the Disciplinary Proceedings against Neil T. Noesen* makes it clear that even if states do not explicitly allow pharmacists to refuse to provide contraceptives, pharmacists might still take it upon themselves to do so.<sup>137</sup> Most states' refusal clauses only allow one to avoid participating in abortion,<sup>138</sup> and emergency contraceptives are not abortifacients.<sup>139</sup> The Oklahoma refusal clause does not extend to contraceptives.<sup>140</sup> Wisconsin's refusal clause also does not apply to pharmacists or contraceptives.<sup>141</sup> Nevertheless, Mr. Noesen still felt he had the right to refuse to provide contraceptives, as do a growing number of pharmacists.<sup>142</sup>

Pharmacists and pro-life organizations articulate the belief in the right to refuse as stemming from the First Amendment.<sup>143</sup> The relevant portion of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>144</sup> Pharmacists like Noesen argue that their religious beliefs oppose any medical treatment that prevents human life.<sup>145</sup> Other pharmacists are concerned primarily with emergency contraceptives, believing they result in a termination of an already existent pregnancy.<sup>146</sup> In either case, the pharmacists hold their personal religious beliefs above the right of the patient to receive medication.<sup>147</sup> These pharmacists make constitutional arguments for a right to refuse, arguing that forcing them to provide medication, which they believe promotes sin, restricts their right to freely exercise their religion.<sup>148</sup>

While it is true that one of the greatest rights held by citizens of the United States is the freedom to exercise one's religion,<sup>149</sup> that right does not afford a pharmacist the

136. *Id.*

137. *E.g. id.*

138. *E.g.* Okla. Stat. Ann. tit. 63, § 1-741.

139. *See generally* Schaper, *supra* n. 8, at 8.

140. Okla. Stat. Ann. tit. 63, § 1-741(B).

No person may be required to perform, induce or participate in medical procedures *which result in an abortion* which are in preparation for an abortion or which involve aftercare of an abortion patient . . . and refusal to perform or participate in such . . . procedures is not grounds for civil liability nor a basis for disciplinary or other recriminatory action.

*Id.* (emphasis added).

141. Wis. Stat. Ann. § 253.09. This statute applies explicitly to abortion. *Id.*

142. *See generally* *In re Noesen*, *supra* n. 4.

143. *See id.* at Analysis of the Evidence (F); *see generally* Pharmacists for Life Intl., *Why a Conscience Clause is a Must . . . Now!* <http://www.pfli.org/main.php?pfli=conscienceclausefaq> (accessed Nov. 1, 2005) (emphasizing religious freedom).

144. U.S. Const. amend. I.

145. *See In re Noesen*, *supra* n. 4.

146. *See* Pharmacists for Life Intl., *supra* n. 143.

147. *Id.*

148. *See generally id.* (implicitly invoking the First Amendment through emphasizing religious freedom).

149. U.S. Const. amend. I.

choice of refusing to provide contraceptives.<sup>150</sup> Without limitation, the First Amendment's Free Exercise Clause could result in a claim for almost every sort of situation.<sup>151</sup> After all, "[t]here is simply no government activity that could not compromise someone's conscience."<sup>152</sup> One author notes,

[I]f twenty years ago, someone asked for an illustration of a government activity that did *not* implicate free exercise concerns, one might have suggested assigning social security numbers to potential welfare recipients. Of course, she would have been wrong because we now know that social security numbers can (according to at least one religion) destroy the soul of those to whom they are assigned.<sup>153</sup>

While this example shows how far religious freedom could be extended generally, other examples demonstrate that allowing every exercise of religious freedom could result in harm to others.<sup>154</sup> At the extreme, incest, the bombing of abortion clinics, ethnically based killings, and many other horrendous abuses on humanity have been done in the name of religion.<sup>155</sup> Thus, lines must be drawn when the free exercise of one's religion results in harm to another.<sup>156</sup>

In *Cantwell v. Connecticut*,<sup>157</sup> the Supreme Court pointed out that while there is unlimited protection on what one may believe, there are limits on how one may act based upon those beliefs.<sup>158</sup> The Court explained this by stating,

Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, [the First Amendment] safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.<sup>159</sup>

Numerous courts have applied the test given in *Cantwell* "and have found that religiously motivated conduct that inflicts harm on others is not protected by the Free

150. The Free Exercise Clause has limits to what it allows. See generally R. Collin Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in City of Boerne v. Flores*, 31 Creighton L. Rev. 693 (1998); Scott E. Thompson, *The Demise of Free Exercise: An Historical Analysis of Where We Are, and How We Got There*, 11 Regent U. L. Rev. 169, 191 (1998).

