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NOTE

THE CONSCIENCE CONFLICT: AN EVALUATION OF
ILLINOIS' "MUST-FILL" STATUTE

M. Kevin Bailey[†]

I. INTRODUCTION

In opposition to a bill that authorized a tax to support Christian educators, James Madison wrote: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."¹ Madison reasoned that government's "interference with liberty is illegitimate" because it is contrary to the moral principle that every individual has the right to live life "free from such interference."²

Today, a conflict is rapidly intensifying in America on the role that religion and morals "should play in the provision of the goods deemed foundational in our society; goods such as health care"³ The battle lines have been drawn, with pharmacists who refuse to dispense emergency contraceptives on one side, and those who support state action requiring all pharmacists to dispense contraceptives without delay on the other. This Note, however, argues that the pharmacist's right to refuse to dispense emergency contraception and the patient's right to contraceptives without delay can coexist. Section II presents the history of the conscience clause issue; Section III analyzes the issue; Section IV analyzes a recent case; and Section V proposes solutions to the issue.

II. HISTORY PRESENTED

A. Emergency Rule

On April 1, 2005, Illinois Governor Rod Blagojevich filed an emergency rule (hereinafter "the rule") requiring Illinois pharmacists that sell

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1. JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments*, in THE COMPLETE MADISON: HIS BASIC WRITINGS 299 (Saul K. Padover ed., 1953).

2. Roger Pilon, *Madison's Constitutional Vision: The Legacy of Enumerated Powers*, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 25, 28 (John Samples ed., 2002).

3. Robert K. Vischer, *Conscience in Context: Pharmacists Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83, 84 (2006).

contraceptives to accept and fill prescriptions for contraceptives without delay.⁴ The rule came in response to a complaint that on February 23, 2005 a pharmacist refused to fill two women's prescriptions for emergency contraception at a pharmacy in downtown Chicago.⁵ The governor described the refusals as part of a concerted effort to deny women access to contraceptives.⁶ Governor Blagojevich's emergency rule was made permanent on August 16, 2005.⁷

The permanent rule requires all Division I pharmacies,⁸ "upon receipt of a valid, lawful prescription for a contraceptive . . . , [to] dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient . . . without delay, consistent with the normal timeframe for filling any other prescription."⁹ In the event that a contraceptive, or a suitable alternative, is not in stock, the pharmacy must order the contraceptive unless the patient would rather transfer the prescription to another local pharmacy.¹⁰ Under all

4. Press Release, Office of Illinois Governor Rod Blagojevich, *Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives* (Apr. 1, 2005) <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?RecNum=3805> (last visited Sept. 7, 2008). Governor Blagojevich explained that a "pharmacy will be expected to accept that prescription and fill it in the same way, and in the same period of time they would fill any other prescription. No delays. No hassles. No lecture. Just fill the prescription." *Id.*

5. Kari Lydersen, *Pharmacies Required to Fill Prescriptions for Birth Control*, WASH. POST, Apr. 2, 2005, at A02, available at <http://www.washingtonpost.com/wp-dyn/articles/A19703-2005Apr1.html> (last visited Sept. 7, 2008).

6. *Id.* ("[T]his is happening all other the country. There's a pattern of this behavior. This is not just a coincidence, but part and parcel of a larger campaign.") (quoting governor Blagojevich).

7. On April 18, 2005 Governor Blagojevich filed a permanent rule with the Joint Committee on Administrative Rules (JCAR) to further protect women's access to contraceptives once the 150-day emergency rule expired. Press Release, Office of Illinois Governor Rod Blagojevich, *Gov. Blagojevich Moves to Make Emergency Contraceptive Rule Permanent* (Apr. 18, 2005), available at <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?RecNum=3862> (last visited Sept. 7, 2008). The JCAR granted permanent status to the governor's emergency rule on August 16, 2005. Press Release, Office of Illinois Governor Rod Blagojevich, *State Commission Gives Permanent Approval to Gov. Blagojevich's Emergency Rule Protecting Illinois Women's Right to Birth Control* (August 16, 2005), available at <http://www.illinois.gov/PressRelease/PrintPressRelease.cfm?RecNum=4247> (last visited Sept. 7, 2008).

8. ILL. ADMIN. CODE tit. 68, §1330.5 (1987) ("[A]ny pharmacy that engages in general community pharmacy practice and that is open to, or offers pharmacy service to, the general public.").

9. 29 Ill. Reg. 5833 (Apr. 29, 2005) [hereinafter *Register*] (An amendment to the *Pharmacy Practice Act of 1987* codified Illinois' emergency rule).

10. *Id.*

circumstances an unfilled prescription for birth control must be returned to the patient at the patient's request.¹¹ Notwithstanding the changes in the rule, it remains consistent with other state boards of pharmacy¹² in allowing refusal to fill a prescription based on the patient's best interests.¹³ As an additional safeguard for women seeking emergency contraception, Illinois now requires Division I pharmacies to prominently display a notice that informs women of their rights to receive contraceptives without delay.¹⁴

In response to the emergency rule the Illinois Pharmacists Association ("IPHA") sent Governor Blagojevich a letter complaining that the new law required pharmacists to abide by a particular set of beliefs.¹⁵ Pharmacists who refuse to fill such prescriptions usually label emergency contraception as an abortifacient and object on moral or religious grounds.¹⁶

The Governor has contended that nothing in his administrative order requires pharmacists or drug stores to stock emergency contraceptives.¹⁷ While the Governor's assertion may be correct, an Illinois rule requires pharmacies that carry *any* contraceptives to dispense *all* FDA approved contraceptive

11. *Id.* Karen Pearl, national president of the Planned Parenthood Federation of America, reported that some pharmacists not only refuse to fill emergency contraceptive prescriptions but also keep the patient's prescription. See Lydersen, *supra* note 5.

