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If You Can't Say Something Nice, Don't Say Anything at All: Hill v. Colorado and the Antiabortion Protest Controversy

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If You Can't Say Something Nice, Don't Say Anything at All: Hill v. Colorado and the Antiabortion Protest Controversy

I. INTRODUCTION

Abortion. The very word evokes an emotional reaction in every American's conscience. The topic of abortion remains one of the most hotly debated and controversial issues in modern society, despite more than twenty years of contention since the landmark decision of Roe v. Wade. The United States Supreme Court has attempted in many decisions to create a jurisprudence maintaining individual freedom to perform or seek an abortion, while simultaneously allowing the debate about abortion to rage on as a moral or political issue. In Hill v. Colorado, these two concerns collided. This decision represents the most current opinion regarding the redheaded stepchildren of First Amendment freedom: abortion clinic protestors, and their ability to express antiabortion views to patients entering abortion clinics for treatment. The Hill decision addressed a Colorado statute that restricted protest around medical facilities. This statute, Colo. Rev. Stat. § 18-9-122, enacted in 1993, was a legislative effort unprecedented in the history of the abortion debate. In order to understand this ruling, one must first look at the history of First Amendment jurisprudence in the area of abortion protest.

II. BACKGROUND OF ANTI-ABORTION SPEECH RESTRICTIONS

A. Restrictions on Speech Generally

The First Amendment's admonition that "Congress shall make no law . . . abridging the freedom of speech" has been cited since the birth of our country as evidence that special protection exists for the promulgation of ideas and opinions, especially on matters of political or otherwise social concern. This admonition against congressional action has been extended to the individual states, through the power of

1. Throughout this note, the term "antiabortion" will be used to refer to individuals who express a disagreement with the abortion procedure. This term is meant to include those individuals who proclaim themselves to be "pro-life".
3. 120 S. Ct. 2480 (2000).
the Fourteenth Amendment. However, subsequent case law has demonstrated that not all speech is protected equally. Some types of speech recognized as being vulnerable to greater government interference and restraint are fighting words, untruthful or misleading commercial speech, defamation, and obscenity. If the government attempts to restrict any speech outside of these categories, it must comport with exacting limitations in order to protect against the possibility of governmental censure of unpopular ideas. In particular, "protest" speech has been especially guarded, unless accompanied by other inseparable and lawless behavior.

B. Abortion Protest

Since the Roe v. Wade decision effecting legalized abortion, a small but significant portion of the American public has chosen to actively protest the availability of abortion services. These vocal and sometimes strident opponents of the abortion procedure have often claimed First Amendment protection of their speech. Many abortion protestors, such as the petitioners in Hill v. Colorado, confine their protest to counseling potentially abortion-bound women immediately outside of abortion clinics. This area around abortion clinics has become a modern war zone in many cities and communities. There have been many occasions on which anti-abortion protestors outside of clinics have clashed with pro-abortion commentators, clients, and escorts or family members of clients as they attempt to enter for medical services.

Many commentators suggest that the media's sensationalism of violence has led to a false impression regarding abortion protestors and their activities around the clinics. In all fairness to abortion

5. See Palko v. Connecticut, 302 U.S. 319 (1937), which established that the first eight amendments to the Constitution were incorporated by the Fourteenth Amendment, and hence were enforceable against the States.
13. For comments on the non-violent activities of anti-abortion protestors, see Mary Ann Glendon, When Words Cheapen Life, N.Y. Times, June 10, 1995, at A19. Also, see
protestors, these situations are not "the norm". Most protestors, such as the petitioners in *Hill v. Colorado*, confine themselves to a more peaceful method of protest, finding it more effective as a form of communication. A newspaper or television journalist, however, is not likely to videotape or otherwise report on a peaceful protest composed of abortion opponents standing in a circle and offering a prayer—such events are not usually considered newsworthy. The shouting, pushing, insults, and threats of violence are not everyday happenings, but these violent actions do occur among a handful of antiabortion protestors. Unfortunately, these violent protestors are the type with which Americans are most familiar.

