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Conscience Clause Legislation for Pharmacists

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COMMENT

FREEDOM OF CHOICE FOR EVERYONE: THE NEED FOR CONSCIENCE CLAUSE LEGISLATION FOR PHARMACISTS

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With ever-increasing advancements in technology comes ever-increasing controversy. As society in America continues to legalize medical products and procedures that conflict with many religious traditions, medical professionals frequently have to face the ethical dilemma of whether to perform services that they find morally repugnant. These professionals are often faced with a choice between following their consciences or losing their jobs. In this time of questionable medical advancements, the need for conscience clauses has never been greater. If society is prepared to legalize controversial health care products and procedures, it must also work to protect those who do not agree with them.

This paper will address the need for federal and state lawmakers to create conscience clauses in order to protect medical professionals, specifically pharmacists, from being forced to violate their consciences in the workplace.¹ Part I will set forth the need for conscience protection in general. Part II will examine conscience protection from a historical perspective. Part III will explain the inadequacy of current legal protections. Part IV will analyze the situation facing today's pharmacists. Part V will address the reasons that pharmacists should be granted protection. Part VI will examine and respond to the opposition to conscience clause legislation for pharmacists. Finally, Part VII will address the compromise that must be

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1. This paper is limited to the question of whether the *state* can/should require a pharmacist to fill prescriptions to which the pharmacist has moral objections. It does not address a pharmacy's right to demand a pharmacist's agreement to fill these prescriptions as a condition of employment. Whether a pharmacist has a cause of action for wrongful discharge for refusing to fill a prescription against a private employer is an important question, but one that must be saved for another paper. For a discussion on the competing rights and interests of health care professionals and their employers, see Bruce G. Davis, *Defining the Employment Rights of Medical Personnel within the Parameters of Personal Conscience*, 1986 Det. C. L. Rev. 847.

made between patients' autonomy and pharmacists' right of conscience.

I. THE NEED FOR CONSCIENCE PROTECTION FOR HEALTH CARE PROFESSIONALS

a. *Controversial Practices*

Up until the advent of the birth control pill in the 1960s and the legalization of abortion in the 1970s, medical ethics were fairly simple, unambiguous, and followed by health care professionals with few exceptions.² In 1970, a *California Medicine* editorial stated, "The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life This ethic. . . [has been] the keystone of Western medicine."³ The editorial continued, "[t]his traditional ethic is . . . being eroded at its core and may eventually be abandoned. . . . Hard choices will have to be made . . . [that will] of necessity violate and ultimately destroy the traditional Western ethic with all that portends. It will become necessary and acceptable to place relative rather than absolute values on such things as human lives."⁴

In the past three and a half decades since these alarming words were written, this editorialist's prophecy has largely come true.⁵ Over the years, the "sanctity of life ethic" has essentially vanished from the realm of medical ethics.⁶ Today, legality—rather than moral principle⁷—has become the deciding factor.⁸

Recent developments in medicine and pharmaceuticals put health care professionals ever more "at the vortex of some of society's most controversial moral dilemmas."⁹ "Medically-related practices with profound moral implications"¹⁰ include surgical abortion, chemical abortion (e.g., RU-486), human cloning, embryonic stem cell research, sterilization, contraception, sex changes, genetic engineering or testing (including gender selection),

2. Nancy Valko, *Are Pro-Life Healthcare Providers Becoming an Endangered Species?*, <http://www.wf-f.org/03-2-Healthcare.html> (2003).

3. *A New Ethic for Medicine and Society*, 113 Cal. Med. 67 (Sept. 1970).

4. *Id.* at 67–68.

5. Wesley J. Smith, *Culture of Death: The Assault on Medical Ethics in America* 10 (Encounter Books 2000).

6. *Id.*

7. For a discussion on bioethics based on moral principles, see James F. Childress, *Principles-Oriented Bioethics: An Analysis and Assessment from Within*, in *A Matter of Principles?* 72 (Edwin R. DuBose et al. eds., Trinity Press Intl. 1994).

8. Valko, *supra* n. 2, at ¶ 11.

9. H.R. Subcomm. on Health of the Comm. on Energy and Commerce, *Hearing on Protecting the Rights of Conscience of Health Care Providers and a Parent's Right to Know*, 107th Cong. 29 (July 11, 2002) (prepared statement of Professor Lynn Wardle) [hereinafter *Prepared Statement of Professor Wardle*].

10. *Id.*

prenatal testing for genetic disorders, euthanasia, assisted suicide, and capital punishment by lethal injection.¹¹

Because of the growing availability of controversial medical practices, federal and state governments need to provide protections for medical professionals who refuse to engage in these practices for moral or religious reasons.¹² To put it another way, health care providers must not be forced to provide products or services that violate their own consciences. In our democratic society, no one should be forced to act contrary to his or her most basic convictions. “The right to refuse to participate in acts that conflict with personal ethical, moral, or religious convictions is accepted as an essential element of a democratic society.”¹³ When society legalizes morally controversial products and procedures, it has a duty to provide laws to protect those who do not want to participate in them.¹⁴

b. The Campaign Against Conscience Protection

Unfortunately, there is a campaign in this country to coerce medical providers to submit entirely to the will of the patient. Patients often claim that their “rights” to particular services win out when in conflict with a health care professional’s moral or religious objection to these services.¹⁵ Along with many other pro-choice representatives, Guttmacher Institute analyst Shannon Criniti believes that “the conscience that matters most belongs to the patient.”¹⁶ Patient autonomy has trumped professional autonomy, and as a result, many health care workers and institutions are being punished for being faithful to their consciences.

“Slowly but surely, more and more pro-life doctors, nurses, and other health care workers are getting the message that they and their views are unwelcome in today’s health care system.”¹⁷

For example, New York City became the first U.S. city to require hospitals to provide abortion training for all their OB/GYN resident doctors, unless they invoke a narrowly written conscience clause.¹⁸ NARAL (Na-

11. *Id.*

12. Bryan A. Dykes, Student Author, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 Ga. L. Rev. 565, 567 (2002).

13. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?* 351 New Eng. J. Med. 2008, 2009 (2004).

14. See Sean Murphy, *Protection of Conscience Project, Establishment Bioethics*, <http://www.consciencelaws.org/Examining-Conscience-Ethical/Ethical16.html> (Apr. 4, 2003).

15. Teresa Stanton Collett, *Protecting the Health Care Provider’s Right of Conscience* ¶ 4, http://www.cbhd.org/resources/healthcare/collett_2004-04-27_print.htm (Apr. 27, 2004).

16. Newsmax.com, *Court Rules Pharmacist May Object to Abortion Pill* ¶ 14, <http://www.newsmax.com/archives/articles/2001/1/25/184722.shtml> (Jan. 26, 2001).

17. Valko, *supra* n. 2, at ¶ 2.

18. Linda Villarosa, *Newest Skill for Future Ob-Gyns: Abortion Training*, N.Y. Times F6 (June 11, 2002) (available at <http://www.nytimes.com/2002/06/11/health/womenshealth/11ABOR.html>).

tional Abortion and Reproductive Rights Action League) and other abortion rights activists are hoping to duplicate the initiative in cities within the other seventeen states that provide Medicaid-financed abortions.¹⁹

Pro-choice groups have a number of other initiatives in place to abolish the legal protections afforded in forty-five states to health care providers who decline involvement in abortion.²⁰ The Abortion Access Project, which operates in twenty-four states, has the goal of “increasing access to abortion services by expanding . . . the number of hospitals offering abortion services.”²¹ The project’s tactics, it admits, are to “pressure hospitals”²² through both political and legal means, mainly by challenging the mergers of religious hospitals with public hospitals.²³

The ACLU’s (American Civil Liberties Union) Reproductive Freedom Project is advocating the requirement that all hospitals, including Catholic ones, provide abortions. The Project’s report argues, “When . . . religiously affiliated organizations move into secular pursuits—such as providing medical care or social services to the public or running a business—they should no longer be insulated from secular laws. In the public world, they should play by public rules.”²⁴ Ironically, the ACLU claims to be an organization committed to “defend[ing] and preserv[ing] the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States” including the “freedom of religion” found in the First Amendment.²⁵

Twenty states have adopted mandates to require employers who provide insurance coverage for employees’ prescription drugs to provide coverage for contraceptives as well, including abortifacients such as the “morning-after pill.”²⁶ Catholic Charities challenged California’s law that mandated contraception coverage—even for religiously affiliated organizations—arguing that the law should be held unconstitutional as a violation of religious freedom.²⁷ Religious organizations took a serious blow to their

19. *Id.*

20. U.S. Conf. Catholic Bishops, *The Protection of Conscience Project, Repression of Conscience, The Campaign to Force Hospitals to Provide Abortion*, <http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-30.html> (Sept. 2003).

21. *Id.*

22. Abortion Access Project, *Why We Need to Increase Accessible Abortion Services at Hospitals*, <http://www.abortionaccess.org/viewpages.php?id=63> (accessed Nov. 30, 2005).

23. *Id.*

24. ACLU Reprod. Freedom Project, *Religious Refusals and Reproductive Rights* 11, <http://www.aclu.org/FilesPDFs/ACF911.pdf> (accessed Nov. 30, 2005).