151. Arnold H. Loewy, *Constitutional Law and Civil Rights Symposium, Part I: Rethinking Free Exercise of Religion after Smith and Boerne: Charting a Middle Course*, 68 Miss. L.J. 105, 107 (1998).

152. *Id.*

153. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 696 (1986) (parenthetical in original)).

154. See e.g. *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (cited in Staci D. Lowell, Student Author, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 Clev. St. L. Rev. 441, 453 (2004)).

155. See generally Greg Burton, *When Incest Becomes a Religious Tenet*, <http://www.rickross.com/reference/polygamy/polygamy25.html> (Apr. 25, 1999); Jim Morris, *Furrow Had Deep Roots in Hate Groups*, <http://www.cnn.com/US/9908/12/hate.groups/> (Aug. 12, 1999); *Nation in Brief: Oklahoma: Abortion Clinic Again Hit by Bombs*, L.A. Times A17 (Jan. 20, 1997).

156. See generally *Bob Jones*, 461 U.S. 574; *Cantwell v. Conn.*, 310 U.S. 296 (1940) (discussed in Lowell, *supra* n. 154, at 453); *Brener v. Diagnostic Hosp.*, 671 F.2d 141 (1982) (discussed in Allen & Brushwood, *supra* n. 53, at 8).

157. 310 U.S. 296.

158. *Id.* at 303–04.

159. *Id.* (footnote omitted) (cited in Lowell, *supra* n. 154, at 452).

Exercise doctrine.”<sup>160</sup> For instance, in *Bob Jones University v. United States*,<sup>161</sup> the university argued it should remain exempt from taxes, even though it had racially discriminatory admissions procedures, because the procedures were founded upon the school’s religion.<sup>162</sup> The Court ruled the conduct of the university was not protected under the First Amendment because it resulted in harm to others in the form of racial discrimination.<sup>163</sup> Thus, it harmed potential applicants who were of a disfavored race.<sup>164</sup>

Likewise, in *Brener v. Diagnostic Hospital*,<sup>165</sup> a pharmacist refused to work on the Sabbath.<sup>166</sup> The pharmacy’s director tried to accommodate the situation but was unable to develop a schedule that would allow the pharmacist to not work on the Sabbath without causing undue hardship to the hospital and other employees.<sup>167</sup> The court noted that requiring the other pharmacists to trade shifts to accommodate the pharmacist with a moral objection disrupted work routines and lowered morale.<sup>168</sup> The court held that even though the objection was based upon religious beliefs, the conduct’s effect made it appropriate for the pharmacy to not schedule in accordance with the pharmacist’s moral objection.<sup>169</sup> These cases demonstrate that the slippery slope of religious protection given by the First Amendment comes to a halt before it allows an individual, in the name of religious freedom, to act in a way that results in harm to another.<sup>170</sup>

Unwanted pregnancy is a harm in itself.<sup>171</sup> Like the harm of racial discrimination under religious guises in *Bob Jones University*, harm is caused by denying women medication under similar guises.<sup>172</sup> Such denials take away the rights a woman has legally.<sup>173</sup> Accordingly, pharmacists cause patients harm, analogous to the harm caused in *Brener*, when they refuse to provide emergency contraceptives.<sup>174</sup> Like in *Brener*, the result is harm to an individual other than the one making the religious choice.<sup>175</sup> In *Brener*, the harm was to fellow employees.<sup>176</sup> In the case of refusing to provide contraceptives, the harm is not only to fellow employees<sup>177</sup> but also to the patient who is

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160. Lowell, *supra* n. 154, at 453.

161. 461 U.S. 574.

162. 461 U.S. at 577 (discussed in Lowell, *supra* n. 154, at 453); *see also* Lowell, *supra* n. 154, at 453 (for a general discussion of how the case follows from *Cantwell*).

163. *Bob Jones*, 461 U.S. at 605

164. *Id.*

165. 671 F.2d 141.

166. *Id.* at 143.

167. *Id.* at 143–44.

168. *Id.* at 147 (discussed in Allen & Brushwood, *supra* n. 53, at 8).

169. *Id.*

170. *See generally* *Bob Jones Univ*, 461 U.S. 574; *Cantwell*, 310 U.S. 296; *Brener*, 671 F.2d. 141.

171. *See generally* Mary B. Sullivan, Student Author, *Wrongful Birth and Wrongful Conception: A Parent's Need for a Cause of Action*, 15 J.L. & Health 105 (2000). In wrongful conception or wrongful birth causes of action, the harm is in the conception itself. It is harmful because it denies an individual the legal right to make his or her personal decision concerning whether to become a parent. *Id.* at 117–18.

