Law, Ethics, and Gender

Pharmacist Refusals: A New Twist on the Debate Over Individual Autonomy

Leslie C. O’Toole, JD; and Kevin B. Sobel-Read, JD
Ellis & Winters, LLP, Raleigh, North Carolina

By all accounts, the battle over contraception and abortion rights has expanded into new and increasingly contentious territory: the pharmacy. According to The Washington Post, for example, an “increasing number of clashes are occurring in drugstores across the country.” Web searches reveal, however, that the same incidents are covered repeatedly, whereas new occurrences seem to be few and far between. What’s all the fuss about? The real key is not the scope of the debate, but the debate itself, which has found abortion activists and abortion opponents taking surprising and uncharacteristic stances. With their eyes often on a larger political picture, each side provides its own twist to the underlying question: What are the legal and ethical obligations of a pharmacist to dispense pharmaceuticals that he or she is morally opposed to?

The background of the debate involves individual pharmacists who, citing religious and moral grounds, have refused to dispense emergency contraceptives or birth control to women with valid prescriptions. In some instances, women have been publicly berated and humiliated by the pharmacist; in other cases, the pharmacist has gone so far as to hold the prescription hostage, refusing even to transfer the prescription to another pharmacy. Because emergency contraception is extremely time sensitive, generally requiring ingestion within 72 hours after intercourse to be effective, such delay tactics have meant that certain women could not receive their prescriptions in time to prevent pregnancy. In response, women’s rights groups have strongly called for legislation to guard against what they proclaim is an assault on the right to choose.

Religious groups and others have been equally vocal in lobbying for laws to protect pharmacists’ moral and religious prerogative not to participate in actions they view as ranging from immoral to murderous. For these reasons, the pharmacist refusal debate has often been entwined in the abortion debate. The debates are nevertheless distinct. Most saliently, the battle over pharmacist refusals extends beyond abortion, encompassing birth control pills, even when not taken for contraceptive purposes but instead for health reasons, such as the regulation of a woman’s menstrual cycle or endometriosis.

Such distinction notwithstanding, the pharmacist refusal debate has largely been fueled by the interests driving the abortion debate. The ethical ramifications of pharmacist refusals are therefore made all the more interesting by the ironic positions taken by each side. A hallmark of the women’s rights movement has for decades been the sanctity of an individual’s right to autonomy. Abortion opponents have simultaneously advocated for legislation that would bar the activity in question. In the pharmacy refusal debate, however, the roles are reversed. Here, abortion opponents vociferously...
defend the individual’s right to self-determination. At the same time, pro-choice advocates are lobbying heavily for prescriptive legislation to curtail that individual autonomy.

The Legal Landscape

Pharmacists are bound by a patchwork of rules and regulations that vary by state. As will be discussed further, these rules differ greatly. Indeed, some jurisdictions mandate that a pharmacist dispense birth control and emergency contraception regardless of personal beliefs. Other jurisdictions have rules—commonly called conscience clauses by proponents and refusal laws by opponents—that specifically allow the pharmacist to refuse those prescriptions that he or she opposes. Still other jurisdictions provide little or no guidance at all.

State law is the primary source for defining the rights and responsibilities of pharmacists. To date, two states, Massachusetts and North Carolina, have through their respective pharmacy boards adopted policies that generally require pharmacists to dispense valid prescriptions. North Carolina, for example, does allow refusals, but only where such refusal does not impinge on the rights of others. According to the North Carolina Board of Pharmacy:

"A pharmacist has the right to avoid being complicit in behavior that is inconsistent with his or her morals or ethics. It is unacceptable, however, for pharmacists to impose their moral or ethical beliefs on the patients they serve. Pharmacists who object to providing a medication for a patient on this basis alone, therefore, should take proactive measures so as not to obstruct a patient’s right to obtain such medication.

The Board notes that although pharmacists have a right to avoid moral or ethical conflict, they do not have a right to obstruct otherwise legitimate prescription dispensing or delivery solely on the basis of conscientious objection. Board of Pharmacy staff interprets this policy to mean that if a pharmacist refuses to fill a prescription for emergency contraception, then that pharmacist has an obligation to get the patient and the prescription to a pharmacist who will dispense that prescription in a timely manner."

Illinois likewise requires pharmacists to dispense valid prescriptions. But unlike the quiet pronouncements of Massachusetts and North Carolina, Illinois entered the debate at the highly publicized behest of its governor. Following several refusal incidents, in April 2005 Governor Rod Blagojevich filed an emergency rule, later made permanent, which requires that:

"Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient’s agent without delay, consistent with the normal time frame for filling any other prescription."

The Illinois Department of Financial and Professional Regulation has since filed actions against several pharmacies for violation of the new rule. At the same time, a handful of pharmacists have sued to stop enforcement of the rule, alleging that it forces them to violate their religious beliefs.

At the other end of the spectrum are 4 states that have explicitly adopted legislation or regulations protecting pharmacists’ right to refuse: Arkansas, Georgia, Mississippi, and South Dakota. Georgia’s Code of Professional Conduct for pharmacists, for example, provides that:

"It shall not be considered unprofessional conduct for any pharmacist to refuse to fill any prescription based on his/her professional judgment or ethical or moral beliefs."

