

FINDING SPACE FOR OPPOSING CONSCIENCES: REHABILITATING THE MORAL MARKETPLACE FOR THE EMERGENCY CONTRACEPTION DEBATE

*Jeffrey Paul Jarosch**

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INTRODUCTION

Matters of conscience are not like ordinary disputes. When people disagree on moral issues, they often believe that they are absolutely right and everyone else is absolutely wrong. In such disagreements, compromise is elusive. When sex, religion, and health care are all involved, the issue can only become more volatile. Thus, a conflict involving emergency contraception has the potential to become angry and explosive.

One of the first signs of such a conflict occurred in January 2006. Walgreens put four Illinois pharmacists on unpaid leave for refusing to fill

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prescriptions for emergency contraception.¹ The pharmacists objected to dispensing the drug for moral and religious reasons.² The company did not take action against the pharmacists as part of some grand moral stance or in line with an official company policy; its decision was simply a reaction to the legal environment in which the pharmacies operated.³ The previous April, Illinois Governor Rod Blagojevich had issued a rule requiring pharmacies to dispense contraceptives “without delay, consistent with the normal timeframe for filling any other prescription.”⁴ Walgreens attempted to accommodate the pharmacists, but the options available were limited by the Illinois rule. After suspending the pharmacists, Walgreens offered to transfer them to positions in nearby Missouri stores where they would not be legally required to participate in the provision of emergency contraception.⁵ This attempted compromise between Illinois law and the pharmacists’ conscientious choices did not satisfy the suspended pharmacists, who filed suit alleging that the Illinois rule violated their constitutional rights.⁶

This lawsuit was an early eruption in a series of conflicts between pharmacists who seek the ability to refuse to dispense drugs to which they are morally or religiously opposed and those who seek to protect access to such pharmaceuticals. Emergency contraception is at the center of this debate.⁷ In this confrontation, each side has noble goals.⁸ On one side, object-

¹ *4 Pharmacists Suspended over Morning-After Pill*, CHI. TRIB., Dec. 1, 2005, at B7.

² *Id.*

³ See generally Press Release, Wal-Mart, Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006), <http://www.walmartfacts.com/articles/1704.aspx> (identifying legal requirements in two states and political pressure in two others as the reason for a nationwide change in pharmacy policy).

⁴ Press Release, Office of the Governor, Governor Blagojevich Moves to Make Emergency Contraceptives Rule Permanent (Apr. 18, 2005), <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862>; see also Duty of Retail Pharmacy to Dispense Contraceptives, ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2008).

⁵ *4 Pharmacists Suspended*, *supra* note 1. Walgreens also offered to help the pharmacists, who worked in Illinois suburbs of St. Louis, get licensed in Missouri. *Id.*

⁶ Judy Peres, ‘Morning-after’ Pill Deal Reached: Pharmacists, State Accept Rule Change, CHI. TRIB., Oct. 11, 2007, at B1.

⁷ “Plan B” is the primary form of emergency contraception used in the United States. See U.S. Food & Drug Admin., Plan B: Questions and Answers, <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm> (last visited Aug. 19, 2008). Plan B is a high dose of levonorgestrel, a hormone commonly used in regular birth control pills. *Id.* Taken within seventy-two hours of intercourse, it prevents pregnancy by stopping ovulation, or if ovulation has already occurred, decreasing the chances that sperm will fertilize an egg, or that a fertilized egg will implant in the uterine lining. *Id.* While the Food and Drug Administration considers Plan B to be a contraceptive, opponents—particularly those who believe life begins at fertilization—consider emergency contraception to be an abortifacient. Gardiner Harris, *F.D.A. Gains Accord on Wider Sales of Next-Day Pill*, N.Y. TIMES, Aug. 9, 2006, at A13. In 2006, the FDA approved Plan B to be dispensed over the counter without a prescription. U.S. Food & Drug Admin., *supra*. This change in status does not significantly change the issues involved in pharmacist refusal because the drug is still kept behind the pharmacy counter and must be dispensed by a pharmacist. *Id.*

⁸ Robert K. Vischer puts it well: “Conscience drives a single mother to conclude that the morning-after pill is her best option to prevent an unplanned pregnancy, but also drives her pharmacist to decline

ing pharmacists wish to maintain their religious autonomy and stop a coercive state from imposing values upon them.⁹ On the other, proponents of reproductive choice seek to ensure that women in need of emergency contraception are not blocked by pharmacists imposing their own religious beliefs.¹⁰

Compromise between requirements that pharmacies dispense emergency contraception and pharmacists who wish to object is possible. A compromise was recently reached in Illinois, though this compromise currently faces a legal challenge.¹¹ After the pharmacists filed suit in federal district court,¹² the state, the objecting pharmacists, and pharmacies reached a compromise that allows individual pharmacists to object as long as pharmacies ensure that emergency contraception is available to customers.¹³ Under the compromise, nonpharmacists may dispense emergency contraception with the approval of an offsite pharmacist.¹⁴ This compromise has been challenged by several pharmacists.¹⁵ The plaintiffs allege that the rule violates the Illinois Health Care Right of Conscience Act, which grants health care providers a general right to refuse to participate in actions to which they are conscientiously opposed.¹⁶ The Right of Conscience Act establishes that it is “unlawful for any person, public or private institution, or public official to discriminate against any person . . . because of such person’s conscientious refusal to . . . participate in any way in . . . health care services contrary to his or her conscience.”¹⁷ Such discrimination could include suspending the employee for refusing to dispense emergency contraception based on religious principles.¹⁸

to fill it.” Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL’Y REV. 83, 84 (2006).

⁹ See, e.g., Pharmacists for Life Int’l, *Why a Conscience Clause Is a Must . . . NOW!*, <http://www.pfli.org/main.php?pfli=conscienceclausefaq> (last visited Aug. 19, 2008) (“Pharmacists are increasingly under demands and pressures in our contracepting/aborting society to ‘go along’ in dispensing chemicals and devices which they know will be used to destroying [sic] a nascent human life at its earliest stages.”).

¹⁰ See, e.g., Planned Parenthood Fed’n of Am., *Access to Emergency Contraception*, <http://www.plannedparenthood.org/issues-action/birth-control/emergency-contraception-morning-after-pill-21020.htm> (last visited Aug. 19, 2008) (“Despite its potential to prevent unintended pregnancy, and thereby reduce the need for abortion, anti-choice groups continue to oppose emergency contraception, mischaracterizing how it works and how safe it is.”).

¹¹ See *infra* text accompanying notes 38–44 and 53–58.

¹² See *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006) (order denying motion to dismiss pharmacists’ complaint).

¹³ Peres, *supra* note 6.

¹⁴ *Id.*

¹⁵ Dean Olsen, *Pharmacist Hopeful for Plan B Challenge; Drugstore Owner at Odds with Rule to Require Stocking of Contraceptive*, STATE J. REG. (Springfield, Ill.), Oct. 15, 2007, at 1.

¹⁶ *Id.*

¹⁷ Health Care Right of Conscience Act, 745 ILL. COMP. STAT. 70/5 (2007).

¹⁸ *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052, 1056–1058 (C.D. Ill. 2007) (denying employer’s motion to dismiss claim arising under the Illinois Right of Conscience Act).

While courtroom battles are certain to continue, broad solutions should originate from legislatures, not courtrooms. Dozens of commentators have recently proposed potential statutes and legislative reforms that would attempt to maintain both pharmacists' ability to refuse to dispense drugs to which they object and women's ability to get emergency contraception.¹⁹ Some legislatures have taken up these proposals.²⁰

There is, however, resistance to legislative compromise. Some have suggested that compromise may best be attained not by legislative action, but by inaction and reliance on market forces.²¹ Robert K. Vischer has led these advocates for market-driven compromise, arguing that legislative solutions tend to favor one side unilaterally, either choosing access over conscience or conscience over access.²² He argues that in order to ensure space for competing consciences to operate, legislatures must remain silent.²³ According to Vischer, if multiple viewpoints are allowed to compete in a "moral marketplace," pharmacies that support different consciences may thrive.²⁴ Rather than having a single compromise imposed on all market actors, thus making them "morally fungible via state edict," Vischer envisions compromise through a plurality of coexisting standards.²⁵

This Comment argues that statutory intervention is necessary to achieve any compromise between those who seek absolute freedom for pharmacists to refuse to dispense emergency contraception and those who seek absolute access to the drug. While the goals of the moral marketplace are noble—not to promote a single viewpoint over another, but to ensure a space where each may be heard—it will fail to meet those goals. The moral marketplace does not promote compromise because the market is not sensitive to either side's goals, there are significant barriers to the adequate function of the marketplace, and the marketplace will ultimately impose greater uniformity of conscience upon both pharmacists and women seeking emergency contraception. States should enact legislative solutions that ensure that those engaged in the debate over emergency contraception—pharmacists and pharmacy customers—remain autonomous moral actors.

¹⁹ See, e.g., Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe Is not Enough: When Religion Controls Healthcare*, 31 *FORDHAM URB. L.J.* 725, 728–29 (2004) (urging a right to refuse with a requirement for referral); Georgia Chudoba, Note, *Conscience in America: The Slippery Slope of Mixing Morality with Medicine*, 36 *SW. U. L. REV.* 85, 105 (2007) (requiring "reasonable accommodation" of employee conscience if employee submits a "refusal statement"); Jacqueline Gilbert, Note, *When Rights Collide: In a Battle Between Pharmacists' Right of Free Exercise and Patients' Right to Access Contraception, Who Wins?—A Possible Solution for Nevada*, 7 *NEV. L.J.* 212, 236 (2006) (advocating requirements for public notice of refusals).

²⁰ See *infra* Part I.A.

²¹ See *infra* Part II (providing an overview of these arguments).

²² Vischer, *supra* note 8, at 85.

²³ *Id.* at 86.

²⁴ *Id.*

²⁵ *Id.*

To the extent possible, pharmacists should remain free to choose whether to dispense emergency contraception, and customers should be able to access the drug if they so desire. While a free market may allow pharmacies to make moral decisions, only statutory intervention can ensure space for the *individuals* to whom these moral decisions really matter.

