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Just Fill the Prescription:

Why Illinois' Emergency Rule Appropriately Resolves the Tension Between Religion and Contraception in the Pharmacy Context

Sarah J. Vokes*

Introduction

Across the nation, women with valid prescriptions for contraception are being denied their prescriptions based on the individual beliefs of the pharmacists on duty.¹ In December 1996, a pharmacist refused a Delhi, Ohio woman birth control pills due to the pharmacist's personal religious beliefs.² In July 2002, a college student in Menomonie, Wisconsin was denied her prescription based on a pharmacist's opposition to all birth control.³ In June 2004, a Glen Carbon, Missouri woman was

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1. Correy E. Stephenson, *Increasing Number of Health Care Providers Refusing to Give Treatment Based on Religious Beliefs*, KANSAS CITY DAILY REC., Apr. 26, 2005, at 1 ("An increasing number of health care providers across the country are invoking their religious beliefs to refuse to give treatment, medication and services they find morally objectionable. The most common examples are pharmacists who refuse to fill prescriptions for birth control or emergency contraception."); *Pharmacy Refusals 101*, UPDATE (Nat'l Women's Law Ctr., Washington, D.C.), Nov. 29, 2005, at 1, available at <http://www.nwlc.org/pdf/11-05Update-PharmacyRefusal101.pdf> (noting that there have been reports of pharmacists refusing to fill prescriptions for birth control in many states, including California, Georgia, Louisiana, Illinois, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Texas, Washington, and Wisconsin).

2. Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at 3A ("Brauer was fired in 1996 after she refused to refill a prescription for birth-control pills at a Kmart in the Cincinnati suburb of Delhi Township.").

3. See Anita Weier, *Patient, Pharmacist Collide*, CAPITAL TIMES (Madison, Wis.), Mar. 16, 2004, at 1A (describing a college student's experience after walking

refused her birth control prescription; instead what she received from her pharmacist was a "full rant about [the] 'murder of a baby.'"⁴ In September 2004, a young single mother in Laconia, New Hampshire attempted to have a prescription for emergency contraception filled at a local pharmacy only to have it rejected by the pharmacist for reasons unrelated to medical treatment or the patient's health.⁵ In early 2005, a woman in Texas was refused her prescription for emergency contraception based on the pharmacist's beliefs about abortion.⁶ In March 2005, a woman left a Glencoe, Minnesota pharmacy "empty-handed" when a pharmacist declined to fill her valid birth control prescription based on "moral reasons."⁷ In July 2005, when a twenty-nine year old art teacher attempted to fill a prescription for birth control and emergency contraception at a pharmacy in St. Charles, Illinois, the pharmacist refused to fill the prescription based on "personal beliefs."⁸ In February 2006, a pharmacist in Beardstown, Illinois, refused to fill a woman's valid prescription for emergency contraception.⁹ These incidents highlight a growing tension between a pharmacist's right to free exercise of religion and a patient's fundamental right to health care, specifically contraception.

into the K-mart pharmacy to have her prescription filled: the pharmacist asked the student why she was taking birth control pills, and when the student responded that she was taking them for contraceptive purposes, the pharmacist refused to fill her prescription).

4. Betty Cuniberti, *In Rural Missouri, Pharmacists Emerge as Pastor, Governor and Surgeon General*, ST. LOUIS POST-DISPATCH, May 1, 2005, at E1.

5. See Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, WASHINGTON POST, Mar. 28, 2005, at A1.

By the time Suzanne Richards, 21, finally got another pharmacy to fill her morning-after pill prescription—after being rejected by a drive-through Brooks Pharmacy in Laconia, N.H., one late Saturday night in September—the 72 hours had long passed.

"When he told me he wouldn't fill it, I just pulled over in the parking lot and started crying," said Richards, a single mother of a 3-year-old who runs her own cleaning service. "I just couldn't believe it. I was just trying to be responsible."

Id.

6. Betsy Malloy, *Dispensing Morality: Refusal Clauses, Religious Exemptions and Conscience Clauses*, 21 TEX. LAW. 38 (2005) ("Earlier this year in Texas, a pharmacist objected to a woman's prescription for the morning-after pill because of his belief that such emergency contraception is a form of chemical abortion.").

7. Rene Sanchez, *New Arena for Birth-Control Battle*, STAR TRIB. (Minneapolis), May 3, 2005, at A1.

8. Gala M. Pierce, *Complaint Filed Against Pharmacy*, CHI. DAILY HERALD, Sept. 16, 2005, at F2.

9. Dean Olsen, *"Plan B" Prescription Allegedly Rejected*, ST. J.-REG. (Springfield), Feb. 3, 2006, at 1.

During the past three decades, states have created laws to allow health care providers the option of choosing not to provide certain medical services, motivated largely by a desire to protect doctors who did not wish to perform abortions following the *Roe v. Wade*¹⁰ decision in 1973.¹¹ These laws generally do not cover pharmacists; however, a recent upsurge in political activity around the country has been focused on attempting to pass legislation to include pharmacists in such health care provider "conscience clauses."¹²

This Article will examine the issue of pharmacist refusals of valid prescriptions for contraceptives. In the background section, this Article will first discuss the fundamental nature of the right to contraception. Then, it will discuss the rise of conscience clauses for health care providers, the unique role pharmacists play in the health care system, as well as the current movement for more protection for pharmacists. Further, this Article will examine the factors leading up to Illinois Governor Rod R. Blagojevich's emergency rule regarding the fulfilling of valid prescriptions for contraception, what that rule means, as well as the current state of litigation surrounding this new rule.

In the analysis section, this Article will argue that Governor Blagojevich's rule strikes the appropriate balance between religion and health care. In coming to this conclusion, it will argue that the license pharmacists receive, as well as the profession's standards of care, require pharmacists to fill prescriptions. Then, this Article will distinguish between individual and institutional refusal. Additionally, it will examine whether Title VII of the Civil Rights Act of 1964¹³ requires that pharmacists be accommodated by their employers. Finally, this Article will conclude that the Illinois rule is likely to withstand the court challenges it currently faces.

I. Background

A. Contraception as a Fundamental Right

Contraception use has been firmly established as a right included in the fundamental right of privacy by the Supreme

10. 410 U.S. 113 (1973).

11. See *infra* notes 27-31 and accompanying text.

12. See *infra* notes 33-34 and accompanying text.

13. 42 U.S.C. 2000e-2(a) (2004).

