

Pharmacists and the “Morning-After Pill”: Creating Room for Conscience Behind the Counter

Tony J. Kriesel*

I. INTRODUCTION

A woman walks into her local pharmacy, where she has been a customer for years, to fill what she believes to be a routine prescription for birth control. The pharmacist, after perusing the doctor’s drug choice, takes a deep breath, looks the customer in the eye, and says, “Sorry, my conscience does not allow me to fill this. Please take it elsewhere.”

What prompts the pharmacist’s unusual response? Is birth control no longer legal? Does the Constitution no longer guarantee the fundamental right to contraception? While such questions might be racing through the woman’s mind, a closer look reveals that this is no routine prescription for birth control. Rather, the doctor prescribed a particular type of drug, commonly called the “morning-after pill” or “emergency contraception,” which women take within seventy-two hours of sexual intercourse to prevent pregnancy beyond administration of the drug.¹

A scientific controversy surrounding the effect of the drug prompts the pharmacist’s unexpected response: some argue the drug simply prevents pregnancy, much like a condom or other ordinary contraception,² while others, such as the pharmacist above, believe it terminates a pregnancy, effectively making the drug an abortion.³ By choosing not to fill the prescription, the

© 2005 Tony J. Kriesel.

* J.D. expected 2006, University of Minnesota Law School.

1. See generally Felicia Stewart, James Trussel & Paul F.A. Van Look, *Emergency Contraception*, in *CONTRACEPTIVE TECHNOLOGY* 279-303 (18th rev. ed. 2004) (describing the history, methods, effectiveness, advantages, disadvantages, and other issues regarding emergency contraception).

2. See David A. Grimes & Elizabeth G. Raymond, *Emergency Contraception*, 137 *ANNALS OF INTERNAL MED.* E-180, E-182 (2002).

3. See Stephanie Simon, *Illinois Drugstores Required to Fill*

pharmacist exercises her right to not participate in that procedure.

This scenario has played out in many pharmacies across the country,⁴ prompting a variety of political,⁵ legal,⁶ and moral responses.⁷ Proponents of the customer's right to free access of the drug argue the patient's autonomy as a consumer of drugs should prevail,⁸ and the Constitution's fundamental right to contraception protects that autonomy.⁹ In contrast, supporters of the pharmacist's right to conscience cite the free exercise clause of the First Amendment¹⁰ and the pharmacist's particular role in patient health care.¹¹ Consequently, the

Prescriptions for Contraceptives, L.A. TIMES, Apr. 2, 2005, at A15.

4. See Rene Sanchez, *New Arena for Birth-Control Battle*, STAR TRIB., May 3, 2005, at A1, A10 (reporting that while the exact number of emergency contraception refusals nationwide is unknown, both sides of the debate say it is happening more often and predict it will increase).

5. See, e.g., Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1 (stating that some state legislators are proposing laws that allow pharmacists to refuse filling prescriptions to which they are opposed, while others are proposing laws that require pharmacists to dispense any legal prescription for birth control).

6. See, e.g., Eric Noe, *Some Pharmacists Have Triggered Legal Battles by Refusing to Fill Contraceptive Prescriptions*, ABC NEWS, May 3, 2005, <http://abcnews.go.com/Health/LegalCenter/story?id=701109&page=1> (documenting Illinois Governor Rod Blagojevich's directive requiring pharmacists to dispense any valid prescriptions for the morning-after pill, as well as the legal challenge against the order).

7. See, e.g., Erik A. McClave, *A Catholic Pharmacist's Struggle*, TCRNEWS, <http://tcnews2.com/pharmacy.html> (last visited Oct. 1, 2005) (describing the pharmacist author's frustration and guilt in dispensing drugs that are contrary to his religious and moral beliefs).

8. See Stephanie E. Harvey et al., *Do Pharmacists Have the Right to Refuse to Dispense a Prescription Based on Personal Beliefs?*, http://www.nm-pharmacy.com/body_rights.htm (last visited Oct. 1, 2005).

9. See Yuliya Fisher Schaper, *Emergency Contraception for Rape Victims: A New Face of the Old Battleground of Legal Issues in the Bipartisan Abortion Politics in the United States*, 29 RUTGERS L. REC. 1, 9 (2005).