172. *Bob Jones Univ*, 461 U.S. 574.

173. Sullivan, *supra* n. 171, at 117.

174. 671 F.2d 141.

175. *Id.* at 147.

176. *Id.*

177. Like in *Brener*, it is reasonable to presume co-workers of pharmacists who refuse to fill prescriptions



seeking to avoid the harm of an unwanted pregnancy.<sup>178</sup>

Repeatedly, courts have upheld the decision of *Roe* that individuals have a legal right to make their own decisions concerning their reproductive lives.<sup>179</sup> Anyone impeding that individual right causes harm because violating an individual's right harms that individual.<sup>180</sup> Women denied their contraceptives are harmed even when the result is not pregnancy.<sup>181</sup> The potential of becoming pregnant alone may induce fear and emotional distress in the patient.<sup>182</sup> Likewise, the patient may be severely burdened with having to get the prescription elsewhere.<sup>183</sup> The short window of opportunity to use emergency contraceptives may force a woman who cannot get her contraceptives from a pharmacist at a particular location to deviate from her schedule greatly in order to reach a locale where the medication will be provided.<sup>184</sup> Likewise, a woman may be thoroughly embarrassed due to questioning of how she is planning to use her medication and why she needs it. She may feel stigmatized or humiliated when she is turned away from the counter after being judged publicly by a pharmacist as wanting "immoral" medication.<sup>185</sup>

In the case of an unwanted pregnancy as the result of another's actions, the effects of the harm are that it impedes the legal right to make one's own choice,<sup>186</sup> brings about emotional and financial burdens,<sup>187</sup> and includes a host of other personalized difficulties that may be associated with an unwanted pregnancy.<sup>188</sup> It is difficult to enumerate the harm precisely because it will vary based on the totality of the circumstances.<sup>189</sup> After all, as differences in women demonstrate a need for reproductive choices to be personal,<sup>190</sup> these differences also demonstrate that the harm of an unwanted pregnancy differs depending on the woman personally struggling with it.<sup>191</sup> However, even though it is difficult to enumerate all of the ways that unwanted pregnancy is harmful, some jurisdictions saw the harm as significant enough to create "wrongful pregnancy" and "wrongful conception" tort causes of action.<sup>192</sup> Therefore, it is apparent that unwanted

will be left to do the objecting pharmacist's duty.

178. Sullivan, *supra* n. 171, at 117.

179. See e.g. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 767-68 (1994).

180. This is demonstrated by numerous civil rights cases in which plaintiffs were awarded damages because of the harm caused them when their civil rights were violated. See generally Catherine Fisk & Erwin Chemerinsky, *Civil Rights without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7 Wm. & Mary Bill Rts. J. 755 (1999) (arguing that there is a discrepancy in damages awarded among various civil rights cases and the shift should be toward the way Title VII is dealt with).

181. *In re Noesen*, *supra* n. 4, at Analysis of the Evidence (E).

182. Stein, *supra* n. 6.

183. Teliska, *supra* n. 16, at 231.

184. See generally Teliska, *supra* n. 16.

185. See generally *Pharmacists for Life Intl.*, *supra* n. 143 (discussing the "evils" of contraception).

186. Sullivan, *supra* n. 171, at 117.

187. See e.g. *id.* at 111.

188. See generally *id.* at 117.

189. As with most situations, the harm may manifest itself in a variety of ways. What is primarily a financial burden to one person may be an emotional burden to another.

190. Sullivan, *supra* n. 171, at 111.

191. *Id.*

192. See generally Sullivan, *supra* n. 171 (noting *Phillips v. U.S.*, 508 F. Supp. 544 (D.S.C. 1981)).

pregnancy suffices legally as harmful.<sup>193</sup>

Consequentially, pharmacists may not hide behind the First Amendment in order to turn away patients seeking emergency contraceptives.<sup>194</sup> The risk of harm is too great, especially considering the prescription must be ingested very soon after intercourse.<sup>195</sup> While the causal link between a pharmacist's refusal and the harm of an unwanted pregnancy is mitigated in some circumstances by patients' actions to find alternative pharmacists,<sup>196</sup> such mitigation may be extremely difficult in many situations.<sup>197</sup> There may be no other pharmacy or pharmacist available in rural communities.<sup>198</sup> In some situations, other pharmacies may be closed, or the woman needing the prescription may not have transportation to another pharmacy.<sup>199</sup> Rape victims, who are already less likely to act within the limited range of time, may be even further deterred when the pharmacist they muster up the courage to see turns them away.<sup>200</sup> Additionally, even though the harm can be mitigated in some circumstances, it is unjust to allow pharmacists to harm patients simply because the patient may have the opportunity to mitigate the harm.<sup>201</sup> There is no guarantee the patient will be able to mitigate the harm,<sup>202</sup> and it does not change the fact that unwanted pregnancy may result from the medication being denied.<sup>203</sup> Because the extension of refusal clauses to pharmacists allows them to put their own morals at the forefront, even if doing so will result in harm to a patient, the First Amendment does not protect such action.<sup>204</sup>

