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Public Policy Analyst, United States Conference of Catholic Bishops' Secretariat for Pro-Life Activities. The views expressed here are those of the author and not necessarily those of the Conference of its member bishops. I am grateful to Professor Charles E. Rice for his review and comments.

THE ABORTION DEBATE THIRTY YEARS LATER: FROM CHOICE TO COERCION

*Maureen Kramlich**

For more than thirty years, supporters of legalized abortion have publicly advocated for the practice as a matter of "choice."[1] Initially, these advocates argued for a "right to choose" to be free *from* governmental interference in the decision to abort. In 1971, Sarah Weddington, who represented Jane Roe[2] in the case of *Roe v. Wade*,[3] argued before the United States Supreme Court for a "liberty *from* being forced to continue the unwanted pregnancy"[4] She argued before the Court for a negative right, for a restraint on governmental interference in the abortion decision, not for a positive right of access or governmental entitlement to abortion. But today, advocates of legalized abortion argue for governmental facilitation of abortion and are attempting to shift the debate in the

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1. *See, e.g.*, NARAL PRO-CHOICE AMERICA, THE NARAL PRO-CHOICE AMERICA MISSION (2004), *at* http://www.prochoiceamerica.org/about/mission.cfm (last visited Feb. 3, 2004) ("For over thirty years, NARAL Pro-Choice America has been the political arm of the pro-choice movement and a strong advocate of reproductive freedom and choice."); PLANNED PARENTHOOD FEDERATION OF AMERICA, POLICY STATEMENT: ABORTION (1998), *at* www.plannedparenthood.org/about/thisispp/mission.html#06Abortion (last visited Feb. 3, 2004) ("Abortion must always be a matter of personal choice.").

2. A pseudonym for Norma McCorvey. *See 'Jane Roe' Joins Anti-Abortion Group*, N.Y. TIMES, Aug. 11, 1995, at A12. Interestingly, McCorvey has since changed sides in the debate and is now a pro-life activist. *See id.* In fact, she recently filed a motion to overturn the decision in *Roe*. *See* Plaintiff's Rule 60 Motion for Relief from Judgment at 1, McCorvey v. Hill, 2003 WL 21448388 (N.D. Texas 2003) (No. 3:03-CV-1340-N). The motion was denied. *See* Order Denying Rule 60(B) Motion, *McCorvey*. The motions, briefs, and orders in this case are collected on the court's website, http://www.txnd.usc ourts.gov/judges/notable2.html (last visited Feb. 3, 2003).

3. 410 U.S. 113 (1973).

4. A transcript of the Dec. 13, 1971 oral arguments from *Roe v. Wade* has been put online by www.oyez.org, a project associated with Northwestern University. *See* http://www.oyez.org/oyez/resource/case/334/argument/transcript (last visited Feb. 3, 2004) [hereinafter Roe Transcript]. During arguments, Weddington said: "I think that in as far as 'liberty' is meaningful, that liberty to these women would mean liberty *from* being forced to continue the unwanted pregnancy." *Id.* (emphasis added).

public forum from "choice" to "access," a state of affairs that implies "coercion" of those health care providers who disagree.

Academic literature[5] attempting to recast abortion jurisprudence has influenced this public debate. These legal arguments propose reshaping the law's treatment of abortion rights[6] by shifting it from a negative liberty to a positive one, thereby requiring the government to provide access. Governmentally secured access, according to this view,[7] includes forcing unwilling health care providers, both institutional and individual,[8] to participate in abortions.[9]

Pro-life supporters now find themselves seeking to protect in law not only the life of unborn children and the authentic freedom and dignity of women,[10] but also their right to not participate in what they regard as a monumental injustice. In addition to working proactively for legal protection for unborn children, pro-life advocates are also working to defend the legal tradition, now at least

5. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Harriet Pilpel & Dorothy E. Patton, *Abortion Conscience and the Constitution*, 6 COLUM. HUM. RTS. L. REV. 279 (1974).

6. I do not think there is an abortion right at all, but that discussion is beyond the scope of this piece. For especially persuasive critiques of the abortion right granted by the Court in *Roe v. Wade*, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003), and John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

7. *See* Pilpel & Patton, *supra* note 5, at 304-05.

8. In this essay I deal primarily with protecting institutional providers from forced involvement in abortion. For an extensive treatment of individual providers' rights to object, see J. David Bleich, *The Physician as a Conscientious Objector*, 30 FORDHAM URB. L.J. 245, 261-63 (2002).

9. It is clear that abortion proponents have, at the very least, called upon objecting individual providers to make referrals for abortions. *See, e.g.*, Sylvia A. Law, *Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 282 (1994-1995) ("General principles of medical malpractice and medical ethics require responsible physicians to provide the medical information that is relevant to patient choice and to make referrals for medical services that the treating physician is unable or unwilling to provide."); *see also* CATHERINE WEISS ET AL., AMERICAN CIVIL LIBERTIES UNION REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 10 (2002) ("[W]hatever their religious or moral scruples, doctors and other health professionals should give complete and accurate information and make appropriate referrals."), *available at* www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=10946&c=224 (last visited Jan. 26, 2004).

10. *See* POPE JOHN PAUL II, EVANGELIUM VITAE §§ 2, 92 (1995), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html (last visited Feb. 3, 2004). Pope John Paul II refers to "authentic freedom" as the kind of freedom "actualized in the sincere gift of self." *Id.* § 92. In the document he also speaks of a "'new feminism'" that "rejects the temptation of imitating models of 'male domination', in order to acknowledge and affirm the true genius of women in every aspect of the life of society, and overcome all discrimination, violence and exploitation." *Id.* § 99.

three-decades old,[11] of protection of conscience rights—more specifically, of protection from forced involvement in abortion.

An ideology that calls for abortion on demand, at any stage of pregnancy,[12] and, if a woman cannot afford one, paid for by the government,[13] is largely driving the new public debate about whether all health care providers, including Catholic providers, should be forced to participate in abortions.

Another factor fuelling this debate is the very nature of the practice of abortion. Abortions, by and large, are performed in free-standing, specialized clinics located in urban areas. According to the most recent statistics available from the Alan Guttmacher Institute ("AGI"), a research organization affiliated with the Planned Parenthood Federation of America,[14] seventy-one percent of all abortions were provided by abortion-dedicated clinics,[15] and ninety-four percent of all abortion providers are located in urban

11. *See infra* note 118 and accompanying text.