Court. Beginning in 1965, *Griswold v. Connecticut*¹⁴ laid the groundwork for future decisions upholding this right based on "the zone of privacy created by several fundamental constitutional guarantees."¹⁵ Although this decision was based on the zone of privacy that surrounds the institution of marriage,¹⁶ the Court expanded upon this reasoning in subsequent cases. Seven years later in *Eisenstadt v. Baird*,¹⁷ the Supreme Court expanded the scope of this fundamental right, affirming its holding in *Griswold* and extending it to both married and unmarried women.¹⁸ And just five years later, this right was decisively recognized in *Carey v. Population Services International*,¹⁹ which held that the decision whether to have children is at "the very heart of this cluster of constitutionally protected choices."²⁰ In recognizing the importance of this right, the Court determined that intrusions by the state on the right to privacy in using contraception are subject to strict scrutiny.²¹ Although contraception use is included within the fundamental right to privacy, the Court has not held that access to reproductive health services is a fundamental right.²² The right to privacy does not guarantee that access.²³

Nearly one third of all women in the United States who use some sort of contraception method are on birth control pills; over eleven million women use birth control pills as their regular

14. 381 U.S. 479 (1965).

15. *Id.* at 485.

16. *See id.* at 486. In its opinion, the Court described its view of the importance of marriage as an institution:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

17. 405 U.S. 438 (1972).

18. *See id.* at 453 ("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.").

19. 431 U.S. 678 (1977).

20. *Id.* at 685.

21. *See id.* at 686 ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.").

22. *See* Malloy, *supra* note 6, at 38 ("In [*Maier v. Roe*] in 1977 and [*Harris v. McRae*] in 1980, the Supreme Court did not interpret the right to privacy to guarantee a woman access to comprehensive reproductive health services.").

23. *See id.*

method of contraception.²⁴ Emergency contraception use is not as widespread, but is on the rise.²⁵ If used more pervasively, emergency contraception could prevent up to 1.7 million unwanted pregnancies and 800,000 abortions each year.²⁶ It is against this backdrop that pharmacy refusals occur and that health care refusal clauses are enacted.

B. Roe v. Wade and the Genesis of Health Care Refusal Clauses

Roe v. Wade brought a number of changes to the health care landscape of this country, including the birth of health care refusal clauses. In the years immediately following the decision in 1973, a majority of states passed legislation that allows at least some health care providers to opt out of providing medical services.²⁷

24. See *Contraception Use*, FACTS IN BRIEF (Alan Guttmacher Inst., New York, N.Y.), Jan. 2006, at 1, available at http://www.agi-usa.org/pubs/fb_contr_use.pdf (stating the number of women using birth control pills at 11,661,000 of the 38,109,000 women who practice contraception).

25. See *Emergency Contraception*, FACT SHEET (Katharine Dexter McCormick Library, Planned Parenthood Fed'n of America, New York, N.Y.), Jan. 2006, at 7, available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/ec/factemergency-contraception.pdf> ("Planned Parenthood is the leading provider of emergency contraception in the U.S. The number of women receiving [emergency contraception pills] from Planned Parenthood has grown from roughly 17,000 in 1995 to 984,000 in 2004.").

26. See *A Brief History of Emergency Hormonal Contraception*, REPORT (Katharine Dexter McCormick Library, Planned Parenthood Fed'n of America, New York, N.Y.), Sept. 2005, at 3, available at <http://www.ppfa.org/pp2/portal/files/portal/medicalinfo/ec/fact-emergency-contraception-history.pdf> (citing Anna Glasier & David Baird, *The Side Effects of Self-Administering Emergency Contraception*, 339 NEW ENG. J. MED. 1, 1-4 (1998)).

27. CATHERINE WEISS ET AL., RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACLU REPRODUCTIVE FREEDOM PROJECT 1 (2002), available at <http://www.aclu.org/FilesPDFs/ACF911.pdf>. The report describes the upsurge in refusal clauses immediately proceeding *Roe v. Wade*:

Refusal clauses pertaining to certain reproductive health services swept the nation in the years following the Supreme Court's 1973 decision legalizing abortion in *Roe v. Wade*. Congress started the trend that same year when it passed the Church Amendment (named for its sponsor, Senator Frank Church) in reaction to a 1972 court order that had required a Catholic hospital to allow a sterilization procedure to be performed on its premises. Among other things, the Church Amendment established that the receipt of federal funds under various public health programs would not require individuals or entities to perform or assist in sterilization or abortion procedures to which they had moral or religious objections. The states soon followed suit. According to the Alan Guttmacher Institute, by the end of 1978, more than forty states had enacted refusal clauses pertaining to abortion, and several had enacted clauses related to sterilization and/or contraception.

Id. (footnotes omitted).

Currently forty-six states have such regulations in effect.²⁸ Regulations vary in their scope; some exceptions are permitted solely based on religious grounds, some are for private institutions only, while others are written more broadly.²⁹ These refusal clauses were spurred by the legalization of abortion.³⁰ The purpose of these clauses was to protect doctors, hospitals, and health clinics that did not wish to perform abortion services.³¹ Because of that history, these regulations generally do not specifically cover pharmacists. Since the "initial spate of legislation" following *Roe v. Wade*,³² however, refusal or conscience clauses have not been an issue in the political forum until about the last decade.³³ In the past decade, this issue has resurfaced as a hot-button political issue.³⁴

C. New Reproductive Rights Technology

One of the factors contributing to the recent rise in refusal clause legislative activity has been the introduction of new reproductive health products into the market.³⁵ Two such products are emergency contraception (commonly known as the morning-after pill) and mifepristone (commonly known as RU-486

28. *Refusing to Provide Health Services*, ST. POLICIES IN BRIEF (Alan Guttmacher Inst., New York, N.Y.), Feb. 1, 2006, available at http://www.agi-usa.org/pubs/spib_RPHS.pdf.

29. *Id.*

30. WEISS ET AL., *supra* note 27, at 1.

31. *See id.* (discussing enactment of the Church Amendment and how individual states followed suit with the enactment of refusal clauses).

32. *Id.*

33. *Id.* (describing the various factors leading to a new burst of activity in refusal clauses, including the movement for universal healthcare, the rise in mergers of religiously-affiliated and secular hospitals, the managed care revolution, and the introduction into the market of emergency contraception and RU-486).

34. *Id.*

35. *Id.*; see also Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider 'Conscience,' Patient Needs*, Guttmacher Rep. on Pub. Pol'y, 1, Aug. 2004, at 1-3, available at <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.pdf>. Sonfield describes these new products in the article:

Much of the new momentum comes from the advent of technologies and medical practices that some Americans find objectionable. Examples include in vitro fertilization and other assisted reproductive technologies; medical research involving human embryos or fetuses, or embryonic stem cells; and end-of-life practices such as assisted suicide or even adherence to living wills. Refusal clause advocates have used public misgivings about these technologies and practices to push for provisions applying to these activities specifically—or to any activity, without limitation—and for an increasingly wide group of individuals and institutions that they claim are unwilling "participants" in these activities.