25. Am. Civ. Liberties Union, *American Civil Liberties Union: About Us*, <http://www.aclu.org/about/index.html> (accessed Nov. 30, 2005).

26. See U.S. Conf. Catholic Bishops Secretariat for Pro-Life Activities, *On the Health Care Providers’ Right of Conscience Act (HB 2711)*, <http://www.usccb.org/prolife/issues/abortion/kansas202.htm> (Feb. 20, 2002) (citing seventeen states with mandates in 2002) [hereinafter *USCCB Testimony*].

27. Henry J. Kaiser Fam. Found., *Kaiser Daily Reproductive Health Report, Supreme Court Rejects Catholic Charities’ Appeal of District Court Ruling Upholding California Contraceptive*

conscience rights when the Supreme Court rejected Catholic Charities' appeal without comment.²⁸ Federal lawmakers considered a similar bill, the Equity in Prescription Insurance and Contraceptive Coverage Act, which would have required all private health plans to cover prescription contraceptives to the same extent that they cover other prescription drugs.²⁹

For individual medical professionals, "intimidation, harassment, and coercion are becoming increasingly common as pro-life health care providers try to advocate for both their patients and their professional ethics."³⁰ For example, a nurse was threatened that she would be fired because "she refused to follow a doctor's verbal order to increase an intravenous morphine drip 'until he stops breathing' on a patient who continued to survive despite having a ventilator removed."³¹ Doctors told a fellow OB/GYN physician they would stop referring patients to him "if he continued to sign an annual pro-life ad."³² At a conference on ethics committees, an insurance company executive recommended that hospitals avoid appointing "family values" members to their ethics committees.³³ A Cincinnati pharmacist was fired from her job for refusing to dispense Micronor, a contraceptive with the primary mechanism of preventing implantation of a fertilized embryo, which she believed would cause a very early abortion.³⁴

So, what should be done to protect the right of conscience? Supporters of conscientious objection for health care providers must form a campaign in support of conscience clause protection on the local, state, and federal levels.³⁵ As medical professionals and providers continue to face increasing assaults on their conscience rights, lawmakers need to enact statutes to protect American health care workers' constitutional right to free exercise of religion.

II. THE CASE FOR CONSCIENCE PROTECTION: A HISTORICAL PERSPECTIVE

a. *The Founders' Intention*

The right to be free from coercion to participate in acts that conflict with one's moral or religious convictions is an essential element of a demo-

Coverage Law, http://www.kaisernetwork.org/daily_reports/print_report.cfm?DR_ID=26075&dr_cat=2 (Oct. 5, 2004).

28. *Catholic Charities of Sacramento, Inc. v. Cal.*, 125 S. Ct. 53 (2004).

29. H.R. 2727, 108th Cong. (July 15, 2003); Sen. 1396, 108th Cong. (July 11, 2003).

30. Valko, *supra* n. 2, at ¶ 2.

31. *Id.* at ¶ 3.

32. *Id.*

33. *Id.*

34. Karen L. Brauer, *Repression of Conscience, K-Mart Pharmacist Fired for Refusing to Dispense Abortifacient*, <http://www.consciencelaws.org/Repression-Conscience/Conscience-Repression-08.html> (accessed Dec. 1, 2005).

35. Maureen Kramlich, *The Assault on Catholic Health Care* ¶ 19, <http://www.usccb.org/prolife/programs/rfp/kramlich.htm> (accessed Dec. 1, 2005).

cratic society.³⁶ The founders of the Republic recognized freedom of conscience as so important that they included it in the very first amendment of the Constitution: “Congress shall make no law . . . prohibiting the free exercise [of religion].”³⁷ The right of conscience that underlies the First Amendment preceded even the Declaration of Independence.³⁸ As early as June of 1776, the Virginia Declaration of Rights provided that “all men are equally entitled to the free exercise of religion, according to the dictates of conscience.”³⁹

One reason that the founders chose to include freedom of religion in the Constitution is because virtue in the citizenry is indispensable for a system of self-government to survive. For example, George Washington stated,

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . Tis substantially true, that virtue or morality is a necessary spring of popular government. The rule indeed extends with more or less force to every species of Free Government. Who then is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.⁴⁰

In other words, as Professor Lynn Wardle puts it, the founders recognized that “[i]f you demand that a man betray his conscience, you have eliminated the only moral basis for his fidelity to the rule of law, and have destroyed the foundation for all civic virtue.”⁴¹

More importantly, freedom of religion was given a special place in the American founding, because the framers viewed liberty of conscience as inviolable.⁴² Inalienable rights, such as liberty of conscience, were reserved for the people, and the government could not infringe on them because those rights are inherent to every human person.⁴³

James Madison, in his *Memorial and Remonstrance against Religious Assessments*, put it this way:

It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a

36. Cantor & Baum, *supra* n. 13, at 2009.

37. U.S. Const. amend. I.

38. *Prepared Statement of Professor Wardle*, *supra* n. 9, at ¶ 29.

39. *Id.*

40. George Washington, *The Papers of George Washington, The Farewell Address* ¶¶ 25–26, <http://gwpapers.virginia.edu/education/life/quest9.html> (accessed Dec. 1, 2005).

41. *Prepared Statement of Professor Wardle*, *supra* n. 9, at ¶ 33.

42. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 *Notre Dame L. Rev.* 371, 389–94 (1996).

43. Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 *Wm. & Mary L. Rev.* 819, 823–24 (1998).

member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.⁴⁴

Madison explained that freedom of religion is “in its nature an unalienable right,” because “what is here a right towards men, is a duty towards the Creator.”⁴⁵ Madison understood that free exercise did not just mean that governments should avoid persecuting religious dissidents, but that “every man” has a duty to God that is “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”⁴⁶

The Founders concluded that freedom of conscience was a fundamental, natural right, despite the fact that there was an alternate competing view, based on the writings of John Locke.⁴⁷ Locke viewed religious freedom as a mere matter of toleration and accommodation.⁴⁸ “It makes a big difference whether respect for another’s moral convictions is given simply as a matter of convenience and tolerance (to be suspended when outweighed by other political considerations . . .), or whether that is a matter of your neighbor’s basic civil rights.”⁴⁹ Fortunately, the Founders viewed freedom of conscience as a fundamental right, and not just something that needed to be tolerated.⁵⁰ Early colonial charters and state constitutions spoke of this freedom as a right, and the United States Constitution included freedom of religious exercise in the Bill of Rights.⁵¹ Unfortunately and ironically, though, modern courts and commentators have largely reverted to Locke-like thinking, and speak of religious freedom in terms of toleration and accommodation instead of rights.

b. *The Court’s Interpretation*

A major revision of First Amendment doctrine occurred in *Employment Division v. Smith*.⁵² In *Smith*, the United States Supreme Court substantially curtailed the judicial protection previously afforded to rights of conscience, holding that “the right of free exercise does not relieve an indi-

44. James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 2, <http://www.law.ou.edu/hist/remon.html> (accessed Dec. 21, 2005).

45. *Id.*

46. *Id.*

47. *Prepared Statement of Professor Wardle, supra* n. 9, at ¶ 30.

48. See John Locke, *A Letter Concerning Toleration* (William Popple, trans.), <http://www.constitution.org/fjl/tolerati.htm> (accessed Dec. 5, 2005).

49. *Prepared Statement of Professor Wardle, supra* n. 9, at ¶ 30.

50. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1449–55 (1990).

51. *Id.*

52. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

vidual 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).'"⁵³ In other words, "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."⁵⁴ So long as a statute is a "law[] of general applicability" that does not discriminate against any particular religion or religious group, the law will be sustained if it is rationally related to a legitimate governmental interest, despite any burden it may have on religious freedom.⁵⁵

The Court acknowledged "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."⁵⁶ Calling this an "unavoidable consequence of democratic government," the Court stated that it "must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."⁵⁷

Many commentators insist that *Smith* is contrary to the deep logic of the First Amendment. First Amendment scholar Judge Michael McConnell maintains that the *Smith* opinion's narrow reading of the free exercise clause is problematic:

The Free Exercise Clause, by its very terms and read in the light of its historic purposes, guarantees that believers of every faith, and not just the majority, are able to practice their religion without unnecessary interference from the government. . . . It singles out a particular category of human activities for particular protection, a protection that is . . . needed by any person of religious convictions caught in conflict with our secular political culture. For this protection the *Smith* opinion substitutes a bare requirement of formal neutrality. Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more.⁵⁸

53. *Id.* at 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).

54. *Id.*

55. *Id.* The claimants in *Smith* were disqualified from receiving Oregon unemployment compensation benefits after they were dismissed from employment for using peyote, a drug they ingested for sacramental purposes. The claimants argued that Oregon drug laws should not prohibit the use of peyote for religious purposes; however, the Court held that the free exercise clause does not prohibit the application of Oregon drug laws to ceremonial ingestion of peyote, and thus the state could deny claimants unemployment compensation for work-related misconduct based on use of the drug. *Id.* at 890.

56. *Id.* at 890.

57. *Id.*

58. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1152-53 (1990).