12. *See, e.g.*, Press Release, National Organization for Women, House Ban On Late-Term Abortion Procedure Next Step In Assault Against Legalized Abortion (Nov. 1, 1995), *available at* http://www.now.org/press/11-95/11-01-95.html (last visted March 4, 2004). During oral arguments in *Roe*, in response to a question from Justice White as to whether the right to abortion exists "right up to the time of birth," Weddington answered "The Constitution, as I see it, gives protection to people after birth." *See* Roe Transcript, *supra* note 4.

13. NARAL PRO-CHOICE AMERICA, PUBLIC FUNDING FOR ABORTION 1 (2002), *available at* http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=1 894 (last visited Feb. 3, 2004) ("The freedom to choose is a fundamental freedom, but restrictions on funding make it an unattainable choice for many women."); NAT'L ORGANIZATION FOR WOMEN, 1996 NATIONAL CONFERENCE RESOLUTIONS: REPRODUCTIVE RIGHTS (1996), *at* www.now.org/organization/conference/1996/resoluti.html#rights (last visited Jan. 26, 2004) ("Therefore, be it resolved that NOW reaffirm its original and consistent position, represented by prior National Board motions and previous National Conference resolutions, that a woman's right to have a safe, legal, and accessible abortion is an absolute right *without restriction.*") (emphasis added); NAT'L ORGANIZATION FOR WOMEN, NOW REFRAMING ABORTION RIGHTS BRIEFING ON "BREAKING THE ABORTION DEADLOCK, FROM CHOICE TO CONSENT" (1997), *at* http://www.now.org/issues/abortion/m cdonagh.html (last visited Jan. 26. 2004) ("Especially with regard to poor women's right to abortion, we have seemed to reach an end point in our efforts to have poor women's rights to abortion recognized as a constitutional right, or even through legislation.").

14. *See* THE ALAN GUTTMACHER INSTITUTE, THE HISTORY OF THE ALAN GUTTMACHER INSTITUTE (2004), *at* http://www.agi-usa.org/about/history.html (last visited Jan. 26, 2004) ("The Center was originally constituted as a semiautonomous division of Planned Parenthood Federation of America (PPFA). . . . AGI became an independent, not-for-profit corporation in 1977; it remains a special affiliate of PPFA."). AGI receives about ten percent of its funding from Planned Parenthood. *See* THE ALAN GUTTMACHER INSTITUTE, 2001 ANNUAL REPORT 41 (2002), *available at* http://www.agi-usa.org/about/agi2001ar.pdf (last visited Jan. 26. 2004).

15. *See* Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services*, 35 PERSPS. ON SEXUAL & REPROD. HEALTH 6, 12 tbl. 5 (2003).

areas.[16] Only five percent of abortions were provided by hospitals, and only 603 hospitals provided them.[17] This number represents 11.6 percent of all hospitals nationwide.[18]

The practice of abortion is also increasingly being consolidated into larger facilities. The AGI confirms the trend: "Between 1996 and 2000, the number of providers declined in each size category except the largest (5,000 or more); thus, abortions were increasingly concentrated among a small number of very large providers."[19]

Market pressures account for the practice of abortion by specialized, urban and large case-load providers. To generate a profit margin, abortion clinics have almost exclusively located in urban areas where there is a large population base. *The New York Times*, for example, interviewed abortion providers about the nature of the business and quoted one abortion provider, Dr. William Ramos, as saying, "Abortion clinics are no different from other specialty services. . . . In the entire state of Nevada, there is only one Lexus dealer and only one Acura dealer."[20] The article concludes, "Clinic owners say they have little choice but to cluster in cities—that is the only way they can find enough patients."[21]

Unwilling to venture out into unprofitable rural areas to perform abortions, the abortion lobby is seeking to mandate their availability across the country. The American Civil Liberties Union ("ACLU") has recently developed an argument that effectively calls for the abolition of laws protecting the rights of health care providers who decline involvement in abortion.[22] The ACLU positions the debate as an issue of what kinds of exemptions, if any, the state should make for health care providers who decline participation in abortion (and in other kinds of ethically controverted areas

16. *See id.* at 11.

17. *See id.*

18. The 11.6 percent figure derives from the American Hospital Association's 2002 annual survey of hospitals. *See* Press Release, American Hospital Association, Fast Facts on U.S. Hospitals from Hospital Statistics (Dec. 10, 2003), *available at* www.hospitalconnect.com/aha/resource_center/fastfacts/fast_facts_US_hospitals.html (last visited Feb. 4, 2003). Taking the 5,794 U.S. registered hospitals counted in the survey, subtracting the 605 non-federal psychiatric hospitals and non-federal long term care hospitals counted in the survey, and dividing into that number the 603 hospitals that provide abortions produces 11.6 percent.

19. *See* Finer & Henshaw, *supra* note 15, at 11.

20. *See* Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, N.Y. TIMES, Dec. 30, 2000, at A1.

21. *Id.*

22. *See* WEISS ET AL., *supra* note 9, at 11.

of reproductive health care).[23] Though the ACLU acknowledges there is no constitutional duty to provide abortion, it positions abortion as a standard of care from which an objecting provider must seek an exemption.[24] They then inquire into what circumstances, if any, exemptions (which the ACLU refers to as "refusals") are appropriate.[25] The circumstances under which the ACLU would allow an exemption are quite narrow because the criteria are narrow.[26] The ACLU developed a two-part test that sets out these criteria: first, whether a conscience clause would "impose burdens on people who do not share and should not bear the brunt of the objector's religious beliefs,"[27] and second, whether the conscience clause protects "the religious practices of pervasively sectarian institutions or instead protects institutions operating in the public sphere."[28] As to the second component, the ACLU adds:

> When, however, religiously affiliated organizations move into secular pursuits—such as providing medical care or social services to the public or running a business—they should no longer be insulated from secular laws. In the public world, they should play by public rules. The vast majority of health care institutions—including those with religious affiliations—serve the general public. They employ a diverse workforce. And they depend on government funds.[29]

Under these standards, in fact, no hospital qualifies for conscience protection. The standards exclude any entity engaged in health care, something the ACLU considers a wholly secular project. This is confirmed in the report, which notes, "[a]mong health care institutions, Christian Science sanatoria may exemplify those

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23. *See id.* at 10.