10. See Correy E. Stephenson, *Health Care Providers Refusing Treatment Based on Religious Beliefs*, KAN. CITY DAILY REC., Apr. 26, 2005, at 1, 2 ("In this country, we decided from the beginning to respect and accommodate the free exercise of religion" (quoting Francis J. Manion, attorney at the American Center for Law & Justice)).

11. See *Hearing on H.B. 2711 Before the S. Public Health & Welfare Comm.*, 2002 Leg., Reg. Sess. (Ks. 2002), available at http://www.pfli.org/PKoch_Testimony_KS_Senate2002.html [hereinafter Koch testimony] (testimony of Paula Koch) (testifying in support of a bill that would allow pharmacists to conscientiously object to filling some prescriptions, that the pharmacist is part of "the health care team" and not simply a "conduit of the physician's wishes").

controversy becomes a clash of constitutional rights, only one of which may prevail.

Part II of this article argues that emergency contraception is an abortion, and the pharmacist is within her right in denying access to the drug. Part III demonstrates that even if emergency contraception is not an abortion, there is still no right to have a prescription for the drug filled at any pharmacy a woman chooses. Part IV addresses state laws that compel pharmacists to dispense drugs, regardless of their conscientious objections. This discussion leads to the conclusion that the pharmacist may legally and constitutionally refuse to fill a prescription for emergency contraception.

II. THE PRIMARY AREA OF CONTENTION: IS EMERGENCY CONTRACEPTION AN ABORTION?

Emergency contraception, which is relatively new to the market,¹² operates differently than other types of contraception. What makes this drug different from a condom or the birth control pill, and why do some people view dispensing emergency contraception as equivalent to assisting in the procurement of an abortion?

A. EMERGENCY CONTRACEPTION: A DIFFERENT KIND OF CONTRACEPTION

The most popular methods of contraception in the United States are implemented before sexual intercourse, preventing the fertilization of the woman's egg.¹³ In contrast, emergency

12. See Stewart, Trussel & Van Look, *supra* note 1, at 280 (recounting that two products, Preven and Plan B, used specifically for emergency contraception, were approved by the FDA in 1998 and 1999, respectively). Preven was withdrawn from the market in 2004, making Plan B the sole emergency contraceptive product. *Id.*

13. See James Trussell, *The Essentials of Contraception: Efficacy, Safety, and Personal Considerations*, in *CONTRACEPTIVE TECHNOLOGY*, *supra* note 1, at 221, 222 (stating that the four most popular contraception methods in the United States are female sterilization, oral contraceptive pills, male condoms, and male sterilization). Female sterilization cuts or blocks the fallopian tube, preventing the sperm and egg from uniting. See Amy E. Pollack, Charles S. Carignan & Roy Jacobstein, *Female and Male Sterilization*, in *CONTRACEPTIVE TECHNOLOGY*, *supra* note 1, at 531, 532. Oral pills block the luteinizing hormone surge, which inhibits ovulation. See Robert A. Hatcher & Anita Nelson, *Combined Hormonal Contraceptive Methods*, in *CONTRACEPTIVE TECHNOLOGY*, *supra* note 1, at 391, 392. The male condom acts as a physical barrier to prevent the passage of semen. See Lee Warner, Robert A. Hatcher & Markus J. Steine, *Male Condoms*, in *CONTRACEPTIVE TECHNOLOGY*, *supra*

contraception is taken after intercourse, when other methods of contraception were either not used or may not have been effective.¹⁴ Also referred to as the “morning-after pill” and “postcoital contraception,” “emergency contraception” has emerged as the preferred medical term, as it prevents the false impression that it must be taken the morning after sex and emphasizes that it should not be an ongoing contraception method.¹⁵

Plan B is the only drug currently marketed as emergency contraception.¹⁶ While several other drugs, used in proper dosages, can have the same effect as Plan B,¹⁷ the latter remains the only drug specifically marketed for “contraceptive emergencies.”¹⁸ To be effective, two doses of the drug must be taken, the second dose twelve hours after the first.¹⁹ While most studies have shown emergency contraception must be taken within seventy-two hours of sexual intercourse, the drug may still be effective for up to 120 hours.²⁰

Depending upon where the woman is in her menstrual cycle, emergency contraception can have several effects. When taken prior to ovulation, emergency contraception prevents fertilization,²¹ similar to other common forms of contraception. When taken during ovulation, however, studies have shown the development of a receptive uterine lining can be altered.²² This alteration may prevent a fertilized egg from implanting in the woman’s uterus,²³ thereby ending further development of the egg. It is this effect that concerns abortion opponents.

note 1, at 331, 332. Male sterilization, or vasectomy, blocks the *vasa deferentia*, preventing the passage of sperm into the ejaculated seminal fluid. See Pollack, Carignan & Jacobstein, *supra*, at 533.

