

# Obstacles to Access:

## *How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*

Holly Teliska†

On July 6, 2002, Amanda Renz went to the pharmacy at a K-Mart in Wisconsin to obtain a refill of her hormonal oral contraceptive.<sup>1</sup> The only pharmacist on duty, Neil Noesen, asked Amanda if her prescription would be used as a contraceptive.<sup>2</sup> When she replied affirmatively, Noesen refused to fill her prescription and would not transfer it to a pharmacist at another store because he does not believe in the use of contraception.<sup>3</sup> By refusing to provide this woman with timely and appropriate access to contraception, Noesen failed his duty to serve the patient when he declined to fill the prescription.<sup>4</sup> Amanda, a college student on a low dosage of hormones, missed the first day of her pill cycle and was subjected to an increased risk of pregnancy and other pregnancy-related health risks.<sup>5</sup>

Amanda is only one of many women who have been denied timely access to contraception. Since May 2004, there have been 180 reported incidents of a doctor or a pharmacist refusing to provide contraceptive services to women.<sup>6</sup>

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†. J.D. Candidate, Boalt Hall School of Law, University of California at Berkeley.

1. Complainant's Requested Findings, Conclusions and Discipline, at ¶ 8, In the Matter of the Disciplinary Proceedings Against Neil T. Noesen, R.Ph. (2004) (Case No. LS-0310091-PHM) [hereinafter Complaint Against Noesen].
2. *Id.* at ¶ 5, ¶ 11-13; Sarah Sturmon Dale, *Can a Pharmacist Refuse to Dispense Birth Control?* TIME, June 7, 2004, at 22.
3. *Id.* at ¶ 14.
4. *Id.* at ¶ 15-16; Brief of Amici Curiae Planned Parenthood Advocates of Wisconsin and NARAL Pro-Choice Wisconsin at 8-9, In the Matter of the Disciplinary Proceedings Against Neil T. Noesen R.Ph. (2004) (Case No. LS-0310091-PHM) [hereinafter Amici Curiae Brief].
5. Amici Curiae Brief, *supra* note 4, at 4-8.
6. Kimberlee Roth, *Pharmacists, doctors refuse to dispense pill on moral grounds*, CHI. TRIB.,

Legislators should be on notice that women are facing new obstacles in obtaining ordinary health care services. Fortunately, Amanda had the option of traveling to another local pharmacy to have her prescription filled.<sup>7</sup> However, many women do not have that option.

The lawsuit against Noesen is one of the first of its kind.<sup>8</sup> The Wisconsin Department of Regulation and Licensing brought a disciplinary proceeding against Noesen for failure to fulfill his professional obligations.<sup>9</sup> An administrative judge made a recommendation to the Wisconsin State Pharmacy Examining Board regarding the proper response to Mr. Noesen's conduct.<sup>10</sup> In her order, the judge found that Mr. Noesen engaged in practice that "constitutes a danger to the health, welfare, or safety of a patient and has practiced in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist[.]"<sup>11</sup> These findings were based on his refusal to adequately inform his supervisors of his conscientious objections and his refusal to provide any information to the patient or to transfer her prescription. As part of the judge's recommendations to the Wisconsin Pharmacy Examining Board, she wrote, this pharmacist "clearly needs training in the ethics of his profession," and ordered that he be required to take ethics courses for pharmacists.<sup>12</sup>

Similar court cases are likely to arise considering that twenty state legislatures have introduced bills that would allow pharmacists to deny contraceptive access to women through the use of refusal clauses aimed specifically at pharmacists.<sup>13</sup> In fact, three states, South Dakota, Arkansas and Mississippi, have passed laws that allow pharmacists to refuse to fill prescriptions when doing so would conflict with a pharmacist's personal moral philosophy.<sup>14</sup> The most recent law passed in Mississippi is surprisingly broad in

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Nov. 17, 2004, at C1. This number only reflects the incidents that have been reported to Planned Parenthood Federation of America. Some of the incidents date back several years and it is likely that more have occurred but have gone unreported. *Id.*

7. Complaint Against Noesen, *supra* note 1, at ¶ 21-25. Unfortunately, however, Noesen would not transfer the prescription to another pharmacist. *Id.*
8. Marilyn Gardner, *Pharmacists' Moral Beliefs vs. Women's Legal Rights*, CHRISTIAN SCI. MONITOR, Apr. 26, 2004, at 11; Charisse Jones, *Druggists Refuse to Give Out Pill*, USA TODAY, Nov. 9, 2004, at 3A; Carol Ukens, *R.Ph's Refusal to Transfer Rx Lands Him in Trouble*, DRUG TOPICS, Feb. 23, 2004, at 51 [hereinafter Ukens, *R.Ph's Refusal*].
9. Complaint Against Noesen, *supra* note 1.
10. Complainant's Closing Argument and Brief, Section I, In the Matter of Disciplinary Proceeding against Neil Noesen (2004) (Case No. LS-0310091-PHM) [hereinafter Complainant's Closing Argument].
11. Proposed Final Decision and Order, Conclusions of Law at ¶ 3, In the Matter of the Disciplinary Proceedings Against Neil Noesen (2004) (Case No. LS-031009-PHM).
12. *Id.* at 8, 23.
13. These states are: Arizona, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. THE NATIONAL WOMEN'S LAW CENTER, PHARMACIST REFUSALS 101 (Feb. 2005).
14. THE ALAN GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (Nov. 1, 2004) [hereinafter STATE POLICIES IN BRIEF]. The Alan Guttmacher Institute (AGI) is a nonprofit organization "focused on sexual and reproductive

scope and will have a significant impact on rural and low-income women.<sup>15</sup> If a pharmacist is allowed to put his or her own beliefs above the health care needs of a patient, some women will be unable to fill their contraceptive prescription if they have a limited choice of pharmacy providers or limited ability – financially or logistically – to travel to another pharmacy for service.<sup>16</sup> Thus, state legislatures around the country bring politics into the practice of pharmacy when considering broad refusal clauses of this sort.<sup>17</sup> The Noesen case demonstrates why protective measures for women must be included in any debate about pharmacist refusal clauses.

Any law that allows a pharmacist to refuse contraceptive services (or other services related to reproductive health) to a patient should, at the very minimum, require the referral services denied to Amanda. Pharmacists who do not believe in contraception should still be required by state law to follow the minimum standards of pharmaceutical care, which include giving effective notice that they do not fill prescriptions for contraception and referring the patient to a friendly pharmacist. In addition, women should be publicly alerted to these obstacles.