#### B. Patients' Rights to Liberty and Privacy

While pharmacists do not have a constitutional right to refuse to provide emergency contraceptives, patients do have a constitutional right to not be subjected to laws that allow others to deny filling their prescriptions.<sup>205</sup> This right is based upon the patient's right to privately decide how to regulate her reproductive life.<sup>206</sup> In *Planned Parenthood v. Casey*,<sup>207</sup> the Supreme Court stated,

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing . . . . Our precedents

193. See generally *Phillips*, 508 F. Supp. 544; see also *Sullivan*, *supra* n. 171.

194. Because providing pharmacists with First Amendment protection would likely result in them using that protection in a way that may harm others, pharmacists are not protected by the First Amendment. See generally *Bob Jones Univ.*, 461 U.S. 574.

195. See generally *Rodrigues et al.*, *supra* n. 37.

196. However, in *In re Noesen*, seeking alternatives was not useful. *In re Noesen*, *supra* n. 4, at Findings of Fact ¶ 32.

197. *Id.*

198. *Teliska*, *supra* n. 16, at 231.

199. *Id.*

200. *Skeeles*, *supra* n. 41, at 15–16.

201. *Reynolds v. U.S.*, 98 U.S. 145 (1878). "Every man is presumed to intend the necessary and legitimate consequences of what he knowingly does." *Id.* at 167.

202. See e.g. *In re Noesen*, *supra* n. 4, at Findings of Fact ¶ 32.

203. *Id.*

204. See generally *Bob Jones Univ.*, 461 U.S. 574; *Cantwell*, 310 U.S. 296; *Brener*, 671 F.2d 141.

205. See generally *Casey*, 505 U.S. 833.

206. *Id.* at 851.

207. *Id.*

“have respected the private realm of family life . . .” These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life.<sup>208</sup>

Thus, in *Casey*, the Court actually expanded the arena of rights, taking reproductive decisions from a protected “zone of privacy,” as established in *Griswold*,<sup>209</sup> to a broad “protected realm of personal liberty”<sup>210</sup> under the Fourteenth Amendment.<sup>211</sup> Hence, women are not only protected to make their own decisions because of privacy rights<sup>212</sup> but also because of liberty rights.<sup>213</sup> Because individuals have the right to privately make decisions concerning their reproductive systems, it is essential that they be allowed to do so.<sup>214</sup> Otherwise, they are denied their liberty to make such decisions, which in turn violates the Fourteenth Amendment.<sup>215</sup>

The Fourteenth Amendment explicitly states,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.<sup>216</sup>

This amendment obviously deals with the constitutionality of state actions.<sup>217</sup> However, it is still applicable to pharmacists refusing to provide medications. State legislatures enact laws describing how pharmacists are to act and identifying actions that will result in professional discipline.<sup>218</sup> When a state enacts a law allowing pharmacists to refuse to provide emergency contraceptives, the state violates the patient’s rights by taking away her liberty, which, as shown in *Casey*, includes her reproductive decisions.<sup>219</sup>

Likewise, when states enact conscience clauses allowing pharmacists to refuse to provide emergency contraceptives, they deny women under the state’s “jurisdiction the equal protection of the laws.”<sup>220</sup> Women have the legal right to choose to use emergency contraceptives for contraception.<sup>221</sup> Thus, when states say that pharmacists may choose not to provide such medication, the state arguably takes away the patient’s right to be protected from pregnancy through a legal means, thus violating her

208. *Id.* (quoting *Prince v. Mass.*, 321 U.S. 158, 166 (1944)) (also cited in Prothro, *supra* n. 29, at 721).

209. The “zone of privacy” is discussed in *Griswold*, 381 U.S. at 485, and analyzed in Prothro, *supra* n. 29, at 721.

210. Prothro, *supra* n. 29, at 722. In *Casey*, the Court stated that “the controlling word in the case before us is ‘liberty.’” 505 U.S. at 846.

211. U.S. Const. amend. XIV.

212. *Griswold*, 381 U.S. at 485.

213. *Casey*, 505 U.S. at 846.