12. Generally, state boards of pharmacy have policies that require pharmacists to fill all prescriptions for which they are licensed. The two significant exceptions to this rule include: when the pharmacist doubts the validity of a prescription or when use of a drug could be against the patient's best interests. Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access to Emergency Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY, June 1999, <http://www.guttmacher.org/pubs/tgr/02/3/gr020301.html> (last visited Sept. 7, 2008).

13. *Register*, *supra* note 9, at 5833 ("Nothing . . . shall interfere with a pharmacist's screening for potential drug therapy problems . . .").

14. JCARE adopted Governor Blagojevich's proposal to require pharmacies to post notice of women's right on August 8, 2006. Press Release, Office of Illinois Governor Rod Blagojevich, *Gov. Blagojevich's Contraceptives Rights Rule Wins Approval from Legislative Rules Committee* (Aug. 8, 2006), available at <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?RecNum=5163> (last visited Sept. 7, 2008).

15. Letter from Michael Patton, Executive Director of Illinois Pharmacy Association, to Rod Blagojevich, Illinois governor (Apr. 5, 2005) (on file with author) (stating pharmacists are "individuals, not automatons.")

16. See discussion *infra* Part III.

17. *IL Gov. Rod Blagojevich Appears on CNN's Lou Dobbs Tonight*, Dec. 1, 2005, <http://www.democraticgovernors.org/content/525> (last visited Sept. 7, 2008); See also Public Health News, *Illinois Governor Issues Emergency Rule Requiring Pharmacies to Fill Contraceptive Prescriptions*, Apr. 5, 2005, <http://www.medicalnewstoday.com/medicalnews.php?newsid=22281> (last visited Sept. 7, 2008) (according to Susan Hofer of the Illinois Department of Financial and Professional Regulation all pharmacies are not required to stock contraceptives).

methods.¹⁸ One of the more controversial birth control methods approved by the FDA is Plan B, often referred to as the “morning-after pill.”

B. Plan B

Plan B, administered orally in the form of two levonorgestrel pills, is taken to prevent pregnancy after unprotected sex or contraceptive failure.¹⁹ On August 23, 2006 the U.S. Food and Drug Administration (“FDA”) approved over-the-counter sales of Plan B to both men and women age 18 and over.²⁰ The FDA’s approval marks the first time a hormonal contraceptive will be available without a prescription in the United States.²¹ Though critical of the age restriction, the Planned Parenthood Federation of America praised the decision as a milestone for women’s health.²² Some social conservatives on the other hand have characterized Plan B as abortion.²³ Conservatives have also argued that the sales of nonprescription emergency contraceptives will exacerbate the problem of sexual promiscuity directly resulting in more unwanted pregnancies and sexually transmitted diseases.²⁴

The approval of over-the-counter sales of Plan B and its interplay with the Illinois emergency rule have sparked a debate between Illinois pharmacists and State of Illinois officials. Michael Patton, executive director of the IPHA,

18. Guttmacher Institute, *State Policies in Brief, Refusing to Provide Health Services* (Apr. 1, 2007), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (last visited Sept. 7, 2008) (remarking that Illinois is the only state that requires pharmacies that stock contraceptives to dispense all approved methods). Because pharmacies must obtain contraceptives that are not in stock under that particular pharmacy’s procedures for ordering contraceptives not in stock, “we recognize that this will allow those pharmacies who do not stock any oral contraceptives to be exempted from this rule inasmuch as their standard ordering procedure is to *not* order them.” Illinois Pharmacists Association, *IPHA’s Position Statement on Emergency Contraceptives* (on file with author).

19. U.S. Food and Drug Administration, *Plan B: Questions and Answers*, updated Dec. 14, 2006, <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm> (last visited Sept. 7, 2008). The FDA has approved only two emergency contraceptives—Preven (approved in 1998 but no longer marketed) and Plan B (approved in 1999 and available over-the-counter in 2006). *Id.* Levonorgestrel is a synthetic hormone used for over thirty-five years in birth control pills. *Id.*

20. Julie Rovner, *Timeline: The Debate Over Plan B*, Aug. 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=5725514> (last visited Sept. 7, 2008).

21. Rob Stein, *FDA Approves Plan B’s Over-the-Counter Sales*, WASH. POST, Aug. 25, 2006 at A04. A prescription is still required for those under age eighteen and the drug can only be sold at a pharmacy. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

contends that the Governor's emergency rule requiring pharmacies that carry contraceptives to also carry Plan B²⁵ could be preempted by the FDA's decision.²⁶ Patton claimed, "there is nothing in the law that would require me to handle something that is not prescription-driven."²⁷ Considering the rule's language "upon receipt of a valid, lawful prescription" one could conclude that the emergency rule only applies to prescription drugs. Susan Hofer, a spokeswoman for the Illinois Department of Financial and Professional Regulation (the agency responsible for implementing the rule), disagreed with Patton's interpretation and claimed the stocking requirements still apply because Plan B remains a prescription drug for girls under age eighteen.²⁸

The IPHA also claims that a pharmacist has a right to refuse to dispense controversial medication under the Illinois Health Right of Conscience Act (hereinafter "Illinois Conscience Clause").²⁹ The Illinois Conscience Clause was adopted in 1977 and has since been considered one of the country's broadest and strongest right of conscience statutes.³⁰ According to the statute, "no physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to . . . participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health care personnel."³¹ Litigation is pending in Illinois to decide whether the legislature intended the phrase "health care personnel" to include pharmacists.³²

25. As applied in the emergency rule, the term "contraceptive" refers "to all FDA-approved drugs or devices that prevent pregnancy." *Register*, *supra* note 9. The FDA has classified Plan B as a contraceptive. See generally FDA, *supra* note 19.