In analyzing the emergency contraception debate, this Comment speaks to the broader question of how the law should address moral questions. It concludes that moral questions are too important to individuals to be left to the whim of competition between market entities that may not care about such issues. This point is important to a number of areas in which private actors and public entities jointly decide the outcome of specific moral questions.²⁶ Ultimately, in these areas of law that have significant moral aspects, the individuals whose lives are shaped by the moral choices available to them deserve a guarantee that they will have meaningful moral options. Such an important aspect of humanity should not be left to the whim of the market.

Part I of this Comment outlines the legal environment and describes various statutes that either require pharmacists to dispense emergency contraception or allow them to refuse to do so. It also examines the few cases involving conscientious objection to emergency contraception, particularly in Illinois, where most of this litigation has occurred. Part II gives a detailed description of the moral marketplace and identifies the theorists who have promoted it. Part III argues that an unregulated moral marketplace will not allow a plurality of moral viewpoints to flourish: the market will not respond to individuals' moral beliefs, there are significant barriers to participation in the moral marketplace, and the moral marketplace locates moral agency at the pharmacy rather than the individual level. Part IV concludes that legislation is the appropriate method to resolve the problems inherent in the moral marketplace and proposes specific statutory solutions. These solutions fall into two categories: remedial measures that attempt to reform the moral marketplace, and comprehensive compromises that limit the policies that pharmacies can enact while ensuring that individuals can exercise moral agency.

I. BACKGROUND: THE LEGAL ENVIRONMENT

In order to understand the scope of the disagreement between the two sides in the debate over emergency contraception, it is necessary to look at the laws that they have successfully enacted and the legal challenges they have waged.

²⁶ One such area is education. Individuals have preferences, including (but not limited to) moral preferences as to how their children are educated. These preferences can, for the most part, only be realized through interaction with educational institutions.

A. Existing Statutes and Regulations

At least thirteen states have specifically addressed emergency contraception in the pharmacy setting through legislative or executive action.²⁷ Four states have refusal laws that explicitly allow pharmacists to refuse to participate in dispensing any contraception, including emergency contraception.²⁸ Five other states have broad refusal clauses that allow several types of health care providers to refuse to participate in various services, likely including pharmacists' participation in dispensing emergency contraception.²⁹ A Maine statute is typical of this group: "No private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection."³⁰ Four states have laws that protect access to emergency contraception, either by requiring pharmacies to fill all valid prescriptions, or by requiring pharmacies carrying any contraception also to dispense emergency contraception.³¹ Some of these laws either favor absolute access³² or absolutely protect pharmacists' conscience-based objections.³³ Others, similar to the compromise reached in Illinois, reject this framework and attempt to allow pharmacists to conscientiously object to certain medications while simultaneously protecting women's access to emergency contraception.³⁴

²⁷ In addition, most states have enacted narrower conscience clauses that allow health care professionals, including pharmacists, to refuse to participate in abortions. Kristen Marttila Gast, *Cold Comfort Pharmacy: Pharmacist Tort Liability for Conscientious Refusals to Dispense Emergency Contraception*, 16 TEX. J. WOMEN & L. 149, 165 & n.55, 166 (2007).

²⁸ GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 2 (2009), http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (the four states are Arkansas, Georgia, Mississippi, and South Dakota).

²⁹ *Id.* (the five states are Colorado, Florida, Illinois, Maine, and Tennessee).

³⁰ ME. REV. STAT. ANN. tit. 22, § 1903(4) (2008).

³¹ GUTTMACHER INST., STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION 2 (2009), http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf (the four states are California, Illinois, New Jersey, and Washington). Additionally, proposed federal laws would protect access to legal pharmaceuticals. *See* Access to Legal Pharmaceuticals Act (ALPhA), H.R. 1652, 109th Cong. (2005) (would allow individual pharmacists to refuse to fill a prescription if the prescription is filled "without delay" by another pharmacist); Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005) (would require pharmacies that receive payments or have contracts under the Medicare and Medicaid programs to ensure that all valid prescriptions are filled without unnecessary delay or interference).

³² *See, e.g.*, N.J. STAT. ANN. § 45:14–67.1 (West 2008) (requiring pharmacies to dispense all valid prescriptions).

³³ *See, e.g.*, Comprehensive Family Planning Act, FLA. STAT. ANN. § 381.0051(6) (2007) (allowing for refusal not only to dispense contraception, but also to provide any information on contraceptive services).

³⁴ *See, e.g.*, CAL. BUS. & PROF. CODE § 733(b)(3) (West 2009) (allowing pharmacists to refuse to fill a prescription on "ethical, moral, or religious grounds" if they have notified their employer in writing and the pharmacy can establish another way for the customer to get her prescription filled "without undue hardship").

While states differ in their approaches towards emergency contraception, there are some points of agreement. For example, no state allows pharmacists to take a prescription, refuse to fill it on moral or religious grounds, and refuse to return it to the customer.³⁵ Regulating whether pharmacists may conscientiously object to emergency contraception is becoming common, but not all states have approached the subject yet.

B. Cases in Which Pharmacists Have Challenged Laws and Rules Limiting Their Ability to Refuse

Though states are increasingly likely to consider legislation on emergency contraception, very few courts have ruled on challenges to these laws. To date, most lawsuits regarding refusals to dispense emergency contraception have been filed by pharmacists challenging their employers under Title VII of the 1964 Civil Rights Act.³⁶ Title VII prohibits adverse actions against employees based on religious beliefs if the employer could “make reasonable accommodations for . . . employees’ religious beliefs and practices [without creating] undue hardship to the employer.”³⁷

In one of the first cases to attempt to use Title VII to protect conscientious objection to emergency contraception, *Menges v. Blagojevich*, the Illinois pharmacists formerly employed by Walgreens—along with two pharmacists employed by other pharmacies—alleged that the Illinois “without delay” rule violated their rights to reasonable accommodation of their religious beliefs.³⁸ The Central District of Illinois denied the defendants’ motions to dismiss because the pharmacists had pled that their religious beliefs could be accommodated with only a *de minimis* burden on pharmacies and that other pharmacists were in fact accommodated by Walgreens stores in every state except Illinois.³⁹ Since Title VII requires *de minimis* accommodation, it could preempt Governor Blagojevich’s state rule, which does not allow accommodations that create any delay in filling a valid prescription.⁴⁰ While Walgreens attempted to comply with the Illinois rule and accommodate its pharmacists by offering them jobs out of state,⁴¹ such forced transfers are likely to constitute the type of adverse employment actions proscribed by Title VII.⁴²

³⁵ Gast, *supra* note 27, at 173.

³⁶ 42 U.S.C. § 2000e (2006).

³⁷ *Noesen v. Med. Staffing Network, Inc.*, 232 F. App’x 581, 584 (7th Cir. 2007).

³⁸ *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 995–96 (C.D. Ill. 2006) (order denying motion to dismiss pharmacists’ complaint).

³⁹ *Id.* at 1003–04.

⁴⁰ *Id.* at 1002–03.

⁴¹ 4 *Pharmacists Suspended*, *supra* note 1.

⁴² See *Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004) (“For purposes of Title VII, an adverse employment action is a significant change in the claimant’s employment status such as hiring, discharge, denial of promotion, reassignment to a position with significantly different job responsibilities, or an action that causes a substantial change in benefits.”).

In the wake of the denial of the state's motion to dismiss, an agreement was struck that allows pharmacists to refuse to dispense emergency contraception while maintaining the "without delay" requirement.⁴³ The settlement reached a compromise by shifting the duty to fill prescriptions from the individual pharmacist to the pharmacy, and by bending the rules normally applicable in dispensing prescription drugs: certain nonpharmacist employees may give the drug to customers after approval by an off-site pharmacist.⁴⁴

Another Illinois case, *Vandersand v. Wal-Mart Stores, Inc.*, demonstrates the necessity of such explicit legal compromises.⁴⁵ The defendant pharmacy suspended Vandersand, a pharmacist, for telling a nurse-practitioner that he would not distribute emergency contraception to her patient.⁴⁶ Vandersand alleged that Wal-Mart suspended him because he refused to participate in health care services he considered to be immoral, and Wal-Mart had thereby violated the Illinois Right of Conscience Act⁴⁷ and Title VII of the Civil Rights Act.⁴⁸ Though Wal-Mart countered that it could not comply both with Blagojevich's Administrative Rule requiring pharmacies to dispense emergency contraception and the Conscience Act allowing pharmacists to refuse to dispense the drug, the Central District of Illinois denied the motion to dismiss.⁴⁹ The incident that led to the *Vandersand* case occurred before the compromise that eventually stemmed from the *Menges* decision had been reached. Had the post-*Menges* compromise been in place at the time of the incident, Wal-Mart may have been able to satisfy both laws, allowing local pharmacists to refuse to dispense emergency contraception, while using other staff to fill the prescription in conjunction with a pharmacist at another Wal-Mart location.

The post-*Menges* compromise allows pharmacists significant freedom while imposing only a minor burden on pharmacies and maintaining individual access to emergency contraception. However, not all objecting activities by pharmacists are protected by Title VII or state statutes. Shortly after the *Menges* decision, the Seventh Circuit encountered an objecting pharmacist who it ruled could not be accommodated with only a *de minimis* burden on the pharmacy. In *Noesen v. Medical Staffing Network*, Neil Noesen, a pharmacist at Wal-Mart and a repeat-objector to emergency contraception, alleged that his employer discriminated against him based on his

⁴³ Peres, *supra* note 6; *see also* ILL. ADMIN. CODE tit. 68, § 1330.91(j)(4) (2008) (allowing certain nonpharmacist employees to dispense emergency contraception with the assistance of a nonobjecting pharmacist at a remote location).

⁴⁴ ILL. ADMIN. CODE tit. 68, § 1330.91(j)(4) (2008).

⁴⁵ *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. 2007).

⁴⁶ *Id.* at 1053.

⁴⁷ Health Care Right of Conscience Act, 745 ILL. COMP. STAT. 70/5 (2007).

⁴⁸ *Vandersand*, 525 F. Supp. 2d at 1053.

⁴⁹ *Id.* at 1055–56, 1058.

religious beliefs in violation of Title VII.⁵⁰ Noesen had been fired from his pharmacy job when he refused to speak to customers seeking contraception.⁵¹ The Seventh Circuit affirmed the district court's finding that Wal-Mart had not violated Title VII because it had repeatedly attempted to accommodate Mr. Noesen, and that any further accommodation would create undue hardship for the pharmacy.⁵² This decision demonstrates that under current law, some accommodation of pharmacists' conscientious objections must be made, but that pharmacies need not accommodate all objecting behavior. In particular, the law does not necessarily protect behavior that unduly disrupts business and goes beyond objection to actively bar other health care providers from providing women with emergency contraception.

