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Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves from Them.

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REFUSAL CLAUSES & PRO-LIFE PHARMACISTS: HOW CAN WE PROTECT OURSELVES FROM THEM?

MINH N. NGUYEN*

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* St. Mary’s University School of Law, Candidate for J.D., May 2007; University of Texas at Austin, B.S. in Human Biology, Aug. 2004. I would like to thank my parents, Duc Nguyen and Ba Dao, for all your love and support. Also, to my sister and brother, Kim and Tri Nguyen, thank you for being so excited about all my accomplishments and inspiring me to always want to make you proud. Thank you to my friends, for their understanding and support while I spoke endlessly about this comment. I would like to thank A. Dumas, because without his guidance I wouldn’t have made it to where I am today. Finally, I wish to extend a special thanks to K. Kirkwood, because without his support I wouldn’t still be here today. Thank you for pushing me to do my best and never letting me quit.

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

— Margaret Sanger, founder of Planned Parenthood¹

I. INTRODUCTION

The pro-life/pro-choice debate that has plagued the right to privacy for decades has broadened, and now includes reproductive contraception among the ranks of intense controversy. This latest controversy, which began with doctors and other healthcare providers, has evolved from the refusal to participate in abortion procedures to an alarming trend of pharmacists who decline to fill prescriptions for oral contraceptives.²

For over a year, Julee Lacey, a married mother of two children, went to get her birth-control pills at the same local CVS pharmacy in North Richland Hills, Texas.³ One day last year, the pharmacist refused to dispense the prescription claiming that birth control was contrary to her personal beliefs.⁴ A similar incident occurred in Denton, Texas, where emergency contraceptives (ECPs) were denied to an alleged victim of rape.⁵ The victim obtained a prescription for the ECPs from a hospital; however, three different pharmacists denied her access to the prescription, asserting that contraception was contrary to their moral and religious beliefs.⁶

This phenomenon is not unique to Texas. More than a year after the incident in Denton, the frequency of pharmacists who allow their personal moral convictions to dictate the availability of prescription contraceptives has increased.⁷ For example, Kathleen Putz, a mother of four children, discovered that her local Milwaukee Walgreen's would not fill her "emergency prescription for the morning-after pill" after the condom

1. Margaret Sanger Quotes, http://womenshistory.about.com/od/quotes/a/margaret_sanger.htm (last visited Jan. 22, 2006).

2. KaiserNetwork.org, Daily Reports, *Kaiser Daily Reproductive Health Report Summarizes Opinion Pieces on Pharmacists Refusal to Fill Certain Prescriptions*, Apr. 20, 2005, http://www.kaisernetwork.org/daily_reports/rep/rep_index.cfm?hint=2&DR_ID=29461.

3. *Id.*

4. Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 8, 2004, at 3A, available at http://www.usatoday.com/news/nation/2004-11-08-druggists-pill_x.htm.

5. *Id.*

6. NARAL Pro-Choice America, *Women's Stories About Pharmacy Discrimination*, http://www.prochoiceamerica.org/long_way/stories.html (last visited Jan. 22, 2006).

7. Editorial, *Pharmacy Foes: Drug Denial Deters Democracy*, LANTERN (Columbus, Ohio), Feb. 11, 2005, at 1, available at <http://www.thelantern.com/news/2005/02/11/> (follow "Pharmacy foes" hyperlink).

used by her husband was compromised.⁸ On another occasion, a CVS pharmacist near the University of Massachusetts, Amherst, campus deleted a student's online order for birth control, because "he didn't want to fill it."⁹ Within the last two years, there have been approximately 180 similar incidents of pharmacists refusing to fill prescription contraceptives on grounds of moral or religious objections.¹⁰ Across the nation, pharmacists in at least eleven states have refused to fill prescriptions for oral and/or emergency contraceptives.¹¹ This trend has even spread overseas to Australia, where the sole pharmacy "in the small rural town of Merriwa" refused to supply both condoms and "the morning-after pill for ethical reasons."¹²

This religious fundamentalism has presented more than a minor inconvenience for women seeking prescription contraceptives. Every patient is entitled to have his or her prescriptions filled for medications that licensed physicians and healthcare providers have prescribed. Some women were fortunate and simply had to wait for another pharmacist at the same facility to dispense the contraceptives.¹³ Those who were not so lucky were forced, by necessity, to travel varied distances to find a pharmacist whose personal beliefs did not interfere with their duty to dispense prescription drugs. Still others were delayed for so long that they were forced to postpone or skip the dosage altogether.¹⁴

During their reproductive years, 95% of women in the United States use a contraceptive at least once, and 27% of those women choose to take oral contraceptive pills.¹⁵ Oral contraceptives, or birth control pills, prevent pregnancy by inhibiting the release of eggs from the ovaries.¹⁶ Without an egg for sperm to fertilize, pregnancy cannot occur.¹⁷ The pill

8. Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A5490-2005Mar27.html>.

9. Amy Grzybowski, *University Drive Pharmacist Denies a Student Birth Control*, DAILY COLLEGIAN (MASS.), Dec. 13, 2004, [http://www.dailycollegian.com/news/2004/12/13/follow "University Drive pharmacist denies a student birth control" hyperlink](http://www.dailycollegian.com/news/2004/12/13/follow%20University%20Drive%20pharmacist%20denies%20a%20student%20birth%20control).

10. Molly M. Ginty, *Pharmacists Dispense Anti-Choice Activism*, WOMEN'S ENEWS, May 2, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2278>.

11. *Id.*

12. Kerri Parnell, Editorial, *Religious Prejudice Has No Place in Theory or Practice*, AUSTL. DOCTOR, July 22, 2005.

13. Grzybowski, *supra* note 9.

14. Jones, *supra* note 4.

15. PLANNED PARENTHOOD FED'N OF AM., INC., REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS 1 (2004), <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-041217-refusal-reproductive.pdf>.

16. MayoClinic.com, Birth Control Pill, <http://www.mayoclinic.com/invoke.cfm?objectid=287D1ABE-1807-41DF-A121B6D1FF492B12> (last visited Jan. 22, 2006).

17. *Id.*

also functions by thickening the mucus lining of the cervix, thereby reducing the amount of sperm entering the uterus and gaining access to “any eggs that may have been released.”¹⁸ When taken correctly, birth control pills are 99% effective in preventing pregnancy.¹⁹ The effectiveness of the medication is reduced to only 92-95% when a user misses or delays taking the pill.²⁰ Emergency contraceptives, such as the morning-after pill, contain higher doses of the active ingredients than those found in other oral contraceptives and also serve to prevent pregnancies.²¹

Pro-life activists have expressed their concerns about emergency contraception. Unlike surgical abortions and the highly controversial RU-486,²² emergency contraceptives (ECPs) are ineffective once a woman becomes pregnant.²³ Emergency contraception, which must be taken within 72 hours for 75-89% effectiveness,²⁴ functions to prevent pregnancy by one of three mechanisms: inhibiting ovulation; preventing fertilization; or hindering the “implantation of a fertilized egg.”²⁵ Pharmacists for Life International, a pharmacy association which claims to be the only exclusively pro-life pharmaceutical association,²⁶ argues that this third method amounts to an abortion since many believe that life begins at the moment an egg is fertilized.²⁷

On the other hand, pro-choice advocates at Planned Parenthood contend that “pharmacists have a duty to dispense drugs. . . lawfully prescribed by a physician,” and “should not employ individuals who are not

18. *Id.*

19. *Id.*

20. Sexual Health InfoCenter, Birth Control Pill, <http://www.sexhealth.org/birthcontrol/pill.shtml> (last visited Jan. 22, 2006).

