CHALLENGING FAKE ABORTION CLINICS: PROTECTING WOMEN'S PRIVACY INTERESTS WITHOUT VIOLATING THE FIRST AMENDMENT

INTRODUCTION

In the years after the Supreme Court legalized abortion, anti-abortion groups have remobilized and have developed new, aggressive tactics to prevent women from exercising their constitutional right to end their pregnancy.[1] Realizing the difficulty of changing the law in the near future, these groups have instead focused on stopping individual abortions, feeling that they are "saving lives."[2] Their tactics have included picketing, frightening and intimidating women from entering abortion clinics, and, at times, bombing clinics.[3]

1. J. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTIONS (1985); AMERICAN CIVIL LIBERTIES UNION, PRESERVING THE RIGHT TO CHOOSE 4-8 (1986). Copies of all briefs, affidavits, complaints, manuals and other related material cited in this Note are on file at the Review of Law & Social Change.

2. Donovan, *The Holy War*, 17 FAM. PLAN. PERSP. 5 (1985).

3. Violence has been directed at clinics throughout the country. *See* N.Y. Times, May 19, 1987, at B8, col. 5 (Philadelphia); N.Y. Times, Oct. 30, 1986, at B7, col. 3 (New York); N.Y. Times, Dec. 4, 1986, at A32, col. 6 (Kalamazoo, Mich.); N.Y. Times, June 17, 1986, at A21,

Another new tactic is the establishment of "fake abortion clinics." These are anti-abortion counseling centers which advertise in a manner that would lead a pregnant woman or girl to believe that they provide a full range of women's health services when, in reality, they provide only a pregnancy test, accompanied by intense anti-abortion propaganda.[4] Women who are victimized by these centers may feel severe psychological distress:

> I was extremely distraught and confused and I left [the center] shortly thereafter. I began questioning my own sanity and did not know where to turn.[5]

> When I left the Help Clinic I was extremely upset. I was depressed and shaken, and drove around for a long time crying. I found the experience incredibly distressing and infuriating. I felt I had been tricked into watching the anti-abortion slide presentation when [the counselor] was well aware that all I wanted was objective information which she was not willing to give me.[6]

The impact of fake abortion clinics has been staggering. Between 2,000 and 3,000[7] such anti-abortion counseling centers are scattered widely throughout the United States, from New York to Florida, to South Dakota, Texas and California.[8] In a single center in Fort Worth, Texas, over 1,090 women entered during a seven-month period.[9] However, despite their profusion, only a handful of fake abortion clinics have been challenged by either private parties or by state attorneys general.[10]

Fake abortion clinics pose new legal dilemmas; to date there has been little case law or research on the subject. Discussion about fake abortion clinics presents preliminary problems of nomenclature; a term or terms must be chosen to describe the nature of the interests at stake in a fake abortion clinic case. The "clinics" defraud, but more particularly, they interfere with women's ability to make free and informed choices in matters concerning procreation and bodily integrity.

A constitutional privacy analysis does not apply in fake abortion clinic cases because the federal constitutional right to privacy is a guarantee against

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col. 3 (Birmingham, Ala.); N.Y. Times, June 15, 1986, at A21, col. 6 (Manchester, Mo.); N.Y. Times, June 11, 1986, at A21, col. 1 (Wichita, Kansas); N.Y. Times, Mar. 27, 1986, at A18, col. 2 (Pensacola, Fla.); N.Y. Times, Jan. 1, 1986, at A6, col. 6 (Toledo, Ohio).

4. Gross, *Pregnancy Centers: Anti-Abortion Role Challenged*, N.Y. Times, Jan. 23, 1987, at B1, col. 2 [hereinafter Gross, *Pregnancy Centers*].

5. Affidavit of Jane Doe IV at ¶ 12 (dated Jan. 2, 1985), Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986) (Civ. No. 10946), *cert. denied* 476 U.S. 1108 (1986), *later proceeding* 391 N.W.2d 627 (N.D. 1986).

6. *Id.*, Affidavit of Jane Doe III at ¶ 13 (dated Dec. 27, 1984).

7. N.Y. Times, Dec. 17, 1986, at B12, col. 5; N.Y. Times, July 16, 1986, at B2, col. 4.

8. N.Y. Times, Feb. 21, 1987, at B26, col. 1.

9. Brief for Appellee at 11-13, Mother & Unborn Baby Care of N. Texas v. State of Texas, No. 02-86-266-CV (Tex. Ct. App., filed March, 1987).

10. *See infra* notes 48-76 and accompanying text.

only *government* action or inaction.[11] Nevertheless, judicial recognition of the importance of privacy interests made in the context of constitutional analysis informs our understanding of what personal interests are worthy of protection. In a constitutional context, the right to privacy has been deemed to be fundamental to the functioning of a free, autonomous society.[12] This reasoning should be applied when one individual infringes upon the privacy interests of another individual. Thus, this Note will refer to the interests to be protected in a fake abortion clinic case as "fundamental privacy interests," adopting the nomenclature of *Roe v. Wade*,[13] and other constitutional analysis.[14] This does not imply a constitutional cause of action when government conduct is not present. Rather, it suggests that certain privacy interests are so important to the functioning of society that they must be protected, even in a nongovernmental context.[15]

This Note presents three arguments. First, state attorneys general should vigorously challenge fake abortion clinics under their states' unfair and deceptive business practice statutes, using the discretionary authority conferred on them directly by state statutes.[16] Because fake abortion clinics may effectively

11. Constitutional privacy protects two interests: avoiding disclosure of personal matters, California Bankers Ass'n v. Schultz, 416 U.S. 21, 78-79 (Powell, J., concurring) (1973), and independence in making certain kinds of personal decisions. Eisenstadt v. Baird, 405 U.S. 438, 453 (1971) (contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education). The Court has found that the latter interest is broad enough to include the right to make independent decisions regarding procreation, without unjustified governmental intrusion. Roe v. Wade, 410 U.S. 113, 153 (1973). For an historical examination of implied autonomy rights, see Note, Griswold *Revisited in Light of* Uplinger, 13 N.Y.U. REV. L. & SOC. CHANGE 51 (1985).

12. Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747 (1986). *See infra* notes 42-44 and accompanying text.

13. 410 U.S. 113 (1973).

14. Critics have suggested that "privacy" may not sufficiently describe the interests at stake; more accurate terms may include "autonomy" and "equality." For purposes of limiting the scope of the present discussion, "autonomy" is used interchangeably with privacy. *But see* Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1985); Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties & the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (abortion restrictions create unconstitutional gender-based discrimination); F. FOHOCK, ABORTION: A CASE STUDY IN LAW AND MORALS 68-73 (1983) (equal protection argument); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (restrictions on abortions unconstitutionally single out women as Good Samaritans); Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977) (protection of autonomy under the fourteenth amendment).

15. This view of privacy, while not presently supported by constitutional precedent, is also implicit in the recognition in case law of certain protected rights within an entirely private interaction. For example, personal autonomy has been recognized in tort law involving private actors. Indeed, such tort law has sometimes provided the basis for constitutional gap-filling. *See, e.g.*, Gallela v. Onassis, 487 F.2d 986 (2d Cir. 1973); Briscoe v. Reader's Digest Association, 483 P.2d 34 (Cal. 1971).

16. *See, e.g.*, ALA. CODE § 8-19-1 *et. seq.* (1984); ARK. STAT. ANN. § 4-88-101 *et. seq.* (1987); CAL. CIV. CODE §§ 1720 *et. seq.*, 1760 *et. seq.*, 1770 *et. seq.* (West 1985 & Supp. 1987); CAL. BUS. & PROF. CODE §§ 17200 *et. seq.*, 17500 *et. seq.* (Deering 1985 & Supp. 1987); COL. REV. STAT. § 6-1-101 *et. seq.* (1973 & Supp. 1987); FLA. STAT. ANN. § 501.201 *et. seq.* (West Supp. 1987); IDAHO CODE § 48.601 *et. seq.* (1977 & Supp. 1987); IOWA CODE ANN. § 714.16

undermine women's interests in making reproductive choices, state attorneys general are obligated to make such changes. This Note does not deny women's capacity to make independent, informed decisions about abortion; rather, it asserts that deceptive practices and inequalities in bargaining power found in fake abortion clinic scenarios unlawfully interfere with women's ability to make these type of decisions.

Second, this Note argues that state statutes which prohibit the deceptive practices of fake abortion clinics do not violate the first amendment's protection of free speech. The argument adopts much of the reasoning employed by the North Dakota Supreme Court, the only state supreme court to fully consider this constitutional issue.[17]

Third, although victims of fake abortion clinics should succeed under state deceptive business practice statutes, the progress could be uncertain due to the varying strength and capability of enforcement provisions from state to state. Moreover, because these state actions need not explicitly recognize women's interests in reproduction choice,[18] they may not deter the infringement of such interests. Thus, the federal government should adopt legislation specifically proscribing the deceptive behavior of fake abortion clinics and should also provide efficient enforcement mechanisms. While passage may be difficult, such legislation could solve many of the problems posed by state legislation and would best protect women's privacy interests. As in the case of state statutes, such federal legislation can be fashioned without violating the first amendment.

I.
THE NEED TO REGULATE FAKE ABORTION CLINICS

Some organizations operating anti-abortion counseling centers legitimately exercise their first amendment rights by openly promulgating their views against abortion, and by offering "alternative" advice for women seeking abortions.[19] However, fake abortion clinics are anti-abortion counseling centers which promote intentionally false and deceptive speech that is not pro-

(1979 & Supp. 1987); ME. REV. STAT. ANN. tit. 5, § 205A *et. seq.* and tit. 10, § 1211 *et. seq.* (1979 & Supp. 1987-88); MICH. COMP. LAWS ANN. § 445.901 *et. seq.* (West Supp. 1987); MO. ANN. STAT. § 407.010 *et. seq.* (Vernon 1979 & Supp. 1987); NEV. REV. STAT. §§ 598.360, 598.410 *et. seq.*, 598.512, 41.600 (1985); N.Y. EXEC. LAW § 63(12) (Consol. 1983); N.Y. GEN. BUS. LAW § 349 (Consol. 1980 & Supp. 1987); OKLA. STAT. ANN. tit. 15, § 751 *et. seq.* (West Supp. 1987); PA. STAT. ANN. tit. 73, § 201-1 *et. seq.* (Purdon Supp. 1987-88); R.I. GEN. LAWS § 6-13.1-1 *et. seq.* (1985).

17. Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986).

18. Indeed, none of the cases filed to date turn upon recognition of women's interest in unhampered reproductive choice. Awareness of such interests may enter into a discussion of deceptive business practice statutes when and if the court measures the asserted government interest in controlling speech. *See infra* note 113 and accompanying text. On the other hand, when examining whether the fake abortion clinics are deceptive or assaultive, a discussion of privacy interests is not determinative and, thus, may be avoided. *See Fargo*, 381 N.W.2d at 182-83.

