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Abortion Regulation: Louisiana's Abortive Attempt

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time under the circumstances,³⁸ or the grantor could sue to have the option erased from the public records at the end of a reasonable time. Also, the grantor may urge as a defense to a suit on the option that the optionholder attempted to exercise his option after a reasonable time had elapsed.

The rule that options without definite time periods are invalid is a harsh one. The optionholder is left without even an action for damages, as he has no contract on which to sue. The optionholder's only relief is the return of the price of the option, and while this insures that the property will not be held out of commerce forever, the optionholder's rights must be sacrificed in order to reach this result.

A sounder rule is that options are open for a reasonable time, which time is to be determined by the facts and circumstances of each case. This result is clearly available under Louisiana law, and allows courts to give effect to both the intention of the parties to the agreement and to the public policy against holding property out of commerce. In light of these considerations, it is suggested that the present rule, resting, as it does, on a somewhat questionable theory, be disapproved. The rule that options without definite time periods are open for a reasonable time rests on firmer theoretical ground, effects a more equitable balancing of interests, and is more properly applicable to such cases.

H. Evans Scobee

ABORTION REGULATION: LOUISIANA'S ABORTIVE ATTEMPT

During the 1973 fiscal session, the Louisiana legislature enacted provisions¹ regarding abortion in apparent response to the United

detriment of the grantor. *Joffrion v. Gumbel*, 123 La. 391, 48 So. 1007 (1909). The grantor of an option has an action for lesion beyond moiety against the optionholder, the value of the property to be calculated at the time the option was exercised. *Lake-side Dairies v. Gregerson*, 217 La. 510, 46 So. 2d 752 (1950); *Ronaldson & Puckett v. Bynum*, 122 La. 687, 48 So. 152 (1908). Options are specifically enforceable according to justice and equity, not of right. *Chalmette Petro. Corp. v. Chalmette Dist. Co.*, 143 F.2d 826 (5th Cir. 1944).

38. This situation seems to be within the purview of articles 1871-83 of the Code of Civil Procedure, which provide for declaratory judgments.

1. LA. R.S. 40:1299.31-.34 (Supp. 1973); LA. R.S. 13:1569 (1950), as amended by La. Acts 1956, No. 104 § 1, No. 108 § 1, No. 109 § 1, No. 110 § 1; 1968, No. 645 § 1; 1972, No. 139 § 1; 1973, No. 73 § 1; LA. R.S. 13:1570 (1950), as amended by La. Acts 1968, No. 644 § 1; 1973, No. 73 § 1; LA. R.S. 14:87 (1950), as amended by La. Acts 1964, No. 167; LA. R.S. 14:87.1 (Supp. 1973); LA. R.S. 14:87.2 (Supp. 1973); LA. R.S. 14:87.4 (Supp. 1973); LA. R.S. 40:254.1 (Supp. 1973); LA. R.S. 40:309.1 (Supp. 1973);

States Supreme Court decisions, *Roe v. Wade*² and *Doe v. Bolton*.³ In these cases, the plaintiffs brought separate actions seeking declaratory judgments that the existing criminal abortion statutes of Texas⁴ and Georgia⁵ were unconstitutional in that they abridged the plaintiffs' rights of personal privacy protected by the first, fourth, fifth, ninth and fourteenth amendments. The Supreme Court held both statutes unconstitutional on the ground that they infringed upon a pregnant woman's right to privacy protected by the due process clause of the fourteenth amendment.

Although the right of privacy is not specifically mentioned in the Constitution, the Supreme Court has recognized that it exists in marriage,⁶ contraception,⁷ procreation,⁸ child rearing and education.⁹ Those areas, within the protected zone of privacy are "so rooted in the traditions and conscience of our people as to be ranked fundamental."¹⁰ Thus, any regulation limiting or impeding them may be justified only by a compelling state interest.¹¹ Since this right of privacy is not absolute,¹² the Court in *Wade* established a standard corresponding to three stages of pregnancy by which state regulation of abortion is constitutionally scrutinized.¹³ The state does have two "important and legitimate interests"; protecting maternal health and protecting the life of the fetus.¹⁴ "These interests are separate and distinct. Each grows in substantiality as the woman approaches term

LA. R.S. 40:351-56 (Supp. 1973). This note will not attempt to analyze all of the provisions, but will limit its examination to Louisiana Acts 72 and 76 of 1973 in light of the constitutional mandate of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

2. 410 U.S. 113 (1973).