26. Daniel C. Vock, *FDA Ruling Puts Pharmacists in Crossfire*, Sept. 6, 2006, <http://www.stateline.org/live/details/story?contentId=139338> (last visited Sept. 7, 2008).

27. *Id.* "It's kind of like if I decided I didn't want to handle Robitussin cough medicine" (statement by Michael Patton). *Id.*

28. Vock, *supra* note 26. In nine states (not Illinois), a patient can receive Plan B from a specially trained pharmacist in lieu of a doctor's prescription. The legal implications due to recent FDA rulings are currently uncertain. *Id.*

29. Illinois Pharmacist Association, *supra* note 18.

30. Vock, *supra* note 26 (basing proposition on research by Americans United for Life, a public interest law firm that opposes abortion). In 2001, Americans United for Life reported that Illinois was the only state in the country that protected the rights of *all* health care providers who refused to provide health care services based on a moral or religious objection. Americans United for Life, *Health Care Rights of Conscience*, Nov. 2001, http://unitedforlife.org/lg/archive/roc/roc_myths_and_facts.htm (last visited Sept. 7, 2008).

31. 745 ILL. COMP. STAT. ANN. 70/4 (West 2006).

32. See *infra* Part IV. See generally *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (Ill. conscience clause litigation).

C. History of Conscience Clauses

Conscience clause laws were first enacted on the federal and state level following the Supreme Court's decision to legalize abortion in *Roe v. Wade*.³³ Legislators generally designed the laws to reconcile "the conflict between religious health care providers who provide care in accordance with their religious beliefs and the patients who want access to medical care that these religious providers find objectionable."³⁴ Congress enacted the first conscience clause law in the U.S. in 1973.³⁵ The amendment prohibits public officials from a discriminatory denial of public funds to individuals or entities that refuse to perform abortion or sterilization procedures.³⁶ By 1978, only five years after *Roe v. Wade*, most states had enacted some form of conscience clause legislation as well.³⁷ Although the original intent of conscience clause statutes was to allow health care providers to refuse participation in abortion or sterilization procedures, today conscience clause laws protect entities' objections to a range of medical procedures and services, including providing contraception and terminating life-support.³⁸

D. Federal Conscience Clause Legislation

The most recent federal conscience clause legislation has focused on expanding the range of entities that may legally refuse to offer abortion related services without fear of losing accreditation or federal funding.³⁹ Supporters of the legislation argue that it is necessary to protect entities in states where recent legislation has jeopardized rights previously enjoyed under past conscience clause regimes.⁴⁰ Critics argue that further conscience clause legislation would

33. *Roe v. Wade* 410 U.S. 113 (1973). See also Jody Feder, CRS Report for Congress, *The History and Effect of Abortion Conscience Clause Laws*, <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf> (last visited Sept. 6, 2008).

34. Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703, 1703 (1999).

35. See Vock, *supra* note 26 (stating same). The amendment is usually called the Church amendment, after its sponsor, Idaho Senator Frank Church.

36. 42 U.S.C.A. § 300a-7(b). "The receipt of any grant, contract, loan, or loan guarantee . . . by any individual or entity does not authorize any court or public official . . . to require such individual to perform . . . any sterilization procedure or abortion if his performance . . . of such . . . would be contrary to his religious beliefs or moral convictions."

37. Feder, *supra* note 33, at 2 (citing information from, *Conscience Makes a Comeback in the Age of Managed Care*, The Guttmacher Report on Public Policy (Feb. 1998)).

38. Feder, *supra* note 33, at 1.

39. *Id.* at 4.

40. *Id.*

only hinder women's access to abortion.⁴¹ Additionally, critics allege that claims of moral dilemmas are only pretexts to avoid the expense of providing abortion related services.⁴²

During the 108th Congress, two bills known as the Abortion Non-Discrimination Act (ANDA)⁴³ were introduced to Congress for the expansion of the term "health care entity."⁴⁴ Though Congress never ratified either of the two bills, a similar provision was enacted in 2005 as part of the Consolidated Appropriations Act.⁴⁵ Federal legislation has been primarily focused on protecting the rights of doctors and health care entities. Pharmacists, however, have yet to receive federal protection.

E. State Conscience Clause Legislation

Forty-six states currently have right of conscience laws that allow some health care providers to refuse to provide abortion related services.⁴⁶ Four states have enacted right of conscience laws that specifically protect the right of pharmacists to refuse to dispense emergency contraceptives.⁴⁷ Five other states have more general right of conscience statutes that may, depending on statutory interpretation in pending litigation, protect the rights of pharmacists.⁴⁸ Though nine states have enacted "must-fill" policies for all valid prescriptions, some states have provided exceptions for objecting pharmacists.⁴⁹ Illinois and Maine, however, both have an administrative "must-fill" rule that is inconsistent with the state's current right of conscience statute.⁵⁰ The following

41. *Id.*

42. *Id.*

43. H.R. 3664 and S. 1397, 108th Cong. (2003).

44. *Id.* The expanded definition of "health care entity" would have included "other health professionals, hospitals, provider sponsored organization, health maintenance organizations (HMOs), health insurance plans, or any other kind of health care facility, organization, or plan." *Id.*

45. See Consolidated Appropriations Act of 2005, PUB. L. NO. 108-447, HR 4818 (2004). See also Feder, *supra* note 33.

46. Guttmacher Institute, *supra* note 18. Some of the laws protect only private individuals and institutions, while others protect all health care providers. *Id.*

47. Vock, *supra* note 26. Arkansas, Georgia, Mississippi, and South Dakota have such statutes. *Id.*

48. *Id.* Colorado, Florida, Illinois, Maine, and Tennessee have such statutes. *Id.*

49. *Id.* As an example, the California "must-fill" statute allows pharmacists to notify their employer of any objection ahead of time where the employer can make other arrangements for the patient to timely receive her medication. *Id.*

50. *Id.* Neither Illinois nor Maine's right of conscience statute mentions emergency contraceptives. *Id.*

section discusses the interplay between the Illinois Right of Conscience Act and the Illinois "must-fill" rule.