19. For example, the Catholic Church's Birthright Centers often explicitly advertise that

tected by the first amendment. This section argues that fake abortion clinics should be regulated for two reasons. First, fake abortion clinics engage in deceptive practices that may at times be psychologically coercive and assaultive.[20] Second, such practices endanger women's privacy interests.

A. Fake Abortion Clinics' Deceptive and Coercive Nature

Fake abortion clinics' deceptive activities occur both outside the center, in the form of misleading advertising and other inducements to attract pregnant women seeking abortions, and inside the center, in the form of high-pressure tactics to discourage abortion. Outside, the fake abortion clinics attempt to mislead potential clients by renting office space near well-known pro-choice clinics, and adopting names and initials such as "Women's Help Organization," "A Free Pregnancy Center," or "Problem Pregnancy Center," which resemble those belonging to clinics that actually perform abortions. This tactic is advocated by the Pearson Foundation, a St. Louis organization founded in 1969; the Foundation instructs groups in how to set up fake abortion clinics.[21]

The Foundation's manual instructs its readers:

> Only the neutral name is to be displayed on the office building and in advertising. It is advisable to use a P.O. Box address for your visible pro-life name in order to not expose the office as being pro-life. The woman who wants an abortion may not come to the center if the center appears to be pro-life. For this reason the center should not be in a church building.[22]

Telephone book advertisements, apparently patterned after the Pearson manual, have led women to subject themselves and their friends to treatment that they would not have knowingly undergone. One woman, for example, testified:

> I looked up the Women's Health Organization [a pro-choice clinic offering abortions] in the phone book and called the number . . .

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they are anti-abortion, and the Catholic Church publicly condemns a coercive approach. Gross, *Pregnancy Centers, supra* note 4, at B1, col. 2.

20. RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (1965) states that an actor may be liable for assault if she acts "intending to cause a *harmful* or *offensive* contact with the person of the other or a third person, or an imminent apprehension of such a contact . . . ." (emphasis added). Some states recognize claims for psychological distress, or "intentional infliction of emotional distress." *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17200 *et seq.* (West Supp. 1987) (recognized to proscribe intentional infliction of emotional distress). *See also* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); Smith, *Relation of Emotions to Injury & Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939). In referring to these clinics as "assaultive," this Note adopts the nomenclature of states that do recognize psychological assault.

21. Gross, *Pregnancy Centers, supra* note 4, at B1, col. 2.

22. PEARSON FOUNDATION, HOW TO OPERATE A PRO-LIFE PREGNANCY CENTER at 4 (hereinafter PEARSON MANUAL).

> There was no answer, however. I noticed the Women's Help Clinic listed right beneath the Women's Health Organization in the phone book. I thought perhaps it was the counseling branch of the Women's Health Organization, so I called that number.[23]

In the same case, another woman stated:

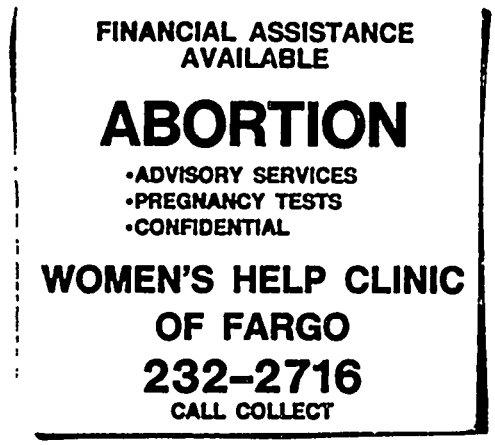
> I looked in the personal ads . . . and found the ad for the Women's Help Clinic [a fake abortion clinic]. Thinking this was the same place that I had been to previously, I called them to get more information. On the phone I told the Help Clinic that I wanted to get an abortion and needed information about going to court. They said they could not talk about it on the phone but that I would have to come in for an appointment . . . . [M]y boyfriend and I went into the Help Clinic for an appointment, all the while thinking that it was at the Women's Health Organization.[24]

By listing themselves under "Birth Control Information Centers" and "Clinics" in the telephone book[25] and by promising financial assistance, fake

23. Affidavit of Jane Doe II at 1 (dated Jan. 3, 1985), Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986) (Civ. No. 10946).

24. *Id.*, Affidavit of Jane Doe I at 1-2 (dated Jan. 3, 1985).

25. For example, the advertisements held to be deceptive and misleading in *Fargo*, 381 N.W.2d at 179 n.1, included:



After the Supreme Court of North Dakota upheld a preliminary injunction against the Wo-

abortion clinics imply they offer a full range of pregnancy-related services, including objective counseling, birth control and abortions, or referrals for abortions. Women who look in the telephone book under "clinics" expect to find objective, scientifically-based services which are administered by medically trained and licensed personnel.[26] Instead, they find untrained, unlicensed people prepared only to perform a simple pregnancy test, but who use the opportunity to engage in high-pressured, one-sided counseling. Because fake abortion clinics are not "clinics" according to the accepted definition of the word, women are misled by the promotion of them as such.[27]

Indexing fake abortion clinics under "Birth Control Information Centers" is similarly misleading where such centers refuse to provide any information about contraceptives. The Pearson Foundation Manual advises: "Never

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men's Help Clinic in *Fargo*, 381 N.W.2d at 183, the Women's Help Clinic refrained from using the above advertisements. However, the Supreme Court of North Dakota found that their new advertisements, reprinted below, were also deceptive and misleading. Thus, the court held the Women's Help Clinic to be in contempt of court. 391 N.W.2d 627, 634 (N.D. 1986).

"CONTEMPLATING ABORTION? Need questions answered? No matter what your decision, we can help. Free Pregnancy tests. Referrals. Licensed physicians. Financial assistance. 232-2716."

"PREGNANT
AND DON'T
WANT TO BE?
A women's clinic —
women helping women
232-2716
Answered 24 hours
CLIP THIS AD for a
FREE Pregnancy Test
*Confidential
*Financial Assistance
*Services performed by
licensed physicians
Call Toll Free:
ND 1-800-732-2422
MN SD 1-800-362-3145
FM Women's Help and
Caring Connection, Inc.
Pro-Life"

26. A "clinic" is defined as:

> [A]n institution associated with a hospital or medical school and dealing chiefly with outpatients. A medical establishment run by several specialists working cooperatively.

American Heritage Dictionary Definition (1975 ed.). The CAL. HEALTH & SAFETY CODE § 1200 (West 1979 & Supp. 1988) similarly defines a "clinic" as:

> [A]n organized outpatient health facility which provides direct medical, surgical, dental or podiatric advice, services, or treatment to patients who remain less than 24 hours .... A place, establishment, or institution which solely provides advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury, where such advice, counseling, information or referrals does not constitute the practice of medicine, ... shall not be deemed a clinic.

27. This argument was made in Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction at 12-14, Committee to Defend Reproductive Rights v. A Free Pregnancy Center, No. 854-267 (Cal. Super. Ct. S.F. County, filed July 15, 1986).

counsel for contraception or refer to agencies making contraceptives available."[28]

In sum, fake abortion clinics generally fail to indicate either in their advertising, or during telephone or in-person inquiries,[29] that they are anti-abortion and do not perform abortions. Furthermore, they do not disclose that in order to obtain the "free" pregnancy test, women must submit to high-pressured, anti-abortion "counseling" likely to be stressful and psychologically harmful.

Once inside the fake abortion clinic, a second stage of deception occurs. Women may be asked to reveal detailed personal information, such as names of their sexual partners and the frequency of sexual activity,[30] on the pretext that such information is necessary to provide a pregnancy test. While women wait for their test results, they are presented with medical misinformation, brutally graphic slide shows, exaggerated statistics, and high-pressured anti-abortion rhetoric.[31] A nurse at a legitimate abortion clinic described what happened to a patient who had been "treated" by one of these centers:

> The young woman who went to the local crisis center was told that the doctor would make her touch her dismembered baby, that the pain would be the most horrible she could imagine, and that she might, after an abortion, never be able to have children. All lies. They called her at home and at work, over and over and over, but she had been wise enough to give a false name. She came to us a fugitive.[32]

Similarly, a former "client" of a fake abortion clinic testified:

> I asked for the results of my test and [the counselor] said I would have to see a slide-show about abortion first. It started with nice

28. PEARSON MANUAL, *supra* note 22, at 45.

29. One woman testified that even after she visited a fake abortion clinic, she was not told that the "clinic" would not perform an abortion. Instead, the center's representative was intentionally evasive:

> I called the number and indicated that Pat had referred me to make an appointment for an abortion Thursday at 2:00 p.m. The person on the phone said 'For an abortion?' I said yes and then she said, 'Oh.' I asked her if I would be able to drive home afterwards because it was an hour and a half drive and if I couldn't drive home I needed to make arrangements to stay with a friend. She said not to worry about it, that we'd talk about it when I got there.

Affidavit of Jane Doe IV at 3 (dated Jan. 2, 1985), Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986) (Civ. No. 10946).

30. *Id.* at 4.

31. After one woman explained to a fake abortion clinic counselor that she simply wanted a pregnancy test, she was told several horror stories about abortion including one about a woman who hemorrhaged and died after an abortion. During the time she was being told these stories, she was constantly being shown pictures of fetuses. Second Amended Complaint, Shanti Friend v. Pregnancy Counseling Center—South Bay, No. C-531-158 (Cal. Super. Ct. L.A. County, filed Nov. 19, 1985). *See also* Second Amended Petition and Petition for Injunctive Relief, Jane Doe v. Mother and Unborn Baby Care of North Texas, No. 67-89003-85 (Tex. Dist. Ct. Tarrant County, filed Apr. 2, 1985).

32. Tisdale, *We Do Abortions Here: A Nurse's Story*, HARPERS, Oct. 1987, at 66, 68.

> music and pictures of women walking through fields. Then you saw a wastebasket full of dead fetuses. And then there was a slide of what they said was a dead woman lying under a sheet . . . . They kept saying that you were going to die.[33]

In some cases, women are physically prevented from leaving the fake abortion clinic until the presentation is over and, at times, women may be so shocked, embarrassed and humiliated that they in fact cannot leave.[34] Exposure to such treatment, without consent and while in a stressful and anxious state, jeopardizes women's ability to weigh their options rationally and make independent, informed decisions regarding abortion.

B. Fake Abortion Clinics' Threat to Women's Privacy Interests

At least two privacy interests are at stake in a fake abortion clinic case. The broadest privacy matter involved could be characterized as the interest in not being lured into a psychologically coercive and assaultive situation without prior and full disclosure of the content and risks.[35] One aspect of this privacy interest is characterized, in the more traditional language of common law torts, as the interest in avoiding "intrusion upon seclusion" or "invasion of privacy." The Restatement of Torts explains:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[36]

This dimension of privacy keeps particular experiences from the public eye and thus protects a person from disclosing personal matters to strangers.[37]

The second interest, directly related to the abortion itself, is the interest in

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33. Anonymous, quoted in *Right to Lie Centers*, Second Opinion and CDRR News (Committee to Defend Reproductive Rights) Apr./May (1986), at 1.