3. 410 U.S. 179 (1973).

4. TEX. PENAL CODE ANN. arts 1191-94, 1196 (1961). The Texas abortion law prohibited all abortions except those performed to save the life of the mother.

5. GA. CODE ANN. §§ 26-1201 to-1203 (1968). The Georgia law prohibited abortion except as performed by a duly licensed physician of the state when necessary in "his best clinical judgment" because continued pregnancy would endanger the woman's health; the fetus would likely be born with serious defects; or the pregnancy resulted from rape.

6. *Loving v. Virginia*, 388 U.S. 1 (1967).

7. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

8. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

9. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

10. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

11. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

12. 410 U.S. 113, 154 (1973).

13. *Id.* at 154.

14. *Id.* at 162.

and, at a point during pregnancy, each becomes 'compelling'.¹⁵ During the initial three months of the pregnancy, neither interest is sufficiently compelling to justify any interference with the abortion decision by the woman.¹⁶ Subsequent to the first trimester, as the health risks of abortion begin to exceed those of childbirth, the state has a compelling interest in the health of the woman. Since its interest in protecting the fetus has not yet reached this point, the state may not prohibit an abortion during the second trimester. The state's powers are limited to regulations that reasonably relate to the preservation and protection of maternal health.¹⁷ The state's second interest, the protection of the life of the fetus,¹⁸ reaches a compelling point at "viability"¹⁹ so that it may limit abortions except where it is necessary to protect the life or health of the woman.

The recent Louisiana enactment provides in part that:

No person employed by the state of Louisiana by contract or otherwise, or any subdivision or agency thereof, and no person employed in any public or private social service agency, by contract or otherwise, including workers therein, which is a recipient of any form of governmental assistance, shall require or recommend that any woman have an abortion.²⁰

This statute is of dubious constitutionality in light of the *Wade* decision. Since legislative enactments regulating fundamental rights must be narrowly drawn so as to protect only the legitimate state interest at stake, a statute which prohibits abortion counseling as Act 72 does by the words "[n]o person . . . shall . . . recommend that any woman have an abortion" is overbroad. Since there exists no state interest which is compelling during the first trimester, any state regulation during this period violates the standard of *Wade*.

15. *Id.* at 162-63.

16. *Id.* at 164.

17. "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility, and the like." *Id.* at 163.

18. *Id.* The Court held that a fetus is not a "person" within the meaning of the fourteenth amendment.

19. The fetus becomes "viable," that is, potentially able to live outside of the mother's womb, albeit with artificial aid, somewhere between the twenty-fourth and twenty-eighth week of gestation. *Id.* at 160. See L. HELLMAN & J. PRITCHARD, *WILLIAMS OBSTETRICS* 493 (14th ed. 1971); *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY* 1689 (24th ed. 1965).

20. LA. R.S. 40:1299.34 (Supp. 1973).

Similarly, regulations during the second trimester must be reasonably related to maternal health. Although, strictly speaking, *Wade* stands for the proposition that abortions may not be made subject to criminal sanctions, fundamental interests may be infringed in many ways short of making them illegal.²¹ However, as many equal protection cases involving voting²² and welfare²³ rights have indicated, any infringement of a fundamental right must be strictly scrutinized; unless the infringing classification or regulation is supported by a compelling state interest, it will be declared unconstitutional. It would seem that a statutory plan, such as Act 72, which impedes the woman's decision to procure an abortion is an impermissible infringement. The United States Second Circuit Court of Appeals found a similar statute without justification, stating that it would be a futile exercise to recognize a woman's right to procure an abortion and then to impede the means to vindicate that right by prohibiting others from offering advice.²⁴ Thus, Act 72 is overbroad in that it prohibits the recommendation of abortions to a woman before the state has a compelling interest in taking action to discourage or proscribe abortions.

