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Martin F. McKernan, Jr.

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COMPELLING HOSPITALS TO PROVIDE ABORTION SERVICES

MARTIN F. MCKERNAN, JR.*

I'd like to talk about four areas: the first is the New Jersey case, *Doe v. Bridgeton Hospital Association*,¹ the second is an analysis of the twin opinions of the Supreme Court in *Roe v. Wade*² and *Doe v. Bolton*,³ *vis-à-vis* the compulsion of health care facilities to provide abortion services, the third is the concept of state action in this particular area, and the fourth is a suggestive preventive matter for health care facilities which desire not to permit the performance of elective abortions.

The first then is a discussion of the case of *Doe v. Bridgeton Hospital Association*, which arose "suddenly last summer" when, on a Wednesday afternoon after three women had been denied elective abortions in three hospitals in South Jersey, their attorneys sought and obtained a temporary restraining order against the implementation of hospital policies which allowed only therapeutic abortions. Wednesday evening the attorneys for these three hospitals, joined as *amicus curiae* by the New Jersey Hospital Association, appealed that decision to a single judge of the Appellate Division of the Superior Court of New Jersey. Now I realize that the procedural niceties are different in the various states, but I think that the whole concept is somewhat of general application.

The single appellate judge, finding that having a child was not irreparable harm, stayed the order of the lower court. On Thursday morning the case was heard by the full panel of the Appellate Division which sustained the judge's stay of the lower court order. The case was taken to the New Jersey Supreme Court which refused to tamper with the decision of the Appellate Division and remanded the case for further consideration and a full hearing. So, in any event, the abortions did not take place in these three hospitals and the case is now before the Superior Court in Atlantic County. We go to trial on June 3rd. It is a unique case in that it is, to my knowledge, the first time that a nonprivate hospital with no religious connection has been sued to allow the performance of abortions in its

* Special Counsel to New Jersey Catholic Hospital Association.

¹ 130 N.J. Super. 416, 327 A.2d 448 (1974).

² 410 U.S. 113 (1973).

³ 410 U.S. 179 (1973).

facilities. I will speak later of the case of *Doe v. Bellin Memorial Hospital*⁴ out of the Seventh Circuit, but of course, Bellin Memorial Hospital has extremely close ties with the Methodist Church in that, although this was not mentioned in the opinion of the court, the Methodist Church has a reversionary right in the hospital, should the corporation ever be dissolved, and it also has the right to appoint 50 percent of its board of trustees. So I think that the *Doe v. Bridgeton Hospital* case is a unique case and, as I say, we will be going to trial on that matter on June 3rd.

The second area I'd like to speak about is an analysis of the decisions of the Supreme Court in *Roe v. Wade* and *Doe v. Bolton*, because I think that it is necessary to have some understanding of these cases, when we speak about the possibility that under the aegis of these cases, a health care facility can be compelled to provide abortion services. In *Wade* and *Bolton*, as you know, the court found that the implied right of privacy in the ninth amendment to the Constitution proscribes criminal sanctions upon the obtainment of abortions except in narrowly limited circumstances. Perhaps the basic question before us then is whether or not these twin opinions of the United States Supreme Court impliedly compelled any hospital to make its facilities available to an individual who wishes to obtain an elective abortion and, of course, the right to an abortion, as you realize, has been raised to the level of a constitutional right. So that's what we're talking about—whether or not these health care facilities are obligated to facilitate the exercise of a constitutional right by a particular individual. Now in attempting to answer that question, I think it's necessary to understand precisely the principle upon which the Supreme Court bottomed its twin opinions in *Wade* and *Bolton* and also necessary to juxtapose the hypothetical allegation that *Wade* and *Bolton* implicitly compel hospitals to provide abortion services against the other decisions involving the ninth amendment's penumbral right to privacy that have been decided by the Supreme Court over the years. The essence of the ruling in *Wade*, as you realize, was that criminal proscriptions upon the obtainment of an abortion violated what the Court called the protected zone found within the penumbra of the ninth amendment. The Court cited as a basis for its holding in *Wade*, its earlier decisions in which state criminal statutes had been held constitutionally violative of this protected zone.