24. *See* WEISS ET AL., *supra* note 9, at 6. Interestingly, the medical profesion has never accepted abortion as a standard of care. In fact, most medical organizations, including the American Medical Association support the right of health care providers to decline involvement in abortion. *See* Maureen Kramlich, *Coercing Conscience: The Effort to Mandate Abortion as a Standard of Care*, 4 NAT'L CATH. BIOETHICS Q. 29 (2004).

25. *See* WEISS ET AL., *supra* note 9, at 10-12.

26. *See id.* at 9 (setting forth a two-part test).

27. *Id.*

28. *Id.*

29. *Id.* at 11. This test incidentally, has recently been approved by the California Supreme Court in a case involving mandated contraceptive coverage in employee health benefit plans. Catholic Charities of California challenged an exemption based on this test because it did not qualify. *See* Catholic Charities of Sacramento v. Super. Ct. of Sacramento County, No. S099822 (Cal. Mar. 1, 2004), *available at* http://www.courtinfo.ca.gov/opinions/documents/S099822.DOC (last visited Mar. 11, 2004).

that should qualify for a religious exemption."[30] The ACLU criteria also exclude any hospital that does not discriminate on the basis of faith in hiring and in patients served.[31] And finally, the ACLU would deny conscience protection to any hospital that received government funding to care for the poor through, for example, the Medicaid program.[32]

An argument similar to the ACLU's was made nearly thirty years earlier.[33] The general counsel for Planned Parenthood at the time, Harriet Pilpel, argued that private hospitals, because they receive government funding, are essentially public hospitals.[34] As "state actors," she said, they ought to provide abortions because any law that protects conscience rights of hospitals to decline involvement in abortion amounts to an unconstitutional governmental restriction of abortion:

> [S]tatutes which purport to allow the receipt or use of government 'largesse' as a basis for the recipients of such funds to restrict constitutionally protected rights of other raises serious constitutional questions. This, of course, is the specific intent of the institutional conscience clauses and the related abortion-restricting provisions: they purport to permit public and private hospitals to refuse to perform abortions (and sterilizations) in direct defiance of the United States Supreme Court rulings prohibiting all but very limited governmental regulation of the abortion procedure in the first and second trimesters of pregnancy.[35]

As a litigation strategy, Pilpel suggested that pro-abortion groups could bring federal civil rights lawsuits under 42 U.S.C. § 1983 to invalidate conscience protections and compel performance of abortions.[36]

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30. WEISS ET AL., *supra* note 9, at 10.

31. *See id.*

32. *See id.* at 11.

33. *See* Pilpel & Patton, *supra* note 5, at 295.

34. *See id.* at 295 (discussing civil rights cases positing that where the state becomes "intertwined" with private activity, the state and hospital become joint venturers).

35. *Id.* at 303.

36. *See* 42 U.S.C. § 1983 (2004). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

One such § 1983 action was brought in 1973 to force a Catholic hospital to perform a sterilization procedure. In *Taylor v. St. Vincent's Hospital*,[37] the plaintiffs argued that St. Vincent's receipt of federal "Hill-Burton" funds,[38] federal money provided for hospital construction, transformed the hospital into a state actor. The court rejected the argument because while the case was pending, Congress eliminated the basis for the suit through enactment of the "Church Amendment."[39] The amendment, named for its sponsor, Senator Frank Church, declares that a hospital's receipt of federal funds in various health programs cannot be a basis for requiring them to participate in abortion and sterilization procedures, if they object because of moral or religious convictions.

But in a number of recent cases, pro-abortion groups have implemented new arguments treating health care providers as public actors and the abortion right as a positive right of access. In these cases, they have employed different legal strategies to impose their view on hospital policies and to intervene in hospital mergers, affiliations and other hospital transactions. The legal tools have included constitutional litigation, charitable trust law, and administrative-regulatory actions.[40]

I. *VALLEY HOSPITAL ASSOCIATION, INC. V. MAT-SU COALITION FOR CHOICE*[41]

After Valley Hospital, a private, non-sectarian hospital in Alaska, elected a new operating board that passed a new abortion

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or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

37. 369 F. Supp. 948 (D. Mon. 1973), *aff'd.*, 523 F. 2d 75 (9th Cir. 1975).

38. 42 U.S.C. §§ 291-291(c).

39. 42 U.S.C. § 300a-7(b) (2) (A).

40. An administrative intervention was used in a case not discussed here. *See* Connecticut Office of Health Care Access Final Decision in Roy Bebe, M.D., Hartford Hospital, John Dempsey Hospital, New Britain General Hospital, Saint Francis Hospital and Medical Center and ASC Network Corporation d/b/a Avon Surgery Center for a Certificate of Need, Docket No. 96-547 (Sep. 29, 1997); *see also* Mergerwatch, *Certificate Of Need Denied to Proposed Outpatient Surgical Center*, *available at* http://www.mergerwatch.o rg/hospitals/avon.html (last visited Nov. 14, 2003).

41. 948 P.2d 963 (Alaska 1997), *aff'd*, Alaska v. Planned Parenthood of Alaska, 35 P.3d 30 (Alaska 2001).

policy for the hospital,[42] the Mat-Su Coalition for Choice, represented by the Alaska ACLU, filed suit. On November 21, 1997, the Alaska Supreme Court ruled in the case and held that the hospital was required to allow elective abortions on its premises. Relying on the Alaska constitution's privacy clause,[43] the court reasoned that Alaska law protects abortion as a fundamental right.[44] According to the court, several factors transform the hospital into a "quasi-public" actor, including: the state's granting of a certificate of need to the hospital; the receipt of federal and state funds for construction and operation of the hospital; and the fact that the hospital's board is drawn from the community.[45] Because of the heightened protection of the abortion right under Alaska law and the fact that the court considered the hospital essentially a public entity, the court held that the hospital had to participate in abortions.[46]

The hospital stated that the board's policy against abortion was based on its moral conscience[47] and was protected by the Alaska conscience law.[48] But the court considered the hospital's policy as inferring with the right to an abortion and held that such a policy could only be promulgated for a compelling reason.[49] The Alaska Supreme Court ultimately struck down the state conscience law as applied to this hospital, holding that there is no compelling state interest in the conscience rights of the hospital.[50]

II. *IN THE MATTER OF THE APPLICATION OF ALLEGHENY HOSPITALS, NEW JERSEY AND ZURBRUGG HEALTH FOUNDATION*[51]

In July 2002, the ACLU of New Jersey, the Religious Coalition for Reproductive Choice, and New Jersey Right to Choose filed a motion to intervene in the purchase of Rancocas Hospital, a bankrupt private hospital, by Our Lady of Lourdes, a Catholic health

42. The hospital allowed abortions when the unborn child had a condition incompatible with life, when the pregnancy was a result of rape or incest, or if pregnancy threatened the mother's life. *See id.* at 965.

