

**SYMPOSIUM: THE FUTURE OF RIGHTS OF CONSCIENCE IN HEALTH CARE:
LEGAL AND ETHICAL PERSPECTIVES: ARTICLE: INDIVIDUAL RIGHTS VS.
INSTITUTIONAL IDENTITY: THE RELATIONAL DIMENSION OF CONSCIENCE
IN HEALTH CARE**

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Text

[*67]

Given the morally controversial nature of developing medical technologies and the centrality of health-care decisions to virtually all modern conceptions of individual autonomy, it is no surprise that health care is a primary battleground in today's conscience wars. Health-care consumers are understandably concerned at the prospect of a provider's moral qualms limiting the available range of treatment options, even if the consumer finds the treatment to be morally permissible. Providers are understandably concerned at the prospect of the state, acting on the consumer's behalf, compelling them to violate their own moral convictions. Both consumer and provider seem to have conscience on their side. Little attention has been paid to the nature, much less the importance, of the relational dimension of these conscience claims.

This omission is exemplified glaringly by the well-publicized battle over the extent to which pharmacists may allow their religiously shaped moral judgments to narrow the range of services they offer. Both sides urge the state to recognize and enforce an individual right - one side advocates for a pharmacist's right to refuse to fill otherwise valid prescriptions on moral grounds without fear of reprisal; the other side argues for a customer's right to have any valid prescription filled by the pharmacy of her choice without delay or inconvenience. ¹ Legislatures, [*68] for the most part, have embraced the contestants' zero-sum terms of debate; the question under discussion has been simply which set of individual rights should be enshrined in law?

¹ See Rob Stein, *Pharmacists' Rights at Front of New Debate: Because of Beliefs, Some Refuse to Fill Birth Control Prescriptions*, *Wash. Post*, Mar. 28, 2005, at A1 ("[The battle between pharmacists' conscience rights and women's reproductive rights] has also triggered pitched political battles in statehouses across the nation as politicians seek to pass laws either to protect pharmacists from being penalized - or force them to carry out their duties.").

An authentic understanding of conscience would require us to step back from these two-dimensional terms of engagement and to contextualize both the pharmacists' and customers' moral claims. The dictates of conscience are defined, articulated, and lived out in relationship with others. Our consciences are shaped externally; our moral convictions have sources, and our sense of self comes into relief through interaction with others. By conveying my perception of reality's normative implications, my conscience makes truth claims that possess authority over conduct - both my own and the conduct of those who share, or come to share, my perception. Conscience, by its very nature, connects a person to something bigger than herself, not only because we form our moral convictions through interaction with the world around us, but also because we invest those convictions with real-world authority in ways that are accessible, if not agreeable, to others. This is the relational dimension of conscience.

As such, taking conscience seriously suggests that the state should allow the pharmacist controversy to play out in the marketplace to the extent that access to drugs deemed essential by the state is maintained. It is important that pharmacies be given the space to craft their own particular conscience policies in response to the demands of their employees and customers. If some pharmacies require all of their pharmacists to provide all legal pharmaceuticals, and some forbid all of their pharmacists from providing certain pharmaceuticals, and some leave it within their pharmacists' own moral discretion whether to provide certain pharmaceuticals, such diversity is not a sign of legal disorder - it is a sign of moral pluralism, and a mark of a society that takes the relational dimension of conscience seriously. On these morally contested matters, the pharmacy should be primarily accountable to the employee and the customer, not the state, and employees and customers should utilize market power to contest (or support) the moral norms of their choosing. Rather than making all pharmacies morally fungible via state edict, the market allows the flourishing of plural moral norms.