34. Affidavits of Jane Doe I-IV, Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986) (Civ. No. 10946).

35. A similar privacy interest often arises in informed consent cases. *See, e.g.*, J. Waltz & T. Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 637 (1969) (discussing patient's right, at least under conditions that do not involve an immediate threat to life, to make her own decision whether to undergo a particular therapy).

36. RESTATEMENT (SECOND) OF TORTS § 652B (1976).

37. The interest in avoiding public disclosure of personal facts is the original "privacy right," first recognized in S. Warren & L. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The Restatement (Second) of Torts recognizes common law liability based upon such invasions:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1976). *See also* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392, 398 (1960) (reexamines Warren's and Brandeis's definition of privacy); Parent, *A New Definition of Privacy for the Law*, 2 LAW & PHIL. 305, 306 (1983) (defines privacy as "not having undocumented personal information about oneself known by others").

making independent personal decisions, including those pertaining to reproductive self-determination. This latter right assumes that people have the capacity to make their own personal decisions:

> The consequence of these capacities of autonomy is that humans can make independent decisions about what their life should be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which will be disowned, which capacities cultivated and which left barren, with whom one will or will not identify, or what one will define and pursue as needs and aspirations.[38]

This privacy interest strikes at the root of what it means to be human:

> In democratic societies there is a fundamental belief in the uniqueness of the individual, in his basic dignity and worth as . . . a human being, and in the need to maintain social processes that safeguard his individuality. Psychologists and sociologists have linked the development and maintenance of this sense of individuality to the human need for autonomy—*the desire to avoid being manipulated or dominated wholly by others.*[39]

Both the interest in freedom from being coerced into a harmful situation and the interest in making unfettered personal choices are implicated in a fake abortion clinic case. These interests are fundamental because, by allowing self-determination of personal life choices, they protect nothing less than "the right to one's personality."[40] The interests may be characterized, then, as enabling conditions for full participation in social and communal life.[41] The importance of privacy also stems from the recognition that it is not an isolated freedom; it has a relationship to the whole structure of human interaction and to the entire spectrum of human rights.[42] For example, one informing principle behind the rights of free exercise of religion and freedom of speech is that individuals have both the need and ability to make decisions regarding their personal lives.

The Supreme Court recently acknowledged the importance of reproductive self-determination:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a wo-

38. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 964-65 (1979).

39. A. WESTIN, PRIVACY & FREEDOM 33 (1967) (emphasis added). For a historical background of the law of unfair duress, see Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253-55, 272-80, 288-90 (1947).

40. S. Warren & L. Brandeis, *supra* note 37, at 207 (privacy interest involved in the context of a discussion of publication of one's personal literary and artistic work).

41. R. PETCHESKY, ABORTION & A WOMAN'S CHOICE 378-79 (1984).

42. *See* A. Simmel, *Privacy is Not an Isolated Freedom*, in J. PENNOCK & J. CHAPMAN, PRIVACY, NOMOS XIII at 71 (1971) ("If privacy prospers, much else will prosper. If privacy is extinguished, much else that we care about will be snuffed out"). *See also* D. O'BRIEN, PRIVACY, LAW, & PUBLIC POLICY (1979)(examining conceptions of privacy).

> man's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[43]

Because of the centrality of reproductive capacities to women's lives,[44] lack of control over one's reproductive capacities is tantamount to lack of control over one's life.[45]

Fake abortion clinics threaten women's fundamental privacy interests by deceptively attempting to negate a woman's ability to make an objective and rational choice on whether to end her pregnancy. Therefore, state attorneys general should challenge fake abortion clinics' deceptive activities under deceptive business practice statutes.[46] Even though such statutes may only reach activity occurring outside fake abortion clinics,[47] by regulating the content of their speech in advertisements and promotions, enforcement of deceptive business statutes will protect informed, independent decision-making, and thus will help to preserve women's reproductive self-determination.

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43. Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747 (1986).

44. Judge Dooling, in McRae v. Califano, 491 F. Supp. 630, 742, *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980), wrote that a woman's right to decide about abortion is "nearly allied to her right to be." *See also* R. PETCHESKY, *supra* note 41, at 3-10. Petchesky states:

> Control over one's body is an essential part of being an individual with needs and rights . . . . Because pregnancies occur in women's bodies, the continued possibility of an 'unwanted' pregnancy affects women in a very specific sense, not only as potential bearers of fetuses, but also in their capacity to enjoy sexuality and maintain their health. *Id.* at 4-5.

45. That women must control their own sexuality in order to be autonomous is a frequent theme in feminist thought. *See* MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Copelan, *Reproductive Sexual Freedom in the 1980s*, 2 ANTIOCH L.J. 47, 52 (1982).

46. For a partial listing of state statutes aimed at protecting consumers against unfair or deceptive business practices, see *supra* note 16.

For an overview of such statutes, see J. SHELDON & G. ZWEIBEL, SURVEY OF CONSUMER FRAUD LAW (June 1978); "FTC Fact Sheet: State Laws to Combat Unfair Trade Practices," (revised June 30, 1982) reprinted in Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, app. at 465 (1984) [hereinafter Comment, *Consumer Protection*]; Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R.3d 449 (1979 & Supp. 1987).

47. Much of the activity occurring inside the clinics is least susceptible to challenge because, arguably, such activity is private, opinionated speech, and perhaps even religiously motivated speech. Religious speech is accorded a high degree of constitutional protection. *See* Murdock v. Pennsylvania, 319 U.S. 105, 113, 115 (1943); *see also* Mertus, *Ecclesiastical Sanctuary: Worshippers' Legitimate Expectations of Privacy*, 5 YALE L. & POL'Y REV. 493, 503-04 (1987).

Nevertheless, it is likely the conduct that occurs inside fake abortion clinics may not only be challenged under state statutes that proscribe misleading and deceptive activities, but also under statutes that proscribe unfair or unconscionable ones as well. Fourteen states explicitly prohibit "unconscionable" practices. These jurisdictions are Alabama, District of Columbia, Kansas, Kentucky, Michigan, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Texas, Utah and West Virginia. *See* PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3.04[1] n.7 (1986).

C. *Litigation Challenging Fake Abortion Clinics*

Fake abortion clinics have provoked outrage both in and outside of the legal community.[48] However, litigation against fake abortion clinics has not kept pace with their rapid expansion, and most cases are in the early stages of litigation. For example, the Supreme Court of North Dakota is the only state supreme court to have ruled on the merits of a first amendment defense by fake abortion clinics.[49] In *Fargo Women's Health Organization, Inc. v. Larson*, a fake abortion clinic doing business as the Women's Help Clinic (the "Help Clinic") appealed from an order granting preliminary injunctive relief to Fargo Women's Health Organization, a medical clinic which performed abortions. The state supreme court found that the Help Clinic's advertisements [50] were commercial messages, and the preliminary injunction issued by a lower court was narrow enough to proscribe only misleading and deceptive activity not protected by the first amendment.[51] In keeping with its narrow scope of review, the court did not explicitly examine whether North Dakota's false advertising statute was applicable to the case.[52]

In another narrowly worded opinion, the Supreme Court of Massachusetts addressed a claim against a fake abortion clinic based upon trademark law.[53] In *Planned Parenthood Federation of America, Inc. v. Problem Pregnancy Center*, the court found that the fake abortion clinic's use of the initials "PP" on its door was a common-law infringement upon the trademark of Planned Parenthood.[54] However, Planned Parenthood was not allowed to re-

48. Hearings concerning deceptive anti-abortion counseling centers have been held by the House of Representatives. N.Y. Times, Dec. 17, 1986, at B12, col. 5. For other examples of reactions, see Uehling, *Clinics of Deception*, NEWSWEEK, Sept. 1, 1986, at 20; *State to Join Lawsuit on Ad Deception*, Fort Worth Star-Telegram, Aug. 9, 1985, at 31A; Bader, *Bogus Clinics Offer Prayers, Not Abortions*, 2 Guardian, Apr. 16, 1986, at 2, 9; Krieger, *Just the Facts?* City Paper, Washington D.C. 10, Feb. 21, 1986, at 10; Bradsbury, *N.D. Court Documents Filed against Fargo Lawyer*, The Forum, Mar. 1, 1986, at A10; *Right to Lie Centers*, *supra* note 33, at 1.

49. Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986).

50. The advertisements are printed *supra*, note 25.

51. One exception was the requirement that the Help Clinic, if it uses the term abortion in its advertisements, affirmatively state that it does not perform abortions. The court found this requirement "redundant and unnecessary to accomplish the objective of preventing false and deceptive activity," and accordingly held that the order should be modified by striking this provision. *Fargo*, 381 N.W.2d at 179.

52. Moreover, it refused to examine the issue of whether Women's Health had a cause of action for trademark infringement. *Fargo*, 381 N.W.2d at 182-83. In an evidentiary hearing on July 23, 1986, the Supreme Court of North Dakota found the Help Clinic in contempt of court for violating the preliminary injunction by continuing to call themselves the "Women's Help Clinic"; by engaging in untrue, deceptive and misleading advertising; by falsely lulling people that came for counseling into believing that they were in fact the Fargo Women's Health Organization, an organization providing abortions; and by failing in their advertisements and contacts to state affirmatively that they did not perform abortions. Fargo Women's Health Org., Inc. v. Larson, 391 N.W.2d 627, 634 (N.D. 1986).

53. Planned Parenthood Fed. of Am., Inc. v. Problem Pregnancy Center, 398 Mass. 480, 498 N.E.2d 1044 (1986).

54. *Id.* at 488-90, 498 N.E.2d at 1049-50.

cover on its unfair and deceptive business practices claim under state law, since the defendant was not engaging in a "trade" or "commerce."[55]

State of Texas v. Mother & Unborn Baby Care of North Texas, a case in Fort Worth, Texas, illustrates the winding, involved progression of such state litigation. Three women who had been "clients" of the Problem Pregnancy Center in Fort Worth brought suit against the center, alleging that it had engaged in fraud and deceptive business practices, and had invaded their privacy.[56] The trial court entered a temporary injunction but the appellate court reversed, holding that the private plaintiffs had no standing.[57] The suit failed, according to the appellate court, because the only evidence of injury was testimony about "fear" and "apprehension."[58] Nevertheless, the court emphasized that it did not approve of the center's "camouflage tactics" and that "[t]here is no question that the appellant's employees purposefully attracted pregnant women to their facility by disseminating information which could lead these women to believe that abortions were available there."[59]

As a result of this holding, the State of Texas intervened.[60] The suit sought to enjoin violations of the Texas Deceptive Trade Practices Act,[61] allegedly committed by Mother and Unborn Baby Care of North Texas. After a second evidentiary hearing, the trial court entered a second temporary injunction.[62] The case was tried on its merits before a jury which voted to convict the center.[63] The judgment required the fake abortion clinic to disclose, upon the utterance of ten "trigger words," including "pregnancy," "abortion," and "financial assistance," that it did not perform abortions.[64] The court also required similar disclosures in advertisements and fined the center for violations of the deceptive trade practices act and for violating the previous temporary injunction.[65] The case is on appeal to the Texas Court of Appeals.[66]

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55. *Id.* at 493-94, 498 N.E.2d at 1052. The only other recorded case is one in which a local court in Pennsylvania rejected the petitioner's tort claim on the grounds that she failed to prove any damages proximately resulting from the defendant's alleged misrepresentation. Bonacci v. Save Our Unborn Lives, 11 Pa. D. & C.3d 259, 265-66 (C. P. Philadelphia 1979).