While most challenges mounted by pharmacists have focused on Title VII, others have been dismissed on procedural grounds before reaching substantive issues. For example, in *Morr-Fitz, Inc. v. Blagojevich*, pharmacy owners sought a declaration that the post-*Menges* compromise rule allowing individual pharmacists to object but requiring pharmacies to fill all valid prescriptions without delay violated state and federal law.⁵³ The Appellate Court of Illinois dismissed the case based on a lack of standing because the plaintiffs had not demonstrated that they would be hurt by the rule.⁵⁴ The court was clear that it was ruling on this as-applied challenge to the law, and that another plaintiff might suffer sufficient harm to challenge the rule.⁵⁵ Judge Turner, in dissent, urged that the rule's potential discipline of a pharmacy for a pharmacist's religiously-based refusal to dispense contraception was sufficient to violate the Illinois Right of Conscience Act.⁵⁶ The Illinois Supreme Court recently agreed that the plaintiffs could at least proceed with their challenge, holding that the plaintiffs had standing and

⁵⁰ *Noesen v. Med. Staffing Network, Inc.*, 232 F. App'x 581, 582 (7th Cir. 2007).

⁵¹ *Id.* at 582–83. When customers came to the counter with contraception prescriptions, Mr. Noesen would walk away. *Id.* at 583. When they called, he would put them on hold and not notify another pharmacist. *Id.* When Wal-Mart fired him, he had to be forcibly removed by the police. *Id.* at 583–84. Mr. Noesen has become a popular target and rallying point for the two sides of the emergency contraception debate. His story is mentioned in at least twenty-six law review articles and is mentioned in the first paragraph of eight of those. See, e.g., Holly Teliska, Note, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 229 (2005).

⁵² *Noesen*, 232 F. App'x at 584.

⁵³ *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164, 1165 (Ill. App. Ct. 2007), *vacated*, No. 104692, 2008 WL 5246307 (Ill. Dec. 18, 2008). Because the court did not reach the substantive issues, the opinion does not mention which state and federal laws the rule allegedly violates.

⁵⁴ *Id.* at 1168–69 (“[T]he chances of plaintiffs suffering any hardship in the future as a result of this rule are so slim . . . they do not outweigh the judiciary’s traditional reluctance to get involved in administrative determinations . . .”).

⁵⁵ *Id.* at 1171.

⁵⁶ *Id.* at 1172 (Turner, J., dissenting) (“The . . . Act purports to protect . . . beliefs and prevent ‘all forms’ of coercion on the part of the government to alter those beliefs.”). Judge Turner saw such coercion in Governor Blagojevich’s statements that “pharmacists ‘are not free to let [religious] beliefs stand in the way’ of delivering emergency contraception . . .” *Id.*

that the dispute was ripe for review.⁵⁷ The Illinois Supreme Court did not reach the substantive challenge at issue, remanding the case to the trial court.⁵⁸

Other cases in which pharmacists and pharmacies have sought the right to refuse have passed the procedural phase and have focused on constitutional issues rather than Title VII or state legislation. In *Stormans, Inc. v. Selecky*, a case presenting facts similar to those in *Morr-Fitz*, the Western District of Washington adopted the position advocated by Judge Turner's dissent in *Morr-Fitz*.⁵⁹ Rather than dismissing the case for lack of standing, the court granted a preliminary injunction for the plaintiff pharmacies and pharmacists, ruling that it was likely that the Washington Administrative Rule would be found to violate the Free Exercise Clause of the First Amendment.⁶⁰ To find that the plaintiffs had standing, the court focused on the fact that two plaintiff pharmacists had been or would be fired because their employers could not afford to hire an additional pharmacist.⁶¹ Like the rule challenged in *Morr-Fitz*, the rule examined in *Stormans* allowed the state to sanction pharmacies that permitted their employees to refuse to fill a prescription.⁶²

These few cases demonstrate that unclear and conflicting rules and statutes have led to unpredictable results, but also that clear compromises present the possibility of satisfying both sides. Though litigants have only recently challenged the application of existing laws to emergency contraception, similar cases decided in the abortion context may provide clues as to future decisions on pharmacist objections.⁶³ In *Tramm v. Porter Memorial Hospital*,⁶⁴ the Northern District of Indiana granted the defendant hospital's motion for summary judgment, refusing to accept the plaintiff nurse's

⁵⁷ *Morr-Fitz, Inc. v. Blagojevich*, No. 104692, 2008 WL 5246307, at *16 (Ill. Dec. 18, 2008).

⁵⁸ *Id.*

⁵⁹ *Stormans, Inc. v. Selecky*, No. C07-5374RBL (W.D. Wash. Nov. 8, 2007), available at <http://www.telladf.org/UserDocs/StormansPIRuling.pdf> (order granting preliminary injunction). Like Justice Turner's dissent in *Morr-Fitz*, the court focused on statements by the governor indicating a desire to curb religious refusal. *Id.* at 16.

⁶⁰ *Id.* at 25–26. *Stormans* is not the only case to challenge a requirement to dispense emergency contraception on free exercise grounds. In *Nead v. Board of Trustees of Eastern Illinois University*, a nurse alleged that she was not given a promotion because she was religiously opposed to giving emergency contraception and would not do so. No. 05-2137, 2006 WL 1582454, at *1–3 (C.D. Ill. June 6, 2006). The court denied the defendant's motion to dismiss her free exercise, Title VII, and Illinois Health Care Right of Conscience Act claims because the pleadings did not demonstrate any meaningful burden on the defendant hospital in accommodating the plaintiff's religion. *Id.*

⁶¹ *Stormans*, No. C07-5374RBL, at 8–9.

⁶² *Id.* at 1.

⁶³ Lora Cicconi, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 735–38 (2007) (looking to abortion cases for clues as to how courts will decide emergency contraception cases).

⁶⁴ *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 21, 1989).

contention that requiring her to clean tools used to perform abortions violated the Indiana Conscience Statute.⁶⁵ In a slightly different context, the Montana Supreme Court held that the defendant hospital in *Swanson v. St. John's Lutheran Hospital* did not violate state law when it fired a nurse who had refused to take part in a sterilization procedure.⁶⁶ The court found that allowing such a refusal would diminish the level of care provided by the only hospital in a large rural area.⁶⁷ These cases demonstrate that courts are likely to consider the context in which a refusal clause is enacted and may not allow pharmacists to refuse to perform duties only tangentially related to the provision of emergency contraception. Though there are relatively few cases challenging refusal clauses, they demonstrate the controversy that the issue creates and the likelihood of future litigation.

C. Cases and Other Pressures Challenging Refusals to Dispense Emergency Contraception

Swanson suggests a concern for access to care and the possibility of suits filed by those who wish to maintain their own or others' access to emergency contraception. A very small number of such cases have been filed by women who have been denied emergency contraception. In *Brownfield v. Daniel Freeman Memorial Hospital*, a rape victim who had been denied emergency contraception at a Catholic hospital sought an injunction requiring the hospital to provide information to patients, including the period of time during which emergency contraception must be taken.⁶⁸ The victim alleged that had she known of the small window of time during which emergency contraception is effective, she would have gone elsewhere to obtain it.⁶⁹ Without the necessary information, she asserted, she was "not in a position to shop around, or to educate herself as to the . . . treatment options available to her . . ." ⁷⁰ The California Court of Appeal found that the hospital had a duty to provide the plaintiff with information about emergency contraception so that she could exercise her own right to medical autonomy.⁷¹ However, the court denied the plaintiff's request for an injunction because she "has not and cannot allege facts demonstrating that she or the general public have, or will, suffer injuries which cannot be compensated by an award of damages."⁷² The court was clear that had the plaintiff suffered any damages as a result of the hospital's failure to provide

⁶⁵ Cicconi, *supra* note 63, at 736 (citing *Tramm*, 1989 U.S. Dist. LEXIS 16391, at *30).

⁶⁶ *Swanson v. St. John's Lutheran Hosp.*, 597 P.2d 702, 714–15 (Mont. 1979).

⁶⁷ *Id.* at 709.

⁶⁸ *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal. App. 3d 405, 408 (Cal. Ct. App. 1989).

⁶⁹ *Id.* at Summ.

⁷⁰ *Id.* at 411.

⁷¹ *Id.* at 413–14.

⁷² *Id.* at 414.

her with the information, she could have recovered damages, but ultimately no damages were available because she had not become pregnant.

While *Brownfield* is the only case where a woman has challenged a health care provider for failing to provide emergency contraception, a few pharmacy-specific cases have been filed as well. In 2006, three Massachusetts women filed a lawsuit against Wal-Mart for failing to stock emergency contraception.⁷³ The case was never decided, however, because shortly thereafter the Massachusetts Board of Pharmacy ruled that all pharmacies were required to stock emergency contraception.⁷⁴ It made this decision based on a preexisting law requiring pharmacies to dispense all commonly prescribed medication.⁷⁵ Around the same time, Connecticut Comptroller Nancy Wyman and Connecticut Attorney General Richard Blumenthal threatened to eliminate coverage for prescriptions at Wal-Mart from the state employee insurance plan unless the company started stocking emergency contraception.⁷⁶ The plan covers more than 188,000 state employees and retirees.⁷⁷

At the time of the Massachusetts lawsuit and the pressure from Connecticut state officials, Wal-Mart only stocked emergency contraception at pharmacies in Illinois, as required by law.⁷⁸ Shortly after the Massachusetts order, Wal-Mart changed its policy and began stocking emergency contraception in all stores nationwide.⁷⁹ A Wal-Mart press release suggested that its about-face was due to an expectation that more states would soon require all pharmacies to dispense emergency contraception.⁸⁰ A similar process of using political pressure to ensure access to emergency contraception may be underway in New York, where the New York Civil Liberties Union recently filed a complaint with the New York State Office of the Professions, urging it to discipline pharmacists who “obstructed . . . patients’ access to medication.”⁸¹ This complaint demonstrates the type of political pressure that groups on both sides of the debate can use to indirectly influence pharmacies’ policy choices. Generally, however, few legal challenges have

⁷³ Michael Barbaro, *In Reversal, Wal-Mart Will Sell Contraceptive*, N.Y. TIMES, Mar. 4, 2006, at C4; Katie Zezima, *National Briefing New England: Massachusetts: Contraceptives Must Be Stocked*, N.Y. TIMES, Feb. 15, 2006, at A20.

