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Objection or Obstacle: Applying Sen's Capability Approach to the Conscientious Refusal of Emergency Contraception

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Abstract

'Conscientious refusal' refers to a kind of justification for refusing to act or not act based on the religious and/or moral convictions of an agent, reasoning which is often protected by law. Conscientious refusal by pharmacists and pharmacy clerks to the sale of emergency contraception is legal in at least fourteen U.S. states. While the ethical dimensions of these objections have been explored within moral and feminist philosophy, conscientious refusal to the over-the-counter sale of emergency contraception has not been significantly studied through an egalitarian lens in political philosophy, especially with attention to existing inequalities in reproductive healthcare. This paper argues that conscientious refusal to the sale of emergency contraception ought to be prohibited in the U.S. due to how these refusals create a burdensome inequality that manifests within a background of historical injustices. This paper utilizes Amartya Sen's capability theory of equality to conclude that reproductive inequalities should be avoided because they pose barriers for the free and equal pursuit of bodily autonomy.

Introduction: Plan B and the Policy Landscape

Since its emergence in 2006, the emergency contraception pill (ECP) sold in the U.S., Levonorgestrel (the 'morning-after-pill' or Plan B), has been objected to on religious and moral grounds by medical providers. Recently, the right to object to providing emergency contraception has extended to pharmacists and pharmacy clerks as more and more states pass laws allowing for conscientious refusal in healthcare venues beyond clinical settings.[1] Conscientious refusal refers to any religious and ethical objections raised by pharmacists on the wrongness of participating in acts that interfere with the creation of human life (in this case, the termination of a future pregnancy, since Plan B does not interrupt pregnancies, but prevents their establishment in the first place). As of 2012, 28% of states legally protect conscientious refusal in pharmaceutical settings. In contrast to other countries where emergency contraception is provided on a prescription-only basis, Plan B is provided over-the-counter in the U.S. for individuals over 17.[2] However, transactions can be interrupted by a store employee because of this age restriction, which ensures that prospective Plan B customers must interact with a pharmacist or cashier to verify their age. For individuals under the age of 17, a prescription is needed to obtain Plan B.[3] In both contexts, state policies that permit conscientious refusal respect the personal convictions of pharmacists and clerks yet inevitably hinder the ability to obtain a medication with lifelong implications for others.

[1] J. Paul Kelleher, "Emergency contraception and conscientious objection." *Journal of Applied Philosophy* 7, no. 3(2010): 292.

[2] Kit Devine, "The underutilization of emergency contraception." *American Journal of Nursing* 112, no. 4 (2012): 47.

[3] *Ibid.*

While the topic of conscientious refusal to emergency contraception has been explored within moral and feminist philosophy already, it has not been significantly studied through a contemporary egalitarian lens. It is thus worthwhile to ask: how does a commitment to equality help shed light, if at all, on the contentious issue of weighing reproductive and religious freedoms? I claim that providers' denial of emergency contraception occurs within a background of existing inequalities that are exacerbated by these policies and require further consideration in the current debate. To help address these inequalities, I argue that pharmacists and store clerks ought to be prohibited from the right to conscientiously refuse the sale of emergency contraception. Such a prohibition should be passed because these refusals deny all people access to emergency contraceptive measures that foster free and equal pursuit of one aspect of bodily autonomy, a fundamental capability. This paper will build upon existing literature on Amartya Sen's capability approach to equality, with special attention to how promoting equality with respect to the capability of bodily autonomy helps address past reproductive injustices.

Equality's Value, Capabilities, and Bodily Autonomy

Before understanding why we ought to promote equality of bodily autonomy, we must first grasp why a commitment to equality is desirable and appropriate in the first place. While there are numerous reasons outlined in the egalitarian literature for equality's value, one of the central reasons that we ought to promote equality is that equality is inextricably linked to another important political aim, justice. Most famously, John Rawls articulates that equality can help alleviate injustices through the promotion of fair practices, recognition of every human's personhood, and passing of policies that do not unfairly privilege one

group over another.[4] All of these considerations are not only tenets of a robustly egalitarian theory, but these practices also help cultivate political justice in a democratic society.[5] As a result, we ought to be committed to equality because egalitarianism can foster justice, including in the sphere of reproductive health.