Id. at 1.

or the abortion pill).³⁶

Although birth control pills were used off-label as emergency contraception for decades,³⁷ emergency contraception was not officially approved by the Food and Drug Administration (FDA) until September 1998.³⁸ Emergency contraception prevents pregnancy when taken within approximately seventy-two hours after intercourse by preventing either ovulation, the fertilization of an egg, or in some cases the implantation of a fertilized egg.³⁹ Emergency contraception does not end an existing pregnancy; instead it is a contraceptive that can be used after intercourse.⁴⁰ In fact, the U.S. Department of Health and Human Services classifies emergency contraception as a method of birth control, not as an abortifacient.⁴¹ Although emergency contraception does not function as an abortifacient, misconceptions about the drug as well as religious opposition to abortion and contraception have led some pharmacists to refuse to fill prescriptions.⁴² Some politicians have also exploited these public misconceptions to enact legislation allowing pharmacists to refuse to fill prescriptions.⁴³

RU-486 was approved on September 28, 2000 by the Food and Drug Administration.⁴⁴ This presented a unique new opportunity for pro-life activists to introduce legislation allegedly protecting pharmacists from providing abortifacients against their

36. *Mifepristone: Expanding Women's Options for Early Abortion*, FACT SHEET (Katherine Dexter McCormick Library, Planned Parenthood Fed'n of America, New York, N.Y.) Jan. 2004, at 1, available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-early-abortion-mifepristone.pdf>.

37. *A Brief History of Emergency Hormonal Contraception*, *supra* note 26.

38. Marlene Cimon, *1st Emergency Birth Control Pill Approved*, L.A. TIMES, Sept. 3, 1998 at A1.

39. *Emergency Contraception*, *supra* note 25 ("Emergency contraceptive pills are not effective if the woman is pregnant . . . ' A recent study found that most often, Emergency contraceptive pills] reduce the risk of pregnancy by inhibiting ovulation." (citation omitted)).

40. *Id.*

41. *Frequently Asked Questions About Emergency Contraception* (The Nat'l Women's Health Info. Ctr.), Nov. 2002. "If you are already pregnant, emergency contraception will NOT work." *Id.* at 1. "Emergency contraception prevents pregnancy." *Id.* at 3.

42. WEISS ET AL., *supra* note 27, at 3.

43. Sonfield, *supra* note 35, at 1 ("[M]any antiabortion and other conservative activist groups have tarred [emergency contraception] as causing abortion, despite broad consensus in the medical community that it prevents an unintended pregnancy.").

44. *Mifepristone*, *supra* note 36, at 1 ("Mifepristone, formerly known as RU-486, is an antiprogesterone drug that blocks receptors of progesterone, a key hormone in the establishment and maintenance of human pregnancy."). The FDA approved Mifepristone for use as an abortifacient. *Id.*

religious beliefs.⁴⁵ In reality, pharmacists have no role in dispensing RU-486; physicians dispense the drug.⁴⁶

D. The Unique Role of Pharmacists

Pharmacists serve a vital role in the health care system. No other professional dispenses prescription drugs, giving the pharmacist a crucial role in health care delivery.⁴⁷ In this way they are on the front lines of the health care industry. As a profession, pharmacies have a monopoly on prescription drugs,⁴⁸ and, individually, pharmacists in some rural areas possess a "virtual geographic monopoly" over the dispensation of prescription medication.⁴⁹

Although a pharmacist's primary obligation is to fill prescriptions, that is not the full extent of his or her duties.⁵⁰ Instead, as professionals they have "always been expected to do more than just dispense" medication to customers.⁵¹ For instance, pharmacists also determine if any prescribed medications cannot be taken together and warn patients of potential side effects.⁵²

45. *Id.* at 2-3.

46. See, e.g., NAT'L ABORTION FED'N, NATIONAL ABORTION FEDERATION 2003 STATE LEGISLATIVE REPORT 6 (2003), available at http://www.prochoice.org/pubs_research/publications/downloads/public_policy/state_bill_report_2003.pdf ("Although such bills deceptively imply that pharmacists dispense medical abortion or other 'abortifacients,' in fact medical abortion drugs are not distributed by pharmacists.").

47. Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 236 (2005).

48. *Id.* at 247.

49. Donald H.J. Hermann, Editorial, *Physicians and Pharmacists Receive a License that Obligates Them to Provide Appropriate Care*, CHI. SUN-TIMES, May 7, 2005, at 16.

50. See American Pharmacists Association, Facts About Pharmacists and Pharmacies, http://www.aphanet.org/AM/Template.cfm?Section=Public_Relations&Template=/CM/HTMLDisplay.cfm&ContentID=2680 ("In the last quarter century, pharmacy has expanded its role within the health care delivery system from a profession focusing on preparation and dispensing of medications to patients to one in which pharmacists provide a range of patient-oriented services to maximize the medicine's effectiveness."); see also American Pharmacists Association, The Pharmacy Profession: Transitioning from Prescription Provider to Health Care Manager, http://www.aphanet.org/AM/Template.cfm?Section=Public_Relations&Template=/CM/HTMLDisplay.cfm&ContentID=2679 ("Pharmaceutical care is a patient-centered, outcomes oriented, pharmacy practice. It requires the pharmacist to work in concert with the patient and the patient's other healthcare providers to promote health, to prevent disease, and to assess, monitor, initiate, and modify medication use to assure that drug therapy regimens are safe and effective.").

51. Malloy, *supra* note 6.

52. American Pharmacists Association, Facts about Pharmacists and

Additionally, in some states pharmacists are permitted to administer vaccinations.⁵³ There are indications that the pharmacist's role in the health care system may be expanding;⁵⁴ they are seen as "key players in the implementation of drug therapies."⁵⁵

Critics say, however, that "filling a prescription is a very different job from writing one" and that the pharmacist's role should neither be confused with nor treated the same as the physician's role with regard to patients.⁵⁶ Instead, a pharmacist's job is likened more to a "conduit" between physician and patient, guaranteeing that a prescription is dispensed to patients properly.⁵⁷ The danger of considering a pharmacist as having the same role as the physician is that "pharmacists are injecting themselves into the doctor-patient relationship without the benefit of the doctor's medical knowledge and the patient's medical history."⁵⁸

E. Current Legislation Aimed at Pharmacists

Although the vast majority of states already have health care provider refusal clauses on the books, the issue of refusal clauses specifically for pharmacists is currently a hot topic among the states. In 2005 alone, twelve states introduced so-called conscience clause legislation aimed at pharmacists.⁵⁹ In the past nine years, at least twenty-five states have considered passing legislation to create a conscience clause for pharmacists.⁶⁰

Pharmacies, *supra* note 50.