The above standard, however, should be the minimum; state legislatures must consider the specific obstacles that women face when pharmacists are allowed to refuse to fill a prescription with no repercussions. Women should not be prevented from accessing their prescription altogether because of a pharmacist's refusal to fulfill his professional obligations. Alternative mechanisms must be in place to allow women to fill their prescription easily and conveniently. For example, women who live in rural areas with only one available pharmacy should not be forced to go without contraception simply because the presiding pharmacist does not agree with the prescription, which was prescribed by doctors to best serve their health care needs. Low-income women without access to transportation or the flexibility to take time off work to find a friendly pharmacist should not be disproportionately burdened by laws that allow pharmacists to refuse service based on their own personal philosophies.

First, this paper will describe the high level of contraceptive use in this country, with most popular forms of contraception requiring prescriptions filled by pharmacists. Part II will describe how the history of refusal clauses has

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health research, policy analysis and public education. . . The Institute's mission is to protect the reproductive choices of all women and men in the United States and throughout the world [and] support their ability to obtain the information and services needed to achieve their full human rights, safeguard their health and exercise their individual responsibilities in regard to sexual behavior and relationships, reproduction and family formation." Mission statement at <http://www.agi-usa.org/about/index.html> (last visited Mar. 27, 2005).

15. The Mississippi Health Care Rights of Conscience Act, ch. 568, 2004 Miss. Laws 547 (LEXIS) (to be codified as MISS. CODE ANN. § 41-98).
16. Adam Sonfield, *New Refusal Clauses Shatter Balance Between Provider 'Conscience,' Patient Needs*, 17 THE GUTTMACHER REPORT ON PUBLIC POLICY 3 (Aug. 2004), at <http://www.guttmacher.org/pubs/tgr/07/3/gr070301.html> (last visited Mar. 27, 2005).
17. Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2010 (2004).

grown out of the abortion debate. Parts III and IV will introduce the American Pharmaceutical Association (APhA), the largest pharmacist organization in the country, and give an overview of the organization's ethical standards of practice. Part V will show how pharmacies respond to employees who refuse to serve customers. Part VI will provide a brief overview of how recent state laws stray from the ethical standards of the APhA. Part VII will specifically analyze the laws passed in Mississippi and South Dakota and explain why these laws are particularly dangerous to women living in those states. Finally, part VIII will offer recommendations to guide state legislators who are considering pharmacist refusal legislation. Legislators must consider the consequences of such broad legislation for all women, and particularly for low-income women and rural women.

### I. CONTRACEPTIVE USE IN THE UNITED STATES

A woman's constitutionally protected right to contraception has been upheld by the courts since the early 1970's.<sup>18</sup> Beginning with *Griswold v. Connecticut* in 1965, the U.S. Supreme Court affirmed the right of married women to use birth control.<sup>19</sup> The Court held that a married couple had a fundamental right to privacy when making family planning decisions.<sup>20</sup> In a concurring opinion, Justice Goldberg emphasized that the "right of privacy in the marital relationship is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."<sup>21</sup> This right was affirmed for all women in 1972, when the Court held that both married and unmarried women have the right to contraceptive services in *Eisenstadt v. Baird*.<sup>22</sup> The Court held, "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 to bear or beget a child."<sup>23</sup> Thus, the right to contraception enjoys the highest level of constitutional protection.<sup>24</sup>

An astounding number of women rely on contraceptive services as part of

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18. Renee C. Wyser-Pratte, Comment, *Protection of RU-486 as Contraception, Emergency Contraception and as an Abortifacient under the Law of Contraception*, 79 OR. L. REV. 1121, 1126 (2000).

19. 381 U.S. 479 (1965).

20. *Id.* at 485 ("The present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law, which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand") (emphasis in original)

21. *Id.* at 499; THE CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING ROE V. WADE 103 (Sept. 2004) (Judge Goldberg "relied extensively on the Ninth Amendment, which states that the specific rights enumerated in the Bill of Rights are not exhaustive").

22. 405 U.S. 438 (1972).

23. *Id.* at 453 (emphasis in original).

24. See generally Wyser-Pratte, *supra* note 18.

their regular health care maintenance. In fact, there are 60 million women in their childbearing years (aged 15-44) in the United States.<sup>25</sup> Only five percent of those who do not want to become pregnant and could become pregnant do not use contraception.<sup>26</sup> These millions of women will be adversely affected by the passage of broad refusal clauses for pharmacists—the very health care professionals depended on monthly for continuous and uninterrupted protection from unwanted pregnancy and other health risks.<sup>27</sup> The typical woman in the United States who wants to conceive only two children must use contraception for approximately three decades of her life.<sup>28</sup>

The most common methods of contraception used by women, regardless of race or ethnicity, are female sterilization, oral contraceptives, and condoms.<sup>29</sup> Sixty-one percent of women who use contraceptive services or devices use reversible methods, such as oral contraceptives (the pill) or condoms.<sup>30</sup> While men and women can more easily purchase condoms because the purchase does not require a pharmacist's services, oral contraceptives provide women a steady form of contraception that offers lower risks of pregnancy.<sup>31</sup> The pill is the most widely-used contraceptive method by women in their twenties. Therefore, these women depend on a pharmacist's services on a regular, probably monthly, basis. In addition, forty-eight percent of women who depend on the Federal Title X Family Planning Grant Program chose oral contraceptives as their method of contraception in 2003.<sup>32</sup> This number suggests that low-income women predominantly rely on oral contraceptives to meet their family planning needs.

In sum, the above statistics indicate that contraception is a regular and necessary part of women's health care for most of their lives. For those women who rely on oral contraceptives, pharmacists play a critical and necessary role.

## II. THE HISTORY OF REFUSAL CLAUSES

Contraceptive services, although a crucial component of reproductive choice, were not the initial target of refusal clauses. The introduction of refusal clauses began as a legislative response to the U.S. Supreme Court's 1973 decision in *Roe v. Wade* to legalize abortion.<sup>33</sup> In response to *Roe*, the Church

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25. THE ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: CONTRACEPTIVE USE (2004), at [http://www.guttmacher.org/pubs/fb\\_contr\\_use.html](http://www.guttmacher.org/pubs/fb_contr_use.html) (last visited Mar. 27, 2005) [hereinafter FACTS IN BRIEF].

26. *Id.*

27. *Id.* Contraceptive prescriptions can be used for more than just pregnancy prevention. Contraception can be used for medical purposes that include the regulation of women's menstrual cycles and for the prevention of endometriosis. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. THE ALAN GUTTMACHER INSTITUTE, FAMILY PLANNING ANNUAL REPORT: 2003 SUMMARY 51 (Aug. 2004) [hereinafter 2003 FAMILY PLANNING ANNUAL REPORT].

