1972

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Recommended Citation

Gerald A. Messerman, Abortion Counselling: Shall Women be Permitted to Know?, 23 Case W. Res. L. Rev. 810 (1972)
Available at: https://scholarlycommons.law.case.edu/caselrev/vol23/iss4/7

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Abortion Counselling: Shall Women be Permitted to Know?

Gerald A. Messerman

I. INTRODUCTION

The growing concern of courts and legislatures with the wisdom and validity of antiabortion laws has been accompanied by an increase in counselling services for women wishing to terminate unwanted pregnancies. Almost two hundred affiliates of Planned Parenthood-World Population, operating throughout the country, have entered the abortion counselling field.¹ The Clergy Consultation Service, started in New York in 1967 by a group of ministers and rabbis, now has some 28 offices in 22 states and employs the services of over one thousand clergymen.² Numerous other groups throughout the country also provide abortion counselling.³ Unfortunately, persons who participate in abortion counselling have found their activities to be somewhat hazardous. At least two criminal prosecutions have already been initiated against clergy counsellors,⁴ and commercial counselling services have been charged with practicing medicine without a license, unlawful fee splitting, and unlawful advertising.⁵

³ Counselling services fall into three broad categories. The first would include services, such as the Clergy Consultation Service, which are noncommercial and which merely provide a woman with specific information regarding how she can acquire an abortion. The second category would include those services which provide such information for a fee, but have no close relationship with the physicians who actually perform abortions. Such services may or may not operate on a nonprofit basis. The third category would include services that not only provide information, but also make specific arrangements for the performance of the abortion. These arrangements may, and often do, include providing transportation, making direct contact with the physician, informing the woman of the cost of the abortion, and actually collecting the entire fee for the referral, the transportation and the medical service.
⁴ One of these cases is Commonwealth v. Hare, __ Mass. ___, 280 N.E.2d 138 (1972).
Moreover, enormous pressure has been generated which, either intentionally or incidentally, has restricted the dissemination of information regarding the availability of legal abortions. Referral agencies have had little success in placing ads in daily metropolitan newspapers, and when intrepid student editors of college newspapers have published the names of abortion referral services, the threat of criminal prosecution has frequently been present. One such student editor was charged under a Florida law that prohibits the publishing of abortion information, despite the fact that referral services in Florida are legal.\(^6\) When the Concordia College newspaper published an advertisement for an abortion clinic in New York, the president of the college immediately suspended publication of the newspaper.\(^7\)

While the media has effectively blacked-out much information concerning abortion and abortion referral services, still other limitations on communication have been self-imposed. Planned Parenthood associations, for example, are reluctant to engage in public promotion of their services, believing that such activity does not conform to the image Planned Parenthood wishes to create.\(^8\) By and large, however, it is the threat of criminal prosecution and media policies which have compelled a restrained approach by many of the counselling services, and particularly by the nonprofit ones.\(^9\)

In practice, the relatively restricted access to abortion information has given rise to a number of important consequences. First, information regarding abortion services has been largely unavailable to all except the better informed and more affluent members of the population. Second, referral agencies have often failed to provide the most effective counselling service appropriate to the needs of the counsellee.\(^10\) And third, because of the unavailability of more con-

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\(^7\) N.Y. Times, Dec. 8, 1970, at 10, col. 8.
\(^8\) The reluctance of Planned Parenthood associations to take an aggressive approach in the abortion counselling field probably derives from the fact that most affiliate associations are funded by broad-based organizations which include very conservative elements.
\(^9\) To a substantial extent, the only factor sufficient to overcome the enormous inhibition created by the threat of criminal prosecution is the desire for profit. The increase in the number of commercial services is largely a result of the unavailability of abortion information through noncommercial services. During an investigation of commercial agencies, the head of the consumer fraud division of the New York State Attorney General’s Office observed that “‘[t]he commercial agencies are able to operate because the out-of-state women are ignorant of the same facilities without a fee.'” Charlton, supra note 2, at 45, col. 3.

\(^10\) Thus, for a considerable period of time, the Clergy Consultation Service minimized its contacts with operating physicians for fear that such contacts might enhance
ventional means of communication, referral services have been advertised in ways that offend the taste and sensibility of substantial segments of the population. For a period of time, for example, vacationers in Miami Beach could look up to the skies and see a low flying airplane trailing a banner that read "Abortion Information" and listed the New York telephone number of a referral agency.¹¹

Despite the pervasiveness of such problems and the variety of legal and practical issues they raise, legal scholars have focused little attention upon the questions presented. Existing law does provide significant guidelines for those engaged in abortion counselling. Yet most counsellors have had substantial difficulty determining precisely what the law permits or demands.¹² An exploration of relevant legal principles should assist in delineating and assessing the nature and magnitude of the risks involved in abortion counselling.¹³

the possibility of successful criminal prosecution. And detailed records were not kept because of a growing concern that such records may be unprotected by any privilege and subject to production upon subpoena. Little follow-up work was done because it was assumed that aggressive counselling would be more susceptible to a claim of active inducement.

¹¹ Id. Billboards have also been used to advertise the availability of referral services.

¹² The difficulties encountered and questions asked by new counselling services include the following:

(1) May the service offered be advertised? If it cannot be advertised, what can be done to make the public aware of the service? If advertising is not permissible for the purpose of achieving a commercial objective, is it permissible where the objective is solely humanitarian? Is a greater latitude permitted to those services which are plainly not conducted for profit?

(2) Do the unauthorized practice of medicine statutes prohibit abortion counselling? In determining whether such services are enjoined by the unauthorized practice of medicine statutes, is the availability of such services through established professional sources a relevant consideration?

(3) Is it improper to give information regarding the availability of legal abortions in a state other than that in which the counsellor is functioning?

(4) How far can the counsellor go in arranging for a legal abortion in a foreign state without subjecting himself to possible penalties for aiding, inducing, or causing an abortion in the state in which he operates?

(5) Is there some legal wisdom in limiting the counsellor's contact with the person who actually performs the abortion?

(6) If the abortion is unlawful where rendered, what risks are encountered by the counsellor?

(7) Are communications received by the counsellor privileged?

¹³ This article will not examine the constitutional challenges to current abortion laws. For a thorough discussion of those constitutional problems, see Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L. REV. 730 (1968). For an excellent discussion of the moral, social, religious, psychological, and economic issues relevant to the entire abortion question, see D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY (1970).
II. THE CONSTITUTIONAL LIMITATIONS

One of the government's principal means for restricting abortion counselling is the criminal proscription of advertising and dissemination of abortion information. The Supreme Court has not yet considered the validity of statutes which limit the public's access to abortion information, but it is clear that such laws must be as-

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14 Several state and federal statutes restrict the right to dispense information regarding abortions. An example, 18 U.S.C. § 1461 (1970), declares the following to be "nonmailable matter" which "shall not be conveyed in the mails or delivered from any post office by any letter carrier:"

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed ....

The penalty for violating this section is substantial — 5 thousand dollars and/or 5 years for the first offense and 10 thousand dollars and/or 10 years for each subsequent offense. The comprehensive prohibition and severe penalties contained in section 1461 are not unique to federal law. Virtually all states which have sought to prohibit dissemination of information regarding how to acquire an abortion have enacted equally comprehensive prohibitions. See generally George, The Evolving Law of Abortions, 23 CASE W. RES. L. REV. 708 (1972).