Stretching the opinions in *Wade* and *Bolton* to the point of alleging that they, in any way, would implicitly compel health care facilities to provide abortion services, I would submit, carries these decisions beyond their logical extremes; and I think that we can see how it is carried beyond logical extremes when we juxtapose this contention against the other decisions in which the Supreme Court has bottomed its invalidation of state

⁴ 479 F.2d 756 (7th Cir. 1973).

criminal statutes on the penumbral right of privacy.

In parallel with its opinions in *Wade* and *Bolton*, such judicial dislike for the governmental intrusion upon what the Court has called “privacies of life” finds its basis as you are aware in *Boyd v. United States*.⁵ Concern for the citizens’ protected zone of privacy finds expression in various decisions of the Court and rests on the same premise which was utilized in *Wade* and *Bolton*. In *Meyer v. Nebraska*,⁶ upon which the Court relied very heavily, the Supreme Court considered the constitutionality of a state criminal statute which proscribed the teaching of a particular foreign language within any school in the state of Nebraska to any student who had not completed the eighth grade. The Court said that there existed within the penumbra of the phrase proscribing the deprivation of life, liberty and property without due process of law, “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁷

While the Court specifically excluded applicability of this decision to schools which the state supports, it found a penumbral right to exist, in parents, over the education of their children enrolled in private schools. The similarity between *Wade* and *Meyer* is obvious. In both cases, state criminal statutes proscribed the performance of particular acts and in both cases such statutes were held to be violative of the citizen’s penumbral constitutional rights. Conversely, I would submit that *Meyer* does not grant to parents the right to compel a school, other than perhaps a school which is owned, financed, supported, and completely operated by the government to teach, say, German, even when the school has the facilities and the teachers to do so. I don’t think that under *Meyer v. Nebraska*, we could contend that there is a right to compel a private school to teach German, so the analogy, I would submit, is fairly clear between *Meyer* and the decision in *Wade*.

In *Pierce v. Society of Sisters*⁸ the Court found a state criminal statute requiring the attendance of children at public schools to be unconstitutional. Mr. Justice McReynolds noted that under *Meyer* the Oregon statute violated the penumbral right of parents and guardians to direct the upbringing and education of children under their control. *Pierce* closely parallels the essence of the opinion in *Wade* in that various state criminal statutes were found violative of the protected zone of privacy found to exist in the penumbræ of various articles of the Constitution. However, I would submit that it is ludicrous to contend that *Pierce v. Society of Sisters*, which, as I say, is bottomed on the same basis the Court used in *Roe v. Wade* and *Doe v. Bolton*, gives parents the right to compel the sisters to provide military education, or to compel the Hill Military Academy to provide religious education.

⁵ 116 U.S. 616 (1886).

⁶ 262 U.S. 390 (1923).

⁷ *Id.* at 399.

⁸ 268 U.S. 510 (1925).

I would submit that in *Loving v. Virginia*,⁹ which, as you know, struck down state anti-miscegenation statutes, has the same bearing to our total discussion as these other cases. Under *Loving*, does a racially mixed couple who wish to marry have the right to compel a clergyman, who has the authority under the laws of Virginia to marry them, to do so? I would submit that it does not. I am sure that you are also aware of the opinions in *Griswold v. Connecticut*¹⁰ and *Eisenstadt v. Baird*,¹¹ which were also bottomed upon the ninth and fourteenth amendments' implied right of privacy. Now I would ask you to juxtapose the allegation presented in the hospital cases to a similar allegation which would be bottomed on *Griswold* and *Eisenstadt*. If under the aegis of *Roe v. Wade* and *Doe v. Bolton* an individual wishing to exercise her constitutional right to an abortion has the right to judicially force a health care facility to provide the facilities for the performance of the abortion, I would submit that under *Griswold* and *Eisenstadt* one has the right to compel the local druggist who might not wish to carry contraceptives, for whatever reason, to carry a complete line. Now we are led, of course, to the question of what if the hospital is the only hospital within a wide area? Well, I'm sure that there are places in the United States where a particular drug store is the only drug store within a wide area, and yet the refusal of that drugstore to carry contraceptives either limits the exercise of this individual's constitutional right or perhaps makes its exercise less easy or perhaps even denies him totally the exercise of this constitutional right. If we can compel the hospital to provide abortion services under the aegis of *Roe v. Wade* and *Doe v. Bolton*, I would submit, we can compel the local druggist to carry a line of contraceptives under the aegis of *Griswold v. Connecticut* and *Eisenstadt v. Baird*, and I think that that contention would be somewhat ludicrous.