33. 410 U.S. 113 (1973) (holding that a woman has a constitutionally protected right to an

Amendment, introduced by Senator Frank Church (D-Idaho), was passed to allow health care providers to opt out of providing and performing abortion and sterilization procedures without the threat of retaliation in the workplace.<sup>34</sup> Lawmakers in forty-six states have passed similar laws that allow some health care providers to refuse to provide abortion services based on their personal beliefs.<sup>35</sup> Some refusal clauses are broadly written to include entire corporate health care systems such as religious hospitals or health maintenance organizations (HMOs).<sup>36</sup>

Over the years, refusal clauses have broadened further to include more than just abortion services. Now some refusal clauses include the right to opt out of assisted reproductive technologies, human embryonic or fetal research, and in vitro fertilization.<sup>37</sup> Until recently, however, most of these refusal clauses did not apply to pharmacists or to the provision of contraceptive services such as oral contraception and emergency contraception.<sup>38</sup> In 1998, South Dakota passed the first refusal clause that applied specifically to pharmacists with regard to the provision of contraception services.<sup>39</sup>

The passage of the first pharmacist-specific exemption came after nearly a decade of debate about pharmacists' professional obligations.<sup>40</sup> In the early 1990s, pharmacist associations began discussing the ethical issues brought about by the introduction of physician-assisted suicide procedures and the drug RU-486.<sup>41</sup> Pharmacy scholars began to question whether pharmacists would be legally protected if they refused to dispense medications related to these new and controversial medical technologies.<sup>42</sup> As the debate developed throughout the 1990s, questions about contraception arose in association with emergency contraception, a contentious drug that pharmacies can also dispense.<sup>43</sup>

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abortion in the first two trimesters of pregnancy under the Due Process Clause of the Fourteenth Amendment); Sonfield, *supra* note 16.

34. Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91 (1973) (West) (codified in various sections of 42 U.S.C.A.); Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 FORDHAM URB. L.J. 725, 746 (2004) [hereinafter Fogel & Rivera, *Saving Roe*].
35. STATE POLICIES IN BRIEF, *supra* note 14.
36. Susan Berke Fogel & Lourdes A. Rivera, *Religious Beliefs and Healthcare Necessities: Can They Coexist?* 30-SPG HUM. RTS. 8, 10 (2003) [hereinafter Fogel & Rivera, *Religious Beliefs*].
37. PLANNED PARENTHOOD, FACT SHEET: REFUSAL CLAUSES: A THREAT TO REPRODUCTIVE RIGHTS at <http://www.plannedparenthood.org/library/facts/041217-refusal.html> (last visited Mar. 27, 2005) [hereinafter PLANNED PARENTHOOD FACT SHEET].
38. Alan Meisel, *Pharmacists, Physician-Assisted Suicide, and Pain Control*, 2 J. HEALTH CARE L. & POL'Y 211, 234 (1999).
39. S.D. CODIFIED LAWS § 36-11-70 (Michie 1999).
40. *Id.*
41. Carol Ukens, *Would Ru-486 Throw R.Ph.'s in Legal, Ethical Briar Patch? Dispensing of abortion pill and other medications by pharmacists*, DRUG TOPICS, Aug. 5, 1991, at 12 [hereinafter Ukens, *RU-486*].
42. See generally William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience*, 5 J. PHARMACY & L. 1 (1996).
43. Carol Ukens, *Conscience v. Patient Rights: R.Ph.'s to Dispense Stirs Up Controversy*, DRUG

Until recently, the scholarly and political debate focused on dispensing emergency contraception (EC) because this drug combination (most commonly sold as Plan B or Preven), taken within 72 hours of unprotected sex, prevents pregnancy either by preventing fertilization or by preventing implantation of a fertilized egg in the uterus.<sup>44</sup> Unfortunately, widespread misinformation has caused some of the public to incorrectly believe that EC causes an abortion.<sup>45</sup> This is simply not true: EC cannot end an established pregnancy.<sup>46</sup> Basic hormonal contraception including EC works only to prevent ovulation and fertilization; these methods do not cause abortions.<sup>47</sup> Those pharmacists who refuse to dispense contraception based on personal positions opposing abortion may do so because of this common misunderstanding or because of their religious attitude toward pregnancy.

The introduction of pharmacist refusal clauses can be framed as a conflict about when a pregnancy begins. According to the American College of Obstetricians and Gynecologists, a pregnancy begins when a fertilized egg is implanted in the uterine lining.<sup>48</sup> The Roman Catholic Church does not agree with this medical understanding. Instead, the Church's official position is that life begins—and conception occurs—at fertilization.<sup>49</sup> Because hormonal contraceptives can prevent pregnancy either by preventing ovulation or by preventing implantation of a fertilized egg if ovulation has already occurred, some pharmacists ignore the medical understanding of pregnancy and improperly believe that hormonal contraceptives can terminate a pregnancy. Therefore, when a pharmacist refuses to dispense hormonal contraceptives, it is likely that the pharmacist believes that pregnancy begins at fertilization, the position of the Roman Catholic Church, instead of implantation, the position of the medical community.<sup>50</sup>

### III. PHARMACEUTICAL STANDARDS OF CARE AND PRACTICE

The American Pharmacists' Association (APhA)<sup>51</sup> creates the standards of

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TOPICS, May 19, 1997, at 38 [hereinafter Ukens, *Conscience v. Patient Rights*].

44. Susan A. Cohen, *Objections, Confusion Among Pharmacists Threaten Access to Emergency Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY: ISSUES AND IMPLICATIONS (June 1999); Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77 (2002-03).
45. Cohen, *supra* note 44.
46. *Id.*
47. PLANNED PARENTHOOD FACT SHEET, *supra* note 37.
48. Carol Ukens, *Confrontation at the Counter: the Issue of Pharmacists' Versus Patients' Rights is Producing Conflicts and Pink Slips*, DRUG TOPICS, July 26, 2004, at 26 [hereinafter Ukens, *Confrontation*].
49. Herbe, *supra* note 44, at 86.
50. Ukens, *Confrontation*, *supra* note 48; Herbe, *supra* note 44, at 86.
51. The APhA is the largest professional association of pharmacists in the United States. More information about the mission of the APhA can be found at [http://www.aphanet.org/AM/Template.cfm?Section=About\\_APhA](http://www.aphanet.org/AM/Template.cfm?Section=About_APhA) (last visited on Mar. 27, 2005).