C. Federal Legislation

In recognition of the potential for intense disagreement amongst protestors and abortion clients or supporters, the U.S. Congress enacted the Freedom of Access to Clinic Entrances Act (FACE) in 1994.14 This Act made physical obstruction or the use of force or threat of force to injure, intimidate, or interfere with anyone seeking reproductive health services a federal crime.15 In addition, the FACE Act also provides for civil lawsuits for violations of the act.16 This law reinforced the ideal that women seeking reproductive counseling should be provided the opportunity to enter a clinic without suffering from violence immediately outside the building. The need for federal protection of women was seen as a necessary step to reduce actual or perceived violence directed toward women seeking abortion-related services.

D. Injunctions

Several cases have dealt with the problem of abortion clinic protests that have been curtailed by judicial injunctions. The two main cases are *Madsen v. Women's Health Center, Inc.*17 and *Schenck v. Pro-Choice Network of Western New York.*18


15. *Id.*
16. *Id.*
1. Madsen v. Women’s Health Center, Inc.

The Madsen controversy arose from abortion protest activity outside a clinic located in Melbourne, Florida. The operators of the health clinic had previously requested and received an injunction prohibiting the interference of public access to the clinic, as well as physical abuse of those entering or leaving the clinic. However, little progress was made by the first injunction, and the clinic operators requested a broader injunction upon the protest activities. The second injunction had several more restrictive provisions, including: (1) a 36-foot buffer zone around all clinic entrances and driveways; (2) a restriction on excessive noisemaking within earshot of patients inside the clinic; (3) a restriction on use of “images observable” by patients inside the clinic; (4) a prohibition on approach by protestors towards clients and patients within a 300-foot zone without consent; and (5) a 300-foot buffer zone around the clinic staff’s residences. The antiabortion protestors at the clinic claimed this injunction violated their free speech rights.

The Supreme Court used a content-neutral test in Madsen to determine the constitutionality of the injunction. The Court dismissed the protestors’ claim that the injunction was a content-based restriction, stating that every injunction, because it rests on prior behavior of an identifiable group, must by its definition affect only one group or viewpoint. Although the injunction was content-neutral, the Court was forced to create a new test for its constitutionality. The Court found the Ward test, which measured time, place, and manner restrictions in traditional public forums, to be lacking in this instance. The stan-

20. Id. at 758.
21. Id.
22. See id. at 759-62.
23. Id.
24. Id.
25. See id. at 762. (The Court stated: “An injunction, by its very nature, applies only to a particular group . . . because of the group’s past actions in the context of a specific dispute . . . .”).
26. See Ward v. Rock Against Racism, 491 U.S. 791 (1989). The test utilized in Ward questioned whether a regulation “was narrowly tailored to serve a significant governmental interest” and whether the restriction would “leave ample alternative channels of communication open.” See id. at 796, 802. The Supreme Court explained this test further: “Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, and manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests, but that it need not be the least restrictive means of doing so.” Id. at 798.
standard of Ward, although appropriate for a statute, did not provide review stringent enough for an injunction.\textsuperscript{27} Accordingly, the Court adopted a modified standard: "We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."\textsuperscript{28} In evaluating the second injunction, the Court found that the limitation on noise, as well as the 36-foot buffer zone around clinic entrances, burdened no more speech than necessary, and these provisions were found constitutional.\textsuperscript{29}

Several provisions of the injunction failed the Court's new test. The limitation on images observable was deemed overly restrictive, as clinics could take action to protect patients inside without burdening the protestors' speech by simply drawing their curtains.\textsuperscript{30} In addition, the Court struck down the 300-foot "no approach" zone, which required consent before a protestor could approach anyone entering the clinic.\textsuperscript{31} The Court stated: "Absent evidence that the protesters' speech is independently proscribable (e.g., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm this provision cannot stand."\textsuperscript{32} This 300-foot area, commonly referred to as a "floating" buffer zone, was considered to burden "more speech than necessary to prevent intimidation and to ensure access to the clinic."\textsuperscript{33} While the 36-foot fixed buffer zone prevented speech near clinic entrances and thus helped ensure that protestors would not obstruct access or block traffic, the floating buffer zone served no such readily identifiable purpose.\textsuperscript{34}