It should be noted that many, if not most, of these statutory limitations are on advertising. Counselling itself is not generally prohibited in such statutes.

15 Recent decisions however, have suggested some possible guidelines. In Eisenstadt v. Baird, 40 U.S.L.W. 4305 (U.S. March 22, 1972), the Court, on equal protection grounds, invalidated a Massachusetts statute which prohibited distribution of contraceptive devices to anyone but married persons. The Court concluded that there was no rational basis for affording different treatment to married persons than was afforded unmarried persons. Although the state might have a legitimate interest in protecting the health, safety, and morals of the community by discouraging sexual promiscuity among unmarried persons, the Court questioned whether that was the intended purpose of the statute: "Even on the assumption that the fear of pregnancy operates as a deterrent to fornication the Massachusetts statute is .... so riddled with exceptions that deterrence of pre-marital sex cannot reasonably be regarded as its aim." Id. at 4307. The Court did not decide whether the Massachusetts statute might be upheld "simply as a prohibition on contraception," deferring resolution of that question with the observation that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." Id. at 4308.

The relevance of Baird to the issues involved in abortion counselling is apparent. First, while the Court did not decide the constitutional arguments involved in the abortion controversy, it reaffirmed its commitment to the proposition that decisions regarding procreation should be left to the individual: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. The term "unwarranted governmental intrusion" awaits interpretation, but the Court does insist that the same standard be applied with respect to single persons as is applied in determining the rights
essed in the context of first amendment principles. Appraisal of
the constitutionality of limitations on advertising requires examina-
tion of two distinct but interrelated interests — the counsellor's
right to speak, and the counsellee's right to hear and know.

A. The Right of the Counsellor to Inform

A preliminary inquiry concerning referral and counselling activ-
ities is whether the activity constitutes speech and is thus granted
the protection of the first amendment, or whether the activity is
conduct that is unprotected by the first amendment.16 Counselling
limited to the distribution of general information concerning abor-
tions and specific information concerning the procurement of legal
abortions is clearly speech.17 When the counsellor actually ar-
ranges for performance of the abortion, however, his activity may
well go beyond pure speech and become action which is beyond
the protection of the first amendment.18

Where the counselling agency's activity falls within the realm of
speech, any restrictions upon such activity can be constitutional only

of married persons. A second important implication of Baird arises out of the Court's
unwillingness (criticized by Chief Justice Burger) to accept at face value the state's as-
sertion that legislation affecting exercise of the right to determine whether children will
be born can be justified on the ground that such legislation is necessary to protect and
promote public morality. Any such claim will be subjected to probing judicial scrutiny
where the fundamental right of privacy is infringed upon.

17 See Street v. New York, 394 U.S. 576 (1969), where the Court reversed a con-
viction under a flag desecration statute. Compare Tinker v. Des Moines Independent
18 But see United States v. O'Brien, 391 U.S. 367 (1968), where the Court indi-
cated that speech, when mixed with "non-speech," may still be protected to some ex-
tent by the first amendment. Id. at 376. In any event, if the counsellor merely
arranges or helps to arrange for a legal abortion, the due process clause of the 14th
amendment would afford him some protection from criminal prosecution, for a state
may not make criminal conduct which is no more than the facilitating of a legal act.
upon a showing of a compelling state interest. This conclusion follows from a long series of cases in which the Supreme Court has held that where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196.\(^{19}\)

If a counselling service were merely to provide information regarding the circumstances in which an abortion could be lawfully procured in the state in which the service was operating, it is difficult to conceive of any legitimate basis for inhibiting the dissemination of such information. Thus, the communication would constitute protected first amendment expression. It would not fall within any of the areas of expression which may be regulated by the state: there would be no incitement of others to commit unlawful acts;\(^{20}\) no utterance of inflammatory words;\(^{21}\) no danger of shocking those who might be exposed to the words uttered;\(^{22}\) and no obscenity.\(^{23}\)

The same result should obtain where the counselling service provides similar information on the availability of abortions that are legal only in states other than the one in which the service is operating. Although a stronger state interest might arguably exist in this situation, it is doubtful that the state's interest would rise to the compelling nature required to warrant a restriction upon first amendment rights. Indeed, one federal court so concluded in the case of *Mitchell Family Planning, Inc. v. City of Royal Oak*.\(^{24}\) *Mitchell* held unconstitutional a municipal ordinance which prohibited billboard advertising of any information concerning the procuring of an abortion. The court reasoned that "the City of Royal Oak has insufficient interest in an abortion to be performed in another state to warrant [such a] limitation of speech."\(^{25}\)

Thus, where the agency's services do not include the actual ar-


\(^{25}\) *Id.* at 743.
rangement of the abortion operation, it appears that a state could not meet the burden necessary to curtail the solely informational nature of the service. An even stronger case for this proposition can be made by examining the counselee’s, or the public’s, right to know.

B. The Counselee’s Right to be Informed

That the first amendment protects more than the right to speak is a proposition most recently relied upon by the Supreme Court in invalidating a statute which prohibited the possession of pornographic literature: "It is now well established that the Constitution protects the right to receive information and ideas . . . , regardless of their social worth, [and that this right] is fundamental to our free society." The public’s right to receive information is a right of increasing prominence in contemporary America. It has been relied upon not only to protect an individual’s right to possess pornographic materials, but also to justify publication of important classified government documents, to bar prosecution of an agency advertising Mexican divorces, and in a variety of other instances.

Within the context of the first amendment balancing test, the importance of the need for access to particular information is critical in determining whether there is a protected right to acquire such information. That factor should entitle dissemination of abortion

26 Stanley v. Georgia, 394 U.S. 557, 564 (1969). A somewhat anomalous situation has been created by the decisions in Stanley and Griswold. Stanley, for example, establishes that the right to possess pornographic literature is protected by the concept of privacy implicit in the first amendment. On the other hand, acquisition of pornographic literature is rendered rather difficult by numerous decisions upholding the right of the government to regulate the sale of pornographic literature. E.g., Roth v. United States, 354 U.S. 476 (1957). Likewise, the Court in Griswold rejected a prohibition against the use of contraceptive devices by married persons as an unwarranted invasion of marital privacy protected by the penumbra of the first amendment. The Court also held, in Griswold, that professional persons who prescribed the use of contraceptives for married persons had standing to assert the privacy interest of those persons and that they could not be convicted as aiders and abettors in light of the fact that the principal offense was unconstitutionally defined. Thus, the right of married persons to use contraceptives has been raised to constitutional dignity. And the right to prescribe such use has found incidental protection. But the Court has yet to determine whether a state may legitimately prohibit the sale of contraceptive devices to married and unmarried persons alike. As with pornography, the right to possess and use is protected, but, as yet, not the right to acquire. If sale is prohibited, of course, acquisition is rendered very difficult.

The principle that the first amendment protects the right to know and receive information and ideas has long been recognized by the Court. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Lamont v. Postmaster General, 381 U.S. 301 (1965).