III. THE ISSUES CONFRONTED

A. *Illinois Health Care Right of Conscience Act*

Whether the term "health care personnel," as used in the Health Care Right of Conscience Act, includes pharmacists is at the heart of the present debate between Illinois pharmacists and Governor Blagojevich. The Illinois conscience clause 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."⁵¹ The Illinois Pharmacists Association's position is that "health care personnel" should be interpreted to include licensed pharmacists.⁵² The IPHA has communicated to Governor Blagojevich its desire to work with the state of Illinois to accommodate both pharmacists' beliefs and women's health care needs.⁵³

In his public remarks, Governor Blagojevich has shown little sympathy to pharmacists, referring to their refusals to dispense emergency contraceptives as "political statements."⁵⁴ The Governor's position is that Illinois' conscience clause applies only to doctors and nurses and not pharmacists.⁵⁵ In 2005, the governor compared pharmacists that refuse to fill prescriptions to vegan supermarket clerks that refuse to sell customers meat.⁵⁶ The day following this comment, the American Pharmacists Association and the IPHA released a statement that claimed the governor's remarks had denigrated the pharmacy profession and that such characterization was patently unfair.⁵⁷

51. 745 ILL. COMP. STAT. ANN. 70/3(c) (West 2006). See *Vandersand v. Wal-Mart Stores, Inc.*, No. 06-3292, slip op. at 13-14 (C.D. Ill. 2007).

52. Illinois Pharmacists Association, *supra* note 18, ("We would ask further that this reference also be included in the Illinois Pharmacy Practice Act as well, since pharmacists are by Illinois law deemed to be 'health care professionals.'").

53. Letter from Michael Patton, *supra* note 15.

54. CNN's Lou Dobbs Tonight, *supra* note 17.

55. *Id.* See also Letter from Illinois Governor Rod Blagojevich to Illinois Physicians (Apr. 26, 2005) (on file with author) (the governor told physicians that "pharmacists should not be in a position to deny a woman access to health care simply because they disagree with the decision she and her doctor made.")

56. CNN's Lou Dobbs Tonight, *supra* note 17, (In analogizing the two jobs, the governor stated: "I'm sorry, I have a moral objection to meat, I'm not going to sell you the hamburger."). He concluded that pharmacists that refuse to dispense contraceptives should find another job. *Id.*

57. American Pharmacists Association, *Illinois Governor Denigrates Pharmacy Profession*

The governor's rationale for excluding pharmacists from the protection provided by the state's conscience statute was that the law only protected doctors, nurses, or health care professionals that refused to perform abortions.⁵⁸ The definition of "health care" applicable to the Health Care Right of Conscience Act, however, encompasses more than abortion related services as the governor has contended.⁵⁹ "Health care" is defined in the statute as "any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counseling, referrals, or any other advice in connection with the use or procurement of *contraceptives* and sterilization or abortion procedures"⁶⁰ At the present, Illinois doctors, whether in private practice or at a public or private institution, can legally refuse to prescribe patients both emergency contraceptives and basic contraception.⁶¹

The Illinois right of conscience statute defines "conscience" as "a sincerely held set of moral convictions arising from belief in and relation to God"⁶² Assuming the governor is correct to exclude pharmacists from protection under the right of conscience statute, and additionally the statute allows doctors to legally refuse to prescribe contraceptives, the law arbitrarily protects one group's "moral convictions" and not another's. As for pharmacists who have a moral conflict with Governor Blagojevich's "must-fill" policy, they must either persuade the governor to revise the language of the rule to include pharmacists,⁶³ or convince the Illinois courts that the legislature's intent was to include pharmacists in the statute.

Pharmacists may have a viable argument that the definitions of "health care" and "health care personnel" are broad enough to infer the legislature's intent was to include pharmacists.⁶⁴ On its face, the phrase "*any other person who*

LINCOLN DAILY NEWS, Dec. 5, 2005, available at <http://archives.lincolndailynews.com/2005/Dec/05/Features/perspectives120505.shtml> (last visited Sept 7, 2008).

58. CNN's Lou Dobbs Tonight, *supra* note 17. Governor Blagojevich considered the decision of health care professional not to participate in abortion related services as "understandable," but concluded that the current debate centered on contraceptives not abortions. *Id.*

59. 745 ILL. COMP. STAT. ANN. 70/3(a) (West 2006).

60. *Id.*

61. *Id.* See also Guttmacher Institute, *supra* note 18 (stating same).

62. 745 ILL. COMP. STAT. ANN. 70/3(e) (West 2006).

63. Along with asking that pharmacists be specifically included in the right of conscience act, the IPHA has proposed statutory language that would protect both patient and pharmacists. Illinois Pharmacists Association, *supra* note 18. See generally *infra* part V (discussion of IPHA's proposal).