Another example of the Supreme Court striking down a state criminal statute on the basis that it violated one's penumbral right to privacy, of course, is the decision in *Stanley v. Georgia*.¹² In that case, as you know, the Supreme Court gave to individuals the right to read pornographic material in the privacy of their home. Now, I don't think that we could say, therefore, that an individual who wishes to read pornographic material in his home and is being denied the exercise of this right by the refusal of the local book store to carry obscene or pornographic material, has the right to compel the local book store owner to carry obscene material. However, if we will say that the private hospital can be compelled to provide abortion services, in order to facilitate the exercise of one's constitutional right to abortion, I think, that's when we must also say that one has the right to compel the local book store to carry pornographic material, with-

⁹ 388 U.S. 1 (1967).

¹⁰ 381 U.S. 479 (1965).

¹¹ 405 U.S. 438 (1972).

¹² 394 U.S. 557 (1969).

out which perhaps one's constitutional right is being totally denied and certainly its exercise in many cases would be limited.

When we talk about state action, and I am sure that many of you are aware of *Nyberg v. City of Virginia*¹³ in Minnesota, I think that if we are going to say that the public hospital must provide abortion services because this right is granted to one under the Constitution as interpreted by the Supreme Court in *Roe v. Wade* and *Doe v. Bolton*, I would submit we must say that one can compel the public library to maintain a certain section for its adult patrons whereby they could borrow pornographic material. And I think then, that we move in to the total question of state action, and I think that this is extremely important. I understand that Mr. Horan this morning spoke of a case out of the Second Circuit, and I certainly think that it is worthy of our consideration. However, I feel that on the issue of state action perhaps the old line will hold—the old line being only two years old, but I think that it will be sustained. And, of course, that case involved a question of racial discrimination and, as you know, the Supreme Court has always been much more willing to find state action in questions of racial discriminations than it has in other areas.

The question of whether the actions of a private hospital are the actions of the state or constitute action done under color of state law, of course, leads to a discussion of the most far-reaching decision of the Supreme Court in a state action case, namely *Burton v. Wilmington Parking Authority*.¹⁴ Now, of course, that case, as you know, has been limited somewhat by the decision of the Court in *Moose Lodge v. Ivis*,¹⁵ decided some 11 years later. However, even under *Burton*, which is the furthest the Supreme Court was willing to go in finding state action, when we approach the refusal of the private hospital to perform abortions, I think that we have to paraphrase Mr. Justice Clark's question in *Burton*, and that is whether or not the government "has so far insinuated itself into the affairs of the institution as to be judicially . . . recognized as a joint participant"¹⁶ in the challenged refusal to do whatever the plaintiffs want done—be it the performance of an abortion or anything else. Now the Supreme Court's most recent definitive analysis of the attributes of state actions, I said, is the decision in *Moose Lodge*. I'd like to point out certain portions of the *Moose Lodge* decision, which I think are germane to our discussion.

I am quoting:

In 1883, this Court in the *Civil Rights Cases* . . . set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discrimina-

¹³ 495 F.2d 1342 (8th Cir. 1974).

¹⁴ 365 U.S. 715 (1961).

¹⁵ 407 U.S. 163 (1972).