What this means for health care providers is that they cannot expect courts to extend any protection against laws that violate their moral or religious beliefs.⁵⁹ Because *Smith* essentially “obliterated the shelter of the First Amendment for health care providers”⁶⁰ to refuse to participate in immoral practices, the only source of recourse for conscientious objecting medical professionals lies with the legislative branch.⁶¹

c. *The Rise of Conscience Clauses*

Because the courts offer little protection for freedom of conscience, in order to protect the religious rights of health care professionals, the federal and state governments need to enact conscience clauses. Conscience clauses are statutes or regulations that provide “explicit protection for the rights of health care providers to decline to provide or participate in providing health services that violate their religious or moral beliefs.”⁶² Though they vary in form, these provisions generally prohibit discrimination or retribution against individuals who refuse to participate in specified medical practices or procedures.⁶³ These clauses have been a “time-honored method”⁶⁴ of allowing people to opt out of behavior that conflicts with their religious beliefs.⁶⁵ “The basic principle is that no individual should be forced to act in violation of his or her own conscience.”⁶⁶ The Supreme Court has upheld the validity of these provisions.⁶⁷ In *Roe v. Wade*’s⁶⁸ companion case, *Doe v. Bolton*,⁶⁹ the Supreme Court upheld Georgia’s conscience clause,⁷⁰ stating, “a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion

59. Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. Leg. Med. 177, 217 (1993).

60. *Id.* at 216.

61. The United States Supreme Court has recently agreed to hear a case that may alter *Smith*. On April 18, the Court granted certiorari for *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 04-1084, agreeing to decide whether a small religious group is allowed a religious exemption from a federal ban on the importation of hallucinogens. Charles Lane, *Supreme Court to Decide Whether Church Can Import Drug*, Washington Post A02 (Apr. 19, 2005).

62. Wardle, *supra* n. 59, at 178.

63. Michael J. Frank, *Safeguarding the Consciences of Hospitals and Health Care Personnel: How the Graduate Medical Education Guidelines Demonstrate a Continued Need for Protective Jurisprudence and Legislation*, 41 St. Louis U. L.J. 311, 348–49 (1996).

64. Carol Hogan, *Conscience Clauses and the Challenge of Co-operation in a Pluralistic Society* ¶ 13, <http://www.cacatholic.org/rfconscience.html> (Feb. 2003).

65. *Id.*

66. *USCCB Testimony*, *supra* n. 26, at ¶ 2.

67. *See Doe v. Bolton*, 410 U.S. 179, 197 (1973).

68. 410 U.S. 113 (1973).

69. 410 U.S. 179 (1973).

70. *Bolton*, 410 U.S. at 197–98. The Georgia conscience clause stated, in part, “A physician, or any other person who is a member of or associated with the staff of a hospital . . . who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate. . . .” *Id.* at 205.

procedure.”⁷¹ Although the Court struck down numerous other provisions in the Georgia statute, holding that they were an unconstitutional interference with a woman’s right to abortion, it left the conscience clause intact.⁷²

Even some pro-choice commentators agree that individuals should not be forced to participate in procedures that they find morally objectionable and are entitled to conscience protection:

It should be clearly understood at the outset that the validity of conscience clauses insofar as they apply to individuals is not in question here. An individual has a fundamental right not to engage in any activity—abortion, sterilization or any other activity—which would be against his or her conscience.⁷³

Prompted by the legalization of abortion in the infamous *Roe v. Wade*⁷⁴ decision in 1973, Congress provided its first legislation protecting the right to refuse to provide abortion.⁷⁵ “The Church Amendment” — named after its sponsor, Senator Frank Church—recognized that, while *Roe* removed government obstacles (laws) to a woman’s right to an abortion, it did not go so far as to grant women an *entitlement* to abortion; therefore, exemptions for health care providers were in order.⁷⁶ The Amendment specifies that an individual must not be forced to participate in government-funded research over moral objections.⁷⁷ The states soon followed suit, and today almost all states provide some protection for health care professionals’ freedom of conscientious objection to involvement in abortion.⁷⁸

Today, the freedom of conscience of health care professionals is currently recognized and protected by a vast body of laws. At the federal level, these laws protect conscientious objection to a range of medical procedures, including abortion,⁷⁹ sterilization,⁸⁰ and contraception.⁸¹ On November 20,

71. *Id.* at 197–98.

72. Irene Prior Loftus, Student Author, *I Have a Conscience, Too: The Plight of Medical Personnel Confronting the Right to Die*, 65 *Notre Dame L. Rev.* 699, 720 (1990).

73. Harriet F. Pilpel & Dorothy E. Patton, *Abortion, Conscience and the Constitution: An Examination of Federal Institutional Conscience Clauses*, 6 *Colum. Hum. Rights L. Rev.* 279, 284 (1974–1975).

74. 410 U.S. 113 (1973).

75. *Church Amendment to the Health Services Extension Act of 1973*, 42 U.S.C. § 300a-7 (1973).

76. Hogan, *supra* n. 64, at ¶ 13.

77. Davis, *supra* n. 1, at 860 (citing 42 U.S.C. § 300a-7 (1985)).

78. *USCCB Testimony*, *supra* n. 26.

79. *See* 42 U.S.C. § 300a-7(b) (2000) (prohibiting public discrimination against individuals and entities that object to performing abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(c) (2000) (prohibiting entities from discriminating against physicians and health care personnel who object to performing abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(e) (2000) (prohibiting entities from discriminating against applicants who object to participating in abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 238n (2000) (prohibiting discrimination against individuals and entities that refuse to perform abortions or train in their performance); 20 U.S.C. § 1688 (2000) (ensuring that federal sex discrimination standards do not require educational institutions to provide or pay for abortions or abortion benefits).

2004, the United States Congress approved a spending bill that includes the Hyde-Weldon Conscience Protection Amendment, which provides:

None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.⁸²

In other words, the Amendment prohibits discrimination against health care providers who decline to be involved with abortions.

While most federal and state conscience clause legislation focuses almost exclusively on objection to abortion, many states also provide protection for those who refuse to participate in a broader range of ethically sensitive medical procedures.⁸³ Conscience clauses are often included in legal mandates for proscribed activities, usually at the request of impacted Catholic institutions.⁸⁴ For example, Oregon recognized the need for conscience protection when it enacted its Death with Dignity Act, providing that health care workers, including pharmacists, who are morally opposed to physician-assisted suicide, can be free not to participate without fear of retribution.⁸⁵

Only one state, Vermont, does not have any kind of conscience protection on its books.⁸⁶ The other forty-nine states provide at least some kind of protection for rights of conscience for at least some health care professionals under at least some circumstances.⁸⁷ The state of Illinois has adopted one of the most comprehensive right-of-conscience laws in the country,

80. See 42 U.S.C. § 300a-7(b) (2000) (prohibiting public discrimination against individuals and entities that object to performing sterilizations on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(c) (2000) (prohibiting entities from discriminating against physicians and health care personnel who object to performing sterilizations on the basis of religious beliefs or moral convictions); 42 U.S.C. § 300a-7(e) (2000) (prohibiting entities from discriminating against applicants who object to participating in sterilizations on the basis of religious beliefs or moral convictions).

81. See *Treasury and General Government Appropriations Act of 2002*, Pub. L. No. 107-67, § 641, 115 Stat. 514, 554-55 (2002) (prohibiting health plans participating in the federal employee health benefits program from discriminating against individuals who, for religious or moral reasons, refuse to prescribe or otherwise provide for contraceptives, and protecting the right of health plans that have religious objections to contraceptives to participate in the program).

82. *Consolidation Appropriations Act of 2005*, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2005).

83. W. Cole Durham, Jr., Mary Anne Q. Wood & Spencer J. Condie, *Accommodation of Conscientious Objection to Abortion: A Case Study of the Nursing Profession*, 1982 *BYU L. Rev.* 253, 309 (1982).

84. Hogan, *supra* n. 64, at 3.

85. Or. Rev. Stat. Ann. § 127.885(4.01)(4) (2003).

86. *Prepared Statement of Professor Wardle, supra* n. 9, at 29.

87. *Id.*; see also *Health Care Rights of Conscience: Current State Statutes*, http://www.unitedforlife.org/guides/archive/roc/roc_statute_guide.htm (Nov. 2001) [hereinafter *Health Care Rights of Conscience*].

under which civil rights protection is afforded to all health care providers and extends to any procedure “which is contrary to the conscience of such physician or health care personnel.”⁸⁸ Mississippi also provides generous protection for all health care providers to “decline to comply with an individual instruction or health-care decision for reasons of conscience.”⁸⁹ The state of Washington provides comprehensive conscience protection for conscientious objectors participating in all health care services, but only for individual health care providers and religiously affiliated health care plans and facilities.⁹⁰ The other states’ right-of-conscience laws are not as comprehensive as those of Illinois, Mississippi, and Washington. As mentioned above, most provide protection only for those who decline to participate in abortion.⁹¹

III. THE INADEQUACY OF CURRENT LEGAL PROTECTION

a. *Current Statutes Are Too Narrow*

While the principle of protection for the right of conscience is widely acknowledged, the current laws only provide a patchwork of protection, leaving gaping holes in the protection needed for all health care professionals.⁹² Most federal statutes are connected to the receipt of federal funds or to specific federal programs, which makes their scope limited.⁹³ In addition, since most state statutes only protect physicians, hospitals, and hospital employees from being forced to perform abortions, many medical practices are not included and many individuals and institutions are left unprotected.⁹⁴ As noted above, few existing statutes protect the full range of institutions and individuals that may be involved in the increasingly complex and controversial health care system.⁹⁵ “As the range of medical technologies continues to expand and social mores change, the number of

88. 745 Ill. Comp. Stat. 70/1-14 (1998); *see also* 720 Ill. Comp. Stat. 510/13 (2000).

