The Unwilling Listener: *Hill v. Colorado*'s Chilling Effect on Unorthodox Speech

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> Please don't tell me that in America I can't approach someone with the truth on a public sidewalk.
>
> Jeannie Hill[1]

It is easy to view anti-abortion protestors as crazed zealots. After all, these protestors have thrown themselves on the hoods of cars entering abortion clinic parking lots; blockaded driveways, sidewalks and entrances; poured glue into clinic locks; invaded and ransacked clinics; and confronted women near clinics with "in your face" tactics such as yelling, pushing, and grabbing.[2] These techniques have historical antecedents. As Judge Kozinski of the United States Court of Appeals for the Ninth Circuit recently wrote:

> Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, anti-war, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.[3]

The "tinge of menace" to which Kozinski refers, results in legislatures and courts overreacting to anti-abortion speech, unnecessarily restricting even peaceful forms of protest.[4] Justice Scalia, for example, describes the

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[1] Telephone interview with Jeannie Hill (Mar. 12, 2001). Jeannie Hill was one of the petitioners in Hill v. Colorado, 530 U.S. 703 (2000). She has extensive experience as a "sidewalk counselor" and is the author of a well-known guide to "sidewalk counseling." *See infra* note 6.

[2] *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357, 362-63 (1997) (describing large-scale blockades and aggressive methods of anti-abortion protestors in upstate New York); Am. Life League, Inc. v. Reno, 47 F.3d 642, 646 (4th Cir., 1995) (noting that between 1977 and 1993, more than 1,000 acts of violence against abortion providers and more than 6,000 clinic blockades occurred in the United States); NOW v. Scheidler, 968 F.2d 612, 615 (7th Cir., 1992) (describing unlawful methods of anti-abortion protestors), *rev'd*, 510 U.S. 249 (1994); Hill v. Thomas, 973 P.2d 1246, 1250-51 (Colo. 1999) (describing anti-abortion protests in Colorado, including blocking clinic entrances, intimidation, and harassment of those seeking services), *aff'd*, 530 U.S. 703 (2000); Operation Rescue v. Planned Parenthood, 975 S.W.2d 546, 550 (Tex. 1998) (protesters chained themselves to fixtures within clinics).

[3] Planned Parenthood v. Am. Coalition of Life Activists, 244 F.3d 1007, 1014 (9th Cir. 2001). For a discussion of the similarity between abolitionists and anti-abortion protestors, see Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853 (1999).

[4] *See, e.g., Schenk*, 519 U.S. at 377 (finding injunction requiring a 15 foot buffer between protestors and patients to burden more speech than necessary); Madsen v. Women's

record in some abortion protest cases as being "so devoid of threatening physical confrontation it would make an old-fashioned union organizer blush."[5]

One form of anti-abortion speech practiced by "sidewalk counselors" such as Jeannie Hill depends upon closely approaching women outside clinics in a calm, nonthreatening manner.[6] Near any health care facility in Colorado, however, it is illegal for speakers "engaging in oral protest, education, or counseling" to knowingly approach within eight feet of another person without that person's consent.[7] Recently, in *Hill v. Colorado*,[8] the United States Supreme Court, by a 6-3 vote, found the Colorado law was justified by the "unwilling listener's" privacy interest in avoiding unwanted communication.[9] The extraordinary balance of

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Health Center, Inc., 512 U.S. 753, 774-75 (1994) (finding injunction banning all uninvited approaches of patients within 300 feet of the clinic to burden more speech than necessary); Sabelko v. City of Phoenix, 120 F.3d 161, 165 (9th Cir. 1997) (municipal ordinance requiring protestors to remain 8 feet from patients fails narrow tailoring analysis).

[5] Williams v. Planned Parenthood Shasta-Diablo, Inc., 520 U.S. 1133, 1135 (1997) (Scalia, J., dissenting from denial of cert.). *See also Madsen*, 512 U.S. at 786-90 (Scalia, concurring in the judgment in part and dissenting in part) (the record does not show violence nor attempts to block clinic entrances; anyone familiar with "run-of-the-mine labor picketing" will be aghast at what the Court allows to be enjoined).

[6] *See* JEANNIE HILL, SIDEWALK COUNSELING WORKBOOK 10, 27 (3d ed. 1999) [hereinafter WORKBOOK] (emphasizing the need to make the advance toward the patient as nonthreatening as possible and to put her at ease with a calm and cheerful posture) *at* http://sidewalk.batcave.net (visited Nov. 1, 2001) . *See also* JUDITH FETROW, DON'T PANIC: THE SIDEWALK COUNSELOR'S GUIDEBOOK 8, 12 [hereinafter GUIDEBOOK] (advocating friendly approaches and the need to "treat every woman like a close personal friend") *at* http://www.ewtn.com/library/prolife/sidewalk.txt (visited Apr. 15, 2001). Views similar to those of Hill and Fetrow are offered by Janet Hafernik and Mary Hall Kleypass, whose testimony about "sidewalk counseling" is cited extensively in *Operation Rescue-Nat'l v. Planned Parenthood*, 975 S.W.2d 546, 574-76 (Tex. 1998) (Gonzalez, J., concurring in part and dissenting in part).

As Joseph Schiedler wrote, there "is no one way to do sidewalk counseling." JOSEPH SCHIEDLER, CLOSED: 99 WAYS TO STOP ABORTION 19 (1985). The methods advocated by Hill, Fetrow, Hafernik and Kleypass differ from the methods employed by others. Some "sidewalk counselors" have "turned to harassing, badgering, intimidating and yelling at the patients . . . . They continue to do so even after the patients signal their desire to be left alone. The 'sidewalk counselors' often crowd around patients, invade their personal space and raise their voices in a loud and disturbing manner." Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1425 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part en banc*, 67 F.3d 377 (2d Cir. 1995) *aff'd in part, rev'd in part*, 519 U.S. 357 (1997). However, Jeannie Hill does not use such methods. Hill v. Colorado, 530 U.S. 703, 710 (2000) (noting that "sidewalk counseling" by petitioners was not abusive or confrontational). As used in this Article, the term "sidewalk counseling" refers to the techniques used by Mrs. Hill and not the more confrontational techniques used in cases such as *Schenck*.

[7] COLO. REV. STAT. § 18-9-122(3) (2000).

[8] 530 U.S. 703 (2000).

[9] *Id.* at 716.

privacy and free expression in *Hill* departs from longstanding First Amendment doctrine; *Hill* especially contrasts with *Bartnicki v. Vopper*,[10] a recently decided case reaffirming the supremacy of First Amendment rights over privacy interests. Furthermore, the tailoring analysis in *Hill* differs substantially from *Lorillard Tobacco Co. v. Reilly*,[11] another recently decided case in which the Court found tobacco advertising restrictions to be improperly tailored.

At first blush, *Hill* has the typical attributes of many of the Court's contemporary First Amendment cases with disputes among the justices over whether or not the law was content neutral, was narrowly tailored, and left open ample alternative means of communication. What is unique about Justice Stevens's majority opinion, however, is his construction of a privacy interest that for the first time overrides the First Amendment right of speakers in a public forum. As I show in this Article, the privacy interest in *Hill* is a house of cards that collapses upon close examination.

Regardless of one's stance on reproductive autonomy as a constitutional right and the power of governments to punish private action that interferes with the exercise of constitutional rights, the *Hill* decision is problematic. The law at issue in *Hill* is not a narrowly tailored reconciliation of the First Amendment and the constitutional right of reproductive autonomy. Although prompted by anti-abortion protests, the Colorado law protects the privacy interest of anyone, patient or non-patient, near any type of health care facility. I contend that the privacy interest in *Hill* cannot be confined to the health care setting on a principled basis; the unwilling listener's interest in avoiding unwanted expression could be the basis for laws restricting speech near other places, such as the sites of labor disputes.

Part I of this Article discusses "sidewalk counseling" and the impact of the Colorado law on that form of one-on-one communication. Part II discusses the flaws of applying the captive audience, following and dogging, or "right to be let alone" rationales to the Colorado law. The recent *Bartnicki* decision is also analyzed; when read alongside *Hill*, *Bartnicki* shows the malleability of the "right to be let alone." Finally, Part III compares the narrow tailoring methodologies used in *Hill* and *Lorillard Tobacco*.

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[10] 121 S. Ct. 1753 (2001). *See infra* notes 122-41 and accompanying text.

[11] 121 S. Ct. 2404 (2001). *See infra* notes 161-78 and accompanying text.

I. SIDEWALK COUNSELING AND THE FIRST AMENDMENT

A. Sidewalk Counseling

> By the time a woman is approaching the doors of the abortion center she is determined to get inside. She has been warned that you, the radical anti-choice terrorist, are going to try to stop her. The way to disarm what the abortuary staff has told her about you is to be friendly. No one is expecting polite, kind, gentle people. That is not what they are shown on the news, and your quiet spirit will disarm them.[12]

Sidewalks outside abortion clinics can have a highly charged atmosphere; if clinic patients are unable to park on clinic property, they generally will be accompanied on sidewalks by clinic escorts. "Sidewalk counselors" and escorts both compete for the patient's attention, but Jeannie Hill describes escorts as "very aggressive. The escorts tell the girl to hurry and tell the sidewalk counselors to back up, talking loudly so the girl can't hear the sidewalk counselor. Pro-abortion people can't compete with the truth and they don't want the girls to stop and talk with us."[13] Moreover, crowds of protestors heighten the tension around a clinic and Mrs. Hill regards crowds as a deterrence to effective "sidewalk counseling." It is difficult for a "sidewalk counselor" to get a patient's attention in the noise and tumult created by protestors.[14]

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[12] GUIDEBOOK, *supra* note 6, at 11. Mary Hall Kleypass testified that in her training of "sidewalk counselors," she emphasizes the "importance of our demeanor, our approach to be gentle, our eye contact, our nonverbal cues, everything we do is gentle and inviting. We don't carry signs or yell or scream. The object is to love the woman. You can't love the woman with all that other stuff." Operation Rescue-Nat'l v. Planned Parenthood, 975 S.W.2d 546, 574 (Tex. 1998) (Gonzalez, J., concurring in part and dissenting in part).

[13] Telephone interview with Jeannie Hill, *supra* note 1. Hill adds that escorts "'guard' the patient by approaching her car in the parking lot or on the street and 'warn' her that we are there. Then they try to prohibit the patient from hearing what we say and from taking our literature." WORKBOOK, *supra* note 6, at 14; *see also Schenck*, 799 F. Supp. at 1425 n.6 in which the District court wrote:

> The Court notes that the patient escorts also become frustrated and angry by the persistence of "sidewalk counselors." The patient escorts often respond by raising their voices in order to drown out the "counselors'" message and attempt to block and impede the "sidewalk counselors" from following patients. While the Court can understand the frustration of the escorts, the evidence adduced at the hearings clearly shows that their behavior often serves only to exacerbate an already difficult situation.

[14] Telephone interview with Jeannie Hill, *supra* note 1.