53. American Pharmacists Association, *The Pharmacy Profession: Transitioning from Prescription Provider to Health Care Manager*, *supra* note 50 ("Currently, more than half of the states have been identified as allowing pharmacists to provide immunizations.").

54. Teliska, *supra* note 47 ("David Brushwood, a University of Florida professor and an expert on pharmacy and the law, has noted that the role of pharmacists in medical care has expanded so that pharmacists now have a mission to provide 'pharmaceutical care' for patients.").

55. Donald W. Herbe, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 87-88 (2002/2003) ("As key players in the implementation of drug therapies, pharmacists are expected to withhold drugs 'from those who have no authority to use them' and not to withhold 'medications from those who do have authority to use them.'").

56. Amanda Paulson, *Culture War Hits Local Pharmacy*, CHRISTIAN SCI. MONITOR, April 8, 2005, at 1, 11.

57. Kimberly M. Glow, M.D., Letter to the Editor, *Druggists' Views Can't Interfere With Job*, ST. J.-REG. (Springfield), May 25, 2005, at 9.

58. Malloy, *supra* note 6.

59. *Id.*

60. Correy E. Stephenson, *Increasing Number of Health Care Providers*

In 1998, South Dakota became the first state to enact legislation to create a refusal exception for pharmacists.⁶¹ South Dakota defines "unborn child" in such a way to allow pharmacists to refuse to dispense ordinary birth control pills, in addition to medical abortifacients.⁶² To date, only four states currently have laws that specifically allow pharmacists to refuse to fill prescriptions based on moral reasons.⁶³

F. One State's Unique Approach: Illinois' Solution

On February 23, 2005, two women at a downtown Chicago pharmacy were denied prescriptions for contraceptives by a pharmacist.⁶⁴ The women complained about the refusals, which resulted in the Illinois Department of Financial and Professional Regulation filing a formal complaint against the pharmacy.⁶⁵ This incident served as a catalyst for the Governor to launch a new effort to guarantee women's access to contraception.⁶⁶ On April 1, 2005, Governor Rod R. Blagojevich announced an emergency rule

Refusing to Give Treatment Based on Religious Beliefs, KANSAS CITY DAILY REC., Apr. 26, 2005.

61. Angles K. Brown, *Lawsuit Protection Helps South Dakota Druggists Bring Beliefs to Work*, CHI. TRIB., May 14, 1998, at C2; see S.D. CODIFIED LAWS § 36-11-70 (2004).

No pharmacist may be required to dispense medication if there is reason to believe that the medication would be used to:

- (1) Cause an abortion; or
- (2) Destroy an unborn child as defined in subdivision 22-1-2(50A); or
- (3) Cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing.

No such refusal to dispense medication pursuant to this section may be the basis for any claim for damages against the pharmacist or the pharmacy of the pharmacist or the basis for any disciplinary, recriminatory, or discriminatory action against the pharmacist.

Id.

62. S.D. CODIFIED LAWS § 22-1-2(50A) (2005) (defining "'Unborn Child,' [as] an individual organism of the species homo sapiens from fertilization until live birth").

63. Stephenson, *supra* note 60, at 1 (stating "[f]our states—Arkansas, Georgia, Mississippi and South Dakota—already allow pharmacists to refuse to fill prescriptions based on their religious beliefs").

64. Kari Lydersen, *Ill. Pharmacies Required to Fill Prescriptions for Birth Control*, WASH. POST, Apr. 2, 2005, at A2.

65. *Id.*; Abdon M. Pallasch, *Sell Contraceptives, Gov Orders Druggists*, CHI. SUN-TIMES, Apr. 2, 2005, at 5 ("Blagojevich, through his Financial and Professional Regulation Department, also filed an administrative complaint against Osco on Friday, charging the pharmacy with 'failure to provide pharmaceutical care' and 'unprofessional conduct' for refusing to dispense contraceptives to the two women in February. The state could fine or even ultimately close the store.").

66. Lydersen, *supra* note 64 (describing the new rule as coming "in response to complaints that on Feb. 23, a pharmacist refused to fill prescriptions for two women at an Osco pharmacy in downtown Chicago" (emphasis added)).

(Rule): "pharmacies in Illinois that sell contraceptives must accept and fill prescriptions for contraceptives without delay."⁶⁷ The purpose of the Rule is to prohibit "individual pharmacist's personal beliefs" from interfering with a woman's access to contraception.⁶⁸ The Governor, in announcing this Rule, emphasized the importance of ensuring equal access to health care for women.⁶⁹

The Rule additionally outlines what must occur if the drug is not in stock, stating that "the pharmacy must obtain the contraceptive under the pharmacy's standard procedures" or "if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedure," and "an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs."⁷⁰ This provides for prescriptions to be transferred, but only in cases when the particular medication is out of stock, not when an individual pharmacist objects to filling it based on personal beliefs. Finally, the language clearly targets pharmacies, not *pharmacists*. The state is putting the onus on pharmacies as institutions to create solutions to filling their customers' prescriptions in a timely fashion.⁷¹

The Rule went into effect immediately, and, as an emergency rule, it was effective for 150 days.⁷² The Rule withstood an

67. Press Release, Office of the Governor, Gov. Blagojevich Takes Emergency Action to Protect Women's Access to Contraceptives (Apr. 1, 2005), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3805>; Abdon M. Pallasch, *Sell Contraceptives, Gov Orders Druggists*, CHI. SUN-TIMES, Apr. 2, 2005, at 5 (On April 1, 2005, Governor Rod R. Blagojevich announced the filing of an emergency rule: "Our regulation says that if a woman goes to a pharmacy with a prescription for birth control, the pharmacy is not allowed to discriminate who they sell it to and who they don't," Blagojevich said. "No delays. No hassles. No lectures. Just fill the prescription."); see 29 Ill. Reg. 13639 (Aug. 26, 2005); 29 Ill. Reg. 5833 (Apr. 29, 2005).