43. The privacy clause states that, "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22.

44. *Valley Hosp. Ass'n*, 948 P. 2d at 969.

45. *Id.* at 969-71.

46. *Id.* at 971.

47. *Id.*

48. *See* ALASKA STAT. § 18.16.010(b) (2003).

49. *Valley Hosp. Ass'n*, 948 P.2.d at 971.

50. *Id.*

51. No. Bur-L-3541-98 (N.J. Super. Ct. Civ. Div. Date 2002).

care system.[52] After the purchase, Our Lady of Lourdes planned to discontinue the sterilizations and abortions that Rancocas had been performing. The ACLU attorney argued that the decision to discontinue these procedures amounted to a change in charitable mission,[53] and she sought by court order and state attorney general action to compel the Catholic system[54] to "build a separate facility on the hospital campus to 'provide anticipated discontinued tubal ligation and pregnancy terminations.'"[55]

Interestingly, the lawyer representing Rancocas accepted the basic—though unstated—premise of the ACLU argument that the hospital was required to ensure access to abortion:

> Mr. Kozlov [counsel for Rancocas]: There is not a single instances [sic] presented by counsel of anyone in the community serviced by these hospitals suffering a harm. There is not the slightest suggestion that services are not adequately being provided. There is not the slightest suggestion
>
> The Court: You mean at Rancocas or in the community?
>
> Mr. Kozlov: In the community if your Honor please, in the community.[56]

The judge ultimately rejected the argument set forth by the ACLU that the hospital was a charitable trust,[57] but he too seemed to accept the ACLU's basic argument that access to abortion must be secured. He simply found that, in this case, there was sufficient access to abortion in the community so there was no need to compel Lourdes to help build an abortion clinic:

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52. *See* Transcript of Notion of Motion, In the Matter of Allegheny Hospitals and Zurbrugg Health Foundation, at 7, 13 (Oct. 24, 2002) [hereinafter Transcript, Allegheny Hosps.].

53. *Id.* at 16.

54. *Id.* at 18-24.

55. Press Release, American Civil Liberties Union, ACLU and New Jersey Public Interest Group Contest Hospital Merger that Reduces Access to Family Healthcare (July 8, 2002), *available at* http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=1 0515&c=224 (last visited Feb. 3, 2004).

56. Transcript, Allegheny Hosps., *supra* note 53, at 31.

57. *See id.* at 61. The court held:

> I'm satisfied that the Charitable Trust Doctrine does not apply here since Rancocas itself is not a charitable trust. It was not created by gift or devise. It is a nonprofit hospital, and its mission to provide healthcare and services to the public, all of which will continue notwithstanding the transfer of its operations to Lourdes. And I'm satisfied that its mission is not materially altered.

Id.

> In the absence of any evidence presented by [the ACLU] to the contrary that such services are not available in the community and there is no such evidence presented here, I see no reason to continue this matter and to allow intervention, because I'm satisfied that it would not serve any purpose other than to speculate regarding the need to have such services also available at Rancocas.[58]

III. *NATIONAL ORGANIZATION FOR WOMEN V. CITY OF ST. PETERSBURG, BAYFRONT MEDICAL CENTER, BAYFRONT HOSPITAL*

Bayfront Hospital, which leased land from the city of St. Petersburg at a subsidized rate, joined Baycare Health, a consortium of hospitals that follows the United States Conference of Catholic Bishops' *Ethical and Religious Directives for Catholic Health Care Services*.[59] By joining the consortium, Bayfront estimated that it would save $10 million a year. Prior to joining Baycare, Bayfront had been performing approximately ten abortions a year, all in cases of fetal deformity. At the time it entered the consortium, Bayfront agreed to cease performing abortions.

After an article appeared in *The Tampa Tribune* with the headline, "Baycare Hospitals Curtail Abortions,"[60] the city attorney wrote a memo to the hospital's attorney, alleging that the hospital was restricting access to medical care, violating "constitutional provisions applicable to the use of public lands and funds,"[61] and disobeying a clause in its lease requiring it to "operate the premises without regard to race, color or *creed*."[62] The city eventually sued Bayfront and Baycare. A few months later, the ACLU of Florida, along with several other groups, sued Bayfront and the city.[63] According to the ACLU, the hospital's refusal to perform abortions

58. *Id.* at 59-60

59. *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES pt. 4 (4th ed. 2001), *available at* www.usccb.org/bishops/directives.htm (last visited Feb. 3, 2004). Directive 45 states: "Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted." *Id.*

60. Vickie Chachere, *Baycare Hospitals Curtail Abortions*, TAMPA TRIB., July 29, 1999, at 1.

61. Memorandum from Michael S. Davis to David L. Robbins, Esq. 2-3 (Aug. 11, 1999) (on file with the author and the City of St. Petersburg Office of the City Clerk).

62. *Id.* at 1.

63. *See* Nat'l Org. for Women v. City of St. Petersburg, No. 8:00-cv-1698-T-26C (M.D. Fla. filed Aug. 16, 2000), *available at* www.aclufl.org/legislature_courts/legal_departmen t/briefs_complaints/bayfrontcomplaint.cfm (last visited Mar. 11, 2004).

violated the Establishment Clause,[64] a claim based on the city's subsidization of the hospital property, a fact that turned the hospital into a state actor. Accordingly, adopting a policy against performing abortions amounted to an unconstitutional state establishment of religion. In negotiations with the city, the hospital offered to purchase the land at fair market value—$47 million. The city rejected the offer. Under pressure from the lawsuit and mounting legal fees, Bayfront was forced to leave the consortium.