89. Miss. Code Ann. § 41-41-215(5) (2004).

90. Wash. Rev. Code §§ 9.02.150, 48.43.065, 70.47.160 (2000).

91. For a complete list of state conscience clauses, see *Health Care Rights of Conscience*, *supra* n. 87 (providing an overview of current rights of conscience laws); *Prepared Statement of Professor Wardle*, *supra* n. 9, at 31 (appendix, providing text from each state’s conscience protecting statutes, current as of 2002).

92. Wardle, *supra* n. 59, at 180–181.

93. *See* 42 U.S.C. §§ 300a-7(b), 300a-7(c), 300a-7(e) (2000) (conscience protections limited to entities that receive and individuals who work in entities that receive federal funds under the Public Health Service Act, Community Mental Health Centers Act, Developmental Disabilities Services and Facilities Construction Act, or Developmental Disabilities Assistance and Bill of Rights Act of 2000); *Treasury and General Government Appropriations Act, 2002*, Pub. L. No. 107-67, § 641, 115 Stat. 514, 554–55 (2002) (protections under only the federal employee health benefits program); 18 U.S.C. § 3597(b) (2005) (protects only prosecutors, correctional, and other enumerated personnel in the context of federal death penalty cases and executions).

94. *USCCB Testimony*, *supra* n. 26.

95. *Id.*

medical services involving potentially serious conflicts of conscience is certain to increase.”⁹⁶

b. Statutes Are Subject to Hostile Judicial Interpretation

Another increasing problem for conscientious objectors comes from the judicial branch. Even after states enact conscience protection for medical professionals, judges often interpret the conscience clauses very narrowly, and will jump through any available loophole without protecting the conscience of the health care professional. Courts are quick to downplay the needs of a medical professional’s conscience.⁹⁷ As one commentator noted, “even broadly constructed statutes face . . . problem[s]. . . . [A]n adequate conscience provision may be narrowly construed by a judiciary which is less than sympathetic to the principles of the objector’s conscience.”⁹⁸

Strict interpretation of the statutory language is the ordinary rule in conscience clause cases.⁹⁹ As a result, any effort of a state legislature to afford conscience protection may be diminished through adverse judicial interpretation.¹⁰⁰ For example, courts have narrowly interpreted the term “abortion,” and a California court denied a hospital conscience protection in *Brownfield v. Daniel Freeman Marina Hospital*,¹⁰¹ holding that estrogen pregnancy prophylaxis was not the same as abortion.¹⁰² Similarly, a Pennsylvania court in *Spellacy v. Tri-County Hospital*¹⁰³ concluded that the state conscience clause only protected those forced to be directly involved with abortions. Thus, an admissions clerk who was fired by the hospital as a result of her refusal to participate in the admission of abortion patients was left without recourse.¹⁰⁴

A district court in Montana denied relief to a nurse-anesthetist who was fired from her job for refusing to perform a sterilization procedure, despite the fact that Montana has a conscience clause stating, “All persons shall have the right to refuse . . . to participate in sterilization.”¹⁰⁵ The district court reasoned that the nurse’s right to refuse was “far outweighed” by both the rights of the hospital and the nurse’s inability to be an effective

96. Wardle, *supra* n. 59, at 181.

97. Judith F. Daar, *Medical Futility and Implications for Physician Autonomy*, 21 Am. J. L. & Med. 221, 229 (1995).

98. Frank, *supra* n. 63, at 349.

99. Wardle, *supra* n. 59, at 199.

100. *Id.* at 349.

101. 256 Cal. Rptr. 240 (Cal. App. 2d Dist. 1989).

102. *Id.* at 245.

103. 1978 WL 3437 (Pa. Ct. Com. Pleas Mar. 23, 1978), *aff’d*, 395 A.2d 998 (Pa. Super. 1978).

104. *Id.*

105. *Swanson v. St. John’s Lutheran Hosp.*, 182 Mont. 414, 427–28 (1979) (reversing the district court’s decision).

hospital employee, even though the state legislature did not see fit to include such provisions in the conscience clause.¹⁰⁶

Additionally, in Alaska, even though there is a conscience clause protecting hospitals' rights not to participate in abortion,¹⁰⁷ the state supreme court ruled that private hospitals receiving state or federal funds were required to allow an abortionist to perform abortions in its surgical suites, because the hospital, by receiving state money, had become a "quasi-public" institution.¹⁰⁸

Because the already limited protections afforded by the legislatures are subject to hostile interpretation by the courts, lawmakers need to craft more expansive statutes that provide specific protection for particular health care professionals. "With new organized threats to conscience on the horizon, it is especially important for states to expand and strengthen their existing protections now."¹⁰⁹ One such group that needs specific protection is pharmacists.

IV. PHARMACISTS ON THE BATTLEGROUND: THE NEED FOR SPECIFIC PROTECTION

a. *The Current Situation*

Pharmacists currently face a great deal of heat for their conscientious objection to medical products. While others are often protected from controversial procedures, pharmacists have fallen through the cracks of the legal protection of conscience. In most states, pharmacists with conscientious objections to abortifacients and lethal drugs are left defenseless.

Legislatures in twenty-two states are proposing bills that would provide conscience protections,¹¹⁰ but only three states currently have conscience rights statutes that specifically protect pharmacists. Arkansas,¹¹¹

106. *Id.*

107. Alaska Stat. § 18.16.010(b) (1998) ("Nothing in this section requires a hospital or person to participate in an abortion . . .").

108. *Valley Hosp. Assn., Inc. v. Mat-su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); see also H.R. Subcomm. on Health of the Comm. on Energy and Commerce, *Hearing on Protecting the Rights of Conscience of Health Care Providers and a Parent's Right to Know*, 107th Cong., 2d Sess. 12 (July 11, 2002) (Prepared Statement of Karen Vosburgh, Director of the Board of Valley Hospital); Collett, *supra* n. 15.

109. USCCB Testimony, *supra* n. 26.

110. These states are Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Henry J. Kaiser Fam. Found., *Sen. Boxer Introduces Federal Legislation to Require Pharmacists to Fill all Prescriptions, Including Contraceptives*, http://www.kaisernetwork.org/daily_reports/print_report.cfm?DR_ID=29436&dr_cat=2 (Apr. 19, 2005); see also Stuart Shepard, *Pharmacists Seek Conscience-Clause Protection*, <http://www.family.org/cforum/fnif/news/a0036020.cfm> (Mar. 30, 2005).

111. Ark. Code Ann. § 20-16-304 (2005) ("Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information . . .").

Mississippi,¹¹² and South Dakota¹¹³ all have laws that protect pharmacists from being forced to fill certain prescriptions when it would constitute a violation of conscience. Georgia officials have adopted a regulation in the Georgia Code of Professional Conduct allowing pharmacists to refuse to fill prescriptions.¹¹⁴ The Arizona legislature passed a similar law, but it was recently vetoed by the governor.¹¹⁵

Not only is there a lack of legal protection for conscientious-objecting pharmacists, but there is also a growing campaign to pass laws that would force pharmacists to fill all prescriptions, regardless of matters of conscience. For example, the Pro-Choice Resource Center's Spotlight Campaign "organizes regional meetings to build a network of opposition to 'conscience' . . . clauses that allow . . . pharmacists . . . to deny women access to services like abortion."¹¹⁶

On the national legislative front, Representative Carolyn McCarthy (D-NY) has recently introduced a bill into Congress that would "amend the Public Health Services Act with respect to the responsibilities of a pharmacy when a pharmacist employed by the pharmacy refuses to fill a valid prescription for a drug on the basis of religious beliefs or moral convictions."¹¹⁷ Under the proposed law, if an employee of a pharmacy declines to fill a prescription because of religious or moral objections, the pharmacy will be subject to a civil penalty and can be sued by the patient for actual and punitive damages.¹¹⁸

In addition, at the state level, the Nevada State Assembly, at the urging of Planned Parenthood, approved an amendment to stop pharmacists with religious objections from refusing to fill prescriptions for any drug, including abortifacient contraceptives.¹¹⁹ Legislation has been proposed in California, Missouri, New Jersey, and West Virginia that would require pharmacists to fill all prescriptions, even those to which they are morally

112. Miss. Code Ann. § 41-107-5 (2005) (A health care provider (including pharmacists and pharmacy employees) "has the right not to participate" in "a health care service that violates his or her conscience.").

113. S.D. Codified Laws § 36-11-70 (2000) (protecting the civil rights of pharmacists who may conscientiously object to dispensing medication that will cause abortion, assisted suicide, or euthanasia).

114. Ga. Admin. Code § 480-5-.03(n) (2005) ("it shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her . . . ethical or moral beliefs.").

115. See Ann Walker, "Conscience Clause" Hurts Women, Yuma Sun (Apr. 14, 2005) (available at http://sun.yumasun.com/artman/publish/articles/story_16039.php).