¹⁶ 365 U.S. at 725.

tory or wrongful," against which that clause "erects no shield" The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service . . . from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities . . . as light, electricity, water and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in *The Civil Rights Cases* . . . and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition.¹⁷

In 1968, the Second Circuit Court of Appeals said in *Powe v. Miles*,¹⁸ "the essential point [is] that the state must be involved not simply with some activity of the institution alleged to have inflicted injury . . . but . . . [that the activity itself—that the intrusion of the state—actually caused the injury]."¹⁹ I would submit that it is unreasonable to hold that any government or any governmental agency, to cite the words that Justice Clark used in *Burton* is a "joint participant and/or beneficiary" in a private hospital's refusal to allow the performance of elective abortions. And I don't think that we can say, using the words of the Supreme Court in *Moose Lodge*, that in any way is any government or agency thereof the impetus behind the decision of any private health care facility to refuse to allow the performance of elective abortions. I think that not only in New Jersey, but certainly in every state, the varying policies of hospitals on whether to allow or not to allow elective abortions indicated that neither the federal government nor the state government has taken any action in this regard to encourage or discourage the allowance of elective abortions.

I should like to refer you to some other decisions on the concept of state action, and I think that these cases tend to illustrate the futility of the claim that the actions of private hospitals in refusing to allow the performance of elective abortions are actually the actions of the state.

One interesting case is *Braden v. University of Pittsburgh*,²⁰ a 1972 case in which state action was alleged since the institutional defendant, the University of Pittsburgh, received one-third of its operating budget from the Commonwealth of Pennsylvania. The Commonwealth had the authority to appoint one-third of the trustees and further to exempt the university's bonds from state taxation. Indeed, the Commonwealth Act of 1966 had designated the University of Pittsburgh as a state-related institution within Pennsylvania's system of higher education. Even so, the court

¹⁷ 407 U.S. at 172-73 (citations omitted).

¹⁸ 407 F.2d 73 (2d Cir. 1968).

¹⁹ *Id.* at 81.

²⁰ 343 F. Supp. 836 (W.D. Pa. 1972).

noted, this act did not endow the university with the attributes of a state agency. The court further refused to imply state action in the conduct of the university's affairs and alleged discrimination by the other indicia of state action such as the exemption from taxation of the university's bonds.

It has also been held that the fulfillment of a function which is "impressed with the public interest" or the grant of extraordinary tax advantages is sufficient, even when coupled with other indicia of governmental involvement, to cloak an otherwise private institution with the mantle of state action. As to fulfilling a function which is impressed with the public interest, I would refer you to *Grossner v. Trustees of Columbia University*,²¹ and in the case of extraordinary tax advantages, I would refer you to *Browns v. Mitchell*.²² I would also refer you to *Martin v. Pacific Northwest Bell Telephone Company*,²³ in which state action was alleged in sexual discrimination because of the fact that the Pacific NW Bell Telephone Company was imbued with a public interest. The court said: "In this case, plaintiff's allegations at most concern Pacific Bell's public service functions; they neither show nor tend to show an intrusion by the State into matters of Pacific Bell's internal management."²⁴ And I think that this is a necessary point to realize: that in establishing state action, under *Burton* and most especially under *Moose Lodge*, it must be shown that the government was the impetus or played an important part in the internal decision to allow or not to allow the performance of abortions.

I'd like to turn to the receipt of funds under the Hill-Burton Act,²⁵ another area in which state action has been found. This has sometimes, as you know, been considered sufficient to cloak a private hospital and its medical staff with the mantle of state action. The foremost case in this area, as I am sure you realize, is *Simkins v. Moses H. Cone Memorial Hospital*,²⁶ a racial discrimination case out of the Fourth Circuit in 1953. Nonetheless, various other decisions have indicated that the receipt of Hill-Burton funds is not sufficient to establish state action; and at this point, we come to the decision of the Seventh Circuit in *Doe v. Bellin Memorial Hospital*.²⁷ In that case, a preliminary restraint ordering the defendant hospital to permit the performance of abortions was dissolved by the Seventh Circuit. The court said:

No doubt the defendant hospital agreed to abide by a variety of regulatory terms related both to its operations and to the use of Hill-Burton funds in connection with its acceptance of benefits under that Act. There is no evi-

²¹ 287 F. Supp. 535 (S.D.N.Y. 1968).