\textsuperscript{27} Madsen, 512 U.S. at 764-65. (The Court stated: "Injunctions ... carry greater risks of censorship and discriminatory application than do general ordinances .... We believe these differences require a somewhat more stringent application of general First Amendment principles ....").
\textsuperscript{28} Id. at 765.
\textsuperscript{29} Id. at 768, 772.
\textsuperscript{30} Id. at 773.
\textsuperscript{31} Id. at 773-74.
\textsuperscript{32} Id. at 774. (citation omitted).
\textsuperscript{33} Id. The term "buffer zone" implies the creation of an area where protest speech is not permitted. Here, the Supreme Court refused to create a 300-foot floating buffer zone (a non-speech zone which moves with a particular person as they move), but allowed the 36-foot fixed buffer zone (a non-speech zone with a radius determined by a fixed object, such as a building) to stand.
\textsuperscript{34} Id. In the subsequent analysis of the 300-foot buffer zone around clinic staff's residences, the Court stated: "The record before us does not contain sufficient justification for this broad ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." Id. at 775. While the Court simply stated the 300-
2. Schenck v. Pro-Choice Network of Western New York

The Schenck case contained significant factual differences from Madsen, although it also came about as a result of controversial antiabortion protesting. However, Schenck involved two abortion clinics in Rochester and Buffalo, New York which had been “subjected to numerous large-scale blockades” by protestors. The clinic operators first sought a temporary restraining order, and later an injunction, following violation of the restraining order by antiabortion protestors. The injunction carried several provisions restricting the protestors’ First Amendment speech freedoms, including a “fixed” buffer zone prohibiting protest within fifteen feet of doorways, parking lot entrances, or driveways of abortion clinics. In addition, the injunction also contained a restriction called a “floating” buffer zone, which banned protest within fifteen feet of “any person or vehicle . . . leaving such facilities.” Perhaps the most controversial portion of the injunctive order, the “cease and desist” provision, stated that any protestors entering either buffer zone had to immediately stop counseling or protesting and retreat to a distance of fifteen feet before resuming her speech.

In analyzing the Schenck case, the Court utilized the test for constitutionality of injunctions regarding a traditional public forum developed in Madsen: “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.” The Court looked at the private claims asserted in the complaint by the operators of the health clinic, as well as the government’s interests, which included an interest in public safety and order. Also asserted were interests in “promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services.”

36. Id. at 362.
37. Id. at 365-66.
38. Id. at 367.
39. Id.
40. Id.
41. Id. at 371 (quoting Madsen 512 U.S. at 765).
42. Id. at 375.
43. Id. at 376.
In contemplating these interests, the Court concluded that the fixed buffer zone provision met constitutional standards. The Court stated that these restrictions on the movement or location of the antiabortion protestors were "necessary to ensure that people and vehicles trying to enter or exit the clinic property . . . can do so." Thus, the coexistence of a significant government interest in safety and access, as well as a history of prior disruptive and dangerous conduct by protestors, justified the restriction on speech created by the fixed buffer zone.

The floating buffer zone provision, however, was struck down by the Court as burdening "more speech than is necessary to serve the relevant governmental interests." After commenting upon the difficulty of balancing the speech interests of the antiabortion protestors in a traditional public forum (public sidewalks) and the history of physically abusive and harassing conduct, the Court struck the floating buffer zone because of practical enforcement concerns. The Court reasoned that the difficulty of determining and maintaining a fifteen-foot distance while a protestor counseled a potential abortion clinic client may lead to inadvertent violations. In addition, uncertainty regarding compliance with the injunction's floating buffer zone might lead to a "chilling effect" which would unnecessarily reduce speech out of a fear of violating the court's order.