116. U.S. Conf. Catholic Bishops, *supra* n. 20.

117. H.R. 1539, 109th Cong. (Apr. 8, 2005) (referred to the Committee on Energy and Commerce).

118. *Id.* at § 249(c)(2).

119. Nev. Assembly 144, 72d Sess. (Feb. 14, 2003); Ed Vogel, *Assembly Voice Vote: Pharmacists Told to Heed Doctors' Rx: Role of Religious Beliefs, Dispensing Medicine Debated*, Las Vegas Rev. J. (Apr. 4, 2003), (available at http://www.reviewjournal.com/lvrj_home/2003/Apr-04-Fri-2003/news/21036565.html).

opposed.¹²⁰ The pharmacist licensing board in North Carolina recently “clarified its policy to prevent pharmacists from obstructing customers from filling prescriptions.”¹²¹

In March 2005, Illinois Governor Rod R. Blagojevich issued an “emergency regulation” to force pharmacists in the state to fill all legal prescriptions for legal drugs.¹²² One pharmacist has already filed suit, challenging the “emergency rule,” alleging it is void because it violates pharmacists’ rights protected by the Illinois Healthcare Right of Conscience Act¹²³ (ironically, one of the most expansive conscience clauses in the country),¹²⁴ and because it exceeds the governor’s authority under state and federal law.¹²⁵

In the last year, at least fifteen pharmacists have found themselves in court for refusing to dispense pharmaceuticals that contradicted their consciences.¹²⁶ In Wisconsin, an administrative judge recently recommended a reprimand and remedial ethics classes for Catholic pharmacist Neil Noesen, because he declined to fill or transfer a prescription for contraceptives based on his religious objection.¹²⁷ The judge also required Noesen to pay the full cost of the proceedings, which are estimated at \$20,000.¹²⁸

b. Moral Objections to Certain Medications

The three main categories of prescription drugs to which pharmacists have religious or ethical objections are drugs that act as abortifacients, lethal drugs used for the purpose of assisted suicide, and those used for capital punishment.

i. Abortifacients

Perhaps the most controversial abortifacient drug is RU-486 (also called Mifepristone, and sold in the United States under the brand name Mifeprex), which is used up to seven weeks into a woman’s pregnancy.¹²⁹

120. Henry J. Kaiser Fam. Found., *supra* n. 27; *see also* Kari Lydersen, *Illinois Rule Says Pharmacies Must Fill Orders for Birth Control*, *Seattle Times* A6 (Apr. 2, 2005).

121. Lydersen, *supra* n. 120.

122. Steve Chapman, *From the Right to Choose to the Power to Compel*, *Balt. Sun* 11A (Apr. 11, 2005).

123. 745 Ill. Comp. Stat. 70/1 (2000).

124. *Prepared Statement of Professor Wardle*, *supra* n. 9, at 31.

125. Am. Fam. Assn., *Pro-Life Pharmacy Worker Wants Court to Cancel Contraceptive Order*, <http://headlines.agapepress.org/archive/4/afa/192005b.asp> (Apr. 19, 2005).

126. Stuart Shepard, *Pharmacists Seek Conscience-Clause Protection*, <http://www.family.org/cforum/fnif/news/a0036020.cfm> (Mar. 30, 2005).

127. Carol Ukens, *Pharmacist Faces Discipline for Refusal to Transfer Script*, <http://www.drugtopics.com/drugtopics/content/printContentPopup.jsp?id=153753> (Apr. 4, 2005).

128. Todd Richmond, *Pharmacy Board Approves Sanctions Against Pharmacist: Neil Noesen Refused to Fill Prescription for Birth Control Pills*, *St. Paul Pioneer Press* B3 (Apr. 14, 2005).

129. Off. Population Research Princeton U. & Assn. Reprod. Health Professionals, *The Emergency Contraception Website*, <http://ec.princeton.edu> (last updated Nov. 2005) [hereinafter *Emergency Contraception Website*] at <http://ec.princeton.edu/questions/ecnotru.html>. Although mifepristone is currently distributed to women directly from doctors and certain health clinics, it is

Many pro-life pharmacists are opposed to dispensing emergency contraception, basically large doses of existing birth control pills (or another drug, levonorgestrel, known as Plan B), which can have an abortifacient effect.¹³⁰ Some pharmacists refuse to prescribe any form of birth control pills, because of the possibility that the drug will lead to a chemical abortion.¹³¹

Although abortion rights organizations deny that emergency contraceptives cause abortions,¹³² the reason that they rule out abortion is because they base their understanding of the beginning of human life on the United States Food and Drug Administration/National Institutes of Health and the American College of Obstetricians and Gynecologists definition of the beginning of pregnancy as the implantation of a fertilized egg in the lining of a woman's uterus.¹³³ According to this view, since emergency contraceptives work before implantation, the woman is not "pregnant" before this time.¹³⁴

However, not all medical professionals adhere to the FDA as the source of determining when life begins. In a hearing before a Senate Judiciary Subcommittee, a number of medical experts testified on the question of when life begins and many concluded that it begins at conception.¹³⁵ For example, Dr. Jerome LeJeune, Genetics Professor at the University of Descartes in Paris and the discoverer of the Down's Syndrome chromosomal pattern, testified, "[A]fter fertilization has taken place, a new human being has come into being." He stated that this is "no longer a matter of taste or opinion" and "not a metaphysical contention, it is plain experimental evidence."¹³⁶ Dr. Hymie Gordon, Chairman of the Department of Genetics at

important to mention this drug because the potential for pharmaceutical access exists. Donald W. Herbe, Student Author, *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, 82-83 (2002-03).

130. Depending on the time that they are taken during the woman's menstrual cycle, emergency contraceptives may inhibit or delay ovulation, inhibit tubal transport of the egg or sperm, interfere with fertilization, or alter the endometrium (the lining of the uterus), thereby inhibiting implantation of the embryo. Emergency Contraception Website, *supra* n. 129, at <http://ec.princeton.edu/questions/ecabt.html>.

131. Hormonal contraceptives have three mechanisms of action: 1) prevent ovulation, 2) thicken the cervical mucus to prevent sperm from entering the uterus and fallopian tube, and 3) alter the lining of the uterus so implantation cannot take place. PDR Health, *Hormonal Options: Pills, Shots, and Implants*, http://www.pdrhealth.com/content/women_health/chapters/fgwh21.shtml (last updated 2004). The third action, if and when it occurs, is an abortifacient, because human life has begun but cannot continue to develop without the nourishment provided through the mother's uterine wall.

132. *Emergency Contraception Website*, *supra* n. 129.

133. Comm. on Terminology, Am. College Obstetricians & Gynecologists, *Obstetric-Gynecologic Terminology* (E.C. Hughes ed., F.A. Davis Co. 1972).

134. *Protection of Human Subjects*, 45 C.F.R. § 46.102 (Mar. 9, 1983).

135. Sen. Subcomm. on Separation of Powers of the Jud. Comm., *The Human Life Bill: Hearings on S. 158*, 97th Cong. (Apr. 23-24, 1981).

136. *Id.*

the Mayo Clinic verified that “[b]y all the criteria of modern molecular biology, life is present from the moment of conception.”¹³⁷

ii. Drugs Used for Assisted Suicide

The majority of pharmacists object to the dispensation of drugs for assisted suicide. Physician-assisted suicide is defined by the American Society of Health-System Pharmacists as “[t]he practice by some health professionals of providing a competent patient with pharmaceutical means for the patient to use with the primary intention of ending his or her own life.”¹³⁸ One survey found that 76% of pharmacists believe that they should be able to refuse to participate in assisted suicide, but also felt that their job might be at stake if they did so.¹³⁹ In Oregon, where assisted suicide is legal, there is a conscience clause that protects healthcare workers; however, pharmacists may not be covered by the clause because it refers to those involved in administering the drugs, and pharmacists do not administer, they dispense.¹⁴⁰ The pharmacist provides the patient the means to commit suicide by dispensing a drug prescribed by a doctor in a lethal dose to bring about the end of the patient’s life.¹⁴¹ Those pharmacists who believe that medication should not be used to end life should be allowed to opt out of the process.

iii. Drugs Used for Capital Punishment

Another category of objectionable lethal drugs dispensed by pharmacists are those to be used for executions via lethal injection. Pharmacists are involved in the execution process because they are the ones who prepare and dispense these lethal substances for the Department of Corrections.¹⁴² A handful of states have even enacted statutes that allow departments of corrections to obtain the lethal drugs from pharmacists without a prescription.¹⁴³ However, many pharmacists who oppose capital punishment believe that they should not be required to participate in the lethal injection process. As the executive vice president of the Florida Pharmacy Association said, “I believe pharmacists should not be forced into participating in

137. *Id.*

138. Marjorie Weiss, *A Role for the Pharmacist in Physician-Assisted Suicide?* 265 *Pharm. J.* 649 (Oct. 28, 2000).

139. Karen Snyder, *Ethical Hot Spots: What Should You Do?* 141 *Drug Topics* 41 (Jan. 20, 1997).

140. 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 (accessed Apr. 19, 2005).

141. *Id.*

142. Donna Young, *Florida’s Lethal-Injection Process Involves Pharmacist*, 58 *Am. J. Health-System Pharm.* 1688, 1688 (Sept. 1, 2001).