²² 409 F.2d 593 (10th Cir. 1969).

²³ 441 F.2d 1116 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971).

²⁴ 441 F.2d at 1118.

²⁵ 42 U.S.C. § 291 *et seq.* (1970).

²⁶ 323 F.2d 959 (4th Cir. 1963).

²⁷ 479 F.2d 756 (7th Cir. 1973).

dence, however, that any condition related to the performance or non-performance of abortions was imposed upon the hospital [T]his record does not reflect any governmental involvement in the very activity which is being challenged. We find no basis for concluding that by accepting Hill-Burton funds the hospital unwittingly surrendered the right it otherwise possessed to determine whether it would accept abortion patients.

Nor do we believe that the implementation of defendant's own rules relating to abortions is action "under color of" state law

The facts that defendants have accepted financial support . . . from both the federal and state governments, and that the hospital is subject to detailed regulation by the State, do not justify the conclusion that its conduct . . . [is in any way state action].²⁸

The entire Hill-Burton argument, of course, has now been effectively mooted by *Watkins v. Mercy Medical Center*,²⁹ which is out of the U.S. District Court of Idaho. In *Watkins*, the physician sought monetary damages and injunctive relief against the hospital, which had denied him reappointment to the medical staff. The defendant hospital, as the court noted, is financed and operated almost entirely by the Catholic Church. The denial of reappointment to the medical staff stems from the doctor's refusal to comply or agree with the Ethical and Religious Directives because of his disagreement with the directives' guidelines on the performance of abortions and sterilizations. The final decision of the court rested on two points, both the religious character of the hospital and the lack of state action. The lack of state action is what I would like to just briefly touch upon. The court observed that if the relief which the plaintiff physician sought was to be granted, it must be established that the hospital's rules requiring conformity by the medical staff to the directives which prohibit what the court called contraceptive procedures, was "an act done under color of state law." Since the hospital is not owned or operated by the state, the court said that the only means by which it could be said to act under color of law is that if it is sufficiently affected by state law and by the regulation and administration of federal funds to be considered acting under color of law. The defendant hospital in that case had been constructed with funds received under the Hill-Burton Act. Various decisions, as I've noted, have held that such receipt affects the recipients of state action. However, the court in *Watkins* said that the recent conscience clause amendment to the Hill-Burton Act³⁰ effectively revoked the ability of the court to hold that the hospital's denial of facilities for abortions or sterilizations was state action, simply because it received Hill-Burton funding. The court said: "By its plain language this [conscience clause

²⁸ *Id.* at 761.

²⁹ 364 F. Supp. 799 (D. Idaho 1973).

³⁰ Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401, 87 Stat. 91, amending 42 U.S.C. § 201 (1970).

amendment] prohibits any court from finding state action on the part of a hospital which receives Hill-Burton funds and using that finding as a basis for requiring the hospital to make its facilities available for the performance of sterilization procedures or abortions."³¹ The court further noted that neither does the fact that Mercy Medical Center receives tax exempt status from the state, is licensed by the state, and applies for and receives state and federal monies under the Medicare and Medicaid program, support a finding that the hospital is sufficiently clothed with state control so as to be said to be acting under color of state law.

A more interesting analysis of the situation of the conscience clause amendment to the Hill-Burton Act is, of course, found in *Taylor v. St. Vincent's Hospital*,³² and I am sure you have all received that decision from Mr. Consedine. In this case, as you know, the plaintiffs sought to compel the institutional defendant, St. Vincent's Hospital, to allow the performance of a tubal ligation in the facilities and were successful in the first *Taylor* decision. In its second decision, the same judge said:

Essential to the plaintiffs' invocation of jurisdiction in this cause is that the defendant, in its alleged violation of the plaintiffs' constitutional rights [in refusing to allow the sterilization], acted under color of state law. The plaintiffs' assertion that the defendant is acting under the color of state law is grounded primarily on the fact that Hill-Burton grants have been used to defray a portion of the cost of hospital remodeling and construction over the years. In fact, this court, in its order dated October 27, 1972, found jurisdiction in this cause because of the receipt of such funds by the defendant.³³