⁷⁴ Zezima, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ Christopher Keating, *Wal-Mart Warned in Plan B Dispute*, HARTFORD COURANT, Mar. 24, 2006, at B1.

⁷⁷ *Id.*

⁷⁸ News in Brief, *Wal-Mart OKs Pill Change*, BOSTON HERALD, Mar. 4, 2006, at 14.

⁷⁹ *Id.*

⁸⁰ See Wal-Mart, *supra* note 3.

⁸¹ Press Release, ACLU, Pharmacists Should Be Held Accountable for Refusing to Honor Prescriptions for Emergency Contraception, NYCLU Says (Aug. 15, 2006), <http://www.aclu.org/reproductive-rights/contraception/26469prs20060815.html>. Ultimately, the Office of the Professions declined to take any action based on the complaint. New York Civil Liberties Union, *In re Heller*, et al., <http://www.nyclu.org/node/1064> (last visited Apr. 1, 2009).

been mounted to force pharmacies to dispense emergency contraception—most pressure has emerged from the political arena.

D. Professional Organizations and the Drugstore Industry

Underlying this moral dilemma is an industry that is dominated by large organizations. Some of these have weighed in on the debate over emergency contraception. In 1998, the American Pharmacy Association (“APhA”) adopted a policy that seeks to support pharmacists who wish to object to prescriptions and, at the same time, preserve access to legal pharmaceuticals.⁸² The American Society of Health-System Pharmacists has an equally noncommittal policy that urges support for both sides of the debate.⁸³ The American Medical Association (“AMA”), representing physicians, not pharmacists, seeks generally to expand access to prescription drugs, including emergency contraception. In a policy directed at patients’ ability to access medications prescribed by physicians, the AMA seeks to ensure that pharmacists’ interests in making conscientious refusals yield to patients’ interest in accessing drugs prescribed by physicians.⁸⁴ The AMA also specifically seeks to expand access to emergency contraception, including making the drug “more readily available through pharmacies”⁸⁵ While it is unclear how effective these efforts are, there is some evidence that these groups have influenced the development of pharmacy policies.⁸⁶

Other big players in the industry have been much more reluctant to take a public stance on emergency contraception. While some pharmacies have adopted explicit policies regarding emergency contraception, most have not. A study of the top fifty national pharmacy chains found that only eleven had publicly available policies regarding pharmacists’ ability to refuse to fill a legal prescription.⁸⁷ Of the pharmacies that have available policies, most attempt to keep close to the APhA policy of generally trying both to allow pharmacists’ conscientious objections and to ensure access to

⁸² Pharmacist.com, Current APhA Policies Related to the Practice Environment & Quality of Work-life Issues, http://www.pharmacist.com/AM/Template.cfm?Section=Search1§ion=Control_Your_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267 (last visited Aug. 20, 2008) (“APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and . . . the establishment of systems to ensure patient’s [sic] access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.”).

⁸³ See Gast, *supra* note 27, at 160–61.

⁸⁴ AM. MED. ASS’N., HEALTH AND ETHICS POLICIES OF THE AMA HOUSE OF DELEGATES 97 (Policy H-120.947), <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf>.

⁸⁵ *Id.* at 68 (Policy H-75.985).

⁸⁶ See Erica S. Mellick, Comment, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL’Y 402, 413 (2006) (“Most commercial drugstores seem to follow the APhA recommendations.”).

⁸⁷ SaveRoe.com, Fifty Pharmacy Scorecard, available at <http://web.archive.org/web/20061021030508/http://www.saveroe.com/campaigns/fillmypillsnow/pharmacyscorecard> (last visited, July 6, 2009).

prescription drugs.⁸⁸ Most publicly available policies allow pharmacists to refuse in some situations. Walgreens allows pharmacists to refuse to fill a prescription and hand the customer off to another employee or to refer the customer to another Walgreens store.⁸⁹ CVS and Wal-Mart similarly allow objecting pharmacists to refuse and refer customers to another store.⁹⁰ Costco and K-Mart allow pharmacists to refuse, but they ensure that the customer gets her prescription filled either by another pharmacist in the store or by home delivery.⁹¹

These big-name pharmacies wield significant power in the industry. In 2001, chain drugstores accounted for seventy-three percent of industry income.⁹² The top four chains at that time, Walgreens, CVS, Rite Aid, and Eckerd, controlled more than sixty percent of the market.⁹³ For chain drug stores, sales of prescription drugs account for more than sixty-one percent of overall revenue, and sixty percent of all prescriptions issued nationwide are filled in these four drug store chains.⁹⁴ This massive industry underlies the dispute between those who seek to preserve access to emergency contraception and those who seek to protect pharmacists' right to conscientiously object.

II. BACKGROUND: THE MORAL MARKETPLACE

Legal scholars have studied the dispute over emergency contraception from many angles, including specific examinations in light of constitutional principles,⁹⁵ discrimination law,⁹⁶ labor law,⁹⁷ principles of judicial construction,⁹⁸ tort liability law,⁹⁹ and the doctor–patient relationship.¹⁰⁰ Nearly all

⁸⁸ See Mellick, *supra* note 86, at 413 (describing the similarities between several major pharmacies' policies and the APhA policy).

⁸⁹ See Katherine A. James, Note, *Conflicts of Conscience*, 45 WASHBURN L.J. 415, 424–25 (2006); Mellick, *supra* note 86, at 413.

⁹⁰ See Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL'Y 139, 169 (2006); Mellick, *supra* note 86, at 413.

⁹¹ See Gilbert, *supra* note 19, at 220.

⁹² *Drug Stores and Proprietary Stores*, in 2 ENCYCLOPEDIA OF AMERICAN INDUSTRIES 815, 816 (Lynn Pearce ed., 2005).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See, e.g., Taylor Genovese, Note, *Prescribing Morality: The Constitutionality of Pharmacist Conscience Clauses*, 34 HASTINGS CONST. L.Q. 111 (2006).

⁹⁶ See, e.g., Charu A. Chandrasekhar, *Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006).

⁹⁷ See, e.g., Schmall, *supra* note 90.

⁹⁸ See, e.g., Cicconi, *supra* note 63.

⁹⁹ See, e.g., Gast, *supra* note 27.

¹⁰⁰ See, e.g., Dennies Varughese, Comment, *Conscience Misbranded!: Introducing the Performer v. Facilitator Model for Determining the Suitability of Including Pharmacists Within Conscience Clause Legislation*, 79 TEMP. L. REV. 649 (2006).

of these commentaries pick sides. Most assume that there is not room for both conscientious objection and access to emergency contraception.¹⁰¹ Some, however, attempt to allow multiple perspectives to flourish. Most who seek compromise do so by proposing legislative schemes that seek to push the balance between conscience and access away from the status quo and towards their preferred side. A few commentators, however, genuinely seek to allow multiple visions to flourish without promoting one side over another. Robert K. Vischer, for example, believes that compromise can be achieved through operation of market forces free from government interference in favor of either pharmacists' consciences or access to emergency contraception.¹⁰² He hopes that in the free "moral marketplace," both sides will find room to operate, and society will benefit from the debate that occurs in the pharmacy marketplace.¹⁰³

Using a free market approach to achieve moral ends may at first seem counterintuitive. Indeed, some theorists have argued that morality and the market are like oil and water. For example, Judge Richard Posner argues that "people seem to behave morally in situations in which the costs of behaving morally are small, but to respond to incentives in situations in which those costs are large."¹⁰⁴ Because pharmacies rarely publicize their emergency contraception policies, even learning of such policies may come with a cost. Judge Posner's view thus suggests that pharmacy customers are unlikely to consider their pharmacy's policy on emergency contraception until they need to obtain the drug themselves and it becomes not simply a moral, but also a very practical concern. Similarly, an individual pharmacist is unlikely to consider her employer's policy unless she expects to have a conscientious conflict with it.

Some theorists, however, have argued that there is room for moral interaction within economic markets that could extend beyond immediate moments of conflict. Thomas Dunfee was among the first to suggest that moral debate can occur through market functions and that such debate can even provide answers to moral questions.¹⁰⁵ To Dunfee, the Marketplace of Morality is "a place where individuals act under their moral impulses . . . [and is] a marketplace in which transactions represent the aggregate acted-upon moral preferences of its participants."¹⁰⁶ This marketplace is a forum to which everyone contributes, to different degrees, based on individual

¹⁰¹ See Vischer, *supra* note 8, at 85 (arguing that most commentaries adopt "zero sum" terms in which each incremental gain by one side results in an equal loss for the other).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 195 (1990).

¹⁰⁵ See generally Thomas W. Dunfee, *The Marketplace of Morality: First Steps Toward a Theory of Moral Choice*, 8 *BUS. ETHICS Q.* 127 (1998).

¹⁰⁶ *Id.* at 127.

moral preferences.¹⁰⁷ The Marketplace of Morality is a place in which Dunfee sees the possibility of discovering moral and ethical truths.¹⁰⁸ He believes that through market transactions, a debate occurs that may lead to an understanding of what is moral or ethical.¹⁰⁹ Violations of these standards, especially in the business context, will be visible in market outcomes: “If a manager fails to react to conspicuous signs of moral expectations for her firm, she may implement strategies doomed to underperform or even produce losses for the firm.”¹¹⁰ As an example, Dunfee points to an oil company that proposed to dispose of a decommissioned oil rig by sinking it in the North Sea.¹¹¹ The company may have hurt its own bottom line by failing to anticipate the environmentalist response that ultimately forced the company, at great expense, to change course and dispose of the rig in another manner.¹¹²

Other theorists identify a similar moral element to the marketplace, but they seek no absolute answers from this market debate. Rather, they want moral debate to occur in a free marketplace in order to make space for multiple truths. William A. Galston argues for restrained government regulation in matters of conscience to ensure that “there is no single way of life, based on a singular ordering of values, that is the highest and best for all individuals.”¹¹³ It is this valuing of pluralism, rather than pure compromise, that sets these theorists apart. In *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, Vischer joins this group and applies this focus on a plurality of viewpoints to the emergency contraception context.¹¹⁴ Vischer seeks to find space for the two sides in this clash of consciences.¹¹⁵ He argues that in a clash between two conscience-based positions, such as the debate over emergency contraception, state power should not be used to select one position over the other.¹¹⁶ Such statutory

¹⁰⁷ For example, some people take their moral preferences into account when selecting what type of food to buy, what clothes to wear, and which gas station to patronize, or even whether to patronize one at all. In these decisions, moral desires to reduce global warming, stop cruelty towards animals, or support a living wage could influence ordinary spending patterns. The extent to which these moral issues play a role in decisionmaking varies from person to person.