214. Sullivan, *supra* n. 171, at 110–11.

215. *Casey*, 505 U.S. at 851.

216. U.S. Const. amend. XIV.

217. *Id.*

218. *E.g.* Wis. Stat § 450.10.

219. *Casey*, 505 U.S. at 851.

220. *Id.*

221. 62 Fed. Reg. at 8610.

Fourteenth Amendment right.<sup>222</sup>

Similarly, a woman is arguably denied “protection of the laws”<sup>223</sup> when the state in which she resides does not have a law requiring pharmacists to provide emergency contraceptives.<sup>224</sup> Even when there is no law explicitly allowing pharmacists to refuse to provide emergency contraceptives, they still often take it upon themselves to do so.<sup>225</sup> Therefore, to protect the right of patients to get legal medications, states must enact laws requiring pharmacists to provide such medication. Failing to enact such laws leaves women seeking emergency contraceptives without legal protection.<sup>226</sup>

While the Fourteenth Amendment does not specifically regulate pharmacists, its impact on states provides women the right to have laws protecting their right to obtain emergency contraceptives.<sup>227</sup> This is evident through the right of privacy, liberty, and equal protection.<sup>228</sup> Thus, there is a strong constitutional basis for enacting laws that actually require pharmacists to provide emergency contraceptives.

### C. *Who Is Really the Gatekeeper?*

Since the FDA made emergency contraceptives available over-but-behind the pharmacist counter, physicians have been excluded from the decision of whether a patient should receive emergency contraceptives. However, prescriptions are still required to receive emergency contraceptives for women under the age of eighteen.<sup>229</sup> In such instances, physicians, rather than pharmacists, should be the gatekeepers of prescription medications.<sup>230</sup> The traditional role of physicians, as far as prescriptions are concerned, is to be the prescriber.<sup>231</sup> The physician diagnoses what medication the patient needs and writes a prescription.<sup>232</sup> The pharmacist, on the other hand, is the dispenser.<sup>233</sup> The pharmacist fills the prescription and gives it to the patient with very few exceptions.<sup>234</sup> When pharmacists decide not to fill valid, legal prescriptions without a solid basis such as drug interactions, they take themselves out of the role of dispenser and put themselves in the role of physician.<sup>235</sup> This presents major problems because the professions are meant to be separate and pharmacists are not in a position to overstep the decisions made by physicians.<sup>236</sup> Pharmacists have different relationships with

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222. *See generally* U.S. Const. amend. XIV.

223. *Id.*

224. Oklahoma falls into this category. Without a law requiring prescriptions be filled, pharmacists may interpret existing laws as providing them rights to refuse. *See e.g. In re Noesen, supra* n. 4.

225. *E.g. id.*

226. *Id.*

227. *See generally* U.S. Const. amend. XIV.

228. *Id.*

229. FDA, *supra* n. 14.

230. *See generally* Richard A. Abood, *Physician Dispensing: Issues of Law, Legislation and Social Policy*, 14 Am. J.L. & Med. 307, 311–12 (1989).

231. *Id.* at 308.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See generally* Abood, *supra* n. 230, at 312.

236. *Id.*

patients than those between physicians and patients.<sup>237</sup> Likewise, pharmacists are trained and regulated to dispense medications.<sup>238</sup>

Recently, there has been debate concerning whether physicians should be able to dispense medications.<sup>239</sup> Pharmacists and other critics of this developing trend argue that it is important to keep the professions separate.<sup>240</sup> Besides obvious financial motivations influencing this argument for pharmacists,<sup>241</sup> there is also a belief that the split in these two professions developed out of necessity.<sup>242</sup> Pharmacists and physicians have different talents.<sup>243</sup> Over time, these differences evolved into a separation of the two professions with different focuses when training each profession.<sup>244</sup> Allowing physicians to dispense medication would disrupt this separation and the currently customary "checks and balances."<sup>245</sup> It also creates a likelihood that patients will not be served as effectively because pharmacists and physicians specialize in different fields.<sup>246</sup> In an era in which specialization in the field of medicine is considered good for creating health care providers better able to treat the patient's specific needs, it would curtail the positive effects of specialization to allow the professions of physicians and pharmacists to cross.<sup>247</sup> Arguments, often made by pharmacists, that physicians should not cross the line and serve as pharmacists<sup>248</sup> can easily be used to support the argument that pharmacists should not be able to cross the line to serve as physicians deciding whether a patient should receive medication.