The court went on to say, however, that on June 18, 1973, the President signed into law the Health Programs Extension Act of 1973. By its plain language, this Act prohibits any court from finding that a hospital which receives Hill-Burton funds is, by virtue of such receipt, acting under color of state law in refusing to permit the performance of abortions or sterilizations. So I think that in wrapping up the whole idea of precisely what the Supreme Court did say in *Roe v. Wade*, if we are to compel the private health care facility to provide abortion services, then we can also compel the local druggist who is also licensed and regulated to at least some degree by the state to carry a complete line of contraceptives. In the area of state action, I don't think that we can establish that in any hospital, other than totally owned governmental hospitals, that the state or the federal government or any agency thereof, is a joint participant in or a beneficiary of or gives the impetus to, the decision not to allow the performance of elective abortions in its facilities, and I think that this is the key that we have to remember.

³¹ 364 F. Supp. at 801.

³² 369 F. Supp. 948 (D. Mont. 1973).

³³ *Id.* at 950.

Finally, I should like to suggest a prophylactic measure, as long as we have mentioned *Eisenstadt* and *Griswold*, that I think is designed to provide further insulation for the health care facility that does not want to allow the performance of elective abortions in its facilities. I think, that this raises an extremely serious problem for the Catholic health care facility which the free exercise clause does not completely solve. I think we have to realize that while perhaps a court will not compel the owners or the staff of the Catholic health care facility to violate their consciences, there is a certain problem created; I think that the analogy would be posed, let us say, if the Jehovah's Witnesses decided to open a hospital. That sect, as you know, does not sanction blood transfusions, and if management of that hospital said, "We are not going to allow blood transfusions," I don't think that any court would say that "You must allow blood transfusions in your facilities." I think, however, it is certainly reasonable to say that a court could well hold, "We won't force you to violate your conscience, but if you are not going to allow blood transfusions you are just going to have to get out of the hospital business." And I think that this is a certain justifiable fear when we are speaking of the Catholic hospital if abortion, termination of pregnancy, comes to be accepted as a standard form of medical practice and procedure. I think that then we are faced with the same problem: "If you don't want to conform to what is accepted medical procedure, then perhaps you ought to just get out of the health care field." This is something that I think we can perhaps protect ourselves against by establishing a two-pronged corporate resolution that I would urge upon all hospitals. This would be a resolution that relies not only on the fact that the provision of abortion services violates the tenets of the religion which sponsored that hospital and under which it is maintained, but also that it is not necessarily good medical procedure. There are numerous articles in many medical journals that indicate that the simple provision of surgical abortion services is not good medical practice, that there should be pre-operative and post-operative care, that there should be psychological counselling and psychiatric care provided, and an ongoing contraceptive program provided to the individual who has undergone the abortion. So I think that perhaps the Catholic hospital can say, "Well, we do not have these facilities, we don't have the resources to provide these facilities and since we don't have these facilities, we feel that the provision of surgical abortion services is not service to the total patient." So I think that that establishes the refusal to perform abortions to some extent as good medical practice. Secondly, of course, the corporate resolution should contain an extremely strong statement that the allowance of the performance of abortions directly violates the tenets of the religion which sponsors the hospital, and under which religion the hospital is maintained.

Now, does the statement, that the bare provision of abortion services is not always good medical procedure protect the Catholic hospital completely? And the answer is obviously "no." However, in a series of cases

the courts have held that when a hospital makes a policy decision as to the allocation of resources, no matter how involved that hospital is with the provision of health care to the public community, it is not the job of the judiciary to “second-guess” such a policy decision. I think that if we do adopt a corporate resolution, saying that we find it to be bad medical practice to simply provide for elective surgical abortions, and secondly, that such provision would do a grievous harm to the tenets of the religion under which the hospital is maintained, we perhaps insulate ourselves from judicial “second-guessing.” ✓