¹⁰⁸ See *id.* at 136–37 (describing the Marketplace of Morality as the moral context that leads to popular support for some decisions, but not others).

¹⁰⁹ See *id.* at 142–43 (“A [marketplace-]based analysis offers several insights concerning the nature and role of ethical theory in business ethics.”); see also Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS. 129, 155 (1999) (advocating Justice Holmes’s idea that truth may be obtained through market competition).

¹¹⁰ Dunfee, *supra* note 109, at 147.

¹¹¹ *Id.* at 147–48.

¹¹² *Id.*

¹¹³ William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 AM. J. JURIS. 149, 150 (2003).

¹¹⁴ Vischer, *supra* note 8.

¹¹⁵ *Id.* at 84.

¹¹⁶ *Id.*

intervention would, he argues, make “all pharmacies morally fungible via state edict”¹¹⁷

Vischer argues that if the law refuses to choose sides in the debate and impose one side’s position on everyone, both objecting pharmacists and advocates who wish to preserve access to emergency contraception will be able to find space in which their goals can be met.¹¹⁸ He envisions individual pharmacists and consumers choosing to work at and patronize pharmacies with moral viewpoints with which they identify, and feels this is only possible in an industry that allows a plurality of viewpoints to flourish.¹¹⁹ Vischer believes that if the marketplace is unregulated, it will create a plurality of choices and will allow room for both pharmacists who wish to object and women who seek access to emergency contraception.

The importance of pluralism, however, goes beyond tolerance. Vischer promotes a specific view of how individuals should express their moral beliefs and how society should respond to moral conflicts. He sees drugstores not just as places to fill prescriptions, but as communities and fora where individuals come together to form associations with coherent moral identities.¹²⁰ Maintaining the moral identity of individual pharmacies is important not because these commercial entities have inherent moral worth, but because through them, individuals exercise their own moral agency and create environments where that agency can thrive.¹²¹ If the government imposes statutory uniformity, such individual moral agency is impossible, but in a free market, Vischer argues, individuals will have choice and agency.¹²² This assumption exposes Vischer’s unfounded optimism that the large-scale actors in the pharmacy industry are morally malleable by individual consumers and that pharmacists will satisfy these customers’ moral needs. These pharmacies often do not care about their moral positions, and individual customers and pharmacists face significant barriers in trying to influence pharmacies’ moral positions.¹²³

James A. Sonne makes a similar argument that the ability to determine conscience-based policies should be left to employers, not to legislatures.¹²⁴ While admitting that his free-market proposal would leave pharmacists’

¹¹⁷ *Id.* at 86.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (“Individual consciences can thrive through overlapping webs of morality-driven associations and allegiances, even while diametrically opposed consciences thrive simultaneously.”).

¹²⁰ *Id.* at 100–01.

¹²¹ *Id.* at 100 (“[I]ndividuals become active participants in cultivating their own moral environments, not just constituents asking that their chosen norms be imposed on the whole.”).

¹²² *Id.* at 103.

¹²³ *See infra* Part III.

¹²⁴ James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 280 (2007) (“[T]hat some . . . might argue for an increase in corporate responsiveness to the interests of its affected constituencies, whether internal (e.g., workers, investors) or external (e.g., customers, society at large), does not necessarily mean that such an increase is, or should be, dictated by law.”).

moral choices in the hands of their employers, Sonne sees moral mandates as less dangerous when they originate from an employer rather than from the state.¹²⁵ He echoes Vischer's distaste for monolithic solutions, arguing against legislating on moral issues because such legislation creates all-or-nothing stakes: "[T]he uncompromising mandates presently in vogue unduly burden the relationship between employers and employees by converting what should only be a moral problem into a legal one."¹²⁶

These theorists have noble goals and a remarkable vision for maintaining space for differing moral viewpoints. Unfortunately, the free market for which they advocate will not alone create the result they seek. This Comment identifies pathologies that can result from overreliance on a free pharmacy market in the emergency contraception context, and suggests that statutory interventions are necessary in order to rehabilitate the goals of the moral marketplace.

III. GUARANTEEING SPACE FOR COMPETING CONSCIENCES

Vischer is correct that in a clash of reasonable conscience-based opinions, state power should not be used to choose one position over another. However, this does not mean that there is no place for statutory intervention. Such intervention is necessary to ensure that the moral marketplace does not lead to distorted results that stem from a moral monopoly. A lack of intervention will not guarantee that pharmacies adopt a plurality of moral viewpoints or that there will be space for competing consciences. This is the case because an unregulated moral marketplace may not be adequately sensitive to moral debate. Even if it is sensitive to the emergency contraception issue, barriers to the market disproportionately bar some viewpoints, leading to distorted market results. Ultimately, leaving the issue to the market will result in less space for discussion and competing consciences, not more.

A. The Free Marketplace Is Not Sensitive to Moral Issues

The moral marketplace is unlikely to be sensitive to its constituents' moral desires, and when it does respond to moral viewpoints, it will ignore those that are in the minority. There is no guarantee that pharmacies will care about conscientious refusal or access to emergency contraception. Moral concerns are almost always secondary to financial ones for businesses, particularly national chains that conduct seventy-three percent of the pharmacy business.¹²⁷

Walgreens' actions in Illinois demonstrate that moral stances were unimportant in formulating the company's policies. When Illinois pharma-

¹²⁵ *Id.* at 286.

¹²⁶ *Id.* at 287.

¹²⁷ *Drug Stores and Proprietary Stores*, *supra* note 92.

cists violated state law by refusing to dispense emergency contraception, the company did not take a stand for or against their actions. It did not even defend or clearly articulate its own policy. Instead, Walgreens sought to transfer the pharmacists to nearby Missouri where their actions would pose no legal problem.¹²⁸ The extent of Walgreens' moral statement was that the company was going to do what it could to follow the law without concerning itself with the ethics of pharmacist refusals or access to emergency contraception—an essentially amoral stance. This is not a position with which most informed consumers will identify when choosing one pharmacy over another. Even customers with very strong viewpoints would have trouble figuring out whether Walgreens shares their viewpoint or not. In some situations the chain allows pharmacist refusals, in others it requires all pharmacists to dispense emergency contraception—these determinations are determined purely by local law. The company's lack of any clear moral position effectively undercuts Vischer's goals for the moral marketplace. The diverse moral viewpoints of customers and employees will not find space within the marketplace if the pharmacies that make up the market are not concerned with the moral aspects of their own policies.

Even in the rare situation in which businesses do respond to the moral desires of their customers and employees, rather than purely to economic concerns, they generally only respond to the broadest moral consensus, not to diverse conscientious viewpoints.¹²⁹ Consequently, only mainstream moral viewpoints will contribute to the formation of important company policies. Those holding minority viewpoints will be shut out of this debate. This may reflect active decisions by pharmacies to bring their policies in line with mainstream morality, or it may represent a business decision that it is financially risky to promote minority moral viewpoints.

Dunfee identifies this possibility that markets will react only to broad moral consensus points, not to a plurality of moral viewpoints. While he does argue that individuals will act on their moral preferences frequently enough to influence the market and that companies that do not follow moral norms will suffer financially, Dunfee sees public moral opinion as a blunt instrument, slowly and generally pushing entire industries towards points of moral consensus.¹³⁰ This push will lead to greater homogeneity in pharmacy policies, not to a plurality of consciences finding representation in different pharmacies. According to Dunfee's logic, those pharmacies that follow minority moral viewpoints will either change their policies to be in line with mainstream societal values or will not survive.¹³¹

¹²⁸ 4 *Pharmacists Suspended*, *supra* note 1.

¹²⁹ See Dunfee, *supra* note 109, at 147–50 (successful businesses must follow the broad moral trends of the marketplace).

¹³⁰ *Id.* at 140, 150 (suggesting that in order to have a significant market effect, moral positions must be held by some plurality of the customer base—“some marketplace actions based on moral desires will cancel the effect of those acting on the opposite desires”).

¹³¹ *Id.* at 147.

Dunfee's analysis suggests that just because there is some demand for representation of a minority moral viewpoint does not mean that any pharmacies will adopt that viewpoint. Because the pharmacy industry is dominated by large players¹³² that face high costs to maintain multiple policies in different locations, they are likely only to adopt mainstream policies that are serviceable nationwide. Wal-Mart's significant voluntary shift in emergency contraception policy demonstrates that even when there is an active moral minority, pharmacies will be unlikely to adopt that position, and minority moral viewpoints will be rejected from the moral marketplace by broad social pressure. Wal-Mart initially followed a minority moral viewpoint by refusing to carry emergency contraception in any of its stores.¹³³ After it faced legal requirements to carry emergency contraception in two states, and pressure from two others, the chain reversed its policy in anticipation of more states imposing mandatory coverage.¹³⁴ The legal pressure was not widespread, yet Wal-Mart changed its policy nationwide.¹³⁵

Wal-Mart's decision to change its policy for the forty-six states where it faced no legal pressure to do so is evidence either that the moral issue was not important enough to the company to justify the cost of maintaining state-specific policies or that it interpreted the limited pressure as a sign of the moral environment, and sought to bring itself in line with the perceived majority position. Either way, Wal-Mart's nationwide policy reversal is a sign that even without legal interference the marketplace will not produce a plurality of moral viewpoints, but will instead bring moral minorities into line with the moral majority.

The limited importance of moral issues to pharmacies and the inability of minority moral viewpoints to influence pharmacy policies demonstrate that an unregulated marketplace will not allow for the expression of a plurality of viewpoints, but uniformity in pharmacy policies. An absolutely free moral marketplace is a particularly unjustifiable goal because in order to maintain the moral independence of pharmacies it sacrifices the moral preferences of individual pharmacists to refuse to fill prescriptions and of individual customers to purchase and use emergency contraception.¹³⁶

B. Barriers and Asymmetries

Even if the marketplace is sensitive to moral debate, it cannot create space for multiple conscientious beliefs because significant barriers and asymmetries stop customers and pharmacists from engaging in meaningful morally charged market activities. Vischer identifies two conditions that

¹³² See *supra* Part I.D.