The doctor-patient relationship is founded upon the idea that physicians must treat patients holistically.<sup>249</sup> Almost a century ago, one author wrote,

The treatment of a disease may be entirely impersonal; the care of the patient must be completely personal. The significance of the intimate personal relationship between physician and patient cannot be too strongly emphasized, for in an extraordinarily large number of cases both diagnosis and treatment are entirely dependent on it.<sup>250</sup>

Patients count on such holistic treatment from doctors.<sup>251</sup> There is an expectation that the physician will look out for the patient, keeping a variety of needs in mind.<sup>252</sup>

237. Harlin G. Adelman & Wendy L. Zahler, *Pharmacist-Patient Privilege and the Disclosure of Prescription Records*, 1 J. Pharm. & L. 127 (1992) (discussing the differences in privileges between the two relationships).

238. Abood, *supra* n. 230, at 314.

239. *Id.* at 308.

240. *Id.* at 312.

241. *Id.* at 342-43.

242. *See generally id.* at 313.

243. Abood, *supra* n. 230, at 313.

244. *See generally id.* at 313.

245. *Id.* at 343-44.

246. *See generally id.* at 313.

247. *See generally id.*; *see also* David Meltzer, *The Regulation of Managed Care Organizations and the Doctor-Patient Relationship: A Conference Sponsored by the University of Chicago Law School, the Division of Biological Sciences, and the MacLean Center for Clinical Medical Ethics: Hospitalists and the Doctor-Patient Relationship*, 30 J. Leg. Stud. 589, 591 (2001).

248. Abood, *supra* n. 230.

249. Meltzer, *supra* n. 247, at 595.

250. *Id.* at 594 (quoting Francis W. Peabody, *The Care of the Patient*, 88 J. Am. Med. Assn. 887 (1927)).

251. *Id.* at 594-95.

252. *Id.* at 595.

After all, “the essence of the practice of medicine is that it is an intensely personal matter.”<sup>253</sup> There is frequent counseling in physician’s offices of whether a patient is willing to use a prescription based on the various effects it may have.<sup>254</sup> This interaction, combined with the medical need and factors such as age, enables the physician to decide if a medication is right for a particular patient.<sup>255</sup>

The personal relationship between doctor and patient is typically also built upon trust.<sup>256</sup> Much of this trust stems from the conduct physicians practice under the Hippocratic Oath.<sup>257</sup> The Hippocratic Oath commands the physician to protect the patient’s privacy.<sup>258</sup> It explicitly states, “[w]hat I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.”<sup>259</sup> Thus, patients’ knowledge that the physicians must keep their information private results in a higher likelihood that patients will trust their relationships with physicians.<sup>260</sup>

Pharmacists’ relationships with patients do not have the same foundation as patients’ relationships with physicians.<sup>261</sup> Individuals are more likely to schedule repeat appointments to see the same physician than they are to plan to pick up their medications when a particular pharmacist is on duty.<sup>262</sup> Pharmacists dispense prescription medications to patients through drive-through windows.<sup>263</sup> They send prescriptions requested over the phone by delivery trucks to patients who cannot conveniently travel to the pharmacy.<sup>264</sup> Often there is no personal interaction between the pharmacist and the patient.<sup>265</sup> Thus, it would be extremely difficult for the pharmacist to be capable of treating the patient’s entire circumstance.<sup>266</sup> After all, one “must understand the patient’s personal condition to effectively treat a wide range of diseases in which factors relating to aspects of the patient’s family and/or social condition or personal psychological factors may play a role.”<sup>267</sup> Without understanding the patient in such a way, it would be difficult for a pharmacist to decide what a patient truly needs.

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253. *Id.* (quoting Peabody, *supra* n. 250, at 813–14).

254. Julie Gantz, Student Author, *State Statutory Preclusion of Wrongful Birth Relief: A Troublesome Re-Writing of a Women’s Right to Choose and the Doctor-Patient Relationship*, 4 Va. J. Soc. Policy & L. 795, 801–02 (1997).

255. *See generally* Meltzer, *supra* n. 247, at 595.

256. Abood, *supra* n. 230, at 350.

257. *Hippocratic Oath*, *supra* n. 81; *see also* Robert M. Gellman, *Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy*, 62 N.C. L. Rev. 255, 267 (1984).

258. *Id.*

259. *Id.*

260. *See generally* Abood, *supra* n. 230, at 350.

261. Adelman & Zahler, *supra* n. 237, at 127.

262. *See generally* Meltzer, *supra* n. 247 (discussing the importance of the doctor-patient relationship to the patient); *see also* *Welcome to the Pharmacy*, <http://www.walgreens.com/pharmacy/default.jsp?headerSel=yes&tab=pharmacy> (accessed Nov. 10, 2005) (showing that patients may want forego the pharmacist-patient relationship altogether).