Act 72 provides further that a doctor may recommend an abortion only when he "is acting to save or preserve the life of a pregnant woman." The validity of this part of the Act, in so far as the first two trimesters are concerned, is likewise questionable since it is as overbroad as the provision prohibiting the recommendation of abortions where there is no compelling state interest. As to the third trimester, *Wade* established that the state may not prevent an abortion where it is necessary to preserve the life or *health* of the woman.²⁵ Justice Burger's concurring opinion points out that the "term health is used in its broadest medical context."²⁶ Thus, it is apparent that a woman's health includes her psychological health and is not limited to her physical well-being.²⁷ Since Louisiana's Act permits a doctor

21. *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 705 n.2 (1st Cir. 1973).

22. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965).

23. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

24. *Abele v. Markle*, 342 F. Supp. 800, 801 n.5 (D. Conn. 1972). The court struck down Conn. Gen. Stat. 53-29 which provided in part: "Any person who . . . advises . . . her to take or use anything, . . . with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both."

25. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

26. 410 U.S. 179, 207-08 (1973).

27. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE

to recommend an abortion only to save the *life* of the woman, it is not in accord with the mandate of the Court and appears unconstitutional.

The legislature also enacted the following provisions:

[n]o hospital, clinic or other facility or institution of any kind shall be held civilly or criminally liable . . .²⁸ and “[n]o hospital, clinic or other medical or health facility, whether public or private, shall ever be denied governmental assistance . . .²⁹ for refusing to permit its facilities, staff or employees to be used in any way for the purpose of performing any abortion.”³⁰

Public hospitals in Louisiana are established by state law³¹ and are under the administrative and regulatory authority of the Louisiana Health, Social and Rehabilitation Services Administration.³² Thus, the acts of a public hospital or its governing authority constitute state action for the purpose of the fourteenth amendment.³³ Applying the standard of *Wade*, the hospital as a governmental entity must have a compelling interest to justify a policy permitting some hospital and surgical procedures and prohibiting others, such as abortion, that involve fundamental rights. The United States Court of Appeals for the First Circuit, subsequent to *Wade*, held that a municipal hospital's ban on a surgical procedure (tubal ligation)³⁴ limited a fundamental interest in the pregnancy decision and was objectionable since the hospital permitted the performance of other comparable surgical procedures involving no greater risk or demands on the staff

L.J. 920, 921 n.19 (1973). “(Thus the statutes of most states must be unconstitutional even as applied to the final trimester, since they permit abortion only for the purpose of saving the mother's life. . .) This holding—that even after viability the mother's life or health (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience, see 93 S. Ct. at 755 (Burger, C.J., concurring)); *United States v. Vuitch*, 402 U.S. 62 (1971), must, as a matter of constitutional law, take precedence over what the Court seems prepared to grant at this point has become the fetus's life.”

28. LA. R.S. 40:1299.32 (Supp. 1973).

29. “The term governmental assistance as used in this section shall include federal, state and local grants, loans and all other forms of financial and other aid from any level of government or from any governmental agency.” LA. R.S. 40:1299.33(A) (Supp. 1973).

30. LA. R.S. 40:1299.33 (C) (Supp. 1973).

31. LA. R.S. 40:2001 (Supp. 1956).

32. LA. R.S. 46:1751 (Supp. 1972).

33. *Robinson v. Florida*, 378 U.S. 153 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Foster v. Mobile County Hosp. Bd.*, 398 F.2d 227 (5th Cir. 1968); *Cypress v. Newport News General and Nonsectarian Hosp. Assoc.*, 375 F.2d 648 (4th Cir. 1967).