pharmaceutical care for its members with the Pharmacist Code of Ethics.<sup>52</sup> The Code of Ethics is useful in understanding the standard of care and the professional behavior expected of pharmacists. Pharmacists are not bound by the Code, however, and there are no means of enforcement.<sup>53</sup> Instead, state pharmacy boards develop specific guidelines for their state-licensed pharmacists to follow.<sup>54</sup> Courts then use those guidelines to compare the standard of practice to the conduct of a pharmacist.<sup>55</sup>

The Code of Ethics, adopted by the APhA membership in 1994, is used to “guide pharmacists in relationships with patients, health professionals, and society.”<sup>56</sup> According to the Code, pharmacists are necessary to the provision of health care services, and their primary focus should be the needs of each patient.<sup>57</sup> The first principle of the Code describes the patient-pharmacist relationship as a “covenant” in which a pharmacist has a “moral obligation” to the patient as a result of the trust given to the profession by the public.<sup>58</sup> This obligation is appropriate because, according to state licensing requirements, pharmacists have a monopoly on dispensing medication to the public.<sup>59</sup>

The second principle of the Code exemplifies the “patient-centered focus” of pharmacy practice.<sup>60</sup> This principle states that a pharmacist “places concern for the well-being of the patient at the center of professional practice,” and that a pharmacist “focuses on serving the patient in a private and confidential manner.”<sup>61</sup> Thus, if the profession aspires to serve the patient’s well being, it

52. PHARMACIST CODE OF ETHICS (American Pharmacists Association 1994), at <http://www.aphanet.org.pharmcare/ethics.html> (last visited Nov. 10, 2004) [hereinafter CODE OF ETHICS]; Amici Curiae Brief, *supra* note 4, at 12.

53. Cohen, *supra* note 44; Ukens, *Confrontation*, *supra* note 48; THE NATIONAL WOMEN’S LAW CENTER, *supra* note 13.

54. In Wisconsin, the complaint alleges that Noesen’s conduct violated Wis. Adm. Code § Phar. 10.03(2). According to the statute, unprofessional conduct includes: “Engaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient.” Complainant’s Closing Argument, *supra* note 10, at 1.

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

56. CODE OF ETHICS, *supra* note 52, at Preamble.

57. *Id.* § I (“Considering the patient-pharmacist relationship as a covenant means that a pharmacist has moral obligations in response to the gift of trust received from society”); *id.* § II (“A pharmacist places concern for the well-being of the patient at the center of professional practice”); *id.* § III (“[I]n all cases, a pharmacist respects personal and cultural differences among patient[s]”).

58. *Id.* § I.

59. Allen & Brushwood, *supra* note 42, at 2.

60. CODE OF ETHICS, *supra* note 52, § 2 (“A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner. 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”). See also Amici Curiae Brief, *supra* note 4, at 14.

61. CODE OF ETHICS, *supra* note 52, § 2.



seems unlikely that the Code would permit pharmacists to put their personal beliefs before their duty to serve a patient. The third principle also speaks to the pharmacist's duty to respect each patient and to "respec[t] personal and cultural differences among patients."<sup>62</sup> This also seems to preclude pharmacists from imposing their religious or moral beliefs on patients.

The fourth principle specifically affirms the professional nature of pharmacy and the duty of pharmacists to "avoi[d] discriminatory practices . . . that impair professional judgment, and actions that compromise dedication to the best interests of patient."<sup>63</sup> Again, if pharmacists subordinate women's medical needs for contraception to their personal beliefs, pharmacists compromise their dedication to women's best interests. In addition, the refusal to provide contraception has a discriminatory effect on women because men can purchase condoms over the counter. Women, however, continue to depend on prescriptions and a pharmacist's services to meet their contraceptive needs.

Finally, the seventh principle of the Code recognizes that pharmacists serve a growing community and that "the primary obligation of a pharmacist is to individual patients."<sup>64</sup> 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.<sup>65</sup> Pharmaceutical care must adhere to the seventh principle by placing patients' needs above all else.

#### IV. APhA PHARMACIST REFUSAL CLAUSES

The American Pharmacists' Association (APhA) joined the debate about professional obligations in pharmaceutical care in 1998. The APhA's House of Delegates adopted a new policy after the issuance of an in-depth committee report on a "Pharmacist Conscience Clause."<sup>66</sup> The APhA Policy Committee Report discusses the myriad issues that arose when members debated the issue of

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62. *Id.* § 3 ("A pharmacist respects the autonomy and dignity of each patient. 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.").

63. *Id.* § 4 ("A pharmacist acts with honesty and integrity in professional relationships. A pharmacist has a duty to tell the truth and to act with conviction of conscience. A pharmacist avoids discriminatory practices, behavior or work conditions that impair professional judgment, and actions that compromise dedication to the best interests of patients.").

64. *Id.* § 7 ("A pharmacist serves individual, community and societal needs. The primary obligation of a pharmacist is to individual patients. However, the obligations of a pharmacist may at times extend beyond the individual to the community and society. In these situations, the pharmacist recognizes the responsibilities that accompany these obligations and acts accordingly.").

65. Allen & Brushwood, *supra* note 42, at 1.

66. APhA, 1997-1998 POLICY COMMITTEE REPORT, PHARMACIST CONSCIENCE CLAUSE, available at <http://www.aphanet.org> (last visited Mar. 27, 2005) [hereinafter APhA COMMITTEE REPORT]; Ukens, *Confrontation*, *supra* note 48.

refusal.<sup>67</sup> The House of Delegates adopted the following resolution: “[The] APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient access to legally-prescribed therapy without compromising the pharmacist’s right of conscientious refusal.”<sup>68</sup>

This policy aims to provide a system in which pharmacists can act consistently with their moral beliefs while still maintaining an appropriate level of patient care by providing alternative sources for patients to receive their prescriptions. Unfortunately, the “establishment of systems” clause is extremely vague and provides no guidelines for what constitutes a sufficient alternative plan for patients to receive their medications.<sup>69</sup> A review of the Committee Report is useful to understand how the House of Delegates resolved if and when pharmacists could refuse to dispense medication such as contraception:

Pharmacists choosing to excuse themselves from such a situation continue to have a responsibility to the patient – ensuring that the patient will be referred to another pharmacist or be channeled into another available health system. Exercising the authority to excuse themselves from the dispensing process, and thus avoiding having personal, moral decisions of others placed upon them, requires the same consideration of the patient – *the patient should not be required to abide by the pharmacist’s personal, moral decision.* Providing alternative mechanisms for patients in this situation ensures patient access to drug products, without requiring the pharmacist or the patient to abide by personal decisions other than their own.<sup>70</sup>

While some have praised the ability of the profession to develop formal and informal approaches to this policy, women will suffer without formal guidelines in place.<sup>71</sup> According to APhA staff counsel, the policy “should be seamless to the patient. . .[I]t’s a policy to support stepping away, not obstructing.”<sup>72</sup> Unfortunately, this statement ignores the realities of such a policy. While state laws should at least require a referral, often a referral will be insufficient to overcome the obstacle of refusal. If a pharmacy has a policy of referring women to another pharmacy when a pharmacist refuses to fill a prescription, a rural woman may still be unable to reach another pharmacist many miles away. Put into practice, the policy has not been successful, as the Noesen case in Wisconsin proves. There, Noesen abandoned the patient in favor of his own beliefs, and the patient suffered because of his decision and because

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67. APhA COMMITTEE REPORT, *supra* note 66.