28 Hiett v. United States, 415 F.2d 664 (5th Cir. 1969).
information to a high degree of constitutional protection. The need to be informed of facts concerning abortion is at least as great to those seeking such information as is the need of others to possess pornographic material or to acquire information concerning Mexican divorces. Women concerned with terminating an unwanted pregnancy desperately desire information regarding how to do so, and whether a legal abortion is secured or not can be a question of extraordinary impact in a woman's life. Indeed, the intensity with which a woman will search for an abortion, the urgency of the search, and the tragic frustration and indignities frequently encountered have been related by many.

The right to know is an integral aspect of the first amendment, and protection of that right requires that restrictions upon the dissemination of abortion information be struck down unless a state can demonstrate compelling reasons for such restrictions. Because such information does not fall within the categories of expression which heretofore have been validly regulated or prohibited, it is doubtful that a state could meet this burden. Furthermore, if the right to have an abortion is deemed a fundamental right, the right to know in the context of abortion counselling would assume an added dimension. Any restriction upon the dissemination of abortion information would infringe upon the right to abortion, and could therefore be justified only under the most limited circumstances, if any.

C. Advertising Abortion Information

It may be of little solace to those involved in abortion counselling to know that the dissemination of abortion information is protected by the first amendment if the advertising of their services is not similarly protected. Nonetheless, this may be the case in certain instances. Relying on the commercial sector doctrine, courts have frequently held that advertisements and solicitations do not enjoy the protection of the first amendment. The commercial sector doctrine has its genesis in Valentine v. Chrestensen, where the Supreme Court held that distribution of advertising handbills intended solely for a commercial purpose might legitimately be prohibited. In the words of the Court,

31 316 U.S. 52 (1942).
the streets are proper places for the exercise of the freedom of communicating information and disseminating opinions and . . . though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. [It is] equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets and to what extent such activities shall be judged a derogation of the public right of the user, are matters for legislative judgment.32

Many of the statutes which inhibit counselling activity33 are written as restrictions on advertising. Should the commercial sector doctrine be invoked to uphold such statutes, the effectiveness of otherwise legal referral agencies would be seriously impaired. It is possible, however, that the statutory restrictions on advertising will not receive the judicial deference that would ensue from a rigid application of the commercial sector doctrine, particularly when the agencies in question operate on a nonprofit basis.

Courts have gone to great lengths to distinguish communication by professionals to their clients, from aggressive, commercially motivated communication designed to promote the sale of particular goods or services. A case in point is Planned Parenthood Committee v. Maricopa County,34 where the Supreme Court of Arizona rejected a constitutional challenge to a statute which prohibited the publication of "a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception . . . ."35 In upholding the Arizona statute, the court read the term "publishes a notice or advertisement" to apply only to an open appeal to the general public. General literature dealing with the population problem was held to be outside the proscription of the statute. Also excepted were such materials as "[a]rticles and press releases in newspapers and periodicals, including editorials, commentaries, and informational articles on matters of current public interest . . . ."36 The statute would not apply, the

32 Id. at 54.
33 Cf. note 14 supra.
36 92 Ariz. at 237, 375 P.2d at 723.
court held, to "the dissemination of birth control information by a
doctor to his patient, or by the Planned Parenthood Committee to
those who seek such information from them . . .".37 This exception
arises from the fact that "person-to-person consultation" would not
be considered advertising. But if information describing the use
and application of particular contraceptive devices were made avail-
able to the general public, "this would amount to advertising and
fall within the prohibitive terms of the statute."38

The Arizona court distinguished between referrals by physicians
to Planned Parenthood that were made "to persons who . . ., of
their own accord, sought birth control information from the re-
ferring party"39 and referrals made in the course of the physician's
treatment of the patient, from aggressive solicitation of referrals "by
the employment of touters or canvassers."40 The latter type of ag-
gressive solicitation would constitute advertising, but the former,
professional referrals would not.

Given this construction of the statute, the constitutional chal-
lenge was dismissed by the court in summary fashion. The court
concluded that the law did "not prohibit the public discussion or
advocacy of the general ideas which plaintiff [sought] to pro-
mote,"41 that it imposed no prior restraint upon the exercise of
speech, and that it did not limit person-to-person conversation. The
restriction in the statute was considered to be very limited: "The
only limitation . . . is that plaintiff may not advertise, in the sense of
publicly advocating, specific trade branded devices or preparations in
the contraceptive field."42 Suggesting that advertising "does not
enjoy the same degree of protection under the first amendment as do
other noncommercial forms of idea expression,"43 the court found
no defect in this limitation.

Furthermore, the court declared that the validity of any re-
straint upon the exercise of speech must be determined by balanc-
ing "the state's interest in the welfare and safety of its citizens
against the individual's interest in free speech and the degree of im-
pairment of this freedom caused by the governmental regulation."44

37 Id.
38 Id. at 238, 375 P.2d at 724.
39 Id.
40 Id.
41 Id. at 239, 375 P.2d at 725.
42 Id. at 239-40, 375 P.2d at 725.
43 Id. at 240, 375 P.2d at 725.
44 Id. at 241, 375 P.2d at 726.
To implement this balancing test, the court inquired whether there was any reasonable public interest which would justify the limitations upon expression imposed by the statute. Such a justification was found to exist in the state’s objective of protecting the health and morals of the community by restricting sexual activity among unmarried persons. Considering the importance of this objective and the historical regulation of advertising that has been tolerated against first amendment challenges, the statutory proscription was deemed acceptable.

This approach to the advertising statutes — while potentially affording more protection to the abortion counsellor than would a rigid application of the commercial sector doctrine — is still a serious impediment to those who desire counselling but do not know where it is available. A different and more realistic approach to the advertising issue was taken in Mitchell Family Planning, Inc. v. City of Royal Oak where the court struck down a municipal ordinance prohibiting billboard advertising of abortion information. The nonprofit Mitchell Family Planning Agency had rented billboard space and put up an advertisement reading:

Abortion Information
Male and Female Sterilization Information
Mitchell Family Planning Incorporated

In response to the agency’s request for an injunction restraining enforcement of the municipal ordinance, the court held that the ordinance was impermissibly broad because it seemed to prohibit advertising which could result in legal abortions as well as illegal ones. The court did not suggest that Mitchell’s form of advertising was subject to any different tests than were other forms of expression. Then, because there was no indication that contacting the agency would imminently result in an illegal abortion, the court concluded that there was no clear and present danger that a substantive evil which the city had the power to prohibit would take place. Accordingly, no limitation of speech was justified.

While it remains to be seen what test is applied to advertising by nonprofit groups, a different test might well be applied to adver-

46 Id. at 739.
47 Id. at 742.
tising by for-profit agencies as judicial hostility to money-making activities in the abortion field is manifested. Although there is a certain dilution of first amendment protections when the balancing test is applied, its utilization would still be preferable to reliance on the commercial sector doctrine — for under the balancing test it is possible that advertising even by commercial agencies will find an adequate measure of protection.