[*69] As of 2008, eighteen states had laws that explicitly address the question of pharmacists and conscience.² Four states have enacted conscience clauses specifically protecting the exercise of conscience by pharmacists,³ and other states encompass pharmacists within the conscience protection afforded health-care providers in general.⁴ Mississippi's statute is held up as a template by the conscience movement, as it protects pharmacists⁵ from being held "civilly, criminally, or administratively liable for declining to participate in a health care service that violates his or her conscience," and forbids any employment discrimination based on such exercises of conscience.⁶

Other states have pursued rights claims from the opposite angle, enacting laws aimed at ensuring customer access to all drugs for which they have a valid prescription. California law forbids a pharmacist from refusing to fill a

² See Nat'l Women's Law Ctr., Appendix A to Partners in Access 34 (Jan. 2008), <http://www.nwlc.org/sites/default/files/pdfs/AppendixA-update.pdf>.

³ The states are Arkansas, Georgia, Mississippi, and South Dakota. See [Ark. Code Ann. § 20-16-304](#) (West 2010); Ga. Comp. R. & Regs. 480-5-.03(n) (West 2010); [Miss. Code Ann. § 41-107-5](#) (West 2010); [S.D. Codified Laws § 36-11-70](#) (West 2010). As this article was written, Idaho was on the verge of enacting similar legislation. See Simon Shifrin, House Passes Bill to Give Idaho Pharmacists Conscience Protections, Idaho Bus. Rev., Apr. 6, 2009, at 5A.

⁴ See, e.g., [Colo. Rev. Stat. § 25-6-102\(9\)](#) (West 2010) ("No private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection."); [Fla. Stat. Ann. § 381.0051\(6\)](#) (West 2007) ("This section shall not be interpreted so as to prevent a physician or other person from refusing to furnish any contraceptive ... for medical or religious reasons."); [Or. Rev. Stat. Ann. § 127.625](#) (West 2010) (shielding health-care providers from being required to participate in the withdrawal or withholding of life-sustaining procedures); [Tenn. Code § 68-34-104\(5\)](#) (West 2010) (preserving religious and conscientious objection rights of health-care providers with same statutory language as Colorado); [Wyo. Stat. Ann. § 42-5-101\(d\)](#) (West 2010) (protecting refusals to offer "family planning and birth control services").

⁵ [Miss. Code Ann. § 41-107-5](#) (West 2010). The statute covers all "health care providers," which is explicitly defined to include pharmacists. Id. § 41-107-3(b).

⁶ Id. § 41-107-5(2)-(3).

prescription on moral or religious grounds unless she notifies her employer in writing of her objections and the employer is able to ensure the patient's "timely access to the prescribed drug."⁷ New Jersey requires a pharmacy to fill all lawful prescriptions for drugs that it carries, notwithstanding an employee's moral or religious objections.⁸ If a pharmacy does not carry a drug, it is required to help the customer locate another pharmacy that does carry the drug.⁹ **[*70]** As of 2008, fourteen states have some type of law aimed at ensuring that pharmacists' conscience claims do not threaten customer access.¹⁰ Other states have considered, or are considering, similar measures.¹¹

State action on this issue is not waiting on the legislature. The Washington State Pharmacy Board, under pressure from the governor, has adopted a rule requiring pharmacies to fill all legally valid prescriptions, effectively ending a practice by which pharmacists could decline to fill a prescription on moral or religious grounds and refer the customer to another pharmacy.¹² Now an individual pharmacist can exercise a right of conscience, but only if another pharmacist is present to fill the prescription in question.¹³

And in response to two incidents in Chicago in which pharmacists refused to dispense birth control pills, Illinois Governor Rod Blagojevich ordered all pharmacies serving the public¹⁴ to dispense "all FDA-approved drugs or devices that prevent pregnancy" to the patient "without delay, consistent with the normal timeframe for filling any other prescription."¹⁵ The Governor's stated justification for the order was pitched in the language of individual rights, albeit those of the customer, not the pharmacist.¹⁶ And a significant motivation seemed not so much a perceived threat to contraceptive access **[*71]** itself, but potential inconvenience and aggravation.¹⁷ Efforts by pharmacy chains to carve out their own policies on the issue were immediately squelched.¹⁸

⁷ [Cal. Bus. & Prof. Code § 733\(b\)\(3\)](#) (West 2010).

⁸ [N.J. Stat. Ann. § 45:14-67.1](#) (West 2010).