143. Human Rights Watch, *Appendix: Methods of Execution: by State*, <http://www.hrw.org/reports/1994/usdp/10.htm> (accessed Apr. 27, 2005) (no prescription needed in Delaware, Idaho, Mississippi, New Hampshire, New Jersey, and South Dakota).

such activities. . . . It boils down to a right of conscience whether to participate or not.”¹⁴⁴

V. REASONS FOR CONSCIENCE PROTECTIONS FOR PHARMACISTS

a. *Pharmacists, Like Physicians, Are Professionals*

Pharmacists are not just prescription-dispensing machines—they are integral members of the health care team. Society relies on pharmacists to ensure the safety of drugs prescribed in combination and to instruct patients on the appropriate use of medications.¹⁴⁵ Pharmacists have traditionally served an important role as the guardian and gatekeeper of the nation’s drug supply.¹⁴⁶ They are already given a great deal of discretion in exercising their professional judgment in refusing to dispense medications. For example, they screen prescriptions for drug interactions, allergies, and proper dosage for the safety and welfare of the patient.¹⁴⁷ The Indiana Supreme Court ruled that a pharmacist has a duty to refuse to dispense medications based on professional judgment.¹⁴⁸ Thus, a pharmacist is not required to dispense a prescription just because a doctor prescribed it.

Pharmacists are highly trained professionals with ethical and moral accountability. It is inappropriate and condescending to deny a pharmacist’s right to exercise personal judgment in refusing to fill certain prescriptions.¹⁴⁹ In making professional judgments about pharmaceuticals, it is difficult to draw the line between where a pharmacist’s professional judgment ends and moral judgment begins. The two are difficult to separate. If we allow pharmacists to refuse to fill prescriptions based on other grounds, why should we force them to fill those that they find morally abhorrent?

b. *Pharmacists Should Not Have to Abandon Their Morals*

Society is confused when it denies pharmacists their conscience rights; it wants its workers to be conscientious but not to have a conscience. This is a contradiction. Most professionals are not required to abandon their morals in the workplace. For example, lawyers are free to choose the clients and issues that they represent.¹⁵⁰ Likewise, society should not force phar-

144. Young, *supra* n. 142.

145. Cantor & Baum, *supra* n. 13, at 2010.

146. David B. Brushwood, *The Professional Capabilities and Legal Responsibilities of Pharmacists: Should “Can” Imply “Ought”?* 44 Drake L. Rev. 439, 461 (1996).

147. Wis. Sen. Labor Comm., *Hearing on Sen. Bill 21* (Mar. 5, 2003) (testimony of pharmacist Yvonne Klubertanz, R.Ph.) [hereinafter *Klubertanz Testimony*].

148. *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E. 2d 514 (Ind. 1994).

149. Cantor & Baum, *supra* n. 13, at 2010.

150. Model R. Prof. Conduct 1.16(b)(4) (ABA 2002) (“A lawyer may withdraw from representing a client if . . . [the] client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”); see also Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 Fordham L. Rev. 1339 (Mar. 1998).

macists to leave their faith and morality at the door when they enter the pharmacy.¹⁵¹ Doing so would be dehumanizing to individual pharmacists and would cause the pharmacy profession to become robotic.

Responding to the need for conscience protection for pharmacists, the American Pharmaceutical Association (AphA) adopted a policy that recognizes a pharmacist's right to refuse dispensing medications based on the pharmacist's personal beliefs.¹⁵² However, as noted above, this policy has not stopped states from mandating pharmacists to fill all legal prescriptions.¹⁵³ In those states, should Catholic pharmacists be forced out of the profession as counter-revolutionaries just because they abide by the ethics of the magisterium of the Catholic Church? To force a pharmacist to participate in the taking of an innocent human life should never be a principle of law or professional ethics.¹⁵⁴

There is currently a shortage of health care professionals in America, and pharmacists are especially in high demand.¹⁵⁵ It would be an injustice to society to refuse equal opportunity for pharmacists who object to dispensing medications that cause the death of a person.¹⁵⁶ As one pharmacist notes, "Pharmacists should have the right like any health professional to define their scope of practice and practice with integrity and dignity. We, like our patients, should not be treated as a means to an end. It is not right to force someone to do something against their conscience."¹⁵⁷

The public typically rates pharmacists as the most trusted professionals (even above clergy), according to the Gallup Poll list of professionals rated for their "honesty and ethical standards."¹⁵⁸ However, "[g]iven that most Americans do not believe in abortion-on-demand, one wonders if pharmacists will continue to be held in such high regard if the American people understand what may be required of employee pharmacists, and perhaps eventually all pharmacists."¹⁵⁹ It would be a great disservice to society to strip pharmacists of their ability to make moral decisions.

151. Cantor & Baum, *supra* n. 13, at 2009.

152. Am. Pharm. Assn., *Report of the House Delegates, Subject: Pharmacist Conscience Clause*, <http://www.aphanet.org/lead/hod.html> (1998) ("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 to conscientious refusal.").

153. *See infra* sec. VI(a).

154. Herbe, *supra* n. 129, at 102.

155. Klubertanz *Testimony*, *supra* n. 147.

156. *Id.*

157. *Id.*

158. Am. Pharm. Assn., *Facts About Pharmacists and Pharmacies*, <http://www.aphanet.org/AM/Template.cfm?Section=Search&Template=/CM/HTMLDisplay.cfm&ContentID=3537> (accessed Apr. 22, 2005).

159. Brauer, *supra* n. 34.

c. *Freedom to Exercise One's Conscience Is a Fundamental Right*

As our nation's founding fathers recognized, freedom of conscience is a fundamental human right.¹⁶⁰ James Madison explained that this freedom is "in its nature an unalienable right" because "what is here a right towards men, is a duty towards the Creator."¹⁶¹ Pharmacists do not only have a duty to their profession and patients; many also have a duty to God. For these pharmacists, true conscience recognizes a higher being that obliges it to perform certain actions and avoid others.¹⁶² As Cardinal John Henry Newman, a great defender of the rights of conscience, put it: "Conscience has rights because it has duties."¹⁶³

Madison called these duties to the Creator "precedent, both in order of time and in degree of obligation, to the claims of Civil Society."¹⁶⁴ George Washington maintained that "the conscientious scruples of all men should be treated with great delicacy and tenderness" and laws should "always be as extensively accommodated" to them as "a due regard to the protection and essential interests of the nation may justify and permit."¹⁶⁵ As Pope John Paul II said,

To refuse to take part in committing an injustice is not only a moral duty; it is also a basic human right. Were this not so, the human person would be forced to perform an action intrinsically incompatible with human dignity, and in this way human freedom itself, the authentic meaning and purpose of which are found in its orientation to the true and the good, would be radically compromised. What is at stake therefore is an essential right which, precisely as such, should be acknowledged and protected by civil law.¹⁶⁶

Because it is an inalienable right, each person should be free to act consistently with the dictates of his or her conscience and no pharmacist should be forced to perform an act that would violate his or her core beliefs.

VI. THE OTHER SIDE OF THE DEBATE

While many states are proposing conscience clause legislation for pharmacists, reproductive and euthanasia rights activists are vehemently

160. *See supra* sec. II(a).

161. Madison, *supra* n. 44, at 299.

162. George Cardinal Pell, *The Inconvenient Conscience*, 153 *First Things* 22, 26 (May 2005).
 163. John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: Difficulties Felt by Anglicans in Catholic Teaching* 250 (Uniform ed., Longman, Green & Co. 1868–1881).

164. Madison, *supra* n. 44, at 299.

165. George Washington, *Letter to the Religious Society Called Quakers (Oct. 1789)*, in *George Washington on Religious Liberty and Mutual Understanding* 11, 11 (Edward Frank Humphrey ed., 1932).

166. Pope John Paul II, *Evangelium Vitae*, No. 74 (Mar. 25, 1995) (available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelicum-vitae_en.html).

against these types of conscience clauses, and are seeking to block legislation that would afford any of these protections.¹⁶⁷ The opponents of conscience protection for pharmacists pose four main arguments for why pharmacists should be forced to dispense all legal prescriptions. First, they argue that a patient's autonomy should trump a pharmacist's right to conscience.¹⁶⁸ A second argument is that a pharmacist should not be allowed to impose his or her views on the patient.¹⁶⁹ Third, opponents argue that conscience clauses have potential for abuse.¹⁷⁰ Finally, advocates against conscience protection argue that pharmacists will block access to certain drugs.¹⁷¹

a. Viewing Autonomy as Freedom to Choose Good

The argument that a patient's right to autonomy is more important than—and should never be limited by—a pharmacist's right to conscience is based on a flawed view of autonomy. Society once valued autonomy in the light of the moral laws to which we are bound; “it now understands autonomy as the existential liberty to compose our lives, and even reality, for ourselves.”¹⁷² Our culture equates autonomy with freedom *from* a given thing: “freedom from constraint, from rules, from direction, from guidance, from immutable principles.”¹⁷³ With this understanding of freedom, patient autonomy becomes the patient's right to do anything he or she desires. However, this definition of autonomy is dangerous and misplaced.