68. Fernando Grillo, Sec'y of the Ill. Dept. of Fin. and Prof'l Regulation, Letter to the Editor, BALTIMORE SUN, Apr. 15, 2005, at A16 ("We are telling pharmacies that stock and dispense contraceptives that they can't let an individual pharmacist's personal beliefs delay or hinder a woman's ability to have her prescription for birth control filled in the same timely manner as any other prescription.").

69. Press Release, *supra* note 67 ("Today—in the 21st Century—our actions are nothing more than protecting a woman's right to have the same access to health care as men do. Nothing more. Nothing less," said Gov. Blagojevich.").

70. 29 Ill. Reg. 13639 (Aug. 25, 2005).

71. Grillo, *supra* note 68 ("It is the drugstore's responsibility to reach an accommodation with the beliefs of its staff. It is not the responsibility of the state of Illinois to accommodate those beliefs at the expense of women who are seeking safe, federally approved contraceptives.").

72. John Chase, *Contraceptive Rx's Ordered Filled*, CHI. TRIB., Apr. 2, 2005, at C18.

immediate challenge in the Joint Committee on Administrative Rules to suspend it.⁷³ The order became a permanent rule in August 2005.⁷⁴

On April 13, 2005, Pat Robertson's Center for Law and Justice filed suit on behalf of two pharmacists against the Governor and sought an injunction against the Rule.⁷⁵ A similar complaint, filed by Americans United for Life on September 14, 2005,⁷⁶ was dismissed by Sangamon County Judge John Belz on September 22, 2005. The judge denied injunctive relief because the parties had not "exhausted all other legal remedies."⁷⁷ Additionally, another suit is pending that was filed by the Center for Law and Religious Freedom on behalf of a Chicago pharmacist.⁷⁸ In September 2005, three pharmacists filed suit against the Governor on the grounds that the Rule violates the Illinois Health Care Right of Conscience Act (Conscience Act), as well as Title VII of the Civil Rights Act of 1964 (Title VII), among other grounds.⁷⁹ Most recently, on December 21, 2005, seven pharmacists filed suit against the Governor also based in part on alleged violations of the Conscience Act and Title VII.⁸⁰ Five of these pharmacists have been fired from an Illinois Walgreens since the new Rule has been in effect for refusing to fill emergency contraception prescriptions.⁸¹

73. Mary Massingale, *Panel Backs Governor's Rule for Pharmacies*, ST. J.-REG. (Springfield), May 18, 2005, at 19 ("A bipartisan legislative panel on Tuesday upheld the governor's emergency rule requiring pharmacies to dispense prescribed birth-control pills and emergency contraception. By a 6-5 vote, members of the Joint Committee on Administrative Rules shot down an attempt by Sen. Brad Burzynski, R-Clare, to suspend the April 1 rule. Eight votes would have been required to suspend it.").

74. Pierce, *supra* note 8.

75. John Chase, *State Birth-Control Rule Challenged*, CHI. TRIB., Apr. 14, 2005, at C4.

76. See Verified Complaint for Declaratory and Injunctive Relief, *Morr-Fitz, Inc. v. Blagojevich*, No. CH-495 (Ill. Cir. Ct. Sept. 14, 2005), available at <http://www.aul.org/ilroc/complaint-2005.9.14.pdf>.

77. Doug Finke, *Circuit Court Denies Relief for Pharmacists*, ST. J. REG. (Springfield), Sept. 23, 2005, at 11.

78. Massingale, *supra* note 73.

79. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 76, at 18.

80. Complaint for Declaratory and Injunctive Relief at 8-9, *Menges v. Blagojevich*, No. 05-3307 (C.D. Ill. Dec. 21, 2005).

81. *Id.* at 1.

II. Analysis

A. License Obligates Pharmacists to Fill Prescriptions

Pharmacists as a profession are regulated by states.⁸² Although it is not binding on the profession or its members, the American Pharmacists Association (APhA)⁸³ has adopted a "code of ethics" for pharmacists which outlines "the principles that form the fundamental basis of the roles and responsibilities of pharmacists."⁸⁴

The Code of Ethics suggests that it is not within a pharmacist's role to deny a patient medication that is safe and legal.⁸⁵ The Code of Ethics frames the pharmacy profession as a patient-centered occupation, which suggests that the primary focus of all actions taken on behalf of the pharmacist should be the patient.⁸⁶ Further, Principle III specifically discusses respect of an individual patient's dignity, which would include respecting a

82. Johanna L. Keely, Position Paper, *Pharmacist Scope of Practice*, 136 ANNALS OF INTERNAL MED. 1, 79 (2002).

83. American Pharmacists Association, Facts about Pharmacists and Pharmacies, *supra* note 50 ("The American Pharmacists Association (APhA) is the national professional society of pharmacists, representing the interests of the third largest health profession. Since its founding in 1852, APhA has been a leader in the professional and scientific advancement of pharmacy, and in safeguarding the well being of the individual patient.").

84. American Pharmacists Association, *Code of Ethics for Pharmacists*, available at <http://www.aphanet.org/AM/Template.cfm?section=search&template=cm/htmldisplay.cfm&contentid=2809> (The Code was adopted on October 27, 1994).

85. *See id.* The Code of Ethics lists eight principles:

- I. A pharmacist respects the covenantal relationship between the patient and pharmacist. . . .
- II. A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner. . . .
- III. A pharmacist respects the autonomy and dignity of each patient. . . .
- IV. A pharmacist acts with honesty and integrity in professional relationships.
- V. A pharmacist maintains professional competence. . . .
- VI. A pharmacist respects the values and abilities of colleagues and other health professionals. . . .
- VII. A pharmacist serves individual, community, and societal needs. . . .
- VIII. A pharmacist seeks justice in the distribution of health resources. . . .

Id.

86. *See id.* The Code further elaborates on Principle II:

A pharmacist places concern for the well-being of the patient at the center of professional practice. In doing so, a pharmacist considers needs stated by the patient as well as those defined by health science. A pharmacist is dedicated to protecting the dignity of the patient. With a caring attitude and a compassionate spirit, a pharmacist focuses on serving the patient in a private and confidential manner.