21. MayoClinic.com, *Morning-After Pill: How Does it Work?*, May 13, 2005, <http://www.mayoclinic.com/health/morning-after-pill/AN00592> (last visited Jan. 22, 2006).

22. Also known as Mifepristone, RU-486 is used as an abortifacient, or a chemical abortion of early pregnancy. This synthetic steroid is taken within sixty-four days of conception. Taken “within four hours of the second dose,” it is ninety-two percent to ninety-nine percent effective. Wikipedia.com, The Free Encyclopedia, Mifepristone, <http://en.wikipedia.org/wiki/RU-486> (last visited Jan. 22, 2006).

23. Caroline Bollinger, *The Debate over Emergency Contraception*, Prevention.com, <http://www.prevention.com/article/0,5778,s1-1-93-35-4167-1,00.html> (last visited Jan. 22, 2006).

24. Planned Parenthood Federation of America, Inc., Facts About Birth Control, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-birth-control-02.xml> (last visited Jan. 22, 2006).

25. Marie McCullough, *Abortion Debate Spreads to Pharmacy Counter*, RIGHTGRRRL.COM, Mar. 28, 1999, <http://www.rightgrrrl.com/dec97grrl/032899.shtml>.

26. Pharmacists for Life International, <http://www.pfli.org/main.php?pfli=ABoutus> (last visited Jan. 22, 2006).

27. McCullough, *supra* note 25.

prepared to serve all of their customers.”²⁸ Similarly, Pharmacists for Choice’s founder Robert Tendler argues that pharmacists are obligated to fill the prescriptions of the patients that come into the pharmacy.²⁹ Advocates are worried that these occurrences will complicate patient-pharmacist interactions and may serve to undermine reproductive rights.³⁰ Patients expect their healthcare providers, including their pharmacists, to act in the patients’ best interests, regardless of the providers’ personal convictions. Once pharmacists begin to allow their religious or moral convictions to influence their medical decisions and actions, the health and safety of all patients will be compromised.

In most states, pharmacists who refuse to dispense birth control prescriptions face the possibility of disciplinary action, including termination of employment.³¹ However, under new and proposed legislation — commonly referred to as refusal clauses, religious exemptions, or conscience clauses — healthcare providers may legally refuse to “provide or participate in certain medical procedures for moral or religious reasons”³² without fear of such consequences.

This development has a disparate effect on women. There have been no reports of pharmacists or healthcare providers refusing to sell or provide condoms to males. Nor have there been any moral objections to supplying impotence drugs. Women appear to be the only group affected by refusal clauses, facing the almost certain possibility of being denied their contraceptives.

This comment will discuss legislation that grants physicians, pharmacists, and other healthcare providers the right to refuse to provide services or to dispense drugs based on moral or ethical opposition. More importantly, the discussion will focus on the current and future effect of such legislation upon women’s reproductive freedom. Part II will provide a background look at women’s rights and how the courts have handled similar controversies. Part III will address the disparate effect these laws have on women and their impact on women’s health. Part IV will discuss what effect the legislation will have on women’s rights of privacy and their available remedies, including a discussion on the implication of constitutional protections.

28. Planned Parenthood Federation of America, Inc., A Summary of State Legislation, Laws, and Administrative Action, <http://www.plannedparenthood.org/pp2/portal/files/portal/media/factsreports/fact-state-summary.xml> (last visited Jan. 22, 2006).

29. McCullough, *supra* note 25.

30. Ginty, *supra* note 10.

31. Betsy Malloy, *Dispensing Morality; Refusal Clauses, Religious Exemptions and Conscience Clauses*, TEX. LAW., June 13, 2005, at 38.

32. *Id.*

II. LEGAL HISTORY

A. Privacy

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

—Supreme Court Justice Brennan, in *Eisenstadt v. Baird*³³

The battle for the right to privacy, or personal autonomy, was not won overnight. Originally a right that conferred only an entitlement to be left alone, the United States Supreme Court's interpretation of the right to privacy has evolved into a "liberty" protected by the Fourteenth Amendment.³⁴ The privacy of family, marriage, and motherhood are now protected from governmental intrusion.³⁵

1. *Griswold* and Marital Privacy

The first step towards expanding the right of privacy occurred nearly forty years ago and led to the widespread acceptance of contraception that exists today.³⁶ In *Griswold v. Connecticut*,³⁷ two Planned Parenthood colleagues, executive director Estelle Griswold and medical director C. Lee Buxton, were convicted for violating a state statute prohibiting the distribution of information, instructions, and medical advice to married couples regarding contraceptive materials.³⁸ Although not expressly enumerated in the constitution, the various guarantees of the Bill of Rights have been held to establish a "penumbra" of rights that result in a constitutional guarantee of privacy.³⁹ The Court found that, together, the First, Third, Fourth, and Fifth Amendments created a right of privacy in marital relations, described as a sacred association in which the government has no place.⁴⁰ The Supreme Court struck down the

33. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating unmarried persons have the right of access to contraceptives).

34. Legal Information Institute, Right of Privacy: Personal Autonomy, http://www.law.cornell.edu/topics/personal_autonomy.html (last visited Jan. 22, 2006).

35. *Id.*

36. See generally SUSANNE PICHLER, PLANNED PARENTHOOD FED'N OF AM., INC., *GRISWOLD V. CONNECTICUT—THE IMPACT OF LEGAL BIRTH CONTROL AND THE CHALLENGES THAT REMAIN* (2005), <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-000501-griswolddone.pdf>.

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

38. *Id.* at 480 (holding that the right of privacy included a right to marital privacy).

39. *Id.* at 483.

40. See *id.* at 484-86 (interpreting the First Amendment right of association, the Third Amendment prohibition against quartering soldiers during times of peace, the Fourth

Connecticut statute on grounds that it violated the judicially recognized right to privacy, particularly where enforcement of the statute would require intrusion into the sanctity of marital bedrooms, an idea the Court found wholly-repulsive.⁴¹ The decision ensured married persons the freedom to manage their own choices regarding conception and contraceptives without the threat of governmental interference.

2. Individual Privacy

It took the Court seven more years, in *Eisenstadt v. Baird*,⁴² to extend the freedom to distribute contraceptives to unmarried individuals on the same basis as married persons.⁴³ A Massachusetts law made it legal to administer or prescribe contraceptives to married persons but not to unmarried persons.⁴⁴ In 1967, William Baird was convicted under the statute for providing Emko Vaginal Foam to a young woman following a lecture on contraception.⁴⁵ While the Supreme Court declined to specifically address the privacy issue as it pertained to unmarried persons, the Court invalidated the statute on grounds that it treated unmarried persons differently than married persons.⁴⁶ The Court held that the statute violated the “rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.”⁴⁷ Deterring premarital sex was found to be insufficient justification to warrant restricting a woman’s freedom to decide whether or not to conceive children.⁴⁸ The outcome of the case gave unmarried persons the same rights as married persons under *Griswold* — a constitutionally protected right of privacy in procreative decisions.