56. Second Amended Petition and Petition for Injunctive Relief and Temporary Restraint, Jane Doe v. Mother and Unborn Baby Care of N. Texas, No. 67-89003-85 (Tex. Dist. Ct. Tarrant County, filed Apr. 2, 1985).

57. Mother and Unborn Baby Care of N. Texas v. Jane Doe, 689 S.W.2d 336, 339 (Tex. Ct. App. 1985).

58. *Id.* at 338.

59. *Id.*

60. The state intervened as a sovereign acting for itself and as parens patriae for its citizens. Plaintiff's Original Petition, Information in Quo Warranto, And Petition for Civil Remedies at 2, State of Texas v. Mother & Unborn Baby Care of N. Texas, No. 67-99153 (Tex. Dist. Ct. Tarrant County, filed Sept. 17, 1986).

61. TEX. BUS. & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1968 & Supp. 1987).

62. Trial Record for State of Texas v. Mother & Unborn Baby Care of N. Texas, *infra* note 63, at 79-82.

63. State of Texas v. Mother & Unborn Baby Care of N. Texas, No. 67-99153 (Tex. Dist. Ct. Tarrant County, Oct. 7, 1986). *See* N.Y. Times, Oct. 8, 1986, at I16, col. 1.

64. Brief of Appellee, Mother & Unborn Baby Care of N. Texas v. State of Texas, No. 02-86-266, at 4 (Tex. Ct. App., filed March, 1987).

65. *Id.*

In San Francisco, the District Attorney and private plaintiffs are challenging the deceptive practices of a fake abortion clinic under the California Business & Professions Code[67] in *People of the State of California v. A Free Pregnancy Center* and *Committee to Defend Reproductive Rights v. A Free Pregnancy Center.*[68] Preliminary injunctions restraining A Free Pregnancy Center from advertising in the yellow pages under the heading of "Family Planning Information Center," without including the words "abortion alternatives," were issued in September of 1986,[69] and August of 1987.[70] The case will be tried on its merits in early 1988.[71]

A Los Angeles case, *Shanti Friend v. Pregnancy Counseling Center—South Bay*,[72] not only challenges the deceptive practices of a fake abortion clinic under the California Business and Professions Code, but also alleges that the center was practicing medicine without a license, in violation of the California Medical Practice Act.[73] In August 1985, the superior court sustained the demurrer of the defendants on the unfair business practice claim, holding that the advertising was not deceptive and defendants were not required to reveal their point of view in the advertisements.[74] However, on the grounds that defendants were practicing medicine without a license, by portraying themselves as a medical "clinic," the superior court later issued a preliminary injunction against the center's administration of pregnancy urine tests.[75]

These cases illustrate that increasing numbers of state attorneys general and private parties are utilizing state deceptive business practice statutes to challenge fake abortion clinics. Still, the number of cases in which fake abor-

66. Oral argument was heard in the Texas Court of Appeals on Sept. 16, 1987. Assistant Attorney General Elliot Shaven expects that a decision will be reached in early 1988. Telephone interview with Elliot Shavin, Assistant Attorney General, Consumer Protection Division (Oct. 2, 1987).

67. CAL. BUS. & PROF. CODE §§ 17200 and 17500 (Deering 1976 & Supp. 1987).

68. Complaint for Injunction, Restitution and Civil Penalties, People of the State of California v. A Free Pregnancy Center, No. 861-193 (Cal. Super. Ct. S.F. County, filed July 15, 1986), and First Amended Complaint, Committee to Defend Reproductive Rights v. A Free Pregnancy Center, No. 854-267 (Cal. Super. Ct. S.F. County, filed June 25, 1986), *consolidated as* No. 854-267 (Committee to Defend Reproductive Rights). Corollary issues in the case include claims of unauthorized adoptions and attempted child abductions. Complaint for Injunctions, Restitution and Civil Penalties at 5, People of the State of California v. A Free Pregnancy Center, No. 861-193 (Cal. Super. Ct. S.F. County, filed July 15, 1986).

69. Preliminary Injunction, Committee to Defend Reproductive Rights v. A Free Pregnancy Center, No. 854-267 (Cal. Super. Ct. S.F. County, Sept. 15, 1986).

70. Order for Preliminary Injunction at 2, Committee to Defend Reproductive Rights v. A Free Pregnancy Center, No. 854-267 (Cal. Super. Ct. S.F. County, Aug. 10, 1987).

71. Letter from David Moon, Assistant District Attorney, San Francisco, to Author (Oct. 7, 1987).

72. Second Amended Complaint, Shanti Friend v. Pregnancy Counseling Center—South Bay, No. C-531-158 (Cal. Super. Ct. L.A. County, filed Nov. 19, 1985).

73. CAL. BUS. & PROF. CODE §§ 17200, 17500, 2000 and 2052 (Deering 1976 & Supp. 1987).

74. Ruling on Demurrer/Statement of Decision, Shanti Friend v. Pregnancy Counseling Center—South Bay, No. C-531-158 (Cal. Super. Ct. L.A. County, Aug. 9, 1985).

75. Preliminary Injunction, Shanti Friend v. Pregnancy Counseling Center—South Bay, No. C-531-158 (Cal. Super. Ct. L.A. County, Dec. 4, 1985).

tion clinics' actions are challenged is minuscule as compared to the thousands that go unchallenged.[76]

II.
ENFORCEMENT OF STATE DECEPTIVE BUSINESS PRACTICE STATUTES DOES NOT VIOLATE THE FIRST AMENDMENT

Some of the coercive and assaultive activities inside fake abortion clinics arguably consist of "opinions." Thus, such activities are not susceptible to challenge as being false and deceptive under state deceptive business practice statutes[77] and might be protected by the first amendment. However, even a limited approach which concentrates on the first stage of deception, the deception which occurs *outside* fake abortion clinics in the form of advertisements, may also raise first amendment concerns.[78] This section examines the Supreme Court's treatment of restraints on promotional speech and applies the relevant judicial doctrine to the fake abortion clinic scenario.

A. The Degree of Constitutional Protection Provided Fake Abortion Clinic Advertising

Any system of prior restraint on speech bears a heavy presumption against its constitutional validity.[79] The first amendment, as applied to the states through the fourteenth amendment, protects both commercial and non-commercial speech from unwarranted government regulation.[80] Commercial expression receives protection because it "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[81] The Supreme Court reasons that:

> [P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.[82]

Nevertheless, commercial speech does not receive the full panoply of protections under the first amendment because such speech is considered to be of

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76. *See supra* notes 7-8 and accompanying text.

77. *See supra* note 47 and accompanying text.

78. In addition to the first amendment, fake abortion clinics have claimed protection under the freedom of religion clause of the first amendment and the equal protection clause of the fourteenth amendment. *See* Answer of Defendants Lourdes Foundation, Carolyn Connelly, and Carolyn Armstrong, People of the State of California v. A Free Pregnancy Center, No. 861-193 (Cal. Super. Ct. S.F. County, filed Aug. 19, 1986).

79. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

80. Bolger v Youngs Drug Prod. Corp., 463 U.S. 60, 64-65 (1983); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-62 (1976).

81. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561-62 (1980).

82. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

"less constitutional moment than other forms of speech."[83] Commercial speech neither contributes to self-government nor nurtures personal autonomy.[84] Failure to distinguish between commercial and noncommercial speech, the Court fears, "could invite dilution, simply by a leveling process of the force of the Amendment's guarantee with respect to the latter kind of speech."[85]

The test for determining the validity of a commercial speech regulation is less stringent then the test for noncommercial speech regulation: the former need only advance a *substantial* governmental interest while the latter must directly advance a *compelling* state interest.[86] In addition, unlike other forms of speech, commercial speech is not protected if it is misleading or fraudulent.[87] Thus, in determining whether the government may prohibit the deceptive communications of fake abortion clinics, it is necessary to determine first whether the clinics' activities constitute commercial or noncommercial speech.

To date, the Supreme Court has failed to formulate a precise definition of commercial speech but has instead relied upon "common-sense" distinctions between commercial and noncommercial speech.[88] Thus, where an advertise-

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83. *Central Hudson*, 447 U.S. at 563 n.5. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971, 2980 (use of the word "Olympic" was commercial speech and, therefore, was entitled to a lesser degree of first amendment protection than non-commercial speech).

Whether commercial speech should be protected has been a topic of great debate. *See, e.g.*, Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437 (1980); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979) (first amendment protects self-government and self-fulfillment; neither value is implicated by regulation of commercial speech); Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979) (lower level of first amendment protection afforded to commercial speech is justified); Alexander, *Commercial Speech & First Amendment Theory: A Critical Exchange*, 75 NW. U.L. REV. 307 (1980) (response to Farber). *See also* Bibliography, *Survey of the Literature: Commercial Speech and Commercial Speakers*, 2 CARDOZO L. REV. 659 (1981).

84. Jackson & Jeffries, *supra* note 83, at 14. For the argument that the central purpose of the first amendment is to protect political expression and not to regulate commercial speech, *see* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 79 (1960).

85. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

86. *See infra* text accompanying note 117.

87. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 563; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771; Friedman v. Rogers, 440 U.S. 1, 9 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 467-68; Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

88. *Ohralik*, 436 U.S. at 455-56; Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977); Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626, 637 (1985). One critic notes:

> Both the Supreme Court and its critics have been relatively unconcerned with the problem of defining commercial speech. Rather, discussion has mainly concerned analysis of the actual and proposed tests used in deciding disputes.

Simon, *Defining Commercial Speech: A Focus on Process Rather Than Content*, 20 NEW ENG. L. REV. 215, 219 (1984-1985) (suggests that a commercial speech test focus on the harm speech might cause).