Id.

patient who chooses a course of medical care that is different from what the pharmacist would do him or herself.⁸⁷ The principle directs pharmacists to respect each patient's "personal and cultural differences." This is consistent with the proposition that when the pharmacist's beliefs are in direct conflict with the patient's decision, a pharmacist ought to fill the prescription against his or her own beliefs out of respect for the patient's beliefs.⁸⁸ In essence, by determining which prescriptions to fill and consequently which patients to serve, a pharmacist is acting in contradiction to his or her role and mission.⁸⁹

Additionally, a pharmacist's unique role in the health care system obligates him or her to fill prescriptions. Because the state licenses only certain individuals to dispense medication (pharmacists), those individuals are obligated to then provide the care their license dictates. A patient cannot simply purchase his or her medication with a prescription; a pharmacist is required in order for a patient to receive the care that her or his physician has determined is medically necessary. DePaul University College of Law Professor Donald Hermann has argued that pharmacists "receive a license that obligates the licensed individual to provide appropriate medical care to their patients."⁹⁰

B. Institutional/Pharmacy Solutions are Preferable to Individual/Pharmacist Employee Solutions

Although this Article argues that an individual pharmacist is obligated to fill valid, safe prescriptions, the new Rule in Illinois does not actually place that responsibility on pharmacists. Instead, the Rule is aimed at pharmacies as institutions, rather than at the individual pharmacist employees. Specifically, the language requires pharmacies to dispense the medication.⁹¹ The

87. *Id.*

88. *Id.* The Code explains Principle III: "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." *Id.*

89. Todd C. Frankel, "I'm Sorry I Won't Fill That Prescription," ST. LOUIS POST-DISPATCH, Dec. 4, 2005, at B1.

90. Hermann, *supra* note 49, at 16.

91. 29 Ill. Reg. 13663 (Sept. 9, 2005).

Upon receipt of a valid, lawful prescription for a contraceptive, a *pharmacy* must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the *pharmacy* must

Rule does not require all pharmacies to fill these prescriptions; pharmacies that do not carry contraceptives at all are not affected by the Rule.⁹² In fact, a pharmacy could choose to cease carrying and dispensing contraceptives in response to this Rule.⁹³

Placing the obligation on pharmacies is a preferable solution to placing the obligation on individual pharmacists. One benefit is that this approach clearly prioritizes women's health because pharmacies that sell contraceptives will enact policies to ensure that prescriptions are filled rather than face fines or loss of their operating license.⁹⁴ Another benefit of aiming compliance at pharmacies as institutions instead of individual pharmacists is that it may minimize instances where individual pharmacists' right to adhere to their own religious beliefs are compromised.⁹⁵ Pharmacies as institutions can elect to accommodate their employees' beliefs. Pharmacies can, for example, determine in advance whether individual employees have objections to particular medications and attempt to preempt conflicts from arising by taking such proactive measures as coordinating schedules to provide a pharmacist on duty at all times who does not object to dispensing contraceptives. Whether accommodation by the employer pharmacy is in reality required under federal law is discussed below.

C. Title VII Does Not Bar the New Administrative Rule

Because the Illinois law places the burden of filling

obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.

Id. (emphasis added).

92. Press Release, Office of the Governor, *supra* note 67. The rule "requires pharmacies that sell contraceptives to fill prescriptions for birth control without delay." *Id.* (emphasis added).

93. *Pharmacies Sue Over Birth Control*, CHI. SUN-TIMES, Sept. 15, 2005, at 24 ("Blagojevich spokeswoman Abby Ottenhoff said pharmacy owners who object to some forms of birth control have the option of not selling contraceptives at all.").

94. See, e.g., Olsen, *supra* note 9.

95. Grillo, *supra* note 68 ("It is the drugstore's responsibility to reach an accommodation with the beliefs of its staff. It is not the responsibility of the state of Illinois to accommodate those beliefs at the expense of women who are seeking safe, federally approved contraceptives.").

prescriptions on the pharmacy as an entity and not on the pharmacist as an individual professional, conflicts could occur between the pharmacist and her or his employer. Depending on their policy, employers may require their pharmacists to dispense prescriptions regardless of the individual employee's personal religious beliefs.⁹⁶ If an employee were to challenge such a policy, he or she would likely raise a claim under Title VII of the Civil Rights Act of 1964.⁹⁷ Title VII requires that an employer "reasonably accommodate . . . an employee's religious observance or practice."⁹⁸ Such accommodations are required unless they cause "undue hardship on the conduct of the employer's business."⁹⁹ Currently, two lawsuits pending against the state of Illinois allege violations of Title VII.¹⁰⁰

96. Pharmacies vary widely in their policies regarding filling patient prescriptions and accommodating employee pharmacists. Planned Parenthood Federation of America has conducted a survey of many of the national pharmacy chains to determine their policies in such conflicts. A few such pharmacies that have policies that might lead to a pharmacist employee being required to fill a prescription, despite their religious beliefs are Costco Wholesale, Fagen Pharmacies, Kmart Pharmacies, and Price Chopper Pharmacies. These pharmacies would not *necessarily* force their pharmacists to fulfill prescriptions in opposition to their religious beliefs, but simply that it is a result that could occur under their stated policies. Costco Wholesale Corporation states, "[w]e do not encourage or permit our Pharmacists to allow personal beliefs to impede the legitimate dispensing of legally prescribed medication." Letter from Costco Wholesale to Planned Parenthood Federation of America, http://www.saveroe.com/media/113_costcoletter.pdf. Fagen Pharmacy stated its policy in a letter to Planned Parenthood Federation of America, "Fagen Pharmacy does not allow its employees' personal beliefs to take precedence over the individual health decisions of patients and physicians." Letter from Fagen Pharmacy, (Sept. 1, 2004), http://www.saveroe.com/media/116_fagenpharmacyletter.pdf. Kmart Corporation explains its policy when the only pharmacist on duty opposes dispensing medication due to religious beliefs: "If there is no way to accommodate the objection without resulting in an untimely delay to the customer, our policy requires the pharmacist to fill the prescription notwithstanding his or her objection." Letter from Kmart Corp. to Planned Parenthood Fed'n of America (May 9, 2005), http://www.saveroe.com/media/117_kmartletter.pdf. Price Chopper states that "it is not with in [sic] the standard of practice and scope of the pharmacy profession to make any moral judgments that may affect the health care decisions of our patients and their physicians." Letter from Price Chopper to Planned Parenthood Fed'n of America (Apr. 21, 2004), http://www.saveroe.com/media/115_pricechopperletter.pdf.

97. 42 U.S.C. 2000e-2(a) (2004).