The immediate objective of "sidewalk counseling" is to establish a rapport with clinic patients so that they will accept information from the counselor. This requires that the counselor closely approach the patients in a non-threatening manner, asking a question such as, "Can I get you to stop for just a second so I can give you some information that you won't receive inside this facility?"[15] If a woman is receptive, Jeannie Hill and her associates use conversation, a variety of printed materials such as brochures and photographs, and plastic replicas of babies to "present the truth of abortion in a caring manner and to always do so with an attitude of love."[16]

The initial conversation is on "an emotional level with an offer to help this person who is troubled" and is designed to get the patient to meet elsewhere for a discussion of alternatives.[17] Mrs. Hill states that when a woman favorably responds to counseling, "[i]t is an experience that you will never forget. It is a time to rejoice and offer a prayer of thanks to God."[18]

If a patient will not meet elsewhere and does not respond to "positive" literature, "then it's time to show her what happens to her child (son or daughter) during the abortion, with literature displaying the reality of what the 'procedure' does to her baby."[19] If the patient is uninterested, Jeannie Hill either responds with silence, prayer or a single sentence as the woman enters the clinic.[20] Mrs. Hill and her associates also display signs to women walking through clinic parking lots, but she cautions that some protest messages on signs aimed at the general public are inappropriate for clinic patients.[21]

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[15] GUIDEBOOK, *supra* note 6, at 11. Fetrow adds that statements such as "Please don't kill your baby" are not very productive "if you want someone to stop and talk with you." *Id.* at 10.

[16] WORKBOOK, *supra* note 6, at 5. She adds that "sidewalk counselors" should avoid touching patients. *Id.* at 8.

[17] *Id.* at 27. Hill claims that if a woman will agree to meet elsewhere, she will probably change her mind about having an abortion. Telephone interview with Jeannie Hill, *supra* note 1. Fetrow adds that "because the atmosphere on the street in front of the clinic is usually very stressful, this is not the proper place to discuss alternatives." GUIDEBOOK, *supra* note 6, at 16.

[18] WORKBOOK, *supra* note 6, at 30. Similar religious views are expressed by Fetrow who describes "sidewalk counseling" as "crisis evangelism" and claims that abortion centers are "the new mission field." GUIDEBOOK, *supra* note 6, at 2.

[19] WORKBOOK, *supra* note 6, at 28.

[20] *Id.* at 31. Fetrow recommends that the counseling end with evangelism. "Any counseling that separates the woman and her decision from the Lord is defeating." GUIDEBOOK, *supra* note 6, at 16.

[21] WORKBOOK, *supra* note 6, at 10-11. In 1988, Hill was charged with disturbing the peace in front of an abortion clinic for displaying to the general public a sign stating "The Killing Place." The other side of the sign depicted an 8 to 10 week old fetus. Telephone

The key to the effectiveness of "sidewalk counseling" is the ability to personally approach and offer individuals information.[22] The personal approach, particularly by religiously-motivated speakers, has deep First Amendment roots. In a series of cases during the 1930s and 1940s involving Jehovah's Witnesses who distributed literature door-to-door or stopped people on public sidewalks to offer information, the Supreme Court acknowledged that these forms of communication are "in accordance with the best tradition of free discussion."[23] Especially on public streets and sidewalks, citizens have a right "peacefully to impart" their views to others and "a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[24] Even Justice Stevens, writing for the Court in *Meyer v. Grant*,[25] recognized the importance of interactive, one-

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interview with Jeannie Hill, *supra* note 1. The charge of disturbing the peace was dropped. *See* Cannon v. City of Denver, 998 F.2d 867 (10th Cir. 1993). Hill claims that the Denver police are "on the pro-abortion side" and the Tenth Circuit found that there was "evidence tending to show police harassment of anti-abortion protestors." *Cannon*, 998 F.2d at 877. Hill won a monetary award against the Denver police. E-mail from Jeannie Hill to the author, (Mar. 15, 2001) (on file with author).

[22] One commentator describes close approaches, or "forced proximity" as facilitating forms of speech that have unique communicative value:

> For example, "sidewalk counseling" — the attempt to engage individual listeners in discussion — might be much easier to initiate when counselors are free to approach potential listeners closely. Leafleting, too, might be much more effective if leafleters can wave their pamphlets before the eyes of their targets. The use of small visual aids — such as fetuses in glass jars — also is likely to have greater communicative impact the more closely these objects are displayed.
>
> Forced proximity also might have communicative value as a form of "symbolic speech" that conveys a message of its own. Although a speaker who raises her voice above the conversational level might become irritating to listeners, she also might enhance the dramatic impact of her message. Similarly, a speaker who approaches closer than necessary to be seen or heard might underscore the intensity of her beliefs.

Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1860 (1988) [hereinafter *Too Close for Comfort*] (notes omitted). *See also* Darrin Alan Hostetler, Note: *Face-to-Face with the First Amendment:* Schenck v. Pro-Choice Network *and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 STAN. L. REV. 179, 204 (1997) (stating that detached forms of speech, like picketing and chanting, can be fully accomplished from a distance but when the state prohibits the personal approach, "it runs a substantial risk of diminishing the communicative impact" of the intended message).

[23] Martin v. City of Struthers, 319 U.S. 141, 145 (1943). *See also* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (describing pamphlets and leaflets as "historic weapons in the defense of liberty").

[24] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[25] 486 U.S. 414 (1988). In *Meyer*, Justice Stevens referred to the act of circulating a petition for a ballot proposition as involving "core political speech." *Id.* at 422. He quoted

on-one communication that intrudes upon passersby. Until *Hill*, the First Amendment meant that speakers on public sidewalks did not need to obtain consent before closely approaching listeners. It meant that "sidewalk counselors" like Jeannie Hill could successfully get their message across.

B. The Colorado Statute

> In a small hearing room in the basement of the Colorado Capitol in Denver seven years ago, Sen. Mike Feeley and state Rep. Diana DeGette shifted around the room.
>
> 'Can you hear me now?' one would ask. 'How about now?'
>
> When they found what seemed like the right distance — a comfortable distance, but close enough to hear each other at a normal tone of voice — someone left and came back with a tape measure.
>
> They were eight feet apart.
>
> Eight feet became the size of the 'bubble,' the distance that abortion protestors had to keep between themselves and women entering clinics. The 'bubble bill,' as it was called, was intended to stop the 'in-your-face' tactics of abortion protestors outside clinics.[26]

In 1993, the Colorado legislature enacted a statute to balance the right of a person "to obtain medical counseling and treatment in an unobstructed manner" against the right of others "to protest or counsel against certain medical procedures . . . ."[27] One subsection of the statute provides criminal and civil sanctions against anyone who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to

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the testimony of one of the appellees who described his efforts to get voters to sign a petition: "[T]he way we go about soliciting signatures is that you ask the person — first of all, *you interrupt the person in their walk or whatever they are doing. You intrude upon them* and ask them, 'Are you a registered voter?'" *Id.* at 421 n.4 (emphasis added).

[26] Mike Soraghan, *DeGette Celebrates Decision*, DENVER POST, June 29, 2000, at A-9. Coincidentally, Boulder and Denver also selected eight-foot zones in their laws regulating speech activities near medical clinics. The Colorado legislature was aware of these ordinances when it enacted the law at issue in *Hill*. *See* Brief on the Merits for Respondents at 2, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856). The Boulder ordinance is discussed in *Too Close For Comfort*, *supra* note 22.

[27] COLO. REV. STAT. § 18-9-122(1) (2000).

or exit from a health care facility."[28] Another provision targets certain expressive activities where the speaker approaches someone near the entrance to a health care facility. The approach provision states:

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.[29]

As interpreted by the Colorado Supreme Court, the law requires both a *means rea* requirement (knowingly) and an *actus rea* requirement (approaches). A speaker who stands still within the 100-foot zone does not have to move away from anyone passing by.[30] The absence of a duty to withdraw distinguishes this statute from the floating 15-foot buffer zone found unconstitutional in *Schenck v. Pro-Choice Network*.[31] Unlike

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[28] *Id.* at § 18-9-122(2). One year after Colorado enacted its law, Congress enacted the Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (2000)) (prohibiting "physical obstruction" of those seeking to obtain or provide reproductive health services). Courts have repeatedly treated FACE as being consistent with the First Amendment. *See, e.g.*, Am. Life League v. Reno, 47 F.3d 642 (4th Cir. 1995). *See generally* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests* (pt. 1), 29 U.C. DAVIS L. REV. 553, 608 (1996). Vigorous enforcement of FACE is cited as a significant factor affecting the declining incidence of clinic blockades and invasions. NARAL, *Freedom of Access to Clinic Entrances Act (FACE)* (2001) (visited Apr. 17, 2001) *at* http://www.naral.org/mediaresources/fact/pdfs/freedom.pdf. Some states have also enacted laws prohibiting obstruction of access to health care facilities. *See e.g.*, N.C. GEN. STAT. § 14-277.4(a) (Supp. 1996). *See generally* Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997) (finding FACE and the North Carolina statute to be constitutional means of protecting access to health care facilities).

[29] COLO. REV. STAT. § 18-9-122(2). Colorado has other laws that would apply to unprotected behavior near medical clinics. *See, e.g.*, COLO. REV. STAT. § 18-3-202 (assault); COLO. REV. STAT. § 18-9-106 (disorderly conduct); COLO. REV. STAT. § 18-9-111 (2000) (harassment).

[30] Hill v. Thomas, 973 P.2d 1246, 1257 (Colo. 1999). The state supreme court explained, "so long as the petitioner remains still, he or she cannot commit the actus rea of approaching . . . ." *Id.*

[31] 519 U.S. 357 (1997). In *Schenck*, an injunction required protestors to remain at least 15 feet from people entering or leaving clinics. The Court concluded that it would be difficult for speakers to comply with this "floating" buffer zone. The Court stated:

> The sidewalk outside the clinic is 17-feet wide. This means that protestors who wish to walk alongside an individual entering or leaving the clinic are pushed into the street, unless the individual walks a straight line on the outer edges of the sidewalk. Protestors could presumably walk 15 feet behind the individual, or 15 feet in front of the individual while walking backwards. But they are then faced with the problem of watching out for other individuals entering or leaving

the injunction in *Schenck*, which protected only those seeking access to an abortion clinic, the Colorado law offers protection to anyone, patient or non-patient, within 100 feet of any health care facility. While there is some testimony in the legislative history concerning animal rights protests at other types of medical facilities, the legislative history shows that enactment of the law was "primarily motivated by activities in the vicinity of abortion clinics."[32]

Jeannie Hill claims that at the legislative hearings, "all abortion opponents were portrayed as violent people who engage in biting and kicking."[33] Although the legislature heard testimony that "sidewalk counseling" presented valuable information to women,[34] none of the Colorado courts which considered the constitutionality of the law referred to this type of testimony. Rather, the state courts referred only to legislative testimony concerning the blocking of clinic entrances and harassment of patients. For example, the Colorado Supreme Court quoted testimony about protestors such as the following:

> [T]he protestors are yelling and screaming. They are flashing their bloody fetus signs. They are yelling "you are killing your baby." They are yelling at us as escorts that we are guards from Dachau [World War II Nazi concentration camp utilized to commit atrocities against people of Jewish ancestry] . . . they are talking about fetuses and babies being dismembered, arms and legs torn off. . . . A young black woman came for services yesterday. They called her "mammy."[35]

The use of this passage as evidence of the need for the ban on approaches is curious because the passage focuses on messages, rather than the manner of expression. Despite the claims of its supporters,[36] the

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> the clinic who are heading the opposite way from the individual they have targeted. With clinic escorts leaving the clinic to pick up incoming patients and entering the clinic to drop them off, it would be quite difficult for a protestor who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits.