263. For instance, most Walgreens have drive-through windows.

264. *See e.g.* Walgreens, *supra* n. 262 (where a patient can order a prescription to be delivered online).

265. *Id.*

266. *See generally* Meltzer, *supra* n. 247, at 595.

267. *Id.* at 595 (discussing Peabody, *supra* n. 250).

Pharmacists' relationships with patients also differ from physician-to-patient relationships because pharmacists do not have the same requirements to protect the patient's confidentiality.<sup>268</sup> Therefore, patients probably trust pharmacists less than physicians. Even when pharmacists have the desire to keep patients' prescription information confidential, pharmacists may be compelled to release it.<sup>269</sup> They are not given the same statutory protection to keep things confidential that as physicians.<sup>270</sup> Even if not compelled to release information, the atmosphere of a pharmacy, versus the closed quarters of a doctor's office, is not conducive to privacy when discussing personal matters. There are often other individuals waiting within a few feet, making it impossible to refrain from disclosing information to bystanders within earshot. This may have an even harsher effect in the case of underage women seeking emergency contraceptives. Thus, without confidentiality, it would be difficult to build a strong trusting relationship between a pharmacist and a patient.

All of the aforementioned problems of blurring the line between the roles of physician and pharmacist apply when considering whether pharmacists should be allowed to refuse to fill prescriptions for emergency contraceptives to women under eighteen. The relationship factor is especially pertinent when one is making decisions concerning reproduction.<sup>271</sup> As a very private issue, reproductive decisions are high on the list of issues deserving confidentiality.<sup>272</sup> In the case of prescriptions for emergency contraceptives, the decision to take the drugs must be made in a very limited amount of time.<sup>273</sup> That decision is made through discussions between patient and physician and, in some instances, the patient's parents or guardians under the umbrella of the specific nuances of those relationships.<sup>274</sup> When pharmacists force patients to rehash the issue at a pharmacy,<sup>275</sup> they intrude upon the decision already made and risk making the patient's private decision public.

Consequentially, the various roles played in the health care profession have evolved to be more specialized for a good reason.<sup>276</sup> The training, talents, and nature of relationship with patients result in the need for physicians and pharmacists to refrain from overlapping their roles.<sup>277</sup> When pharmacists refuse to fill legal prescriptions for emergency contraceptives, they overstep the boundaries of their profession, intruding on the professions of physicians. In doing so, they put patients in an unusual and difficult position because, due to traditional roles, patients expect physicians to prescribe medicines and pharmacists to dispense them.<sup>278</sup>

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268. Adelman & Zahler, *supra* n. 237, at 127.

269. *Id.* at 139.

270. *Id.*

271. Gantz, *supra* n. 254, at 798.

272. See generally *Griswold*, 381 U.S. at 485.

273. See generally *Rodrigues et al.*, *supra* n. 37.

274. Gantz, *supra* n. 254, at 803-04.

275. See e.g. *In re Noesen*, *supra* n. 4, at Findings of Fact ¶ 25.

276. Abood, *supra* n. 230, at 313.

277. *Id.*

278. See generally *id.* at 313, 350.

D. *Enacting New Legislation in Oklahoma*

Oklahoma needs to enact a law denying pharmacists the right to refuse to dispense contraceptives in order to protect the rights and needs of patients. The majority of Oklahoma citizens consider themselves "pro-life."<sup>279</sup> Therefore, there is a likelihood that pharmacists in this state will also tend to hold to that philosophy. Without explicit language telling pharmacists they must provide emergency contraceptives, they are likely to act as other pharmacists have in other states with no clear guidelines, using their personal moral compass as the guide of whether to refuse to dispense emergency contraceptives.<sup>280</sup>

Oklahoma is primarily made up of a large number of small or rural communities.<sup>281</sup> As already mentioned, such communities often only have one pharmacy which may be open for very limited hours.<sup>282</sup> If women from such communities are denied emergency contraceptives, they may not have anywhere else to go.<sup>283</sup> They may have no transportation,<sup>284</sup> or the time in which the pills are effective may pass before they can reach another pharmacy.<sup>285</sup> Thus, the nature of the communities in Oklahoma highlights the necessity of protecting its citizens through legislation prohibiting pharmacists from refusing to dispense the needed medication.