A recent case involving advertisements for Mexican divorces indicates how the public's right to acquire information may be balanced against the governmental power to regulate commercial solicitation. In *Hiett v. United States*, the defendant was convicted of using the mails to distribute written material "giving or offering to give information concerning where or how or through whom a divorce may be secured in a foreign country, and designed to solicit business in connection with the procurement thereof." On appeal, the Government urged that this provision was a constitutionally permissible regulation of activity which went beyond the kind of expression protected by the first amendment. Solicitation, the Government argued, "is not a form of speech entitled to First Amendment protection, just as obscene, abusive language, and threats of fighting words are not protected." The court rejected this contention and held that even purely commercial expression was entitled to some degree of first amendment protection.

The test to be applied, according to *Hiett*, is the same one used where courts are confronted with the validity of restraints upon expression which involve more than speech. Where speech is combined with conduct for the purpose of achieving communication, the court noted, such "nonpure" speech is afforded protection measured by balancing "the harm done by the overbreadth and vagueness of the statute against the legitimate interests the legislature was seeking to protect" to determine whether the latter "are so overwhelming as to justify the encroachment."

That the same test should be applied to commercial expression is the ultimate conclusion reached by the court: "[C]ases show that when speech is coupled with solicitation, as it is in the expression [the statute] prohibits, it is no longer pure speech and it is to be

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48 See T. Emerson, supra note 16, at 53-56.
49 415 F.2d 664 (5th Cir. 1969).
51 415 F.2d at 669.
52 Id. at 672.
tested by the balancing approach."

Applying the balancing test to the commercial expression involved in solicitation of foreign divorce business, the court concluded that the statutory prohibition was intolerably broad, that the information it sought to remove from the public domain related to matters of great social importance, and that the Government's interest — the desire to preserve family integrity — could be achieved in a more reasonable way.

The analogy is obvious between an interdiction against mailing information designed to solicit foreign divorce business and a prohibition against advertisements and dissemination of information regarding the availability of abortions in or outside of the state in which the information is distributed. If the information dispensed by the counselling service relates to lawful means of securing an abortion, it should not come within the state's legitimate power to bar expression which incites others to unlawful conduct. Furthermore, if the importance of the information to the public is realistically considered, it is likely that the purported governmental interest in prohibiting the advertising or dissemination of abortion information will prove inadequate to justify such a prohibition.

Simplistic application of the ill-defined and ambiguous commercial sector doctrine would clearly yield a far less desirable result. But the exclusion under that doctrine of commercial advertising from the protection of the first amendment cannot withstand analysis. The illogic of conditioning first amendment rights upon the motivating force impelling a particular expression is rather apparent. Any number of cases, for example, have recognized that newspapers, although profit-making businesses, are entitled to first amendment protection. Similarly, picketing may be engaged in primarily for the purpose of achieving economic gain, but this fact does not place picketing outside the ambit of the first amendment. And a book dealer, despite his profit motivation, retains first amendment protection: "It is . . . no matter that the dissemination [of books] takes place under commercial auspices." Thus, the doctrine that commercial communication is outside the system of protected expression has been employed to justify controls over commercial adver-

54 415 F.2d at 672.
55 Id. at 671-73.
56 See, e.g., Chicago Joint Board, Amalgamated Workers of America v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970); The Associates and Aldrich Co. v. Times-Mirror Co., 440 F.2d 133 (9th Cir. 1971).
tising, but the simplistic analysis which suggests that the first amendment becomes irrelevant upon a finding of commercialism does not withstand scrutiny.

Indeed, the commercial sector doctrine has little to commend it. It assumes that the motivation behind expression is different where the expression may be characterized as political, social, or literary, as opposed to expression which is crassly commercial. This assumption is simply not supported by fact.

The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

Moreover, the commercial sector doctrine implicitly assumes that those who communicate information by way of advertising are offering facts less important to the public than is the information conveyed in noncommercial expression. This assumption also does not withstand scrutiny. It would be difficult to find, for example, information more intensely desired and more immediately relevant to a woman's life than the abortion information offered by counselling services. If there is to be a free flow of information regarding matters of great public importance and if that information cannot flow through noncommercial channels of communication, alternative, commercial channels must be established and must be granted constitutional protection if the information is to find its way into the public domain.

Thus, to determine whether abortion advertising is protected first amendment activity, a number of different questions must be considered. First, is the counselling activity engaged in for commercial gain? Second, is the counselling activity advertised in a public manner? Third, what alternative means of gaining access to information are available to the public? And fourth, is the counselling service disseminating information dealing solely with legal abortion procedures? Where the counselling service is conducted for profit, the commercial sector doctrine may be applicable for it still has vitality in the courts, as ill-founded as it may be. At worst,
application of the doctrine would exclude the counselling activity from first amendment protection. But more realistically, the validity of limitations upon the dissemination of information by a commercial counselling service would be evaluated by application of a balancing test only slightly different from that which is applied to restrictions upon other communication activities. And when non-profit or noncommercial agencies are involved, traditional first amendment principles indicate that there would be little justification for restrictions.

III. Counselling as Aiding, Abetting, or Inducement of Abortion

A. Culpability as an Accomplice of the Abortionist

One of the problems that concerns abortion counselling and referral agencies is whether a counsellor who gives information leading to the performance of an illegal abortion may be convicted as an aider and abettor or as an accessory before the fact.61 This issue was raised in Commonwealth v. Hare62 in the prosecution of a clergyman who provided information to a woman seeking an abortion. In an indictment filed in 1969 in Middlesex County, Massachusetts, the clergyman was charged with abortion.63 The in-

61 The common law divided guilty parties into principals and accessories; principals being those persons who actually perpetrated the offense, and accessories being those who contributed to the offense but did not actually perform the felonious act. See 1 M. Hale, Pleas of the Crown 612-21 (2d ed. 1800); R. Perkins, Perkins on Criminal Law 643-48 (2d ed. 1969). Accessories were of three types: (1) before the fact; (2) at the fact (commonly called aiders and abettors); and (3) after the fact. While the distinctions of guilt between principals and accessories at or before the fact have been largely abolished by statute, and all are charged and punishable as principals (see, e.g., 18 U.S.C. § 2 (1970), the common law definitions are still pertinent in assessing whether one can be charged as an accessory. Thus, an accessory before the fact is one who, though absent at the commission of the felony, procures, counsels, commands, induces, or advises another to commit the felony. 1 F. Wharton, Criminal Law § 263 (11th ed. 1912).

An aider and abettor is one who is present, either actually or constructively, and who (with mens rea) either assists the perpetrator in the commission of the crime, stands by with intent (known to the perpetrator) to render aid if needed, or commands, counsels, or otherwise encourages the perpetrator to commit the crime. R. Perkins, supra at 645; F. Wharton, supra at § 245.

An accessory after the fact is one who in no way is tainted with guilt of a crime when perpetrated, but who, with full knowledge of the facts, thereafter conceals the offender or gives him some assistance to save him from detection, arrest, trial, or punishment. R. Perkins, supra, at 646; F. Wharton, supra, at § 281.


63 Mass. Gen. Laws Ann. ch. 274, § 2 (1970) provides: "Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal."
dictment alleged that the minister, "with intent to procure the miscarriage of . . . [one woman], did aid or assist [another] in unlawfully using an instrument or other means upon the body of . . . [the woman]." A bill of particulars was filed in which the commonwealth alleged that the minister, knowing that he was in violation of the laws of Massachusetts, "instructed" the woman and her companion to proceed to the alleged abortionist, "knowing he was an unlicensed physician," for the purpose of having him perform an unlawful abortion.