IV. ABORTION AS A NEGATIVE LIBERTY

In *Roe v. Wade*,[65] the United States Supreme Court created a negative right to abortion, a right of the individual seeking abortion to be from governmental interference.[66] This remains true even after *Roe* was modified by *Planned Parenthood v. Casey*,[67] which allows the government to interfere with abortion access before viability so long as the interference does not create an undue burden[68].

The Supreme Court announced the contours of the abortion right as a matter of constitutionally permissible government restrictions on abortion. The *Roe* Court held impermissible any state oversight or regulation of abortion during the first trimester, the time period during which, the Court said, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[69] During the second trimester, the Court allowed state regulation, but not prohibitions of, abortion for the purpose of advancing women's health; after viability, the Court allowed the state to regulate and seemingly to proscribe abortion for the purpose of protecting the unborn child.[70]

64. *See* U.S. CONST. amend. I.

65. 410 U.S. 113 (1973).

66. *See id.* at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.").

67. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

68. *See id.* at 876-79.

69. *See Roe*, 410 U.S. at 164.

70. *See id.* at 164-65 ("[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."). But in *Roe's* companion decision, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court rendered any potential ban meaningless. In *Doe*, the Court slipped in an expansive definition of "health" that gutted any potential post-viability ban under *Roe*. Health includes "all factors—physical, emotional, psychological, familial,

The Court expressed the right as a right to be "left" alone,[71] a right to be free *from* governmental interference in the abortion decision (except during the second trimester if the state chooses to interfere to protect women's health, and after viability if the state chooses to interfere to protect the unborn child).

The Court located this right in the Due Process Clause of the Fourteenth Amendment, in the amendment's "concept of personal liberty."[72] The Court cited one case for this concept, *Meyer v. Nebraska*,[73] which involved a German teacher's challenge to a Nebraska law prohibiting teaching foreign languages in the schools.[74] The *Meyer* Court, in dicta, developed a broad statement of liberty that it believed to be covered by the Fourteenth Amendment.[75] Interestingly, the *Meyer* Court struck down the statute not because it implicated a fundamental right of privacy for which the state must demonstrate a compelling interest, but on lesser grounds requiring merely a showing of rational basis. As the Court wrote: "We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."[76]

Nonetheless, the *Meyer* Court, at most, created a right to be free from criminal penalty in the teaching of German. The Court created a negative right. It made no mention of the parents' right to German textbooks, nor of the teachers' right to students to whom they could teach German.

The *Roe* Court also cited a number of other cases which it said, "recognized that a right of personal privacy, or a guarantee of cer-

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and the woman's age—relevant to the well-being of the patient." *See Doe*, 410 U.S. at 192.

71. *See supra* note 66 and accompanying text.

72. *Roe*, 410 U.S. at 153.

73. 262 U.S. 390 (1923).

74. The law excepted the teaching of Latin, Greek, and Hebrew. *See id.* at 401.

75. The statement holds:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399.

76. *Id.* at 403.

tain areas or zones of privacy, does exist under the Constitution."[77] It cited *Union Pacific R.R. Co. v. Botsford*,[78] *Stanley v. Georgia*,[79] *Terry v. Ohio*,[80] *Katz v. United States*,[81] *Boyd v. United States*,[82] *Olmstead v. United States*,[83] and *Griswold v. Connecticut*.[84] All of these cases described the privacy right as a right to be free from government interference. In *Katz*, the Court clearly described the privacy right as a "right to be let alone"[85]

The Court also found specific applications of the privacy interest in marriage, procreation, contraception, child rearing, and the education of children,[86] citing *Loving v. Virginia*,[87] *Skinner v. Oklahoma*,[88] *Eisenstadt v. Baird*,[89] *Prince v. Massachusetts*,[90] and,

77. *Roe*, 410 U.S. at 152.

78. 141 U.S. 250 (1891) (holding that in a civil action the court may not order a surgical examination of a plaintiff without her consent). Interestingly, in this case, the Court notes a common law exception to the general ban on forced bodily exams, known as "the writ *de ventre inspiciendo*," that allows authorities "to ascertain whether a woman convicted of a capital crime was quick with child," as a precaution against the taking of the life of the unborn child. *See id.* at 253.

79. 394 U.S. 557 (1969) (holding "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime").

80. 392 U.S. 1 (1968). The Court held:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

81. 389 U.S. 347 (1967) (holding that a person's expectation to privacy under the Fourth Amendment could extend to calls made in telephone booths).

82. 116 U.S. 616 (1886) (holding a governmental notice to produce a fraudulent invoice an unreasonable search and seizure).

83. 277 U.S. 438 (1928) (Brandeis, J., dissenting). Brandeis disagreed with the majority's view that a wiretapping did not amount to a search.

84. 381 U.S 479 (1965) (invalidating Connecticut's ban on the use of contraception).

85. *Katz*, 389 U.S. at 350.

86. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

87. 388 U.S. 1 (1967) (invalidating Virginia's anti-miscegenation law).

88. 316 U.S. 535 (1942) (invalidating an Oklahoma law requiring the forced sterilization of "habitual offenders").

89. 405 U.S. 438 (1972) (invalidating Massachusetts's ban on the distribution of contraceptives to unmarried people).

90. 321 U.S. 158 (1944) (upholding a Massachusetts's child labor law banning juvenile Jehovah's Witnesses from street preaching).

Pierce v. Society of Sisters.[91] These cases too, involved negative liberties:[92] the right to not be banned from marrying someone of another race; the right to not be forcibly sterilized; the right (of a single person) to not be prohibited in obtaining contraception; the right to not send children to public school. These cases did not establish positive liberty interests or governmental entitlements to the interest at stake. There is no right to have the government find an interracial spouse, perform a sterilization procedure, distribute contraception, or pay for a private education. The *Roe* Court relied on this case law finding negative rights and it created a negative right to abortion.