⁹ *Id.*

¹⁰ Nat'l Women's Law Ctr., *supra* note 2, at 34-35.

¹¹ For example, Missouri's legislature considered a bill that would require a pharmacist to fill all prescriptions unless her employer could accommodate her objections without undue hardship to the consumer; "undue hardship" is defined in part as an inability to fill the prescription in "the equivalent time period as the pharmacy ... fills other prescriptions of in-stock medications." S.B. 458, 93d Gen. Assemb., 1st Reg. Sess. (Mo. 2005).

¹² Wash. Admin. Code § 246-869-010 (2010).

¹³ In late 2007, a federal district court temporarily enjoined implementation of the new rule on the ground that its enforcement would violate the free exercise rights of pharmacists. [Stormans, Inc. v. Selecky](#), 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007), *rev'd*, [586 F.3d 1109, 1113-16 \(9th Cir. 2009\)](#).

¹⁴ The order applies to any "Division I pharmacy," defined as "any pharmacy that engages in general community pharmacy practice and that is open to, or offers pharmacy service to, the general public." Pharmacy Practice Act of 1987, Ill. Admin. Code tit. 68, § 1330.5 (2010).

¹⁵ Press Release, State of Ill. Dep't of Fin. & Prof'l Reg., Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), available at <http://www.idfpr.com/newsr/s/041805govcontraceptivespermrule.asp>.

¹⁶ Filling prescriptions for birth control is about protecting a woman's right to have access to medicine her doctor says she needs. Nothing more. Nothing less. We will vigorously protect that right." *Id.*

¹⁷ Dirk Johnson & Hilary Shenfeld, Swallowing a Bitter Pill in Illinois, *Newsweek*, Apr. 25, 2005, at 28 (reporting Blagojevich's assertion that women should be able to fill birth control prescriptions "without delay, without hassle and without a lecture").

¹⁸ See *Four Pharmacists Suspended over Morning-After Pill*, *Chi. Trib.*, Dec. 1, 2005, § 2, at 7 (reporting Walgreen's suspension of pharmacists for failing to comply with Governor's rule); *Legal Battle over Pharmacists' Obligations Is Joined in Illinois*, *Chain Drug Rev.*, June 6, 2005, at 248 ("The supermarket pharmacy retailer accommodated [the pharmacist]'s religious beliefs until it was required to order him to comply with the governor's rule... . [He] would refer patients seeking emergency contraceptives to

The national debate received a high-profile jolt when President George W. Bush issued a new conscience regulation in the closing days of his administration.¹⁹ The rule cut off federal funding from state and local governments, hospitals, health plans, or other entities that do not accommodate health-care personnel - including pharmacists - who refuse to participate in research or services that are contrary to their religious beliefs or moral convictions.²⁰ As a condition of continued funding, more than 584,000 health-care organizations were given until October 1, 2009, to provide written certification of compliance.²¹ Supporters insisted that the regulation merely implemented existing law,²² and was necessary "to ensure that health-care professionals have the same civil rights enjoyed by all Americans."²³ Opponents claimed that the rule threatened patients' rights and women's health, and that it would "cause chaos among providers across the country."²⁴ Seven states and two family-planning [*72] groups sued to block the rule,²⁵ and the rule's critics pressured President Obama to revoke it.²⁶

Conscience clauses have been common since *Roe v. Wade*,²⁷ as the notion that physicians should not be compelled to participate in a procedure as morally wrenching as abortion has not been especially controversial. The advent of "Plan B" emergency contraception has driven pharmacists to seek the same protection enjoyed by physicians.²⁸ Plan B prevents pregnancy for up to three days after intercourse, and some pharmacists believe that it functions as an abortifacient by blocking the fertilized egg's implantation in the uterus.²⁹ Along with pharmacists' expanded discretion as gatekeepers to pharmaceutical care,³⁰ the widespread availability of Plan B provided a

another pharmacy less than 500 yards from the store in which he practices."). A legal challenge filed by pharmacists was still making its way through the courts as this article was written. See [Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 377, 392-93 \(Ill. 2008\)](#) (ruling that pharmacists have standing to bring claim remanding for further proceedings).