See generally E. ROME & W. ROBERTS, CORPORATE & COMMERCIAL FREE SPEECH:

ment proposes a commercial transaction, listing only products and prices, it is most likely pure commercial speech subject to little first amendment protection.[89] Most cases are less easily defined because "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."[90]

Recent opinions suggest that the Court considers the format and content of the speech as well as the motivations of the parties. Simply stated, commercial speech proposes a transaction; noncommercial speech offers more than goods or services to prospective clients. Speech has been held to be noncommercial when it "communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support."[91] Whether a fee is actually charged is not dispositive;[92] courts have considered the speaker's economic interests in conjunction with the audience's expectations.[93] In other words, if the audience reasonably expects that a transaction will be forthcoming, the speech in question may be considered commercial, even though the speaker does not expect to profit.[94]

The format, content, and motives of fake abortion clinics' advertisements indicate that they should be considered commercial speech. Fake abortion clinics attract clients by advertising in newspapers and telephone books, and on bill-boards, posters, and radio. These advertisements do not communicate information about abortion and intentionally avoid expressing the viewpoint of the advertiser.[95] Rather than commenting upon matters of public issue, the advertisements are placed in a commercial context because they ostensibly

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FIRST AMENDMENT PROTECTION OF EXPRESSION IN BUSINESS (1985) (explains evolution and current status of commercial speech doctrine); Note, *The First Amendment and "Scalping" By a Financial Columnist: May a Newspaper Article Be Commercial Speech?*, 57 IND. L.J. 131, 156-61 (1982) (urges balancing test in order to assure that only harmful commercial speech is regulatable); Comment, *Standard of Review for Regulations of Commercial Speech: Metromedia, Inc. v. City of San Diego*, 66 MINN. L. REV. 903, 923 (1982) (suggests that regulation of commercial speech should be limited to speech that directly concerns business activity); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 222-36 (1976) (explores definition of commercial speech after *Virginia State Bd.*).

89. For example, the Court has also found that gender-based help-wanted ads are "classic examples of commercial speech" in that they do no more than propose employment. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

90. Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

91. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (libel charges arising from paid civil rights advertisement in the New York Times).

92. *Id.* at 265-66. *See also Bates*, 433 U.S. at 363. Economic intent as a focus sweeps both too broadly and too narrowly, since all who advertise have some measure of both economic and noneconomic motivation. *See* Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372, 381-84 (1979).

93. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 561 (motivations of audience are relevant in determining whether speech is commercial).

94. *Id.*

95. The Pearson Manual on operating fake abortion clinics, *see supra* note 22 and accompanying text, specifically instructs operators of fake abortion clinics to use certain operating procedures in order to conceal the anti-abortion nature of their clinics.

promote services and solicit patronage. In that respect, they constitute classic examples of commercial speech.[96] In addition, the public may reasonably expect that fake abortion clinics' advertisements are commercial because, by promising that financial assistance is available and credit cards are accepted, many advertisements imply that a commercial transaction may be forthcoming.[97]

Arguably, fake abortion clinics' advertisements serve a greater purpose than the mere offer of services because each advertisement pertains to abortion, an issue of great public debate.[98] Yet many, if not all products or services, may be loosely tied to public concerns in such broad areas as health and safety, individual freedoms, environmental protection, or economic policy.[99] Courts have considered the public's interest in receiving information[100] but have explicitly refused to allow mere references to public debate to take communications out of the zone of commercial speech and into the area of fully protected speech:

> A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the

96. Thus, the fake abortion clinics' advertisements fit the definition for commercial speech articulated in Friedman v. Rogers, 440 U.S. 1 (1979), where the Court referred to commercial advertising as that which "contained statements about the products or services offered and their prices." *Id.* at 12. (In a fake abortion clinic case, the initial cost is listed as "free.") Similarly, in Village of Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1979), a commercial solicitation was defined as one which "is primarily concerned with providing information about the characteristics and costs of goods and services."

97. The only state supreme court to have ruled on the merits of a first amendment defense by a fake abortion clinic adopted this reasoning. The court, in Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176 (N.D. 1986), stated:

> Irrespective of the degree, if any, that monies are received by the Help Clinic from its clients we do not believe that factor is dispositive of our determination that the communication involved is commercial speech. More importantly, the Help Clinic's advertisements are placed in a commercial context and are directed at the providing of services rather than toward an exchange of ideas. The Help Clinic advertisements offer medical and advisory services in addition to financial assistance.

Id. at 180-81.

98. When determining whether speech may be regulated, the Court has taken special care to ascertain whether the underlying conduct that is the subject of advertising restrictions is "constitutionally protected and could not have been prohibited by the state." Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968, 2979 (1986); *see also* A. Doberman, *Advertising for Abortion Services and Contraceptives*, 1985 ANN. SURV. AM. L. 655, 658. "Special care," however, does not mean that the Court has found that advertising restricting constitutionally protected activity is always invalid. Moreover, in the present case, abortion is not likely to be characterized as a constitutionally protected activity because the right to an abortion is only guaranteed against unreasonable government restrictions. *See supra* note 11 and accompanying text. Thus, in a fake abortion clinic case, advertising relates to an important public issue, not to a constitutionally protected activity.

99. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 562-63 n.5.

100. *Bigelow v. Virginia* formulated the standard for determining the constitutionality of commercial speech regulations as "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." 421 U.S. at 826.

context of commercial transactions.[101]

If a fake abortion clinic is interested in publishing facts or expressing opinions, "it can do so outside the commercial context and receive full first amendment protection; hence, it is unnecessary to extend the full panoply of first amendment protections to the clinic's commercial solicitation of clientele."[102]

Thus, fake abortion clinics' advertising is similar in one crucial respect to that at issue in *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*,[103] which involved advertising by casino owners. There, the Court specifically noted:

> The narrowing construction of the statute and regulations announced by the Superior Court effectively ensure that the advertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling.[104]

Just as in *Posadas*, an essential element of the first amendment is well protected in a fake abortion clinic scenario. [105]

Speech in the fake abortion clinic context is distinguishable from the abortion advertising at issue in *Bigelow v. Virginia*.[106] In *Bigelow*, a newspaper publisher was convicted, under a Virginia statute prohibiting publication of any statement which would encourage abortions, for printing an advertisement which announced that abortions were legal in New York without residence requirements. The advertisement offered to "make all arrangements" for "immediate placement in accredited hospitals and clinics at low cost" to

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101. Bolger v. Youngs Drug Prod. Corp., 463 U.S. at 68.

102. Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d at 181.

103. 106 S. Ct 2968 (1986). In *Posadas* the Court held that Puerto Rico statutes and regulations restricting the advertising of casino gambling aimed at residents of Puerto Rico do not violate the First Amendment. This Note does not examine whether the Puerto Rican government did indeed have a substantial government interest in seeking to reduce demand for gambling by residents, whether the regulations in *Posadas* directly advanced that interest, and whether the restrictions were no more than necessary to serve the Commonwealth's interests. Rather, it merely notes the Court's decision that the speech at issue was commercial speech.

104. 106 S.Ct. at 2976 n.7, *citing* Zauder v. Office of Disciplinary Counsel, 471 U.S. 626, 637 n.7 (noting that Ohio's ban on advertising of legal services in Dalkon Shield cases "has placed general restrictions on appellant's right to public facts or express opinions regarding Dalkon Shield litigation.").

105. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973), emphasizing that "nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment."

106. 421 U.S. 809 (1975). This discussion of *Bigelow* parallels that of the leading case on fake abortion clinic advertisements, *Fargo*, 381 N.W.2d at 181-82; *see also* supra note 25. For an in-depth discussion of *Bigelow*, see Boyce, *Commercial Speech: First Amendment Clarified*, 28 U. FLA. L. REV. 610 (1976); Sheridan, *Commercial Speech: The Supreme Court Sends Another Valentine*, 25 BUFFALO L. REV. 737 (1976).

facilitate abortions.[107] The Court, in holding that the statute violated the publisher's first amendment rights, reasoned that the advertisement was noncommercial speech because it did more than simply propose a transaction. It contained factual matter of clear public interest, most prominently the statement: "Abortions are now legal in New York. There are no residency requirements."[108]

Cases against fake abortion clinics are substantially different from *Bigelow* in at least three important respects. First, unlike *Bigelow*, fake abortion clinic cases filed to date do not involve the regulation of factual material or opinions of public interest. Rather, they involve regulation of mere commercial solicitation of clientele.[109] Second, fake abortion clinic challenges seek narrowly prescribed orders restraining *false* and *deceptive* information. Under such orders, fake abortion clinics would still be able to advertise their services; they simply would not be able to do so in a false and deceptive manner. *Bigelow*, on the other hand, involved a broadly drawn statute prohibiting the dissemination of concededly accurate factual information. Indeed, the Court in *Bigelow* suggested that its decision may have been different if the advertisement at issue had been "deceptive or fraudulent."[110]

Third, application of deceptive business practice statutes to a fake abortion clinic scenario furthers at least three substantial governmental interests: prevention of deceptive business practices,[111] promotion of informed decisions regarding procreation, and, consequently, protection of women's privacy interests.[112] In contrast, the Court in *Bigelow* found that Virginia had no authority or power to regulate the advertising in question:

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107. *Bigelow*, 421 U.S. at 812.

108. *Id.* at 822.

109. *See supra* notes 95-97 and accompanying text.

110. *Bigelow*, 421 U.S. at 828.

111. The Supreme Court has specifically noted that "government may ban forms of communication more likely to deceive the public than to inform it." Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 563, *quoting* Friedman v. Rogers, 440 U.S. at 13, 15-16. Thus, prevention of deceptive business practices is a substantial governmental interest.

112. Whether promotion of informed decisions regarding procreation (which may be termed promotion of public health and welfare) and protection of women's privacy interests are necessarily substantial interests is unclear. It is difficult to draw generalizations as to what government interests may be deemed substantial for purposes of justifying restrictions on commercial speech:

> [T]he decisions to date offer little guidance because practically all of the state restrictions on commercial speech which the Supreme Court has invalidated have been voided not on the ground that the state interest was insufficiently important or substantial but because the means selected to advance that interest was not directly related to the government interest, even if it were assumed that the state interest had qualified as a substantial one.

E. ROME AND W. ROBERT, *supra* note 88 at 120-21, *citing Central Hudson*, 447 U.S. 557, and *Virginia State Bd.*, 425 U.S. 748. Because protection of health, safety, and welfare has traditionally been recognized as a legitimate and substantial government interest, *see, e.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), it may justify restrictions on commercial speech.

> Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach.[113]

Because the regulation in *Bigelow* did not promote a substantial government interest, the Court held it to be invalid.

In conclusion, fake abortion clinic advertising is commercial because its format and content promote clinical services. Public expectations that the center's advertisements promote a potential commercial transaction are reasonable; these advertisements' traditional format and content suggest the availability of a commercial transaction. The advertising at issue in *Bigelow* is inapposite because it contained accurate information regarding abortion, and because the regulations failed to promote a sufficient government interest. Therefore, the constitutional validity of regulation under state deceptive business practice statutes must be judged under commercial speech standards.[114]

B. The Constitutionality of Regulation of Fake Abortion Clinic Advertising Under Commercial Speech Standards

The Supreme Court has identified general principles for determining the validity of commercial speech regulations in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*,[115] and *Posadas De Puerto Rico Associates v. Tourism Company of Puerto Rico*.[116] *Central Hudson* articulated a four-part test:

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113. *Bigelow*, 421 U.S. at 827-28 (emphasis in original).

114. Even if the advertisements were found to be non-commercial speech, they could still be prohibited without contravening the first amendment. For example, the fake abortion clinics' "clients" may be seen as a captive audience that is subject to information that it does not want to hear. Under extremely stressful circumstances, enhanced by the actions of the fake abortion clinics, most members of this audience cannot immediately walk away. Under such circumstances, a lesser degree of first amendment scrutiny is warranted. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1973).