14. See Grimes & Raymond, *supra* note 2, at E-180.

15. See *id.*

16. See Stewart, Trussel & Van Look, *supra* note 1, at 280.

17. See *id.* at tbl.12-1.

18. *Id.* Insertion of a copper-releasing intrauterine device (IUD) may also be used as emergency contraception. See *id.* at 285-86. It is not, however, implicated in the current debate upon which this article focuses.

19. See Grimes & Raymond, *supra* note 2, at E-180 to E-181.

20. See Stewart, Trussel & Van Look, *supra* note 1, at 285.

21. See *id.*

22. See *id.*

23. See *id.*

B. THE BIOLOGICAL ARGUMENT FOR EMERGENCY
CONTRACEPTION'S ABORTIFACIENT EFFECT

Human development begins with the fertilization of the egg by the sperm.²⁴ At fertilization, embryonic development begins.²⁵ The term "embryo" describes the first eight weeks of human development.²⁶ The single cell created by fertilization is called a zygote,²⁷ which is genetically unique because both mother and father contribute half the chromosomes that make up the cell.²⁸ At this point, the gender of the unborn child has been determined.²⁹ These biological facts support the contention that pregnancy begins when the egg and sperm fuse.³⁰

This assertion is contradicted by popular use of the word "pre-embryo" to describe the period between fertilization and implantation in the uterus.³¹ The origin of this term, however, is less than scientific. First defined in 1986, "pre-embryo" was initially used in the United States and the United Kingdom for public policy reasons related to *in vitro* fertilization.³² The term was needed to alleviate moral concerns regarding the status of the fertilized egg prior to implantation in the uterus.³³ Prior to 1986, the term "embryo" described the developing human beginning at the time of conception.³⁴

An abortion is a premature stoppage of the development of

24. See, e.g., BRUCE M. CARLSON, HUMAN EMBRYOLOGY AND DEVELOPMENTAL BIOLOGY 2 (2d ed. 1999); KEITH L. MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 34 (6th ed. 1998); RONAN O'RAHILLY & FABIOLA MÜLLER, HUMAN EMBRYOLOGY AND TERATOLOGY 31 (3d ed. 2001).

25. See CARLSON, *supra* note 24, at 2; WILLIAM J. LARSEN, HUMAN EMBRYOLOGY 1 (2d ed. 1997); MOORE & PERSAUD, *supra* note 24, at 2.

26. See CARLSON, *supra* note 24, at xv; LARSEN, *supra* note 25, at xv-xvi. The term "fetus" is used to describe development from eight weeks to birth. See CARLSON, *supra* note 24, at xvi-xvii.

27. MOORE & PERSAUD, *supra* note 24, at 2.

28. *Id.* at 37.

29. See CARLSON, *supra* note 24, at 32; MOORE & PERSAUD, *supra* note 24, at 37.

30. See CARLSON, *supra* note 24, at 2.

31. See, e.g., THE AMERICAN HERITAGE COLLEGE DICTIONARY 1078 (3d ed. 1993).

32. See J.D. Biggers, *Arbitrary Partitions of Prenatal Life*, 5 HUM. REPROD. 1, 3-5 (1990) (suggesting the term was used to facilitate a discussion on the moral status of the "early prenatal human organism").

33. See *id.* at 4.

34. *Id.* at 1.

the embryo or fetus before viability.³⁵ If one accepts the medical understanding that pregnancy begins at fertilization, then when emergency contraception prevents a fertilized egg from implanting in the uterus, this leads to an abortion.³⁶ This is the reason why medical doctors have said emergency contraception can be abortifacient,³⁷ and some state legislatures have attempted to define abortion as the termination of a pregnancy anytime after fertilization.³⁸ Moreover, this argument is the reason why pharmacists all across the country are refusing to fill prescriptions for emergency contraception.