¹⁹ See [45 C.F.R. § 88.4\(d\) \(2009\)](#).

²⁰ *Id.* § 88.4(e).

²¹ Rob Stein, Rule Shields Health Workers Who Withhold Care Based on Beliefs, *Wash. Post*, Dec. 19, 2008, at A10 [Rule Shields Health Workers]; see also David G. Savage, Broader Medical Refusal Rule May Go Far Beyond Abortion, *L.A. Times*, Dec. 2, 2008, at A1 (reporting that proposed regulation would cover 4,800 hospitals, 234,000 doctor's offices, and 58,000 pharmacies).

²² See, e.g., [42 U.S.C. § 300a-7](#) (2000).

²³ Stein, *supra* note 21.

²⁴ *Id.*

²⁵ Rob Stein, Lawsuits Filed over Rule That Lets Health Workers Deny Care, *Wash. Post*, Jan. 16, 2009, at A4.

²⁶ See *id.*

²⁷ [410 U.S. 113 \(1973\)](#).

²⁸ Robert K. Vischer, Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace, [17 *Stan. L. & Pol'y Rev.* 83, 91 \(2006\)](#).

²⁹ It is not clear whether Plan B actually does block the implantation of a fertilized egg. See, e.g., James Trussel & Elizabeth G. Raymond, Office of Population Research, Princeton Univ., Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy 5 (2010), <http://ec.princeton.edu/questions/ec-review.pdf>.

³⁰ Pharmacists do not function as clerks, especially in recent years, as the legal system has imposed on them a counseling role in many contexts. See Alan Meisel, Pharmacists, Physician-Assisted Suicide, and Pain Control, [2 *J. Health Care L. & Pol'y* 211, 231-32 \(1998-1999\)](#); see also William L. Allen & David B. Brushwood, Pharmaceutically Assisted Death and the Pharmacist's Right of Conscience, [5 *J. Pharmacy & L.* 1, 1 \(1995-1996\)](#) ("Pharmacists see themselves as drug therapy managers whose duty it is to assure that patients' best interests are being promoted."); Molly M. Ginty, Pharmacists Dispense Anti-Choice Activism, *Women's eNews*, (May 2, 2005), <http://www.womensenews.org/story/reproductive-health/050502/> pharmacists-dispense-anti-

spark for the conscience controversy. It has now spilled over to the dispensation of the more common birth control pills, and in a few cases, to other medications like anti-depressants.³¹ As pharmaceutical technology encompasses moral hot potatoes such as genetic screening tools, research derived from embryonic stem cells, or race-specific medications,³² the stakes and passions will ratchet up accordingly. [*73] In the states that have not taken up the issue, observers believe that "it is only a matter of time."³³

The conscience battle cannot be resolved by simplistic invocations of the pharmacist's individual liberty. The nature of the pharmacist's professional role must also be considered. If I was hired as state executioner, I would be hard-pressed to demand that I be excused on grounds of conscience from participating in the administration of the death penalty - that task is central to my professional role, and no one is forcing me to serve as state executioner. That said, we should be cautious about redefining professional roles so narrowly that we disqualify huge segments of the population who could perform the vast majority of the tasks associated with the position.

Arguments that rely solely on individual liberty are embarking on a dangerous path for two additional reasons. First, individual liberty is easily embraced by those who support and those who oppose a pharmacist's right of conscience. Our society tends to conflate negative and positive forms of liberty - e.g., a right not to be prohibited by the state from using certain pharmaceuticals subtly morphs into a right to obtain those pharmaceuticals at the pharmacy of your choice. This tendency is more starkly displayed by the pro-consumer side, but the pro-pharmacist side is not immune - e.g., a right not to be forced by the state to perform certain objectionable services morphs into a right to force a pharmacy to employ you regardless of the degree to which your conscience will preclude you from performing services valued by the pharmacy owner.