Id. at 378. *See also* Sabelko v. City of Phoenix, 120 F.3d 161, 164-65 (9th Cir. 1997) (finding municipal ordinance suffers from the same defect as the injunction in *Schenck*).

[32] Hill v. Colorado, 530 U.S. 703, 715 (2000).

[33] Telephone interview with Jeannie Hill, *supra* note 1.

[34] *See infra* text accompanying note 40.

[35] *Hill*, 973 P.2d at 1250.

[36] For example, a Planned Parenthood official claimed that the law meant that patients "will no longer have to fight off propaganda and offensive photographs or run a gauntlet of screaming picketers on their way to see their doctor . . . ." *Colorado Establishes Abortion*

"bubble" law does not prohibit the display of signs and graphic photographs, prevent screaming or the use of amplification equipment, or protect clinic patients and escorts from protestors' messages. The activities of "sidewalk counselors" such as Jeannie Hill depend upon approaching the patients in a nonthreatening manner; highly confrontational methods such as yelling defeat the purpose of "sidewalk counseling." Indeed, Mrs. Hill believes that her credibility as a "sidewalk counselor" is undercut by blocking people or shouting at them.[37] Thus, the ban on approaches restricts a peaceful form of expression that depends upon close proximity, while leaving protestors free to scream insults at a distance of eight feet.

Justice Stevens's opinion for the *Hill* Court concluded that the legislative history showed that "aggressive counselors . . . sometimes used strong and abusive language in face-to-face encounters."[38] Only Justice Kennedy, in his dissenting opinion, referred to any legislative testimony regarding the value of "sidewalk counseling." According to Justice Kennedy, a leaflet can have "a profound difference" in a woman's decision-making process.[39] He quoted the testimony of a woman who stated:

> One of the major reasons I did not go through with my scheduled abortion was the picture I was given while I was pregnant. This was the first time I had ever seen the other side of the story. . . . The people supplying the pamphlet helped me make my choice. I got an informed decision, I got information from both sides, and I made an informed decision that my son and I could both live with.[40]

As will be shown next, Justice Kennedy regarded close personal approaches as having great communicative impact. Justice Stevens, though, assumed that the eight foot barrier did not impede effective "sidewalk counseling."

C. *The Impact of the Colorado Statute on Sidewalk Counseling*

Q. Could you sidewalk counsel from across the street of an abortion facility?

A. I would not call that sidewalk counseling, because it would not

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Clinic Buffer Zone, HOUSTON CHRONICLE, Apr. 20, 1993, at A2.

[37] Telephone interview with Jeannie Hill, *supra* note 1.

[38] Hill v. Colorado, 530 U.S. 703, 710 (2000).

[39] *Id.* at 789 (Kennedy, J., dissenting).

[40] *Id.* at 790.

> be able to include the interaction between the girl and myself. It would be more of a yelled appeal than it would be counseling.
>
> Q. Can you sidewalk counsel by shouting?
>
> A. That wouldn't be sidewalk counseling. I suppose that you can make your opinion known or offer help, but that wouldn't be counseling, because you would be missing the interactiveness of an encounter one on one. . . .
>
> Q. In order to successfully sidewalk counsel, what, if any, factor, is your initiating the conversation?
>
> A. That is very important because the women sometimes have been told things about us or about others that aren't true. A lot of times they're upset, their heads are down, and they are closed off. A gentle voice saying, 'Hi, can I help you,' is a very important way in helping them to look up and interact.[41]

All courts which reviewed the no-approach law regarded it as content neutral[42] and applied the *Ward v. Rock Against Racism* test for time, place and manner regulations.[43] Part of this test, in theory, calls for an assessment of the adequacy of alternative means of communication.

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[41] Operation Rescue-Nat'l v. Planned Parenthood, 975 S.W.2d 546, 575 (Gonzalez, J., concurring in part and dissenting in part) (quoting testimony of Mary Hall Kleypass).

[42] Justice Stevens's opinion for the Court, like that of the lower courts, characterized the law as content neutral because it applied equally to all demonstrators, regardless of viewpoint. 530 U.S. at 719. To Justice Stevens, the statutory phrases "oral protest, education or counseling" did not pose the danger of viewpoint discrimination. Rather, those terms targeted speech activities that were likely to be invasive. *Id.* at 724. In his dissenting opinion, Justice Scalia regarded the law as viewpoint based; the claim that the law applied to all viewpoints was "a wonderful replication" of Anatole France's statement that the law "in its majestic equality, forbids the rich as well as the poor to sleep under bridges . . . ." *Id.* at 744 (Scalia, J., dissenting). Both Justices Scalia and Kennedy found the text of the statute to indicate that the Colorado legislature was aiming at anti-abortion speech. *Id.* (Scalia, J., dissenting); *id.* at 768-69 (Kennedy, J., dissenting). The law's application to medical facilities was also troubling to Justice Kennedy: "If 'oral protest, education, or counseling' on every subject within an 8-foot zone present a danger to the public, the statute should apply to every building entrance in the State." *Id.* at 767. Drawing on civil rights protests, Justice Kennedy claimed that if a state with a history of segregation had enacted a statute regulating oral protest within 100 feet of the entrance to any lunch counter, "our predecessors would not have hesitated to hold it was content based or viewpoint based." *Id.*

[43] 491 U.S. 781, 791 (1989) (content-neutral time, place and manner restrictions are permissible if they are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication) (quoting Clark v. Cmty. for Creative Non-violence, 468 U.S. 288, 293 (1984)).

However, in applying *Ward*, courts generally only note the availability of different forms of expression, with little attention to their qualities.[44] None of the courts in *Hill* attached any significance to the communicative value of close proximity; they were satisfied with the availability of impersonal means of communication such as the display of signs. As I have previously argued, however, the assessment of alternative means of communication should be rigorous.[45] When courts presume that alternative means of communication are adequate, there is also reduced scrutiny of the nature of the state's interest and the narrowness of the government's methods.

The Colorado Supreme Court concluded that the eight-foot buffer allowed "normal conversational tones"[46] without explaining how, like Goldilocks, it found this distance to be just right. Earlier, in *Schenck*, the Supreme Court found a 15-foot buffer zone to be unconstitutional because it prevented communication from a normal conversational distance, would be difficult for speakers to comply with as they walked along sidewalks, and would be difficult to enforce.[47] The Colorado courts distinguished *Schenck* from the Colorado law because the latter had a lesser distance and speakers who remained stationary did not "knowingly approach" a patient.[48] Moreover, as the policy choice of a coordinate branch of government, the law was entitled to greater deference than a judicially crafted injunction.[49] But the fact that the Colorado law was distinct from the broad injunction in *Schenck* does not begin to engage the issue of whether or not intimate communication can

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[44] *See, e.g., Hill*, 973 P.2d at 1258-59 (stating that law does not "prohibit protestors from being seen and heard" near health care clinics; protestors are "still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual . . . .").

[45] *See* William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 799-810 (1986). *See also* William E. Lee, *Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court*, 15 COLUM.-VLA J.L. & ARTS 495, 497-511 (1991) (noting that courts are ill-equipped to analyze ability of various media to convey emotion and other aspects of symbolic forms of expression; courts should treat prohibition of symbolic medium as serious restriction on communicative opportunities).

[46] 973 P.2d at 1259.

[47] 519 U.S. at 377 & nn. 9-10; *see also supra* note 31.

[48] 973 P.2d at 1259.

[49] *Id.* at 1255. The state supreme court rejected the somewhat heightened scrutiny that had been applied to injunctions in *Madsen* and *Schenck*. *Id.*; *see* Madsen v. Women's Health Ctr., 512 U.S. 753, 764-65 (1994) (noting that because injunctions carry "greater risks of censorship" than do general ordinances, standard time, place and manner analysis is not sufficiently rigorous). *But see id.* at 790-97 (Scalia, J., concurring in judgment in part and dissenting in part) (criticizing adoption of "intermediate-intermediate scrutiny" and arguing for strict scrutiny of speech-restricting injunctions).

effectively occur at a distance of eight feet.

Justice Stevens's opinion for the Court is bereft of any concern for the value of intimate communication. He agreed with the Colorado Supreme Court that normal conversation could occur at a distance of eight feet; background noise and other speakers' voices might make it difficult for speakers to be heard at this distance, but he added that the statute did not restrict the use of amplification equipment.[50] This prompted Justice Scalia to claim the Court "displays a willful ignorance of the type and nature of communication affected by the statute's restrictions."[51] The suggestion that normal conversation could occur at a distance of eight feet on a public sidewalk was regarded by Justice Scalia as "absurd."[52] Moreover, while amplified speech would be appropriate for "protesting," it was inappropriate for "sidewalk counseling." As Justice Scalia wrote:

> The availability of a powerful amplification system will be of little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and to say, sympathetically and as softly as the circumstances allow, something like: 'My dear, I know what you are going through. I've been through it myself. You're not alone and you do not have to do this. There are other alternatives. Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?' The Court would have us believe that this can be done effectively — yea, perhaps even *more* effectively — by shouting through a bullhorn at a distance of eight feet.[53]

Justice Stevens's lack of concern for the impact of the law on "sidewalk counseling" is also captured by his speculation that the statute "might encourage the most aggressive and vociferous protestors to moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding sidewalk counselors . . .to make themselves heard."[54] This concern for moderation simply disregards the

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[50] Hill v. Colorado, 530 U.S. 703, 726 (2000).

[51] *Id.* at 756 (Scalia, J., dissenting).

[52] *Id.* Jeannie Hill uses the term "hogwash" to describe the claim that normal conversation can occur at an eight-foot distance, especially when an escort is walking next to the patient and talking loudly. Telephone interview with Jeannie Hill, *supra* note 1.

[53] 530 U.S. at 757 (Scalia, J., dissenting).

[54] *Id.* at 727. Justice Scalia questioned the majority's suggestion that the law might actually aid speakers and quoted from another case in which the Court stated: "The First Amendment mandates that we presume that speakers, not the government, know best

fact that protestors, intent on bullying women through screaming or amplified speech, are unaffected by the law as long as they do not "knowingly approach" another person.

As for leafletting, Justice Stevens believed the law primarily affected the ability of leafletters to reach unwilling readers; leafletters could still offer literature to willing recipients.[55] This disregards the normal interaction between pedestrians and leafletters. Most people on a public street are going somewhere and are unlikely to alter their course to approach a leafletter. Instead, the leafletter approaches passersby, making it easy for them to take the leaflet without changing their course. In their dissenting opinions, Justices Scalia and Kennedy regarded the consent requirement as a serious burden on leafletting. Justice Scalia believed that few "pedestrians are likely to give their 'consent' to the approach of the handbiller (indeed, by the time he requested it they would likely have passed by), and even fewer are likely to walk over in order to pick up a leaflet."[56] Justice Kennedy added that effective leafletting required the ability to show the leaflet to potential recipients at close proximity. "Merely viewing a picture or brief message on the outside of the leaflet might be critical in the choice to receive it. To solicit by pamphlet is to tender it to the person. The statute ignores this fact."[57]

Although Justice Stevens acknowledged the petitioners' claim that sidewalks and streets affected by the statute were "quintessential" public forums,[58] he drew upon *Heffron v. International Society for Krishna Consciousness, Inc.*,[59] as support for the restriction on leafletting. *Heffron*

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what they want to say and how to say it." *Id.* at 756 (Scalia, J., dissenting) (quoting Riley v. Nat'l Fed'n of Blind, 487 U.S. 781,790-91 (1988)). *See also id.* at 781 (Kennedy, J., dissenting) ("It is for the speaker, not the government, to choose the best means of expressing a message.")