64. 745 ILL. COMP. STAT. ANN. 70/3(West 2006).

furnishes, or assists in the furnishing of, health care services” seems to encompass not only pharmacists, but “any other person.”⁶⁵ Furthermore, the expansive definition of “health care” indicates a clear legislative intent to include “contraceptives” under the health care services that one can refuse to provide.⁶⁶ In light of the foregoing definitions, the statute’s section on liability could be interpreted to read: “No physician or health care professional [i.e. pharmacists] shall be civilly or criminally liable [for participating] in any way in any particular form of health care service [i.e. providing contraceptives] which is contrary to the conscience of such physician or health care personnel.”⁶⁷ Governor Blagojevich, however, has already taken a stand against this argument.⁶⁸

B. Abortifacient or Contraception?

Many doctors and pharmacists have a moral objection to prescribing or filling a prescription for Plan B because they view Plan B as an abortifacient. In that case, the Illinois “must-fill” law is requiring pharmacists to assist in abortion.⁶⁹ Whether Plan B is an abortifacient or a contraceptive has no legal significance to doctors in Illinois because they can make a personal choice on the issue and refuse to write the prescription.⁷⁰ Similarly, if the Health Care Right of Conscience Act applies to pharmacists, they may make a personal decision on the matter as well.⁷¹ If, however, pharmacists are not covered under the statute, the question of whether emergency contraceptives are abortifacients is a significant concern.

In contradistinction, Governor Blagojevich remarked that neither emergency contraceptives nor other hormonal contraceptives “terminate pregnancies, what they do is prevent pregnancies and that’s far different from performing an

65. *Id.* at 70/3(c) (the definition of “health care personnel”).

66. *Id.* at 70/3(a) (the definition of “health care”).

67. *Id.* at 70/4.

68. *See generally* 745 ILL. COMP. STAT. ANN. § 70/1-14 (West 2006); *See also* CNN’s Lou Dobbs Tonight, *supra* note 17 (Governor Blagojevich stating that “[t]he fact is, pharmacists are not covered under that law, and nor should they be.”).

69. Pontifical Academy for Life, *Statement on the So-Called “Morning-After Pill”* (Oct. 31, 2000), available at http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20001031_pillola-giorno-dopo_en.html (last visited Sept. 6, 2008). “The proven ‘anti-implantation’ action of the *morning-after pill* is really nothing other than a chemically induced abortion.” *Id.* Recall that the purpose of the first federal conscience clause legislation was to protect those who objected to facilitating abortions. *See generally* 42 U.S.C.A. §300a-7(b).

70. 745 ILL. COMP. STAT. ANN. 70/3(a) (West 2006).

71. *Id.*

abortion.”⁷² An understanding of the varying views of when life begins and Plan B’s effect on the pregnancy process is necessary to understand the complexity of this issue.

C. The Pregnancy Process

The position of the American College of Obstetricians and Gynecologists (ACOG) is that pregnancy is a process in which several factors are necessary before a woman becomes “pregnant.”⁷³ There are two divergent views as to when in this process conception takes place. Some medical experts claim “conception” is not a specific point in time, but the complete process, only resulting if there is implantation.⁷⁴

Since 1978, the Department of Health and Human Services has defined pregnancy as “the period of time from implantation until delivery.”⁷⁵ The definition does not necessarily suggest the federal government has declared that life begins when implantation is complete. Practically, the definition is well suited for legal purposes (i.e. recognizing a fetus⁷⁶), because at implantation, extrinsic evidence can validate a pregnancy.⁷⁷ Most opponents of emergency contraception believe that a pregnancy begins the moment the egg is

72. CNN’s Lou Dobbs Tonight, *supra* note 17.

73. Lisa Kaeser, *What Methods Should Be Included in a Contraceptive Coverage Insurance Mandate?*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Oct.1998, <http://www.guttmacher.org/pubs/tgr/01/5/gr010501.html> (last visited Sept. 7, 2008) (referencing the American College of Obstetricians and Gynecologists *available at*, <http://www.acog.org> (membership required to access text)). During *ovulation* at least one sperm must unite with the women’s egg during the short window of time before the egg is discarded in menstruation. In the *fertilization* process a single sperm penetrates the exterior of an egg (“oocyte”) forming a new cell (“zygote”). Fertilization usually occurs in the fallopian tubes and can take up to twenty-four hours. Once the zygote is formed it begins to divide and differentiate as it is carried to the uterus via the fallopian tubes. *Implantation* of the zygote (now a “preembryo”) in the woman’s uterine lining (“endometrium”) begins approximately five days after fertilization. Completing the implantation process can take from eight to fourteen days. Some experts extend the period as long as eighteen days. *Id.*

74. *Id.* Lisa Kaeser of the Guttmacher Institute states that “conception” is a nonmedical term commonly used as a synonym for fertilization. *Id.*

75. 45 C.F.R. § 46.202(f) (2006). See also Kaeser, *supra* note 73 (stating same).

76. The statute defines fetus as “the product of conception from implantation until delivery. *Id.* at 46.202(c).

77. The statutory language following the definition of “pregnancy” seems to indicate an evidentiary purpose for the definition. “A woman shall be assumed to be pregnant if she exhibits any of the pertinent presumptive signs of pregnancy, such as missed menses, until the results of a pregnancy test are negative or until delivery.” *Id.* at 46.202(f).

fertilized.⁷⁸ A statement by the Pontifical Academy for Life best summarizes the position of many individuals who have refused to dispense emergency contraception: “[I]t can never be legitimate to decide arbitrarily that the human individual has greater or lesser value (with the resulting variation in the duty to protect it) according to its stage of development.”⁷⁹