A motion to dismiss the indictment was filed on the ground that the indictment and bill of particulars did not charge an offense under the laws of Massachusetts. The trial judge granted the motion to dismiss, stating:

I do not regard the use of the word 'instructed,' in the Bill of Particulars as implying that the defendant directed, advised, or induced . . . [the woman] to proceed to Brunelle, the alleged abortionist. An inspection of the evidence . . . before the Grand Jury confirms this view. In plain language, the defendant informed . . . [the woman] of the telephone number and address of Brunelle as one who would perform an abortion for $400. From the facts alleged in the Bill of Particulars and the reasonable inferences which may be drawn therefrom, no more can be concluded than that . . . [the woman] sought out the defendant, seeking information as to an abortion, and that the defendant furnished her with the name, address, and telephone number of the alleged abortionist, and the price. There is no evidence of any connection or communication between the defendant and Brunelle.

The trial judge further pointed out that essential facts were missing from the commonwealth's case that would be necessary to find Hare guilty as an accessory. Namely, there had been no showing of "an association of the defendant with the venture or that he participated in it as in something that he wished to bring about and that he sought, by his action, to make it succeed."

On appeal from the trial judge's order granting dismissal, the Supreme Judicial Court of Massachusetts reversed the lower court, but for reasons not really pertinent to the ultimate question of whether Hare's conduct was criminal. The court held that the dismissal order should have been denied because the indictment (considered without reference to the bill of particulars) adequately

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64 ___ Mass. at ___, 280 N.E.2d at 140 n.4.
65 Id. at ___, 280 N.E.2d at 139.
66 Id. (emphasis added).
67 Id.
charged a crime. But the supreme judicial court did provide dictum favorable to Hare's position:

If the bill of particulars in the instant case in fact presents the total extent of the Commonwealth's proof, we think, without so deciding, that the allowance of a motion for a directed verdict might well be required at the conclusion of the Commonwealth's opening statement or at the close of the Commonwealth's case.69

Thus, although the trial judge erred procedurally in granting the defendant's motion, the supreme court apparently agreed in substance with the judge's conclusion that Hare's conduct did not make him culpable as an accessory.

Since remand, the Hare case has not yet followed its full course, but it does point out a critical problem which must be considered by all abortion counselling services in determining the manner in which they will operate. The Cleveland Consultation Service — of which Hare was a member — had been functioning before legal abortions were widely available in a number of states without concern for whether an abortion was necessary to preserve the life or health of the woman. Referrals were made to persons believed to be licensed physicians by the Consultation Service, although an effort was made to minimize the contact between the doctors and the Consultation Service on advice of counsel that this procedure would reduce exposure to criminal prosecution. The particular physician involved in the Hare case, as the facts developed, had lost his license as a consequence of an earlier abortion conviction. Consequently, the illegality of the abortion in Massachusetts was indisputable.70 But there had been no actual contact by the minister-defendant and the unlicensed physician; no fee had been charged for the service by the minister; and no effort had been made by the minister to encourage the woman to have an abortion. Upon these facts, the question of whether or not the abortion counsellor could be convicted of being an accessory can be resolved on the basis of established legal principles.

68 The error of the lower court was in considering facts alleged in the bill of particulars as limiting the commonwealth's indictment. The proper procedure, held the supreme court, was to look solely to the allegations in the indictment. The allegations in the Hare case (which were merely a general rephrasing of the criminal statute) were deemed adequate once the bill of particulars was ignored.

69 Id. at ——, 280 N.E.2d at 143.

70 If an abortion were legal (either because it was not proscribed by statute or because a proscriptive statute was unconstitutional), one presumably could not be charged with aiding and abetting. See Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265 (1963).
A classic case concerning the requisites of culpability as an accessory is *United States v. Peoni,* where Judge Learned Hand articulated the applicable standards in language that won approval in numerous subsequent decisions. After reviewing statutory and common law history concerning the definitions and tests for determining whether one is guilty as an accessory, Judge Hand stated:

It will be observed that all [the accepted] definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used — even the most colorless, "abet" — carry an implication of purposive attitude towards it.

In *Peoni,* the court reversed a conviction on a charge of counterfeiting where guilt was predicated on the assertion that the defendant had acted as an accessory before the fact. Judge Hand found that the defendant's conduct "was indeed a step in the causal chain which ended in [the principal's] possession [of counterfeit bills]," but it was nothing more. The court thus rejected the "but-for" test as a means of determining whether evidence is sufficient to establish guilt: even if the Government could prove that the substantive offense would not have occurred without the participation of the alleged accessory, that in itself would not be sufficient to support conviction.

Further guidance as to the risks involved in abortion counselling can be found in *Morei v. United States,* where a Government agent had sought to obtain narcotics from a physician. The physician did not give the agent the drugs, but he "did give the name of defendant Morei, and his address in Cleveland and told [the agent] to see

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71 100 F.2d 401 (2d Cir. 1938).
72 *See, e.g.*, Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); Morei v. United States, 127 F.2d 827, 831 (6th Cir. 1942).
73 100 F.2d at 402. The same test was articulated by the Supreme Court in Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), where the Court, quoting Judge Hand, stated: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed.'"
74 Peoni had sold counterfeit bills to one Regno; and Regno sold the same bills to one Dorsey. All three knew the bills were counterfeit and Dorsey was arrested while trying to pass the bills. The issue, then, was whether Peoni was guilty as an accessory to Dorsey's possession of the bills. 100 F.2d at 401.
75 *Id.* at 403.
76 *Id.* at 402-03.
77 127 F.2d 827 (6th Cir. 1942).
Morei and tell him [the physician] had sent [the agent] and that 'he'll take care of you.'" When Morei subsequently sold the narcotics to the agent, the physician was charged and convicted as an accessory to the sale, but his conviction was overturned on appeal. Because there had been no showing that the physician had any stake in the venture, the appellate court would not permit an inference of the necessary interest in the outcome of the principal's criminal acts. In evaluating the relationship shown by the evidence, the court observed: "This is not the purposive association with the venture that ... brings [the physician] within the compass of the crime of purchasing or selling narcotics, either as principal, aider and abettor, or accessory before the fact."81

A similar decision was rendered by the Third Circuit Court of Appeals in United States v. Moses,82 where the evidence demonstrated that the defendant introduced certain persons, at their request, to a seller of narcotics. The defendant had vouched for the buyers and a purchase was made. Nonetheless, the court found "'[t]here was nothing to show that [the defendant] was associated in any way with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him."83 Thus, "'[a]lthough appellant's conduct was prefatory to the sale, it was not collaborative with the seller. For this reason, the conviction [could not] be sustained.'"84

Transposing the principles developed in the cases described above to the typical abortion counselling situation, one can draw certain tentative conclusions. First, if the counsellor is not actually acting in concert with the abortionist, the probability of conviction as an