[55] 530 U.S. at 727-28.

[56] Justice Scalia added, "A leafletter, whether he is working on behalf of Operation Rescue, Local 109, or Bubba's Bar-B-Que, stakes out the best piece of real estate he can, and then walks a few steps toward individuals passing in his vicinity, extending his arm and making it *as easy as possible* for the passerby, whose natural inclination is generally not to seek out such distributions, to simply accept the offering." *Id.* at 758 (Scalia, J., dissenting). *See also* Brief of Amici Curiae Am. Fed'n of Labor and Congress of Industrial Org. at 7, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856) (stating that handbillers walk toward passersby, making it possible for passersby to take the handbill without altering their course).

[57] 530 U.S. at 789 (Kennedy, J., dissenting). Justice Kennedy offered a brief review of prior leafletting cases, concluding that "the whole course of our free speech jurisprudence . . . rests to a significant extent on cases involving picketing and leafleting." *Id.* at 781.

[58] 530 U.S. at 715.

[59] 452 U.S. 640 (1981).

involved a state fair which differs significantly from streets.[60] Additionally, the *Heffron* Court sustained a requirement that the sale of literature and solicitation of donations occur at a fixed location, while noting that oral proselytizers were free to wander the fairgrounds and initiate face-to-face discussions.[61] To the extent that Justice Stevens's *Hill* opinion analyzed the streets and sidewalks around health clinics, it was to emphasize that patients are often in a vulnerable condition and could be protected from "unwanted encounters . . . ."[62] Stated differently, the area near the entrance to a health clinic is the wrong place for uninvited, intimate expression.

Justices Scalia and Kennedy believed the Court had it backwards; the area near the entrance to an abortion clinic was of special communicative importance.[63] Justice Kennedy acknowledged the "immediacy of speech," "urgency of persuasion" and "preciousness of time" of "sidewalk counseling."[64] For speakers like Jeannie Hill, Justice Kennedy claimed "the 100-foot zone in which young women enter a building is not just the last place where the message can be communicated. It likely is the only place."[65]

When a court regards a form of expression as insignificant, scrutiny of the state's interest and means of serving the interest are highly deferential. Given the minimal importance Justice Stevens attached to "sidewalk counseling," deferential scrutiny of the state's interest was to

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[60] *Id.* at 651.

[61] *Id.* at 644 n.3 & 655.

[62] 530 U.S. at 729. Justice Stevens quoted Justice Blackmun's description of hospitals as places where "human ailments are treated, where patients and relatives alike are often under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere . . . ." Beth Isreal Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment). In *Beth Isreal*, the Court held that a hospital could prohibit employees from distributing union literature and soliciting union support in patient-care areas; these activities could occur in a cafeteria where there was little possibility of disrupting patients. The case did not involve speech occurring on public sidewalks adjacent to the hospital. Justice Blackmun's statement was also quoted in *Madsen* to support a restriction on protest noise which was audible, and inescapable, to patients inside an abortion clinic. 512 U.S. at 772. The yelling and amplified speech at issue in *Madsen* is distinct from the "sidewalk counseling" in *Hill*.

[63] 530 U.S. at 763 (Scalia, J., dissenting); *id.* at 789 (Kennedy, J., dissenting). *See also* GUIDEBOOK, *supra* note 6, at 3, stating that clinics "present us with a tremendous opportunity to reach out to those people who will not come to our churches, and who seldom see God's love."

[64] 530 U.S. at 792 (Kennedy, J., dissenting).

[65] *Id.* at 789. He added that sidewalk counselors "likely do not have resources to use the mainstream media for their message, much less the resources to locate women contemplating the option of abortion." *Id.* at 788.

be expected. As will be shown next, what makes Justice Stevens's opinion in *Hill* so peculiar is that the unwilling listener is an interest he created, rather than an interest relied upon by the state.

II. THE PRIVACY INTEREST IN *HILL*

The text of the Colorado statute describes its goal as ensuring that citizens "obtain medical counseling and treatment in an unobstructed manner" by preventing "willful obstruction of a person's access to medical counseling and treatment . . . ."[66] The Colorado courts considering the no-approach law referred to a variety of interests, such as the safety of those seeking access to medical facilities,[67] and Colorado explicitly rejected the unwilling listener argument at the Supreme Court. The state claimed that the "right to be left alone" on public sidewalks was a "straw interest" invented by the petitioners as a means of discrediting the law.[68]

As crafted by Justice Stevens, the interest in protecting unwilling listeners from unwanted communication cannot be reconciled with the Court's prior cases involving unamplified speech on sidewalks. Justice Stevens's interest rests upon a foundation which shifts from a captive

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[66] COLO. REV. STAT. § 18-9-122 (1). The eight-foot barrier is obviously poorly tailored to prevent physical obstruction because many speech activities occurring at close proximity would not impede access to a clinic.

[67] The court of appeals concluded that the statute ensured "safety and unobstructed access for patients and staff entering and departing from health care facilities." 911 P.2d at 674. In its post-*Schenck* opinion, the court of appeals again referred to ease of access. 949 P.2d at 108. The state supreme court referred to access to medical facilities as a part of the fundamental right of privacy, but did not refer to the unwilling listener. 973 P.2d at 1253. The state supreme court's analysis of privacy is rather thin. The court drew upon statements, such as Justice Brandeis's famous reference to a "right to be let alone" in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), and also cited other cases, such as Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113 (1973) for the proposition that *governmental* interference with a right of privacy must be supported by a compelling interest, 973 P.2d at 1253, apparently not acknowledging that "sidewalk counselors" are private actors, and that the law protected anyone — patient or non-patient — near any medical clinic.

[68] Brief for Respondents at 25 n.19, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856). The state noted that the Colorado supreme court "did not base its ruling on the right to be let alone on public sidewalks, but on the right to safe access to medical services as a component of the overall right of privacy." *Id.* at 25. At oral argument, the attorney for the state never mentioned a right to be let alone, and instead simply described the law as protecting "sick, disabled, and vulnerable people on their way to and from . . . hospitals and doctor's offices." Transcript of Oral Argument at *29, Hill v. Colorado, No. 98-1856, 2000 U.S. Trans LEXIS 14. Justice Scalia remarked that among the "firsts" created in the Court's pro-abortion jurisprudence, *Hill* was "the first case in which, in order to sustain a statute, the Court has relied upon a governmental interest not only unasserted by the State, but positively repudiated." 530 U.S. at 750 (Scalia, J., dissenting).

audience rationale, to a right to be free from "following and dogging," to an aspect of a broader "right to be let alone." Upon close analysis, each rationale has serious conceptual flaws when applied to the context of "sidewalk counseling."

A. The Captive Audience Rationale and Sidewalk Counseling

A captive audience exists where listeners are either unable to avoid exposure to speech or avoidance entails a significant burden. Is someone walking on a public sidewalk a captive audience? Justice Stevens offered no analysis of the degree of captivity experienced by pedestrians near the entrances of health care facilities. Rather, he assumed that the behavior of "sidewalk counselors" is "so intrusive that the unwilling audience cannot avoid it."[69] While the contours of the captive audience doctrine are uncertain,[70] the settings in which the Court has previously found a captive audience to be present are markedly distinct from *Hill*.[71]

Prior to *Hill*, the only case in which the Court found that quiet speech on public streets or sidewalks impinged upon unwilling listeners is *Frisby v. Schultz*,[72] a case that is readily distinguishable from *Hill*. At issue in *Frisby* was a municipal ordinance prohibiting picketing that focused on a particular residence; the law was passed in response to orderly and quiet protest activity occurring in front of the home of a physician who performed abortions. Although the law restricted speech in a traditional public forum, the Court found that it was a narrowly tailored means of protecting residential privacy. The home is unique because "a special benefit of the privacy all citizens enjoy within their

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[69] 530 U.S. at 716.

[70] *Compare* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 542 (1980) (holding that offensive messages mailed with utility bills do not affect privacy interests because recipients "may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket") *with* Rowan v. Post Office, 397 U.S. 728, 736-37 (1970) ("a mailer's right to communicate must stop at the mailbox of an unreceptive addressee").

[71] *See, e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (public high school students who are required to attend an assembly are a captive audience); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (passengers on city transit system are a captive audience). The only captive audience cases involving expression originating on streets are those involving amplified or loud speech. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 772-73 (1994), (sustaining injunction against "shouting, yelling, use of bullhorns, auto horns, sound amplification equipment"); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) ("In his home or on the street . . . [the unwilling listener] is practically helpless to escape this interference with his privacy" caused by amplified speech). *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (sustaining Central Park sound amplification regulation designed to avoid undue intrusion into adjacent residential areas and areas of Central Park designated as quiet zones).

[72] 487 U.S. 474 (1988).

own walls . . . is an ability to avoid intrusions."[73] Picketing focused on a residence was an inherently offensive intrusion because the "resident is figuratively, and perhaps literally, trapped within the home and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."[74] Stated differently, there is no First Amendment right to "force speech into the home of an unwilling listener."[75]

Outside the home, a different set of considerations apply; citizens have to absorb the "first blow" of offensive speech before they turn away and the fact that some individuals would prefer to avoid any exposure whatsoever is irrelevant. Consider, for example, *Cohen v. California*[76] where the state relied upon the captive audience rationale to defend its prosecution of a young man who wore, in the corridor of a county courthouse, a jacket bearing the words "Fuck the Draft." Unlike the home, where individuals were trapped by the "raucous emissions" of amplified speech from sound trucks, "those in the Los Angeles courthouse could effectively avoid *further* bombardment of their sensibilities simply by averting their eyes."[77] Even if the privacy interest in a courthouse was more substantial than in Central Park, it was "nothing like" the privacy interest in one's own home.[78] This meant that the presumed presence of some in the courthouse who were unwilling to be exposed to the message in the first instance was an insufficient basis for Cohen's conviction. To justify Cohen's conviction, the state would

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[73] *Id.* at 484-85. The Court's commitment to protecting residential privacy applies even in communication settings where residents may easily avoid continued exposure to objectionable communication. In FCC v. Pacifica Found., 438 U.S. 726 (1978), the Court sustained a restriction on indecent broadcasts because such material intrudes upon residential privacy. Although a listener encountering offensive material could "simply extend his arm and switch stations or flick the 'off' button," *id.* at 766 (Brennan, J., dissenting), the Court believed "this was like saying that the remedy for an assault is to run away after the first blow." *Id.* at 749. In other words, inside the home an individual should not even have to absorb the "first blow" of offensive expression. *See also id.* at 759 (Powell, J., concurring) (distinguishing between the home and public settings).