68. APhA 2004 HOUSE OF DELEGATES, REPORT OF THE POLICY REVIEW COMMITTEE 10 (2004) at <http://www.aphanet.org> (last visited Mar. 27, 2005); Cohen, *supra* note 44, at 3 (quoting the APhA).

69. APhA COMMITTEE REPORT, *supra* note 66.

70. *Id.* (emphasis added).

71. Ukens, *Confrontation*, *supra* note 48.

72. Roth, *supra* note 6 (quoting Susan Winckler, staff counsel to the APhA).

of his misunderstanding of the Code of Ethics and the requirements of the refusal policy.<sup>73</sup> Instead of serving the patient, this policy allows some pharmacists to prevent women from accessing their contraceptive prescriptions in a timely manner.<sup>74</sup>

Therefore, the report and the new APhA policy seem to be inconsistent with the Code of Ethics, which obligates pharmacists to focus foremost on patients' needs. According to the Code of Ethics, it is unethical for a pharmacist to ignore any one of various obstacles patients may face. In addition, while the policy requires an "alternative mechanism" to be in place, those states that have already passed laws allowing pharmacist refusals have not appropriately implemented those "mechanisms" to address the paramount health care concerns of patients.<sup>75</sup>

### V. THE POSITION OF INDEPENDENT PHARMACIES

Long before pharmacist refusal clauses became a common topic of debate in state legislatures across the country, pharmacies developed company policies to address this issue. Today, as more women come forward with complaints of refusing pharmacists, pharmacies have had to further articulate their positions to respond consistently to these complaints.<sup>76</sup> Most well-known chain pharmacies have a policy in place regarding pharmacist refusals.

Walgreens follows the recommendations of the APhA in its 4,400 drugstores nationwide.<sup>77</sup> Its policy allows pharmacists to refuse to dispense medication as long as they assist patients in having their prescription filled.<sup>78</sup> The refusing pharmacist may either have another pharmacist at the store fill the prescription, or if another Walgreens pharmacist is not available, the refusing pharmacist is required to refer the patient to the nearest Walgreens to have the prescription filled.<sup>79</sup>

CVS also has a "refuse and refer" policy.<sup>80</sup> Its policy requires a pharmacist to ensure that a patient has her prescription filled either by another pharmacist at that store or by another local pharmacy.<sup>81</sup> Unfortunately, it is unclear how

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73. See Complaint Against Noesen, *supra* note 1.

74. Pharmacist refusals of contraception are likely to proliferate according to a nationwide survey of pharmacists conducted by *Drug Topics* and referenced in the Committee Report. Their study found that 36% of pharmacists would refuse to provide an abortifacient drug. The highest rate of refusal was found in the South with a refusal rate of an alarming 44%. APhA COMMITTEE REPORT, *supra* note 66, at 10.

75. This will be addressed in Section VI of this paper.

76. Roth, *supra* note 6.

77. Kristin Gerencher, *Debate over Contraception Access Reignites*, CBS MARKETWATCH, May 13, 2004, at [www.marketwatch.com](http://www.marketwatch.com).

78. Liz Austin, *Pharmacist's Refusal Stirs Debate: Rules Vary on Moral Choice Not to Provide Morning-After Pill*, HOUS. CHRON., Feb. 29, 2004, at 34.

79. Gerencher, *supra* note 77.

80. Gloria Feldt, *Whose Conscience?*, TOMPAINE.COMMONSENSE, October 8, 2004, at [http://www.tompaine.com/articles/whose\\_conscience.php](http://www.tompaine.com/articles/whose_conscience.php) (last visited Mar. 27, 2005).

81. Stephanie Simon, *Pharmacists New Players in Abortion Debate: Six States Consider*

seriously CVS executives enforce this policy. Last March, a married mother of two was refused her contraception prescription at a Texas CVS pharmacy.<sup>82</sup> The CVS pharmacist did not receive a severe penalty, and the chain would only state publicly that it was “addressing the situation.”<sup>83</sup>

Eckerd Pharmacy has a more definitive stance: Their employment manual alerts pharmacists that they are never allowed to decline to fill a prescription for moral or religious reasons.<sup>84</sup> In fact, Eckerd terminated three employees last year after one of its pharmacists refused to fill a prescription for emergency contraception (EC) for a rape survivor based on his moral objections to the drug, and his two co-workers also refused to fill the prescription.<sup>85</sup> A friend of the rape survivor said the woman was victimized a second time when the pharmacist refused to fill her legal prescription.<sup>86</sup> Unfortunately, this rape survivor is not alone in her struggles to obtain EC. Some Eckerd pharmacies limit women’s options altogether by not carrying EC.<sup>87</sup>

Wal-Mart refuses to carry EC altogether at any of its pharmacies.<sup>88</sup> A spokeswoman stated that this represents a “business decision, not a moral judgment.” This response, however, is inadequate when one considers that Wal-Mart serves a significant percentage of the nation’s rural population, a population with few options when it comes to pharmacies.<sup>89</sup>

However, Wal-Mart is not the only pharmacy that does not carry EC, formal policy or not. According to one 2004 study, 25% of the pharmacies surveyed in New York City did not carry EC.<sup>90</sup> Of these, none had posted a sign to alert women to this fact.<sup>91</sup> If women in New York City face obstacles to finding a pharmacy that carries EC, women in rural locations are likely to face even greater hurdles: first in finding a pharmacy that carries EC, and then in finding a friendly pharmacist to serve their needs. Thus, women already face difficulties in accessing their prescriptions, even without legislation that legally restricts their access.

## VI. LEGISLATIVE TREND—PHARMACIST REFUSAL CLAUSES

Legislation allowing pharmacist refusal clauses poses an alarming threat to

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*Legislation That Would Shield Those Who Refuse to Dispense the ‘Morning After’ Pill as a Matter of Conscience*, L.A. TIMES, March 20, 2004, at A18; Gardner, *supra* note 8.