The case law developed new negative rights because the amendments themselves upon which the Court relied involved negative rights. The First, Fourth, Fifth Amendments, and the Due Process Clause of the Fourteenth Amendment speak of limitations on the exercise of governmental authority. The First Amendment restrains Congress *from* "prohibiting" the free exercise of religion and *from* "abridging" the freedom of speech.[93] The Fourth Amendment protects persons and their homes *from* searches and seizures without warrants.[94] The Fifth Amendment protects persons *from* being forced to self-incriminate.[95] The Fifth Amendment,[96] along with the Fourteenth Amendment, protects persons *from* denials of life, liberty, and property (without due process).[97] Almost all of the Bill of Rights' provisions protect rights in the negative. Two exceptions are the right to counsel and the right to a speedy trial and a trial by a jury,[98] which require government action to secure these rights for its citizens.[99] But these are exceptions. Nearly all of the rights in the Bill of Rights and the Due Process Clause of the Fourteenth Amendment express negative

91. 268 U.S. 510 (1925) (invalidating an Oregon law that required public school education for children between the ages of eight and sixteen).

92. With the exception of *Prince*, which did not establish any right but rather upheld a Massachusetts law as applied against a Jehovah's Witness mother. *See* Prince, 321 U.S. at 453-55.

93. *See* U.S. CONST. amend. I.

94. *See* U.S. CONST. amend. IV.

95. *See* U.S. CONST. amend. V.

96. *See id.*

97. *See* U.S. CONST. amend. XIV, § 1.

98. *See* U.S. CONST. amend. VI.

99. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686 (1984) (requiring the government to secure effective counsel for criminal defendants); Gideon v. Wainwright, 372 US 335, 342-43 (1963) (requiring the government to secure competent counsel for indigent criminal defendants).

rights. The abortion right, extrapolated from these rights, is no different.

Subsequent decisions affirmed the holding that the constitution regards abortion as a negative right. In *Webster v. Reproductive Health Services*,[100] the Court upheld a Missouri law's prohibition on the use of public employees and facilities for abortion. The Court noted, "[A]s we said earlier in this Term in *DeShaney v. Winnebago County Dept. of Social Sevices*, '[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'"[101] In *Harris v. McRae*,[102] the Court concluded that the Hyde Amendment's ban on the use of federal funds for (supposedly) medically necessary abortions did not violate *Roe* because the abortion right did not create an entitlement:

> But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[103]

As a matter of constitutional law, then, conscience protection does not conflict with the abortion right created by the Court.

The strongest evidence that no conflict between conscience protection and abortion law exists lies in *Roe's* companion case, *Doe v. Bolton*.[104] In *Doe*, the Court left intact a conscience clause in Georgia's abortion statute while striking down other provisions of the law. In so doing, the Court wrote:

> Under § 26-1202(e) [the statute left intact], the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26-1202(e) affords adequate protection to the hospital,

100. 492 U.S. 490 (1989).
101. *Id.* at 507 (citation omitted).
102. 448 U.S. 297 (1980).
103. *Id.* at 316.
104. Doe v. Bolton, 410 U.S. 179 (1973).

> and little more is provided by the committee prescribed by § 26-1202 (b) (5) [the statute struck down].[105]

Therefore, the federal government and the states are free to enact laws protecting the conscience rights of health care providers who object to participation in abortion. The federal government and the states are free to protect conscience rights (whether they are required to do is a separate question). But if the state were to compel a health care provider to kill or to engage in acts that the provider regards as killing, such compulsion may be so objectionable that it takes on constitutional dimensions, such that protections against this injustice are "implicit in the concept of ordered liberty."[106]

Because there is no right to abortion, but a right to be free from governmental interference, the question of whether a hospital is a public actor is irrelevant. A public hospital is not required to make abortion accessible[107] and the state is not required to subsidize it.[108] If the state is not required to provide abortion, private entities that may look or seem or act like the state are not required to provide it either.

Even the Alaska abortion law interpreted in *Valley Hospital*[109] protected abortion as a negative right until the Alaska Supreme Court construed it in that case to require more, to require positive action on behalf of the government. In *Valley Hospital*, the court said, "we are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These

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105. *Id.* at 197-98. Ga. Code § 26-1202 (e) (1933), the portion of the statute left intact, holds:

> Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

Id.

106. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

107. Full Cite of Webster.

108. Full Cite of Harris.

109. Valley Hosp. Ass'n v. Mat-su Coalition for Choice, 948 P.2d 963 (Alaska 1997).

rights may be legally *constrained* only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest."[110] The right, then, is a fundamental right to not be restricted by the government in the exercise of the right, unless there is a compelling interest and narrowly tailored restrictions to accomplish that compelling interest. The fundamental rights analysis that the court applies to abortion is what makes the Alaska protection of the abortion right greater than the protection under federal constitutional principles. It is not the case that Alaska law had created (prior to *Valley Hospital*) a right of access, but rather that Alaska applied fundamental rights analysis and the United States Supreme Court applies a lesser analysis. The United States Supreme Court applies the undue burden analysis, an analysis not as heightened as strict scrutiny rights but not as diminished as rational basis review.[111]

The Alaska Supreme Court developed its abortion jurisprudence through construction of the state constitution's privacy clause. The privacy clause, too, implicates a liberty interest expressed negatively. It says, "The right of the people to privacy is recognized and shall not be infringed."[112] It protects interests that shall not be infringed—not interests to be actualized or realized by the government.

On a strict reading, then, of the Alaska constitutional right to privacy and the abortion jurisprudence that developed in that court prior to *Valley Hospital*, the court should not have imposed on the hospital the requirement of making abortion available on its premises. But now that court, at the prompting of the Alaska ACLU, has created a positive right of access to abortion, an entitlement to abortion that coerces unwilling providers to facilitate it.

In the Lourdes/Rancocas hospital case, the ACLU took a different approach by applying charitable trust law in an attempt to force Lourdes to provide access to abortion. One question that remains after this case is whether it is appropriate at all to treat hospitals, non-profit corporations, as instruments. I am inclined to think that it is not. But even if applying charitable trust law is appropriate, ultimately, the ACLU lawyers were seeking to have the attorney general and the court to compel Lourdes to build an abortion clinic to maintain "access" before allowing transaction. Such a position conflicts with well-developed case law on the abortion right. The

110. *Id.* at 969 (emphasis added).
111. *See supra* notes 66-68.
112. ALASKA CONST. art. I, § 22.

government's role is not to ensure access to abortion. Moreover, the ACLU's position would have violated New Jersey law, which provides conscience protection to hospitals with respect to both abortions and sterilizations.[113] The lawyer for Lourdes should have questioned why the hospital should have been expected to continue "access" or demonstrate that there was sufficient "access."

