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The Right of Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception

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THE RIGHT TO REFUSE: A CALL FOR ADEQUATE
PROTECTION OF A PHARMACIST'S RIGHT TO REFUSE
FACILITATION OF ABORTION AND EMERGENCY
CONTRACEPTION

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I. INTRODUCTION

The ability to convince an individual, through the art of honest persuasion, of the righteousness of a belief is celebrated, however, in failure of such persuasion, compelling that person to act contradictory to their retained ideal is detestable. The free will to reject a movement or disagree with a practice is the sort of liberty this Nation was founded upon, yet today the potential exists that many in the pharmaceutical profession will be forced into behaviors repugnant to their basic standards of goodness and morality. The proliferation of abortive and contraceptive drug therapies has thrust many pharmacists into roles as facilitators of practices they

oppose on fundamental levels without a corresponding ability to opt out of such action.

When a patient desires drug therapies that, in the eyes of the pharmacist, are likely to destroy an unborn human life, the pro-life pharmacist is left in an unsettling position: accommodate the patient and breach basic moral principles *or* adhere to conscience and risk liability and disciplinary action.¹ Unlike physicians and nurses, who are protected by legislation passed in the wake of abortion's legalization,² pharmacists who follow their conscience by refusing to dispense controversial medications or referring to a willing pharmacist have no reliable legal or professional basis to prevent or rectify retaliatory action by employers, patients, and peers.³ Solving this predicament is especially difficult in light of the pharmacist's professional ethical duty to promote the patient's best interests.⁴

The purpose of this Note is *not* to argue for or against either the pro-life or pro-choice positions. The purpose of this Note is to shed light on a serious moral dilemma that faces many pharmacists today, to call for universal acceptance in the pharmacy profession of a right of conscience, and to suggest adequate state and national legislative measures that would protect and prevent pharmacists from having to act contrary to their basic moral convictions.

Section I provides background regarding present day abortive and contraceptive drug therapies and the role of the pharmacist in providing such medications. Section II is presented to provide some perspective and background as to moral belief regarding abortion and emergency contraception (EC) and how such a belief may conflict with a pharmacist's professional duties. The discussion of the tension between moral and professional duties illustrates that the beliefs regarding abortion and EC of the pharmacist who chooses conscience over professional duty are genuinely fundamental and deserve respect. Section III illustrates the detrimental consequences that choosing conscience could wreak. Section IV sheds light on the inadequacy of current common and statutory law that could feasibly protect the pharmacist's moral convictions from retaliation or liability. Finally, Section V proposes that professional pharmaceutical organizations lead the way to recognizing a true right of conscience, which would eventually result in universal legislation protecting against all potential ramifications of choosing conscience.

II. SECTION I: ANTI-REPRODUCTION PILLS AND THE PHARMACIST'S ROLE

A. *The Pills*

On September 28, 2000, the Food and Drug Administration (FDA) approved the drug mifepristone, formerly known as RU-486, for use in the United States as an abortifacient.⁵ Mifepristone had previously been approved and is currently used in

¹See *infra* Section III.

²See *infra* Section IV.C.

³See *infra* Section IV.

⁴See *infra* Section II.

⁵U.S. Department of Health and Human Services, HHS News, *FDA Approves Mifepristone for the Termination of Early Pregnancy* (Sept. 28, 2000), available at

some European countries, including France, England, and Sweden.⁶ Although mifepristone has other potential uses, such as postcoital contraception and daily-use birth control,⁷ its FDA approved use is as an early pregnancy abortifacient.⁸

Mifepristone acts as an anti-hormone and precludes a woman's uterus from retaining an *implanted* fertilized egg.⁹ The drug blocks progesterone, an essential hormone in the acceptance and retention of an implanted egg within a woman's uterus; and, when taken in concurrence with misoprostol, induces a spontaneous abortion.¹⁰ The fact that the mifepristone abortion regimen acts to destroy an implanted egg as opposed to a fertilized yet not implanted egg, is what distinguishes it from emergency contraception.

Drugs used post-coitally with the intent to prevent the development of a pregnancy are referred to as emergency contraception.¹¹ This labeling as emergency contraception is a bit conclusory, as the definition of whether use of such drugs is contraception or abortion lies at the heart of the controversy over them.¹² However, for purposes of convenience and clarity, this Note will refer to drug regimens consumed post-intercourse for the purpose of preventing the onset or continuance of pregnancy as emergency contraception (EC), as that is the term that has been attached to them in modern medical, social, and political arenas.

Notwithstanding this controversy, the physical and biological effects of orally administered EC, often referred to as the morning-after pill, are not in dispute. EC may prevent the development of a pregnancy by inhibiting any of four successive biological events, either pre or post fertilization, necessary to establish and maintain a pregnancy.¹³ EC works before fertilization by either suppressing ovulation, like regular birth-control pills, or preventing fertilization of an egg by inhibiting the movement of the sperm or the egg.¹⁴ If an egg becomes fertilized, then EC may disrupt transport of the fertilized egg to the uterus or, if the transport through the fallopian tube is complete, prevent the implantation of the fertilized egg in the woman's uterus.¹⁵ EC is most effective when used up to seventy-two hours after

<http://www.fda.gov/bbs/topics/news/NEW00737.html> (last visited Apr. 7, 2004) [hereinafter HHS News].

⁶*Id.*

⁷Gwendolyn Prothro, *RU 486 Examined: Impact of a New Technology on an Old Controversy*, 30 U. MICH. J.L. REFORM 715, 728 (1997).

⁸See HHS News, *supra* note 5.

⁹Prothro, *supra* note 7, at 724.

¹⁰Planned Parenthood Federation of America, *Mifepristone: A Brief History*, at <http://www.plannedparenthood.org/library/ABORTION/Mifepristone.html> (last visited Jan. 2, 2002) [hereinafter Planned Parenthood].

¹¹AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, EMERGENCY CONTRACEPTION: THE PHARMACIST'S ROLE I (2000).

¹²See *infra* Section II.

¹³AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 3.

¹⁴*Id.*; see also Jane E. Brody, *Pregnancy Prevention, the Morning After*, N.Y. TIMES, Apr. 10, 2001 (Late Edition), at F8.

¹⁵*Id.*

unprotected intercourse and becomes completely ineffective after implantation occurs, usually six or seven days after intercourse.¹⁶

B. The Pharmacist's Role

During the past twenty years emergency contraception pills (ECPs) have been available to and used by American women.¹⁷ During this time frame non-emergency oral contraceptives (those taken as a daily pre-intercourse regimen) were used off-label as emergency contraception¹⁸ and were distributed as such "primarily in hospital emergency rooms, reproductive health clinics, and university health centers."¹⁹ These medical facilities would repackage oral contraceptives for use as emergency contraception; pharmacies associated with certain clinics would repackage oral contraceptives into EC regimens and label them as such; and private physicians would instruct patients to take a larger dosage of their regular birth control pills as EC.²⁰

In 1998 the FDA approved the Preven Emergency Contraceptive Kit, an EC based on the Yuzpe regimen.²¹ In 1999, the FDA also approved Plan B, another EC regimen.²² While different regimens of oral contraceptives had been distributed and used before 1998 as emergency contraceptives, Preven and Plan B are the first regimens specifically approved by the FDA as safe and effective emergency contraceptives, to be packaged and marketed as such.²³ Additionally, modified doses of oral contraceptives, not specifically packaged for use as an EC, can still be prescribed in doses that would effect emergency contraception if doctor and patient desire such a method.²⁴

Emergency contraception pills are classified as prescription drugs,²⁵ and "states are delegated the power and responsibility of determining which health care professionals ... have prescriptive authority."²⁶ Currently, many states have

¹⁶AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 1, 4.

¹⁷AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 1.

¹⁸Heather M. Field, *Increasing Access to Emergency Contraceptive Pills Through State Law Enabled Dependent Pharmacist Prescribers*, 11 UCLA WOMEN'S L.J. 141, 147 (2000).

¹⁹AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 1.

²⁰Renee C. Wyser-Pratte, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient Under the Law of Contraception*, 79 OR. L. REV. 1121, 1135 (2000).

²¹AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 2. The Yuzpe regimen was the first EC drug formulation and was described by Albert Yuzpe and colleagues in 1974. *Id.* at 1.

²²*Id.* at 2.

²³*Id.*

²⁴*Id.* at 6.

²⁵*Id.* at 2; *see generally* Field, *supra* note 18.