C. LIMITATIONS ON THE CONSTITUTIONAL RIGHT TO AN ABORTION

While it is easy to understand why abortion opponents are opposed to the use of emergency contraception, supporters of free access to emergency contraception suggest that such opposition is legally irrelevant. It is argued that even if the drug is abortifacient, the Constitution protects a woman's right to an abortion.³⁹ To interpret this protection as grounds to compel pharmacists to provide abortions, however, is to extend the right too far. The Supreme Court has never suggested the right to an abortion means a pregnant woman has the right to receive an abortion from any doctor whom she chooses or at any

35. MOORE & PERSAUD, *supra* note 24, at 3.

36. *See id.* at 532.

37. *See, e.g.*, MOORE & PERSAUD, *supra* note 24, at 532 (“[Morning-after pills] prevent implantation, not fertilization. . . . [T]hey should not be called contraceptive pills. Conception occurs but the blastocyst does not implant. . . . Because the term *abortion* refers to premature stoppage of a pregnancy, the term *abortion* could be applied to such an early termination of a pregnancy.”); Davey & Belluck, *supra* note 5, at A16 (“Emergency contraceptive pills can be abortifacient if they are taken after ovulation has occurred.” (quoting Dr. Gertrude Murphy, M.D.)).

38. *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.1(1) (West 1979) (defining abortion as “the deliberate termination of a human pregnancy after fertilization of a female ovum”). In *Margaret S. v. Edwards*, the plaintiff argued this definition was impermissibly vague, as it could implicate the morning-after pill. *Margaret S. v. Edwards*, 488 F. Supp. 181, 190-91 (E.D. La. 1980).

39. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“[A] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (affirming *Roe*’s essential holdings).

clinical setting she might choose. In fact, the Court has explicitly stated otherwise.

In *Doe v. Bolton*,⁴⁰ a companion case to *Roe v. Wade*,⁴¹ a Georgia statute was challenged that, in part, required a committee of at least three hospital staff members to approve of an abortion before the procedure could be administered.⁴² In striking down the provision, the Court speculated that the reason for the provision was, perhaps, to protect the hospital itself, rather than out of concern for the woman's need to make an informed decision.⁴³ In response to the hospital's speculated concern, the Court stated, "the hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure."⁴⁴

Sixteen years later in *Webster v. Reproductive Health Services*,⁴⁵ the Court made an even more direct pronouncement on an individual's right not to participate in the abortion procedure. At issue was a Missouri statute that prohibited any public employee in the state from performing or assisting in an abortion, unless the procedure was necessary to save the mother's life.⁴⁶ In upholding the statute, the Court observed:

Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all. The challenged provisions only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital.⁴⁷

In short, a state is not constitutionally required to provide facilities and physicians for abortions. In the same opinion, the Court further stated that "[n]othing in the Constitution requires States to enter or remain in the business of performing abortions. Nor . . . do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions."⁴⁸

40. 410 U.S. 179 (1973).

41. 410 U.S. 113 (1973).

42. *Doe v. Bolton*, 410 U.S. at 183-84.

43. *See id.* at 197.

44. *Id.* at 197-98.

45. 492 U.S. 490 (1989).

46. *Id.* at 507.

47. *Id.* at 509.

48. *Id.* at 510.

Moreover, the Court has never suggested there is a constitutional obligation for private doctors or facilities to provide abortion services. In *Doe*, the Court did not question the constitutionality of the Georgia statute provision allowing all physicians and hospitals, public and private, to refrain from the abortion procedure.⁴⁹ *Poelker v. Doe*,⁵⁰ decided four years after *Roe* and *Doe*, lends further support to this proposition. There, the Court upheld a directive by a city mayor to disallow abortions in the two city hospitals, except when the mother's health was in serious danger.⁵¹ Justice Brennan, in his dissent, expressed disapproval toward the ruling, largely due to his concern that women seeking abortions might not have a private clinical alternative in some areas of the country, if similar public hospital bans were in place.⁵² Again, there was no suggestion that the Constitution might require private physicians or facilities to provide abortions, thereby ensuring access to the procedure. No doctor or hospital, public or private, then, has the constitutional obligation to participate in an abortion procedure.

It follows that because emergency contraception may act as an abortion procedure, there is no constitutional obligation of any state or private actor to provide access to emergency contraception. This makes the drug neither illegal nor unconstitutional, but it does mean it is constitutionally permissive for businesses, public and private, as well as individual pharmacists and employees, to deny emergency contraception to their customers.