In *Carey v. Population Services International*,⁴⁹ the Supreme Court broadened the scope of privacy by extending to minors the right to obtain and possess birth control.⁵⁰ The Court based its decision on the holdings in *Griswold* and *Eisenstadt*.⁵¹ Applying strict judicial scrutiny, the Court

Amendment protection against unreasonable search and seizure, and Fifth Amendment Self-Incrimination Clause to create zones of privacy).

41. *See id.* at 485-86.

42. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

43. *See id.* (holding unmarried individuals have the same right to contraceptives as married persons).

44. *Id.*

45. *Id.* at 440.

46. *Id.* at 453.

47. *Eisenstadt*, 405 U.S. at 443.

48. *Id.* at 448.

49. *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977).

50. *Id.* (giving minors the right of access to birth control).

51. *See id.* at 688-89 (upholding past precedent that married and unmarried individuals have the right to contraceptives).

invalidated a statute prohibiting the sale or distribution of contraceptives to minors because the State of New York failed to show that the action was necessary to achieve or promote a compelling state interest.⁵² The Court reasoned that “the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”⁵³ Subsequent to the Court’s decisions, contraceptives are legally accessible by married individuals, unmarried individuals, and now minors.

3. Expanding Privacy

a. *Roe v. Wade*

*Roe v. Wade*⁵⁴ is the settled law of the land. It is not – it’s a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the Casey decision. Accordingly, it’s the settled law of the land.⁵⁵

In the landmark case *Roe v. Wade*, the Supreme Court held that a state law prohibiting abortion violated an individual’s constitutional right to privacy guaranteed by the Fourteenth Amendment.⁵⁶ *Roe*, a Texas resident, sought to terminate her pregnancy but was unable to obtain an abortion legally because state law prohibited abortions.⁵⁷ *Roe* brought suit against the Dallas County District Attorney, claiming the statute was “unconstitutionally vague and that [the state statute] abridged her right of personal privacy.”⁵⁸ The Court agreed, recognizing that the right of privacy encompasses “activities relating to marriage, procreation, contraception,” and family relationships.⁵⁹ The Court struck down the statute for being overly broad. The Court refused to say that abortion was an absolute right, however, and asserted that the right to abortion was subject to some limitations.⁶⁰ The Court also stated that early abortion laws were enacted to protect pregnant women from placing their lives in dan-

52. *See id.* at 688.

53. *Id.* at 693.

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

55. Press Release, NARAL Pro Choice America, Bush Administration Admits That Roberts “Settled Law” Statement Is Meaningless (July 26, 2005), http://www.prochoiceamerica.org/news/press-releases/2005/20050726_settledlaw.html (quoting John G. Roberts, during the confirmation hearing, when asked for his own views on *Roe v. Wade*, 410 U.S. 113 (1973)).

56. *Roe*, 410 U.S. at 164.

57. *Id.* at 120 (articulating that the statute provided an exception only when the pregnancy was threatening the life of the mother).

58. *Id.*

59. *Id.* at 152-53.

60. *See id.* at 154.

ger at a time when the procedure was extremely hazardous.⁶¹ The parties who challenged abortion laws claimed these procedures were relatively safe because of modern medical advances, and thus those concerns were no longer valid.⁶²

The Court's decision in *Roe* sparked a debate that continues to raise moral and legal questions until this day: whether abortion should be legal. That question inherently raises the concerns over the role that religion plays in American jurisprudence. The decision sparked pro-life movements, in which people began protesting and demonstrating throughout the nation, and specifically targeting the front steps of abortion clinics.⁶³ Protesters organized rallies and distributed literature to persuade women to reconsider their decision to have an abortion.⁶⁴ In extreme cases, pro-life activists burned and bombed clinics purported to provide abortion services.⁶⁵ Likewise, groups supporting abortion rights and the *Roe* decision have emerged and expressed their views to the nation.⁶⁶ However, pro-choice advocates have not resorted to the extreme measures that some of their counterparts have elected to employ, and instead continue to inform the public of the choices available to them in order to promote reproductive freedom.

Subsequent cases like *Webster v. Reproductive Health Services*⁶⁷ and *Planned Parenthood v. Casey*⁶⁸ reaffirmed the *Roe* decision and upheld the constitutional right to abortion as a privacy interest. *Webster* approved a Missouri law that imposed restrictions on the use of state funds, facilities, and employees in abortions.⁶⁹ Provisions requiring testing for the viability of a fetus after twenty weeks of pregnancy were found to be constitutional, but those limiting abortions in the second trimester of pregnancy were deemed unconstitutional.⁷⁰ In *Casey*, the Court upheld a woman's right to have an abortion, but lowered the standard for analyz-

61. *Roe*, 410 U.S. at 148.

62. *Id.* at 151.

63. National Abortion Federation, History of Abortion, http://www.prochoice.org/about_abortion/history_abortion.html (last visited Jan. 22, 2006).

64. *Id.*

65. *Id.*

66. See generally Million4Roe.com, <http://www.million4roe.com> (last visited Feb. 20, 2006); SaveRoe.com, <http://www.saveroe.com> (last visited Feb. 20, 2006).

67. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (holding that some restrictions on abortion were unconstitutional while upholding other restrictions as valid).

68. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (certain restrictions on abortion were constitutional but that provision requiring spousal consent was not).

69. *Webster*, 492 U.S. at 490.

70. *Casey*, 505 U.S. at 846 (reaffirming the central holding of *Roe v. Wade*, 410 U.S. 113 (1973)).

ing restrictions of that right by invalidating a regulation requiring spousal consent while upholding the others.⁷¹

Roe changed the Court's interpretation of the right of privacy, expanding it to include procreation, contraception, and family planning.⁷² The Court classified the right as fundamental, one warranting strict judicial scrutiny - which is a two-prong analysis - a compelling state interest to justify any governmental intrusion and a means narrowly tailored to that interest.⁷³ Married persons, unmarried couples, and minors could expect to have privacy and autonomy when making decisions such as whether or not to use contraceptives, which contraceptives to use, whether or not to have children, and if so, how many children to have. The Court's decision limited any governmental intrusion before the fetus was viable.⁷⁴ After viability, the state's interest in protecting the fetus outweighs the woman's right to personal autonomy.⁷⁵ Without prohibiting abortion, the state may impose regulations on abortion after the point of viability, so long as the restrictions were tailored to state interests.⁷⁶ Privacy now encompassed a freedom of reproductive choice that included decisions regarding contraception and abortion, exercisable by married, single, and minor individuals.

b. *Lawrence v. Texas*

The right of privacy was further developed in *Lawrence v. Texas*.⁷⁷ The Supreme Court recognized an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," and struck down a Texas statute criminalizing homosexual sodomy.⁷⁸ Justice Kennedy stated in the majority opinion:

Liberty protects the person from *unwarranted government intrusions* into a dwelling or other private places. . . . [T]he State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where *the State should not be a domi-*

71. See generally *id.* (holding that the requirement of spousal consent for abortion was unconstitutional).

72. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

73. *Id.* at 155.

74. See *id.* at 163 (viability is reached at the end of the first trimester, when the fetus presumably has the ability to maintain a meaningful life once outside the mother's womb).

75. See *id.* at 163-64 (reasoning that after viability the State's interest was to promote the "potentiality of human life").

76. *Id.* at 164-65.

77. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (holding all individuals have a right to personal autonomy).

78. *Id.* at 572.

nant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and *certain intimate conduct*.⁷⁹

The Court held that homosexual individuals possessed the same autonomy that their heterosexual counterparts enjoyed.⁸⁰ Furthermore, the court ruled that the statute in question did not further any legitimate state interest that would “justify its intrusion into the personal and private life of the individual.”⁸¹ This decision reinforced the principle that individuals possess a right of privacy, which includes the right to make decisions regarding private aspects of their lives without fear of governmental interference. The government is barred not only from intruding in an individual’s personal activities both inside and outside the home, but also from interfering with any private decisions, including whether or not to use contraceptives.

B. *Current Legislation – Refusal Clauses*

In a legislative reaction to *Roe*, refusal clauses were enacted to afford doctors and healthcare providers the opportunity to opt-out of performing or assisting in abortions.⁸² Forty-six states currently have refusal clauses as part of their legislation, thirty-four of which only refer to abortion.⁸³ In the other twelve states, the statutes concern both abortion and contraception.⁸⁴ Now, bills are being introduced to extend the coverage of these clauses to include contraception.⁸⁵

Arkansas, Georgia, Mississippi, South Dakota, and now Arizona have enacted regulations that permit pharmacists to deny prescriptions for birth control.⁸⁶ Mississippi allows its healthcare providers and institutions to “decline to comply with an individual instruction or healthcare decision for reasons of conscience.”⁸⁷ Arkansas gives healthcare providers the right not to participate in any healthcare services.⁸⁸ This includes prescribing and dispensing any drug that may go against the healthcare

79. *Id.* at 562 (emphasis added).

80. *Id.* at 574.

81. *Id.* at 578.

82. National Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation* (Jan. 2006), <http://www.ncsl.org/programs/health/conscienceclauses.htm>.

83. PLANNED PARENTHOOD FED’N OF AM., *supra* note 15, at 3.

84. *Id.*

85. *See generally* National Conference of State Legislatures, *supra* note 82.

86. Brianne Carlon, ‘The Pill’ Won’t Be Hard to Swallow for Kent State U. Students, *Officials Say*, DAILY KENT STATER, Oct. 13, 2005.

87. MISS. CODE ANN. § 41-41-215 (West 1999).

88. ARK. CODE ANN. § 20-16-304 (2005).

provider's conscience.⁸⁹ Illinois is the only state that requires all hospitals that provide treatment to alleged sexual assault survivors to institute a protocol to ensure each patient be provided with FDA-approved contraceptives.⁹⁰ Thirteen other states, including Texas, have introduced legislation under the Pharmacist Refusal Clause that, if passed, would give pharmacists the right to refuse to provide emergency contraceptive services.⁹¹

Texas plans to amend TEX. OCC. CODE ANN. § 103.003, with House Bill 16, to grant physicians, pharmacists, and other healthcare providers the right to refuse to “dispense or participate in the dispensing of an emergency contraceptive.”⁹² In California, pharmacists must dispense a lawful prescription unless he or she provides written notification, upon acceptance of employment, that he or she holds ethical, moral, or religious objections to dispensing those drugs.⁹³

Three states, however, are conscious of women's rights and the necessity of birth control in certain circumstances, and thus have enacted laws that *require* a pharmacist to honor prescriptions.⁹⁴ Pharmacists in New Jersey are prohibited from refusing to dispense or refill prescriptions solely on the basis of moral or religious objections.⁹⁵ The laws in these states show that some legislatures are aware of the temerity of refusal clauses.

Controversy continually surrounds the issue of abortion and contraceptive rights, despite over thirty years of debate. *Roe* decided that the right to privacy included a woman's right to abortion, regardless of whatever restrictions subsequent decisions place on the right. Currently, pharmacists and other healthcare professionals can decide whether to fill a legally-prescribed medical prescription. Furthermore, they have the option of refusing to perform the duties of their employment for moral, ethical, or religious reasons. This new legislation begs two questions: (1) does the patient have a right to obtain medications prescribed to her by her doctor; and (2) who has the patient's best interest in mind?

89. § 20-16-304.

90. 410 ILL. COMP. STAT. ANN. 70/2.2 (West 2005) (concerning emergency contraception for sexual assault survivors).

91. National Conference of State Legislatures, *supra* note 82.

92. Tex. H.B. 16, 79th Leg. R.S. (2005).

93. Assemb. B. 21, 2004 Leg. Reg. Sess. § 4069(3)(A) (Cal. 2005), *available at* <http://ssl.csg.org/dockets/26cycle/2006B/26bbills/2126b09aca.pdf> (last visited Jan. 22, 2006).

94. National Conference of State Legislatures, *supra* note 82.

95. N.J.S.A. 45:14-40 (2005); S. 2178, 211th Leg. Reg. Sess. (N.J. 2005).

III. HISTORY OF DISPARATE TREATMENT OF WOMEN CONCERNING REPRODUCTIVE FREEDOM

A. *Discrimination*

*Disparate treatment based on unique, sex-based characteristics, such as the capacity to bear children, is sex discrimination.*⁹⁶

It is clear that refusal clauses have a disparate impact on women. There have been no articles or reports issued concerning a male being denied access to condoms directly caused by the religious convictions against contraception by a pharmacist. Spermicide sales have not been affected. There have been no headlines published which proclaim a refusal to perform vasectomies. There is no doubt that new legislation permitting refusal clauses is directed at women.

Refusing women access to contraceptives is, in itself, a violation of the Equal Protection Clause of the Fourteenth Amendment.⁹⁷ Although the language of the refusal clauses makes no specific reference to “women,” women are obviously the target, as they comprise the only group that consume oral contraceptives or ECPs. These laws categorize on the basis of sex, thus, they should be subjected to the Supreme Court’s intermediate judicial scrutiny, under which the law in question must be substantially related to an important government interest.⁹⁸ At first glance, the governmental interest appears to respect the beliefs and morals of conscientious pharmacists and healthcare providers. However, the apparent motive, in fact, serves as a deterrence to premarital intercourse. But the government does not have the right to intrude upon an individual’s private decision concerning premarital intercourse.⁹⁹ Under a heightened scrutiny, it can hardly be imagined that either government “motive” would be held important enough to validate discriminating against women by refusing to fill their prescriptions.

There is at least one case that illustrates why courts have already denied these governmental interests because they are insufficient to be “important.” In *Erickson v. Bartell Drug Co.*,¹⁰⁰ two female plaintiffs filed a class action suit claiming that an employer’s policy of denying coverage for prescription contraceptives, from a comprehensive health plan, was

96. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001).

97. U.S. CONST. amend. XIV, § 1 (“no state shall. . . deny to any person within its jurisdiction the equal protection of the laws.”).

98. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529 (2001) (under intermediate scrutiny, the means must be substantially related to an important government interest and no obviously less-discriminatory and equally-effective means exists).

99. See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unmarried individuals have the same right to contraceptives as married persons).