¹³³ See Wal-Mart, *supra* note 3.

¹³⁴ Illinois and Massachusetts had mandated that pharmacies carry emergency contraception, and New York and Connecticut were considering such mandates. *Id.*

¹³⁵ *Id.*

¹³⁶ See *infra* Part III.C.

must be met in order for a professional to appropriately exercise her conscience in a moral marketplace: First, the client or customer must have adequate information about the professional's conscience-based position; second, the client must have other options to which she may turn for the services.¹³⁷ The fact that neither of these conditions can be counted on in the pharmacy setting suggests a significant barrier to pharmacists and customers exercising power in a moral marketplace. Pharmacists and customers do not have adequate information to act intelligently in the market, and women seeking emergency contraception may not have other pharmacies to which they may turn. Additionally, parties acting in the pharmacy marketplace have different levels of power that systematically disadvantage some groups attempting to satisfy their moral desires.

Market participants do not have access to the information they need to play a role in the moral marketplace. Dennies Varughese claims that an unregulated pharmacy market will ensure that patients know "which pharmacy will honor their prescription and can avoid the humiliating and frustrating process of bouncing from pharmacy to pharmacy in search of a contraceptive-friendly pharmacist."¹³⁸ However, in the absence of state regulation, just the opposite will occur: the frantic search feared by Varughese will be commonplace. An informational asymmetry limits the extent to which both women seeking emergency contraception and pharmacists seeking employment may choose pharmacies based on their moral preferences. Very few pharmacies publish their policies—only eleven of the top fifty pharmacies have made policies publicly available.¹³⁹ By not publishing policies, the remaining pharmacies actively disable their customers and potential employees from participating in the moral marketplace. Such refusal to participate in the marketplace raises the costs for pharmacists to find jobs in line with their conscientious choices. It similarly restricts customers' abilities to access emergency contraception or to support a pharmacy that does not dispense drugs to which they have moral or religious objections.

Some states have sought to limit this avoidance of the moral marketplace, others have exacerbated the problem. A California law seeks to make the moral marketplace more transparent by requiring that managed care organizations and insurance companies (but not pharmacies) warn patients of restrictions on the provision of reproductive health services.¹⁴⁰ Other laws limit the information available in pharmacies. For example, some states' conscience clause laws allow health care workers to refuse to engage in activities to which they object and to refuse to tell the patient

¹³⁷ Robert K. Vischer, *Professional Identity and the Contours of Prudence*, 4 U. ST. THOMAS L.J. 46, 57 (2006); see also Dunfee, *supra* note 105, at 138 (also suggesting that there are "minimal prerequisites" for individuals to be able to function as market actors).

¹³⁸ Varughese, *supra* note 100, at 698–99.

¹³⁹ Fifty Pharmacy Scorecard, *supra* note 87.

¹⁴⁰ CAL. HEALTH & SAFETY CODE § 1363.02 (West 2007).

where or whether the services they are conscientiously refusing are otherwise available.¹⁴¹

Vischer provides an example that demonstrates the importance of information to market participation: a group of Harvard Law students successfully convinced a Boston law firm to stop advocating a controversial position for one of its clients by threatening to picket the firm's recruitment of students.¹⁴² Vischer lauds their recognition of the moral dimension of the firm's practice.¹⁴³ But this example precisely demonstrates the deficiencies of the pharmacy marketplace. It is not possible for women seeking emergency contraception or pharmacists seeking employment to engage in such laudable moral action if they do not have access to the necessary knowledge of the pharmacy policies. The Harvard Law students would not have been able to change the firm's practice if they did not have knowledge of the positions that the firm advocated. Women seeking emergency contraception face an additional barrier to participation in the moral marketplace because they have only seventy-two hours in which to figure out which pharmacy holds a moral position in line with their own ethics. Because pharmacies, for the most part, do not publish their policies on emergency contraception, individuals cannot reliably make the meaningful choices necessary to the moral marketplace.

This leads to the next barrier to the adequate functioning of the moral marketplace in the pharmacy context: women seeking emergency contraception may not have other options, especially within the limited timeframe during which emergency contraception is effective. Because emergency contraception's effectiveness decreases sharply over time, any delay is potentially a denial.¹⁴⁴ This limited timeframe accentuates the information asymmetry problem discussed above. While it may be possible for individual customers to work to investigate and discover pharmacy policies, women seeking emergency contraception are asked to do this in a limited and stressful period of time. Furthermore, not all women have access to multiple pharmacies; many may not have the resources to visit more than one. Limited pharmacy choices can be an especially acute problem in rural areas, where pharmacies tend to be separated by greater distances.¹⁴⁵ Also, managed care systems often impose additional limits on the pharmacies

¹⁴¹ See MISS. CODE ANN. § 41-107-5 (2005). *But see* *Brownfield v. Daniel Freeman Marina Hosp.*, 208 Cal.App.3d 405, 413-14 (Cal. Ct. App. 1989) (defendant hospital failed to meet its statutory duty by refusing to provide rape victim with information regarding emergency contraception and did not have immunity under the relevant conscience statute).

¹⁴² Vischer, *supra* note 137, at 61 (students protested Ropes & Gray's representation of Catholic Charities and its attempt to get around a state requirement that adoption agencies not discriminate against same-sex couples).

¹⁴³ *Id.*

¹⁴⁴ See James, *supra* note 89, at 434.

¹⁴⁵ Gilbert, *supra* note 19, at 235 ("[T]here are many areas . . . where the community is too small to support more than one pharmacy. Thus there will be no competition.").

where women seeking emergency contraception may fill their prescriptions.¹⁴⁶ These restrictions on women seeking emergency contraception demonstrate that neither of Vischer's requirements for the smooth functioning of the moral marketplace—adequate information and other available options—are consistently met in the pharmacy setting.

An additional problem with the function of the moral marketplace in the pharmacy setting is an inherent asymmetry in the power held by the two sides of the debate. Women seeking emergency contraception are disadvantaged by their status as customers rather than as professionals who have the power to dispense or deny necessary medications. Dunfee suggests that in the marketplace of morality, consumers may use market actions to resist standards imposed by a professional elite.¹⁴⁷ However, this is far from clear in the pharmacy setting. As professionals, pharmacists have a built-in advantage in that they belong to preformed associations that advocate their interests to their employers. The ethical codes of such associations are important signals of moral standards that businesses should follow or risk negative financial consequences.¹⁴⁸ Facing associations with articulated and accepted stances, women who find themselves in a conscientious position in opposition to established groups must fight an uphill battle to have their opinions reflected in the moral marketplace.¹⁴⁹ Furthermore, these large associations have, for the most part, already implemented their preferred policy choices. Most pharmacies have adopted policies that follow the guidelines promoted by the American Pharmacists Association—guidelines that focus on maintaining pharmacists' ability to conscientiously object.¹⁵⁰

The high barriers to entry into the moral marketplace limit participation not only for women seeking emergency contraception, but also for pharmacists who wish to follow their moral preferences. Like marginalized women seeking emergency contraception who have limited choices, marginalized pharmacists—for example, those from economically depressed regions or marginalized groups—will have fewer choices in the job market. A pharmacist faced with few job options may not have the luxury of allowing her moral preferences to be a determinative factor in her job search. Instead, she may be forced to take a job that does not comport with her moral preferences. She may be forced to dispense emergency contraception when

¹⁴⁶ See Chudoba, *supra* note 19, at 97.

¹⁴⁷ Dunfee, *supra* note 105, at 138.

¹⁴⁸ See Dunfee, *supra* note 109, at 150 (describing how firms look to “authentic norms” to determine marketplace morality). For the most part, the major pharmacies generally follow the leading ethical codes with their emergency contraception and conscientious refusal policies. See *supra* Part I.D.

¹⁴⁹ Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 965 (1997) (“[U]norganized . . . speakers are unable to compete with the wealthy corporations and organized interest groups that have access to sophisticated public relations tools and communications technologies.”).

¹⁵⁰ See Mellick, *supra* note 86, at 413; see also Current APhA Policies, *supra* note 82.

she would prefer not to do so, or she may not be allowed to provide her customers with a drug that she thinks is important for their medical care.

These high barriers to participation in the moral marketplace do not act equally on all parties. Those who have less social and economic power are much more likely to be excluded from the moral marketplace. Since pharmacies' reactions to customers' and employees' moral desires are ultimately driven by their financial concerns, pharmacies will have a greater incentive to conform to the moral desires of populations that have the resources to express them. Customers who cannot choose between meaningfully different pharmacies will be barred from participation in the moral marketplace.¹⁵¹

This differential access to the moral marketplace limits the extent to which moral debate can lead to incorporation of minority perspectives.¹⁵² Since the empowered groups that have access to the moral marketplace may not have the same moral stances as those who are excluded from the moral marketplace, the marketplace will not provide space for a true plurality of viewpoints—only the perspectives of the privileged few. Because of the high barriers to participation in the moral marketplace, it is not an open debate in which multiple viewpoints can find space to operate; instead, it is simply a forum for “fine-tuning among established groups.”¹⁵³ This warped outcome undercuts the utility of the free marketplace and suggests that legislation is a better solution.¹⁵⁴

C. Locating Moral Agency

A statutory solution is necessary because the unregulated moral marketplace will not create space for a plurality of viewpoints. Some might argue that if a limited range of viewpoints are to be represented, the range

¹⁵¹ Cf. R. Randall Rainey, S.J. & William Rehg, S.J., *The Marketplace of Ideas, The Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923, 1958 (1996) (“Wealth disparities among citizens . . . skew public discussion in favor of the interests of those who possess power and wealth in an open society.”).

¹⁵² See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 90 (“Other than assuring dominance of national perspectives, the marketplace encourages only fine-tuning among established groups.”). Brietzke agrees, arguing that “the rich rarely surrender even marginal advantages at a price the poor can afford, while the poor frequently surrender important interests for a pittance.” Brietzke, *supra* note 149, at 964. Ingber further argues that the marketplace is a self-sustaining animal that is difficult to change because ideas that support the structure of the market itself are the most likely to be accepted. Ingber, *supra*, at 17.

¹⁵³ Ingber, *supra* note 152, at 90.