The "cease and desist" provision, however, was not discussed extensively by the Court. However, the Court did make clear that the "cease" clause was not grounds for proclaiming the entire injunction unconstitutional as a content-based restriction, but rather was a result of the protestors' prior conduct. In addition, the Court proclaimed that this injunction, as well as the order discussed in Madsen, could

44. Id. at 380.
45. Id.
46. Id.
47. Id. at 377.
48. Id. at 377-78.
49. Id. at 378. The Supreme Court went on to reinforce the difficulty of compliance with the floating buffer zone provision, stating: "Since there may well be other ways to both effect such separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened), we conclude that the floating buffer zones burden more speech than necessary to serve the relevant governmental interests." Id. at 378-79.
50. Id.
51. Id. at 379.
52. Id. at 384-385.
not be justified "on the basis of any generalized right 'to be left alone' on a public street or sidewalk".\textsuperscript{53}

Thus, the law as developed in the injunction cases of \textit{Schenck} and \textit{Madsen}, as well as in the federal legislation (FACE Act), seemed to establish a recognizable pattern of balance amongst the rights of abortion clinic patients and antiabortion protestors. The right of access to abortion clinics was a heavily guarded commodity, accompanied by federal criminal and civil penalties for interference. This right could be adequately protected in most cases by fixed buffer zones disallowing protest within a reasonable distance from clinic entrances. However, the speech rights of antiabortion protestors were not subjected to excessive restriction, for all forms of floating buffer zones that reached the Supreme Court, as well as consent or "cease and desist" provisions, were immediately struck as forbidding too much speech.\textsuperscript{54} The two interests involved appeared to be evenly, or at least comfortably, balanced. The scales were readjusted, however, when the Court handed down its decision in \textit{Hill v. Colorado}.

III. \textit{Hill v. Colorado}: The Case

A. Factual Background

The Colorado General Assembly enacted Colo. Rev. Stat. § 18-9-122 in 1993, which provides in pertinent part:

The general assembly . . . declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility . . . . 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. Any person who violates this subsection . . . commits a class 3 misdemeanor.\textsuperscript{55}

Prior to the adoption of this statute, several hearings were conducted before the House and Senate Judiciary Committees of the General Assembly of Colorado.\textsuperscript{56} These hearings largely consisted of testimony regarding "the conduct of some antiabortion protestors at various med-

\textsuperscript{53} Id. at 383 (quoting \textit{Madsen} 512 U.S. at 753).
\textsuperscript{54} \textit{Schenck}, 519 U.S. at 377; \textit{Madsen}, 512 U.S. at 774.
ical clinics directed both at patients and staff." The testimony revealed antiabortion protestors' efforts to deny access to clinic entrances, as well as other harassing conduct. The Committees also heard testimony regarding both the impossibility of enforcing any type of crowd control outside of such clinics, and the fear potential clients felt for their safety when attempting to enter for medical advice.

The petitioners in this case, Leila Hill, Audrey Himmelmann, and Everitt Simpson, are morally opposed to the practice of human abortion. To express their opinion and combat the "evil" of abortion, the petitioners participated in what they called "sidewalk counseling." This practice consisted of educating, counseling, or otherwise persuading "passersby about abortion and abortion alternatives through leafleting, sign displays, conversation, and other means." These activities took place on public ways and sidewalks near abortion clinics. The petitioners were never charged with any violent activity regarding their protest or sidewalk counseling. These protestors, through years of experience, deemed compliance with the statute difficult, for they felt it was almost impossible to remain on the sidewalk, at least eight feet away from others, while continuing their oral protest or counseling. In reaction to the difficulties created by the statute, the petitioners altered their manner of protest to avoid arrest.

B. Procedural History

1. Request for Injunction by the District Court of Jefferson County, Colorado

A few months after the statute was enacted by the General Assembly, petitioners brought an action which claimed that Colo. Rev. Stat. § 18-9-122(3) violated the First Amendment of the United States Constitution on its face. Petitioner's action requested a permanent injunction against enforcement of the statute by government officials of

57. Id. at 672.
58. Id.
61. Id.
62. Id.
63. Id.
64. Id. at 3.
Colorado. The District Court of Jefferson County granted summary judgment for respondents, denied the injunction, and held that the statute did not violate the First Amendment.