²⁶*See* Field, *supra* note 18, at 223-24 (citing 21 U.S.C. § 353(b)(1) (1994)).

authorized collaborative practices that have expanded the role of pharmacists.²⁷ These collaborative practices generally authorize greater independence of the pharmacist to initiate drug therapies not specifically prescribed by a patient's physician or other authorized health care professional.²⁸ In other words, some patients may not require a prescription from their doctor before being distributed certain medications or drugs from a pharmacist. However, with the exception of Washington, California, and Alaska,²⁹ states do not authorize this expanded pharmacist role in the distribution of ECPs. Pharmacists are generally limited to dispensing ECPs specifically prescribed by some other authorized health care professional. Other general duties of a pharmacist in the distribution of ECPs may include counseling and educating women on EC use at the time the prescription is filled.³⁰

In Washington, California, and Alaska, pharmacists have the dual authority to prescribe *and* dispense ECPs under each state's respective collaborative practices.³¹ Generally speaking, the pharmacist may dispense ECPs in accordance with "standardized procedures or protocols developed by the pharmacist and an authorized prescriber[.]"³² Thus, a woman need not receive authorization from her doctor prior to buying ECPs; the pharmacist acts not as a third party or indirect provider of ECPs, but as a direct provider in accordance with a general collaborative protocol.

If pro-choice groups and the American Medical Association have their way, pharmacists will have no future role in ECPs. This is because these groups support an FDA reclassification of ECPs as over-the-counter (OTC) drugs, rather than prescription.³³ Many pro-choice groups claim as a top goal the persuasion of the FDA to reclassify ECPs as OTC.³⁴ If OTC status were granted, then "women would be able to get ECPs without encountering any type of health care provider."³⁵

²⁷*Id.* at 226. The expansion of pharmacist's authority may include "1) the administration of immunizations/vaccines; 2) substitution power for prescribed drugs or some degree of selection power of particular drugs for certain conditions; and 3) patient-specific or general drug therapy management." *Id.*

²⁸*Id.* at 229-30.

²⁹Heidi Welborn, *Expanding the Pharmacist's Role in Providing Emergency Contraception*, 41 J. AM. PHARMACEUTICAL ASS'N 767 (2001).

³⁰AMERICAN PHARMACEUTICAL ASSOCIATION SPECIAL REPORT, *supra* note 11, at 10.

³¹Welborn, *supra* note 29, at 767; *see also* Field, *supra* note 18, at 231-32 (citing Washington state statutes and regulations that authorize pharmacist to prescribe ECPs); CAL. BUS. & PROF. CODE § 4052(8) (West 1996) (California statute authorizing pharmacist prescriptive power over ECPs).

³²CAL. BUS. & PROF. CODE § 4052(8).

³³*See* Welborn, *supra* note 29, at 768.

³⁴Cheryl Wetzstein, *In an Emergency; Advocates Push Access to 72-Hour Birth Control*, WASH. TIMES, Jan. 2, 2002, at A2 (citing groups such as Advocates for Youth, Planned Parenthood Federation of America, and the National Abortion and Reproductive Rights Action League).

³⁵Field, *supra* note 18, at 200.

OTC status for ECPs is not generally supported by pharmacists however,³⁶ and is not likely in today's political climate. Advocates on both sides of the issue believe the Bush administration, with its influence on the FDA, will delay or negate a switch in classification from prescription to OTC.³⁷ The behavioral and social policy concerns raised by ECPs³⁸ "may make switching ECPs to OTC status a politically unpopular move."³⁹ In any event, ECPs are currently available only by prescription.

Many restrictions have been imposed by the FDA in the use and distribution of mifepristone. First, the drug can only be used during the first forty-nine days after a woman's last menstrual cycle.⁴⁰ Also, the drug is distributed to women directly from doctors and certain health clinics.⁴¹ Mifepristone "is not and will not be available in pharmacies[.]"⁴² Thus, under the current FDA restrictions, pharmacists have no role in mifepristone-induced abortions.

While current mifepristone use is much lower than expected since its FDA approval and subsequent availability to the public,⁴³ some signals suggest that future use or access may become more widespread. A survey of doctors by the Kaiser Family Foundation discovered that twenty-three percent of doctors said they were "likely" to offer mifepristone in 2002; up from the seven percent that actually provided the drug since its approval.⁴⁴ Also, health centers offering mifepristone have reported a ninety-nine percent rate of abortion in women who have taken the drug.⁴⁵ An expected increase in availability, a near perfect rate of achieving the desired ends of abortion, together with continued efforts by pro-choice groups, such

³⁶See Welborn, *supra* note 29, at 768.

³⁷Doug Thomas, *After Sex Pill Gets New Push*, OMAHA WORLD-HERALD, Feb. 20, 2001, at 1 (quoting representatives of Planned Parenthood and Metro Right to Life, both of whom believe OTC status is not forthcoming in the near future).

³⁸OTC status may magnify controversial issues such as promiscuity, sexually transmitted diseases, availability of counseling and health care, and the abortion/contraception controversy. Field, *supra* note 18, at 204.

³⁹*Id.* at 204.

⁴⁰U.S. Food and Drug Administration, Center for Drug Evaluation and Research, Mifepristone Questions and Answers, at <http://www.fda.gov/cder/drug/infopage/mifepristone/mifepristone-qa.htm> (last visited Feb. 20, 2002) [hereinafter FDA].

⁴¹See HHS News, *supra* note 5. Only doctors and other health care providers that meet certain qualifications mandated by the FDA may distribute mifepristone. Some of these required qualifications include the ability to determine the duration of the woman's pregnancy and provide surgical abortion in the case the drug regimen fails to procure an abortion.

⁴²See FDA, *supra* note 40.

⁴³See Julia Duin, *Just 7% of U.S. Doctors Prescribe Abortion Pill*, WASH. TIMES, Sept. 25, 2001, at A3. Only six percent of gynecologists and one percent of family practice doctors surveyed prescribed the drug since its approval. *Id.*

⁴⁴Evan Henderson, *Abortion Pill Not yet a Frequent Choice*, DAILY NEWS OF L.A., Nov. 12, 2001, at L6.

⁴⁵*One Year After Approval of Mifepristone, Planned Parenthood Reports Widespread Satisfaction Among Patients and Providers*, U.S. Newswire, Sept. 24, 2001, 2001 WL 21898499 [hereinafter Planned Parenthood II].

as Planned Parenthood, to increase accessibility to abortion,⁴⁶ could be the impetus to pharmaceutical distribution of mifepristone in the future.

FDA approval of mifepristone and ECPs, such as Preven and Plan B, has made drug related reproductive therapy a real and potentially widespread option for women. Marketing campaigns by women's and abortion-rights groups and the drug manufacturers themselves will further introduce these drug options to women. This drug therapy revolution of sorts has expanded the pharmacist's role in the provision of emergency contraception, and perhaps, in the future, the provision of mifepristone.

The more women that are aware of and desire EC, the more involved and important pharmacists will become in the contraception process. One can imagine that if more and more states adopt the liberal EC distribution procedures of Washington and California, then pharmacists would become the primary providers of ECPs. And if mifepristone distribution restrictions are relaxed, pharmacists could feasibly become key players in the furnishing of abortion drugs as well. Whether they like it or not, pharmacists are being thrust into the role of common, everyday providers of controversial reproductive medications⁴⁷, and this position may put some pharmacists in the predicament of having to choose between their moral convictions regarding EC and abortion and the patient's wishes.

III. SECTION II: THE NATURE OF THE MORAL DILEMMA

This section entails examining the rationale of believing abortion and EC are morally wrong accompanied by an examination of the nature of a pharmacist's ethical obligation to her patients.⁴⁸ Understanding these competing interests allows us to better appreciate that the serious pharmacist who chooses conscience over professional duty is surely abiding by a fundamental tenet in her life; fundamental principles such as these must be protected, not punished.

A. Abortion Viewpoints

The mere mention of abortion can instill passion into any argument unlike any modern day controversy. Whether or not a woman's Constitutional right to abortion is affirmed for all time, unified agreement on the morality (or immorality) of the procedure of terminating a pregnancy will certainly never be reached. However, even those who defend the right to abortion believe "that it is intrinsically a bad thing, a kind of cosmic shame, when a human life at any stage is deliberately extinguished."⁴⁹ People have a general agreement about the sanctity of unborn human life.⁵⁰

⁴⁶*See id.* The President of Planned Parenthood was quoted as stating that her organization "will continue to work to expand availability of [mifepristone] and other advances in reproductive health care[.]"

⁴⁷*See supra* Section II.

⁴⁸In this section the terms "ethical" and "professional" are used synonymously.

⁴⁹RONALD DWORKIN, *LIFE'S DOMINION* 91-92 (1993).

⁵⁰Frances M. Kamm, *Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 164 (1995) (book review); Eric Rakowski, *The Sanctity of Human Life*, 103 YALE L.J. 2049, 2070 (1994) (book review and critique of *LIFE'S DOMINION*).