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78 Id. at 829-30.
79 The Court stated:
There was no evidence that Dr. Platt planned with the other defendants or conspired directly or indirectly with them ... There was no community of scheme between [them] ... nor was there any prearrangement or concert of action. Dr. Platt was paid nothing and it is not claimed that he ... expected to receive anything from the claimed transaction. Id. at 831.
80 Like Judge Hand in the Peoni case, the Morei court also rejected the "but-for" test, stating that to accept such a standard "would open a vast field of offenses that have never been contemplated within the common law by aiding, abetting, inducing or procuring." Id. at 831.
81 Id. at 832. Nor could the physician be convicted of aiding and abetting the government agent, Beach. As the court remarked: "Giving Beach the name of Morei, under the circumstances of this case, and with no further connection with the offense, would not render Dr. Platt guilty of aiding and abetting Beach, or of being his accessory before the fact." Id.
82 220 F.2d 166 (3d Cir. 1955).
83 Id. at 168.
84 Id.
aided and abettor or accessory before the fact is diminished. Second, if the counsellor is not profiting by the act of the abortionist, courts are apt to hold that he does not have a sufficient stake in the outcome of the venture to support a conviction. And third, where the counsellor either encouraged an abortion or had a personal interest in securing an abortion, the probability of a sustainable conviction is substantially increased.

Some of these tentative conclusions find direct support in the present case law. For example, in *Scott v. State*, the Supreme Court of Delaware held that "the furnishing of the name of the person who later committed the abortion [is not] sufficient to convict one of aiding, abetting or procuring an abortion." In *Scott*, the defendant secured the name and address of the abortionist and accompanied the patient to the apartment of the abortionist knowing that she intended to have an abortion performed. Despite these facts, the evidence was held insufficient to convict.

On the other hand, if the evidence tends to support an inference of concerted action between the party making the referral and the person performing the abortion, the hazard of conviction is great. So, in *State v. Ellrich*, conviction was sustained upon evidence demonstrating that the defendant-physician was contacted for the purpose of performing an abortion; that he gave the name and telephone number of the abortionist to the woman seeking the abortion; and that he told her to call from a certain pay phone and to say that she was calling from a particular address, rather than use the defendant's name. These peculiar instructions, held the Supreme Court of New Jersey, showed a "prearranged code" between the defendant and the principal and "spell out quite clearly and convincingly a criminal concert of action."

A personal interest, sufficient to establish guilt as an aider and abettor, may be found where the defendant seeks to bring about the abortion for personal reasons. Thus, in *Commonwealth v. Don-*

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86 Id. at 255, 113 A.2d at 882.
87 A similar conclusion was reached in *People v. Northcot*, 45 Cal. App. 706, 189 P. 704 (1920), where a physician who refused to perform an abortion gave his patient the name of a physician who did perform the abortion.
89 Id. at 150, 89 A.2d at 687. *See also* *McLure v. State*, 214 Ark. 159, 215 S.W.2d 524 (1948) (concert of action established upon evidence that defendant-physician referred woman to another doctor for an abortion, that he stated "he had sent a million over there," that he instructed the woman to return to him for treatment, and that the woman returned to the defendant when the operation was completed).
oghne, the fact that the person who arranged the abortion was responsible for the pregnancy of the woman was held sufficient to establish his personal stake in the venture. Presumably, however, such a personal stake would not exist in the routine counselling situation.

B. Culpability as an Accomplice of the Abortee

In those cases in which the evidence has been held insufficient to support conviction of an individual as an aider and abettor to abortion where the principle offender was the abortionist, there was no issue before the court as to whether the individual who assisted in making arrangements could be convicted as an accomplice to the offense of unlawfully procuring an abortion. In several states the woman upon whom the abortion is performed may be charged with soliciting or submitting to an unlawful abortion. In such an instance, it is possible that the counsellor may be charged as an accomplice to her offense. But here as well, the principles discussed above would pertain — i.e., if the counsellor has a personal stake, financial or otherwise, in the outcome of the woman’s effort to obtain an abortion, the chances of his conviction as an accomplice are increased.

In jurisdictions where the participation of the woman is considered innocent or noncriminal and the counsellor is concerned solely with assisting the woman, it is unlikely that any conviction of the counsellor would be possible. This conclusion derives from the established principle that “there can be no conviction for aiding and abetting someone to do an innocent act.” On the other hand, if there is a community of interest between the counsellor and the party performing an illegal abortion, the innocence of the woman will not save the counsellor from the risk of conviction as an accessory to the abortionist.

IV. Additional Hazards of Abortion Counselling

The manner in which an abortion counselling service operates, bears not only upon the extent to which its participants are subjected
to prosecution as accessories, but also upon the seriousness of other risks. For obvious reasons, those services which not only provide information, but also, and for a fee, make specific arrangements for the performance of the abortion invite the greatest possibility of legal interference.  

A. Commercial Services: Some Special Problems

Judicial hostility to abortion counselling services that operate for a profit has been strongly in evidence. For example, in *State v. Abortion Information Agency, Inc.*, a temporary injunction was obtained in New York restraining a commercial abortion counselling service “from transacting business as a referral agency for performing abortions.” The agency operated by advertising, receiving telephone calls from women who wished to have abortions performed, advising the woman how an abortion might be obtained, informing the caller of the probable cost of the physician and hospital services, and charging the caller a fee for the referral and the operation.

Women who used the service entered licensed hospitals and were examined and treated by licensed physicians. Nonetheless, the activities of the agency were found to be illegal on the following grounds: (1) the agency was acting as an intermediary or broker in the sale of professional services in violation of the public policy of the state; (2) the agency was engaged in fee splitting contrary to the law and public policy of the state; and (3) the agency was engaged in the unauthorized practice of medicine which, according to the court, involved some effort at determining the type of operation to be performed upon the women seeking abortions.

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83 As discussed earlier, actual arrangement of an abortion would constitute action rather than speech and would not be protected under the first amendment. See notes 16-18 supra & accompanying text.


85 The fee included a charge for all of the services, including the operation. The agency, not the patient, was billed by the hospital. Id.

86 Id. at 143-44. Later in the opinion, the court stated that "it is quite clear that plaintiff has made out a clear and convincing case concerning the inherent dangers to the public involved in this situation, considering the distinct probability of domination by the agency of the institutions." Id. at 144.

87 Id. Interestingly the court deemed irrelevant the fact that the fee splitting did not result in an increase in the cost to the patient. Id.