2. Colorado Court of Appeals (Part I)

The petitioners appealed to the Colorado Court of Appeals, which upheld the trial court’s denial of the injunction. The Court of Appeals determined that the statute was a content-neutral restriction because it was not directed exclusively at antiabortion protestors or their viewpoint. In analyzing Colo. Rev. Stat. § 18-9-122, the Court of Appeals applied the traditional test for time, place, and manner restrictions on speech in a traditional public forum. The Court held the statute constitutional under the requirements of the Ward test: (1) the statute advanced a significant government interest in safety and access; (2) the statute did not burden speech more than was reasonably necessary because protestors could continue to communicate, albeit at a greater distance; and (3) the statute allowed for ample alternative channels for communication, as it did not restrict the use of signs, posters, or communication outside the eight-foot buffer zone. The court dismissed petitioners’ claim that the statute was vague, as all terms in the statute were afforded meaning via the Colorado Criminal Code or common usage. In addition, the court rejected petitioners’ contention that the statute represented a prior restraint on speech for the reason that refusal to “license” protest speech rested upon private citizens rather than a government entity. The Court of Appeals affirmed the District Court’s denial of an injunction against the statute’s enforcement, declaring the statute to be constitutional with no First Amendment violations.

68. Id. at 670.
69. Id.
70. Id. at 673. The Colorado Court of Appeals concluded that “§ 18-9-122(3) is content-neutral because the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred.” Id.
71. Id. at 673-74.
72. Id. at 674.
73. Id.
74. Id. at 674-75.
75. Id. at 672.
3. *Colorado Court of Appeals (Part II)*

Following the unfavorable disposition of their case by the Colorado Court of Appeals, petitioners applied for certiorari by the United States Supreme Court.\(^76\) The Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Colorado Court of Appeals for further consideration in light of *Schenck v. Pro-Choice Network of Western New York*.\(^77\)

The Colorado Court of Appeals again affirmed the District Court's denial of an injunction against enforcement of the statute.\(^78\) After consideration of the *Schenck* decision, the Court of Appeals determined that the First Amendment analysis of Colo. Rev. Stat. § 18-9-122 was unchanged.\(^79\) The Court of Appeals maintained that the statute was a "content-neutral, generally applicable statute supported by a valid governmental interest" which provided ample alternative methods for communication.\(^80\) The court declared the interest of ensuring access to health clinics to be a sufficient government interest.\(^81\) In addition, the Court of Appeals dismissed petitioners' complaints about the practical difficulty of complying with the statute due to an inability to accurately estimate distance by stating that the scienter requirement ("knowingly approach") of Colo. Rev. Stat. § 18-9-122 protected inadvertent violators from prosecution.\(^82\)

4. *The Supreme Court of Colorado*

The petitioners appealed the trial court's denial of the injunction to the Colorado Supreme Court. The Colorado Supreme Court first carefully weighed of the interests involved for both the petitioners and the State of Colorado.\(^83\) The court found that, although the First Amendment did restrain the government's attempts to prohibit speech, the protections afforded did not outweigh the State's interests.\(^84\) The court reemphasized the General Assembly's determination that the

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76. After the Colorado Court of Appeals upheld the District Court's denial of an injunction, the petitioners requested an en banc review of the decision. En banc review by the Court of Appeals was denied, as was certiorari by the Colorado Supreme Court. Therefore, the petitioners requested certiorari from the United States Supreme Court.

77. 519 U.S. 357 (1997).


79. Id. at 110.

80. Id. at 109-10.

81. Id.

82. Id. at 110.


84. Id.
The right of access to counseling and treatment at medical facilities was paramount. After expanding upon that finding, the Colorado Supreme Court determined that the right of access was contained within a greater "right to be let alone" or a generalized right to privacy. After reasoning that privacy rights had generally included pregnancy or child-rearing decisions, the court concluded:

the First Amendment can accommodate reasonable government action intended to effectuate the free exercise of another fundamental right, an individual's right to privacy, here represented by access to medical counseling and treatment.