Freedom is an essential part of human dignity, so it is obviously important for a patient to be able to exercise freedom in choosing his or her medical care. However, a patient's freedom should not be exalted “to such an extent that it becomes an absolute . . . source of values.”¹⁷⁴ “Autonomy is of great value, but its value does not lie in the freedom to make any choice. It lies in the freedom to make good choices; to fully appropriate into one's being the value of goodness and to participate in the creation of

167. See *supra* sec. IV and accompanying text.

168. See Newsmax.com, *supra* n. 16 (“The conscience that matters most belongs to the patient.”).

169. See Sophia Brumby, *A Prescription for Discrimination*, Cavalier Daily (Apr. 22, 2005) (available at <http://www.cavalierdaily.com/CVarticle.asp?ID=23366&pid=1295>).

170. Cantor & Baum, *supra* n. 13, at 2010.

171. See Holly Teliska, Student Author, *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 (2005).

172. Pell, *supra* n. 162, at 25.

173. Sean Murphy, *Freedom of Conscience and the Needs of the Patient* (Banff, Alberta, Nov. 2001) (available at <http://www.consciencelaws.org/Conscience-Archive/Speeches/Freedom%20Conscience%20Needs%20Patient.pdf>).

174. Pope John Paul II, *Veritatis Splendor*, No. 32 (Aug. 6, 1993) (available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html).

future possibilities of goodness.”¹⁷⁵ Freedom should thus be interpreted as freedom *for* a given thing: freedom “for discerning the good that needs to be done, for choosing the good, for doing good.”¹⁷⁶ Viewing autonomy as the freedom to choose what is good recognizes that humans flourish when they are able to choose between competing goods in order to select those that are most compatible with their interests and desires.¹⁷⁷

In order to choose what is good, one must be able to “form convictions about what is truly good and live accordingly.”¹⁷⁸ Thus, human freedom must be integrally connected to the truth.¹⁷⁹ Disconnecting autonomy and truth allows the individual to be the “supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil.”¹⁸⁰ This unfettered right to do whatever one wants can lead to disastrous effects. A definition of freedom that is indifferent to the moral value of the choices made “justifies the strong seeking to enslave the weak and the rich seeking to profit from the misery of the poor.”¹⁸¹ Freedom to do immoral acts does not serve either the individual or society.¹⁸² Because freedom is connected to truth, patient autonomy has its limits. Society has the right to restrict patients’ choices, especially when those choices would cause harm to the patient (in the case of assisted suicide) or others, such as the unborn, death row inmates, or pharmacists.

Furthermore, even if one accepts the “freedom to do anything” definition of autonomy, allowing a patient to order the pharmacist to fill a prescription severely infringes upon the pharmacist’s own right to autonomy. As social critic Iain Benson recognizes:

In medicine where two people are involved, autonomy is always a two-way street. Yes, the patient or “client” has his or her autonomy; but so, too, does the practitioner. There is no good reason (except perhaps one grounded in an anti-religious bias) to advocate that a patient’s autonomy should trump the autonomy of the professional health-care worker just because the two views conflict.¹⁸³

According to Francis Manion, senior counsel at the American Center for Law and Justice, “It comes down to a societal choice of what we value

175. Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 Wake Forest L. Rev. 635, 649 (Fall 1997).

176. Pope John Paul II, *Evangelium Vitae*, *supra* n. 166.

177. See generally Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon Press 1993).

178. Murphy, *supra* n. 173.

179. *Id.*

180. Pope John Paul II, *Evangelium Vitae*, *supra* n. 166.

181. Collett, *supra* n. 175, at 650.

182. *Id.*

183. Iain T. Benson, “Autonomy,” “Justice” and the Legal Requirement to Accommodate the Conscience and Religious Beliefs of Professionals in Health Care, <http://www.consciencelaws.org/Examining-Conscience-Legal/Legal04.html> (updated Mar. 2001).

more deeply. . . . I hope even today that we value and individual's freedom of conscience more than we value the instant convenience of the customer coming in for a particular service."¹⁸⁴ The "customer is always right" philosophy may be the best guiding principle for McDonald's, but it is an inappropriate standard for medical ethics.¹⁸⁵

b. Who Is Imposing on Whom?

Those who seek to block conscience protection for pharmacists argue that a pharmacist should not be allowed to impose his or her views on the patient. However, when the patient's views differ from those of the pharmacist, the question is: who is imposing on whom in this situation? When a pharmacist declines to dispense a prescription, he is not making a moral judgment about the patient, but he is making a moral judgment about his own actions—about his moral obligation to avoid doing what he believes is wrong. A conscientious objector's main concern is to avoid taking part in an immoral act.¹⁸⁶ Forcing a pharmacist to provide a medication that the pharmacist believes will lead to the death of a person is imposing the patient's views onto the pharmacist, not the other way around.

Opponents of conscience protection believe that ethics are like tools; a person can have one set at home, one set in the office, and another when he goes out on the town.¹⁸⁷ However, many pharmacists do not view their ethics as tools "that can be picked up or put down, used or discarded, depending upon the situation or circumstances involved."¹⁸⁸ Rather, conscientious-objecting pharmacists internalize their ethics, making them a part of their personal identities. "[When] a person has only *one* identity, served by a single conscience that governs his conduct in private and professional life . . . [w]e identify this as the virtue of personal integrity."¹⁸⁹ Therefore, it is often impossible for a pharmacist not to bring her ethics into the workplace—to ask her to do otherwise would be to violate her integrity.

c. Acting According to Conscience v. Discrimination

Some claim that society should not support conscience clause legislation because "the contours of conscientious objection remain unclear."¹⁹⁰

184. Molly McDonough, *Rx for Controversy*, 4 ABA J. E-Report 3 (June 10, 2005).

185. Susan Martinuk, *Customer Isn't Always Right on Issues of Conscience*, The Province (June 13, 2001) (available at <http://www.consciencelaws.org/Examining-Conscience-Ethical/Ethical20.html>) (quoting Dr. Paul Ranalli, neurologist at the University of Toronto).

186. Sean Murphy, *Service or Servitude: Reflections on Freedom of Conscience for Health Care Workers* 4, <http://www.consciencelaws.org/Conscience-Archive/Documents/Service%20or%20Servitude.pdf> (2004).

187. Newsmax.com, *supra* n. 16.

188. Frederic Hafferty & Ronald Franks, *The Hidden Curriculum, Ethics Teaching, and the Structure of Medical Education*, 69 J. Academic Med. 861, 862 (Nov. 1994).

189. Murphy, *supra* n. 173, at 4.

190. Cantor & Baum, *supra* n. 13, at 2008.

Conscience clauses without limit raise the valid concern that a pharmacist would have license to discriminate against certain classes of people when refusing to dispense medications. For example, some worry that a pharmacist who believes that HIV is caused by immoral behavior would be able to refuse to fill prescriptions for HIV drugs.¹⁹¹ However, just because conscience clauses have potential for abuse is no reason to ban conscience clauses all together.

First, conscience clauses should be aimed at protecting pharmacists from dispensing particular drugs that cause an *effect* that the pharmacist deems immoral, e.g., abortion or suicide; these clauses should not enable pharmacists to target particular *individuals* that the pharmacist deems immoral—e.g., those with HIV—when refusing to dispense. A pharmacist in Oregon who is morally opposed to dispensing drugs for assisted suicide refuses to dispense the drug because of the drug's effect, not because he does not like the particular person who is seeking the drug. On the other hand, a pharmacist who refuses to dispense HIV drugs does so not because he feels the effects of the drug are wrong, but rather because he has a bias against persons with HIV. The former pharmacist should be protected; the latter should not.

To avoid the discrimination problem, conscientious objection *can* be limited through the wording of the legislation. Because most pharmacist conscientious objection centers around abortifacients, lethal drugs for assisted suicide, and drugs used for capital punishment,¹⁹² state legislation could limit the conscience clause protection to those particular situations. For example, South Dakota's conscience clause is codified as, "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 . . . ;^[193] or (3) cause the death of any person by means of an assisted suicide, euthanasia, or mercy killing."¹⁹⁴ A state where pharmacists are involved with capital punishment by lethal injections could include language in the legislation to cover that situation as well. According to the objecting pharmacist, these three types of drugs have the intended effect of killing a human life in common. Limiting legislation to these situations will focus the objection on the effects of the drugs and will prevent pharmacists from targeting particular classes of people.

Even if narrowly drafted conscience clauses leave room for potential misuse, states should not refrain from enacting them. No law is free from the possibility of the slippery slope argument—even the most carefully drafted laws can be abused. As one judge put it:

191. *Id.* at 2010.

192. *See supra* sec. IV(b).

193. "Unborn child" is defined as "an individual organism of the species homo sapiens from fertilization to live birth." S.D. Codified Laws § 22-1(50A) (2006).

194. S.D. Codified Laws § 36-22-70 (2006).

Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.¹⁹⁵

d. Pharmacists Will Not Block Access to “Needed” Drugs

Proponents of requiring pharmacists to prescribe abortifacients and other lethal drugs argue that pharmacists will block access to drugs that patients “need.” This argument is flawed, because, first, it presupposes that abortifacients and lethal drugs are “needs” of the patient. Loosely defined, a “need” is some good that is essential for the well-being of the patient.¹⁹⁶ So, if an abortifacient is not a *bona fide* need, pharmacists may not be obligated to dispense it. The problem lies in deciding who defines what the patient’s needs are. Is it the patient? What if the patient is wrong about what he or she “needs”?