Thus, the controversy arises when weighing unborn life against the life of the would-be mother.⁵¹ Varying convictions regarding the morality of abortion emerge dependant upon how each individual person weighs the natural and human “investments” in unborn life against the toll on the natural and human “investments” in the woman that childbirth would bring.⁵² Abortion proponents, while recognizing the sanctity of unborn life, give priority to the woman’s life⁵³ in varying circumstances.⁵⁴ Thus, abortion proponents say, while abortion has “negative moral significance,” it is, on the whole, morally justified in light of the woman’s life.⁵⁵

However, opponents of abortion believe that it is wrong in all or most circumstances at any point during a pregnancy.⁵⁶ Some abortion opponents base this belief on the premise that unborn life is human with a fundamental right to continued life, and thus abortion is morally unjustified in all circumstances.⁵⁷ Most opponents base their belief on the premise that the sanctity of unborn life, while having no rights itself, always outweighs the woman’s life, except in extreme circumstances, such as rape.⁵⁸ As abortion proponents recognize the sanctity of the fetus, abortion opponents recognize the values sacrificed and difficulties encountered by denying abortion.⁵⁹ However, opponents “proclaim ... that none of these reasons can ever objectively confer the right to dispose of another’s life, even when that life is only beginning”; and further that “[I]f life is too fundamental a value to be weighed against even very serious disadvantages.”⁶⁰

⁵¹See Rakowski, *supra* note 50, at 2050.

⁵²*Id.* at 2070.

⁵³This word is used with respect to the woman’s lifestyle and general happiness, not necessarily as a reference to the life or death of the woman.

⁵⁴See Kamm, *supra* note 50, at 164; Rakowski, *supra* note 50, at 2069-70.

⁵⁵Kamm, *supra* note 50, at 164; Rakowski, *supra* note 50, at 2070.

⁵⁶The Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion, ¶ 17, (Nov. 18, 1974), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html (last visited Jan. 3, 2002) [hereinafter Declaration on Procured Abortion].

⁵⁷See generally *id.*

⁵⁸Rakowski, *supra* note 50, at 2070. Dworkin argues that most abortion opponents do not believe that fetuses are “babies” with rights and interests. The argument, quite simply, is this: fetuses are, at least in the early and middle stages of pregnancy unconscious beings. Only sentient beings have “rights and interests.” Thus, fetuses themselves have no rights or interests. Most abortion opponents must then have a “detached objection” to abortion – one that does not presuppose a fetus to have rights and interests. For Dworkin, this must be true to rationalize the rape and “life of the mother” exceptions of most abortion opponents. See *id.* at 2055-56.

⁵⁹See Declaration on Procured Abortion, *supra* note 56, ¶ 14.

⁶⁰*Id.* Of course, there are those abortion opponents who allow for exceptions in extreme circumstances such as rape. See *supra* note 58 and accompanying text.

B. Emergency Contraception: Abortion?

The current debate over mifepristone is one of access and opportunity – abortion opponents see the approval of mifepristone as a more accessible and convenient *method* of abortion. No debate exists over whether mifepristone acts as an abortifacient. Thus, the above viewpoints on the morality of abortion clearly apply to the use and provision of mifepristone. However, the morality of ECPs in the abortion context is not as clear. The ambiguity of whether ECPs fit into the abortion debate is a result of a separate, yet related, question: when human life begins. For if life does not begin until the fertilized egg becomes implanted in the woman’s uterus, then ECPs do not effect an abortion.⁶¹ But, for those that believe that life commences at fertilization, then ECPs, with their potential to destroy a fertilized egg, effect an abortion. The question of when life begins has given rise to a debate within a debate: assuming abortion is immoral, is EC abortion? – that is, does life begin at fertilization or implantation? Science and the Roman Catholic Church⁶² offer some guidance on the issue, however inconsistent and convoluted.

1. The Science of Life’s Beginnings: The Impetus to the Debate

The fertilization of a woman’s egg, occurring after intercourse, is “the merger of egg and sperm into a genetically complete entity.”⁶³ First, the sperm must capacitate, a process not thoroughly understood by the medical community, which entails the sperm’s “acquisition of fertilizing ability through exposure to the female reproductive tract.”⁶⁴ Capacitation takes approximately five to six hours.⁶⁵ Then, once the sperm and egg, which each have twenty-three chromosomes, “have combined those chromosomes into a single 46-chromosome nucleus” fertilization is complete.⁶⁶ This combination process takes approximately twelve hours.⁶⁷ Thus, the fertilization process, which takes place in the fallopian tube, is complete approximately seventeen to eighteen hours after intercourse, and mitotic divisions of the fertilized egg commence.⁶⁸ The fertilized egg is called a zygote.⁶⁹

The zygote remains in the fallopian tube for three to four days, where cleavage – mitotic divisions of the zygote into multiple cells - occurs and continues through the

⁶¹See *supra* Section I.

⁶²As the Roman Catholic Church has been an impassioned protector of the unborn, discussion of religious teachings and traditions on life’s beginnings is limited to those of the Roman Catholic Church. A discussion of other denomination’s beliefs is beyond the scope of this note.

⁶³Elizabeth Spahn and Barbara Andrade, *Mis-Conceptions: The Moment of Conception in Religion, Science, and Law*, 32 U.S.F.L REV. 261, 293 (1998).

⁶⁴LUIGI MASTROIANNI, JR., EPILOGUE TO FERTILIZATION AND EMBRYONIC DEVELOPMENT IN VITRO 356 (Luigi Mastroianni, Jr. & John D. Biggers eds., 1981).

⁶⁵Spahn and Andrade, *supra* note 63, at 293.

⁶⁶STUART IRA FOX, HUMAN PHYSIOLOGY 618 (4th ed. 1993).

⁶⁷*Id.*

⁶⁸Spahn and Andrade, *supra* note 63, at 293.

⁶⁹*Id.*

implantation process.⁷⁰ The zygote travels through the fallopian tube to the uterus (where it becomes a morula).⁷¹ Once in the uterus, the morula “floats” in suspension and, after approximately three days, implants itself into the uterine wall (and is called a blastocyst). Thus, implantation occurs about seven days after intercourse.⁷²

The American Medical Association (AMA) equates conception, and in effect the beginning of life, with the implantation of the blastocyst in the woman’s uterus.⁷³ This theory is in accord with various medical dictionaries’ definitions of conception.⁷⁴

2. The Teachings of the Roman Catholic Church

The Roman Catholic Church’s official teaching and belief is that life begins, and conception occurs, at fertilization.⁷⁵ Fusing science and religion, the Roman Catholic Church claims confirmation of its belief from modern genetics, in that “the program of what this living being will be” is established from “the first instant.”⁷⁶ The Roman Catholic Church recognizes a distinction between life’s commencement and the moment of “ensoulment” – when the body and soul fuse.⁷⁷ However, a unanimous tradition on when ensoulment occurs does not exist.⁷⁸ Both Saint Augustine and Saint Thomas Aquinas taught that ensoulment occurred forty to eighty days after conception, not at the instant of conception,⁷⁹ and current authors are still in disagreement.⁸⁰ Nevertheless, that the moment of human life, with or without soul, commences at fertilization is not in dispute within the Church.⁸¹

⁷⁰ARTHUR C. GUYTON, TEXTBOOK OF MEDICAL PHYSIOLOGY 1033-34 (9th ed. 1996).

⁷¹*Id.* At this point the morula is a mass of sixteen to thirty-two cells. *Id.*; see also HUMAN PHYSIOLOGY 675 (Arthur J. Vander et al. eds., 6th ed. 1993)).

⁷²HUMAN PHYSIOLOGY, *supra* note 71, at 677; ELAINE N. MARIEB, ESSENTIALS OF HUMAN ANATOMY & PHYSIOLOGY 480 (4th ed. 1994).

⁷³Spahn and Andrade, *supra* note 63, at 294.

⁷⁴See *id.* at 333 n.205 (citing SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 131 (Supp. 1992) (defining conception as “the onset of pregnancy, marked by implantation of the blastocyst”); ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH 258 (3rd ed. 1983) (defining conception as “the onset of pregnancy, marked by implantation of the blastocyst; the formation of a viable zygote”); 1 OXFORD COMPANION TO MEDICINE 254 (1986) (defining conception as “the fertilization of an ovum by a spermatozoon and the implantation of the resulting zygote”)); *but see infra* note 83.

⁷⁵“From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth.” Declaration on Procured Abortion, *supra* note 56, ¶ 12.

⁷⁶*Id.* ¶ 13.

⁷⁷See *id.* ¶ 13 n.19.

⁷⁸See *id.*

⁷⁹See Spahn and Andrade, *supra* note 63, at 270-71.

⁸⁰*Id.*

⁸¹Declaration on Procured Abortion, *supra* note 56, ¶ 13 n.19.

Further, recognition of abortion, even before ensoulment, as a grave fault was and is unanimous.⁸²

While not all abortion opponents are Catholic, the Church's teachings have resonated with many Americans.⁸³ Most people believe abortion is morally wrong most of the time.⁸⁴ Some of the people opposed to abortion are pharmacists.⁸⁵ And even more importantly, some pharmacists believe life begins at fertilization, and thus find EC to be an early form of abortion.⁸⁶ The pharmacist who holds these principals dearly will face the dilemma of having to choose between her conscience and her professional duties.