[74] *Frisby*, 487 U.S. at 487. Justice Brennan argued in a dissenting opinion that residential picketing could be regulated, rather than prohibited, to eliminate the intrusive or coercive elements. As examples of constitutional regulations, he suggested controlling the number of picketers, the hours of picketing, and the noise level. In his view, a solitary picket does not implicate residential privacy interests. *Id.* at 493-96 (Brennan, J., dissenting).

[75] *Id.* at 485.

[76] 403 U.S. 15 (1971).

[77] *Id.* at 21 (emphasis added).

[78] *Id.* at 22; *see also* Rowan v. Post Office, 397 U.S. 728, 738 (1970)("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.").

have to "show that substantial privacy interests are being invaded in an essentially intolerable manner."[79] Otherwise, a political majority could silence dissidents "simply as a matter of personal predilections."[80]

1. The Captive Audience in *Madsen* and *Schenck*

The notion that abortion clinic patients are a captive audience did not originate in *Hill*. In both prior abortion protest cases, the Court rejected the claim of lower courts that clinic patients have a "right to be left alone" when on the sidewalk. While there is language in *Madsen* indicating that the state may protect the well-being of patients who are captives of medical circumstances, a close reading of the case reveals that this does not refer to patients on sidewalks. In *Schenck*, the Court left intact a restriction on "sidewalk counselors" who had engaged in a pattern of harassment, but rejected the captive audience rationale for this restriction.

In *Madsen*, the Florida Supreme Court claimed that the interest in residential privacy applied by analogy to medical privacy. Just as targeted picketing of a home threatened the well-being of the resident, targeted picketing of a clinic threatened the well-being of a patient held captive by medical circumstances.[81] The U.S. Supreme Court accepted this interest, in combination with others such as ensuring public safety and promoting the free flow of traffic, as sufficient to justify an appropriately tailored injunction. Given this combination of interests, *Madsen* is not a model of clarity; nonetheless, the captive audience rationale appears to be most in play in the following: 1) the restriction on noise levels, 2) the ban on "images observable," 3) the restriction on protest activities within 300 feet of the residence of a clinic employee, and 4) the ban on approaches within 300 feet of the clinic.[82]

In sustaining the restriction on noise levels while invalidating the ban on "images observable," the *Madsen* Court distinguished the efforts

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[79] 403 U.S. at 21.

[80] *Id.*; *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975), in which Justice Powell wrote that "[m]uch that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide what types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."

[81] Operation Rescue v. Women's Health Ctr., Inc., 626 So.2d 664, 673 (Fla. 1993), *aff'd in part and rev'd in part sub nom.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

[82] The Court sustained a 36-foot buffer zone as a means of ensuring access to the clinic and facilitating the orderly flow of traffic. Insofar as the buffer zone affected private property adjacent to the clinic, it was unconstitutional. Madsen v. Women's Health Ctr., 512 U.S. 753, 769-71 (1994).

patients must take to avoid exposure to loud speech and messages on signs. Patients inside the clinic who did not want to see signs displayed by protestors could simply ask to have the clinic close its curtains, a task which is much easier "than for a patient to stop up her ears . . . ."[83] As for the ban on residential protest activities, the Court, acknowledging the importance of residential privacy and tranquility, agreed that sound levels could be restricted. However, the 300-foot zone was broader than necessary to prohibit picketing focused on a particular residence.[84]

On the streets and sidewalks outside the clinic, patients had to tolerate uninvited approaches, as long as these approaches did not involve proscribable speech such as fighting words or threats.[85] This simply meant that medical privacy did not override the right of speakers to approach patients with messages the patients may prefer to avoid in the first instance. The legitimate interests of the state on the sidewalk were limited to preventing intimidation and ensuring access to the clinic.[86]

The Court in *Schenck* also rejected the captive audience rationale, but upheld a fixed 15-foot buffer zone around clinic doorways, driveways, and driveway entrances as a means of ensuring access to the clinic. Two "sidewalk counselors" were allowed within that zone to initiate conversation "of a non-threatening nature" provided that the counselors were required to "cease and desist" if patients wanted to walk away.[87] The district court reasoned that this provision protected the right of people approaching and leaving a clinic to be left alone.[88] The Supreme Court left the cease and desist provision intact because the record showed persistent harassment and intimidation of patients. Significantly, the Court stated that the lower court's reference to the "right to be left alone" did not accurately reflect "our First Amendment jurisprudence in this area."[89] Justice Scalia, concurring in part and

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[83] *Id.* at 773. Patients at the clinic were not required to undertake "Herculean efforts to escape the cacophony of political protests." *Id.* at 772-73.

[84] *Id.* at 774-75.

[85] *Id.* at 774.

[86] *Id.*

[87] The terms of the injunction are found in *Schenck v. Pro-Choice Network*, 519 U.S. 357, 366 n.3 (1997). Due to abuse of this provision, the injunction was later modified to completely exclude the defendants from the buffer zones. New York v. Operation Rescue Nat'l, 2000 U.S. Dist. LEXIS 20059 (W.D.N.Y. July 26, 2000).

[88] The district court found that women entering clinics were a captive audience because the defendants' aggressive conduct "makes it impossible for women entering the clinics simply to avert their eyes or cover their ears to avoid receiving defendants' message." Pro-Choice Network of W. N.Y. v. Project Rescue of W. N.Y., 799 F. Supp. 1417, 1436 (W.D.N.Y. 1992).

[89] *Schenck*, 519 U.S. at 383. The *Schenck* Court referred to *Madsen* as sustaining an injunction designed to ensure physical access to the clinic, "but not on the basis of any

dissenting in part, regarded the majority's rejection of the "right to be left alone" as the most important holding in *Schenck*. Protecting people from unwanted speech on public sidewalks, and ensuring "personal space" were not legitimate governmental interests.[90]

2. The Captive Audience in *Hill*

To understand Justice Stevens's treatment of "sidewalk counseling" in *Hill*, it is necessary to backtrack to his view, stated in 1980, that labor picketing consists of a mixture of "conduct and communication."[91] That is, the communication element invokes a "reasoned response to an idea" whereas the conduct element triggers an "automatic" or unreasoned response.[92] This is an arbitrary distinction which merely states in different terms the fear that labor picketing is coercive. It also tries to separate form from content.[93] In his *Madsen* opinion, concurring in part and dissenting in part, Justice Stevens likened "sidewalk counseling" to labor picketing. Apparently, the "conduct" element in that case involved abuse of an unreceptive audience by "sidewalk counselors" who followed and harassed women on their way to clinics.[94]

In *Hill*, Justice Stevens sought to distinguish the ideas expressed by "sidewalk counselors" from the close approach used in this form of expression. The purpose of the Colorado law was not to protect patients from particular messages. Rather, it was to protect patients from "potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically

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generalized right 'to be left alone' on a public street or sidewalk." *See also id.* at 376 (describing the legitimate interests in *Madsen* as ensuring public safety, promoting the free flow of traffic, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services).

Justice Scalia argued that the Court's failure to endorse the district court's reasoning for the "cease and desist" provision required invalidation of this part of the injunction. *Id.* at 386-89 (Scalia, J., concurring in part and dissenting in part).

[90] 519 U.S. at 386-89 (Scalia, J., concurring in part and dissenting in part).

[91] NLRB v. Retail Store Employees, Local 1001, 447 U.S. 607, 619 (1980) (Stevens, J., concurring). *See generally* Lee, *Speaking Without Words*, *supra* note 45, at 514-17 (criticizing the distinction between speech and conduct).

[92] *Retail Store Employees*, 447 U.S. at 619.

[93] Justice Stevens has also attempted, unsuccessfully in my view, to distinguish form from content in other settings. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 438 (1989) (Stevens, J., dissenting) (flag burning involves "disagreeable conduct," not "disagreeable ideas"); FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (restriction on indecent language will affect the form, not the content of communication).

[94] Madsen v. Women's Health Ctr., 512 U.S. 753, 780-81 (1994) (Stevens, J., concurring in part and dissenting in part).

approaching" at close proximity.[95] But why do citizens on sidewalks in areas away from health care facilities have to endure unwelcome close approaches by communicators? Are pedestrians near other buildings able to simply walk by speakers, while pedestrians near health care facilities are unable to do so? Is everyone near a health care facility in a fragile emotional state, while all those near other buildings are able to withstand unwelcome encounters with no adverse effects? Are health care facilities the only type of building that citizens frequent out of necessity? Significantly, Justice Stevens did not answer these questions. The distinction between the area near health care facilities and other areas rests upon a value judgment about privacy in different settings.

According to Justice Stevens, the right to avoid unwelcome speech was greatest in the home, but could also be protected in what he called "confrontational settings,"[96] a marvelously loose term that could also encompass labor picketing, anti-fur protests, gatherings of neo-Luddites, and innumerable public disputes. What Justice Stevens meant, though, was that patients near health care facilities have an interest in privacy that protects them from receiving even the "first blow" of unwanted approaches. This is not a fact-based statement about the inability of patients to avoid "further bombardment" from "sidewalk counselors." Instead, the captive audience language in *Hill* is best understood as a statement about the importance of patient privacy and the unimportance of speech at close proximity. Whether one agrees or disagrees with the balance struck in *Hill*, it cannot be disputed that this outcome is without precedent.

B. Following and Dogging

The unwilling listener also has the "right to be free" from persistent "following and dogging," a phrase Justice Stevens found in *American Steel Foundries v. Tri-City Central Trades Council*,[97] a 1921 labor case. He quoted the following passage from *American Steel Foundries*:

> How far may men go in persuasion and communication, and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others

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[95] Hill v. Colorado, 530 U.S. 703, 718 n.25 (2000). Justice Scalia claimed that a woman's reaction to a close approach by a "sidewalk counselor" is not an effect which occurs without reference to the content of the speech. *Id.* at 748 (Scalia, J., dissenting).

[96] *Id.* at 717.

[97] 257 U.S. 184 (1921).

> to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustified annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free.[98]

Justice Stevens's use of this passage is striking for two reasons. First, the selection of a passage from a labor case reflects his view of the minimal importance of "sidewalk counseling." *American Steel Foundries* involves interpretation of the Clayton Act's protection of peaceful means of communication in labor disputes.[99] The First Amendment was not raised by the litigants and is not mentioned in the opinion. Until *Hill*, this passage had never been quoted in any of the Court's First Amendment cases.[100]

Second, *American Steel Foundries* actually undercuts Justice Stevens's argument against peaceful "sidewalk counseling." *American Steel Foundries* involved an injunction against strikers after several assaults took place. The court issuing the injunction noted that "violent methods were pursued from time to time in such a way as to characterize the attitude of the picketers as continuously threatening."[101] Due to the presence of a large number of picketers, and the atmosphere of violence, some workers slept inside the steel mill. Other workers entering and leaving the mill were put to a "severe test of their nerve and physical strength and courage."[102] As a result, the Supreme Court affirmed the injunction against picketing, but ordered an important modification. The strikers could post one "missionary" at each entrance to the plant, provided that "their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by

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[98] 530 U.S. at 717 (quoting *Am. Steel Foundries*, 257 U.S. at 204).

[99] Clayton Act, ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (2001)).

[100] Justice Scalia called this passage an "irrelevant anachronism" and believed the Court would regret injecting it into First Amendment jurisprudence. 530 U.S. at 754 (Scalia, J., dissenting).