All other states remain in a gray area in between. Although these various states’ codes of professional conduct generally allow refusals to dispense for medical reasons, such as harmful drug interactions, these states’ rules are currently silent with regard to moral or religious convictions. Efforts have been made by both sides of the debate to enact favorable legislation in these jurisdictions, and bills have recently been introduced in at least 13 states to either protect or curtail pharmacist refusals.

The debate is not limited to state government and administrative agencies, however, but has spread both to the national arena and to local politics. On a federal level, legislators have introduced 3 bills to Congress, each prohibiting
pharmacist refusals. Others have suggested that federal sex discrimination and civil rights legislation might apply either to prohibit or protect, as the case may be, pharmacists in their actions.\textsuperscript{1,11} Title VII, which is an example of such legislation, was at the center of a related 1999 action brought by a Hasidic Jewish pharmacist against Eckerd Corporation after Eckerd declined to hire him because he refused to sell condoms. A federal judge found that the plaintiff had enough evidence to warrant a trial. The jury, however, later rejected the plaintiff's allegations and cleared Eckerd of any wrongdoing.\textsuperscript{12} The impact of this case on the pharmacist refusal debate therefore remains unclear.

On a national policy level, the American Pharmacists Association has taken a stand, albeit an ambiguous one, relying on a “two-part policy statement [that] supports the ability of the pharmacist to step away from participating in activity to which they have personal objections—but not step in the way.”\textsuperscript{13} Even the American Medical Association (AMA) has weighed in, adopting resolutions at its 2005 annual meeting supporting “legislation that requires individual pharmacists or pharmacy chains to fill legally valid prescriptions or to provide immediate referral to an appropriate alternative dispensing pharmacy without interference,” and encouraging the AMA to “enter into discussions” with other national associations “to guarantee that, if an individual pharmacist exercises a conscientious refusal to dispense a legal prescription, a patient’s right to obtain legal prescriptions will be protected by immediate referral to an appropriate dispensing pharmacy.”\textsuperscript{14}

On a smaller scale, at least one local government has also entered the fray. The Austin, Texas, city council voted in late 2005 to require Walgreens to fill all prescriptions for birth control and emergency contraception in-store or risk losing a contract with the city’s medical assistance program. If an individual pharmacist refuses, the store manager must fill the prescription.\textsuperscript{15} Austin is reportedly the first city to demand such services as a condition to entering city contracts.

Lastly, individual pharmacies and pharmacy chains have enacted policies to guide pharmacists’ conduct. Brooks and Eckerd pharmacies, for example, require a pharmacist to dispense the item in question or to contact another pharmacist or supervisor in the store who will.\textsuperscript{16} Other chain stores, such as Wal-Mart, refuse to sell emergency contraception altogether,\textsuperscript{3} in some ways avoiding the debate, in other ways crashing into it head-on.

The consequence of this patchwork of rules and regulations is that pharmacists may be subject to legal liability for a refusal to dispense medication. The violation of state law and/or pharmacy board policy could lead to disciplinary action. Similarly, a refusal could lead to civil liability for emotional distress or wrongful conception, or to other civil claims. The full extent of potential liability has not yet been tested but surely will be if such refusals continue to occur.

The Debate Re-examined: The Ethical Dilemma

Abortion rights versus religious rights, individual rights versus the rights of others—the pharmacy refusal debate offers more questions than it does answers. On the one hand, there seems little to criticize in a pharmacist’s efforts to stand by his or her beliefs. But what if the pharmacist’s refusal denies a woman her validly prescribed emergency contraception in time to be effective, or forces her to travel to another town to buy her birth control pills?

Some commentators have been quick to point out the slippery slope of pharmacist refusals. Once the door has been opened for allowing pharmacists to refuse to dispense birth control and emergency contraception, then pharmacists could likewise refuse to dispense Viagra® to single or gay men, or could deny AZT (zidovudine) to people living with AIDS; likewise, a Scientologist pharmacist could refuse to dispense Paxil® to women suffering from postpartum depression.\textsuperscript{9} The possibilities are endless. When a doctor validly prescribes a medication relying on his or her expert medical judgment, should a pharmacist be permitted to refuse to fill the prescription?
Nevertheless, as noted earlier, pharmacist refusals are explicitly protected in some jurisdictions. Does this legislation alter the ethical equation? Is it even proper for such decisions to be left to the legislature and not to the individual?

Given the unique function of the pharmacist, the refusal debate at first seems to be a limited one. But the debate has broader implications beyond both pharmacists and contraception/birth control. First, as discussed previously, the ability of pharmacists to refuse to dispense contraception or birth control could lead to pharmacist refusals with regard to other medications as well. Second, pharmacist refusals could serve as an example for other health care professionals. Once pharmacists have been granted personal discretion, it is not impossible to imagine a nurse who refuses to administer a validly ordered medication because it was developed through a kind of animal testing to which he or she objects, or a hospital administrator who refuses to sign an insurance claim for a treatment because it was created using stem cells.17 Therefore, the pharmacist refusal debate may serve as a litmus test for future ethical battles in other areas of health care.

According to a 2004 CBS/New York Times poll, most Americans agree that pharmacists should not be allowed to deny medication that has been validly prescribed.18 Yet those who advocate too diligently for the restriction of free expression must be wary so that in some future circumstance, they do not find their own autonomy curtailed. Finding the right moral and ethical balance, however, is another matter entirely.

REFERENCES