C. *The Pharmacist's Professional Ethical Obligations*

Pharmacy is a profession, and much like the professions of medicine and law, entails a duty to assure and promote the patient's best interests.⁸⁷ As professionals, pharmacists are expected to give priority to the patient's interests over their own immediate interests.⁸⁸ As key players in the implementation of drug therapies, pharmacists are expected to withhold drugs "from those who have no authority to use them" and not to withhold "medications from those who do have authority to use them."⁸⁹

The patient's best interests are the pharmacist's primary commitment and concern. Among other things, pharmacists are expected to "help individuals achieve optimum benefit from their medications, to be committed to their welfare, and to

⁸²*Id.* ¶ 7.

⁸³See Cheryl Wetzstein, *Advocates of Emergency Contraception have Begun a Campaign Designed to Expand Access to 72-Hour Birth Control Pills*, INSIGHT ON THE NEWS, Feb. 4, 2002, 2002 WL 8338126. The presidents of two different organizations, Life Issues Institute and American Life League "maintain[] that medical groups are wrong when they say pregnancy begins after implantation in the womb" and thus ECPs are "very, very early abortive drug[s]." *Id.* The article also states that over 100 doctors "have signed a statement questioning federal designation of EC as 'contraception.'" *Id.*

⁸⁴See Public Agenda, *Abortion: Major Proposals*, at http://www.publicagenda.org/issues/pcc_detail.cfm?issue_type=abortion&list=2 (last visited Feb. 20, 2002) (a public opinion poll by a nonprofit, bipartisan organization). The question: is abortion morally wrong most of the time? Fifty-five percent polled answered yes. Thirty percent answered no. *Id.*

⁸⁵See, e.g., Pharmacists for Life International, at <http://www.pfli.org/main.php?pf=aboutus.html> (last visited Jan. 8, 2002) [hereinafter PFLI]. Pharmacists for Life International (PFLI) is the only exclusively pro-life pharmacy association. It represents almost 1500 pharmacists, and hundreds of lay supporters worldwide. *Id.*

⁸⁶*Id.*

⁸⁷William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & LAW 1 (1996).

⁸⁸Stephanie E. Harvey, EiLun Lu, Oscar Rivas, & Julie Rodgers, *Do Pharmacists Have the Right to Refuse to Dispense a Prescription Based on Personal Beliefs?*, at http://www.nm-pharmacy.com/body_rights.html (last visited Jan. 3, 2002) [hereinafter Harvey].

⁸⁹Allen & Brushwood, *supra* note 87, at 2.

maintain their trust"⁹⁰; to place "concern for the well-being of the patient at the center of professional practice" taking into consideration the "needs stated by the patient";⁹¹ and to hold "the patient's welfare paramount."⁹² Further, patient autonomy and "personal and cultural differences among patients" must be respected by the pharmacist.⁹³ These professional duties, and others, encompass the "collective conscience" of the pharmaceutical profession, and their implementation by each pharmacist is considered a moral obligation.⁹⁴

When presented with a validly authorized prescription for a legal medication, by a patient aware of the risks involved in taking the medication, and for whom the medication would be reasonably safe, the aforementioned principles and expectations leave the pharmacist with an ethical duty to fill and dispense the prescription.⁹⁵ The duty to dispense in these circumstances may give rise to a serious conflict between the pharmacist's personal conviction concerning abortion and her professional duty to the patient.

In 1998, the American Pharmaceutical Association (APhA), and subsequently various other pharmaceutical organizations, eased the conflict between personal and professional morals by adopting policies recognizing a pharmacist's right to refuse dispensing medications based on the pharmacist's personal beliefs.⁹⁶ However, if the pharmacist exercises her right of conscience and refuses to fill the prescription, the duty to the patient is not extinguished, and could be fulfilled by referring the patient to another pharmacist or distributor.⁹⁷ In any event, "the patient should not be required to abide by the pharmacist's personal, moral decision."⁹⁸ For many pharmacists, a referral would be no more than passive participation in the activity

⁹⁰American Pharmaceutical Association, Code of Ethics for Pharmacists, *available at* <http://www.aphanet.org/pharmcare/ethics.html> (last visited Jan. 8, 2002) [hereinafter Code of Ethics].

⁹¹*Id.*

⁹²American Pharmaceutical Association, Principles of Practice for Pharmaceutical Care, *available at* <http://www.aphanet.org/> (last visited Jan. 8, 2002).

⁹³Code of Ethics, *supra* note 90.

⁹⁴American Pharmaceutical Association, 1997-98 Policy Committee Report, Pharmacist Conscience Clause, *available at* <http://www.aphanet.org/lead/committee2.html> (last visited Dec. 31, 2001) [hereinafter Committee Report].

⁹⁵*Id.*; Harvey, *supra* note 88.

⁹⁶American Pharmaceutical Association, Report of the House Delegates, Subject: Pharmacist Conscience Clause, *available at* <http://www.aphanet.org/lead/hod.html> (last visited Dec. 31, 2001) [hereinafter Conscience Clause]. "APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal."

⁹⁷Committee Report, *supra* note 94.

⁹⁸*Id.*

they initially refused to actively assist.⁹⁹ Thus the dilemma, while transformed into whether to refer or not, is equally troublesome to the pharmacist.

IV. SECTION III: THE POTENTIAL RAMIFICATIONS OF CHOOSING CONSCIENCE

The pharmacist who ultimately decides that her moral convictions regarding abortion outweigh her professional obligation to the patient may refuse to fill the prescription and refer the patient to another pharmacist; or, the pharmacist with conscientious objection may refuse to dispense and refuse to refer. While the former decision will, in practical terms, shield the pharmacist from most negative consequences, the latter decision could have serious implications for the pharmacist, including employment termination or demotion, civil tort liability, or disciplinary action from the state pharmacy board.

A. *Employment Ramifications*

A pharmacist who follows her conscience may be terminated or demoted by her employer. The employment-at-will rule provides the employer with great leeway in terminating or demoting a pharmacist: employment may be terminated or diminished for any or no reason.¹⁰⁰ Because of the immediate low cost and convenience to the employer, termination or demotion is probably the most likely and frequent detriment to a pharmacist who chooses to follow her conscience.

The ongoing story of Karen Brauer is an illustration of this possibility. Ms. Brauer, a pro-life pharmacist who believes EC is an early form of abortion, often turned away prescriptions for EC regimens during her employment at a large commercial pharmacy.¹⁰¹ On one occasion, a patient came to the pharmacy with a valid prescription refill for Micronor, an oral contraceptive that may be used as EC, and Ms. Brauer turned the patient away in accordance with her conscience.¹⁰² The patient complained, and when Ms. Brauer refused to agree to fill all legal prescriptions in the future, including EC regimens, the employer-pharmacy fired her.¹⁰³

B. *Tort Liability*

A pharmacist, as a professional, has a duty to exercise reasonable care in practicing her profession.¹⁰⁴ The standard of care required to satisfy this duty varies from jurisdiction to jurisdiction and is adopted and applied based on various sources.¹⁰⁵ All jurisdictions require technical accuracy in the administration of

⁹⁹See Carol Ukens, *Duty vs. Conscience: R.Ph.s Who Refuse to Dispense Raise Ethical Concerns*, DRUG TOPICS, November 3, 1997, at 54.

¹⁰⁰Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000).

¹⁰¹Karen Brauer, *Pharmacy Has a Conscience Problem*, at <http://www.gargaro.com/kmart.html> (last visited Jan. 7, 2002) [hereinafter Brauer].

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴See, e.g., *Eldridge v. Eli Lilly & Co.*, 485 N.E.2d 551 (Ill. App. Ct. 1985).

¹⁰⁵Some of these sources include national organizations such as the American Pharmaceutical Association, federal statutes and regulations, state statutes and regulations, and

prescriptions.¹⁰⁶ This includes assuring “the patient receives the correct drug, dosage, and directions for use.”¹⁰⁷ Other standards may supplement accuracy and require the exercise of the pharmacist’s independent judgment, including being alert for clear errors or mistakes in the prescription,¹⁰⁸ which would implicate a duty to verify the prescription with the physician or to refuse to fill the prescription.¹⁰⁹ Some jurisdictions require the pharmacist to warn the patient of potential risks or dangers that taking the drug entails.¹¹⁰

When the pharmacist refuses to dispense and then refers, if she has given a good faith referral, she has probably satisfied reasonable care.¹¹¹ Further, because the patient ultimately received the pharmaceutical care desired, legal action would probably not be initiated or appropriate.¹¹² If the pharmacist neither dispenses nor refers, whether the pharmacist satisfied her duty of reasonable care in unclear and the chance of “injury” to the patient is increased.