[101] 257 U.S. at 200.

[102] *Id.* at 206.

importunate following or dogging his steps."[103]

It is reasonable, then, to read *American Steel Foundries* as support for the proposition that a right of free passage, whether at a steel mill or health clinic, is not hampered by peaceful approaches by a limited number of speakers. For example, in *Operation Rescue v. Planned Parenthood Inc.*,[104] the Texas Supreme Court drew upon *American Steel Foundries* in its revision of an injunction which created buffer zones around abortion clinics. The Texas Supreme Court found that patient health was affected by unrestricted speech activity by large groups near clinics; there was insufficient evidence, however, to ban peaceful sidewalk counseling by two counselors.[105] Thus, the court crafted a limited exception which permitted two counselors within the buffer zones, provided that "no more than one demonstrator may counsel or attempt to counsel a person or group of persons at a time, and . . . [t]he demonstrator must stop counseling and retreat when a targeted person verbally indicates a desire to be left alone."[106]

It is important to note that the Colorado ban on close approaches does not prevent "following and dogging." Subsection two of the same statute punishes acts that obstruct entrance to a health care facility and the Colorado harassment statute targets "following" in certain circumstances.[107] The no-approach provision, however, allows following at close proximity provided there is no attempt to engage in counseling, display a sign, or distribute leaflets. Further, a "sidewalk counselor" may follow patients — at a distance of eight feet — and *persistently* repeat a request to approach closer, or the counselor may choose to escalate the encounter and follow the patient while shouting threats. Accordingly, any claim that the statute does not restrict speech at a distance of eight feet must also acknowledge that the statute is poorly crafted to prevent "following and dogging."

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[103] *Id.* at 207. For other cases involving restrictions on the number of "missionaries" at the site of labor disputes, *see, e.g.*, United Mine Workers v. Bagwell, 512 U.S. 821 (1994); United Auto., Aircraft & Agric. Implement Workers v. Wis. Employment Relations Bd., 351 U.S. 266, 268-70 (1956); Bakery & Pastry Drivers & Helpers v. Wohl, 315 U.S. 769, 775 (1942).

[104] 975 S.W.2d 546 (Tex. 1998).

[105] *Id.* at 569.

[106] *Id.* at 567. Justice Gonzalez dissented because the "cease and desist" provision elevates a right to be left alone above the right of free expression. It was enough that the injunction prohibited harassment, which would allow counselors to engage in "tactful persistence. . . ." *Id.* at 583 (Gonzalez, J., concurring in part and dissenting in part).

[107] COLO. REV. STAT. §§ 18-9-111(1)(c), 18-9-122(2) (2000).

C. The Right to be Let Alone

In *Hill*, Justice Stevens referred to Justice Brandeis's famous "right to be let alone" as encompassing the unwilling listener's interest in avoiding unwanted communication.[108] But this stretches Brandeis's phrase well beyond recognition.[109] Justice Brandeis used the phrase "the right to be let alone" in a Fourth Amendment case, a significant contextual factor that went unmentioned by Justice Stevens. According to Justice Brandeis, the framers of the Constitution "conferred, *as against the Government*, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion *by the Government* upon the privacy of the individual . . .must be deemed a violation of the Fourth Amendment."[110] Significantly, Justice Brandeis concurred in *American Steel Foundries*,[111] again a fact unacknowledged by Justice Stevens. Apparently, Justice Brandeis's "right to be let alone" did not include the right of workers to avoid the peaceful approaches of "missionaries" at the plant entrances.

Despite Justice Stevens rhetoric in *Hill* about balancing conflicting rights,[112] the so-called right of privacy of unwilling listeners is not based in the Constitution. The Fourth Amendment does not create a general constitutional right to privacy,[113] so the unwilling listener cannot be derived from Fourth Amendment principles. Because the Colorado law protects men as well as women, and patients and non-patients near clinics, it is a stretch to link the unwilling listener to a Fourteenth Amendment or Ninth Amendment right of a woman to choose whether or not to terminate a pregnancy.[114] Similarly, because the law applies

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[108] Hill v. Colorado, 530 U.S. 703, 716 (2000).

[109] Prior to *Hill*, Justice Brandeis's "right to be let alone" had its most important First Amendment application in *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969), where the Court found that due to the privacy of the home, the government could not criminalize the private possession of obscene materials.

[110] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added). The phrase actually originates with Judge Thomas Cooley who included the "right to be let alone" as a class of tort rights in his treatise. *See* THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1st ed. 1880).

[111] Am. Steel Foundries v. Tri-City Central Trades Council 257 U.S.184, 213 (1921) (stating that Justice Brandeis "concurs in substance in the opinion and the judgment of the court").

[112] 530 U.S. at 718 (stating that the right to be let alone must be placed in the scales with the right to communicate).

[113] Katz v. United States, 389 U.S. 347, 350 (1967).

[114] Roe v. Wade, 410 U.S. 113 (1973). Because the statute at issue in *Hill* applies to medical clinics whether or not they provide reproductive services, it may be distinguished from the injunctions protecting abortion clinic patients at issue in *Madsen* and *Schenck*. *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753, 768 (1994) (state has strong interest in

near all health care facilities, not just those facilities providing contraceptives, the unwilling listener is not closely tied to a penumbral right of reproductive autonomy.[115] In a revealing footnote, Justice Stevens acknowledged that the so-called "right to be let alone" of unwilling listeners was a common law "right" — or more accurately an "interest" — that states can choose to protect in certain situations.[116] This was followed by a citation to *Katz v. United States*[117] where the Court stated that a person's "right to be let alone by other people" was left largely to the law of individual States.[118] As an example, *Katz* cites the 1890 law review article in which Warren and Brandeis argue for a common law right of privacy; the "inviolate personality" Warren and Brandeis envisioned was harmed by publication of information about an individual in limited circumstances, not by efforts to speak to an individual on a public sidewalk.[119]

It is ironic that Justice Brandeis, a key figure in the expansion of the Court's protection of free expression,[120] would be cited by Justice Stevens to justify a major retraction of the First Amendment. When severed from the Fourth Amendment and tort contexts that Brandeis addressed, a "right to be let alone" is arguably flexible enough to form the basis for the Colorado law. But a loosely floating "right to be let alone" also supports even greater restrictions on expression than those of the Colorado law. There is no principled basis upon which to limit the "right to be let alone" solely to medical clinics; it could also apply to other "confrontational settings" such as the sites of labor disputes or environmental protests. Or, because a free floating "right to be let alone" can be described as a compelling interest, it could justify a subject-matter ban on speech about medical procedures within 100 feet of medical clinics, similar to the 100- foot campaign-free zone the Court found to be constitutional for polling places.[121]

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protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy).

[115] Griswold v. Connecticut, 381 U.S. 479 (1965).

[116] 530 U.S. at 717 n.24.

[117] 389 U.S. 347 (1967).

[118] *Id.* at 350-51 (note omitted).

[119] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[120] *See, e.g.*, Whitney v. California, 274 U.S. 357, 373-80 (1927) (Brandeis, J., concurring) (describing purposes of free expression).

[121] Burson v. Freeman, 504 U.S. 191 (1992) (upholding campaign-free zone near polling places to prevent voter intimidation).

1. The Right to be Let Alone in *Bartnicki*

The malleability of the "right to be let alone" is aptly illustrated by Justice Stevens's recent opinion for the Court in *Bartnicki v. Vopper*.[122] At issue was the application of federal and state laws punishing the disclosure of illegally intercepted telephone conversations. By a 6-3 vote, the Court ruled that the First Amendment prevented application of the laws to parties who played no part in the illegal interception. When *Bartnicki* is read alongside *Hill*, the following remarkable principle emerges: people have less privacy in their telephone conversations than when walking on a public sidewalk near a health clinic.

During a lengthy and contentious contract negotiation between a Pennsylvania school district and a teachers' union, the union's chief negotiator, Gloria Bartnicki, used her cellular telephone to call the union president, Anthony Kane, on his conventional household telephone. They discussed a proposed strike and the school board's intransigence. During the conversation, Kane stated: "If they're not going to move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys. (pauses) Really, uh, and truthfully, because this is, you know, this is bad news. (undecipherable)."[123] The conversation was recorded by an unknown person and a copy of the recording was left in the mailbox of Jack Yocum, president of a taxpayers' association that opposed the union. Yocum recognized the voices on the tape and played it for some members of the school board; he also gave the tape to a local radio commentator, Frederick Vopper. Several months later when the teachers got a favorable settlement, Vopper played the tape during his news/talk program. Bartnicki and Kane sued Yocum, Vopper, and the two radio stations carrying Vopper's program, for civil damages under the federal Wiretapping Act and the analogous Pennsylvania law.[124]

The federal Wiretapping Act prohibits disclosure of the contents of "any wire, oral, or electronic communication" when the defendant had reason to believe that the material was obtained through the use of an illegal interception.[125] The Act treats interception and disclosure as separate offenses; no involvement in the interception is necessary to establish a violation of the disclosure provision. All telephone conversations are treated alike, whether mundane or highly intimate.

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[122] 121 S. Ct. 1753 (2001).

[123] *Id.* at 1757.

[124] 18 U.S.C. § 2511(1)(c) (2001); 18 PA. CONS. STAT. § 5703(2) (2000). Because the Pennsylvania act is substantially similar to the federal act, it is not discussed separately.

[125] 18 U.S.C. § 2511(1)(c).

And, unlike the common law privacy tort known as public disclosure, there is no burden on the plaintiff to show that the disclosure is highly offensive to a reasonable person.[126] Nor is there a statutory defense for disclosures of matters of legitimate concern to the public. Courts and commentators interpreting the First Amendment have not been kind to the public disclosure tort;[127] it is even more difficult to embrace the broad restrictions on publishing found in the Wiretapping Act.

After concluding that the First Amendment did not protect the defendants, the district court granted a motion for an interlocutory appeal. The Court of Appeals for the Third Circuit found the laws failed content-neutral intermediate scrutiny because the laws did not advance the privacy interests at stake. There was no proof that imposing liability upon those who disclose intercepted materials will deter those who actually commit interceptions.[128]

During the appeal to the Supreme Court, the government, as intervenor, argued that the ban on disclosure removed an incentive for parties to intercept conversations, and minimized the harm to people whose conversations have been illegally intercepted. Justice Stevens assumed that these interests justified a statutory provision relating to the interceptor's own use of information he or she acquired illegally. Punishing those who disclosed information they did not intercept was an unacceptable means of serving those interests.[129] Like the court of appeals, Justice Stevens questioned the assumption that the prohibition against disclosures reduces the number of illegal interceptions.[130]

Turning to the interest in minimizing harm to people whose conversations are disclosed, Justice Stevens acknowledged that "disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."[131] This concern, however, was quickly brushed aside as Justice Stevens carved a content distinction into a content-neutral law. The First Amendment overrode the privacy interest because the conversation between Bartnicki and Kane dealt with a matter of public interest. To support this conclusion,

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[126] *See* Restatement (Second) of Torts § 652D (1976).

[127] *See, e.g.*, Diane Zimmerman, *Requiem for a Heavy-weight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983); Harry Kalven, Jr., *Privacy in Tort Law —Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326 (1966).

[128] 200 F.3d 109, 126 (3d Cir. 1999).