For example, there is a mental illness called body integrity identity disorder which causes a patient to want to cut off his perfectly healthy leg or arm.¹⁹⁷ These patients really believe that they *need* to have their limbs amputated. The patient, consistent with the World Health Organization’s definition of health, thinks that the amputation would improve his “mental and social well-being.”¹⁹⁸ Does this mean that the doctor must ensure that the patient’s limb is cut off? Of course not. But this example illustrates that our definition of needs depends entirely upon what we believe to be conducive to human well-being.¹⁹⁹ We often cannot achieve a consensus about the morality of a procedure because we are operating from different beliefs about the nature of the human person.²⁰⁰

Contrary to many patients, a number of pharmacists do not believe that abortifacients and lethal medications are *bona fide* needs of the patient. They are elective treatments. Just because these drugs are legal does not mean that they are an entitlement. Although, according to the Supreme Court, the government cannot make abortion illegal, women do not have the right to demand abortion from every medical provider or pharmacist. It is legitimate not to view the killing of an individual (whether it be an unborn child or the patient) as a “need.”

195. *U.S. v. Lee*, 106 U.S. 196, 217 (1882) (Gray, J., dissenting).

196. *Id.*

197. Wesley J. Smith, *Taking Requests, Doing Harm*, <http://www.nationalreview.com/comment/comment-smith072303.asp> (July 23, 2003).

198. Murphy, *supra* n. 173, at 2 (quoting the 1948 World Health Organization definition of health: “a state of complete physical, mental, and social well-being and not merely the absence of disease”).

199. *Id.*

200. *Id.*

Second, the argument that pharmacists will block access is misplaced, because conscience clauses would not make any prescriptions inaccessible. These drugs will still be available. Patients will still have access to them, they just will not be able to require an individual pharmacist to dispense them. As pharmacist Susan Grosskreuz puts it, “This isn’t about making birth control pills unavailable to the general population of women, which Planned Parenthood would like you to believe. This is just about my right not to participate in an act that clearly goes against my conscience.”²⁰¹

If a certain drug is stocked in a pharmacy, there are likely to be pharmacists who work there who are willing to dispense it. Most pharmacists give their employers prior notification of their conscientious objection to certain drugs, so the pharmacy is able to come up with a plan to ensure that patients have access to those medications.²⁰² This often allows the pharmacist to exercise her conscience rights without the patient even knowing. For example, when a person comes for birth control pills, the pharmacist can just unassumingly defer to her coworkers.

If the conscientious-objecting pharmacist is the only one on duty that day, the patient may have to wait until the next day, or drive to another pharmacy to get the prescription. Just because it is not as convenient does not mean that there is not access. The pharmacist’s right to be free from forced violation of her conscience outweighs the patient’s burden of going to another pharmacy. Furthermore, most drugs, including time-sensitive emergency contraceptives, are now available to anyone, anywhere from on-line pharmacies, with overnight delivery.²⁰³

To alleviate the patient’s hassle of going to a pharmacy and having her prescription refused, pharmacists can work with their pharmacies to create mechanisms that would give patients advance notice regarding when a pharmacist with moral objections to abortifacients or lethal drugs will be on duty.²⁰⁴ For example, a schedule could be conspicuously posted to alert patients as to when these controversial drugs will be available to customers.²⁰⁵

VII. REFERRAL AS A FALSE COMPROMISE

a. *Cooperation with Evil*

As a “compromise” between patients’ and pharmacists’ rights, many people suggest adding a section into conscience clauses that requires the conscientious objector to refer the patient to someone who will provide

201. Wis. Sen. Lab. Comm., *Hearing on Sen. Bill 21*, 2003 Sess. (testimony of pharmacist Susan Grosskreuz, R.Ph.) (Mar. 5, 2003).

202. See Herbe, *supra* n. 129, at 101.

203. See e.g. eDrugstore.md, *Plan B (Levonorgestrel)*, [http://www.edrugstore.md/Plan-B-\(Levonorgestrel\).jsp](http://www.edrugstore.md/Plan-B-(Levonorgestrel).jsp) (Feb. 27, 2006).

204. See Herbe, *supra* n. 129, at 101.

205. *Id.*

what is wanted, or assist the patient to that end. For example, the conscience clause provided by APhA requires a pharmacist to refer the patient to another pharmacist or distributor if the pharmacist refuses to dispense the prescription herself.²⁰⁶ However, required referral is really not a compromise at all.

For many pharmacists, a referral would be morally wrong, because it would still constitute participation in the immoral activity of dispensing an abortifacient or lethal drug.²⁰⁷ These pharmacists recognize that moral culpability does not just attach to direct participation in X, it also attaches to facilitating the provision of X by someone else.²⁰⁸ For example, if someone comes to you and asks you to kill his ex-girlfriend, you will still be culpable for the wrongdoing if you hire a hit man to do it instead. The law recognizes this as well—one can be charged for a bank robbery if one assists the robber by providing a weapon, even if one is absent when the robbery occurs. Therefore, if it is morally objectionable to a pharmacist to dispense a drug to be used for an assisted suicide, it will be just as morally objectionable for the pharmacist to help the patient find another pharmacist to provide the lethal drug.

Evangelium Vitae reiterates Catholic moral teaching about the sinfulness of cooperation in evil actions. “Christians, like all people of good will, are called upon under grave obligation of conscience not to cooperate in practices which, even if permitted by civil legislation, are contrary to God’s law. Indeed, from the moral standpoint, it is never licit to cooperate formally in evil.”²⁰⁹ The Encyclical goes on to describe “formal” cooperation, which “occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it.”²¹⁰

An example of such formal cooperation might be the father of a child about to be aborted urging the woman to have an abortion, or consenting to it. In the case of a doctor performing an abortion, a nurse who prepares for and assists in the procedure willingly would be guilty of formal cooperation. For a pharmacist, both dispensing a prescription for an abortifacient and assisting the patient to find another pharmacy to dispense it would constitute cooperation with evil.²¹¹

206. Am. Pharm. Assn., *1997–98 Policy Committee Report, Pharmacist Conscience Clause*, <http://www.aphanet.org/lead/committee2.html> (accessed Apr. 20, 2005).

207. Herbe, *supra* n. 129, at 89.

208. Sean Murphy, *Referral: A False Compromise* 5, <http://www.consciencelaws.org/Conscience-Archive/Pamphlets/Pamphlet-Referral.pdf> (Dec. 24, 2003).

209. Pope John Paul II, *Evangelium Vitae*, *supra* n. 166, at No. 74.

210. *Id.*

211. There may be one important distinction to make between an obligation to refer and an obligation to give the patient back the prescription. As the judge in Noesen’s case held, the pharmacist has a duty to return the prescription to the patient because it is her property. See Rich-

b. Alternative Options that Don't Compromise Pharmacists' Consciences

Because requiring referral does little to alleviate the pharmacist's moral duties, in addition to conscience clauses, society needs to come up with alternative solutions, other than required referral, in order to allow the pharmacist to exercise his or her conscience freely.

Wisconsin has already done this and now has a hotline for people to call for information on where to get emergency contraception.²¹² In addition, as Planned Parenthood advises women, "You can get the names and phone numbers of five emergency contraception providers nearest you by calling, toll-free, the emergency contraception hotline: 1-888-NOT-2-LATE. Or contact the nearest Planned Parenthood health center at 1-800-230-PLAN."²¹³ Emergency contraception hotlines provide a balance between the wishes of the patient and the rights of the pharmacist; the patient can find access to the prescription and the pharmacist does not have to violate his or her conscience through the referral.

VIII. CONCLUSION

Society can demonstrate respect for medical professionals' religious freedom in two ways. Either it can refrain from passing laws that conflict with religious ethical and moral teaching, or in passing such laws, it can include conscience clauses to protect the freedom of health care professionals to remain faithful to their consciences.²¹⁴ Since the former option is unfortunately unlikely to happen in the foreseeable future, society must work to see that the second option is implemented in order to protect the fundamental rights of medical professionals.

One cannot serve two masters and must eventually choose one over the other.²¹⁵ It is wrong to require medical professionals to choose between their religious beliefs and their jobs. If a pharmacist believes that accommodating prescriptions for abortifacients or other lethal drugs would be facilitating the death of another, thus violating his or her duty to God, the pharmacist should never be forced to engage in such a practice. Therefore, we as a society need to ensure that health care professionals' religious

mond, *supra* n. 128. Simply giving back the prescription is not cooperation with evil; it is simply returning the rightful property of the patient.

212. Pharm. Access Partn., *EC Pharmacy Update*, <http://www.go2ec.org/ProfileWisconsin.htm> (accessed May 3, 2005).

213. Planned Parenthood Fedn. Am., <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/ec/pub-emergency-contraception.xml> (accessed Apr. 20, 2005).

214. Catholic Health Assoc. U.S., *Conscience Clause Legislation: A Position Paper* (Nov. 1996) (available at <http://www.consciencelaws.org/Conscience-Policies-Papers/PPPMedicalOrg02.html>).

215. *Matthew* 6:24.

rights are protected through conscience clause legislation. If we do not provide protections to ensure that freedom of conscience is respected, religious health care professionals and providers will become an endangered species.