Whether the pharmacist may be liable depends first on whether a duty has been breached – that is, whether refusing to fill a prescription and refusing to refer breaches the duty of reasonable care.¹¹³ A pharmacist’s lack of accommodation to a woman seeking ECPs or abortion drugs may be considered a breach of duty under the failure to accurately administer prescription cases.¹¹⁴ In *Troppe v. Scarf*,¹¹⁵ the pharmacist filled the patient’s prescription with a tranquilizer rather than the birth control called for by the prescription,¹¹⁶ and this was held to be a breach of the

disciplinary decisions of state pharmacy boards. See David W. Hepplewhite, *A Traditional Legal Analysis of the Roles and Duties of Pharmacists*, 44 *DRAKE L. REV.* 519 *passim* (1996).

¹⁰⁶See, e.g., *DeCorda v. State*, 878 P.2d 73, 76 (Colo. Ct. App. 1994); *Baker v. Arbor Drugs, Inc.*, 544 N.W.2d 727, 731 (Mich. Ct. App. 1996); *Stebbins v. Concord Wrigley Drugs, Inc.*, 416 N.W.2d 381, 387 (Mich. Ct. App. 1987); *Troppe v. Scarf*, 187 N.W.2d 511, 513 (Mich. Ct. App. 1971); see generally, R. Paul Asbury, Comment, *Pharmacist Liability: The Doors of Litigation Are Opening*, 40 *SANTA CLARA L. REV.* 907, 909-912 (2000); David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should ‘Can’ Imply ‘Ought’?*, 44 *DRAKE L. REV.* 439, 444 (1996).

¹⁰⁷Asbury, *supra* note 106, at 910.

¹⁰⁸See, e.g., *Nichols v. Cent. Merch., Inc.*, 817 P.2d 1131 (Kan. Ct. App. 1991); *Gassen v. E. Jefferson G. Hosp.*, 628 So. 2d 256 (La. Ct. App. 1993).

¹⁰⁹See, e.g., *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994).

¹¹⁰See, e.g., *Lasley v. Shrake’s Country Club Pharmacy, Inc.* 880 P.2d 1129 (Arizona Ct. App. 1994); *Dooley v. Everett*, 805 S.W.2d 380 (Tenn. Ct. App. 1990).

¹¹¹See *Conscience Clause*, *supra* note 96; see also *supra* Section II.C.

¹¹²Of course, one could imagine a situation in which, because of the referral, medication is not used in a timely fashion, and injury ensues, e.g., ECPs are not used within the seventy-two hour window. In a situation such as this, the discussion that follows would apply.

¹¹³Laura W. Smalley, Annotation, *Cause of Action Against Pharmacist for Injury of Death Caused by Prescription Drugs*, 13 *Causes of Action* 2d. 91 § 5 (2001).

¹¹⁴See *supra* note 106.

¹¹⁵187 N.W.2d 511 (Mich. Ct. App. 1971).

¹¹⁶*Id.* at 512.

pharmacist's duty of care.¹¹⁷ The inaccurately filled prescription was a proximate cause of the ensuing pregnancy and birth of child.¹¹⁸

Women seeking ECPs or abortion drugs may analogize a refusal to fill a prescription with prescriptions inaccurately filled, as in *Tropi*, in that the end result is the same – the patient does not receive the desired and authorized medication and thus pregnancy or child birth ensues. Further, it will be difficult for the pharmacist to defend on the ground that the refusal was an exercise of reasonable independent judgment, as those cases entail refusal on the ground that the prescription had an error or mistake,¹¹⁹ or doubt existed as to whether the physician intended to prescribe the medication.¹²⁰ Here, the only ground for refusal to fill and refer is the pharmacist's personal disapproval of the morality of the medication, which could be considered an unreasonable omission under the current accepted practice of the profession. Thus, a woman could reasonably argue that the refusal to fill a valid prescription on moral grounds is a breach of duty.

In *Tropi*, the woman who was administered the wrong drugs by the negligent pharmacist sued on account of and was compensated for the harms of pregnancy and childbirth, which may include medical and hospital expenses and pain and suffering.¹²¹ Many jurisdictions recognize these injuries as the basis of claims often referred to as wrongful birth, wrongful pregnancy, or wrongful conception.¹²² Further, a very few courts recognize a limited cause of action for wrongful life, a claim on behalf of the infant for the injury of being born.¹²³ Most of these wrongful birth, pregnancy, conception, or life cases involve the acts or omissions of the woman's physician. However, as *Tropi* illustrates, pharmacists may also be liable for these injuries. A pharmacist's refusal to dispense ECPs or other abortion drugs or refer to a willing pharmacist could lead to potentially actionable injuries to the woman. The woman may become pregnant, and an abortion or childbirth could ensue and the injuries and losses associated thereto could be the basis of a civil action. Or the woman might hastily search for another pharmacist who was willing to dispense the desired birth control, and thus incur emotional pain and suffering in light of the stress of potentially not taking the drugs within the required timeframe. All of these ramifications of the pharmacist's refusal to accommodate the patient could potentially be the basis of a civil action.¹²⁴

In any event, the real possibility of pharmacist liability for not dispensing or accommodating a woman who wants ECPs or other abortion drugs exists. The

¹¹⁷*Id.* at 513.

¹¹⁸*Id.*

¹¹⁹*See e.g.*, *People's Service Drug Stores v. Somerville*, 158 A. 12, 14 (Maryland 1932).

¹²⁰*See e.g.*, *Eldridge*, 485 N.E.2d 551, 554.

¹²¹*Tropi*, 187 N.W.2d at 513.

¹²²*See* 62A AM. JUR. 2D *Prenatal Injuries; Wrongful Life, Birth, or Conception* §§ 92-93 (2001).

¹²³*Id.* § 98.

¹²⁴*See supra* Section III.B.

pharmacist must feel safe in following her conscience, and not feel threatened by potential litigation and liability.

C. Disciplinary Action

The practice of pharmacy is a profession regulated and controlled by the state through designated statutes and regulations under such statutes.¹²⁵ The responsibility of enforcing the state's pharmacy acts is often delegated to a statutorily created board,¹²⁶ which may be authorized to grant a license to practice pharmacy and discipline a pharmacist for certain acts or omissions.¹²⁷

Each state's statute and regulations generally designate the offenses for which a pharmacist may be subject to disciplinary action, and further what action the state board may take against the pharmacist. For example, in Ohio the state board "may revoke, suspend, limit, place on probation, or refuse to grant or renew an identification card [license], or may impose a monetary penalty[.]"¹²⁸ The Ohio statute sets out the offenses for which such disciplinary action may be taken,¹²⁹ and further authorizes the state board to adopt rules necessary to carry out the purposes of and enforce the statute.¹³⁰ Gross immorality, dishonesty, dispensing drugs without a valid prescription, and the like are some of the offenses that could result in disciplinary action by a state board.¹³¹ Most disciplinary action involves "misconduct only with drug diversion and pharmacist impairment issues, but not with standard of care issues."¹³² Further, no state's pharmacy rules, whether statutory or administrative, include an obligation to fill valid prescriptions.¹³³

Thus, it seems unlikely that a state board would take any disciplinary action against a pharmacist for refusing to fill and refer a valid prescription. However, as the controversy is new and yet untested, the possibility of disciplinary action may exist in some states. In fact the Executive Director of the National Association of Boards of Pharmacy (NABP)¹³⁴ has recognized the possibility of a "very small

¹²⁵See 25 AM. JUR. 2D *Drugs and Controlled Substances* § 76 (1996).

¹²⁶See 25 AM. JUR. 2D *Drugs and Controlled Substances* § 76 (1996); see also OHIO REV. CODE ANN. § 4729.02 (Anderson 2001); *Id.* § 4729.25.

¹²⁷See, e.g., 25 AM. JUR. 2D *Drugs and Controlled Substances* § 76; see also OHIO REV. CODE ANN. § 4729.16.

¹²⁸OHIO REV. CODE ANN. § 4729.16.

¹²⁹*Id.*

¹³⁰*Id.* § 4729.26.

¹³¹See, e.g., *id.* 4729.16(A)(1)-(2), (C)(3); see generally 25 AM. JUR. 2D *Drugs and Controlled Substances* § 76 (1996).

¹³²Hepplewhite, *supra* note 105, at 544.

¹³³See, e.g., OHIO ADMIN. CODE 4729-5 *et seq.*; see also Harvey, *supra* note 88; e-mail from William T. Winsley, Executive Director, Ohio State Board of Pharmacy, to author (January 2, 2002).

¹³⁴For more information, see <http://www.nabp.net>.

minority” of state boards that may initiate disciplinary proceedings against a pharmacist who refuses to fill a valid prescription because of personal convictions.¹³⁵

V. SECTION IV: THE INADEQUACY OF CURRENT PROTECTIONS OF A
PHARMACIST’S CONSCIENCE

Various legal avenues are available to a pharmacist who is discriminated against due to her conscientious refusal to dispense abortion drugs. Religious discrimination and wrongful discharge claims are the most obvious options for a discharged or demoted pharmacist. Also, current state conscience clause statutes exist that generally protect choosing conscience. However, the current legal remedies offer incomplete, uncertain, costly, and time-consuming protection, if any.