One theory of equality that concerns itself with tackling broad-scale injustices and promoting freedom is Amartya Sen's *capability approach*. Unlike other egalitarian theories that seek to make equal "starting points" (such as resources) or "ending points" (such as welfare), Sen's capability approach conceptualizes the relevant metric to make equal between individuals as what people are "able to do and be" across an entire lifetime.[6] These "beings and doings," or capabilities, include countless different states and functions, such as feeling safe from harm, enjoying adequate social support, and deciding if/when to have children. The issue of bodily autonomy constitutes a good candidate for analysis through a capability framework since reproductive decisions continually occur throughout life. In addition, while all people should have the opportunity to exercise bodily autonomy and agency, a subset of people exists who both possess the particular kinds of sex organs that allow for the carrying of children and who also face routine marginalization.[7] Centrally, one strength of the capability approach to equality is its ability to address structural

[4] John Rawls, *A theory of justice* (Cambridge, MA: Harvard University Press, 2009), 130-131.
[5] Other important reasons for equality's value include how equality promotes respect (both self-respect and 'recognition respect' from others) and prevents domination and oppression, noted in Jeremy Moss, *Reassessing egalitarianism* (London, UK: Palgrave Macmillan, 2014), 23.
[6] Jeremy Moss, *Reassessing egalitarianism* (London, UK: Palgrave Macmillan, 2014), 66.
[7] This group includes both cisgender women who are capable of giving birth and all other people who can give birth that also experience sex and gender-based oppression, including transgender individuals who may face even more discrimination in their reproductive decisions.

kinds of oppression that may only affect certain groups.

To illustrate that a capabilities theory of equality can address structural forms of oppression, Sen highlights that his approach can examine whether politically relevant inequalities occur when a disparity exists in any given instance. Sen asks us to consider the fundamental capability of nourishment, a state that can arise from a variety of circumstances. Importantly, he illustrates that deficits in nourishment may not always stem from injustices that demand egalitarian attention. Take the example of a wealthy person who fasts for religious reasons, Person 1, and a person suffering from hunger due to famine, Person 2, who are both unequal in comparison to others in their nourishment status at the same time.[8] Sen's capability approach can point out that the context of both of these individuals is key in determining any relevant wrongdoings. For Sen, the freedom to achieve capabilities should be made equal rather than the capabilities themselves.[9] In the case of the wealthy, fasting person, Sen's capabilities approach can determine that a politically salient inequality has not arisen since Person A exercised their free choice to fast. However, Person B has not enjoyed the capability of nourishment due to a *lack* of freedom. In other words, the malnourished person in a famine does not choose to be hungry as an expression of their agency but goes hungry against their will from a deficit in access to food.

The above example regarding nourishment can be linked to the example of Plan B access to understand why the conscientious refusal to ECPs should be troublesome for capability theorists. Consider two people who are both capable of becoming pregnant, do not utilize any forms of birth control (thus equal in their

[8] Jeremy Moss, *Reassessing egalitarianism* (London, UK: Palgrave Macmillan, 2014), 66.

[9] *Ibid*, 67.

risk of pregnancy), and do not acquire Plan B within the effective period after sex. Saliently, one person does not acquire Plan B because they make the autonomous choice to not forego a potential pregnancy if one eventually develops, while the other person does not acquire Plan B because the pharmacy employee she encounters in her small town declines the transaction on conscientious grounds. In this case, too, Sen allows us to grasp that the latter person's outcome did not result from her freedom to achieve the capability of autonomous reproductive decision-making. Rather, she did not obtain an ECP due to a lack of a lack of freedom in her choice. Both the famine and ECP examples illuminate how Sen's capability approach provides us with the tools to analyze particular instances of inequality and investigate whether agents have had the free and equal ability to pursue the relevant capability. If all agents have not had the equal ability to pursue the relevant capability, then we are justified in our claim that an injustice has occurred, such as in the case of conscientious refusal.