Second, pitting one form of individual liberty against another form of individual liberty ignores the institutional liberty that is essential for the long-term flourishing of conscience. The rise of small "pro-life" pharmacies is viewed with dread in some quarters.³⁴ As lawyer and bioethicist R. Alta Charo remarked at the prospect of some pharmacies declining to offer contraceptives, "We're talking about creating a separate universe of pharmacies that puts women at [*74] a disadvantage."³⁵ In this regard, institutional liberty appears more threatening than individual liberty; as the ACLU recommended in a report advocating for laws requiring pharmacies to satisfy any lawful request for birth control, "institutions, when operating in the public world, ought to play by public rules."³⁶ Viewing institutional market actors as extensions of the state does not bode well for the liberty of conscience. The state honors its citizens' claims of conscience by ensuring the conditions necessary for the moral conversation to continue, not by imposing one set of claims over another. Rather than short-term political advocacy aimed at one-time legislation, the moral marketplace enlists actors in an ongoing conversation - and in a real sense, competition - regarding the

choice-activism ("Today, [pharmacists] hold more power over our medical decisions than ever before.") (quoting Adam Sonfield of the Alan Guttmacher Institute).

³¹ See Tresa Baldas, *Fighting Refusal to Treat: "Conscience" Clauses Hit the Courts*, Nat'l L.J., Feb. 7, 2005, at 1.

³² Nicholas Wade, *Race-Based Medicine Continued ...*, N.Y. Times, Nov. 14, 2004, § 4, at 12 (reporting that race-based medicines such as BiDil, a new drug that reduces death from heart disease among African-Americans, "may legitimize less benign ideas about race").

³³ Caryn Tamber, *Conscience Clauses for Pharmacists Is Controversial Topic in MD and Other States*, The Daily Record (Baltimore), June 10, 2005, at 1.

³⁴ See, e.g., Alexander J. Sheffrin, *New "Pro-Life Pharmacies" Defend Religious, Moral Objections*, The Christian Post (June 17, 2008), <http://www.christianpost.com/article/20080617/new-pro-life-pharmacies-defend-religious-moral-objections/index.html> (quoting Marcia Greenberger of the National Women's Law Center as claiming that a pro-life "pharmacy like this is walling off an essential part of health care. That could endanger women's health.").

³⁵ Rob Stein, *"Pro-Life" Drugstores Market Beliefs*, Wash. Post, June 16, 2008, at A1.

³⁶ Sondra Goldschein, *ACLU Reprod. Freedom Project, Religious Refusals and Reproductive Rights: Accessing Birth Control at the Pharmacy 4* (2007).

good. Pushing moral ideals upward through employment and consumer transactions fosters social ties in ways that the top-down enforcement of state-enshrined rules cannot.

When the state steps back and permits pharmacies to build moral claims into their corporate identities, customers and employees will both have the opportunity to come together in support of moral claims with which they agree. For pharmacists, this coming together may be significant, allowing them to integrate their personal beliefs and professional calling. For customers, the coming together will probably not constitute a significant segment of their moral identities, but it nevertheless will represent a mediating function that is now largely absent, serving as a vehicle for shared expression, purpose, identity, and meaning. The gap between traditional civil society advocates and health-care providers dealing in morally charged products is not as wide as it might seem.

Of course, sprawling pharmacy chains will not always function as meaningful mediating structures. Compared to smaller, owner-operated pharmacies, a nationwide pharmacy chain may not be a promising vehicle for authentically capturing customers' moral convictions in store policies and practices. It is important to remember, though, that many of the new state laws preclude the moral distinctiveness of all pharmacies, regardless of size.³⁷ Moreover, even [*75] the large chains can make meaningful moral claims that could be relevant to a customer's choice of pharmacy.³⁸

Under a system that recognizes the potential for pharmacies to serve as venues for conscience, the state's primary role will be to address market failure. One important safeguard is for customers to be given the information necessary for participating in the market - i.e., customers and employees should know the moral claims on which the pharmacy's identity is based. If the state allows pharmacies to stake out their own positions on controversial drugs and pharmacists' obligations, it would be justified in requiring those positions to be publicized.