34. Consensual sterilization.

and facilities.³⁵ The court applied the equal protection analysis found in *Shapiro v. Thompson*³⁶ with regard to welfare payments to new and old residents and found that once the state has undertaken to provide general hospital care, it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights unless shown to be necessary to promote a compelling state interest.³⁷ The court relied heavily on *Wade* in finding that the right to consent to sterilization was as essential a part of the pregnancy decision as the exercise of the right of abortion and thus was protected by the same strict scrutiny test as other fundamental rights. It is apparent, therefore, that the same analysis would preclude a public hospital's ban on abortions.³⁸

The Supreme Court in *Doe v. Bolton*,³⁹ a companion case to *Wade*, considered a provision in the Georgia statute⁴⁰ that permitted a hospital to refuse to admit a patient for an abortion. While the Court noted that the provision was intended to afford protection to the denominational hospital, it did not pass on the validity of a "private" hospital policy prohibiting abortions. There are several decisions which have held that actions of "private" hospitals that receive public assistance or function in the public interest constitute state action.⁴¹ In these cases it has been found that state and private

35. *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 705-06 (1st Cir. 1973).

36. 394 U.S. 618 (1969). See also *Klein v. Nassau County Med. Center*, 347 F. Supp. 496 (E.D.N.Y. 1972), appeal pending, 410 U.S. 922 (1973). New York's refusal of medical assistance for performance of other than "medically indicated" abortions denies equal protection to indigent pregnant women seeking abortions for other reasons.

37. *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 706 (1st Cir. 1973). The Court's holdings in *Shapiro* and in *Hathaway* were framed in equal protection terms. *Wade* and *Bolton* in the application of the compelling state interest analysis has apparently revived the methodology of substantive due process. The ramifications this presents for constitutional theory are beyond the scope of this note. See Note, 37 ALBANY L. REV. 776 (1973); Note, 47 TUL. L. REV. 1159, 1163 (1973).

38. It should be noted that the circuits were split on the question of whether *Monroe v. Pape*, 365 U.S. 167 (1961) would allow equitable relief under 42 U.S.C. § 1983 against entities clothed by immunity. Under such reasoning coupled with the statutory provisions [LA. R.S. 46: 759 (1950); LA. R.S. 46:897 (1950)], certain public hospitals might have been sued to furnish effective relief to a woman denied an abortion by a public hospital. However, the United States Supreme Court in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) found no justification for treating the municipality as a "person" when equitable relief was sought. See Comment, 34 LA. L. REV. 540, 544 (1974).

39. 410 U.S. 179, 198 (1973).

40. GA. CODE ANN. § 26-1202(e) (1968).

41. *Sams v. Ohio Valley Gen. Hosp. Assoc.*, 413 F.2d 826 (4th Cir. 1969); *Meredith v. Allen County War Mem. Hosp. Comm'n*, 397 F.2d 33 (6th Cir. 1968); *Simkins v.*

goals, functions, and other activities become so intertwined as to be indistinguishable.⁴² For instance, when a "private" hospital is licensed by the state and subjected to pervasive regulations concerning its operations, its actions may constitute state action. In *Simkins v. Moses H. Cone Memorial Hospital*,⁴³ the court found that the acceptance⁴⁴ of Hill-Burton federal funds⁴⁵ by a private hospital was state action which obligated an observance of federal constitutional mandates. In *Eaton v. Grubbs*,⁴⁶ state action was found even where the hospital did not receive Hill-Burton funds, because it was subject to statewide regulations enacted in conjunction with the state's general participation in Hill-Burton projects. Thus, if there is sufficient involvement⁴⁷ by the state in the funding or regulation of a so-called "private" hospital, state action is present.⁴⁸ Therefore, it would seem that the portion of Act 72 which provides that no private hospital

Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964); *Citta v. Delaware Valley Gen. Hosp. Assoc.*, 313 F. Supp. 301 (E.D. Pa. 1970). *Contra Doe v. Bellin Mem. Hosp.*, 479 F.2d 756 (7th Cir. 1973); *Shulman v. Washington Hosp. Center*, 222 F. Supp. 59 (D.D.C. 1963); *Moore v. Andalusia Hosp., Inc.*, 284 Ala. 259, 224 So. 2d 617 (1969); *Woodward v. Porter Hosp., Inc.*, 125 Vt. 419, 217 A.2d 37 (1966).

42. *Burton v. Wilmington Park. Auth.*, 365 U.S. 715, 722 (1961).

43. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

44. Cone Hospital received funds that amounted to only 15% of the total construction expenses. The court said: "We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans. But we emphasize that this is not merely a controversy over a sum of money. . . . Our concern is with the Hill-Burton program, and examination of its functioning leads to the conclusion that we have state action here." *Id.* at 959, 967.

45. The Hill-Burton Act, 42 U.S.C. § 291 (1970), is a program which provides funds to states to be utilized for hospital facilities and which includes an elaborate and intricate pattern of state and federal regulation.

46. 329 F.2d 710 (4th Cir. 1964).

47. However, the Supreme Court has stated that not all state involvement is sufficient to imbue acts of private entities with "state action." See *Moose Lodge v. Irvis*, 407 U.S. 163, 173 (1972): "Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discrimination,' *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

48. *But see Doe v. Bellin Mem. Hosp.*, 479 F.2d 756 (7th Cir. 1973), which held that the refusal of a state-regulated, private hospital, which receives federal financial support pursuant to the Hill-Burton Act, 42 U.S.C. § 291 (1970), to permit its facilities to be used to perform abortions does not constitute deprivation under color of state law. The court distinguished this case from *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963) by finding there was no governmental involvement in the very activity being challenged. A careful reading of *Simkins* will show that Seventh Circuit decision relied on an "additional theory" not really necessary to the ultimate decision. The distinction made is not a valid one.

shall be denied governmental assistance or be liable for refusing to permit its facilities to be used for the purpose of performing an abortion is again overbroad in failing to recognize that certain "private" hospitals cannot refuse to perform abortions.⁴⁹

The legislature also passed Act 76 which establishes the crime of abortion advertising. "Abortion advertising is the placing or carrying of any advertisement of abortion services by the publicizing of the availability of abortion services."⁵⁰ Freedom of speech and freedom of the press are among the fundamental rights which are protected by the first and fourteenth amendments. Although it is clear that a state has a rational and compelling interest in safeguarding the health, safety, and lives of its citizens,⁵¹ a state may not encroach upon fundamental rights except upon showing a compelling interest which supersedes the rights of the individual.⁵² Thus, even if a state has an interest to be protected, "that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved."⁵³ Therefore, a statute which limits the freedoms of speech and press is subject to strict scrutiny and is valid only when narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.⁵⁴

Act 76 also fails to make a distinction between legal and illegal abortions since the Act proscribes advertising of the availability of any abortion services. Since there is no compelling state interest in the first trimester and clearly defined interests limit the state's regu-

49. The Health Programs Extension Act of 1973, Public Law 93-45, provides in part that the receipt of any grant, such as Hill-Burton funds, does not authorize any court or public official to require any individual or entity to perform any sterilization procedure or abortion if the performance of such acts is contrary to the individual's or entity's religious or moral convictions. Whether Congress can define the limits of "state action" is a constitutional issue beyond the scope of this article. However, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966), indicates that Congress does not have the power to restrict, abrogate, or dilute the guarantees of the fourteenth amendment. It seems that if the limits of "state action" is a judicial determination, rather than a legislative determination, Public Law 93-45 is unconstitutional in attempting to establish that the receipt of federal funds will not imbue the acts of a private entity with "state action."

50. LA. R.S. 14:87.4 (Supp. 1973). The penalty for violation of Act 76 is imprisonment, with or without hard labor, for not more than one year or a fine of five thousand dollars, or both.

51. *Smith v. California*, 361 U.S. 147, 149-50 (1959); *Lovel v. Griffin*, 303 U.S. 444, 450 (1938).

52. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

53. See *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

54. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940).

lation powers in the second and third trimesters, Act 76 is overbroad. A recent district court decision⁵⁵ supports this conclusion where it was held that a Michigan ordinance making it unlawful to advertise any means whereby an abortion may be procured or any information concerning the procuring of an abortion was violative of the first and fourteenth amendments for failing to distinguish between legal and illegal abortions.