82. Feldt, *supra* note 80; Gardner, *supra* note 8.

83. *Id.*

84. Austin, *supra* note 78.

85. Steve Barnes, *Texas: Pharmacists Fired*, N. Y. TIMES, Feb. 13, 2004, at A18; Austin, *supra* note 78.

86. Austin, *supra* note 78.

87. Gerencher, *supra* note 77.

88. Simon, *supra* note 81.

89. *Id.*

90. Jill Filipovic, *Whose Conscience Counts?*, WASH. SQUARE NEWS VIA U-WIRE, Oct. 20, 2004.

91. *Id.*

women's access to reproductive health services. South Dakota, Arkansas, and Mississippi—the only three states where legislation has been passed so far—are exactly the places where the legislation will do the most damage. The women most likely to be burdened by refusing pharmacists are those living in areas with few pharmacy alternatives. If refusal clauses continue to gain support in states across the country, specific guidelines must be in place that address the realities of all women, and especially those women who have neither the time, money, nor ability to go to another pharmacy, and cannot wait for another pharmacist to fill the prescription.

### A. South Dakota law

The introduction of the new APhA policy was accompanied by the passage of the first state law, in South Dakota, which excuses pharmacists from their duty to dispense medication to all legally-deserving patients. Unfortunately for women in South Dakota, the state legislature did not even follow the limited and vague policy recommendations of the APhA.<sup>92</sup> The 1998 South Dakota law permits pharmacists to refuse to dispense medication if there is reason to believe that the medication could be used to cause an abortion, to destroy an unborn child, or to kill someone through assisted suicide, euthanasia, or mercy killing.<sup>93</sup> Under South Dakota law, an unborn child is defined to include a fertilized egg, even if it has not yet implanted in the uterus.<sup>94</sup> Therefore, not only are prescriptions for emergency contraception subject to a pharmacist's beliefs, but other common contraceptive methods are also subject to pharmacist approval.<sup>95</sup> The law is silent regarding patients' recourse should a pharmacist refuse to fill a prescription, and says nothing about providing notice that a pharmacist will refuse to provide contraception.<sup>96</sup> Furthermore, a pharmacist in South Dakota is not required to refer a woman to a friendly pharmacist or physician.<sup>97</sup> The statute's silence on safeguarding patients' rights clearly places the personal convictions of pharmacists above the health care needs of patients.

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92. Cohen, *supra* note 44.

93. S.D. CODIFIED LAWS § 36-11-70 (Michie 1999): "Refusal to dispense medication: 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."

94. S.D. CODIFIED LAWS § 22-1-1(50A) (Michie 1998 & Supp. 2001) (an "unborn child" is "an individual organism of the species homo sapiens from fertilization until live birth"); Cohen, *supra* note 44.

95. S.D. CODIFIED LAWS § 36-11-70, *supra* note 93; Cohen, *supra* note 44.

96. S.D. CODIFIED LAWS § 36-11-70, *supra* note 93; Bryan A. Dykes, *Proposed Rights of Conscience Legislation: Expanding to Include Pharmacists and Other Health Care Providers*, 36 GA. L. REV. 565, 572 (2002).

97. S.D. CODIFIED LAWS § 36-11-70, *supra* note 93.

### B. Arkansas law

Ironically, Arkansas includes its pharmacist refusal clause under the Public Health and Welfare chapter of state law.<sup>98</sup> By law, Arkansas allows physicians, pharmacists, and authorized paramedics to refuse to furnish any contraceptive procedures, supplies, or information.<sup>99</sup> It further protects these medical caregivers from any liability for refusing to provide these services.<sup>100</sup> This state law does not adhere to the APhA guidelines recommending referrals and alternative means to gain access to needed medication. Instead, the law prioritizes the pharmacist's beliefs over the health care of the patient.

### C. Other States

Overall, more than thirty-seven bills in fourteen states were introduced in the 2004 legislative session to permit pharmacists and other health care providers to refuse to serve a patient based on their conflicting personal beliefs.<sup>101</sup> The law passed in South Dakota has been the model for some of these bills.<sup>102</sup> These bills would allow medical professionals to refuse to take part in abortion services or dispense abortifacients (such as RU-486) or contraceptive services.<sup>103</sup> This legislation is not stagnant: Refusal clause legislation that expanded to include a broad range of reproductive health activities was vetoed last April by Wisconsin Governor Jim Doyle (D) after being passed by both houses of the legislature.<sup>104</sup>

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98. ARK. CODE ANN. § 20-16-304 (Michie 2000):

It shall be the policy and authority of this state that:

- (1) All medically acceptable contraceptive procedures, supplies, and information shall be available through legally recognized channels to each and every person desirous of the procedures, supplies, and information regardless of sex, race, age, income, number of children, marital status, citizenship, or motive;
- (2) Medical procedures for permanent sterilization, when performed by a physician on a requesting and consenting person eighteen (18) years of age or older, or less than eighteen (18) years of age if legally married, be consistent with public policy;
- (3) Dissemination of medically acceptable contraceptive information in this state and in state and county health and welfare departments, in medical facilities, at institutions of higher learning, and at other agencies and instrumentalities of this state be consistent with public policy;
- (4) 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; and
- (5) No private institution or physician, nor any agent or employee of such institution or physician, nor any employee of a public institution acting under directions of a physician, shall be prohibited from refusing to provide contraceptive procedures, supplies and information when the refusal is based upon religious or conscientious objections. No such institution, employee, agent, or physician shall be held liable for the refusal."

99. ARK. CODE ANN. § 20-16-304(4).

100. ARK. CODE ANN. § 20-16-304(5).

101. PLANNED PARENTHOOD FACT SHEET, *supra* note 37, at 4-5.

102. Ukens, *Confrontation*, *supra* note 48; S.D. CODIFIED LAWS § 36-11-70, *supra* note 93.

103. PLANNED PARENTHOOD FACT SHEET, *supra* note 37, at 4-5.

104. Sonfield, *supra* note 16.

Not all states have governors who will consider the health risks imposed on women by permitting these types of legal barriers to normal family planning services.

A review of the new laws passed in Mississippi and South Dakota will highlight the severe impact that such expansive legislation imposes on low-income women and women living in rural areas—common themes that apply to many states currently considering this type of legislation.

## VII. NEW LAWS IN MISSISSIPPI AND SOUTH DAKOTA: THREATENING HEALTH CARE ACCESS FOR RURAL AND LOW-INCOME WOMEN

Pharmacist refusal clauses will do the most damage in states like Mississippi and South Dakota that are home to large rural and low-income populations. Choices and options in these states pale in comparison to those available to women in large cities with adequate transportation and a variety of pharmacies.