Access may also be an issue. Especially in rural areas, economic incentives might be insufficient to motivate a contraceptive-dispensing pharmacy to enter the market. Under these circumstances, the state may be justified in requiring the provision of certain pharmaceuticals as a condition of licensing. Imposing this requirement would only follow the state's judgment that access to the pharmaceutical in question is important enough to justify such a measure. This may make it more difficult for a rural pharmacy to refuse to stock a certain pharmaceutical than for pharmacies in more populated settings, but in my view, that is preferable to the current trend toward precluding the moral agency for all pharmacies. The state's intervention should be triggered by demonstrable access problems, not simply by abstract notions of customer rights.

Further, we should acknowledge the limited scope of the access problem, and the correspondingly limited scope of the justified government response. In most areas, rural or otherwise, access to widely relied-on pharmaceuticals like contraceptives is not a problem.³⁹ The fact that individuals might have to go to another pharmacy does not mean that the market has failed.⁴⁰ If we value a society with morally distinct institutions, we must discern between

³⁷ See [Ark. Code Ann. § 20-16-304\(4\)-\(5\)](#) (West 2010); [Cal. Bus. & Prof. Code § 733\(b\)](#) (West 2010); [Colo. Rev. Stat. Ann. § 25-6-102\(3\)](#) (4) (West 2010); [Fla. Stat. Ann. § 381.0051\(3\)](#) (West 2007); Ga. Comp. R. & Regs. 480-5-.03(n) (West 2010); [Miss. Code Ann. § 41-107-3\(b\)](#) (West 2010); [N.J. Stat. Ann. § 45:14-40](#) (West 2010); [Or. Rev. Stat. Ann. § 127.505\(12\)](#) (West 2010); [S.D. Codified Laws § 36-11-2\(19\)](#) (West 2010); [Tenn. Code Ann. § 68-34-104\(5\)](#) (West 2010); [Wyo. Stat. Ann. § 42-5-101\(d\)](#) (West 2010).

³⁸ See Dean Olsen, *Walgreen Joins Lawsuit Against Blagojevich*, St. J.-Reg. (Springfield, Ill.), July 23, 2006, at 5 ("Walgreen hopes the judge allows the chain to reinstate its 'pharmacist conscience clause,' which would allow pharmacists to decline to dispense emergency contraception but requires the pharmacists to refer patients to another pharmacist or pharmacy." (quoting spokeswoman Tiffani Bruce)).

³⁹ See [Stormans, Inc. v. Selecky](#), 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007).

⁴⁰ Given the current lack of professional safeguards, it is arguable whether the widespread availability of drugs via the Internet should be considered a suitable measure of access.

market-driven inconvenience [*76] and market-driven lack of access. The latter warrants state intervention; the former does not.

The distinction is reflected in the recent litigation battle over the State of Washington's rules requiring that all pharmacies dispense all legal pharmaceuticals, particularly the Plan B emergency contraception pill, which was the focus of the dispute. ⁴¹ Two pharmacists and a family-owned pharmacy brought suit, claiming that their "rights of conscience" under the Constitution were violated by the rules' enforcement. ⁴² The federal district court granted a preliminary injunction against the State, ruling that the plaintiffs had demonstrated a likelihood of success in proving that their free exercise rights were violated. ⁴³

In light of binding Supreme Court precedent, the district court was on shaky ground in finding a constitutional violation. ⁴⁴ As a policy matter, the vitality of conscience is not necessarily strengthened by dressing up conscience claims in the workplace as constitutional rights. But as misguided as the district court's reasoning might have been, the pharmacy board's rules were even more so, particularly when viewed through the lens offered by conscience's relational dimension.