A. *Religious Discrimination*

Under Title VII of the Federal Civil Rights Act of 1964¹³⁶, employers may not “refuse to hire ... discharge ... or otherwise discriminate against any individual ... because of such individual’s ... religion.”¹³⁷ Further, an individual’s religion “includes all aspects of religious observance and practice ... unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s ... religious observance or practice without undue hardship on the conduct of the employer’s business.”¹³⁸ As opposition to abortion is often based on religion,¹³⁹ it falls within the ambit of Title VII protection.¹⁴⁰

However, in practical terms, Title VII does not offer guaranteed protection in the context of protecting a pharmacist’s conscience.¹⁴¹ Although the employer must make reasonable accommodations in light of the pharmacist’s abortion position,¹⁴² if an accommodation places an undue hardship on the employer’s business, the employer will not be culpable under Title VII for not implementing it.¹⁴³ Further, the Supreme Court has interpreted undue hardship as any “greater than de minimus cost or imposition upon” the employer’s business, including co-workers.¹⁴⁴

¹³⁵Uken, *supra* note 94 (quoting Carmen Catizone, Executive Director of the National Association of the Boards of Pharmacy).

¹³⁶*See* 42 U.S.C. § 2000e *et seq.* (1994).

¹³⁷*Id.* § 2000e-2(a)(1).

¹³⁸*Id.* § 2000e(j).

¹³⁹*See supra* Section II.B.1.

¹⁴⁰*See* W. Cole Durham, et al., *Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 B.Y.U. L. REV. 253, 295-96 (1982).

¹⁴¹*See* Allen and Brushwood, *supra* note 87, at 8-9.

¹⁴²§ 2000e(j).

¹⁴³*Id.*

¹⁴⁴*Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

In *Brener v. Diagnostic Center Hospital*¹⁴⁵, an Orthodox Jewish pharmacist claimed that because of his faith, he could not work on the Sabbath, sunset Friday through sunset Saturday, or various religious holidays.¹⁴⁶ All of the plaintiff-proposed accommodations were rejected as placing an undue hardship on the employer's business.¹⁴⁷ These proposals included hiring additional substitute pharmacists, having the pharmacy director work the plaintiff's shifts, operating without the plaintiff-pharmacist, or having the pharmacy director order other current employees to trade shifts with the plaintiff.¹⁴⁸ The first three proposals had the obvious burden of increasing costs and decreasing efficiency.¹⁴⁹ Requiring employees to trade shifts with the plaintiff was disrupting work-routines and lowering the morale among the co-workers,¹⁵⁰ and had the effect of discriminating "against some employees in order to enable others to observe" their religion.¹⁵¹

In the context of a pharmacist's conscientious objection to abortion drugs, many of the potential accommodations are analogous to those suggested and rejected in *Brener*. Assuming a pharmacy adopts a policy of providing service to all customers for any valid, legal prescription, any accommodation to the objecting pharmacist probably would result in an undue burden on the employer. For example, a pharmacy may only require one pharmacist on duty during certain shifts, and when the objecting pharmacist is scheduled for the "one pharmacist" shift, trading shifts is not an option because the times when the objecting pharmacist will "observe" her religion by refusing to fill prescriptions of abortion drugs are likely unknown. Further, having an additional pharmacist on duty only during the objecting pharmacist's shift (in order to handle any objectionable prescription) would clearly result in economic loss, and thus be an undue burden.¹⁵² Also, never scheduling the objecting pharmacist during the "one pharmacist" shift could result in lowering co-worker morale and disruption of work routines, both considered undue burdens.¹⁵³

A pharmacy that always has more than one pharmacist on duty during each shift, thus requiring other pharmacists besides the objecting pharmacist to handle prescriptions of abortion drugs, could also lead to a lowering of morale, and thus be an undue burden.¹⁵⁴ Pharmacists in general do not appreciate having technically challenging prescriptions pawned off to them by other pharmacists; passing morally controversial prescriptions to another pharmacist could breed a similar resentment.¹⁵⁵

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 143.

¹⁴⁷*Id.* at 146-147.

¹⁴⁸*Id.*

¹⁴⁹*Id.* at 146.

¹⁵⁰*Brener*, 671 F.2d at 147.

¹⁵¹*Id.* at 146, 147 (citing *Hardison*, 432 U.S. at 85).

¹⁵²*See id.* at 146.

¹⁵³*See id.* at 147.

¹⁵⁴*See* Allen and Brushwood, *supra* note 87, at 8-9.

¹⁵⁵*Id.* at 8.

For example, a pharmacist who opposes abortion but gives priority to her professional duty to the patient (and thus would prescribe such drugs in spite of her personal conscience) could come to resent the objecting pharmacist who refuses to dispense abortion drugs.¹⁵⁶

The above examples are not intended to be an exhaustive analysis of all the possible situations in which accommodating an objecting pharmacist could result in an undue burden. Instead they are intended to illustrate the uncertainty and inconsistency of pharmaceutical conscience protection under Title VII. Also, because it is uncertain that a pharmacist is protected under Title VII, the statute may not deter employers from firing or demoting conscientious pharmacists, thus placing the affirmative burden on the pharmacist to protect her rights. Further, Title VII offers no protection against civil suits against the pharmacist, and no direct immunity from professional discipline.

B. Wrongful Discharge

The conscientious pharmacist may also have a remedy through the common law tort of wrongful discharge.¹⁵⁷ Wrongful discharge is an exception to the employment at will doctrine in that if the employee's discharge conflicts with a recognized public policy, then the employer may be liable in tort.¹⁵⁸ Two main reasons exist as to why a wrongful discharge claim provides weak protection for the conscientious pharmacist. One, it is uncertain at best whether a state would recognize a public policy protecting the right to conscience. Also, in most cases where a pharmacist is fired for following her conscience, the reason for the discharge is not necessarily because her conscience was followed, but rather that doing so was detrimental to the business.

The definition of public policy varies from jurisdiction to jurisdiction, and is constantly evolving and changing in time.¹⁵⁹ In any event, where a discharge may be found to violate public policy is generally limited to four categories: "refusing to engage in illegal activity at the behest of the employer; exercising a public duty; asserting a legal right or privilege; or whistleblowing."¹⁶⁰ In the pharmaceutical context, for a wrongful discharge claim to be viable, public policy must recognize a right of conscience, that is, a right to refuse accommodating the distribution of abortion drugs.¹⁶¹ Thus, a wrongful discharge claim would likely fall within the "asserting a legal right or privilege" category. However, the courts have recognized a discharge as violative of public policy under this category in limited circumstances,

¹⁵⁶*Id.* at 9.

¹⁵⁷82 AM. JUR. 2D *Wrongful Discharge* § 11 (2000).

¹⁵⁸*Id.*

¹⁵⁹See *id.* § 14; Bruce G. Davis, *Defining the Employment Rights of Medical Personnel Within the Parameters of Personal Conscience*, 1986 DETROIT C.L. REV. 847, 852.

¹⁶⁰Mark Brossman and Laurie C. Malkin, *Beyond the Implied Contract: The Public Policy Exception, the Implied Covenant of Good Faith and Fair Dealing, and Other Limitations on an Employer's Discretion in the At-Will Setting*, 600 PRACTISING L. INST. 587, 594 (1999).

¹⁶¹See Davis, *supra* note 159, at 851-52.

and a right to conscience has not been among them.¹⁶² Further, some courts have expressly rejected assertions of public policy where the employee's conduct served and was motivated by personal or private interests.¹⁶³

Even if a court recognized a public policy against firing an employee who follows her conscience, in the context of pharmaceutical care, a wrongful discharge claim would still probably fail. In *Kulch v. Structural Fibers, Inc.*,¹⁶⁴ the Ohio Supreme Court, based on review of cases throughout the country, outlined the elements necessary to the analysis of a wrongful discharge claim.¹⁶⁵ One of the elements included that the "employer lacked [an] overriding legitimate business justification for the dismissal[.]"¹⁶⁶ Where a pharmacist fails to accommodate a patient's valid prescription for legal drugs, deemed safe by the patient's doctor, the employer may have legitimate business justifications for dismissing the pharmacist.¹⁶⁷ The refusal to accommodate could result in low morale among the co-workers, patient dissatisfaction with service, or even lost profits. All of these are clearly detrimental to a business, and thus may prevent a recovery for wrongful discharge even in light of a court-recognized public policy favoring a right to follow one's conscience.