### A. Mississippi

In May 2004, Mississippi Governor Haley Barbour (R) signed into law an initiative that he called the “single most expansive conscience-exception law in the nation.”<sup>105</sup> The Mississippi Health Care Rights of Conscience Act allows health care providers, including pharmacists, health care institutions, and health care payers,<sup>106</sup> to refuse to participate in any health care service that they oppose.<sup>107</sup> The new law protects those providers from any legal liability if they refuse to participate, regardless of the effect on patients.<sup>108</sup> Although the new law maintains that health care professionals may not discriminate based on the patient’s race, color, national origin, ethnicity, sex, religion, creed, or sexual orientation, it says nothing about marital status.<sup>109</sup> Therefore, if a pharmacist were confronted with a single woman seeking to have her birth control

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105. *Id.*; The Mississippi Health Care Rights of Conscience Act, ch. 568, 2004 Miss. Laws 547 (to be codified as MISS. CODE ANN. § 41-98).

106. MISS. CODE ANN. § 41-98, *supra* note 105. According to § 41-98-3(d), “ ‘Health care payer’ means any entity or employer that contracts for, pays for, or arranges for the payment of, in whole or in part, a health care service, including, but not limited to, health maintenance organizations, health plans, insurance companies or management services organizations.”

107. MISS. CODE ANN. § 41-98, *supra* note 105.

§ 41-98-5(1): “Rights of Conscience: A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient’s race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.”

108. MISS. CODE ANN. § 41-98, *supra* note 105; Sonfield, *supra* note 16.

109. MISS. CODE ANN. § 41-98, *supra* note 105, § 41-98-5(1). “However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient’s race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.”

prescription filled, that pharmacist would be legally protected if he refused to fill the prescription because he did not believe in sex outside marriage. The law also does not require pharmacists or other health care personnel to refer patients to or provide information about other health care professionals who may be able to serve them.<sup>110</sup>

While the APhA supports the introduction of refusal clauses for pharmacists, it does so with the condition that pharmacists fulfill their professional obligation to the patient through an alternative mechanism.<sup>111</sup> The Mississippi law fails to consider patients' needs, and, in reviewing the state's demographics, one can see how the law will significantly burden women, especially rural and low-income women.

First, as of 2004, the Alan Guttmacher Institute estimated that 637,700 women of childbearing age (aged 15-44) live in Mississippi.<sup>112</sup> Of this number, approximately 309,680 women in Mississippi are in need of contraceptive services.<sup>113</sup> Therefore, almost half of Mississippi's women of childbearing age need contraceptive services.

Second, there is a high level of poverty in Mississippi: 21 percent of women aged 15-44 have incomes under the federal poverty level.<sup>114</sup> Furthermore, the 2000 Census data shows that Mississippi is largely a rural state, with just 60.6 persons per square mile as compared with the United States average of 79.6 persons per square mile.<sup>115</sup> This combination – women with low-income levels who are more likely to be living in rural areas – contributes to the likelihood that low-income rural women will suffer most in Mississippi under the new law. These women have fewer options when it comes to transportation and choice of pharmacies.

## B. South Dakota

The women of Mississippi and South Dakota have similar struggles in accessing reproductive health care. South Dakota is considered a “testing ground” for anti-choice advocates, and has some of the most restrictive laws in

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110. *Id.* According to § 41-98-3(f), “ ‘Participate’ in a health care service means to counsel, advise, provide, perform, assist in, *refer for*, admit for purposes of providing, or *participate in providing*, any health care service or any form of such service.” (Emphasis added).

111. APhA 2004 HOUSE OF DELEGATES, *supra* note 68 (“APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient’s access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal”).

112. THE ALAN GUTTMACHER INSTITUTE, CONTRACEPTION COUNTS: MISSISSIPPI (2004), at [http://www.guttmacher.org/pubs/state\\_data/states/mississippi/html](http://www.guttmacher.org/pubs/state_data/states/mississippi/html) (last visited Mar. 27, 2005).

113. *Id.*

114. *Id.* In 2004, the Federal Poverty Level (FPL) was \$18,850 for a family of four. A chart showing the FPL for individuals and families for the year 2004 can be found at <http://www.dhs.state.ri.us/dhs/famchild/dfmlguid04.htm> (last visited Mar. 27, 2005).

115. FEDSTATS, MISSISSIPPI MAPSTATS, at <http://www.fedstats.gov/qf/states/28000.html> (last visited Mar. 27, 2005).



the country to prevent women from accessing a full range of family planning services.<sup>116</sup> Thus, it was no surprise when the South Dakota legislature passed the first pharmacist refusal clause in the nation.<sup>117</sup> The political tilt of the state legislature has led to a frightening imposition of political philosophies on state health care laws affecting women's basic health care needs, especially for underserved, rural, and low-income women.<sup>118</sup> Although birth rates to teenage mothers have dropped across the United States, the same has not been true in South Dakota.<sup>119</sup> Since 1990, birth rates have risen in South Dakota for the most underserved populations of women including teens, all minority women, unmarried women, and women with fewer than twelve years of education.<sup>120</sup> These statistics make women's timely access to contraception all the more critical, especially since South Dakota has only one abortion provider in the entire state.<sup>121</sup>

The women of South Dakota are particularly burdened by restricted access to contraception because of the size and demographics of the state. According to the 2000 Census, South Dakota has a very small population of only 754,844.<sup>122</sup> A small population in a mid-size state creates an extremely rural population with only 9.9 persons per square mile, as compared with the United States average of 79.6.<sup>123</sup> According to Kate Looby, the South Dakota State Director of Planned Parenthood, the pharmacist refusal clause law is "very hurtful" to women throughout the state because many communities have only one pharmacy.<sup>124</sup> If a woman is denied contraception in Harding County, population 1,288, or Jones County, population 1,087, it is very unlikely that she will have convenient or feasible access to another provider.<sup>125</sup> In these smaller, more isolated communities, lawmakers have ignored the additional constraints on a woman's ability to find a friendly pharmacist.

Like Mississippi, South Dakota also has a high percentage of low-income women of childbearing age that are in need of publicly funded contraceptive

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116. Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. & POL'Y 345, 353 (2003).

117. It is no surprise considering that South Dakota had only 11 pro-choice state legislators out of a total of 105 state lawmakers as of 2003. *Id.* at 361; *see also* S.D. CODIFIED LAWS § 36-11-70, *supra* note 93.