D. The Effect of Plan B and Other Contraceptives

Contraceptive drugs and devices approved by the FDA prevent pregnancy in three ways: they suppress ovulation, prevent fertilization, or prevent implantation.⁸⁰ Though some hormonal (“systemic” or “non-barrier”) contraceptives have a primary mode of action, they can prevent pregnancy at any of the three stages.⁸¹ The stage at which the contraceptive stops the pregnancy may differ between women; and in some women, the stage may vary from month to month, depending on the timing of ovulation with intercourse.⁸²

According to the FDA, Plan B works like other forms of hormonal contraceptives mainly by preventing the ovary from releasing an egg.⁸³ The FDA advises Plan B to be administered as soon as possible or within seventy-two hours of contraception failure or unprotected sex.⁸⁴ The FDA has stated that Plan B may prevent pregnancy in either the fertilization or implantation stage, but assures consumers that Plan B will have no effect on a zygote that has already completed implantation.⁸⁵ It is this assurance by the FDA, in conjunction with the view that life begins at implantation, which has led some supporters of Plan B to conclude emergency contraceptives are not

78. Pontifical Academy for Life, *supra* note 68 (stating that “[p]regnancy, in fact, begins with fertilization and not with the implantation of the blastocyst in the uterine wall . . .”); See also Illinois Right to Life, *Biology 101: Life Begins at Fertilization, Not Implantation*, <http://www.illinoisrighttolife.org> (last visited Sept. 7, 2008) (quoting pro-lifer Dianne N. Irving: “Every human being begins at fertilization as a single-cell embryo—the zygote”).

79. Pontifical Academy for Life, *supra* note 69.

80. Kaeser, *supra* note 73.

81. *Id.* See also Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies That Won't Sell Emergency Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY, Aug. 2005, <http://www.guttmacher.org/pubs/tgr/08/3/gr080310.html> (last visited Sept. 7, 2008) (stating that emergency and primary contraception may halt a pregnancy after fertilization but before pregnancy).

82. Kaeser, *supra* note 73.

83. FDA, *supra* note 19.

84. *Id.* Patients should take the second tablet twelve hours after the first. Data indicates better results if taken immediately following unprotected sex. *Id.*

85. *Id.*

abortifacients.⁸⁶ Advocates of emergency contraception contend that the social conservatives' position is contradictory if they reject Plan B and accept other forms of hormonal contraception.⁸⁷ This argument seems tenable if in fact regular hormonal contraceptives do indeed prevent pregnancy after the fertilization stage as some experts claim.⁸⁸

Whether Plan B is an abortifacient depends on when an individual believes that life begins. For the individual who believes life begins at fertilization, emergency contraceptives (and possibly other forms of birth control) operate as abortifacients. On the other hand, if life begins after implantation, emergency contraceptives are not abortifacients.

IV. CASE STUDY: *MENGES V. BLAGOJEVICH*

*Menges v. Blagojevich*⁸⁹ is a direct result of the Illinois emergency rule requiring pharmacists to dispense emergency contraceptives. The plaintiffs are licensed pharmacists who have objected to the "must-fill" policy.⁹⁰ The defendants include Governor Blagojevich and other appointed officials of the State of Illinois.⁹¹ Plaintiffs filed the suit in federal district court and Walgreens was allowed a motion to intervene as a third party.⁹²

Plaintiffs alleged that prior to the emergency rule, Walgreens had a nationwide policy known as the Referral Pharmacist Policy.⁹³ The policy allowed pharmacists to refuse to dispense medication for moral or religious reasons if the prescription could be filled by either another pharmacist or by

86. Vock, *supra* note 26 (stating that "[p]lan B is distinct from the abortion pill RU-486.").

87. Kaeser, *supra* note 73. Chris Smith (R-NJ) and Tom Coburn (R-OK), "flatly declared these methods to be abortifacients, even while decreeing—in a glaring self-contradiction—that other birth control pills were not." *Id.*

88. See generally Dailard, *supra* note 81 (basing proposition on explanation by the American College of Obstetricians and Gynecologists).

89. *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006). See also *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007) (In *Vandersand*, a case factually similar to *Menges*, a federal district court also denied the defendant's motion to dismiss. Though yet to be resolved, the case seems promising for objecting pharmacists in that the court found that pharmacists were covered by the Illinois Right of Conscience Act.). See *supra* Part III: Illinois Health Care Right of Conscience Act.

90. *Menges*, 451 F. Supp. 2d at 995. Five of the plaintiffs are former employees of Walgreens, a Division I pharmacy. The other two plaintiffs are currently employed at other Division I pharmacies.

91. *Id.*

92. *Id.*

93. *Id.* at 998.

another store nearby.⁹⁴ In an attempt to comply with the emergency rule, Walgreens changed its policy to require pharmacists to fill all prescriptions despite any objections.⁹⁵ In November 2005, Walgreens placed four of the plaintiffs on unpaid indefinite suspension because they refused to agree in writing to a policy that would require them to fill all prescriptions.⁹⁶ Walgreens claimed the “must-fill” rule is responsible for recent civil suits by employees as well as disciplinary actions from the Illinois State Department for violations of the rule by its pharmacists.⁹⁷

The plaintiffs alleged that the emergency rule violated their free exercise rights guaranteed by the First Amendment of the U.S. Constitution.⁹⁸ The court pointed out that although the First Amendment protects an individual’s free exercise of religion from discriminatory state laws, “religiously neutral state laws of general applicability are not subject to strict scrutiny” despite whether they infringe on another’s beliefs.⁹⁹ The plaintiffs have argued in the complaint and pretrial memorandum that even if the statute is neutral on its face, the true object of the statute is to discriminate against particular religious beliefs.¹⁰⁰ If the plaintiffs can prove that discrimination is the statute’s object, the emergency rule will be subject to strict scrutiny and only a compelling governmental interest will suffice to uphold the statute.¹⁰¹