The Colorado Supreme Court determined that the holding in Schenck was inapplicable to the analysis of Colo. Rev. Stat. § 18-9-122, because Schenck dealt with the constitutionality of an injunction. Since the injunction was judicially created, the test for constitutionality in Schenck was necessarily harsher because of a greater risk of censorship and discriminatory application. In addition, the Colorado Supreme Court denied the applicability of Sabelko v. City of Phoenix, claiming it was sufficiently factually distinct to render it useless. Instead of the harsh injunction standard, the court chose to use the Ward test for time, place, and manner restrictions, after determining the statute was content-neutral. The statute met the requirement of being "narrowly drawn" as it contained the "knowingly approach" clause, which pro-

85. Id. at 1252-53.
86. Id. at 1253. The Colorado Supreme Court held individuals have a "right to be let alone", although the United States Supreme Court had denied this right as a basis for the injunction in Schenck. See Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 361 (1997). The Colorado court justified reliance on the right to be let alone as a basis for their decision here because of the treatment of reproductive privacy rights in cases such as Roe v. Wade.
87. Id.
88. Id.
89. Id.
90. Id. at 1255.
91. Id. The Colorado Supreme Court discussed the ruling in Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997), which involved a city ordinance creating an eight-foot floating buffer zone around persons entering an abortion clinic. However, unlike the present statute's buffer zone and consent requirement, the city ordinance required a protester to withdraw if an entering client came within eight feet of the protester. Thus, in addition to the negative requirement of staying outside an eight-foot zone, the protestors in Sabelko were also subject to a positive requirement to move away upon request, even if the protester was standing still. In Hill, the statute contained no such requirement, as it only affected "approach" by protestors.
92. Hill v. Thomas, 973 P.2d at 1256.
tected innocent or inadvertent violation. In addition, the government interest in providing for the health and safety of potential clients of health clinics was deemed to be sufficient to justify the regulation on petitioners' speech. Finally, the statute left open ample alternative channels for speech, although it did deter leafleting somewhat. The Colorado Supreme Court also dismissed the possibility of chilled speech. The statute satisfied the Ward test as applied by the Colorado Supreme Court, and was thus deemed to be a constitutional restriction on speech. Again the petitioners were denied their request for an injunction against the statute's enforcement. The petitioners applied for certiorari to the United States Supreme Court, which was granted in September of 1999.

C. Majority Opinion of the United States Supreme Court

On June 28, 2000, the United States Supreme Court released its decision regarding the Hill v. Colorado case. This majority decision, written by Justice Stevens, received the approval of six Justices, including Chief Justice Rehnquist, and Justices O'Connor, Souter, Ginsberg, and Breyer. Before addressing the question of constitutionality, the Court proceeded to discuss the interests involved for each side of the controversy.

1. The Interests of Each Party

The Supreme Court first identified the interests of the petitioners as "sidewalk counselors". The sidewalk counselors pointed out that the restriction affected by Colo. Rev. Stat. § 18-9-122 created a speech-free zone "encompass[ing] all the public ways within 100 feet of every entrance to every health care facility everywhere in the State of Colorado." Next the petitioners asserted that all of their activities as sidewalk counselors, including passing out leaflets, displaying signs, and orally communicating, were protected by the First Amendment, regardless of the message's offensiveness. In addition, the petitioners

93. Id. at 1257.
94. Id. at 1258.
95. Id.
96. Id. at 1259.
97. Id.
98. Id.
100. 120 S. Ct. 2480, 2484 (2000).
101. Id.
102. Id. at 2488.
103. Id. at 2488-89.
stated that the areas affected by Colo. Rev. Stat. § 18-9-122 included locations that demanded a high level of scrutiny in order to restrict speech, in that sidewalks and streets have been consistently regarded as traditional public forums.\textsuperscript{104} Finally, the petitioners maintained that their ability to communicate effectively would be lessened tremendously by the enforcement of the statute’s provisions.\textsuperscript{105}