100. *Erickson*, 141 F. Supp. 2d 1266.

sexually discriminatory in that it singled out women, who are the only users of prescription contraceptives.¹⁰¹ Requiring women to spend their own money on contraceptives or else risk an unwanted pregnancy constitutes discrimination.¹⁰² The United States District Court for the Western District of Washington recognized women had different healthcare needs:

Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.¹⁰³

The court recognized the high incidence of unintended pregnancies and the economic burden imposed on a mother, a child, and society.¹⁰⁴ The court noted that prescription contraceptives were a preventative measure to reduce the amount of unwanted pregnancies.¹⁰⁵ The disparate treatment of women, resulting from the lack of access to prescription birth control, was found unconstitutional.¹⁰⁶

Erickson held that employers could not deny women access to contraceptives because it was sexually discriminatory.¹⁰⁷ With current and pending legislation, the government is permitting pharmacists and other health care providers to deny women access to birth control pills and ECPs. What is the difference between Bartell's denial of coverage for prescription contraceptives and pharmacists' refusal to honor prescriptions for contraceptives? There is none. With current and pending legislation, the government is permitting pharmacists and other healthcare providers to deny women access to birth control pills and ECPs.¹⁰⁸ Pharmacists and refusal clauses are just as guilty of sexual discrimination as the Bartell Drug Company. There seems to be little disparity between the one policy considered unconstitutional and a violation of women's rights and another that is spreading throughout the nation at an alarming pace.

101. *Id.* at 1268 (referring to birth control pills, Norplant, Depo-Provera, intra-uterine devices and diaphragms).

102. Covermypills.org, Get The Facts, <http://covermypills.org/facts/thecase.asp> (last visited Jan. 22, 2006).

103. *Erickson*, 141 F. Supp. 2d at 1271.

104. *Id.* at 1273.

105. *Id.*

106. *Id.* at 1276.

107. *Id.*

108. *See generally* National Conference of State Legislatures, *supra* note 82.

To date, the federal government has spent approximately \$117 million to cover costs for male impotence drugs.¹⁰⁹ Estimates suggest that spending will increase to nearly two billion dollars over the next ten years.¹¹⁰ Proposed legislation, voted against on June 24, 2005, would have provided for drugs, including Viagra, Cialis, and Levitra, to be covered under Medicare starting January 1, 2006.¹¹¹ Interestingly, birth control pills are not currently covered by Medicare.¹¹² Nancy Keenan of NARAL Pro-Choice America claims the government is not doing its part to “ensure that women have equitable access to prescriptions for *their* reproductive health.”¹¹³

Currently, sixty-two million American women are of childbearing age.¹¹⁴ Nearly seventy percent of those women are currently sexually active and indicate that they do not wish to become pregnant.¹¹⁵ The majority of these women, nearly eighty-nine percent, are practicing a form of contraception.¹¹⁶ The repercussions of the refusal clauses may potentially affect forty-two million sexually active and fertile women.¹¹⁷ Clearly, not a single male will be directly affected by the pending legislation.

The current governmental program amounts to institutional sex discrimination. The current system allows for federal funding for male impotence drugs while simultaneously denies coverage for birth control. Additionally, government statutes provide protection for pharmacists to deny women access to birth control.

How does the fact that women are the child-bearers warrant differential treatment when it comes to healthcare, contraception, and reproductive choices? Refusal clauses are unconstitutional, just as Bartell’s policy, because women, as a group, are singled out when pharmacists refuse to fulfill prescriptions for preventative contraceptives.

109. Stephen Dinan, *House Votes to Bar Public Funds for Viagra*, WASH. TIMES, June 25, 2005, at A02 available at <http://www.house.gov/doolittle/press/press05/innnews/news6-25-05.html>.

110. *Id.*

111. *Id.*

112. Katha Pollitt, *Stiffed*, NATION, June 13, 2005, available at <http://www.fundersnet.org/resources/docs/pollitt-stiffed.pdf>.

113. Dinan, *supra* note 109 (emphasis added).

114. THE ALAN GUTTMACHER INST., CONTRACEPTIVE USE: FACTS IN BRIEF (2006), available at http://www.guttmacher.org/pubs/fb_contr_use.pdf.

115. *Id.*

116. *Id.*

117. *Id.*

B. *Women's Health*

Refusal clauses allow pharmacists and other healthcare providers to deny access to birth control and emergency contraceptives, inevitably compromising the health of women everywhere. Oral contraceptives are prescribed for a variety of reasons, not just to prevent pregnancy. Birth control pills have been prescribed for mid-cycle pain associated with ovulation, regulation of the menstrual cycle, and the reduction of both heavy bleeding and menstrual cramps.¹¹⁸ They are also utilized by gynecologists to clear up acne, control endometriosis, shrink fibroids, and reduce the risk of ovarian cancer.¹¹⁹ Approximately twelve million women use oral contraceptives for purposes other than preventing pregnancy.¹²⁰ Pharmacists' opposition to oral contraceptives is based on moral objection to abortion, and thus there is no basis to know whether opposition would exist for the twelve million women who utilize the drug for other medical purposes.

Pregnancy can be life-threatening to women with pre-existing medical conditions such as anemia, cancer, severe diabetes, and heart disease.¹²¹ Severely anemic women may experience shortness of breath, fatigue, weakness, and headaches during pregnancy.¹²² Pregnant women with diabetes have a high rate of preeclampsia, postpartum bleeding, infection and hyperglycemia.¹²³ Patients with heart disease have increased chances of developing congestive heart failure, pulmonary oedema, cardiac ischemia, cardiac arrhythmias, and pulmonary emboli.¹²⁴

It is well-settled that complications during pregnancy may severely affect women's health.¹²⁵ Two to three American women die from pregnancy-related complications every day.¹²⁶ These deaths are caused by

118. MedicineNet.com, Oral Contraceptives, Birth Control Pills, http://www.medicinenet.com/oral_contraceptives_birth_control_pills/article.htm (last visited Jan. 22, 2006).

119. Caroline Bollinger, *Access Denied*, Prevention.com, <http://www.prevention.com/article/0,5778,s1-1-93-35-4130-1,00.html> (last visited Jan. 22, 2006).

120. *Id.*

121. NARAL PRO-CHOICE AM. FOUND., REFUSAL CLAUSES: DANGEROUS FOR WOMEN'S HEALTH 3 (2005), <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Refusal-Clauses-Refusal-Clauses-Dangerous.pdf>.

122. Health on the Net Foundation, Mother & Child Glossary - Anaemia and Pregnancy, http://www.hon.ch/Dossier/MotherChild/preexisting_conditions/anaemia.html (last visited Jan. 22, 2006).

123. *Id.*

124. *Id.*

125. See generally CTR. FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SAFE MOTHERHOOD: PROMOTING HEALTH FOR WOMEN BEFORE, DURING & AFTER PREGNANCY (2005), available at http://www.cdc.gov/nccdphp/publications/aag/pdf/aag_drh2005.pdf.

126. *Id.* at 2.

“hemorrhage, blood clot, high blood pressure, infection, stroke, amniotic fluid in the bloodstream, and heart muscle disease.”¹²⁷ Roughly two percent of all pregnancies are ectopic pregnancies, where the fertilized egg implants somewhere outside the uterus.¹²⁸ Other areas include the fallopian tubes, ovaries, cervix, or abdomen.¹²⁹ If an ectopic fetus grows large enough, it can endanger the mother’s life by causing the area it occupies to rupture, thus requiring immediate medical care.¹³⁰

Likewise, another risk is the development of gestational diabetes. Six percent of women develop this condition during pregnancy, increasing the risk of a macrosomic infant.¹³¹ Without access to birth control, women who are predisposed to such conditions are forced to take the risk of developing complications or seek other alternatives, such as permanent sterilization or abortion.¹³²

Women over the age of thirty experience dramatically increased risks of miscarriage, birth defects, gestational diabetes, and difficult labor.¹³³ The older the mother, the higher the risk of chromosomal abnormalities in the child.¹³⁴ Older mothers have a 23.1% chance of miscarriage; the rate of miscarriages for women younger than thirty-five is 6.4%; and 14.7% for women ages 35-40.¹³⁵ If birth control is no longer accessible to these women, many women may be forced to resort to permanent sterilization, which will have a dramatic effect on their bodies, or to bear children with severe birth defects.