III. THE CONCURRENT LIMITATIONS ON THE CONSTITUTIONAL RIGHT TO CONTRACEPTION

The use of the Supreme Court's abortion jurisprudence to support the argument that pharmacists have no obligation to dispense emergency contraception requires that one accept the premise that emergency contraception is abortifacient. Even if that premise is rejected, the Court's jurisprudence outside of the abortion context still supports the conclusion that pharmacists are under no obligation to dispense emergency contraception.

49. See *Doe v. Bolton*, 410 U.S. 179, 184, 197-98 (1973).

50. 432 U.S. 519 (1977).

51. See *id.* at 520-21.

52. See *id.* at 524 (Brennan, J., dissenting).

A. THE COUNTERARGUMENT: EMERGENCY CONTRACEPTION IS ORDINARY CONTRACEPTION

There is no consensus among medical doctors that pregnancy begins at conception. Instead, some doctors declare a woman pregnant approximately one week after conception, when the fertilized egg becomes implanted in the uterus.⁵³ Under this definition, when emergency contraception makes implantation in the uterus impossible, the pregnancy would be prevented, rather than terminated. Instead of operating as an abortion, emergency contraception could not be differentiated from other types of contraception that prevent pregnancy.

The definitional distinction of pregnancy's beginning has been used to argue emergency contraception should not be examined in the abortion framework.⁵⁴ Despite the ramifications that the distinction might have, not the least being the issue at hand, the Supreme Court has yet to address when a legal pregnancy begins.⁵⁵ Lower courts, however, have made conjectures, favoring the "implantation" view over the "conception" view.⁵⁶

B. LIMITATIONS ON THE RIGHT TO CONTRACEPTION

Even if emergency contraception is not an abortion, it does not follow that one has a constitutional right for a prescription to be filled at any pharmacy of one's choosing. Although there is an unquestionable constitutional right for access to contraception in the United States,⁵⁷ there is no precedent suggesting any particular pharmacy or pharmacist is required by the Constitution to dispense contraception. *Griswold v. Connecticut*⁵⁸ struck down a state law that had forbidden the

53. See, e.g., GRIMES & RAYMOND, *supra* note 2, at E-182.

54. See Schaper, *supra* note 9, at 8-9.

55. *Id.* at 8.

56. See, e.g., *Margaret S. v. Edwards*, 488 F. Supp. 181, 190-92 (E.D. La. 1980) (striking down a statute that defined pregnancy as beginning "after fertilization of the female ovum," and holding that the definition was constitutionally vague and might include the morning-after pill); *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 408-13 (Ct. App. 1989) (holding that a Catholic hospital could not refuse to give information on the morning-after pill, as it did not fit within the scope of abortion).

57. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a constitutional right to contraception); see also *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (striking down a Massachusetts statute that denied contraception access to unmarried individuals).

58. 381 U.S. 479 (1965).

use of contraception and any third party assistance in its use, under the auspices of marital privacy.⁵⁹ Seven years later, the Court extended the constitutional right to contraception to include distribution to unmarried individuals.⁶⁰ More instructive than the rights conferred in these cases, however, is where the Court was silent: no mention was made of any obligation, pharmaceutically or otherwise, to carry contraceptive devices. In short, one has a right to buy contraception so long as there is a location from which to buy it. The Constitution protects access, not accessibility.

The third pertinent Supreme Court decision regarding the sale and purchase of contraception is the 1977 case, *Carey v. Population Services International*.⁶¹ There, a New York law permitted only licensed pharmacists to distribute or sell nonprescription contraceptives.⁶² In striking down the law, the Court was concerned with the “restriction of distribution channels to a small fraction of the total number of possible retail outlets render[ing] contraceptive devices considerably less accessible to the public.”⁶³ Although a cursory glance at the cited language might suggest the Court would uphold a law forcing pharmacies to sell emergency contraception, as it would allow for greater access, such an interpretation takes the ruling out of context.

The plaintiff in *Carey* was a mail order retailer of contraception.⁶⁴ By granting the retailer the right to sell in New York, the Court broadened access by lifting a prohibition on entry into the market. Contextually, protecting the rights of retailers to choose to sell contraception is much different than requiring retailers to sell a particular form of contraception. This latter scenario, parallel to the course suggested by emergency contraception access advocates, grossly perverts the constitutional right to contraception beyond its true scope. The constitutional right prevents the state from restricting one’s access to contraception. This right falls short of mandating any particular retailer, including a pharmacy, to sell the products.