Regulation of fake abortion clinics' speech also may be upheld as legitimate "time, place and manner" restrictions. The Supreme Court has approved such regulations "provided that they are justified without reference to the content of the regulated speech, that they serve a significant government interest, and that in so doing they leave open ample alternative channels for communication of the information." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771; *compare* Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) and United States v. O'Brien, 391 U.S. 367, 377 (1968), *with* Buckley v. Valeo, 424 U.S. 1 (1976) and Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1979). Because the speech of fake abortion clinics appears to be commercial, a more detailed discussion of these and other alternative approaches is left to another occasion.

115. 447 U.S. 557 (1980) (striking down a New York Public Service Commission order that completely banned electric utilities from advertising to promote the use of electricity; finding that the government's interest in energy conservation could be met in a less restrictive manner).

116. 106 S. Ct. 2968 (1986) (holding that Puerto Rican statute and regulations restricting advertising of casino gambling, aimed at residents of Puerto Rico, did not violate the first amendment.)

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[117]

Under the *Central Hudson* test, two levels of analysis are described. In order to determine whether a deceptive business practice statute is valid as applied to a fake abortion clinic, the analysis need not proceed past the second sentence in the *Central Hudson* test. In this first level of analysis, fake abortion clinics' advertising does not receive *any* first amendment protection because it is deceptive and misleading.

The conclusion that fake abortion clinics' deceptive speech is not constitutionally protected is supported by the reasoning in *Central Hudson*. The Court noted that the first amendment's concern for commercial speech stems from the informational function of advertising.[118] Therefore, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity or are "more likely to deceive the public rather than to inform it."[119] Generally, the first amendment prohibits regulations based upon the content of messages. Two features of commercial speech, however, permit regulation of its content, when content is false or misleading:

> First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.[120]

These differences "justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion."[121] Inaccurate or misleading commercial messages,

117. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 566.

118. *Id.* at 563. *See also* First Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

119. *Central Hudson*, 447 U.S. at 563; Friedman v. Rogers, 440 U.S. at 13. Moreover, there can be no constitutional objection to regulation of speech related to unlawful activity. *See* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) (holding that ordinance forbidding newspapers from carrying sex-designated advertising does not violate newspaper's first amendment rights).

120. *Central Hudson*, 447 U.S. at 564 n.6 (citations omitted), *citing* Bates v. State Bar of Arizona, 433 U.S. at 381.

121. *Central Hudson*, 447 U.S. at 578.

therefore, are not protected by the first amendment.[122]

Operators of fake abortion clinics know or should know that their advertisements and promotions — which are targeted at women who are likely to seek an abortion or birth control information — are false and misleading.[123] To be sure, regulation of fake abortion clinics' advertisements would be invalid if it "depriv[ed] the public of the information [it] needed to make a free choice."[124] However, in a fake abortion clinic scenario, regulation causes no such deprivation. Rather, it prevents dissemination of deceptive and misleading material, with little or no informational content. Deceptive business practice statutes do not restrict anti-abortion counseling centers from promoting their services so long as those promotions are not deceptive.

Although it is unnecessary to go beyond the second sentence in the *Central Hudson* test in order to validate the application of state deceptive business practice statutes to fake abortion clinic advertising, a second level of analysis is nonetheless provided by the last three criteria of *Central Hudson*: advertising may be regulated if (1) the government's interest in regulation is substantial, (2) the regulations directly advance the government's asserted interest, and (3) the restrictions are no more extensive than necessary to serve that interest.[125]

The first of these three criteria involves an assessment of the strength of the governmental interest in regulating speech. There are several reasons why government might wish to regulate speech in the fake abortion clinic context: to prevent deceptive business practices, to protect people from being unwittingly lured into a coercive, assaultive situation, and to promote informed, independent decision-making regarding procreation and, consequently, to enhance health care generally. Government's interest in preventing deceptive business practices is recognized as legitimate.[126] Its interest in protecting the health, safety and welfare of its citizens also has been recognized as a legitimate, substantial government interest within the police powers.[127] The health,

122. *Friedman*, 440 U.S. at 9; *Bates*, 433 U.S. at 383; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771. *See also* A. COX, FREEDOM OF EXPRESSION 39 (1981).

123. Courts have recognized on the basis of trial records that fake abortion clinics willfully deceive:

> There is no question that appellant's employees purposefully attracted pregnant women to their facility by disseminating information which could lead these women to believe that abortions were available there.

Mother and Unborn Baby Care of N. Texas, Inc. v. Jane Doe, 689 S.W.2d 336, 339 (Tex. 1985).

124. *Central Hudson*, 447 U.S. at 574-75 (Blackmun, J. concurring). *See also* Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 750 (1982) ("Regulation of commercial speech designed to influence behavior by depriving citizens of information . . . violate[s] basic principles of viewpoint- and public-agenda-neutrality.").

125. *See supra* note 117 and accompanying text; *see also* San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. at 2981 n.16 (citing *Central Hudson* test).

126. *Central Hudson*, 447 U.S. at 563.

127. *See, e.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). *See also supra* note 112.

safety and welfare interests of women are particularly worthy of protection in a fake abortion clinic case because these cases go to the heart of women's fundamental privacy and autonomy interests.[128]

Once it is established that the government's interest is substantial, the last two criteria of the *Central Hudson* analysis consider the "fit" between the legislature's ends and the means chosen to accomplish those ends.[129] The Court has refused to uphold regulations that only indirectly advance the state interest involved.[130] However, in the fake abortion clinic context, deceptive business statutes *directly* advance state interests. They prohibit speech that misrepresents the purpose and activities of fake abortion clinics in order to induce women to submit to psychological stress under false pretenses. Further, enforcement of state deceptive business statutes may prevent women from receiving unbiased and accurate medical information about abortion. Application of deceptive business statutes would therefore directly advance women's health care, by promoting informed decisions regarding both reproductive counseling and abortions, and by protecting reproductive self-determination.

The third criterion of *Central Hudson* mandates that speech restrictions be "narrowly drawn."[131] For example, in *Carey v. Population Services International*,[132] the Court held that the State's arguments did not justify the *total* suppression of advertising concerning contraceptives.[133] However, application of deceptive business statutes in the fake abortion clinic context would only require suppression of the portions of advertising that are deceptive and misleading. Anti-abortion counseling centers still would be permitted to advertise if such advertisements were not deceptive. There are no feasible alternatives that would be less restrictive of protected speech.[134] Because application of deceptive business statutes to fake abortion clinics' advertising would directly advance substantial government interests without infringing upon nondeceptive speech, such regulation would be constitutionally valid.

C. *Remedies for Violations of Deceptive Business Practice Statutes*

State deceptive business practice statutes grant broad discretion in fash-

128. *See supra* notes 38-45 and accompanying text.

129. Posadas De Puerto Pico Associates v. Tourism Company of Puerto Rico, 106 S. Ct. at 2977.

130. *Bates*, 433 U.S. at 378 (finding that "restraints on advertising" are an ineffective way of detering shoddy work); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95 (1977) (finding no direct connection between the town's goal of integrated housing and its ban on the use of all "For Sale" signs in front of houses); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 769 (finding that advertising ban did not directly advance the state's goal of enhancing professional standards).

131. *Central Hudson*, 447 U.S. at 566.

132. 431 U.S. 678 (1977).

133. *Id.* at 702. Similarly, the Court in *Central Hudson* found that the regulation was not narrowly drawn. *Central Hudson*, 447 U.S. at 570-01.

134. A feasible alternative must be one that would protect women's interest in not being lured into a psychologically stressful situation, as well as women's interest in freely making decisions regarding procreation.

ioning remedies. Under such statutes, states may invoke the traditional remedy of ordering fake abortion clinics to refrain from misrepresenting the nature of their services in advertisements and in response to personal inquiries. Furthermore, states may compel fake abortion clinics to reveal their anti-abortion stance in future promotional communications.[135] If such injunctions are granted, fake abortion clinics could be subject to sanctions, including civil penalties, for violations of the injunctions.[136] States may even order fake abortion clinics to promulgate corrective advertising to remedy the image created by past deceptive advertising.[137]

While corrective advertising is a relatively new concept, it is not without precedent. For example, in *Warner Lambert Co. v. FTC*[138] the company was ordered to correct the image created by deceptive advertising claims that its product Listerine prevents common colds. In *Warner Lambert*, the D.C. Circuit noted that the Supreme Court had suggested that "[it may be] appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it from being deceptive."[139] The circuit court held that requiring corrective advertising does not violate the first amendment because the remedy does not differ substantially from the more traditional one of affirmative disclosure of unfavorable facts.[140] It reasoned that corrective advertising merely requires certain disclosures, because in their absence the company's prior advertisements would continue to deceive the public.[141]

Other cases have upheld methods for previewing advertising cam-

135. For an example of a cease and desist order, *see* Jay Norris v. FTC, 598 F.2d 1244, 1245-46 (2nd Cir. 1979), *cert. denied*, 444 U.S. 980 (1979). For an example of an affirmative disclosure order, *see* RJR Foods, Inc., Trade Reg. Rep. (CCH) ¶ 20,334 (1973)(consent order)(ordering Hawaiian Punch manufacturers to disclose its fruit juice content for one year or until consumer perception of fruit content is accurate).

136. *See* Walker v. Birmingham, 388 U.S. 307 (1967).

137. *See generally infra* notes 138-41.

138. 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1977). The Supreme Court, however, has not ruled specifically on corrective advertising. Pacific Gas & Elec. v. Public Utilities Comm'n of California, 106 S.Ct. 903 (1986), held that an order requiring a utility to include a third party's political statement in its mailings was unconstitutional. The order in *Pacific Gas* cannot be characterized as a corrective advertising order because it did not seek to correct prior *deceptive* statements. Instead, it forced one party to advance another's political speech.

139. *Warner Lambert*, 562 F.2d at 758, *quoting* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 772.

140. 562 F.2d at 759. For examples of traditional cases ordering affirmative disclosure of unfavorable facts, *see* Ward Laboratories v. FTC, 276 F.2d 952 (2d Cir. 1960) (sellers of treatments for baldness ordered to disclose that the vast majority of cases of thinning hair are attributable to heredity, age, and endocrine balance, and that their treatment would have no effect on this type of baldness); Feil v. FTC, 285 F.2d 879 (9th Cir. 1960) (makers of devices to stop bedwetting ordered to disclose that device would not aid cases caused by disease or organic defects); Royal Baking Powder Co. v. FTC, 281 F. 744 (2d Cir. 1922) (company ordered to disclose change in ingredients).

141. *Warner Lambert*, 562 F.2d at 762.

paigns[142] as well as Federal Trade Commission ("FTC") orders requiring manufacturers to use corrective measures to remedy past deceptive advertising.[143] The FTC has announced it will take a flexible, case-by-case approach in determining when corrective advertising may be necessary.[144]

Corrective advertising may be necessary in fake abortion clinic cases because without such a remedy the public will continue to act based upon a false perception of the centers' services. When ordered in a fake abortion clinic case, corrective advertising would not violate the first amendment because it would not restrain the non-deceptive aspects of the center's speech.