127. *Id.*

128. WebMD.com, Ectopic Pregnancy - Topic Overview, http://www.webmd.com/hw/being_pregnant/hw144923.asp (last visited Jan. 22, 2006).

129. *Id.* The fallopian tubes are the most common place for ectopic pregnancies to develop. *Id.*

130. *Id.*

131. Bonnie J. Dattel, *High-Risk Pregnancy*, BESTDOCTORS.COM, Oct. 6, 2003, http://www.bestdoctors.com/en/conditions/h/high-risk/highrisk_081600.p.htm. Macrosomic infants are those that are born abnormally large. *Id.*

132. THE CONTRACEPTION REPORT, INCREASING ACCESS TO ORAL CONTRACEPTION; OCS AND SICKLE CELL DISEASE, OCS AND HEADACHES 4, 11 (David A. Grimes et al. eds., 1998), available at http://www.contraceptiononline.org/contrareport/pdfs/08_06.pdf.

133. MUSC Children’s Hospital, High Risk Pregnancy-Pregnancy Over Age 30, http://www.musckids.com/health_library/hrpregnant/over30.htm (last visited Jan. 22, 2006).

134. *Id.* Down Syndrome, one of the most common conditions, occurs in 1 of every 100 births to women over the age of forty, and 1 in every 25 if the woman is over forty-five. *Id.*

135. Women’s Health Information, Miscarriage: Why Did it Happen-Was it My Fault?, <http://www.womens-health.co.uk/miscarr.asp> (last visited Jan. 22, 2006).

In the possibilities listed above, and numerous others not expressly listed, contraceptives are of utmost importance.¹³⁶ One inference leads to an absurd conclusion: women are expected to abstain from sexual intercourse to protect themselves from a potentially fatal pregnancy. The pharmacist or healthcare provider who refuses to provide women with pre-existing medical conditions oral or emergency contraceptives may subject those women to an increased risk of illness and death. Essentially, pharmacists chose their profession to provide the best form of medical attention but their personal convictions conflict with the goals of their chosen career. They allow their morals to forgo issuing preventative medicine and risk the health of women by sending them to receive emergency medicine.

C. *Increasing Abortion*

Refusing women the right to timely access contraceptives “could lead to an increased number of unintended pregnancies.”¹³⁷ In the United States, there are almost three million unintended pregnancies, or forty-seven percent of all pregnancies every year.¹³⁸ More than half of these pregnancies are terminated by abortion.¹³⁹ Unwanted or unplanned pregnancies comprise of the reason for ninety-three percent of all abortions.¹⁴⁰ Each year, women give birth to as many as 1.1 million children whose pregnancies were unplanned or even unwanted.¹⁴¹ Roughly thirty-one percent of women who practice contraception use oral contraceptives.¹⁴² The Alan Guttmacher Institute estimates that in 2000, as many as 51,000 abortions, forty-three percent of the total number of abortions, were averted by the use of emergency contraceptives.¹⁴³

Therefore, denying women access to oral and emergency contraceptives with no way of preventing the pregnancy will undoubtedly lead to a higher incidence of abortion. Women who do not wish to become preg-

136. NARAL PRO-CHOICE AM. FOUND., *supra* note 121, at 3 (including other health conditions, such as rheumatic fever, malnutrition, phlebitis, heart disease, and sickle cell anemia).

137. PLANNED PARENTHOOD FED’N OF AM., *supra* note 15, at 1.

138. PICHLER, *supra* note 36, at 3.

139. *Id.*

140. Center for Bio-Ethical Reform, Abortion Facts, <http://www.abortionno.org/Resources/fastfacts.html> (last visited Jan. 22, 2006).

141. THE ALAN GUTTMACHER INST., CONTRACEPTION COUNTS: STATE-BY-STATE INFORMATION (1999), <http://www.guttmacher.org/pubs/ib22.html>.

142. PICHLER, *supra* note 36, at 2 (birth control pills or emergency contraceptive pills).

143. Press Release, The Alan Guttmacher Institute, Rebecca Wind, Emergency Contraception (EC) Played Key Role in Abortion Rate Declines (Dec. 17, 2002), http://www.guttmacher.org/media/nr/2002/12/17/nr_340602.html.

nant or bear children at the time they become pregnant will be left with few alternatives. When the possibility of prevention is eliminated by pharmacists, preventing unwanted pregnancies is not feasible, and termination of the pregnancy becomes far more likely. Vigilante pharmacists¹⁴⁴ fail to realize that if the only choice is between abortion and enduring a high-risk pregnancy, the nation will experience an increase in the frequency of abortions.

IV. LEGAL ANALYSIS II

A. *Right to Contraceptives*

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . [T]he State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.¹⁴⁵

Griswold. Eisenstadt. Carey. Roe. Lawrence. Together, these five cases secured access to contraceptives for all individuals — married persons, single individuals, and minors — under a constitutionally protected right of privacy regarding procreative decisions. Procreative decisions may include any choice regarding abortion, health services, the number of children to have, and the use of contraceptives. However, refusal clauses, both those in effect and those under consideration, permit pharmacists and other healthcare providers to violate these rights by providing pharmacists a statutory right to deny women access to contraceptives. This seriously encroaches on a woman's recognized right to make procreative decisions free from government intrusion. By putting refusal clauses into effect, the government allows pharmacists to assert their religious beliefs and prioritizes that right over women's rights to uninhibited access to contraception.

What is the government's interest in giving pharmacists permission to deny women constitutionally protected access to contraceptives? How does this interest trump women's right of privacy? Why do pharmacists' rights take priority over women's rights? What are the ramifications of giving pharmacists' beliefs superiority over women and *their* personal beliefs?

144. The author classifies vigilante pharmacists as those that have taken matters into their own hands by refusing to dispense birth control, even in the absence of a refusal clause in place.

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

Simply put, there is no justifiable reason for the government to allow such blatant violations of women's autonomic rights. The government has claimed the following as its justified reasoning: *Respect for one's personal beliefs, with respect to the pharmacist*. The government, in this case, seemingly chooses the pharmacists' personal interests over women's constitutional rights. If the beliefs of the pharmacist are important enough to warrant state protection through refusal clauses, women's personal beliefs concerning contraceptives should also warrant such safekeeping. A second justification is presented to *keep "abortifacients" like birth control pills and emergency contraception from being used to supposedly terminate pregnancies*. Many experts in the scientific and medical communities have concluded that "these forms of birth control do not cause abortion."¹⁴⁶ The pharmacists who have refused to fill prescriptions and other supporters of refusal clauses perhaps do not fully understand their role in increasing the number of surgical abortions by thwarting women's attempts to avoid unwanted pregnancies through oral contraception. A third question involves *discouraging premarital or extramarital sexual relations*. The Supreme Court has already decided that the government has no right to interfere in an individual's decision concerning marriage, procreation, contraception, and family relationships.¹⁴⁷

Even if an important government interest exists to justify the violation of women's rights, refusal clauses would nonetheless fail to satisfy the second requirement necessary to withstand the heightened level of judicial scrutiny. This comment argues that the means used does not have a substantial relationship to the government's purpose.