Illinois provides a good model of how legislation protecting patients' rights to emergency contraceptives should be worded.<sup>286</sup> This model establishes a patient-centered approach to dealing with the issue, seeking to make the transaction as hassle-free as possible.<sup>287</sup> However, it does not explicitly prohibit pharmacists from quizzing patients about the use of their medications, and it is slightly outdated due to its reference to prescriptions because emergency contraceptives are now available over the counter. Therefore, to make the proposed Oklahoma legislation as thorough and helpful as possible, the proposal should include a statement prohibiting quizzing the patient about how she will use her medication and why she needs it. Thus, the law in the recommended form would read:

1) Upon receipt of a valid, lawful prescription for an emergency contraceptive, or request for an emergency contraceptive by a women of the age of eighteen or older 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 providing any other medication. *No pharmacist shall ask the patient her purpose in using the contraceptive or why she is in need of it, but shall deliver it to her as any other*

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279. *Survey USA*, <http://www.surveyusa.com/50State2005/50StateAbortion0805SortedbyProLife.htm> (Sept. 12, 2005).

280. *E.g. In re Noesen*, *supra* n. 4.

281. *Oklahoma Very Small Towns and Villages (Fewer than 1000 Residents)*, <http://www.city-data.com/city/Oklahoma3.html> (accessed Nov. 1, 2005) (listing over 250 towns with well under 1,000 residents).

282. *Teliska*, *supra* n. 16, at 231.

283. *Id*

284. *Id*

285. *See generally* *Rodrigues et al.*, *supra* n. 37.

286. *See* *Off. of the Gov.*, *supra* n. 64.

287. *See id.*



*medication would be delivered.* 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 is seeking the contraceptive by prescription and she prefers, the prescription must either be transferred to a local pharmacy of the patient's choice or returned to the patient, as the patient directs.<sup>288</sup>

The proposed legislation shifts the burden of getting the medication from the patient, where it currently often lies, to the pharmacy; leaves the pharmacy to manage its employees; and provides some opportunities for pharmacists to pass the duty to provide the medication to someone else. For instance, if there were multiple pharmacists on duty, nothing explicitly states one pharmacist could not hand a request for emergency contraceptives to another pharmacist to be dispensed. However, even though that would be acceptable under the law, it would only be allowed if it did not appear inconsistent with how any other medication was provided or cause the patient delay.<sup>289</sup> Therefore, through the enactment of this legislation, patients would be fully protected under law from pharmacists keeping them from receiving the medication they need or causing them undue hassle.

## VI. CONCLUSION

Oklahoma should enact a law explicitly prohibiting pharmacists from refusing to provide emergency contraceptives based on moral objections because doing so violates the rights of patients. It forces patients to adhere to the morals of the pharmacists, violating the patient's right of liberty<sup>290</sup> and often causing extreme hardship to the patient.<sup>291</sup>

This growing problem<sup>292</sup> is compounded by views of what emergency contraceptives actually do.<sup>293</sup> Because they are not medically defined as abortifacients,<sup>294</sup> emergency contraceptives are not protected by Oklahoma's abortion refusal clause.<sup>295</sup> However, there is still great ambiguity when pharmacists seek to determine whether they may refuse to provide such medication. Pharmacists do not have First Amendment protection to deny patients emergency contraceptives based on religious beliefs because refusing to dispense emergency contraceptives results in harm to patients.<sup>296</sup> Expanding refusal clauses to pharmacists would violate patients' Fourteenth Amendment rights by denying liberty, the right to privacy concerning reproductive choices, and the equal protection of the law. Likewise, the relationship of physicians to patient, as well as the training and traditional roles of physicians, make

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288. See generally *id.* (proposed addition emphasized).

289. See Off. of the Gov., *supra* n. 64.

290. See *Casey*, 505 U.S. at 851.

291. Sullivan, *supra* n. 171, at 111.

292. See generally Schaper, *supra* n. 8, at 8-9.

293. *Id.* at 7

294. See generally 62 Fed. Reg. at 8610.

295. Okla. St. tit. 63, § 1-741.

296. See generally *Bob Jones Univ.*, 461 U.S. 574; *Cantwell*, 310 U.S. 296; *Brener*, 671 F.2d 141.

them, rather than pharmacists, the correct gatekeepers to prescribe medications to women under the age of eighteen seeking emergency contraceptives.

Enacting legislation in Oklahoma explicitly prohibiting pharmacists from refusing to provide emergency contraceptives or quizzing the patient about her use of contraceptives will result in decreased harm while protecting the rights of patients. All states must seek to proactively legislate protection for patients. As this issue is more highly publicized, states will increasingly act to clear up ambiguities.<sup>297</sup> Oklahoma should take up this issue and follow Illinois before pharmacists strip patients of their rights to liberty and privacy. After all, if pharmacists are allowed to turn people needing medicine away from the counter, what will be allowed next?

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297. See generally Schaper, *supra* n. 8, at 8–9.

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