IV. SHIFTING THE CONTROVERSY: STATE-MANDATED

59. *Id.* at 485.

60. Eisenstadt, 405 U.S. at 441-43.

61. 431 U.S. 678 (1977).

62. *Id.* at 681.

63. *Id.* at 689.

64. *Id.* at 682 n.2.

DISPENSATION

Even if the Constitution grants no right to emergency contraception access, the legitimate arguments for free accessibility remain. Most fundamentally, a pharmacist's refusal to provide a legal prescription for a drug burdens the patient-doctor relationship, in which patients are able to control their health care decisions.⁶⁵ Moreover, specific to the drug in controversy, expedient access is critical when the drug's effectiveness decreases seventy-two hours after intercourse. In geographic areas with few drugstores, a woman denied access to emergency contraception in one pharmacy may be completely denied of the opportunity to use the drug altogether.⁶⁶ Perhaps more worrisome, among the many victims of rape who may become pregnant each year in the United States, barriers to emergency contraception access would require such victims to choose more intrusive methods for dealing with a pregnancy.⁶⁷ In response to these concerns and the probable lack of a constitutional right to guaranteed access to emergency contraception, state legislatures have attempted to exercise their own powers to compel access to the drug by enacting "must-dispense" laws.⁶⁸

A. THE FREE EXERCISE CLAUSE AND *EMPLOYMENT DIVISION V. SMITH*

These "must-dispense" laws have their own constitutional ramifications. For instance, many pharmacists refuse to dispense emergency contraception due to religious beliefs.⁶⁹ For those who accept emergency contraception as abortifacient, religious teachings in opposition to abortion create conflict.⁷⁰

65. See Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe Is Not Enough: When Religion Controls Healthcare*, 31 *FORDHAM URB. L.J.* 725, 727-28 (2004).

66. See Sanchez, *supra* note 4, at A10 (reporting the concerns of Sarah Stoesz, president of Planned Parenthood of Minnesota, North Dakota, and South Dakota).

67. See Schaper, *supra* note 9, at 4-5.

68. See Davey & Belluck, *supra* note 5, at A16 (reporting that California, Missouri, and New Jersey each had such proposals). In addition, similar bills had been proposed on the federal level, in both the House and the Senate. *Id.*

69. See Mike Rutledge, *Pharmacist Sues over Abortion Pill*, *CINCINNATI POST*, Aug. 13, 1999, at 1A, 10A.

70. Some religions explicitly oppose abortion. For some Christians, the following verse is cited: "Before I formed you in the womb I knew you. [B]efore you were born I dedicated you . . ." *Jeremiah* 1:5 (St. Joseph). For Roman

Indeed, cooperation in an abortion may even lead to excommunication in the Roman Catholic Church.⁷¹ Such conflict with religion implicates the free exercise clause of the First Amendment, which prohibits laws that impede the free exercise of religion.⁷²

The Supreme Court established the framework for free exercise challenges in *Employment Division v. Smith*.⁷³ The Court proclaimed the “mere possession of religious or religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”⁷⁴ The Court held that the “right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁷⁵

On the face of the *Smith* standard, the conscientious pharmacist’s argument seems to fail. A law that requires dispensation of valid prescriptions for emergency contraception is “neutral” in the sense that it is presumably not written in animus toward a specific group of pharmacists, and it is of “general applicability” because it applies to all pharmacists, regardless of religious belief. Instead, the impetus behind the law is to ensure access to the drug.⁷⁶

Catholics, “[h]uman life must be respected and protected from the moment of conception. From the first moment of existence, a human being must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life.” CATECHISM OF THE CATHOLIC CHURCH: WITH MODIFICATIONS FROM THE EDITIO TYPICA 606 (Doubleday 1997) (1994). Islam also explicitly opposes abortion. See Hassan Hathout, *Abortion – Contraception – Sterilization* 3-5 (2002), http://www.eufobio.org/~upload/religion/texte/Islam_abortion.pdf (providing Islamic teachings on abortion, including that the act is a sin, meriting punitive measures).

71. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 70, at 606.

72. U.S. CONST. amend. I; see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment incorporates the First Amendment).

73. 494 U.S. 872 (1990).

74. *Id.* at 879.

75. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

76. See Dirk Johnson & Hilary Shenfeld, *Swallowing a Bitter Pill in Illinois*, NEWSWEEK, Apr. 25, 2005, at 28 (reporting that Illinois Governor Blagojevich, after issuing an edict requiring pharmacists to dispense emergency contraception, stated that his reason was to enable women to fill birth control prescriptions quickly and without hassle).

The *Smith* Court, however, articulated an exception to the standard to account for previous cases that struck down seemingly neutral and generally applicable laws that encroached on the free exercise clause.⁷⁷ In defining the so-called “hybrid” exception,⁷⁸ the Court said the First Amendment only bars neutral, generally applicable laws that implicate the “[f]ree [e]xercise [c]lause in conjunction with other constitutional protections, such as freedom of speech and of the press.”⁷⁹ Thus, in order to challenge the must-dispense law on the basis of the *Smith* standard, a pharmacist must state a constitutional claim in addition to the free exercise violation.

The First Amendment’s freedom of speech clause⁸⁰ is the most viable argument. The Court has interpreted the freedom of speech to include expressive conduct.⁸¹ A pharmacist who refuses to fill a prescription may be expressing many ideas through her conduct, including the belief that emergency contraception is abortifacient, as well as the more general belief that abortion is morally wrong. Withholding the drug, however, is not conduct, but rather refraining from conduct. And, in *Wooley v. Maynard*,⁸² the Supreme Court stated that “the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”⁸³

Even if the refusal to dispense emergency contraception constitutes speech, the plaintiff pharmacist must still raise a viable freedom of speech claim in order to challenge a must-

77. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (speculating that the reason for the exception was to distinguish *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court discussed the constitutional right to direct the religious upbringing of their children, as well as the free exercise clause).

78. See *Smith*, 494 U.S. at 881-82.

79. *Id.* at 881. The federal courts of appeals have split on how the hybrid exception should be applied. See Jonathan B. Hensley, Comment *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 128-37 (2000).

80. U.S. CONST. amend. I.

81. *Texas v. Johnson*, 491 U.S. 397, 406 (1989); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

82. 430 U.S. 705 (1977).

83. *Id.* at 714 (1977) (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

dispense law. First, for conduct to be protected under the First Amendment, it must be communicative.⁸⁴ The Supreme Court has promulgated a two factor inquiry for communicative conduct: intent to convey a particularized message and likelihood that the message will be understood by those receiving it.⁸⁵ This analysis will be factually dependent upon the individual pharmacist who withholds a prescription for emergency contraception. In a First Amendment claim, she would have to prove both that she intended to let the customer know that, in her opinion, emergency contraception is morally wrong, and, second, that it is likely the customer understood why the drug was denied.

If the conduct is found to be communicative, a state may still regulate the conduct if it has sufficient justification. The Court allows incidental limitations on those First Amendment freedoms if the government articulates a sufficiently important interest.⁸⁶ The state has an important interest in ensuring some access to contraception for women,⁸⁷ and in the context of emergency contraception, the state might argue this is particularly true for victims of rape. The restriction on the First Amendment freedom implementing the state's interest, however, must be no greater than is essential to further that interest.⁸⁸ Accordingly, a plaintiff pharmacist might argue that the scope of a must-dispense law should contemplate the availability of other pharmacists within the plaintiff's pharmacy, as well as other pharmacies within a geographical region, that might alleviate the need for the plaintiff to dispense emergency contraception.

A must-dispense law that requires a conscientious pharmacist to distribute emergency contraception, then, appears to be at least a candidate for a hybrid claim under the *Smith* framework.⁸⁹ The result of such a claim, however, has

84. See *Spence v. Washington*, 418 U.S. 405, 409 (1974).

85. See *id.* at 410-11.

86. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

87. A state, for example, may not pass a law prohibiting the sale of contraceptives, as it would impinge upon the freedom to choose contraception. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687-88 (1977). Therefore, it is likely both within the constitutional power of the state, as well as an important governmental interest, to ensure women have access to contraceptives.

88. See *O'Brien*, 391 U.S. at 377.

89. *But see* *McConnell*, *supra* note 77, at 1121-22 (opining that the exception was articulated by the Court only to distinguish *Yoder* and was not

become difficult to predict, as the Supreme Court has neither clarified the hybrid exception since its original pronouncement, nor granted certiorari to a case whose outcome depended upon the doctrine.⁹⁰ This ambiguity has resulted in a split in the federal circuit courts of appeals, ranging from not recognizing hybrid claims at all, to requiring an independently viable constitutional claim when invoked.⁹¹

It is far from clear whether a pharmacist challenging a must-dispense law could succeed. This is not to suggest there are no further protections for conscientious pharmacists, but it could mean reliance on the legislative branch rather than the judiciary.