Historical Inequalities and Emergency Contraception

While individual instances of conscientious refusal cause women and others to be unequal with respect to emergency contraception access, larger systems of structural inequality also perpetuate broad-scale inequalities in the pursuit of bodily autonomy. Historical injustices in reproductive healthcare access are relevant to my thesis since conscientious refusal to emergency contraception, importantly, always occurs in the broader U.S. social and political context. Due to interlocking forces of racism and misogyny, women of color, especially in rural areas, have faced particular barriers in achieving reproductive equality in the U.S.[10] Today,

[10] For example, dozens of Black women in the 1980s were sterilized by doctors without their consent, an extreme example of the stripping of bodily autonomy from women of color, described

unequal racial, ethnic, and class disparities remain in pregnancy and birth outcomes. For example, Black, Indigenous, and Alaska Native individuals are up to three times more likely to die from pregnancy-related complications than white individuals, an inequality that increases with maternal age.[11] Black and Latinx individuals are also more likely to report pregnancies being unplanned.[12] These examples reflect merely a few unjust reproductive health disparities that exist between groups in the U.S. I argue that these kinds of disparities only further inhibit women from the ability to make free and equal reproductive health decisions. Conscientious refusal also poses a particular problem for women and others in rural, or even just abundantly conservative areas, due to their lack of alternatives. While it may still be feasible for an individual to purchase an ECP from a different provider (it is mandatory that pharmacists who conscientiously refuse refer customers to another store), the availability of other readily-accessible options does not exist for all populations.[13] The unequal distribution of healthcare resources in the U.S., particularly in rural areas, suggest that the different state statutes regarding conscientious refusal are all the more problematic for those wishing to prevent pregnancy[14]. Arguing that someone faces a mere inconvenience when denied an ECP by a pharmacist who conscientiously refuses assumes that

in Loretta Ross, "African-American women and abortion: a neglected history." *Journal of Health Care for the Poor and Underserved* 3, no. 2 (1992): 192.

[11] Centers for Disease Control and Prevention. "CDC Newsroom Release: Racial and ethnic disparities continue in pregnancy-related deaths." Centers for Disease Control and Prevention, 2019.

[12] Dehlendorf, Christine, Maria Isabel Rodriguez, Kira Levy, Sonya Borrero, and Jody Steinauer. "Disparities in family planning." *American Journal of Obstetrics and Gynecology* 202, no. 3 (2010): 214-220.

[13] McLeod, Carolyn. "Harm or mere inconvenience? Denying women emergency contraception." *Hypatia* 25, no. 1 (2010): 11-30.

[14] Douthit, N., Sakal Kiv, Tzvi Dwolatzky, and Seema Biswas. "Exposing some important barriers to health care access in the rural USA." *Public Health* 129, no. 6 (2015): 611-620.

someone has access to other stores and pharmacies, a luxury that not all have. For example, in areas where contraception is not typically accepted, individuals may have to travel (if they can at all) very far to find a store or pharmacist who will grant them an ECP. In contrast, some individuals may be readily able to obtain an ECP in their area. A pharmacist who objects to the sale of Plan B on conscientious grounds may only pose an inconvenience for people who have an abundance of healthcare resources and other resources (stable income, transportation, etc.), which underscores that the freedom to pursue one capability is often determined by one's freedom to achieve other capabilities. For example, if an individual does not have the free ability to access reliable transportation, seek regular healthcare, and eat wholesome foods, then that individual's ability to freely access emergency contraception and prevent pregnancy is intuitively also affected. The overlapping and interconnected nature of capabilities shows that a lack of freedom to pursue one can then deny the pursuit of another. In summary, conscientious refusal creates a barrier for individuals seeking the free ability to obtain ECPs, which is only further denied by other structural inequalities such as poverty, homelessness, and lack of access to food.