[129] Bartnicki v. Vopper, 121 S. Ct. 1753, 1762 (2001).

[130] *Id.* at 1763-64.

[131] *Id.* at 1764. Chief Justice Rehnquist in his dissenting opinion said Justice Stevens's recognition of privacy was "mere words." *Id.* at 1775 (Rehnquist, C. J., dissenting) (quoting WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA, act 5, sc. 3).

Justice Stevens quoted the seminal Warren and Brandeis article: "The right of privacy does not prohibit any publication of matter which is of public or general interest."[132] Furthermore, a central function of the First Amendment was to promote speech on public issues. Although not developed by Justice Stevens,[133] *Bartnicki* is based on an aversion to laws which chill speech on matters of public significance.

At its essence, Justice Stevens's *Bartnicki* opinion rests on the proposition that those who participate in matters of public interest have a reduced expectation of privacy for their telephone conversations. In other words, privacy is not defined by the circumstances in which communication occurs, but by the content of the communication. In a telling passage, he stated:

> If the statements about the labor negotiations had been made in a public arena — during a bargaining session, for example — they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statement to Kane when the two thought they were alone.[134]

But Bartnicki and Kane were not speaking in public, nor was the interception of their telephone conversation inadvertent. They were using a means of communication in which they had an expectation that their conversation would not be intercepted or disclosed by others. For Chief Justice Rehnquist, whose dissenting opinion was joined by Justices Scalia and Thomas, the context defined the privacy expectations, not the content of the conversation. He added:

> Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally

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[132] 121 S. Ct. at 1765 (quoting Warren & Brandeis, *supra* note 119, at 214).

[133] Earlier, in Fla. Star v. B.J.F., 491 U.S. 524 (1989), the Court held that a Florida law punishing publication of a rape victim's name was unconstitutional. One of the grounds relied upon by the Court in *Florida Star* was the chilling effect created by laws which punish truthful publications. *Id* at 535. In a brief footnote in *Bartnicki*, Justice Stevens cited this portion of *Florida Star*. 121 S. Ct. at 1765 n.22. *But see infra* text accompanying note 137.

[134] 121 S. Ct. at 1760. In his concurring opinion, Justice Breyer concluded that due to the subject matter of the conversation, and the speakers' limited public figure status, there was no legitimate interest in maintaining the privacy of the conversation. *Id.* at 1768 (Breyer, J., concurring).

intercepted and knowingly disclosed.[135]

According to Chief Justice Rehnquist, the interest in privacy "at its narrowest" must embrace freedom from surreptitious eavesdropping on and involuntary disclosure of telephone conversations.[136] And, any chilling effect of the disclosure statute was a positive outcome because it actually served the First Amendment interest of allowing private conversations to "transpire without inhibition."[137]

2. Reconciling *Bartnicki* and *Hill*

Bartnicki is the latest in a line of cases in which the Court found privacy interests to be insufficient to justify restrictions on publishers who lawfully acquire information.[138] Consequently, *Bartnicki* is a rather unremarkable recitation of the paramount importance of the right to publish. The tone of the *Bartnicki* opinion is captured by the following passage: "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[139] But if free expression is preferred over privacy in *Bartnicki*, why does privacy override free expression in *Hill*?

The answer is found in the definition given to privacy in each case. The wiretapping statute regards disclosure of all illegally intercepted telephone conversations to be an invasion of privacy. Justice Stevens found this definition to be too broad; by creating a public interest exemption to the statute,[140] he defined the privacy expectation by the content of the communication, rather than its context.

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[135] *Id.* at 1776 (Rehnquist, C.J., dissenting).

[136] *Id.*

[137] *Id.* at 1772.

[138] *See Fla. Star*, 491 U.S. at 524; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); *see also* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (emphasizing the right of the press to publish lawfully acquired information); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (same); Okla. Publ'g Co. v. District Court, 430 U.S. 308 (1977) (same).

[139] 121 S. Ct. at 1765 (quoting Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)). The use of this passage from *Time* is revealing because in that case the Court treated the privacy interests at issue as rather inconsequential when measured against First Amendment rights.

[140] Justice Stevens claimed that most violations of the statute would not involve matters of public interest. 121 S. Ct. at 1764. Moreover, he believed there would be few cases in which an "anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise . . . ." *Id.* at 1763.

On the other hand, in *Hill*, the Colorado statute defines privacy by context: people near medical clinics need protection from an unwelcome speaker who approaches closely, regardless of the content of the message. Significantly, not all people in the immediate vicinity of a medical clinic are patients in need of protection, and not all approaches by speakers are harmful. Nonetheless, Justice Stevens regarded the comprehensiveness of the Colorado statute as a virtue because individualized determinations of whether an approach was harassing would involve subjective judgments.[141] (The subjective judgment of whether a telephone conversation is a matter of public interest was not mentioned by Justice Stevens in *Bartnicki*.)

Alternatively, the different outcomes in the cases may be explained by the distinction between a ban on publication and a time, place, and manner regulation. To the Court, the Colorado law was only a minor place restriction that did not affect the content of public discussion. The wiretapping law, however, restricted coverage of public issues.

The wiretapping law does not single out the press, nor is it designed to restrict discussion of public issues, but the punishment of truthful publication of a matter of public interest is inconsistent with well-established First Amendment principles. The *Hill* Court was not attuned to the impact of the Colorado law on "sidewalk counseling" and the case stands in stark contrast to a well-established right of speakers on public sidewalks to closely approach even unwilling listeners.

III. NARROW TAILORING

Under the *Ward* test, a content-neutral regulation must be narrowly tailored to serve a significant governmental interest and leave open ample alternative means of communication. Often in cases involving speech near abortion clinics, lower courts have collapsed these lines of inquiry, finding the availability of alternative means of communication to be proof of narrow tailoring.[142] In *Hill*, Justice Stevens's cursory analysis of tailoring was also affected by his belief that the statute left open adequate means of communication.[143] But a law can leave open ample communication options and still be poorly crafted.

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[141] Hill v. Colorado, 530 U.S. 703, 729 (2000).

[142] *See, e.g.*, Am. Life League v. United States, 47 F.3d 642, 652 (4th Cir. 1995).

[143] Justice Stevens claimed that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." 530 U.S. at 726.

The narrow tailoring prong of the commercial speech test is "substantially similar"[144] to the tailoring prong for time, place and manner regulations. In both settings, the test is whether there is a reasonable fit between the ends and the means chosen to accomplish those ends. In *Lorillard Tobacco*,[145] the Court found restrictions on tobacco advertising to be improperly tailored. In sharp contrast to *Hill*, the Court in *Lorillard Tobacco* discounted the availability of alternative means of communication in its assessment of tailoring.

A. Tailoring in Hill

The majority and dissenting justices in *Hill* use markedly different frameworks for the narrow tailoring issue. Justices Scalia and Kennedy acknowledged the power of the state to protect citizens seeking medical treatment from undue interference by private actors, while questioning the legitimacy of the privacy interest crafted by Justice Stevens.[146] That is, the state's interest was defined in terms of protecting access to health care facilities. Under this framework, the subsection preventing obstruction of clinic entrances serves that interest, while the no-approach subsection outruns the interest because it reaches behavior that is not so threatening or intimidating as to impede access. The value of the obstruction subsection is that it does not target expression; all obstructive behaviors that have the prohibited effect are punishable, whether or not they involve protest or counseling. In contrast, the ban on approaches is underinclusive in that it only targets close approaches for expressive purposes. Recall that under the no-approach law, anyone can closely approach and follow another person without consent so long as they do not also engage in specified expressive activities such as oral protest or leafletting.

The framework used by Justices Scalia and Kennedy is based on three propositions which conform to established First Amendment doctrine: (1) the right to communicate through close approaches on public sidewalks is superior to a pedestrian's interest in privacy, (2) behavior

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[144] S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 n.16 (1987). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 799-800 (1989) (availability of less restrictive alternative does not undercut validity of time, place and manner regulation that substantially serves asserted interest); Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (commercial speech cases do not require less restrictive means analysis).

[145] 121 S.Ct. 2404 (2001).

[146] 530 U.S. at 755 (Scalia, J., dissenting) (state may protect access to clinics without prohibiting approaches for purpose of oral protest, education, or counseling); *id.* at 777-78 (Kennedy, J., dissenting) (state may protect access to clinics and prevent physical contact between citizens without regulating expression).

which blocks an entrance to a building is not protected expression, and (3) the state may not use prophylactic measures in its regulation of expression. Justice Stevens, however, defined the state interest in protecting unimpeded access to clinics as also including a no-approach zone of privacy. His framework rests upon three very different and highly questionable propositions: (1) the right to communicate through close approaches is less important than the competing privacy interest, (2) non-obstructive communicative behavior is unprotected, and (3) a more limited system of regulation, such as one which focuses on the impact of each attempt to approach, would be difficult to enforce. The second and third propositions deserve close examination because they conflict sharply with the First Amendment's long-established hostility to prophylactic measures.[147]

Justice Stevens acknowledged that the ban on all non-consensual approaches restricts even those speakers whose approaches would be harmless.[148] Nonetheless, the prophylactic aspect of the statute was justified by the difficulty law enforcement officials would have in making individualized judgments about the impact of each approach. Justice Stevens believed the eight foot rule would aid in even-handed application of the law by avoiding subjective judgments.[149] Because *Hill* involves a facial challenge, Justice Stevens's comments are not based on application of the law by Colorado officials.[150]

The eight foot rule is not as clear as Justice Stevens would have us believe. Setting aside whether or not the terms oral protest, counseling, and education are vague,[151] the statute does not define consent. Thus, the police will have to observe the hurried interactions of speakers and listeners and judge whether or not the listener gave consent by — take your pick — nodding affirmatively, smiling, stopping, extending a hand to receive literature, or saying "Yes, you may approach me." Or, consider the difficulty of evaluating more ambiguous responses such as a grunt, a shrug of the shoulders, raising one's eyebrows, displaying a

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[147] *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940), in which the Court acknowledged the power of states to protect privacy, but concluded that no invasion of privacy was "inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute . . . ." *Id.* at 105.

[148] 530 U.S. at 729.

[149] *Id.* at 715, 729.

[150] As of December 6, 1999, the statute had never been enforced. Brief on the Merits for Respondents at 3 n.4, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856).

[151] Justice Stevens regarded these words to be "common" and readily understandable. 530 U.S. at 732. Justice Kennedy found these words to be "imprecise" and no custom, tradition or legal authority gave the terms the necessary specificity. *Id.* at 773 (Kennedy, J., dissenting).

peace sign, or offering the Star Trek salute.[152]

Justice Stevens also falsely assumes that any option short of the prophylactic ban involves unacceptable subjectivity and the possibility of discriminatory enforcement. Certainly, the Court has been critical of unbridled police discretion in enforcing vague laws,[153] but it has also accepted the necessity of individualized judgments by law enforcement officials when those judgments are narrowly confined. Consider two cases involving speech near special places, *Boos v. Barry*[154] and *Grayned v. City of Rockford*.[155] In *Boos*, the Court found a law prohibiting any congregation of three or more persons within 500 feet of an embassy to be constitutional. By its terms, the statute placed no limit on the dispersal authority of the police. The Court of Appeals for the District of Columbia Circuit provided a narrowing construction of the statute by permitting dispersal only when the police reasonably believed there was a threat to the security of an embassy. To the Supreme Court, the narrowing construction protected peaceful congregations, while allowing protection for embassies.[156] In *Grayned*, the Court sustained an ordinance protecting schools from noise: "Far from having an impermissibly broad prophylactic ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation."[157] Consequently, proper regard for the First Amendment requires that the state use precise methods to protect privacy near medical clinics, even when those methods involve "the

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[152] The petitioners' brief pointed out some of the problems with "consent" by posing the following questions:

> If the sullen boyfriend of an abortion-bound woman tells one of the petitioners to shut up, does that command operate as a denial of consent for all covered expression? For such expression directly targeting the father of the soon-to-be aborted baby? The abortion-bound woman? If a loitering youth flashes a rude hand gesture, will picketers be criminally liable for failing to hide their signs from public view as they walk past the youth?