The preceding is not intended to be an exhaustive analysis of whether a wrongful discharge claim would protect a pharmacist. In fact, it may be that existing conscience clause statutes could provide a powerful basis for a public policy against discharge for conscientious refusal to accommodate.¹⁶⁸ However, in the absence of clear law on the subject, results are uncertain at best. Because of the uncertainty,

¹⁶²The exercise of certain legal rights is often a prohibited basis of discharge. These include filing a workman's compensation claim, suing employers, engaging in political activities, protesting unsafe working conditions, or refusing to take a polygraph. See Brossman and Malkin, *supra* note 160, at 604-05. The great majority of states have adopted conscience clause statutes designed to protect medical personnel from being required to participate in personally objectionable procedures such as abortion. See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177 (1993). One commentator recognized, without citing any authority, that these statutes may provide the "clear mandate" of public policy necessary to a wrongful discharge claim. Davis, *supra* note 159, at 852. Further research by this author found no documented applications of these statutes in the context of wrongful discharge claims.

¹⁶³See *Kalman v. Grand Union Co.*, 443 A.2d 728, 729 (N.J. Super. 1982) (distinguishing between public policy and personal values; stating that conduct motivated by personal morals shall not entitle the employee to immunity from discharge).

¹⁶⁴677 N.E.2d 308 (Ohio 1997).

¹⁶⁵*Id.* at 321-22.

¹⁶⁶*Id.*; see also *McLaughlin v. Gastrointestinal Specialists, Inc.*, 696 A.2d 173, 178 (Pa. Super. Ct. 1997) (where an employee's constant complaints to her employer about an alleged health hazard in the workplace constituted a disruption of the orderly management of the business, and thus such complaints by the employee constituted a legitimate justification for discharge).

¹⁶⁷See *supra* Section IV.A.

¹⁶⁸See *supra* note 162 and accompanying text; see also *infra* notes 170-173 (citing current conscience statutes).

wrongful discharge may not deter employers from firing or demoting conscientious pharmacists, thus placing the affirmative burden on the pharmacist to protect her rights. Further, wrongful discharge offers no protection against civil liability and no direct immunity from professional discipline.

C. Current State Conscience Clause Statutes

Currently, forty-five jurisdictions in the United States offer some statutory protection of the consciences of health care professionals.¹⁶⁹ The legislative acts generally recognize a right to refuse participating in controversial procedures on account of moral or religious grounds and articulate certain remedies and prohibitions designed to protect the right of conscience. However, only South Dakota provides conscience legislation specific to pharmacists¹⁷⁰ and Illinois has enacted a comprehensive conscience statute that protects against recriminatory action against any medical personnel for refusing to act contrary to their conscience, thus encompassing pharmacists in the context of EC distribution.¹⁷¹ As nearly all conscience statutes were enacted without regard to pharmacists, these statutes are deficient in the context of pharmaceutical distribution of reproductive medications in both their scope and protection.

The great majority of current conscience clauses protect a right to refuse to participate in “abortion.”¹⁷² A few states specifically include a right to refuse to participate in contraception procedures within their conscience laws,¹⁷³ thus including EC within its scope. Most of these “contraception-inclusive statutes” are

¹⁶⁹See *infra* notes 170-173.

¹⁷⁰S.D. CODIFIED LAWS § 36-11-70 (Michie 1998).

¹⁷¹ILL. COMP. STAT. ANN. 70/1 *et seq.* (West 1993).

¹⁷²See ALASKA STAT. § 18.16.010 (Michie 1997); ARIZ. REV. STAT. § 36-2151 (1993); CAL. HEALTH & SAFETY CODE § 123420 (West 1996); DEL. CODE ANN. tit. 24, § 1791 (2000); HAW. REV. STAT. ANN. § 453-16 (Michie 2001); IDAHO CODE § 18-612 (Michie 2000); IND. CODE ANN. § 16-34-1-4 to 7 (West 1997); IOWA CODE ANN. § 146.1 (West 1997); KAN. STAT. ANN. § 65-443 (2000); KY. REV. STAT. ANN. § 311.800 (Baldwin 2001); LA. REV. STAT. ANN. § 1299.31 (West 2001); MD. CODE ANN., HEALTH-GEN. § 20-214 (2001); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 1996); MICH. COMP. LAWS ANN. §§ 333.21081-84 (West 2001); MINN. STAT. ANN. §§ 145.414, 145.42 (West 1998); MO. ANN. STAT. § 197.032 (West 1996); MONT. CODE ANN. § 50-20-111 (2001); NEB. REV. STAT. §§ 28-337 to 341 (2000); NEV. REV. STAT. § 632.475 (1999); N.J. STAT. ANN. §§ 2A:65A-1 to 3 (West 2000); N.M. STAT. ANN. § 30-5-2 (Michie 2001); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); N.C. GEN. STAT. § 14-45.1 (2001); N.D. CENT. CODE § 23-16-14 (2001); OHIO REV. CODE ANN. § 4731.91 (Anderson 2001); OKLA. STAT. ANN. tit. 63, § 1-741 (West 1996); 18 PA. CONS. STAT. ANN. § 3213 (West 2000); R.I. GEN. LAWS § 23-17-11 (2001); S.C. CODE ANN. §§ 44-41-40, 50 (Law. Co-op. 2001); TEX. OCC. CODE ANN. §§ 103.001-003 (Vernon 2002); UTAH CODE ANN. § 76-7-306 (2001); VA. CODE ANN. § 18.2-75 (West 2001); WIS. STAT. ANN. § 253.09 (West 2001); 42 U.S.C. § 300a-7 (1988).

¹⁷³See ARK. CODE ANN. §§ 20-16-304(4)-(5) (Michie 2000); COLO. REV. STAT. § 25-6-102(9) (West 2001); FLA. STAT. ANN. § 381.0051(6) (West 1997); GA. CODE ANN. § 49-7-6 (2001); ME. REV. STAT. ANN. tit. 22, § 1903(4) (West 1992); OR. REV. STAT. § 435.225 (1999); TENN. CODE ANN. § 68-34-104(5) (2001); W. VA. CODE § 16-2B-4 (2000); WYO. STAT. ANN. § 42-5-101 (2001).

limited in their protection to either government personnel¹⁷⁴ or private sector personnel,¹⁷⁵ while only a few protect any person, and not just private or public sector individuals.¹⁷⁶

The problem with the “abortion-only statutes” is that they may not include EC.¹⁷⁷ This is illustrated in a California appellate case where the court held that EC “constitutes ‘prevention,’ i.e., birth control, rather than ‘termination,’ i.e., abortion” thus precluding the application of the California conscience clause to a Catholic hospital’s refusal to disclose information about EC.¹⁷⁸ Further, most statutes define “abortion” as the “termination of a human pregnancy”¹⁷⁹ without defining “pregnancy.” Thus, it is likely that scientific definitions of when pregnancy commences (at implantation of the blastocyst)¹⁸⁰ will control, leaving EC void of coverage under most conscience legislation.

A further problem with abortion-only statutes is that they protect against *participation* or *assistance* in abortion.¹⁸¹ Thus, if a pharmacist were successful in persuading a court that EC should be included within the definition of abortion, another hurdle would arise. The pharmacist would still have to convince the court that dispensing of EC is a form of *participation* or *assistance* in abortion. Some interpreters of conscience laws may conclude that the pharmacist’s dispensing of drugs is too far removed an act to qualify as participation, performance, assistance, or provision of abortion. In fact, the Iowa Attorney General opined that a pharmacist who prepares the saline solution used in abortions is not performing or assisting in abortions.¹⁸² Thus, it is unclear at best whether pharmacists who refuse to dispense EC would be considered significant enough actors in the abortion or EC process to be protected under many conscience clause statutes.

Under the statutes that unquestionably protect the pharmacist in the context of distributing EC,¹⁸³ other limitations on the pharmacist’s right to refuse may exist,

¹⁷⁴See GA. CODE ANN. § 49-7-6 (2001); *Id.* § 49-7-2; OR. REV. STAT. § 435.225 (1999); W. VA. CODE § 16-2B-4 (2000).

¹⁷⁵See COLO. REV. STAT. § 25-6-102(9) (West 2001); ME. REV. STAT. ANN. tit. 22, § 1903(4) (West 1992); TENN. CODE ANN. § 68-34-104(5) (2001).

¹⁷⁶See ARK. CODE ANN. § 20-16-304(4) (Michie 2000); FLA. STAT. ANN. § 381.0051(6) (West 1997); WYO. STAT. ANN. § 42-5-101 (2001).

¹⁷⁷See *supra* Section II.B.

¹⁷⁸*Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 413 (Cal. Ct. App. 1989).

¹⁷⁹See, e.g., OHIO. REV. CODE ANN. § 2919.11 (Anderson 2001).

¹⁸⁰See *supra* Section II.B.2.

¹⁸¹See, e.g., ARIZ. REV. STAT. § 36-2151 (1993) (protecting against “participat[ion] in the medical or surgical procedures which will result in...abortion”); IDAHO CODE § 18-612 (Michie 2000) (protecting against “the performance or provision of any abortion”); IND. CODE ANN. § 16-34-1-4 to 7 (West 1997) (protecting refusal to “perform an abortion or to assist or participate in...an abortion”).