A strong argument that a discriminatory purpose exists is that the statute is too underinclusive to validate the Governor’s claim that women’s access to contraceptives is the true purpose of the statute.¹⁰² Plaintiffs contend that if the Governor’s intent was really to provide women more access to birth control, he would have included hospitals and emergency rooms in the “must-fill” statute.¹⁰³ In response to the plaintiff’s foregoing argument, the Governor and state officials argue that the purpose was providing women health care and the

94. *Id.*

95. *Menges*, 451 F. Supp. 2d at 998. Both Walgreens and the plaintiffs claim that the prior policy is still in effect in all the other states. *Id.*

96. *Id.* The fifth plaintiff and former employer of Walgreens was discharged on September 13, 2005 for refusing to fill a prescription for emergency contraceptives. *Id.*

97. *Id.*

98. *Id.* at 999. *See also* U.S. CONST. amend. I. Additionally, the plaintiffs argue the rule is void under Title VII because it requires employers to discriminate on the basis of religion. *See also* The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2-2000e-7 (1964).

99. *Menges*, 451 F. Supp. 2d 992, 994 (C.D. Ill. 2006) (quoting *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

100. *Id.* at 1000.

101. *Id.*

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

103. *Id.*

few pharmacists who refuse to fill prescriptions are only tangential to the main concern.¹⁰⁴

Up to this point, the plaintiffs have withstood a motion by the defendants to dismiss.¹⁰⁵ In the ensuing litigation, the plaintiffs will have a difficult burden of proving the object of the governor's rule was discriminatory. Unless the statute is amended to allow pharmacists the right to refuse filling prescriptions, the resolution of this case is likely to determine whether the consciences of pharmacists are acknowledged in the Illinois marketplace.

V. PROPOSED SOLUTIONS

Federal and state legislators, pharmacists, and philosophers alike, have all proffered ideas to resolve the conscience clause debate. This section presents: (1) proposed federal legislation; (2) other state approaches; (3) the proposal by the Illinois Pharmacists Association; and (4) two competing arguments: *Common Carrier v. Marketplace of Ideas*.

A. *Proposed Federal Legislation*

The Access to Legal Pharmaceuticals Act,¹⁰⁶ introduced in April of 2005 by Senator Frank Lautenberg (D-NJ), proposes an amendment to Title II of the Public Health Service Act that details a pharmacy's responsibilities when an employee objects to filling a prescription. Theoretically, this bill accommodates both the objecting pharmacists and the consumer.¹⁰⁷ In an attempt to provide some sensible protection for consumers, the bill restricts pharmacies from hiring employees who would harass or humiliate an individual or who would refuse to return or transfer a prescription.¹⁰⁸ As for pharmacists opposed to "must-fill" statutes, they most likely object to the congressional finding accompanying the bill that states: "[a]n individual's right to religious belief and worship cannot impede an individual's access to legal prescriptions, including contraception."¹⁰⁹

A competing congressional bill, The Workplace Religious Freedom Act of 2005,¹¹⁰ introduced by then Senator Richard Santorum (R) of Pennsylvania,

104. *Id.*

105. *Id.*

106. Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. (2005) (The latest major action on this bill was Apr. 14, 2005. The bill was read twice and then referred to the Committee on Health, Education, Labor, and Pensions.).

107. *Id.*

108. Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. §§ (a)(3)(A-D) (2005).

109. *Id.* at § 2.

110. Workplace Religious Freedom Act of 2005, S. 677, 109th Cong. (2005) (The latest

allegedly protects those with moral or religious objections to filling certain prescriptions. In a letter to the editor of the *New York Times*, Senator Santorum and Senator John Kerry (D-MA) assured readers that, “[i]f the bill becomes law, a pharmacist who does not wish to dispense certain medications would not have to do so long as another pharmacist is on duty and would dispense the medications.”¹¹¹ The bill provides general protection for all employees by requiring employers to alter “the work schedule or assignment of the employee according to criteria determined by the employer”¹¹² Santorum and Kerry assert that the bill “provides a sensible solution to the potential conflict between an employee’s religious conviction and the needs of pharmacy customers.”¹¹³ Congress’s inability to pass a bill specifically addressing the issue, or its desire not to, has led to a lack of uniformity in state laws.¹¹⁴

B. Other States’ Approaches

States approach this issue in a variety of ways ranging from total protection of pharmacists’ rights to a total denial of their rights. South Dakota’s statute offers pharmacists maximum protection in refusing to dispense emergency contraception in that pharmacists are specifically mentioned in the statute.¹¹⁵ Similar to South Dakota’s approach are the states that have broad conscience clauses likely to encompass pharmacists.¹¹⁶ At the most restrictive end of the spectrum is the proposed legislation in New Jersey.¹¹⁷ If enacted, the New Jersey statute provides: “A pharmacist shall not refuse to dispense or refill a prescription or medication order solely on the grounds that to dispense or refill the prescription or medication order would contravene the pharmacist’s philosophical, moral, or religious rights.”¹¹⁸

major action on this bill was Mar. 17, 2005. The bill was read twice and then referred to the Committee on Health, Education, Labor, and Pensions.).

111. Richard Santorum & John Kerry, Editorial, *Religion in the Pharmacy*, N.Y. TIMES, Apr. 12, 2005, at A1.

112. Workplace Religious Freedom Act of 2005, S. 677, 109th Cong. § (b)(1)(B)(i) (2005).

113. Santorum & Kerry, *supra* note 111.

114. See generally *supra* part IV (Case Study). The United States Constitution and Title VII of the Civil Rights Act may protect pharmacists who object to filling certain prescriptions on a religious or moral basis.