118. Lichtman, *supra* note 116, at 362.

119. *Id.* at 357 (citing to Profile of South Dakota, KIDS COUNT, Right Start Online 2002 (The Annie Casey Foundation, Balt., MD, 2002), at <http://www.aecf.org/cgi-bin/kc2002.cgi?action=profile&area=South+Dakota>).

120. *Id.* at 357-58.

121. *Id.* at 353.

122. US CENSUS BUREAU, SOUTH DAKOTA QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/46000.html> (last visited Mar. 27, 2005).

123. *Id.*

124. Telephone Interview with Kate Looby, Director of Planned Parenthood of South Dakota (January 21, 2005).

125. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR COUNTIES OF SOUTH DAKOTA: APRIL 1, 2000 TO JULY 1, 2003 (CO-EST2003-01-46).

services.<sup>126</sup> Of the 81,890 women in need of contraceptive services, more than half (47,370) of these women require public assistance to meet their family planning needs.<sup>127</sup> Thirty percent of women of childbearing age in Jones County need public assistance or fall under 250 percent of the federal poverty level.<sup>128</sup> This is further evidence that women living in sparsely populated areas will face economic hardships that limit opportunities for travel and the time needed to search for a friendly pharmacist. The state legislature could not have seriously considered the obstacles low-income women face in their state now that pharmacist refusal legislation has become law. The law further reduces South Dakotan women's access to reproductive health care.<sup>129</sup>

In addition to the threat posed by South Dakota lawmakers, there is evidence that the Catholic Church in South Dakota has become more openly involved in this issue by encouraging pharmacist refusals. In September 2004, the Catholic Church honored doctors and pharmacists who do not prescribe or fill contraceptive prescriptions for their patients.<sup>130</sup> The Bishop's Bulletin, a monthly newsletter published by the Catholic Diocese of Sioux Falls, published a statement by Bishop Robert J. Carlson, asking readers and members of the Church to send in the names of those health care professionals who refuse contraceptive services to patients.<sup>131</sup>

The Bishop intended to use these names in a public forum to honor those "who follow the teachings of our faith."<sup>132</sup> This public forum could also serve to inform the Bishop about those Catholic parishioners who do not allow their religion to control their professional responsibilities. In small towns and small parishes, there could be additional consequences for physicians or pharmacists who are not publicly recognized by the Bishop. Such an absence of recognition could cause some members to boycott particular pharmacies. This strategy could lead pharmacists to consider refusing to dispense contraception for fear of being ostracized by their church community. These circumstances further highlight the need for state legislatures to protect women and pharmacists with appropriate legislation.

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126. THE ALAN GUTTMACHER INSTITUTE, CONTRACEPTION COUNTS: SOUTH DAKOTA (2004), at [http://www.guttmacher.org/pubs/state\\_data/states/south\\_dakota.html](http://www.guttmacher.org/pubs/state_data/states/south_dakota.html) (last visited Mar. 27, 2005). "Childbearing age" includes women aged 15-44 years. *Id.*

127. *Id.*

128. THE ALAN GUTTMACHER INSTITUTE, CONTRACEPTIVE NEEDS AND SERVICES, 2001-2002 (2004) at <http://www.guttmacher.org/pubs/win/notes2002.pdf> (last visited Mar. 27, 2005). In 2002, 250% of the Federal Poverty Level was an income equivalent to \$45,250 for a family of four.

129. Lichtman, *supra* note 116, at 355.

130. Rev. Robert J. Carlson, *Life giving love is something each of us needs to share*, THE BISHOP'S BULLETIN, Nov. 2, 2004, at 2.

131. *Id.*

132. *Id.*

### VIII. RECOMMENDATIONS FOR FUTURE LEGISLATIVE INITIATIVES

A patient should never be expected to shoulder the burden of a pharmacist's personal religious philosophy. Future legislative initiatives for pharmacist refusal clauses<sup>3</sup> should be limited by thoughtful consideration of patients' medical needs. Specifically, lawmakers must consider the circumstances facing rural and low-income women whenever proposals for refusal clauses are introduced and debated. Legislators that introduce pharmacist refusal clauses should only do so if they provide specific and realistic alternatives for patients who are refused service by pharmacists who rely on the protection of state laws.<sup>133</sup>

If pharmacists object to particular prescriptions, they should only be allowed to refuse to fill the prescription if meaningful and logistically feasible alternatives are in place. As an alternative, either another pharmacist must be on duty with the refusing pharmacist, or alternative ways of providing service must be in place. A woman should not have to travel to other pharmacies in search of a pharmacist that serves all patients, nor should she have to wait an unreasonable amount of time to have her prescription filled.

Furthermore, pharmacies must be required to post adequate public notice that a particular pharmacist does not fill specific prescriptions along with his or her working schedule.<sup>134</sup> In this way, women will at least have the opportunity to avoid an unsuccessful trip to the pharmacy when an unfriendly pharmacist is working.<sup>135</sup>

If other states introduce legislation modeled on broad refusal clauses, low-income and rural women will suffer needlessly based on the imposition of another's political and religious beliefs on their private health care needs. Specific guidelines must be in place to address the realities of all women. Pharmacists hold a state-regulated monopoly over the power to dispense medication and, at minimum, states must use this power to revoke and refuse the privilege of such licenses to ensure that all women receive professional and dependable service. APhA ethics and standards require a continued obligation to the patient even in the face of conflicting beliefs, and the state should require no less since it licenses pharmacists for the well-being of the public.

If these types of state-regulated standards had been in place in Wisconsin, Amanda Renz might not have been forced to wait two days to have her contraceptive prescription filled, and she might have avoided the anxiety of

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133. THE NATIONAL WOMEN'S LAW CENTER, *supra* note 13, at 3. The public demands no less: According to a November 2004 CBS/New York Times poll, "[Eight] out of 10 Americans believe that pharmacists should not be permitted to refuse to dispense birth control pills. This opinion was strong despite political party affiliation, with 85% of Democrat respondents and 70% of Republican respondents squarely opposed to pharmacist refusals." *Id.*

134. Herbe, *supra* note 44, at 101.

135. THE NATIONAL WOMEN'S LAW CENTER, *supra* note 13, at 3. Posting this kind of information has proven to have a positive impact. When the New York City Council enacted a requirement that pharmacies post a notice that informs customers about whether they carry EC, advocates noted a 20% increase in pharmacies that carry EC. *Id.*

missing the first pill of her cycle. Amanda's story and the disciplinary measures that Neil Noesen now faces should be a warning to state legislatures across the country considering pharmacist refusal clause legislation: Women's health care needs must not be undermined by objecting pharmacists.