¹⁸²1976 Op. Att’y Gen. 478 (Iowa Attorney General opinion March 1, 1976).

¹⁸³See *supra* note 173.

such as protecting the right to refuse only to the extent the pharmacist refuses to dispense.¹⁸⁴ A referral to another pharmacist could be considered separate and unrelated to participation in abortion, and thus a refusal to refer would not be protected against recriminatory action. For many pharmacists referral would be no less in conflict with their moral convictions than actually distributing ECPs.¹⁸⁵

In fact, only four jurisdictions' conscience legislation includes protection of a pharmacist's right to refuse to furnish or provide "information" about contraceptive therapy.¹⁸⁶ A pharmacist who refuses to refer a patient to another pharmacist could argue that a referral is the provision or furnishing of "information" about EC, and thus refusing to refer is protected under these statutes. However, if a pharmacist was successful making such an argument, the protection provided under these four statutes is limited to protection against civil tort liability.¹⁸⁷ The pharmacist's employer would not be prevented from discharging the refusing pharmacist, nor would a state pharmacy board be precluded from initiating disciplinary action if it so desired.¹⁸⁸

The ambiguity of and improbability that current conscience statutes apply in the pharmaceutical context to all possible objections a pharmacist may have regarding certain abortion and contraceptive drugs provides a flimsy foundation on which to enable a pharmacist to avoid contradicting her moral convictions. A pharmacist who does follow her conscience by either refusing to distribute or refusing to refer is at the mercy of a judge's interpretation of the jurisdiction's respective conscience statute, and it is not unlikely that such statutes will be interpreted narrowly.¹⁸⁹ Further, many conscience statutes are confined regarding what they protect against, precluding even a sympathetic judiciary from protecting the pharmacist from all of the various possible consequences of following her conscience.¹⁹⁰ Moreover, the pharmacist should not have to depend on after-the-fact judicial measures to ensure she will not be punished for following her morals. Law and policy that clearly recognize the potential moral dilemmas of pharmacists and accordingly provide broad protection of conscience would put customers and employers on notice so as to accommodate all. Current conscience statutes fail in this regard.

VI. SECTION V: SOLUTION

Legal protection must serve two purposes in order to appropriately ensure a pharmacist's right of conscientious refusal: 1) prevent and deter detrimental recriminatory action against the pharmacist; and 2) provide adequate remedies in the

¹⁸⁴See, e.g., ME. REV. STAT. ANN. tit. 22, § 1903(4) (West 1992) (protecting one's right to refuse to "provide" contraception).

¹⁸⁵See *supra* Section II.C.

¹⁸⁶See ARK. CODE ANN. § 20-16-304(4)-(5) (Michie 2000); COLO. REV. STAT. § 25-6-102(9) (West 2001); FLA. STAT. ANN. § 381.0051(6) (West 1997); TENN. CODE ANN. § 68-34-104(5) (2001).

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹See *supra* notes 178 and 182.

¹⁹⁰See *supra* note 181.

case that the pharmacist is sued or disciplined. The most efficient and effective means to these ends is the enactment of state and federal legislation.

The first step to successful enactment of pharmacist conscience legislation in each state and the United States is the cooperation of local, regional, and national pharmaceutical associations. The American Pharmaceutical Association took a large positive step when it adopted its pharmacist conscience clause.¹⁹¹ However, in the same pronouncement it rejected adoption of a policy encouraging enactment of state and national legal protection of the right of conscience.¹⁹² If pharmacists themselves, as represented by their professional associations and organizations, do not call for state and national legislative action, the road to adequate protection will be more difficult.¹⁹³

In any event, an effective conscience statute should take into consideration many complex issues including broad protection against recriminatory action, efficient administration of pharmacies, and accommodation of patients. First and foremost the conscience clause should serve its purpose stating clearly that no pharmacist shall be required to dispense abortion or EC drugs, nor shall any pharmacist be required to refer to another pharmacist who will dispense abortion or EC drugs.¹⁹⁴ Although pharmacists currently have no role in the distribution of mifepristone,¹⁹⁵ the abortion language should nonetheless be included as the potential for future pharmaceutical access exists.¹⁹⁶ Next, the conscience statute should prohibit discrimination, civil liability, and professional disciplinary action that result from exercising the aforementioned rights of refusal.¹⁹⁷ The statute should also encompass provisions

¹⁹¹See *supra* note 96.

¹⁹²American Pharmaceutical Association, Report of the House Delegates, Rejected Policy Proposals, available at <http://www.aphanet.org/lead/hod.html> (last visited Feb. 16, 2002). The APhA rejected a policy of urging "adoption of state laws and regulations authorizing a pharmacist's conscience clause." *Id.*

¹⁹³At least one state pharmaceutical association has adopted a conscience clause that recognizes the pharmacist's right to refuse dispensing and referring. Angela Bonavoglia, *Co-opting Conscience: The Dangerous Evolution of Conscience Clauses in American Health Policy*, PROCHOICE RESOURCE CENTER (ProChoice Matters series, Port Chester, N.Y.), Jan. 1999, at 4; <http://www.prochoiceresource.org/about/CoopConsc.pdf> (last visited Apr. 7, 2004). The Pharmacists Society of the State of New York adopted a refuse to dispense and refuse to refer clause in 1998. *Id.*

¹⁹⁴As South Dakota is the only state with a pharmacist conscience clause, it provides an example of how the language would appear. The first sentence of South Dakota's pharmaceutical conscience clause states that "[n]o pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to: (1) Cause an abortion; or (2) Destroy an unborn child as defined in subdivision 22-1-2(50A)[.]" S.D. CODIFIED LAWS § 36-11-70 (Michie 1998). "Unborn child" is defined as "an individual organism of the species homo sapiens from fertilization until live birth." *Id.* § 22-1-2(50A). Thus, EC is included in the conscience clause, but no explicit right to refuse referral exists.

¹⁹⁵See *supra* Section II.B

¹⁹⁶See *supra* Section II.B.

¹⁹⁷No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or pharmacy of the pharmacist or the basis for

prohibiting discrimination in the hiring process so as to preclude pharmacy-employers from screening applicants to avoid hiring pro-life pharmacists in the first place.¹⁹⁸ Finally, the statute should provide adequate methods of deterrence. Employment discrimination could be deterred through its criminalization or by providing an express cause of action in tort as a remedy to the discriminatory hiring, firing, demotion, or promotion of pharmacists.

Employer and patient considerations should also exist in a pharmacist conscience clause. Prior notification of a pharmacist's beliefs regarding abortion and EC should be disclosed to the employer so as to enable efficient administration of the pharmacy. Further, patients should be put on notice in advance regarding when pharmacists with moral objections to abortion and EC will be on duty. For example, schedules could be posted conspicuously within a pharmacy as to when abortion and EC drugs will and will not be available to customer-patients. This will enable patients to avoid the hassle of going to a pharmacy and having their prescription refused. In any event, matters such as the aforementioned should be considered when drafting a pharmacist conscience clause.

VII. CONCLUSION

Pharmacists, like other professionals such as physicians and attorneys, have a general duty to ensure their client's best interests, and thus must put the health of patients above all other considerations.¹⁹⁹ Thus, it would seem to follow, when a pharmacist is presented with a valid prescription of what is safe for the patient to consume, the drugs should be distributed without dispute. However, to require that a pharmacist, or any professional, participate in what she would equate to the taking of a human life should never be a principle of professional ethics.

Certain issues, because of their inherent complexity and ambiguity, must be resolved, with guidance from religion, philosophy, and science, in the heart and mind of each individual. The commencement of human life and the relative sanctity of unborn life are issues that fall within this category of subjective individual determination. The thoughtful decision should be respected and free from vilifying recrimination. If a pharmacist, in her heart of hearts, concludes that accommodating prescriptions for abortive and EC medications is akin to directly facilitating the destruction of a precious human life, a refusal to accommodate such prescriptions should be protected under the law and within the profession. A safeguard of the right to refuse is imminently necessary as abortive drugs and EC become more widespread and risk of liability and loss of employment may compel many pharmacists to disregard their sacred beliefs or reap the consequences of their objections. Proactive acceptance of a pharmacist's conscientious objection to abortion and EC within the pharmaceutical community would pave the way to legislative protection already afforded doctors and nurses.²⁰⁰

any disciplinary, recriminatory, or discriminatory action against the pharmacist." S.D. CODIFIED LAWS § 36-11-70 (Michie 1998).

¹⁹⁸Title VII prohibits discrimination in hiring practices. See 42 U.S.C. § 2000e(2)(a)(1) ("It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire...").

¹⁹⁹See *supra* Section III.C.

²⁰⁰See *supra* Section V.C.