The Supreme Court then delineated the interests of the State of Colorado. Primarily, the State was concerned with exercising its “police powers to protect the health and safety of [its] citizens.”\textsuperscript{106} Particularly in this case, the respondents were concerned with “unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.”\textsuperscript{107} The Court further discussed the nature of the right to free speech, stating that a message cannot be curtailed for the sole reason of its offensiveness.\textsuperscript{108} However, the Court limited the refuge allowed for offensive speech, citing \textit{Frisby v. Schultz}: “the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.”\textsuperscript{109} In recognizing this limitation, the Supreme Court concluded that even in a public forum, there might exist a right of privacy allowing citizens to quiet speech which constituted unwanted communication.\textsuperscript{110} The Court referred to this phenomenon as the “right to be let alone”.\textsuperscript{111} The Supreme Court concluded that the right to be let alone was implicit in the Colorado statute, along with the “right of passage without obstruction”.\textsuperscript{112}

2. \textit{Content Neutrality}

The Supreme Court accepted and commented on the determination by the four previous lower state court opinions that Colo. Rev. Stat. § 18-9-122 was a content-neutral statute.\textsuperscript{113} The Court concluded that the regulation was content-neutral because it was not a regulation of speech, but instead was a restriction on the places speech could occur.\textsuperscript{114} Also, the Court found that the statute was “not

\begin{itemize}
\item \textsuperscript{104} \textit{Id.} at 2489.
\item \textsuperscript{105} \textit{Id.}
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.}
\item \textsuperscript{108} \textit{Id.} at 2489.
\item \textsuperscript{109} \textit{Id.}
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 2490.
\item \textsuperscript{113} \textit{Id.} at 2491.
\item \textsuperscript{114} \textit{Id.}
\end{itemize}
adopted because of disagreement with the message [the speech] convey[ed]" and "appl[ied] equally to all demonstrators regardless of viewpoint". 115 The statute’s content-neutrality was further established by the lack of a relation between the State of Colorado’s interest in safe access and privacy and the content of the sidewalk counselors’ speech. 116 Petitioners argued that Colo. Rev. Stat. § 18-9-122 was content-based because the content of the protestors’ speech (whether it consisted of “oral protest, education or counseling”), coupled with proximity, determined whether a protestor was in violation of the law. Rejecting this argument, the Court stated that the statute did not prohibit a particular viewpoint or subject matter. 117 In addition, the Supreme Court majority opinion addressed the concerns of two dissenting Justices by rejecting the argument that legislation motivated by partisan concerns was necessarily content-based. 118

3. Valid Time, Place, and Manner Restriction

Furthermore, the United States Supreme Court agreed with the lower courts that the appropriate test for the constitutionality of the statute was the Ward test for time, place and manner restrictions. 119 As the Court had previously discussed the statute’s content-neutrality and the significance of the government’s interests, the analysis moved on to the questions of narrow tailoring and ample alternative channels of communication. The Supreme Court found the Colo. Rev. Stat. § 18-9-122 to be narrowly tailored, in that the restrictions on speech occurred at the very location where the problem existed—outside abortion clinics. 120 In addition, although the statute was not the least restrictive means of serving the state’s goal, because it was a content-neutral regulation that did not “foreclose any means of communica-

115. Id.
116. Id. The Supreme Court found this mismatch between the purpose of the statute and the protestors’ speech content to be evidence the statute “was not adopted ‘because of disagreement with the message it conveys.’ . . . This conclusion is supported by the State Supreme Court’s . . . holding that the statute’s ‘restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech’.” Id. (quoting Hill v. Thomas, 973 P.2d 1246, 1256 (Colo. 1999)).
117. Id. at 2493.
118. Id. at 2494. The Court stated: “[T]he contention that a statute is ‘viewpoint based’ simply because its enactment was motivated by the conduct of partisans on one side of a debate is without support.”
119. Id.
120. Id. at 2497.
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4. Not Overbroad, Vague, or a Prior Restraint

The Supreme Court dealt the final blow to the petitioners by rejecting petitioners' three additional arguments. First, the petitioners claimed the statute was overbroad as enacted in that it restricted too much speech. This overbreadth argument was based on the theory that the statute "protect[ed] too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred," and restricted all speakers, regardless of their past peaceful conduct. The Supreme Court dismissed petitioners' overbreadth argument, stating that a statute of general application was intended to cover many situations. The Court even found the breadth of Colo. Rev. Stat. § 18-9-122 to be further evidence that the statute was not content-based. The petitioners' attempt to persuade the Court of the statute's unconstitutionality as an overbroad restriction failed.