115. See, e.g., S.D. CODIFIED LAWS § 36-11-70 (2006). The statute states that “[n]o pharmacists may be required to dispense medication” *Id.*

116. ME. REV. STAT. ANN. Tit. 22, § 1591 (2006).

117. S.B. 2178, A.B. 3772, 2004-2005 Sess. (N.J. 2005) (this bill was introduced January 11, 2005, sponsored by New Jersey State Senator Fred Madden).

118. *Id.*

C. *The Illinois Pharmacists Association's Proposal*

For the states that have dedicated themselves to the preservation of religious freedom and to providing women the best possible access to health care, there are state statutes and proposed legislation that attempt to accommodate both.¹¹⁹ Recognizing this trend, the IPHA has proposed language to revise the current "must-fill" statute to allow pharmacists to object to filling prescriptions for contraceptives.¹²⁰ The proposal, however, "would require prior notification by a pharmacist to the pharmacist's immediate supervisor and/or pre-agreed upon referral to a colleague should conscientious objection occur"¹²¹ The purpose of prior notification is to ensure that a system is in place that will provide women timely and efficient health care services.¹²² With the issue over contraceptives and abortifacients being such a sensitive topic, as well as differing views on when life begins, an approach that attempts to respect both positions seems most appropriate for government.

D. *Two competing arguments: Common carrier v. Marketplace of ideas*

In addition to law and policy makers, philosophers have proposed solutions to the conscience clause debate. Elizabeth Anderson, a proponent of an individual's immediate unfettered access to contraceptives, has analogized a pharmacist's refusal to sell contraceptives to a common carrier's refusal to accommodate an individual on the basis on race.¹²³ This argument, which implicitly claims validation from the Civil Rights Act of 1964, asserts that "[t]here are many public accommodations that secure a superior package of freedoms under a common carrier rule than under a rule that permits arbitrary discrimination on grounds of individual conscience, or other arbitrary grounds."¹²⁴ According to Anderson, the state grants a pharmacist a "license to practice pharmacy for others, not a license to practice one's religion on

119. Vock, *supra* note 26. California has a "must-fill" policy with exceptions for pharmacists who notify their employer of a religious objection. *Id.*

120. Illinois Pharmacists Association, *supra* note 18.

121. *Id.*

122. *Id.*

123. See generally Elizabeth Anderson, *So You Want to Live in a Free Society* (5): *Common Property, Common Carriers, and the Case of the Conscientious Objecting Pharmacist*, LEFT2RIGHT, Aug. 2, 2005, http://www.left2right.typepad.com/main/2005/08/so_you_want_to_.html (last visited Sept. 7, 2008). The author compares those who refuse to distribute contraception to individuals who refuse to provide "access to public accommodations such as buses, restaurants, and hotels on grounds of race"

124. *Id.*

others.”¹²⁵ This argument fails to recognize that the rights of two different groups are at stake and that careful consideration should be given to both positions.¹²⁶

On applying the marketplace of ideas philosophy to the conscience clause debate, Robert Vischer stated that “allowing the contest to proceed may be more conducive to a healthy and engaged public life than the current inclination to legally enshrine one set of moral norms and negate the others.”¹²⁷ The premise of the marketplace of ideas argument is that pharmacies are responsible “to the employee and the consumer, not the state, and employees and consumers must utilize market power to contest (or embrace) the moral norms of their choosing.”¹²⁸ The inherent danger in the marketplace of ideas argument is that its application in certain situations can be most burdensome to a minority.¹²⁹ Contrary to the typical equal protection scenario, conscience clause issues potentially burden both sides of the debate. The more an individual embraces the argument that both the pharmacist and the consumer can win this debate, the more credible the marketplace of ideas philosophy becomes.¹³⁰

VI. CONCLUSION

Illinois and similarly situated states should avoid the choice between pharmacists’ rights and consumers’ rights by adopting the proposal of the Illinois Pharmacists Association.¹³¹ It is also imperative that Congress continue its search for a workable solution to this problem in the event state legislatures are unable to resolve the issue.

Sheila Liaugminas stated that allowing “one person’s convenience [to] trump another person’s moral conscience” is “obnoxious, offensive and un-American.”¹³² Many would passionately disagree with such a statement and

125. *Id.*

126. The argument also arbitrarily trumps the religious rights of the pharmacists with the rights of the consumer. It is clear to the author of this Note that discrimination on the basis of race is not the same as asking a consumer to wait while another pharmacist fills the prescription.

127. Vischer, *supra* note 3, at 86.

128. *Id.*

129. For example, consider those abused by such an argument in the years leading up to the civil rights movement.

130. Vischer, *supra* note 3, at 104. “By acknowledging the relevance of our connectedness, and allowing commercial choices to reflect that connectedness, the moral marketplace helps us escape the impoverished discourse of zero-sum, rights-driven individualism.” *Id.*

131. See generally *supra* part V (discussion of IPHA’s proposal).

132. Vischer, *supra* note 3, at 93 (quoting from Sheila G. Liaugminas, *Pharmacists Battling Lawsuits Over Conscience Issues*, NAT’L CATH. REG., Feb. 13-19, 2005, at 1).

consider the converse as the true offense. If the two sides of this debate are going to coexist, each group must try to understand and respect the other. As long as objecting pharmacists are considered to differ “only in degree and not in kind from the Talibanesque taxi driver who refuses to serve women who are unaccompanied by their male relatives,”¹³³ the denial of religious rights will continue. In the end, it might be unnecessary for society to determine which is more intolerable: forcing pharmacists to check their morals at the door, or delaying a consumer temporarily in receiving goods. Government should strive to accommodate both pharmacist and consumer.

133. Anderson, *supra* note 123.