Because of the disparities noted above, this paper does not advocate for a state-by-state to the issue of conscientious refusal, since such an approach would maintain the status quo and would not promote equality in terms of emergency contraceptive access. The moderate view, or the state-by-state approach, that defends conscientious refusal except in rural areas lacking access has most famously been argued by Fenton and Lomasky (2005). While their rightful concern for pharmacists' ability to exercise religious views is warranted, these authors do not fully consider the background of

existing inequalities that individuals face when seeking emergency contraception; I claim that these barriers can exacerbate the potential harms caused by conscientious refusal. Rather, this paper endorses the view of McLeod (2010) who argues that denying an individual an emergency contraceptive prescription does not constitute a mere "inconvenience," but poses a serious inequality. If one is committed to a capability view of equality, then one should take issue with how conscientious refusal places an undue and unfair burden on individuals seeking to prevent pregnancy who live in areas with a higher prevalence of providers who conscientiously refuse. Put simply, to allow conscientious refusal only further exacerbates the obstacles faced by certain groups when pursuing the capability of reproductive choice, while to disallow conscientious refusal creates steps to empower people in their equal pursuit of bodily autonomy.

Competing Capabilities: Religious Expression and Reproductive Choice

One objection to this paper's thesis is that a competing capability, the pursuit of religious expression, overrides or at the very least complicates all people's free and equal pursuit of bodily autonomy. In other words, if the argument is that people should have free and equal access to ECPs, one could point out that people should also have the free and equal ability to practice religion. How, then, can bodily autonomy take priority over religious expression through the outlawing of conscientious refusal to ECPs? It is the case that the dutiful expression of one's religion often has direct implications for a person's relationships, soul, salvation, and path to a sacred afterlife. For many, the capability of religious expression could potentially be even more important than bodily autonomy. This objection is critical for our discussion since Sen leaves the question open of which

capabilities a government should ensure for its citizens.[15] Therefore, it appears possible for an egalitarian committed to the capability approach to argue that the state of being free from religious and moral distress ought to take precedence over reproductive distress.

While this position is persuasive, I will underscore that this objection does not pose an serious issue for this paper's proposal[16]. First, understanding equal access to emergency contraception as part of the broader capability of achieving adequate sexual and reproductive healthcare strengthens its significance in our weighing of capabilities. While all individuals will inevitably value different capabilities, a democratic government must ensure some basic liberties that all others flow from. One of these capabilities includes bodily autonomy and the basic ability to plan when and on what terms to procreate, if at all, especially since having a child hinders access to capabilities later on in life. Sen himself indicates that "life" is the most basic human capability since one cannot fulfill any other functions if one is not alive.[17] This paper argues that Sen's original sentiment also extends to the ability to produce another life; because having a child often entails basic duties of care, one cannot experience capabilities like adequate nutritional intake and educational opportunities without also considering the capabilities of a child and its own nutrition, education, health, and safety. Second, the innumerable physical risks involved with carrying fetuses to term solidifies that bodily autonomy represents a fundamental capability that should not be jeopardized if avoidable. The physical

[15] Jeremy Moss, *Reassessing egalitarianism* (London, UK: Palgrave Macmillan, 2014), 68.
[16] Additionally, Sen notes that, when employing a capability approach to equality, inevitable trade-offs will exist between different capabilities; this paper illuminates one of those trade-offs.
[17] Douglas Hicks, "Gender, discrimination, and capability: Insights from Amartya Sen," *Journal of Religious Ethics* 30, no. 1 (2002): 140.