B. LEGISLATIVE ALTERNATIVES

In a state that passes a must-dispense law, pharmacists opposed to emergency contraception still have legislative recourse. In *Smith*, the Court acknowledged that political accommodations could be made for religious groups that would otherwise be subject to a neutral law of general applicability.⁹²

Furthermore, in a jurisdiction that has not passed a must-dispense law, legislation can be enacted to protect pharmacists who are conscientious objectors. So-called “conscience clauses” or “refusal clauses”⁹³ grant a pharmacist legal permission to refuse to dispense a drug that violates her conscience.⁹⁴ Four

meant to be taken seriously in future cases).

90. See Hensley, *supra* note 79, at 119, 127-28 (citing the only two Supreme Court cases that mentioned the doctrine, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), neither of which clarified its application).

91. Compare *Kissinger v. Bd. of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (calling the hybrid exception “illogical” because if there is an independent viable constitutional claim, then there is no need to combine it with an inviable free exercise claim) with *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996), and *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (recognizing the possibility of hybrid claims). See generally Hensley, *supra* note 79, at 128-37.

92. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990). To illustrate, the Court cited states that chose to except the sacramental use of peyote from their drug restrictions. *Id.*

93. See Fogel & Rivera, *supra* note 65, at 727.

94. For example, the American Pharmacists Association wrote the following 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.” AMERICAN PHARMACISTS ASS’N, REPORT OF THE 2004 SESSION OF THE APhA HOUSE OF DELEGATES 4 (2004),

states have already passed these clauses in some form, and there are legislative proposals in at least twelve other states.⁹⁵

Conscience clauses, in other forms, have been upheld against establishment clause challenges in the past.⁹⁶ A further benefit for conscientious pharmacists is that conscience clauses are not explicitly religious, allowing pharmacists without a free exercise claim to cite their clinical role as part of the “health care team” as a reason to withhold dispensation of emergency contraception.⁹⁷ Such pharmacists believe they are jointly responsible, with the prescribing physician, for every prescription dispensed; similar to physicians, then, these pharmacists argue that they should receive full protection of the law, even when exercising their moral and ethical convictions.⁹⁸

V. CONCLUSION

Despite compelling policy arguments on both sides of the emergency contraception debate, it appears constitutional law favors the pharmacist’s conscientious objection to dispensing emergency contraception. Whether or not emergency contraception is considered abortifacient, the Constitution in no way demands emergency contraception to be available at any retail drug store the consumer chooses. Consequently, supporters of forced drug access cannot rely on the Constitution.

The viability of a legislative alternative is also in doubt. Until the Supreme Court clarifies the hybrid exception articulated in *Smith*, must-dispense laws will remain susceptible to free exercise challenges. In that case, the likelihood of having a prescription filled will depend not only

<http://www.aphanet.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=2472>.

95. See Davey & Belluck, *supra* note 5.

96. See, e.g., *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 310-12 (9th Cir. 1974) (upholding a federal law that prohibited courts from using a hospital’s receipt of federal money as a justification for requiring those hospitals to perform sterilizations that conflicted with their religious beliefs).

97. See Koch testimony, *supra* note 11 (“Pharmacists have worked very hard to be considered partner’s in the health care team.”); Noe, *supra* note 6 (“You don’t need a pharmacist at all if you’re going to just require them to dispense medications. That takes away their clinical role.” (quoting Susan Winckler, Vice President of Policy and Communications for the American Pharmacists Association)).

98. See Koch testimony, *supra* note 11.

2005] *CONSCIENCE BEHIND THE COUNTER* 353

upon state law and the individual pharmacist, but also upon each respective circuit's recognition of the hybrid exception. The constitutionality of conscience clauses, where passed, is less in doubt, providing assurance for conscientious pharmacists in those states.

Undoubtedly controversial and contentious, the debate between free access to emergency contraception and the pharmacist's conscientious objection will continue to incite litigants, lawmakers, and lobbyists. Pharmacists may take solace in the debate's legal implications, however, for there is, indeed, room for conscience behind the counter.