A traditional argument can be easily posted: slippery slope. Once an exception is made to a general rule, other exceptions may follow and effectively remove any possible factual situation to which the rule may be applicable. For example: if pharmacists and other health-care providers are given an excuse to deny women their legally-prescribed contraceptives, exactly how far will the government let this development extend before they put a stop to it? There will be little in the way to prevent pharmacists across the United States from refusing to stock or sell con-

146. SIECUS.com, *Prescriptions Denied: Refusal Clauses Affect Women's Access to Legally Prescribed Medications*, SIECUS.com – Policy Update, Aug. 2004, <http://www.siecus.org/policy/PUupdates/arch04/arch040122.html>.

147. *See generally, Lawrence*, 539 U.S. 558 (holding all individuals have a freedom to make decisions regarding their private lives); *Roe v. Wade*, 410 U.S. 113 (1973) (holding there is a right to abortion included in the right of privacy); *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977) (holding that minors have the freedom to make reproductive decisions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried individuals have a right to contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married individuals have a right to access to contraceptives).

doms. If a pharmacist's moral objection to oral contraceptives prevents women from getting their legally-prescribed medications, then the animal-right's activist pharmacist can insist on denying insulin derived from cows, pigs, or fish to a diabetic. A pharmacist may refuse to give the AIDS patient his medication because the pharmacist feels that AIDS is God's way of punishing homosexuality. Refusal clauses could lead to a chain reaction of pharmacists and healthcare providers refusing to provide services, *any* services, to anyone for any reason. Must it spread to all aspects of medicine before legislators come to their senses?

B. *Pharmacists' Responsibilities*

[We have] an obligation to provide services to our clients. It's not appropriate. . . to dictate public policy based on personal beliefs.¹⁴⁸

There is no denial that pharmacists have a right to their own beliefs and morals, but under no circumstances should their beliefs infringe upon the rights of others. "A provider does not have the right to obstruct access, impose his or her own beliefs on a patient or attempt to use personal beliefs to block or deny a patient's right to care."¹⁴⁹ By denying women access to birth control because of moral opposition, pharmacists and healthcare providers are forcing their views upon others who obviously do not see the issue in the same light.

Refusal clauses have generated strong sentiment in opposition to its growing movement. An opinion poll taken by CBS and the New York Times in November 2004 showed that eight out of ten individuals in America felt that pharmacists should not be given the discretion to refuse to fill birth control medication.¹⁵⁰ From a similar poll of 739 New Hampshire citizens, eighty-six percent stated that "pharmacists should not refuse to fill legal and medically appropriate prescriptions based on their own personal beliefs."¹⁵¹

The clauses seem to be in opposition with a code of ethics The American Pharmaceutical Association adopted in October 1994.¹⁵² The code

148. PLANNED PARENTHOOD FED'N OF AM., *supra* note 15, at 2-3 (quoting Alabama State Health Department Chief Johnson).

149. Press Release, The Alan Guttmacher Institute, Rebecca Wind, Health-care Providers Cross the Line When They Obstruct Women's Access to Legal Medication, (Aug. 3, 2005), <http://www.guttmacher.org/media/nr/2005/08/02/index.html>.

150. NAT'L WOMEN'S LAW CTR., PHARMACY REFUSALS 101 3 (2005), *available at* http://www.nwlc.org/pdf/11-05Update_PharmacyRefusal101.pdf.

151. *Id.* at 4.

152. AM. SOC'Y OF HEALTH-SYS. PHARMACISTS, BEST PRACTICES FOR HOSPITAL & HEALTH-SYSTEM PHARMACY: POSITION AND GUIDANCE DOCUMENTS OF ASHP 2005-2006 103 (2005), *available at* http://www.ashp.org/bestpractices/ethics/Ethics_End_Code.pdf (emphasis in original).

documents the basis of the pharmacists' roles and responsibilities. One notable article addresses patient autonomy:

A pharmacist respects the autonomy and dignity of each patient.

Interpretation: A pharmacist promotes the right of self-determination and recognizes individual self-worth by encouraging patients to participate in decisions about their health. A pharmacist communicates with patients in terms that are understandable. In all cases, a pharmacist respects personal and cultural differences among patients.¹⁵³

Pharmacists have a duty to respect patients' decisions and personal beliefs concerning their own health and maintenance, including birth control and contraception. That respect is absent from the reported incidents where women were, in essence, told that their decision to use contraceptives was morally wrong, and were lectured, humiliated, or admonished for their choices.¹⁵⁴ This crosses the line and desecrates the patient's autonomy and dignity.

Unfortunately, pharmacists are not bound by this code – it is merely a professional guideline. It is up to the individual states to regulate and control the profession.¹⁵⁵ These states are doing a mediocre job. Therefore, the federal government should assert its power and enact legislation that would impose a duty on all pharmacists and healthcare providers to honor each and every legal prescription, regardless of their personal or moral viewpoints.

C. *Newly Proposed Legislation*

1. ALPhA

In April 2005, Representative Carolyn B. Maloney of New York introduced the Access to Legal Pharmaceuticals Act (ALPhA) to the Senate and House of Representatives in an effort to guarantee that every patient can get their legal prescriptions filled.¹⁵⁶ ALPhA respects the right of each individual pharmacist and healthcare provider who refuses to fill the prescriptions for moral or religious reasons. However, the proposed legislation includes a provision that requires the *pharmacy* to fill the prescription without delay, and if necessary to provide a different pharmacist

153. *Id.*

154. NARAL Pro-Choice America, Refusal Clauses, <http://www.prochoiceamerica.org/ppi/facts/refusal.cfm> (last visited Jan. 22, 2006).

155. Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 92 (2002).

156. PICHLER, *supra* note 36, at 5.

to dispense the medication.¹⁵⁷ Furthermore, in the event that the medication is out of stock and a pharmacist refuses to order the product, the pharmacy must ensure that the customer is informed and that the product will be ordered by another pharmacist as soon as possible.¹⁵⁸ Additionally, the pharmacy agrees not to employ “any pharmacist who engages in any conduct with the intent to prevent or deter an individual from filling a valid prescription for a product or from ordering the product.”¹⁵⁹ Prohibited conduct includes refusing to return the prescription form to the customer after declining to fill it, refusing to transfer the prescription to another pharmacy, humiliating or harassing the individual, or breaching medical confidentiality concerning the prescription.¹⁶⁰ ALPhA also provides penalties for pharmacists and pharmacies who fail to comply with the terms.¹⁶¹ This federal statute will pre-empt any conflicting state law including any currently enacted refusal clause.

If enacted, ALPhA will ensure that hundreds of thousands of women across America can have their oral or emergency contraceptive prescriptions filled. Furthermore, the Act may reduce the anxiety associated with delaying or missing a dosage altogether. No woman would be inconvenienced by having to travel to another pharmacy and face the possibility of being refused yet again. Pharmacists will be prohibited from humiliating or chastising a woman in public view.¹⁶² It would ensure that women are not being needlessly exposed to a high probability of becoming pregnant. Additionally, no pharmacist could interfere with a woman’s decisions concerning her own body.