Bayfront, too, was a case about "access" dressed up in alleged Establishment Clause violations. At the heart of Bayfront was the claim by the St. Petersburg city attorney and the ACLU's that discontinuing ten abortions per year at the hospital "restricted access." The further Establishment Clause claim supposed that the hospital was a public actor and that its adoption of a policy to stop providing abortions amounted to an impermissible sectarian policy. The law on this issue is clear. A policy does not violate the Establishment Clause simply because it "happens to coincide or harmonize with the tenets of some or all religions."[114] The Court has specifically applied this reasoning to pro-life policies. In *Harris v. McRae*,[115] the Supreme Court upheld the Hyde Amendment[116] against a claim that it violated the Establishment Clause, writing that "the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[117]

Applying constitutional principles (and state law) to these cases suggests that different standards should have been applied and different results should have been reached in these cases. In Alaska, a correct interpretation of the privacy clause as prohibiting infringements would have allowed the state conscience law to stand. In New Jersey, though the result in that case protected Lourdes from forced participation in abortion, the enquiry into whether there was sufficient access in the community was irrelevant. And in Flor-

113. *See* N.J. STAT. ANN. § 2A:65A-2 (2004) ("No hospital or other health care facility shall be required to perform abortion or sterilization services or procedures."). This law was struck down as a applied to nonprofit nonsectarian hospitals. *See* Doe v. Bridgeton Hosp., 366 A. 2d 641, 647 (1976). The statute is applicable to the Lourdes/Rancocas case because Lourdes is a sectarian hospital.

114. McGowan v. Maryland, 366 U.S. 420, 442 (1961).

115. 448 U.S. 297 (1980).

116. For the current version of the Hyde Amendment, see section 509 of Title IV of Division G (Labor, Health And Human Services, And Education, And Related Agencies Appropriations, 2003) (Foreign Operations, Export Financing, And Related Programs Appropriations) of the Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11, 163 (2003).

117. *Harris*, 448 U.S. at 319-20.

ida, a correct application of constitutional law would have allowed the cost-saving affiliation to continue.

V. A POLICY ARGUMENT FOR PROTECTION OF A RIGHT OF CONSCIENTIOUS OBJECTION TO ABORTION

In addition to the constitutional law argument for protecting these hospitals from forced involvement in abortion, a public policy argument can be made as well. To begin with, federal law has protected the right of conscientious objection to war since the World War I era, when the government first instituted a draft.[118] At the heart of such a policy lies the conviction that it is unconscionable to force someone to kill even in war, even in wars that may be necessary for the defense of the country. Consistent with this tradition is the view that seeks to protect providers from forced involvement in abortion. Most Americans, even Americans who label themselves pro-choice consider abortion to be at least an act of killing, according to a 2000 *Los Angeles Times* poll in which fifty-seven percent of Americans said they consider abortion murder.[119] Even advocates of abortion acknowledge that abortion involves killing.[120]

Second, Americans remain deeply divided about the legality of abortion itself. The *Los Angeles Times* found less than half (forty-three percent) of Americans supporting *Roe v. Wade*.[121] To extend the existing Court-imposed abortion policy from treating abortion as negative right to a positive one would further deepen the division.

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118. *See* United States v. Seeger, 380 U.S. 163, 171 (1965).

119. Alissa Rubin, *Americans Narrowing Support for Abortion*, L.A. TIMES, June 18, 2000, at A1.

120. *See, e.g.*, Diane M. Gianelli, *Abortion Providers Share Inner Conflicts*, AM. MED. NEWS, July 12, 1993, at 3, 23 (quoting an anonymous New Mexico abortion provider, "I have angry feelings at myself for feeling good about grasping the calvaria (head), for feeling good about doing a technically good procedure which destroys a fetus, kills a baby."); Marcia Ann Gillespie et al., *Speaking Frankly*, Ms., May 1, 1997, at 64, 67(quoting Frances Kissling, the president and CEO of Catholics for a Free Choice, as saying "I agree that the way in which the arguments for legal abortion have been made include this inability to publicly deal with the fact that abortion takes a life."). In the same article, Faye Wattleton, a former president of Planned Parenthood Federation of America, says "[We've] deluded ourselves into believing that people don't know that abortion is killing. So any pretense that abortion is not killing is a signal of our ambivalence, a signal that we cannot say yes, it kills a fetus, but it is the woman's body, and therefore ultimately her choice." *Id.*; *see also* David Stout, *An Abortion Rights Advocate Says he Lied About Procedure*, N.Y. TIMES, Feb. 26, 1997, at A12 (quoting Ron Fitzsimmons, the executive director of the National Coalition of Abortion Providers, as saying abortion "is a form of killing. You're ending a life.").

121. *See* Rubin, *supra* note 119.

Third, as a matter of tactics or circumstances, abortion-rights organizations have sought to impose abortion policies on hospital mergers and affiliations that were undertaken largely because of economic pressures.[122] Cost-saving health care alliances have been dismantled by groups advocating for abortion rights.[123] At a time when sky-rocketing health care costs threaten the ability of the health care system to deliver basic care, health care affiliations should not be threatened by the prospect of forced elective procedures, especially elective procedures to which so many people strongly oppose.

The policy protecting conscience rights is widely recognized by both state and federal law. Federal law[124] and the laws of forty-six states[125] shield health care providers from coerced involvement in

122. *See supra* note 59 and accompanying text.

123. *See supra* notes 60-62 and accompanying text.

124. *See* 42 U.S.C. § 300a-7(b) (2004) (prohibiting public discrimination against individuals and entities that object to performing abortions on the basis of religious beliefs or moral convictions); § 300a-7(c) (prohibiting entities from discriminating against physicians and health care personnel who object to performing abortions on the basis of religious beliefs or moral convictions); § 300a-7(e) (prohibiting entities from discriminating against applicants who object to participating in abortions on the basis of religious beliefs or moral convictions); 42 U.S.C. § 238n (2003) (prohibiting discrimination against individuals and entities that refuse to perform abortions or train in their performance); 20 U.S.C. § 1688 (2003) (ensuring that federal sex discrimination standards do not require educational institutions to provide or pay for abortions or abortion benefits).