98. 42 U.S.C. 2000e(j) (2004) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

99. *Id.*

100. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 76, at 18 ("[The new rule] however, requires Plaintiff employers to make filling prescriptions for 'Plan B' a term or condition of employment, and to deprive

The terms "reasonable accommodation" and "undue hardship" are not defined by the statute.¹⁰¹ However, those terms have been explained in two major Supreme Court cases on the issue of accommodating employees' religious practices in the workplace, *Trans World Airlines, Inc. v. Hardison*¹⁰² and *Ansonia Board of Education v. Philbrook*.¹⁰³ Both of these cases interpret the employers' obligations under Title VII narrowly.¹⁰⁴

In *Trans World Airlines, Inc. v. Hardison*, a conflict arose between an employee whose religion prohibited him from working on the Sabbath and the airline's scheduling structure imposed by a collectively-bargained seniority system.¹⁰⁵ The airline was initially able to accommodate Hardison,¹⁰⁶ but the conflict later resurfaced.¹⁰⁷ The airline was then unable to accommodate Hardison, who was fired.¹⁰⁸ The Court denied Hardison's Title VII claim and, in the process, defined the threshold of "undue burden." The Court held that an employer's accommodation of an employee's religious beliefs would constitute an undue burden if it resulted in "more than a de minimis cost."¹⁰⁹

individuals of employment opportunities, in contravention of 42 U.S.C. § 2000e-2."); Complaint for Declaratory and Injunctive Relief, *supra* note 80, at 9 ("As such, the Rule is null, void, and unenforceable under Title VII.").

101. Laurel A. Bedig, *The Supreme Court Narrows an Employer's Duty to Accommodate an Employee's Religious Practices Under Title VII: Ansonia Board of Education v. Philbrook*, 53 BROOK. L. REV. 245, 246 (1987).

102. 432 U.S. 63 (1977).

103. 479 U.S. 60 (1986).

104. Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 585 (2005).

105. 432 U.S. at 67 ("Hardison, like other employees at the Kansas City base, was subject to a seniority system contained in a collective-bargaining agreement The seniority system is implemented by the union steward through a system of bidding by employees for particular shift assignments as they become available.").

106. *Id.* at 68 (working the 11 P.M. to 7 A.M. shift still allowed Hardison to observe his Sabbath).

107. *Id.* ("The problem soon reappeared when Hardison bid for and received a transfer from Building 1, where he had been employed, to Building 2, where he would work the day shift. The two buildings had entirely separate seniority lists; and while in Building 1 Hardison had sufficient seniority to observe the Sabbath regularly, he was second from the bottom on the Building 2 seniority list. In Building 2 Hardison was asked to work Saturdays when a fellow employee went on vacation.").

108. *Id.* at 69 ("When an accommodation was not reached, Hardison refused to report for work on Saturdays. . . . After a hearing, Hardison was discharged on grounds of insubordination for refusing to work during his designated shift.").

109. *Id.* at 84-85. The court explained its reasoning as follows:

To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the

In *Ansonia Board of Education v. Philbrook*, the Court further limited an employer's duties under Title VII.¹¹⁰ In that case, the conflict occurred between a teacher whose religion required him to abstain from working on six religious holidays throughout the school year and a school district's policy that employees are allowed three religious holidays per year.¹¹¹ Philbrook proposed several solutions that better accommodated his religious practices than those the school district was currently providing.¹¹² However, the Court found that the district's initial accommodations were reasonable, which was sufficient effort on the part of the district.¹¹³ The Court held that "where the employer has already reasonably accommodated the employee's religious needs . . . [t]he employer need not further show that each of the employee's alternative accommodations would result in undue hardship."¹¹⁴ The Court rejected the lower court's ruling that "the accommodation obligation includes a duty to accept 'the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business.'"¹¹⁵

Based on the case law, if a pharmacy was unable to accommodate an individual pharmacist employee's desire not to fill certain prescriptions and required the pharmacist to fill prescriptions against the religious beliefs on certain occasions or face termination, a pharmacist would be unlikely to succeed in a Title VII claim.¹¹⁶ Even a minimal burden on the pharmacy such

seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

Id.

110. Bedig, *supra* note 101, at 247.

111. 479 U.S. 60, 62-63 (1986).

112. *Id.* at 64-65 ("[Philbrook's] preferred alternative would allow use of personal business leave for religious observance, effectively giving him three additional days of paid leave for that purpose. Short of this arrangement, respondent suggested that he pay the cost of a substitute and receive full pay for additional days off for religious observances.").

113. *Id.* at 69.

114. *Id.* at 68-69.

115. *Id.* at 68 (quoting the appellate court decision, 757 F.2d 476, 484 (2nd Cir. 1985)).

116. For a more complete discussion of an employer's right to require pharmacist

as paying another pharmacist overtime would likely be deemed undue hardship under the current standards.¹¹⁷

D. Illinois Rule Likely to Withstand Court Challenges

The Title VII grounds alleged by the plaintiffs in the lawsuits currently pending against the Illinois Rule will likely fail. In addition to the Title VII grounds, the challenges to the Illinois law are based on an alleged conflict with the Illinois Health Care Right of Conscience Act ("Conscience Act").¹¹⁸ The Conscience Act was initially enacted in 1977 and was amended in 1997.¹¹⁹

1. Pharmacists Are Not Likely Included in the Conscience Act

The first inquiry into this challenge is whether pharmacists are covered in the scope of the Conscience Act. The suits assert that the Conscience Act can be interpreted as including pharmacists among its definition of "health care providers," while the Governor's office contends that pharmacists are not a profession covered.¹²⁰ The statutory definition of health care

employees to fill valid prescriptions under Title VII in the context of emergency contraception, see Amy Bergquist, *Pharmacist Refusals: Dispensing (with) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 4 (Apr. 2006).

117. Malloy, *supra* note 6 ("Applying this standard, courts have rejected claims such as those from police officers who requested that they be permitted to refuse to provide physical security at an abortion clinic and be permitted to refuse to arrest protesters blocking an abortion clinic entrance. Likewise, courts have not protected a delivery-room nurse who refused to assist in emergency Caesarean sections for women who were in danger of bleeding to death and a human resources employee who refused to counsel unmarried gay or lesbian employees on relationship issues.").

118. Verified complaint for Declaratory and Injunctive Relief, *supra* note 76, at 8-9, 11 (asserting that emergency and permanent rules are in direct conflict).

119. The Conscience Act provides that:

It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

§ 745 ILL. COMP. STAT. ANN. 70/2(c) (West 2005). The 1997 amendments changed the terms "medical" to "health care" throughout the Act. The amendments also added terminology to include payment of health care services. Act effective Jan. 1, 1998, Pub. Act No. 90-0246, 1997 Ill. Laws 2917.