¹⁵⁴ It may be argued that this section does not paint a realistic picture—that in the real world, there is no clear line between those who have access to multiple pharmacies with a plurality of conscience-related policies, and those who do not. Rather, there is a range of levels of market power. This argument does not change the fact that any debate that does occur in the moral marketplace is warped by the systematic exclusion of some would-be participants. Those who have cars, those who have time to go to multiple pharmacies, and those who can move to a different region of the country will always have more power over the marketplace of ideas than those who do not.

should be selected by the market, rather than by legislative coercion. This argument fails because the policies that result from an unregulated moral marketplace are less desirable than those that result from well-considered regulation.¹⁵⁵ Free-market uniformity locates moral agency in the wrong place. It protects the moral agency of corporate pharmacies, but sacrifices the moral integrity of individual pharmacists and individual customers. Pharmacies may not focus on the moral aspects of their policies, but the individuals affected by those policies do. In a world in which pharmacies are free to choose any policy, but consumers and employees have no guarantee of conscientious freedom, the pharmacies are absolutely free from coercion, but the individuals who shop and work at those pharmacies may be denied meaningful moral choice. While pharmacists can apply to work at any pharmacy, and customers can patronize any pharmacy, all of their choices are likely to offer identical, or nearly identical, policies on emergency contraception. The vibrancy of the moral marketplace depends on individuals choosing between different moral options; this is not possible if all pharmacies are essentially the same. The free marketplace favors the economic decisions¹⁵⁶ of companies over the moral agency of individuals—and these companies are likely to take the moral aspects of their policies as at best a secondary value.¹⁵⁷

This flaw in the moral marketplace stems from Vischer's most marked departure from Dunfee's marketplace of morality. For Dunfee, important moral choice begins with the individual.¹⁵⁸ A company that does not respond to that market force will—and according to Dunfee, should—suffer economic consequences.¹⁵⁹ Vischer, however, proposes the moral marketplace in order to protect businesses from becoming “morally fungible via state edict.”¹⁶⁰ Rather than focusing on businesses reacting to their constituents, as Dunfee does, Vischer sees a two-way street—individual pharmacists and customers react to the policy choices that pharmacies make, while pharmacies react to the moral desires of their customers and pharmacists.¹⁶¹ This would be a fine way of preserving the moral agency of businesses, their employees, and their customers if pharmacies were the powerful moral

¹⁵⁵ See *infra* Part IV.A.

¹⁵⁶ This is not to say that companies should not make economically based decisions. Of course they should. However, individual moral interests need not be sacrificed to such economic decisions. Nor are statutory interventions that protect the moral agency of individual customers and pharmacists likely to harm the economic interests of pharmacies.

¹⁵⁷ See *supra* Part III.A.

¹⁵⁸ See Dunfee, *supra* note 105, at 128 (“A foundational assumption supporting the concept of a [marketplace of morality] is that all competent human beings are sovereign in their personal right to make judgments and commitments concerning their own interests.”).

¹⁵⁹ See Dunfee, *supra* note 109, at 147.

¹⁶⁰ Vischer, *supra* note 8, at 86.

¹⁶¹ *Id.* (“Individual consciences can thrive through overlapping webs of morality-driven associations and allegiances, even while diametrically opposed consciences thrive simultaneously.”).

agents that Vischer envisions. Unfortunately, because most pharmacies adopt very similar policies, individual moral choices that rely on corporate entities are really not choices at all. Protecting the moral agency of pharmacies—which they themselves subordinate to economic concerns—results in limited moral choices for individuals who, unlike pharmacies, value their moral agency.¹⁶² While pharmacies do, to a limited degree, respond to their constituents' moral preferences, they respond only to the broadest points of consensus. Thus the moral marketplace preserves some individual moral autonomy, but only for customers and pharmacists in the majority. Minority viewpoints are left without any space in which to function.

IV. REHABILITATING THE MORAL MARKETPLACE WITH LIMITED STATUTORY INTERVENTION

Statutory intervention is necessary and appropriate to solve the problems inherent in the moral marketplace. In establishing such intervention, it is unnecessary to jettison the idea of the moral marketplace. It has a noble goal: To allow the development of a diverse range of pharmacy policies in which people with opposing consciences may find a pharmacy that they can conscientiously support. This marketplace would allow individuals to be moral agents who shape their moral worlds by carefully choosing the pharmacies with which they associate. The free market will not meet this goal, but limited statutory intervention can at least ensure that individual pharmacists and pharmacy customers—rather than the pharmacies themselves—have meaningful moral agency.

It is important that legislative intervention do what the unregulated marketplace cannot. It must ensure that women have access to emergency contraception while allowing individual pharmacists to avoid dispensing medications to which they morally or religiously object. Accommodating both perspectives is possible through statutory intervention.

A. Legislative Solutions Are Appropriate

Legislative solutions are the appropriate method by which to ensure space for expression of differing moral preferences. Such solutions are more likely to preserve space for dissenting opinions than if the problem were left to the mechanisms of the moral marketplace. In the statutory context, those with dissenting opinions are more likely to exercise their voting power as the status quo shifts further away from their preferred state. Sonne recognizes this dynamic as a drawback to the legislative process, ar-

¹⁶² Additionally, this choice imposes particularly high transaction costs on pharmacists and customers who wish to exercise their market function. Pharmacists must change jobs in order to exercise their preferences in the moral marketplace. Women seeking emergency contraception must find out individual pharmacies' policies and choose the one with which they identify—all within Plan B's seventy-two-hour effectiveness period.

guing that it will inevitably lead to unnecessary balkanization.¹⁶³ But, insofar as dissatisfaction with the statutory status quo encourages strong dissenting voices, this is a good thing. In the marketplace, the dissatisfaction of a minority opinion, no matter how strongly expressed, will not lead to those who are systematically disadvantaged being heard. Such groups will have a chance to be included in compromise measures through representative government.

Legislative solutions are also appropriate because statutory intervention is democratic in nature, while the unregulated moral marketplace is undemocratic. Absent regulation, a small number of pharmacy executives determine the policy that thousands of pharmacists must follow if they wish not to risk losing their jobs.¹⁶⁴ Because these executives are likely to follow broad moral pluralities and economic concerns, these decisions are likely to marginalize moral minorities.¹⁶⁵ By allowing pharmacy executives who do not place primary value on moral positions to create a uniform set of policies, the moral marketplace effectively eliminates individual pharmacists' and consumers' abilities to act as moral agents. Since the unregulated moral marketplace locates primary moral agency in the pharmacy, these executives determine the entire set of moral choices that individual pharmacists and pharmacy customers face. So far, the set of choices that this group has created is a narrow one.¹⁶⁶

This small group of elite executives imposing moral choices is certainly no less odious than the elected legislature doing so. Both groups may react to market forces in some sense, but only legislators have any real accountability. For pharmacy executives, it is likely that when economic concerns conflict with moral ones, finances will win out. Statutes, at least, have some collective input and are thus a better mechanism to impose standards than company policies.¹⁶⁷

Statutory regulation is also appropriate because clear rules decrease the cost of participating in the moral marketplace. Statutory regulation is clear in a way that pharmacy policies are not. In an unregulated marketplace, an unexpected pharmacist refusal could undermine the doctor-patient relation-

¹⁶³ Sonne, *supra* note 124, at 291.

¹⁶⁴ See *supra* Part I.D.

¹⁶⁵ See *supra* Part III.A.

¹⁶⁶ See *supra* Part III.A.

¹⁶⁷ Jason Horst argues that judges, rather than the legislature or the marketplace, should address fundamental moral concerns. Judges, Horst argues, unlike other decisionmakers, avoid sacrificing the common good to majority power. Jason M. Horst, *The Meaning of "Life": The Morning-After Pill, the Question of When Life Begins, and Judicial Review*, 16 TEX. J. WOMEN & L. 205, 207–08 (2007). He believes that judges are in the best position to impose moral standards because they may interpret unwritten supermajoritarian principles. *Id.* at 207–08. However, in our constitutional system, moral issues are the last place that unelected judges should be amending the Constitution by divining concrete rules from envisioned consensus. Any such consensus imagined by judges will represent at best personal ideological biases, at worst the position of those empowered groups who have the greatest access to the judiciary, not supermajoritarian consensus.

ship and jeopardize Americans' ability to receive quality medical care.¹⁶⁸ Clear rules as to when customers will have access to emergency contraception and when pharmacists may object will reduce this uncertainty.

Additionally, clear rules governing pharmacies will allow local governments and associations to work towards their own moral goals. For example, if a law is passed that allows pharmacists some ability to conscientiously object, a group that favors access to contraception can provide information to consumers regarding how and where they may reliably get emergency contraception, or take affirmative steps to make it available. In an opaque, unregulated patchwork marketplace, it is much more difficult for actors to achieve their desired results, whether they seek to aid objecting pharmacists or those seeking emergency contraception.

Statutory regulation of pharmacies is also in line with the states' traditional role of making requirements of businesses in order to meet public needs. For example, at common law, inns were required to accommodate all customers.¹⁶⁹ This rule puts a burden on innkeepers to behave in a particular fashion in order to promote the public good of citizens being able to travel between locations and rely on accommodations.¹⁷⁰ States have frequently codified and expanded this common law duty. For example, many states—as well as the federal government—have enacted laws specifically extending innkeepers' common law duty to prohibit them from rejecting customers based upon their race.¹⁷¹ These laws may at times have imposed a duty on innkeepers with which they had qualms, yet they are an accepted method of protecting interstate travel. Similarly, statutes regulating pharmacies are appropriate to protect the public's need to have access to pharmaceuticals, and pharmacists' need to have some latitude in abstaining from the provision of drugs with which they conscientiously object.

Sonne argues that any legislation touching on this type of issue is inappropriate, urging instead that determination of sensitive moral issues should take place privately between employers and employees.¹⁷² Private companies, he argues, will never have the authority over their employees and customers that the state has over its citizens, and thus moral regulation by business is less dangerous than moral regulation by the state.¹⁷³ This claim is dubious in the pharmacy setting for two reasons. First, it overlooks the

¹⁶⁸ See Kelsey C. Brodsho, Comment, *Patient Expectations and Access to Prescription Medication Are Threatened by Pharmacist Conscience Clauses*, 7 MINN. J.L. SCI. & TECH. 327, 334–36 (2005).