In sum, application of deceptive business practice statutes would not require an analysis of the truth or falsity of fake abortion clinics' positions regarding abortion, but would only prohibit them from disguising themselves as something they are not. Thus, state statutes which prohibit the deceptive practices of fake abortion clinics do not violate the first amendment's protection of free speech. State attorneys general should therefore exercise their authority under their states' deceptive business practice acts and bring actions against fake abortion clinics.

III.
TOWARD FEDERAL ACTION

While plaintiffs should successfully challenge fake abortion clinics under state unfair or deceptive business practice statutes, reliance upon such statutes would be insufficient on two levels. First, such action would fail on a practical level to guarantee adequate remedial measures because state statutes vary greatly in scope, enforcement incentives, and actual enforcement policy. The current array of state consumer protection laws is based on a variety of model acts, each with its own scope.[145] The four basic models are:

(1) *The Uniform Deceptive Trade Practices Act*[146] which prohibits eleven specific deceptive practices and generally forbids "any other conduct which simi-

142. Prescreening arrangements were specifically condoned in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 571 n.13. *See also* Freedman v. Maryland, 380 U.S. 51, 58 (1965) (prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards).

143. *See* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967) (upholding FTC order requiring makers of Geritol, who had represented that people who felt tired would find relief in Geritol, to include a statement that Geritol would only help people who felt tired because of iron deficiency anemia); *See also* Banzhaf v. FCC, 405 F.2d 1082 (1968), *cert. denied sub nom* Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) (affirming ruling of FCC requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking).

144. Excerpt from letter to Charles Halpern, Antitrust & Trade Reg. Rep. (BNA) No.936, at A-7 (Oct. 25, 1979).

145. A more detailed exploration of the four models for state deceptive business practice statutes is found in PRIDGEN, *supra* note 47, at ch. 3 *et seq.*; J. Sebert, *Enforcement of State Deceptive Business Practice Statutes*, 42 TENN. L. REV. 689, 698-704 (1975).

146. Uniform Deceptive Trade Practices Act, Vol. 7 (1978 & Supp. 1984).

larly creates a likelihood of confusion or misunderstanding."[147] In most of the states that have adopted this model, a second statute provides additional remedies for consumers because, under the model, the remedy for private actions is limited to injunctions.[148]

(2) *The Uniform Trade Practices and Consumer Protection Law*[149] which contains three alternative formats. The first format, known as the "Little FTC Act," is patterned directly on the Federal Trade Commission Act, and broadly prohibits "unfair methods of competition and unfair or deceptive acts or practices."[150] The second alternative prohibits only false, misleading, or deceptive practices, but not unfair practices.[151] The third alternative, known as the "laundry list" approach, lists thirteen specific prohibited practices, and then generally prohibits "any other practice that is unfair or deceptive."[152]

(3) *Consumer Fraud Acts*, which are similar to the "Little FTC Acts," except that they do not prohibit unfair methods of competition.[153]

(4) *Uniform Consumer Sales Practices Acts*[154] which apply only to "consumer transactions" and list prohibited types of conduct including "unconscionable practices."[155]

Each of these models exempts some class of defendants from their coverage. For example, several statutes exempt certain categories of professionals.[156] The scope of deceptive business practice statutes also varies widely

147. *Id.*

148. The states that have adopted this model are: Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, Ohio, Oklahoma and Oregon. National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 5 (1982) *cited in* PRIDGEN, *supra* note 47 at § 3.02(2)(b) n.5.

149. Council of State Governments, 1970 Suggested State Legislation: Unfair Trade Practices and Consumer Protection Law—Revision, *reprinted* in Trade Reg. Rep. (CCH) ¶ 31,035 B (1972) (hereinafter Council of State Governments).

150. 15 U.S.C. § 45(a)(1) (1980), quoted in Council of State Governments, *supra* note 149 at 2. The states that have adopted this model are: Alaska, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. PRIDGEN, *supra* note 47, at § 3.02(2)(c) n.6.

151. This alternative has not been adopted in its suggested form by any state. PRIDGEN, *supra* note 47, at § 3.02(2)(c).

152. Twenty-six jurisdictions use this form: Alabama, Arkansas, Arizona, California, Georgia, Guam, Hawaii, Idaho, Indiana, Kansas, Maryland, Michigan, Nebraska, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Virgin Islands, and West Virginia. Seven of these states prohibit only certain itemized practices without a catchall provision: Colorado, District of Columbia, Indiana, Mississippi, New York, Oklahoma and Wyoming. *Id.*

153. The states that follow this approach are: Arizona, Arkansas, Delaware, Iowa, Missouri, New Jersey and North Dakota. *Id.* at § 302(2)(d).

154. Uniform Consumer Sales Practices Acts, Vol. 7A (Supp. 1984).

155. This model has been adopted in Kansas, Ohio, and Utah. PRIDGEN, *supra* note 47 at § 302(2)(e) n.11. It has been criticized because of its restrictive approach to public and private class actions. Rice, *Uniform Sales Practices Act—Damage Remedies: The NCCUSL Giveth and Taketh Away*, 67 NW. U.L. REV. 369 (1972).

156. *See, e.g.*, MD. COM. LAW CODE ANN. § 13-104 (1983) (exempting architects, accountants, lawyers, clergymen, veterinarians, and insurance companies); Ohio Rev. Code Ann. § 1345.01 (1983) (exempting doctors and lawyers).

according to their operative language. While some vaguely apply to all entities that are "in business,"[157] others apply to all entities engaged in "trade or commerce."[158]

Not only does the scope of these laws vary widely, but also enforcement patterns vary across and within different models.[159] Given the low level of enforcement by state attorneys general, the challenge to fake abortion clinic tactics has been through the initiation of private actions. The frequency of private enforcement depends in large part upon whether the statute offers an attractive remedy for consumers seeking relief.[160] States with statutes which provide multiple damages or attorney fees to successful plaintiffs[161] generally inspire the greatest number of private actions.[162] While many states only award attorney's fees to prevailing plaintiffs, other states award attorney's fees to prevailing parties, including prevailing defendants.[163] Statutes awarding attorney's fees to prevailing defendants are likely to discourage consumers from bringing an action because of the risk not only of nonrecovery but of having to pay the substantial penalty of the defendant's attorney's fees.

Thus, because state unfair and deceptive business practice statutes vary greatly in scope, private enforcement incentives, and enforcement patterns, reliance upon such statutes would produce sporadic and inconsistent results. The inadequacy of state statutes to challenge fake abortion clinics is strongly suggested by the scarcity of suits currently challenging fake abortion clinics under state statutes. Furthermore, state deceptive business practice statutes

157. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17200, 17500 (Deering 1986 & Supp. 1987). The definition of "business," which includes both commercial and noncommercial entities open to the public, has been broadly construed by California courts. *See, e.g.*, Pines v. Thomson, 160 Cal. App. 3d 370 (1984) (nonprofit corporation that considers its work to be that of a ministry is subject to § 17200).

158. *See, e.g.*, Texas Deceptive Trade Practices Consumer Protection Act, TEX. BUS. & COM. CODE § 17.46(a) (Vernon 1968 & Supp. 1987).

159. *See generally* J. Sebert, *supra* note 145, at 704-06.

160. Damage awards vary greatly among states. Georgia, Hawaii, Massachusetts, and North Carolina provide liberal relief, mandating an award of treble damages where the plaintiff prevails, even absent an "intentional" act by the defendant. States that condition the receipt of multiple or punitive damages upon a showing that the defendant willfully engaged in an unfair or deceptive practice include Georgia, Louisiana, New Hampshire, New Jersey, and South Carolina. Less favorable for plaintiffs are states that leave the award of damages to the court's discretion; these include Connecticut, Idaho, Illinois, Kentucky, Missouri, Montana, Oregon, and Rhode Island. Comment, *Consumer Protection*, *supra* note 46, at 429.

161. *Id.* at 441-48 (Table III).

162. About three-fourths of all reported cases have arisen in Texas, Washington, Massachusetts, Oregon, Georgia and New York combined. *Id.* at 449. All of these states rank high in terms of providing incentives for consumer actions. *Id.* at 463. In addition, roughly half of all reported state decisions involving consumer actions have arisen in Texas under its Deceptive Trade Practice and Consumer Protection Act of 1973. *Id.* at 449. One likely reason for this phenomenon is the liberal relief provided by the Texas statute. For example, in Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977), the Texas Supreme Court construed a sentence in Texas' deceptive business practice statute, which read that "the consumer may seek actual or treble damages," to mean that an award of treble damages was mandatory whenever the plaintiff prevailed.

163. *See supra* note 160.

fail on a systemic level because they do not explicitly recognize the fundamental privacy interests that are implicated in a fake abortion clinic scenario. The use of these statutes fails to send the appropriate signals to policy-makers and to society at large about exactly what interests are worthy of protection. The few courts that have examined fake abortion clinics thus far have largely stayed within the sterile realm of these deceptive business practice statutes, thereby avoiding a discussion of the protection of women's privacy interests.[164]

This section proposes the parameters of federal legislation that would explicitly recognize women's privacy interests and provide for more swift, uniform challenges to fake abortion clinics. Federal legislation would not be without its own inherent limitations, because its remedial adequacy depends upon federal policy-makers being interested and active in protecting women's privacy and autonomy interests. While the prospect of passage of federal legislation may be unrealistic in the current political climate, it could solve many of the problems posed by state legislation. This Note hopes to open dialogue on federal regulation of fake abortion clinics and invites proponents of federal legislation to perfect model legislation.

A. Federal Legislation Specifically Proscribing the Deceptive Business Practices of Fake Abortion Clinics

Fake abortion clinics could conceivably be regulated through Federal Trade Commission regulations.[165] However, promulgation of federal legislation would be preferable to the adoption of new FTC regulations or extension of existing regulations for a number of reasons. First, the FTC's jurisdiction usually is limited.[166] Fake abortion clinic cases may be denied jurisdiction because they may not fall within the realm of activities that Congress sought to regulate under the Federal Trade Commission Act.[167]

Second, even if the FTC did have jurisdiction over fake abortion clinics,

164. Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d at 182 (deciding, without mentioning women's privacy interests, that deceptive activities of fake abortion clinic justified a preliminary injunction); Planned Parenthood Fed. of Am., Inc. v. Problem Pregnancy Center, 398 Mass. at 490, 498 N.E.2d at 1049-50 (narrowly holding that the Problem Pregnancy Clinic violated the common law of trademarks).

165. 15 U.S.C. § 41 *et seq.* (West 1973 and Supp. 1987) empowers the FTC to prescribe interpretive rules and policies.