Most legal commentators disregard this dimension. Marci Hamilton, for example, objected to the district court's ruling because we are dealing with a "right to obtain contraceptives free of state interference." ⁴⁵ It is not clear how such a right is at stake here. The state interference is coming at the request, not of the pharmacies and pharmacists, but of those who wish to obtain contraceptives, and it is not clear that the state needs to intervene in the marketplace unless the goal is to ensure that Plan B is available at every single pharmacy. If we embrace the more modest goal of access to Plan B, there should be a greater showing that state intervention is needed in a particular geographic area.

Hamilton also noted that "the woman seeking contraception has a set of religious beliefs, too, and they permit the use of contraception," [*77] so it is not obvious why "the licensed pharmacist's beliefs get to trump the patient's beliefs[.]" ⁴⁶ She is undoubtedly correct that the pharmacist's beliefs should not trump the patient's, but they only function as a trump when the market is not providing alternative access points to the pharmaceutical at issue. ⁴⁷ Consider the five women who intervened in this litigation in support of the regulations:

. One woman who was out of town visited a pharmacy that did not carry Plan B; the pharmacist there indicated generally the location of another pharmacy for her to try, but did not provide specific directions. The woman returned home early and obtained Plan B at a pharmacy with which she was familiar. ⁴⁸

⁴¹ [Id. at 1248-49, 1255.](#)

⁴² [Id. at 1255.](#)

⁴³ [Id. at 1266.](#)

⁴⁴ See [Employment Div. v. Smith, 494 U.S. 872, 879 \(1990\)](#) (ruling that, for First Amendment purposes, a law is constitutional if it is neutral on the subject of religion and is of general applicability).

⁴⁵ Marci Hamilton, Why a Federal District Court Was Wrong to Apply Strict Scrutiny to a Washington State Law Requiring Pharmacies, but Not Individual Pharmacists, to Fill "Plan B" Prescriptions, FindLaw's Writ (Nov. 15, 2007), <http://writ.news.findlaw.com/hamilton/20071115.html>.

⁴⁶ Id.

⁴⁷ Cf. Adelle M. Banks, Conscience Clauses Not Just About Abortion Anymore, USA Today, Oct. 24, 2009, http://www.usatoday.com/news/religion/2009-10-24-conscience-doctors_N.htm (citing the author's thesis that the free market is "more consistent with the common good than everybody grabbing for the reins of state power").

⁴⁸ [Stormans, Inc., 524 F. Supp. 2d at 1254.](#)

. A second woman was refused Plan B by one pharmacist, but then another pharmacist on duty at the same pharmacy apologized to her and filled the prescription.⁴⁹

. A third woman obtained Plan B on two occasions from Planned Parenthood because she had "heard numerous accounts of pharmacists who refuse to fill emergency contraception prescriptions or otherwise act in a hostile or harassing manner to those seeking such prescriptions."⁵⁰

. A fourth woman did not use Plan B, but participated in a Planned Parenthood testing program designed to identify pharmacists who refused to stock or distribute Plan B. She found that in the town of Wenatchee (population: 27,000), she could obtain Plan B at two out of five pharmacies.⁵¹

. The fifth woman had never used Plan B, but wanted to join the suit to ensure that "all women in Washington, can get timely [*78] access to emergency contraception ... without harassment or hostility."⁵²

These accounts do not provide much evidence that the market has failed. As the Ninth Circuit observed in denying the State's motion to stay the injunction pending appeal, "there is no evidence that any woman who sought Plan B was unable to obtain it."⁵³ While not correcting for any apparent market failure, the regulations do preclude pharmacies from staking out any distinctive claim on the propriety of offering morally contested products and services, short-circuiting any possibility that pharmacies can function as venues for conscience.⁵⁴ To reiterate, this does not mean that pharmacies should somehow be shielded from the marketplace fallout of their conduct. Prior to the adoption of the regulations, in fact, the family-owned pharmacy that ultimately brought suit was the target of a boycott because of its refusal to stock Plan B.⁵⁵ We do not need to give pharmacists a constitutional right to make unilateral decisions about what services they will offer; we also do not need to make all pharmacies morally fungible via state edict absent a specific showing that access has been compromised.