88 Id. at 145. In a dissenting opinion, Judge Steuer found that "there is absolutely no proof that the defendant is practicing or ever has practiced medicine. . . . The defendant makes no diagnosis, does not determine what operation is to be performed, does not perform it, and has nothing to do with the way it is performed or [how] the patient is treated thereafter." Id. at 147-48. In Judge Steuer's view, the practice of med-
As a final justification for its decision, the court concluded that the agency was engaging in the unlicensed (and hence illegal) selling of insurance by providing abortion services at a "guaranteed flat charge that cover[ed] everything."\(^99\)

The decision of the court bristles with hostility to the defendant's money-making activities. Indeed, the court concluded that the agency had "the appearance of one conceived in fraud," simply because its announced purpose, contained in the certificate of incorporation, was

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[t\text{]o provide general information concerning legal abortions to the public and to women with problem pregnancies. The corporation, nor its agents, shall not [sic] undertake to diagnose pregnancy, or any other physical or mental condition of a client. The corporation shall not undertake to advise a client on the medical desirability of obtaining an abortion, nor shall it provide any information or perform any act which may constitute the practice of medicine.\(^100\)
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Fraud was inferred from the fact that, despite this assertion of purpose, a business was developed which engaged "extensively in the procurement of hospital services and . . . arrangements for abortions."\(^101\) The court further concluded, although without pointing to any supporting evidence, that the defendant actually solicited and encouraged women to seek out abortions. Although the initial contact was always established as a result of a call from the woman, this fact was considered inconsequential:

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\text{That the initial inquiry concerning the abortion is made by the patient does not negate the fact that the defendants' methodology once a patient contacted it was to further encourage the abortion, for the sole motive of financial gain to defendants, rather than to aid in giving objective and concerned advice to the patient.}\(^102\)
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The conclusion that the agency was operating in violation of public policy derives from a plain and obvious antagonism to the profit-making nature of the agency's business.\(^103\) This attitude was

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\(^99\) Id. at 145.
\(^100\) Id. at 145-46.
\(^101\) Id. at 146.
\(^102\) Id.
\(^103\) See id. at 147-50 (Judge Steuer, dissenting).
expressed by the trial court in unambiguous terms: "The law which sought to emancipate women from servitude as unwilling breeders, did not intend to deliver them as helpless victims of commercial operators for the exploitation of their misery."104

It is not unlikely that commercial referral agencies in other states may meet similar fates, if not similar rhetoric. Several courts have suggested that the practice of medicine should be protected from commercial exploitation.105 It has been held to be against public policy, for example, to permit a "middleman" to intervene for profit in establishing the professional relationships between physicians and the public.106 Such language parallels the charge leveled in Abortion Information Agency, Inc. that the agency was acting, in violation of public policy, as an intermediary or broker in the sale of professional services, and suggests that the commercial agencies may be in jeopardy.

Indeed, in the State of New York hostility towards commercial referral agencies was so intense that legislation was enacted to abolish these businesses.107 Whether such broad, prohibitory legislation can be successfully challenged remains to be seen. The state clearly has the authority under its police power to prohibit business activities rationally deemed inimical to the public welfare. But no Supreme Court case has yet been decided under such a public welfare notion where the operators of the business could claim their activity was entitled to first amendment protection.108

If the general right to engage in business was all that was at stake, then the proscription of for-profit referral agencies would almost certainly be upheld as a rational legislative action, particularly when one considers the complaints typically directed at the agencies. Before the statutory ban on profit-making referral agencies was enacted in New York, the state had initiated a wide-spread investigation into the activities of commercial referral services. It was claimed by the New York Attorney General that the agencies

104 Id. at 149.
108 Such a first amendment claim was raised and rejected by a lower federal court in S.P.S. Consultants v. Lefkowitz, 333 F. Supp. 1373 (S.D.N.Y. 1971).
engaged in deceptive advertising and failed to inform women of the true cost of the referral service. It was also claimed that the agencies illegally split their fees with the physicians and clinics performing the abortions.\textsuperscript{109}

But if the referral agency can establish a first amendment claim — in addition to the general, but unpersuasive claim of the right to do business — then more than a mere "rational-basis" justification for the legislative prohibition would be required. If the agency's activity constitutes speech, the validity of the proscriptive statute might turn on whether the state's interest in regulating the medical practice or eliminating the particular evils complained of is sufficient to justify the curtailment of first amendment rights. The fact that the state might eliminate abuses by regulation rather than by banning the agencies in toto would then be critical, for if regulation would suffice, there would seem to be insufficient justification for the infringement upon first amendment rights presented by a total prohibition, such as the one established by the New York legislation.\textsuperscript{110}

B. Subpoenas

During the New York State Attorney General's investigation there was substantial litigation regarding issues of great importance to the counselling business, whether commercial or nonprofit. One issue that arose involved the right to subpoena hospital records containing the names and addresses of all patients referred by abortion counselling services, the type of operation performed, the name and address of the treating physician, and the duration of the stay of the patients. In \textit{Montwill Corp. v. Lefkowitz}, the New York County Supreme Court held that the request for this information constituted "a proper demand and a valid exercise of the power vested in the Attorney-General."\textsuperscript{111} The doctor-patient privilege asserted by the hospital was held to cover only information regarding the type of abortion performed. Furthermore, the court refused to impose formal conditions upon release of the information sought in order to keep the names of patients confidential. It felt "assured that the Attorney General [would] not release or

\textsuperscript{109} See generally Chariton, \textit{supra} note 2.


\textsuperscript{111} 66 Misc. 2d 724, 725, 321 N.Y.S.2d 975, 976 (N.Y. County Sup. Ct. 1971).
make any public disclosure of the names of patients who have obtained abortions except as to such disclosure as may be necessary in the continued investigation . . . or the prosecution if any of any action arising out of the subject investigation."\textsuperscript{112}

A similar result was reached in \textit{Weitzner v. Lefkowitz}\textsuperscript{113} where the same New York court, speaking through a different judge, upheld a subpoena directed at a licensed physician who sought to withhold the names and addresses of his patients on the basis of the physician-patient privilege. Noting that the subpoena was issued in the course of an investigation into the activities of "private abortion referral agencies engaged in the business of commercial intermediaries or brokers between patient and doctor and patient and hospital in connection with abortion services,"\textsuperscript{114} the court held that the issuance of the subpoena by the Attorney General constituted a legitimate exercise of his authority to investigate possible fraud and illegal business activity which might cause harm to the public.\textsuperscript{115} The problems which might befall the patients whose names would be disclosed were dismissed with the simple comment that "the court has every confidence that the Attorney-General will prevent unnecessary disclosures."\textsuperscript{116}

At least one New York case, however, has refused to order an abortion referral agency to disclose the names and addresses of the women with whom it had dealt. In \textit{Lefkowitz v. Women's Pavilion, Inc.},\textsuperscript{117} the same New York County Supreme Court — now speaking through a third judge — observed that the Attorney General had presented no argument regarding the relevance and necessity of the names and addresses of clients who had obtained abortions through the referral agency. While casting no doubt upon the good faith of the Attorney General in conducting his investigation, the court held that good faith did not constitute justification

\textsuperscript{112} Id. at 726, 321 N.Y.S.2d at 977.
\textsuperscript{113} 66 Misc. 2d 721, 321 N.Y.S.2d 925 (N.Y. County Sup. Ct. 1971).
\textsuperscript{114} Id. at 722, 321 N.Y.S.2d at 926.
\textsuperscript{115} In light of the fact that the court found that the names and addresses of patients were "not confidential matters," id. at 723, 321 N.Y.S.2d at 927, it is somewhat surprising that the court went to such lengths to demonstrate the closeness of the relationship between the petitioner-physician and the referral agencies. The court acknowledged that the physician was a part owner and chief gynecologist of one of the clinics performing abortions for the agencies, that he was involved in setting up the referral corporations, that he was a major stockholder in two of the corporations which referred patients to his clinic, and that he derived "substantial income from referrals requiring his professional services." \textit{Id.} at 722, 321 N.Y.S.2d at 926.
\textsuperscript{116} Id. at 723, 321 N.Y.S.2d at 927.
\textsuperscript{117} 66 Misc. 2d 743, 321 N.Y.S.2d 963 (N.Y. County Sup. Ct. 1971).
"to embark on a roving course which would result in generally prying into the affairs of any person." The court then added that

the names of those who sought and received abortions are not protected by the umbrella of privilege within the meaning of the statute and judicial interpretation . . . . However, there is a delicate balance which must be maintained. Those persons who sought abortions approached the respondents in confidence with the intent of maintaining secrecy and avoiding embarrassment. This presents a proper case for the court to interfere and modify a subpoena to protect against an undue infringement upon the rights of private citizens . . . . Their right to privacy should be respected and protected. This is especially true in view of the fact that the fee arrangements under investigation by the Attorney-General will still be capable of full discovery.