166. FTC jurisdiction is usually limited to for-profit organizations or to nonprofit organizations promoting the interests of a for-profit industry. 15 U.S.C. § 44 defines "corporation" as "any company, trust, . . . or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . . ." *See* FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (non-profit corporation organized to promote the interests of the egg industry comes within jurisdiction of FTC); Community Blood Bank of Kansas City Area, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969) (blood bank was solely charitable enterprise not within the jurisdiction of the FTC).

167. As the regulatory philosophy in Washington shifted from protectionism to a free market approach, Congress justified limitations upon the FTC based upon the intent of the original Federal Trade Commission Act. PRIDGEN, *supra* note 47, at § 1.01; CONGRESSIONAL QUARTERLY INSTITUTE, REGULATION—PROCESS AND POLITICS 80 (1982). Thus, Congress

new federal legislation would still be preferable. The FTC Act provides only for administrative enforcement, which is inherently weak,[168] and has been rather infrequent.[169] Private causes of action are not available under the FTC's enabling legislation.[170] Additionally, reliance upon the FTC would be ineffective because the Commission often insists upon demonstrated consumer injury in order to find unfair conduct, and the FTC "will consider public policy only as evidence of consumer injury."[171] Because direct injury may be difficult to prove in many fake abortion clinic cases,[172] relief may not be forthcoming from FTC actions.

Instead, there should be a federal statute which would allow for both private party and attorney general actions. Private party actions are necessary in order to preserve individuals' rights to sue in these cases involving fundamental privacy interests. This measure is especially important because attorney general's may refuse to bring suit, not because the action is meritless, but because the suit is technically infeasible or politically undesirable. Moreover, private parties are often better placed to decide when and how to initiate a suit. Private actions are also desirable because, when combined with attorney general actions, they provide an even stronger deterrent to the operators of fake abortion clinics.

While private party actions are necessary, attorney general actions must complement private actions. Because of the magnitude of harm and the fundamental nature of the interests at stake in a fake abortion clinic case, it

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has reduced the FTC's powers by amending the FTCA. FTC Improvements Act, Pub. L. No. 96-252, 94 Stat. 374 (1980).

168. The weakness of administrative enforcement has been noted by many. *See* W. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972) (stating that one advantage of the state "Little FTC Acts" is that they generally provide for private enforcement and private remedies, while the FTC Act is limited to administrative enforcement).

169. In the few instances where Congress has given the FTC enforcement authority over specific deceptive trade practices, *e.g.*, 15 U.S.C. §§ 52-56 (West 1973 & Supp. 1978) (temporary injunction for food, drug, and cosmetic cases), the FTC has largely disregarded such powers. G.J. ALEXANDER, HONESTY & COMPETITION: FALSE ADVERTISING LAW & POLICY UNDER THE FTC ADMINISTRATION 4 (1967). Most cases are disposed of on an informal basis, either after the offender promises to discontinue the offensive act, or agrees to an order proposed by the FTC outside of the administrative hearing setting. Only a minority of cases are disposed of after a hearing. *See Developments—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1071-73 (1967).

To make matters worse, the effectiveness of the FTC was further undermined in 1980 when Congress amended the FTC Act. *See* J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW 284 (1985) (1980 Amendments decreased FTC appropriations, limited its reauthorization period to two years, and demanded that the FTC demonstrate the prevalence in the industry of any trade practice that it sought to proscribe).

170. *See* Baum v. Great Western Cities, Inc. of New Mexico, 703 F.2d 1197 (10th Cir. 1983); Dreisbach v. Murphy, 658 F.2d 720 (9th Cir. 1980); Fulton v. Hecht, 580 F.2d 1234 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

171. Jacobs, *Consumer Litigation and Its Relationship to the Federal Trade Commission's "Unfairness" and "Deception" Standards*, 16 U. TOL. L. REV. 903, 907 (1985) (citing Letter from the Federal Trade Commission to Senators Ford and Danforth, Dec. 17, 1980).

172. Direct injury may be difficult to prove because the harm inflicted by fake abortion clinics is not physically manifested.

should not necessarily be the burden of individual victims to come forward and challenge fake abortion clinics' deceptive business practices. To rely upon only private-sphere enforcement of privacy rights is also inadequate because it ignores inequalities in economic and political power. In a fake abortion clinic case, individual women are at a severe disadvantage in terms of financing quality litigation, compared to the large, well-funded organizations supporting the fake abortion clinics. Additionally, individual plaintiffs may have great difficulty in establishing requisite standing because they may not be sufficiently able to establish injury.[173]

In substance, the law should proscribe the deceptive practices of fake abortion clinics including, but not limited to: (1) fostering confusion as to clinic sponsorship, as in cases where fake abortion centers adopt names or initials similar to those of well-known clinics providing abortions;[174] (2) advertising and promoting abortion counseling or services with no intention of providing them as advertised; (3) promoting misunderstandings as to the nature of services provided by advertising in the telephone book under "Clinics" without disclosing the fake abortion clinic's anti-abortion philosophy and/or lack of medical facilities; (4) misrepresenting the cost of services, by asserting that pregnancy tests are given for free, when they are actually conditioned upon submission to high-pressured, anti-abortion rhetoric; and (5) failing to disclose information concerning the fake abortion clinic's services, when such failure to disclose is intended to induce a consumer into a situation which the consumer would have avoided had the information been disclosed.[175]

As in the case of state legislation prohibiting deceptive business practices, federal legislation proscribing the activities listed above would not violate the first amendment rights of fake abortion clinics. The constitutionality of enforcement of such federal legislation is even clearer than is the enforcement of state deceptive business practices because such federal legislation would be directed toward the deceptive practices that are specific to fake abortion clinics, and thus would have no risk of sweeping "overly broad."[176] Enforcement

173. *See* Mother and Unborn Baby Care of North Texas v. Jane Doe, 689 S.W.2d 336, 338 (Tex. Ct. App. 1985) (in denying temporary injunction against anti-abortion counseling center, the court found that testimony of "fear" and "possibilities" were not sufficient to establish injury and, therefore, plaintiffs did not have standing).

174. This provision is patterned after common law pertaining to trademark infringement. The advantage of adopting a specific provision relating to trademark infringement is that it makes common-law remedies for such infringement available in jurisdictions that have been hesitant to recognize such remedies. *See* Planned Parenthood Fed. of Am., Inc. v. Problem Pregnancy Center, 398 Mass. 485-90, 498 N.E.2d at 1047-50 (1986).

175. Many of these practices are enumerated in: Plaintiff's Original Petition, Information in Quo Warranto and Petition for Civil Penalties at 4, State of Texas v. Mother & Unborn Baby Care of N. Texas, No. 67-99153 (Texax Dist. Ct. Tarrant County, filed Sept. 12, 1986); Complaint for Injunction, Restitution, and Civil Penalties at 2, People of the State of California v. A Free Pregnancy Center, No. 861-193 (Cal. Super. Ct. S.F. County, filed July 15, 1986); Preliminary Injunction, Committee to Defend Reproductive Rights v. A Free Pregnancy Center, No. 854-267 (Cal. Super. Ct. S.F. County, Sept. 15, 1986).

176. *See supra* note 131 and accompanying text. In a case implicating fundamental interests, a more precise regulation is more desirable and is less likely to provoke challenges in

of this proposed federal legislation would thus advance the government's legitimate interests in protecting women from advertising which induces them into psychologically harmful situations. It would also advance women's interests in freely making decisions regarding procreation, without interfering with anti-abortion counseling centers' ability to *openly* advance their views regarding abortion.

B. Benefits of Federal Legislation

Federal protection of the privacy rights implicated in fake abortion clinic cases provides two main benefits. First, federal legislation guarantees more uniform protection of fundamental interests that cannot effectively be protected without such assistance. Under federal legislation, protection of fundamental privacy interests would no longer be conditioned upon the *existence* and *strength* of individual state statutes; rather, protection would be advanced through conscious adoption of a systematic federal policy aimed directly at the false and misleading practices of fake abortion clinics. The federal statute's allowance for a combination of private party and attorney general actions would provide maximum deterrence to the operators of fake abortion clinics. The assistance proposed in this Note recognizes women's capacities and empowers them with the ability to exercise their autonomy based on the fullest possible receipt and exchange of information.

The second, more systemic benefit of federal legislation directly proscribing the fake abortion clinics' illegitimate activities is that, unlike state deceptive business practice statutes, it would directly address the fundamental privacy interests at stake in a fake abortion clinic case. A situation in which a woman is deceived about whether to have an abortion is qualitatively different from one in which a person is deceived about whether to buy a washing machine. In the former case, an entire class of people (pregnant women), is singled out in order to take away a fundamental privacy interest: reproductive self-determination.

Federal legislation would legitimate the value of privacy, and thus would effectively protect those values that are associated with personal autonomy.[177] Federal action on this issue would reaffirm the importance of women's privacy interests and recognize that private parties should not have unrestricted ability to interfere with women's decisions concerning abortion. Courts and legislatures have often failed to acknowledge historic discrimination against women as a class, especially discrimination regarding reproductive self-determina-

court based upon its lack of specificity. *See* Colautti v. Franklin, 439 U.S. 379 (1979); Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

177. D. O'BRIEN, *supra* note 42, at 19. "The most dependable clue to the content of the norm of privacy in any given society is found in the nature of conduct held to violate privacy." Beardsley, *Privacy: Autonomy & Selective Disclosure, in* J. PENNOCK & J. CHAPMAN, PRIVACY, NOMOS XIII at 56 (1971).

tion.[178] This failure has contributed to the continued oppression of women, oppression which stems, in large part, from burdens placed upon their ability to make choices freely regarding reproduction.[179] Thus, federal legislation ultimately could provide a symbolic statement to provoke reconsideration of conceptions of privacy in other areas.[180]

CONCLUSION

Numerous attorneys general, courts and policy-makers are or will be forced to respond to fake abortion clinics. Not only should state attorneys general vigorously enforce deceptive business practice statutes against fake abortion clinics, but courts should also hold that such enforcement does not violate the first amendment. While enforcement of state deceptive business practices is a step toward recognizing and protecting women's privacy and autonomy interests, it is an uncertain, tentative step. This Note urges policy-makers to consider federal legislation specifically aimed at the deceptive business practices of fake abortion clinics in order to best protect women's fundamental privacy interests.

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178. *See* R. PETCHESKY, *supra* note 41, at 2-18, 25-56 (1984); Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM, chs. 2 & 3 (1981).

179. For example, *see* Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children*, 23 U. KAN. L. REV. 23 (1974) (describes ways in which legal rules relating to illegitimacy support a system of female dependency). Today, for the poor and young, the right to reproductive self-determination is virtually meaningless because funding for safe abortions is often denied; even for those who are not poor or young, the right may be greatly restricted. *See* Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 SYRACUSE L. REV. 565, 612 (1982); Copelon, *Reproductive and Sexual Freedom in the 1980's*, 2 ANTIOCH L. REV. 47, 52-53 (1982).

180. For example, such legislation might provoke rethinking of Roe v. Wade, 410 U.S. 113 (1973), a decision which arguably empowers doctors to make decisions regarding abortions, instead of empowering women to make these decisions themselves.

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