Brief for Petitioners at 60, Hill v. Colorado, 530 U.S. 703 (2000) (No. 98-1856). Justice Kennedy added that there is a "middle ground of ambiguous answers and mixed signals in which misinterpretation can subject a good-faith speaker to criminal liability." 530 U.S. at 773 (Kennedy, J., dissenting).

[153] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 551 (1965) (finding that broad discretion of public officials is contrary to the First Amendment).

[154] 485 U.S. 312 (1988).

[155] 408 U.S. 104 (1972).

[156] 485 U.S. at 330-31.

[157] 408 U.S. at 119.

exercise of some degree of police judgment . . . ."[158]

This is not to say the *Ward* test of narrow tailoring requires the state to use the least restrictive means of serving the asserted interest.[159] But it does mean that a time, place or manner regulation may not burden substantially more speech than is necessary to further the state's interests.[160] By prohibiting every non-consensual approach for certain types of expressive activity, regardless of the consequence of any approach, Colorado advances privacy at the unnecessary expense of the right to speak at close proximity.

B. *Tailoring in* Lorillard Tobacco

In January 1999, the Attorney General of Massachusetts issued regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. Drawing upon regulations proposed by the Food and Drug Administration,[161] Massachusetts prohibited outdoor advertising of tobacco products within 1000 feet of a public playground, park, elementary school or secondary school. The Supreme Court found the cigarette advertising restriction to be preempted by the Federal Cigarette Labeling and Advertising Act.[162] Only the cigar and smokeless tobacco outdoor advertising restrictions were subjected to the commercial speech test.

Writing for the Court, Justice O'Connor, joined by Chief Justice Rehnquist, Justices Scalia, Kennedy, and Thomas, held that the breadth and scope of the outdoor advertising restrictions do not represent a "careful calculation" of the burden on speech.[163] By following the FDA's 1000 foot boundary, the Attorney General had not appropriately considered the varying impact of this boundary in rural, suburban, and urban locations.[164] Moreover, the decision to ban all signs of any size was ill-suited to target the problem of highly visible billboards.[165] The

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[158] *Id.* at 114.

[159] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[160] *Id.* at 799.

[161] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996). The Court later ruled that the FDA lacks the authority to regulate tobacco products. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[162] Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404, 2413-21 (2001) (finding that 15 U.S.C. § 1334(b) (2001) preempts Massachusetts outdoor and point-of-sale cigarette advertising regulations).

[163] *Id.* at 2425.

[164] *Id.* at 2426.

[165] *Id.* Justice O'Connor added, "[t]o the extent that studies have identified particular

advertising restrictions also affected a range of communications that did not clearly advance the State's interest in reducing underage use of tobacco products; for example, oral statements by a tobacco retailer to an adult were prohibited if made outdoors.[166] Justice O'Connor believed that in some geographic areas the restrictions would "constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[167]

The Massachusetts tobacco advertising regulations are completely unlike *44 Liquormart v. Rhode Island* where the state prohibited liquor manufacturers and retailers from advertising the price of alcoholic beverages in any manner.[168] Justice O'Connor's characterization of the Massachusetts restrictions as nearly a complete ban overlooks the fact that cigar and smokeless tobacco manufacturers and retailers were able to reach adults through billboards in areas outside the 1000 foot zones,[169] and alternative media such as newspapers, magazines, direct mail, and the Internet. In fact, cigar manufacturers did not use billboards in Massachusetts.[170] The Court of Appeals for the First Circuit regarded the lack of outdoor cigar advertising as evidence that the regulations had a minimal burden on cigar advertisers.[171] Justice O'Connor, though, disregarded the record concerning cigar manufacturers and focused on retailers, especially those with limited advertising budgets. She postulated that the impact of the regulations would be great on those retailers who cannot afford to use forms of expression that are more expensive than onsite outdoor signs. Moreover, she believed alternative forms of communication, such as newspapers, do not allow retailers to propose an instant transaction to passersby on the street.[172]

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advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others." *Id.*

[166] *Id.*

[167] *Id.* at 2425.

[168] 517 U.S. 484 (1996).

[169] The petitioners claimed that the regulation would prevent outdoor advertising in 87% to 91% of the land areas in Boston, Worcester and Springfield. Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180, 191 (D. Mass. 2000). The amount of land available for outdoor advertising in *Lorillard Tobacco* was greater than the amount of land available for adult theatres in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986). In *Renton*, the Court found that the availability of 5% of land in a city left open adequate alternative means of communication.

[170] Consolidated Cigar Corp. v. Reilly, 218 F.3d 30, 49 (1st Cir. 2000); *see also* 84 F. Supp. 2d at 193-94 (distinguishing cigar marketing practices from cigarette marketing).

[171] 218 F.3d at 49.

[172] 121 S. Ct. at 2447; *see also* Amicus Curiae Brief of the Nat'l Ass'n of Convenience Stores at 6-7, Lorillard Tobacco Co. v. Reilly, 121 S. Ct. 2404 (2001). (No. 00-596) (claiming that print and off-site outdoor advertisements are prohibitively expensive and ineffective

Justices Stevens, Souter, Ginsburg and Breyer believed that the record did not show that the 1000 foot restriction was properly tailored. The case was decided by the district court on summary judgment motions and there were a number of important factual questions about the effect of the regulation that remained unanswered.[173] These Justices claimed that the case should be remanded for development of a record on the adequacy of alternative means of communication. Justice Stevens, for example, claimed that "print advertisements, circulars mailed to people's homes, word of mouth, and general information" may or may not be adequate ways of informing adults about tobacco products.[174]

Justice O'Connor's opinion in *Lorillard Tobacco* does not mean that alternative media can never be part of the narrow tailoring prong of the commercial speech test. In *Florida Bar v. Went For It, Inc.*,[175] Justice O'Connor's opinion for the Court sustained a rule prohibiting attorneys from sending targeted direct-mail solicitations to victims or relatives for 30 days following an accident. The rule did not unnecessarily prevent citizens from learning about their legal options because there were many other media, such as television, radio, newspaper, and billboards, in which lawyers could advertise.[176] Read together, *Lorillard Tobacco* and *Went For It* indicate that the availability of alternative media may or may not be analyzed depending on the facts of a case. Or, as Justice Thomas would say, the commercial speech test is malleable.[177]

C. *Reconciling* Hill *and* Lorillard Tobacco

Both *Hill* and *Lorillard Tobacco* raise questions about the power of the state to protect special audiences. In *Lorillard Tobacco,* the measures taken by the state to protect children from tobacco advertising unduly interfered with the ability of speakers to "propose a commercial transaction and the adult listener's opportunity to obtain information about products."[178] This assessment of the effect of the statute rests upon the Court's assumption that alternative methods of communication were inadequate. In *Hill*, the state's protection of medical patients entailed a

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for convenience stores).

[173] 121 S. Ct. at 2447 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[174] *Id.*

[175] 515 U.S. 618 (1995).

[176] *Id.* at 633.

[177] *44 Liquormart v. Rhode Island*, 517 U.S. 484, 520-22 (1996) (Thomas, J., concurring in part and concurring in judgment).

[178] 121 S. Ct. at 2427.

restriction of speech activities directed at anyone within 100 feet of a medical clinic; this measure was described as having a minor impact on expression because alternative means of communication were assumed to be adequate. It is especially striking that the *Lorillard Tobacco* Court regarded the blanket treatment of all signs, regardless of size, as improperly tailored. Yet, the *Hill* Court regarded the blanket treatment of all expressive approaches, regardless of outcome, as properly tailored. Equally striking is Justice O'Connor's attention to the immediacy of speech, a concern completely absent from Justice Stevens's *Hill* opinion.

While *Lorillard Tobacco* does not involve a ban on tobacco advertising in any medium, it does involve a nearly complete ban on outdoor advertising of tobacco products. Perhaps this explains the Court's sensitivity to the importance of this form of communication. *Hill*, in contrast, was seen by the Court as involving only a time, place and manner restriction which had a less severe impact on expression than a complete ban. However, *Hill* can also be seen as involving a complete ban because the Colorado law proscribes all non-consensual approaches for certain expressive purposes. Even though the Colorado law allows speakers to closely approach willing listeners and to use other methods to reach unwilling listeners, *Hill* disregards the communicative importance of closely approaching those who initially may not be receptive to a speaker's message. Prior to *Hill*, speakers on public streets had the right to closely approach anyone — willing or unwilling — to initiate a discussion.

CONCLUSION

Constitutional analysis generally occurs in the abstract with little concern for the people involved. It bears noting, though, that Jeannie Hill was "devastated" by the Supreme Court ruling.[179] She no longer practices "sidewalk counseling." She is uncertain as to how the law would be applied, and based on her prior experiences, she regards the police as being biased against anti-abortion speakers. Moreover, the prospect of an award of civil damages creates a chilling effect; she fears that a civil judgment would wipe out the assets she and her husband have "worked all our lives to acquire."[180] So, in the name of privacy, the marketplace of ideas has lost a non-violent speaker whose message runs contrary to the prevailing orthodoxy.

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[179] Telephone interview with Jeannie Hill, *supra* note 1; *see also* Susan Greene, *Wheat Ridge Plaintiff: "We're Used to Losing,"* DENVER POST, June 29, 2000, at A-08.

[180] Telephone interview with Jeannie Hill, *supra* note 1.

Despite the fact that the Colorado no-approach law is designed to promote access to a range of medical facilities, the underlying tone in *Hill* is a preference for the exercise of reproductive autonomy at the expense of free speech. Perhaps as *Bartnicki* and *Lorillard Tobacco* indicate, *Hill* is a pro-abortion novelty,[181] but even in the context of abortion speech cases, *Hill* goes well beyond the prior holdings in *Madsen* and *Schenck*. Access to reproductive health services can be protected without restricting peaceful forms of expression, as shown by the federal Freedom of Access to Clinic Entrances Act.[182]

In stark terms, the privacy interest in *Hill* contradicts more than a half-century of First Amendment doctrine. Protection for the unwilling listener markedly alters the structure of dialogue on public streets by exalting "order at the cost of liberty."[183] This is scarcely what Justice Brandeis envisioned by a "right to be let alone."

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[181] Hill v. Colorado, 530 U.S. 703, 764 (Scalia, J., dissenting) (describing *Hill* as "one of many aggressively proabortion novelties announced by the Court in recent years.").

[182] *See supra* note 28.

[183] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).