Access cannot be trotted out as a bogeyman every time a pharmacy decides to carve out an identity for itself that diverges from the model of unlimited consumer choice. If the marketplace is going to be relevant, state intervention should be precisely targeted. The state should be legislatively empowered to declare a market failure with respect to particular pharmaceuticals and to require, as a condition of licensing, the provision of those pharmaceuticals by pharmacies operating within that market. But the fear of market failures should not be invoked as the basis for constraining the moral marketplace before it has the chance to operate.

Health-care debates, pitting individual rights against institutional identity, are not, of course, limited to the pharmacy. In the debate over the institutional autonomy of religious hospitals, the overriding [*79] concern has become patient choice and employee freedom, with little credit given to the societal benefits that divergent organizational identities might bring.⁵⁶ Once the value of organizational identity is removed from the equation, the stakes of the

⁴⁹ *Id.*

⁵⁰ *Id. at 1255.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Stormans Inc. v. Selecky*, 526 F.3d 406, 409 (9th Cir. 2008).

⁵⁴ See *id. at 411* (citing a regulation mandate that "'a pharmacy cannot avoid filling prescriptions by referring [the patient] to another pharmacy' even if the only pharmacist on duty has personal objections" (alteration in original)).

⁵⁵ Josh Fischman, Plan B: To Shelve, or Not to Shelve: Emergency Contraception Is on the Hot Seat Again, U.S. News & World Rep., Aug. 14, 2006, at 50.

⁵⁶ See, e.g., Kathleen Gilbert, Dem Candidate: Devout Catholics "Probably Shouldn't Work in the Emergency Room," LifeSiteNews (Jan. 15, 2010), <http://www.lifesitenews.com/ldn/2010/jan/10011502.html> (reporting political candidate's statement that "you can have religious freedom, but you probably shouldn't work in the emergency room").

public debates over controversial health-care issues - emergency contraception, abortion, genetic screening, end-of-life treatment - can be communicated only in terms of the individual employee or patient's interests. If all hospitals are morally fungible, then the state's judgment that a given treatment should be available is equivalent to a judgment that the treatment should be available everywhere. When dissenting institutions are forced to conform, the hospital's various constituents - physicians, administrators, nurses, patients, and financial donors - do not just face a community that makes available a treatment that defies their moral convictions, they face a community that forecloses the opportunity to maintain a subcommunity in which they can live out their convictions.

In some contexts, however, a hospital's moral claims carry sufficient market power that state intervention may be appropriate. It is not enough to show that no other provider serves a particular community. For example, suppose that a Catholic health-care provider operates the only medical facility in a community, but that they would cease operations if forced to offer abortion services. Certainly there is no functioning market of abortion providers, but if the state acted to remedy that, there may very well be no functioning market of health-care services period. The state's market intervention is not guaranteed to expand choice in every circumstance, and tolerating some limits on morally controversial services may serve to maintain a health-care presence in an otherwise underserved area. There is a different set of considerations when the state is asked to permit a merger, for example, between a Catholic provider and a secular provider where the merger would result in the curtailment of controversial services. In those situations, the state may be justified in withholding permission for the merger if it threatens a currently viable market.

Regardless of the policy resolutions reached in a specific health-care dispute, it is important to reorient the conversation toward what **[*80]** is at stake. The conscience-driven practices of providers are not inherently less legitimate than the conscience-driven needs and preferences of health-care customers, provided that goods and services to meet customers' needs and preferences are accessible in the moral marketplace. In a functioning marketplace, the viability of conscience requires us to give providers - and like-minded customers - an opportunity to live out their ideals. If Tom Cruise wants to enter the pharmacy business without selling (highly profitable) anti-depressant medications, the state should stand aside and let him. It is one thing for a true believer to try out his moral convictions in the public sphere and find them incapable of attracting sufficient interest and support to be viable; it is quite another for the state to forbid him from even trying. By more steadfastly defending the social space in which individuals and groups can live out the dictates of their consciences, even when (especially when) those dictates have been rejected by the majority, we will bolster the long-term prospects for the liberty of conscience. It is not just about the individual and the state. There is important space in between.