There is a distinction between the expression of ideas protected by the first amendment and commercial advertising in a business context.⁵⁶ A legislature in exercising its police power in the field of medicine may ban commercial practices which it believes violates public policy.⁵⁷ It is apparent that Louisiana could draft a law, as New York⁵⁸ has done, that would bar profit-making organizations from referring or recommending persons to a *particular* physician or hospital for the purpose of procuring an abortion. New York's law reflects a concern over fee-splitting and is not to be interpreted as an impermissible blanket prohibition against such agencies disseminating information for a fee concerning the availability of abortion services.⁵⁹ Thus, nonprofit agencies that provide abortion information should not encounter legal barriers. The failure to strictly draft Act 76 makes it constitutionally impermissible regardless of the state

55. *Mitchell Family Planning Inc. v. City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972). See also *Y.W.C.A. v. Kugler*, 342 F. Supp. 1048, 1063 (D.N.J. 1972).

56. *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972). See also *Breard v. City of Alexandria*, 341 U.S. 622, 641-45 (1951); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); *Broadcasting Co. v. Kleindiest, Acting Attorney General*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem.* 405 U.S. 1000 (1972).

57. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Exam.*, 294 U.S. 608 (1935).

58. N.Y. PUB. HEALTH LAW § 4501 (1971): "1. No person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health, related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation shall create a presumption that the business or service is engaged in for profit."

59. *S.P.S. Consultants, Inc. v. Lefkowitz*, 333 F. Supp. 1373, 1376 (S.D.N.Y. 1971). This section prohibiting the for-profit referral or recommendation of persons to a physician, hospital or other health facility for medical care did not abridge for-profit abortion referral agencies' first amendment right to disseminate information concerning availability of health care facilities and the public's right to receive such information in that it did not prohibit the agency from disseminating information for a fee concerning the availability of health care facilities, but merely prohibited their referral services. See also *State v. Mitchell*, 66 Misc. 2d 586, 321 N.Y.S.2d 756 (1971); *State v. Abortion Infor. Agency, Inc.*, 69 Misc. 2d 825, 323 N.Y.S.2d 597 (1971).

interest.⁶⁰ Furthermore, the legislature in its zeal to prevent abortion advertising of any kind has failed to protect the legitimate interests of the state in regulating the public health and general welfare.

Acts 72 and 76 appear to be unconstitutional. The state should reconsider its response to the Supreme Court's decisions. Irrespective of its distaste for the rulings, as evidenced by the numerous concurrent resolutions denouncing them, the legislature should concern itself with enacting those important, permissible state regulations which would protect the health of women exercising their fundamental rights under the constitution.

R. Patrick Vance

PRISONERS' RIGHTS—JAILER'S DUTY OF PROTECTION

Two recent decisions by the Louisiana supreme court, *Nedd v. State*¹ and *Parker v. State*,² point to a trend throughout the country to recognize the claims of prisoners seeking judicial enforcement of their rights.³ Nedd, an Angola inmate, was injured when attacked in his dormitory by the same prisoner who had been convicted of aggravated battery for an attack on Nedd some ten years earlier. Parker suffered injuries when he was attacked by an inmate who had previously threatened him. The issue in both cases was whether under the circumstances the state should be liable for damages in reparation for the injuries intentionally inflicted by other inmates. Though recovery was denied in both instances under the facts presented, the

60. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

1. 281 So. 2d 131 (La. 1973).

2. 282 So. 2d 483 (La. 1973).

3. A majority of states now permit inmates to institute civil suits. Even many of those states that still have civil death statutes forbidding suits in tort provide that imprisonment is a disability that interrupts the running of prescription. *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1019 (1970). In addition to the remedy discussed below, an injured prisoner may also have an action under the Civil Rights Act, 42 U.S.C. § 1983 (1970). Protection of inmates against assaults by other prisoners is included in the eighth amendment's prohibition against cruel and unusual punishment. *Penn v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972). Though an isolated attack upon a prisoner, without special circumstances, is not seen as a constitutional deprivation, a prisoner who is injured by being needlessly exposed to an extra-hazardous condition may recover under the Civil Rights Act. *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969). Similarly, if the general conditions at a prison are insufficient to prevent frequent assaults, the constitutional right of prisoners to be free from cruel and unusual punishment is violated. *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972).