dangers of pregnancy are especially relevant when we reflect again on who may be most adversely impacted by conscientious refusal policies. While all people capable of becoming pregnant potentially face harm and complications, maternal mortality rates are highest among women of color living in rural and poor communities, areas where access to a high number of stores and pharmacies may be more limited.[18] The physical impacts of pregnancy are also important to acknowledge in light of Sen's recognition that life is the most important capability: if individuals die as a result of childbirth, especially from pregnancies that could have been prevented through the use of an emergency contraceptive, then they inevitably have no way of achieving equality of any other capabilities, including religious expression. It thus seems plausible to reject the claim that religious freedom could just as easily take priority over bodily autonomy in a ranking of capabilities. Rather, bodily autonomy holds special status as directly linking to one's health and ability to experience other fundamental capabilities. Furthermore, while the objection should resonate with egalitarians (who should desire to promote equality of religious expression in our pluralistic society), intuitive limits exist on the extent to which personal ideologies affect others. For example, take a cashier at a grocery store who does not eat pork due to religious reasons. It would be absurd, and more importantly unfair, if they did not scan pork products that customers wished to buy due to their value systems. While this grocery store case is different in many respects, it illuminates the key features of the ECP case: the equal ability to express religious and spiritual beliefs is not limitless. Like all

[18] World Health Organization. "Fact sheet: maternal mortality." WHO, retrieved May 5, 2020.

capabilities, bounds exist on the extent to which individuals can cultivate a capability. In the grocery store case, an inequality emerges when one group of customers can no longer purchase items they would like to buy with the same freedom of choice that others can. Likewise, in the ECP case, individuals seeking emergency contraception are unduly subjected to the religious prohibitions of others and become unequal in their ability to make an autonomous choice.

Finally, one under looked, yet seemingly crucial difference between the freedom to pursue the capabilities of religious expression versus bodily autonomy is the timeframe in which actions can occur. Emergency contraception methods are labeled 'emergency' for a reason; when examining the issue of conscientious refusal to Plan B, policymakers must remember that the opportunity to prevent the formation of a pregnancy lasts only a few days.[19] These short periods, especially in the face of potential compounding barriers such as lack of financial access and stable transportation, should be taken into consideration. Individual expressions of one's religion ought to always be respected, but the extent to which these expressions can hinder the actions of others should not always be permitted since individuals have the opportunity, in general, to express religiosity throughout the courses of their lives. Some women, differently, may have just a day or a few hours to obtain an ECP to mitigate the future challenges associated with an unwanted and/or unintended pregnancy. Bodily autonomy, expressed through seeking and obtaining an emergency contraceptive, ought to take precedence over religious expression when employing a

[19] Kit Devine, "The underutilization of emergency contraception." *American Journal of Nursing* 112, no. 4 (2012): 46.

capability approach to equality. However, it is not the case that reproductive decisions should *always* outweigh the religious convictions of others. I have minimally shown that a capability approach to equality can justify a prohibition against conscientious refusal to emergency contraception when weighing broadscale inequalities in birth outcomes and access to other resources, the limits of religious expression, and pragmatic concerns about time and efficacy.

Conclusion: Increasing Access and the Way Forward

This paper has argued that religious and moral objections to the purchase of emergency contraception ought to be prohibited due to how these conscientious refusals compromise reproductive health. In particular, this paper has highlighted how seeking emergency contraception occurs for many within a background of historical injustices, necessary context for why conscientious refusal policies exacerbate health disparities. These inequalities should be avoided whenever possible because they pose barriers to the free and equal pursuit of bodily autonomy, a fundamental capability. While the scope of this argument focuses on the issue of conscientious refusal policies and their impacts on Plan B access, this paper has made no claims about the multitude of other inequalities that hinder someone's ability to obtain an emergency contraceptive. Put differently, this paper does not claim that prohibiting conscientious refusal will eliminate all barriers to acquiring emergency contraception, as numerous others persist (such as a lack of access to pharmacies, high costs, ID requirements, and age restrictions). This paper highlights how one theory of equality, Sen's capability approach, can justify the prohibition of conscientious refusal to emergency contraception. Ultimately, the capability approach allows us to scrutinize

the creation of obstacles during urgent

health decisions that pose lifelong

implications.

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