125. *See* ALASKA STAT. § 18.16.010(b) (2003) (struck down in part in Valley Hospital Ass'n v. Mat-su Coalition for Choice, 948 P.2d 963 (Alaska 1997)); ARIZ. REV. STAT. § 36-2151 (2003); ARK. CODE ANN. § 20-16-601 (Michie 2003); CAL. HEALTH & SAFETY CODE § 123420 (Deering 2004); COLO. REV. STAT. § 18-6-104 (2003); CONN. AGENCIES REGS. § 19-13-D54(f) (2004); DEL. CODE ANN. tit. 24, § 1791 (2003); FLA. STAT. ANN. § 390.0111(8) (West 2003); GA. CODE ANN. § 16-12-142 (2002); HAW. REV. STAT. ANN. § 453-16(d) (2003); IDAHO CODE § 18-612 (Michie 2003); 720 ILL. COMP. STAT. 510/13 (2004); IND. CODE ANN. §§ 16-34-1-3 to -7 (Michie 2004); IOWA CODE ANN. §§ 146.1-.2 (West 2003); KAN. STAT. ANN. §§ 65-443 to -44 (2002); KY. REV. STAT. ANN. § 311.800 (Michie 2003); LA. REV. STAT. ANN. §§ 40:1299.3, :1299.32-.33 (West 2003); ME. REV. STAT. ANN. tit. 22 §§ 1591-1592 (West 2003); MD. CODE ANN., HEALTH-GEN. I § 20-214 (2003); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003); MASS GEN. LAWS ANN. ch. 272, § 21B (West 2003); MICH. COMP. LAWS ANN. §§ 333.20181-.20184; 333.20199 (West 2003); MINN. STAT. ANN. §§ 145.414, 145.42 (West 2003); MO. ANN. STAT. §§ 188.100-.120, 197.032 (West 2003); MONT. CODE ANN. § 50-20-111 (2003); NEB. REV. STAT. §§ 28-337 to 28-341 (2003); NEV. REV. STAT. 449.191, 632.475 (2003); N.J. STAT. ANN. §§ 2A:65A-1 to -4 (West 2003); N.M. STAT. ANN. § 30-5-2 (Michie 2003); N.Y. CIV. RIGHTS LAW § 79-I (McKinney 2003); N.C. GEN. STAT. § 14-45.1(e)-(f) (2003); N.D. CENT. CODE § 23-16-14 (2003); OHIO REV. CODE ANN. § 4731.91 (West 2003); OKLA. STAT. ANN. tit. 63 § 1-741 (West 2003); OR. REV. STAT. §§ 435.475(1), 435.485 (2001); 43 PA. CONS. STAT. ANN. § 955.2 (West 2003), 18 PA. CONS. STAT. ANN. § 3213(d) (West 2003), 16 PA. CODE §§ 51.1-51.61 (2003); R.I. GEN. LAWS § 23-17-11 (2003); S.C. CODE ANN. § 44-41-40 to -50 (Law. Co-op 2003); S.D. CODIFIED LAWS §§ 34-23A-12, to -15 (Michie 2003);

abortion. But abortion advocates have put the protections of these laws in jeopardy. To defend the basic principle that no one should be compelled to kill, and to sustain the viability of the health care system in this country, these laws need to be defended, not circumvented and exploited by groups trying to impose an ideology. In addition to defending existing protections, any inadequacies[126] in the law ought to be corrected to strengthen their protections.

Currently, Congress is considering a more modest bill. The Abortion Non-Discrimination Act ("ANDA"),[127] introduced by Senator Judd Gregg (R-N.H.) and Congressman Michael Bilirakis (R-FL), amends an existing federal conscience protection.[128] That law prohibits local, state, and federal governments from discriminating against health care entities that decline to perform, train in, or make referrals for abortions. In the law as it now exists, "health care entity" is defined to include individuals and training programs. The definition explicitly includes training programs because Congress was responding to a threat made by the Accreditation Council for Graduate Medical Education that it would mandate abortion training in all obstetrics and gynecology residency programs.[129] But because the definition of "health care entity" explicitly includes residency programs and residents, the protections of the law have not been invoked to apply outside of the training context to other health care entitites. The language of the law, however, is clear enough. The definition says health care entity "includes."[130] The use of the word "includes" signifies the kinds of things that are illustrative of health care entities. It does not provide an exhaustive list.[131]

TENN. CODE ANN. §§ 39-15-204 to -205 (2003); TEX. OCC. CODE ANN. §§ 103.001-.004 (Vernon 2004), UTAH CODE ANN. § 76-7-306 (2003); VA. CODE ANN. § 18.2-75 (Michie 2003); WASH. REV. CODE § 9.02.150 (2003); W. VA. CODE §§ 16-2F-7, 16-2B-4 (2003); WIS. STAT. ANN. §§ 253.09, 441.06(6), 448.03(5) (West 2003); WYO. STAT. ANN. § 35-6-105 to -106, 35-6-114 (Michie 2003).

126. *See* Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 226 (1993).

127. S. 1397/H.R. 3664, 108th Cong. (1st Sess. 2003).

128. 42 U.S.C. § 238n (2003).

129. *See* 142 CONG. REC. S2062-63 (daily ed. Mar. 14, 1996); 141 CONG. REC. H 8378-82 (daily ed. Aug. 3, 1995).

130. *See* 42 U.S.C. § 238n.

131. The use of "includes" also suggests that the rule of construction, "*expressio unius est exclusio alterius*," does not apply. That rule provides "to express or include one thing implies exclusion of the other." *See* BLACK'S LAW DICTIONARY 602 (7th ed. 1999). Exclusion, however, should not be implied here precisely because Congress has chosen to use "includes."

The ANDA clarifies what is already implicit in the law, by specifying that a heath care entity includes those entities that are commonly thought of as health care entities: "a hospital, a provider sponsored organization, a health maintenance organization, a health insurance plan or any other kind of health care facility, organization or plan."[132] The bill also makes two changes in the scope of the law's protected activities. It provides protection for health care entities that decline to pay for or provide coverage for abortion.[133]

CONCLUSION

Protection of conscience rights through legislative efforts such as the Abortion Non-Discrimination Act is a modest proposal. The question of whether a health care provider should be protected from coerced involvement in abortion should not divide along pro-life and pro-choice lines. A movement that has hailed "choice" as a central value should not seek to impose itself on health care providers who have decided to choose not to get involved in abortion.

132. S. 1397/H.R. 3664.
133. *See id.*