120. *Access to Controversial Morning-After Pill Draws Multiple Suits*, 233-11 LEGAL INTELLIGENCER 4, 4 (2006).

providers specifically lists some professionals, including nurses, nurses' aides, medical school students, but does not specifically list pharmacists.¹²¹

One argument that pharmacists are not covered is that the legislature clearly made the effort to include enumerated professions in the Conscience Act, but chose not to include pharmacists in that list.¹²² Illinois courts employ the canon of statutory interpretation known as *expressio unius est exclusio alterius*, which supports the inference that the omission of pharmacists from the list is meant as an exclusion of pharmacists.¹²³ Additionally, the legislative history indicates that past efforts to add pharmacists to the list of enumerated professions in the Conscience Act have all failed, indicating that the legislature did not intend to cover pharmacists within the purview of the Conscience Act.¹²⁴

Although there are strong arguments that pharmacists are not covered by the Conscience Act, it is possible a court may find that pharmacists are included under the more ambiguous phrase of "any other person who furnishes . . . health care services."¹²⁵ Since pharmaceuticals are a vital part of health care, a pharmacist might be considered a person who furnishes health care services. Additionally, the statutory language that includes those who give "advice in connection with the use or procurement of

Manion claims that the new rule, which went into effect in August and was ordered by Illinois Gov. Ron Blagojevich, is unconstitutional and violates a state Right of Conscience Act, which bans the discrimination against health care workers who refuse to participate in a health care service on moral or religious grounds.

But Abby Ottenhoff, spokeswoman for Blagojevich, said that the conscience act does not apply to pharmacists. Moreover, she argued, the new rule is directed at pharmacies, not pharmacists.

Id.

121. 745 ILL. COMP. STAT. ANN. 70/3(c) (West 2005) ("Health care personnel means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services.").

122. *Id.*

123. See, e.g., *Metzger v. DaRosa*, 805 N.E.2d 1165, 1172 (Ill. 2004) ("The familiar maxim *expressio unius est exclusio alterius* is an aid of statutory interpretation meaning the expression of one thing is the exclusion of another. Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." (citations omitted)).

124. John Chase, *Legislators Back Edict on Birth Pills*, CHI. TRIB. N. SHORE FINAL EDITION, Aug. 17, 2005, at 3 ("But Republican state Sen. Dan Rutherford of Pontiac said the state has twice tried to add pharmacists to the definition of those included under the conscience clause and both times those efforts failed. 'They aren't covered,' he said. 'If they were, then I'd support them.'").

125. 745 ILL. COMP. STAT. ANN. 70/3(c) (West 2005).

contraceptives” as protected health care personnel strengthens the argument that the Conscience Act likely includes pharmacists.¹²⁶

2. Even if Pharmacists Are Included in the Conscience Act, the Rule Should Prevail Over the Conscience Act

Even if the court finds that pharmacists are covered under the Conscience Act, the question of which provision should prevail is not settled. Instead, such a conclusion would simply heighten the conflict between the Conscience Act and the Rule. The court would then have to resolve the conflict presented between the two statutory provisions. This would become a matter of statutory interpretation, in which the court would attempt “to ascertain and give effect to the true intent and meaning of the legislature.”¹²⁷ Two principles of statutory interpretation, in particular, would help guide this process and would support the conclusion that the Rule should prevail over the Conscience Act.

One pertinent rule of statutory interpretation used by Illinois courts pertains to resolving potential conflicts between two statutes. When interpreting statutes, the presumption is that the legislature creates laws with a complete awareness and knowledge of all previously adopted laws.¹²⁸ In the instant case, the legislature approved the Rule requiring pharmacists to fill prescriptions fully aware of the already existing Conscience Act. In keeping with the goal of effectuating legislative intent, the courts will conclude, when two statutes are at odds, that the most recently enacted statute should prevail.¹²⁹ Using this tool of statutory interpretation, the court could find that the new Rule should prevail, as it is the “later expression of [the] legislative intent” of ensuring women have access to their prescriptions.¹³⁰ This interpretation is consistent with the history of the creation of the Rule, since it was enacted with the express purpose of requiring pharmacies to fill contraceptive prescriptions, prioritizing women’s access to prescribed medications.

The second relevant rule of statutory interpretation concerns the relationship between two statutes covering the same area of

126. 745 ILL. COMP. STAT. ANN. 70/3(a) (West 2005).

127. *Kunkel v. Walton*, 689 N.E.2d 1047, 1053 (Ill. 1997) (citing *Solich v. George & Anna Portes Cancer Prevention Ctr. of Chicago, Inc.*, 630 N.E.2d 820, 822 (Ill. 1994)).

128. *State v. Mikusch*, 562 N.E.2d 168, 170 (Ill. 1990).

129. *Vill. of Chatham v. County of Sangamon*, 837 N.E.2d 29, 46 (Ill. 2005) (citing *Mikusch*, 562 N.E.2d at 170-71).

130. *See id.*

law with different degrees of specificity. This rule dictates that a more specific provision prevails over a more general statutory provision.¹³¹ In this case, if a court were to determine that the Conscience Act and the new Rule cover the same area of the law, the new Rule could prevail as a more specific statutory provision.¹³² The Conscience Act is a broad statute designed to cover various health care personnel, health care facilities, and health care payers under conscience-related conflicts.¹³³ On the contrary, the new Rule is a more narrowly-tailored statutory provision; its scope is limited only to pharmacies that sell contraceptives.¹³⁴ In this way, the Rule could be interpreted as a more specific and limited provision, essentially functioning as an exception to when Illinois pharmacists do not necessarily have the right of conscience created by the Health Care Right of Conscience Act in the filling of prescriptions.

Conclusion

Recent technological developments have brought the abortion debate to the pharmacy counter. Misconception over the function of emergency contraception has increased the controversy. As states begin to include pharmacists in legislation that seeks to protect health care providers from litigation in the event that they do not wish to perform abortion services, the conflict between pharmacists' right to their conscience and a woman's right to access to health care is becoming more acute. As many states tackle this problem, Illinois Governor Blagojevich has addressed the conflict in a way that strikes an appropriate balance between individual pharmacists' rights and the need for women to receive access to health care. By approaching the problem through pharmacies as institutions rather than individual pharmacy employees, the law better enables pharmacies to accommodate their employees. Ultimately, however, the law prioritizes universal access to health care, ensuring that women's health will not be compromised.

131. *Vill. of Chatham*, 837 N.E.2d at 46.

132. *See id.*

133. The Conscience Act lists physicians, nurses, nurses' aides, and medical school students, as well as institutions that are covered such as hospitals, clinics, medical schools, laboratories, health maintenance organizations, insurance companies, and management services organizations. 745 ILL. COMP. STAT. ANN. 70/3 (West 2005).

134. 29 Ill. Reg. 13663 (Aug. 12, 2005).