While the New York investigations have apparently ended, there is still the possibility that names and addresses of counsellees may be subpoenaed in other states in an official investigation or in civil or criminal litigation, that the privilege which exists between a physician and patient will not be deemed to encompass this information, and that exposure of the name of the counsellee may lead to substantial embarrassment. Unless a privilege protecting the confidentiality of such information can be successfully asserted on the basis of an independent legal or constitutional principle, referral agencies may be seriously jeopardizing those whom they serve.

C. Unauthorized Practice of Medicine

The question of whether abortion counselling falls within the prohibitions against the unauthorized practice of medicine is an issue which has arisen both in and out of New York. No doubt, the threat of criminal prosecution for practicing medicine without a license has been used as a practical means of inhibiting abortion counselling activities, but whether this approach will withstand judicial scrutiny remains to be seen. If the courts hold to the position that the practice of medicine includes only physical application of the healing arts and the prescribing of specific treatment, counselling services should be in no real jeopardy. Indeed, this position has been accepted by some courts. The majority of courts, how-

118 Id. at 744, 321 N.Y.S.2d at 965.
119 Id. at 745, 321 N.Y.S.2d at 965 (citations omitted).
120 Most counselling agencies do not actually prescribe or administer treatment. There are, however, those which have found themselves in extremely embarrassing positions because they dispensed tranquilizers to their clients.
ever, have upheld statutes or regulations providing that any person who owns, maintains, operates, or manages a medical office is also engaged in the practice of medicine and must have a license therefor.\textsuperscript{122} Presumably, such statutes are designed to protect the public against unqualified medical practitioners, and it has been the theory of most courts that such protection would be vitiated if the standards of ethics, the class of workmanship, and the price of services were subject to the control of lay managers.\textsuperscript{123}

In those cases where management or operation of the "business side" does not include the exercise of any control or direction of the professional work, however, the lay manager has generally not been held to be practicing medicine.\textsuperscript{124} Thus, in \textit{Messner v. Board of Dental Examiners}, where the evidence showed only that the layman was the credit and advertising manager, that he superintended the laboratory to the extent of seeing that the work went out on time, and that he purchased dental and office supplies (but did not determine the grade or character of supplies to be ordered), the court found that he did not control the professional service and, consequently, was not practicing medicine.\textsuperscript{125} On the other hand, in \textit{Worlton v. Davis},\textsuperscript{126} the Supreme Court of Idaho held that a lay

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\textsuperscript{123}In the absence of specific statutory provision to the contrary, it is well settled that neither a corporation nor any other unlicensed person may engage, directly or indirectly, in the practice of medicine. See Annot., 4 A.L.R.3d 383, 385 (1965). See also Pac. Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 52 P.2d 992 (1935) and cases cited \textit{id.} at 594-95, 52 P.2d at 993-94. As of 1965, professional corporations or associations had been authorized by statute in 31 states. Annot., 4 A.L.R.3d 383, 387-88 (1965). Of course, such statutes do not enable \textit{unlicensed} practitioners to incorporate for the purpose of operating a medical practice.

\textsuperscript{124}See, e.g., State v. Williams, 211 Ind. 186, 5 N.E.2d 961 (1937); Parker v. Bd. of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932). Alternatively, the courts have felt that the practice of medicine should not be subject to commercial exploitation, at least not by persons other than licensed physicians. See, e.g., Pac. Employers Ins. Co. v. Carpenter, 10 Cal. App. 2d 592, 595, 52 P.2d 992, 994 (1935).

\textsuperscript{125}But see Parker v. Bd. of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932).

\textsuperscript{126}87 Cal. App. 199, 262 P. 58 (1927). The court reached this result even though the manager in question shared in the profits of the office.

Had it been shown, [however], that [the manager] had authority to participate in the employment or discharge of those engaged to do professional work and the fixing of their compensation a different question would arise. The power to hire and discharge and to fix the compensation of an employee necessarily implies the power to control his work. \textit{Id.} at 204-05, 262 P. at 60.

\textsuperscript{126}73 Idaho 217, 249 P.2d 810 (1952).
\end{footnotesize}
manager was engaged in the practice of medicine where he exercised control as a partner in determining who should be employed by the partnership and in determining remuneration of employees. Thus, the test generally focuses on the degree of lay control over the professional services. If the layman exercises some power to hire, discharge, and fix the compensation of licensed practitioners, then he is likely to be considered to be practicing medicine without a license. If the control test is applied to counselling agencies, a similar result will obtain in those circumstances where the agency exercises such control and supervision over the physicians who actually perform the operations. In most cases, however, there is no such authority exercised by the counselling services. Nor is there any actual dispensation of medical advice, medication, or treatment as would ordinarily be involved in the practice of medicine. Even where the agency makes an initial determination of the probable kind of operation necessary and refers the woman to an appropriate clinic, if a final and independent determination of the kind of operation to be performed is made by a licensed physician, then little more is being offered by the referral agency than information about and easier access to the needed medical services. Since the medical practice statutes are presumably not intended to deprive the public of legitimate medical services or information regarding the availability of medical services, there would seem to be scant justification for holding that such agencies are engaged in the unauthorized practice of medicine.

V. Conclusion

In many ways, the law has taken an approach to abortion counselling services which is intentionally designed to limit the public’s access to information regarding the availability of abortions. By assuming this posture, the law has done nothing more than impose restrictions upon the uninformed. Those in the worst position to pay for a service which they consider necessary may be forced to pay the highest price for that service. The pressures which have been generated by the law have intimidated principally those who

\[127\] A distinction may be drawn, however, in the case of referral agencies which are able to obtain discounts in the price of the abortion operation. Conceivably, the ability to obtain a discount may be read to imply that the agency exercises control over the compensation of the licensed physician sufficient to bring it within the proscriptions of the unauthorized practice statutes.

\[128\] Of course, when such agencies charge a fee for their services, which fee includes the price of the operation itself, the agency may be labeled a "broker" of medical services.
claim to be motivated by high purpose — those who see abortion counselling as a means of protecting the freedom of the individual and of dealing in a limited way with the enormous problems caused by the population explosion. Those who appear to be motivated by less lofty concerns have done a substantial service, if service is to be measured in terms of dissemination of desired information. Regardless of the motives of the counselling agencies, there is little or no justification for withholding information from the public regarding the availability of abortion services. There is equally little justification for the intimidation that derives from the ambiguities created by statutes and judicial decisions applicable to abortion counselling activities.