¹⁶⁹ See generally Paul Hartmann, *Racial and Religious Discrimination by Innkeepers in U.S.A.*, 12 MOD. L. REV. 449, 449 (1949).

¹⁷⁰ See *id.*

¹⁷¹ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (“32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule . . .”).

¹⁷² Sonne, *supra* note 124, at 287 (“[Legal solutions] unduly burden the relationship between employers and employees by converting what should only be a moral problem into a legal one.”).

¹⁷³ *Id.* at 285–86.

massive size of corporate pharmacy chains and the ever growing influence that private companies have over individuals' lives, particularly over the information to which citizens are exposed. The pervasiveness of these large companies may limit the number of other companies to which individuals may turn. A lack of alternatives eliminates individuals' power to negotiate their moral positions with these companies. For example, if all pharmacies to which a customer can drive are operated by the same pharmacy chain, she will not have any ability to exercise a moral choice between pharmacies.¹⁷⁴ Second, Sonne ignores the fact that if the moral marketplace is statutorily regulated, individuals operating in it are guaranteed at least some direct influence over the structure of the marketplace through their voting power. But if it goes unregulated, individuals, especially those who are socially and economically marginalized, will have no direct influence over the fora created within the moral marketplace. Pharmacies offer very limited choices in which individuals may exercise their moral agency.¹⁷⁵

Sonne also argues that use of the legislative process to decide moral issues will "balkanize both sides in a manner that is good neither for [employers and their employees] nor the communities they serve."¹⁷⁶ This possibility is well taken, and it is the reason that statutory intervention should be aimed at structuring the moral marketplace for pharmacies and ensuring that all viewpoints may find space to be heard within it. Not all possible legislative responses are positive or appropriate. Legislative intervention should not attempt to resolve the difficult moral issues at hand. Rather, it should ensure that there is space for individuals on both sides of the debate to exercise their consciences.

B. Statutory Suggestions

There are two reasonable ways in which statutory intervention could address the problems with the moral marketplace. First, it could maintain the idea of the free moral marketplace but undertake to regulate it in order to reduce the informational asymmetry and barriers to entry identified in Part III.B. Second, it could seek to completely eliminate moral agency at the pharmacy level in order to impose free moral choice for individuals.

The first possible type of statutory solution seeks to improve the function of the moral marketplace. Commentators have suggested statutes that could accomplish this in different ways. Some would increase the availability of information in the moral marketplace in order to allow informed market actions by pharmacists looking for jobs and customers looking to fill their prescriptions. For example, refusals to dispense emergency contraception could be made transparent through a public notice requirement.¹⁷⁷ This

¹⁷⁴ See *supra* Part III.B.

¹⁷⁵ See *supra* Part IIIA.

¹⁷⁶ Sonne, *supra* note 124, at 291.

¹⁷⁷ Gilbert, *supra* note 19, at 236.

legal requirement would allow customers to know whether pharmacies carry emergency contraception and choose between them based on individual moral preference.¹⁷⁸

Individual jurisdictions could also help to ensure a plurality of moral options by providing information services such as a telephone hotline that would direct customers to pharmacies that meet their needs.¹⁷⁹ With such services, if there were *any* pharmacies maintaining minority moral viewpoints, the customers and pharmacists in line with those viewpoints could find them. States could also combat the uniformity of the moral marketplace by providing funding for moral needs that the marketplace alone does not meet or by meeting those needs directly.¹⁸⁰ For example, a county in which no pharmacy chooses to carry emergency contraception could provide funding for existing public health clinics to provide it. While these solutions would allow pharmacists and customers to operate more freely within whatever marketplace does exist, they do not reach the broader problem with the moral marketplace: In practice, pharmacies will become morally fungible, and individuals will have no meaningful choices among them.

If individuals rather than pharmacies are to have moral agency, states must enact legislation that ensures that pharmacists who wish to do so may abstain from dispensing emergency contraception and women who wish to do so may obtain it. This can only be accomplished through collectively determined compromises that limit the policies that pharmacies may adopt. Though it was accomplished by administrative regulation, rather than statute, the compromise settled upon in Illinois achieves this goal. It requires all pharmacies to provide emergency contraception, but it provides a mechanism whereby any pharmacist may abstain from contributing to the use of a drug to which they are conscientiously opposed. There are other possible solutions. For example, a jurisdiction could remove emergency contraception from pharmacies altogether and establish an alternate distribution method through, for example, a 1-800 number or through doctors' offices.¹⁸¹

Any proposed statutory solution must be specific. Vague suggestions are unhelpful. Cicconi suggests that pharmacists should be able to conscientiously refuse at will, as long as their refusal does not infringe upon oth-

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Vischer accepts that the moral marketplace may fail to meet all needs and may require some state assistance. See Vischer, *supra* note 8, at 87 ("This role as market actor is carefully circumscribed . . ."). He has, however, been criticized for making such state intervention too difficult. See Gilbert, *supra* note 19, at 235 ("[Vischer's] proposal requires documented market failure before state action.").

¹⁸¹ Under this particular method, it might be costly to ensure that consumers know of the alternate distribution method. But since the FDA has approved emergency contraception for over-the-counter status, the legal barriers to enacting such alternate methods of distribution are relatively low. See *supra* note 7 and accompanying text.

ers' rights.¹⁸² This suggestion merely restates the problem and the goal of reaching compromise without suggesting the bounds of such a compromise. Others make more specific suggestions of statutory schemes that could ensure that individuals rather than companies exercise moral agency. Fogel and Rivera would allow pharmacists to refuse to dispense emergency contraception unless there is no reasonable alternative pharmacy at which the customer could fill her prescription.¹⁸³ They would also impose the reasonable requirement that "no health care professional should be exempt from providing complete and accurate medical information, from making appropriate referrals, or from providing urgent care."¹⁸⁴ Teliska similarly would allow pharmacist refusals only when there is an alternative such as another pharmacist, but not when such refusal would require the customer to go to another pharmacy.¹⁸⁵ James more generally seeks to allow refusals at the individual pharmacist level, but would mandate that each pharmacy ensure that customers have access to emergency contraception.¹⁸⁶

Each of these solutions guarantees, to different degrees, pharmacists' ability to refuse to dispense and women's ability to access emergency contraception. Where on the continuum of possibilities a specific compromise falls is less important than whether it seeks to safeguard both women's ability to access emergency contraception and pharmacists' ability to refuse to dispense it. To some degree, each of these compromises does, as Vischer suggests, make "all pharmacies morally fungible via state edict"¹⁸⁷ by imposing uniform requirements across pharmacies. Considering the alternative, this is not such a bad thing. Under a comprehensive statutory compromise, pharmacies face similar requirements on a moral issue, but individual pharmacists and customers have as much room as possible to follow their own consciences. Under an absolute moral marketplace, by contrast, pharmacies may choose their own philosophy, but when they all choose similar policies, pharmacists and customers become morally fungible, choosing between indistinguishable corporate chains.

Many oppose all statutory intervention with the moral marketplace, arguing that legislation is as all-encompassing and undesirable as unfettered market action. While laws that unilaterally favor one side of the debate over the other are undesirable, they are somewhat exaggerated by critics of legislative solutions.¹⁸⁸ Legislatures can and do enact moderate legislative compromises, like the statutory solutions proposed here. There are areas of

¹⁸² Cicconi, *supra* note 63, at 748–49.

¹⁸³ Fogel & Rivera, *supra* note 19, at 729.

¹⁸⁴ *Id.*

¹⁸⁵ Teliska, *supra* note 51, at 247.

¹⁸⁶ James, *supra* note 89, at 435.

¹⁸⁷ Vischer, *supra* note 8, at 86.

¹⁸⁸ *See, e.g.,* Sonne, *supra* note 124, at 286 ("To this point, those engaged in the conscience clause debate have, for the most part, waged a winner-take-all battle, often pitting one side's conscience claims against the other's.").

agreement at which such compromise may begin. Both sides are likely to agree that the “emergency” aspect of emergency contraception is good and that fewer abortions would be better than more. Starting with such points of agreement will reduce the zero-sum nature of any solution.

CONCLUSION: IS ANYTHING LEFT OF THE MORAL MARKETPLACE?

In his examination of the marketplace of ideas and conscience, William A. Galston sets a goal for the marketplace of ideas: that it should demonstrate a “commitment to moral competition through recruitment and persuasion alone.”¹⁸⁹ Both those seeking to protect women’s access to emergency contraception and pharmacists seeking to protect their ability to refuse to dispense it have failed to meet this goal. Pharmacies have failed to meet this goal by adopting uniform policies that react only to the broadest points of moral consensus, if they react to moral issues at all. Both pharmacists and customers engaged in the debate have failed to meet this goal by insisting on absolutes—either the absolute right to refuse to dispense emergency contraception or the absolute right to receive emergency contraception from any pharmacist at any time.

The idea of the moral marketplace provides a potentially attractive method to relieve this reliance on zero-sum solutions and make space for competing consciences.¹⁹⁰ This vision has noble goals, but it unfortunately falls short of ensuring space in which differing consciences may operate. Statutory interventions are necessary to ensure that individuals may exercise moral agency. These interventions could rehabilitate the moral marketplace by combating its pathologies, or they could impose a compromise that would guarantee that pharmacists wishing to refuse to dispense emergency contraception could do so and that women wishing to access it could do so. Either of these solutions would combat the major problem with the moral marketplace: It locates moral agency in the pharmacy, rather than in the individual.

Fine and McClelland suggest that we should be skeptical about whether the political process can reach compromise, especially where science, religion, and public health meet.¹⁹¹ But we should be equally skeptical of the market’s ability to reach compromise in such an area. Legislative determination is the better of two imperfect solutions. But is anything left of the moral marketplace once it is subject to legislative regulation? Is there any competition of moral ideas once pharmacies are forced to accept compromise positions? It is true that there is little room for competition between *pharmacies*. Instead there is room for *individuals* to make up their own minds, to speak, and to attempt to persuade each other that their views

¹⁸⁹ Galston, *supra* note 113, at 151.

¹⁹⁰ See Vischer, *supra* note 8.

¹⁹¹ See Michelle Fine & Sara I. McClelland, *The Politics of Teen Women’s Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L.J. 993, 995 (2007).

are correct. They may do this through persuasion, not through the coercion of a policy that says “you must fill this prescription,” or “you may not get that pill here.”