2. Pharmacy Consumer Protection Act of 2005

California Senator Barbara Boxer introduced the Pharmacy Consumer Protection Act in April 2005.¹⁶³ If passed, the bill will require pharmacies that receive payments or contracts under Medicaid and Medicare

157. Access to Legal Pharmaceuticals Act, H.R. 1652, 109th Cong. § 249(a)(1) (2005); see also PICHLER, *supra* note 36, at 5.

158. H.R. 1652, § 249(b).

159. H.R. 1652, § 249(a)(3).

160. § 249(a)(3).

161. H.R. 1652, § 249(c) (ranging from a fine of \$5000 per day, to recognizing a private right of action against the pharmacy, allowing for attorney’s fees and punitive damages).

162. NAT’L WOMEN’S LAW CTR., *supra* note 150, at 2 (relating an incident in January 2005, where a Walgreen’s pharmacist refused to fill this mother’s prescription for emergency contraception and proceeded to berate the woman in front of a crowd. The pharmacist was quoted as shouting, “You’re a murderer! I will not help you kill this baby. I will not have the blood on my hands.” The mother subsequently became pregnant and was forced to resort to abortion.).

163. Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005).

programs to make certain all valid prescriptions are dispensed without undue delay or interference.¹⁶⁴ Unless the pharmacy complies with the terms of the Act, the pharmacy will not receive any funds from Medicare or Medicaid programs.¹⁶⁵ Pharmacists tempted to interfere with patients' access to prescribed medications, such as oral contraceptives, put the pharmacy at risk of a lawsuit, but also losing coveted federal reimbursement dollars.

V. CONCLUSION

Women, men, children, doctors, families. We are all being threatened. The fundamental right of choice — reproductive choice — for which we have fought so hard for so long — is being, not so slowly, whittled away and is now being immeasurably diminished by this administration and its appointees. All our freedoms are in danger. Our civil rights — those to privacy, those to separation of church and state. . . are now challenged. And we must *not* succumb. We *must* prevail. We have no choice *but* to protect choice.¹⁶⁶

Pro-life. Pro-choice. The continuous struggle that has gone on for decades does not appear to have an end in sight. However, the debate has not remained stagnant, but has evolved. What was once limited to abortion rights, has now evolved and includes women's reproductive and contraceptive rights. Women are prevented from having medical prescriptions filled because extremist pharmacists do not believe in birth control — legal medications that may have been prescribed for any number of reasons *other* than contraception.

Recent public policy is now placing greater emphasis on pharmacists' rights to deny birth control over women's reproductive freedom. This comment advocates to put an end to giving pharmacists free reign to discriminate against women by withholding oral and emergency contraceptives. This comment advocates against condoning inequity in the treatment of women who use contraceptives and men who use condoms. Likewise, against allowing pharmacists and other healthcare providers to put their own self-interests above that of their patients, and against giving pharmacists a means to subject women to potentially life-threatening pregnancies or a multitude of other complications. This comment also advocates against permitting pharmacists and health care providers to

164. S. 778, § 1898(a)(1).

165. § 1898(a) (holding compliance as to fill all valid prescriptions without delay and ordering any requested item that is out of stock without delay or interference).

166. Planned Parenthood, March for Women's Lives, <http://www.plannedparenthood.org/pp2/portal/files/portal/media/march-quotes.xml> (last visited Jan. 22, 2006) (quoting Bonnie Franklin) (emphasis in original).

force women into situations in which they feel abortion may be their only feasible choice? Yet, the fact remains that state governments have already afforded pharmacists the right to do all this.

Pharmacists deliberately violate their duty to their patient-customers. They and other healthcare providers refuse to recognize and respect an individual's autonomy and the inherent right to make his or her own decisions. When pharmacists refuse to fill prescriptions, they ignore the personal and cultural differences among patients that make their beliefs and values differ from those of the pharmacists'. By denying women their prescription contraceptives, pharmacists and healthcare providers are inevitably contributing to a nationwide increase in unwanted pregnancies, as well as a higher incidence of abortion.

Women have a fundamental right to make reproductive choices concerning contraception.¹⁶⁷ That right has been solidified by years of litigation. There is a right of privacy ensuring the right to make decisions regarding private aspects of their lives without fear of governmental interference. Women should not have to fear being denied access to contraceptives by *pharmacists* when even the government lacks the power to do so.

Refusal clauses are a serious encroachment upon women's reproductive rights. Furthermore, this is merely a symptom of a potentially larger problem. If a pharmacist can deny contraceptive medication, there are no measures to prevent a pharmacist to deny other groups of individuals. The group of immediate concern is a woman's right to choose to have an abortion. Next, the concern is for men and their access to condoms. However, the concern may even affect diabetics and their access to insulin, and AIDS patients and their medications. The future for Plan B, the over-the-counter morning-after pill recently approved by the FDA, seems grim in light of refusal clause legislation. Senator Frank R. Lautenberg expressed similar concerns during an outdoor rally on Capitol Hill in April, where he stated, "[a] pharmacist's personal beliefs should not come between a patient and their doctor. . . . Tomorrow it might be painkillers for a cancer patient. Next year it could be medicine that prolongs the life of a person with AIDS or some other terminal disease."¹⁶⁸

167. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding minors have the freedom to make their own reproductive decisions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unmarried individuals have a right to access to contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding married individuals have a right to obtain contraceptives).

168. Press Release, Congresswoman Carolyn B. Maloney, Lawmakers Introduce Legislation to Ensure Pharmacies Fill All Dr. Prescriptions (Apr. 14, 2005), <http://www.house.gov/maloney/press/109th/20050414ALPHA.htm> (quoting New Jersey Senator Frank R. Lautenberg).

If pharmacists are given the right to withhold oral or emergency contraception, there is no limit to what types of services or medications they may refuse to provide in the future.

In the absence of federal legislation or regulation, each state has approached refusal clauses differently. While some states have granted or plan to grant pharmacists a statutory right of refusal to fill prescriptions for moral or religious reasons, others have specifically prohibited pharmacists from refusing to fill legal prescriptions for *any* reason. But the majority of states are undecided and have yet to take any action for or against refusal clauses affecting contraceptive rights. This inconsistency needs to be rectified, and the federal government must intervene and regulate this nationwide controversy.

The access to Legal Pharmaceuticals Act gives hope to women across America. However, ALPhA may have broader implications than just securing access to contraceptives. Under the Act, pharmacists, and pharmacies in particular, are required to provide all customers with either the requested medication itself or, if they have a personal objections to contraception, a pharmacist who is willing to dispense the medication to the customer. Customers are guaranteed to have their legal prescriptions filled, for whatever medications it may be. This legislation will restore to women their rightful access to contraceptives and ensure that future interference with a patient's rights to their medications will be punishable by law.

Pharmacists must be stopped from violating women's rights or there will be no autonomic decision left sacred to individuals. The refusal clauses in effect should be replaced by protective measures such as AL-PhA, that ensure access to all legally prescribed medications. Protecting women's right to oral and emergency contraception *now* will ultimately protect all Americans' constitutional rights to privacy in decisions relating to healthcare.