Next, the Court addressed the sidewalk counselors' claim that the statute was unconstitutionally vague. The petitioners argued that the statute was unconstitutionally vague because of the ambiguous mean-

121. Id. at 2494.
122. Id. at 2494-95.
123. Id. at 2495.
124. Id. at 2497.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id. at 2498.
ing and lack of definitions for terms within the statute.\textsuperscript{130} These disputed terms included "protest, education, or counseling", "consent", and "approach".\textsuperscript{131} To determine whether a statute is unconstitutionally vague, the Court employs a two-part inquiry. The Court asks first whether the language of the statute fails to provide people of ordinary intelligence a reasonable opportunity to understand the prohibited conduct; and second, whether the statute's language authorizes or encourages arbitrary and discriminatory enforcement.\textsuperscript{132} In regard to the first question, the Court determined that the words used in the statute would be ascribed their common meaning.\textsuperscript{133} Under the second part of the test, the Court held that the scienter requirement protected unwitting violators from prosecution, so the statute could not be designated as a kind of trap for the unwary.\textsuperscript{134} The petitioner sidewalk counselors offered several hypothetical situations testing the vagueness of the statute and difficulties with its application,\textsuperscript{135} but these hypothetical theories were rejected by the Court as being inappropriate for a facial attack on a statute's constitutionality.\textsuperscript{136} Also, the Supreme Court found that the statute, although allowing a degree of judgment by enforcement officials, did not encourage arbitrary prosecution.\textsuperscript{137} Thus, the Court rejected the petitioners' claim Colo. Rev. Stat. § 18-9-122 was unconstitutionally vague.\textsuperscript{138}

Finally, the Supreme Court answered in the negative the sidewalk counselors' claim that the statute constituted a prior restraint on speech.\textsuperscript{139} The Court held that the statute's consent requirement did not prohibit speech or create the possibility of a heckler's veto; it merely limited the places where protest could occur.\textsuperscript{140} Also, the Court correctly stated that all previous findings by the Court of prior restraint were found in government licensing schemes, while the con-

\begin{footnotes}
\item[130.] Id.
\item[131.] Id.
\item[132.] Id.
\item[133.] Id.
\item[134.] Id.
\item[135.] Id.
\item[136.] Id.
\item[137.] Id. at 2498-99.
\item[138.] Id. at 2499.
\item[139.] Id.
\item[140.] Id. The Supreme Court stated: "[T]his statute does not provide for a 'heckler's veto' but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the 'approach' restriction."\
\end{footnotes}
sent requirement here was to be enforced by private citizens. 141 In this light, the Court held that the statute was not an unconstitutional prior restraint on speech, as it was not official or government censorship. 142

The Supreme Court concluded by affirming the Colorado Supreme Court in denying the petitioners' request for an injunction against the enforcement of Colo. Rev. Stat. § 18-9-122. 143

IV. ANALYSIS

A. Content-Based

The Supreme Court refused to apply a standard of strict scrutiny in analyzing Colo. Rev. Stat. § 18-9-122, but instead chose to use a content-neutral standard. If the Supreme Court had found the statute to be content-based, it would have applied strict scrutiny, meaning the statute would carry a presumption of unconstitutionality. In order to preserve the statute under this level of scrutiny, the State of Colorado would have to prove that the statute was narrowly tailored to accomplish a compelling governmental interest. Instead of applying strict scrutiny (which probably would have invalidated the statute), the Court dismissed petitioners' argument that the statute was content-based, grounding their holding upon the theory that the statute simply limited places where speech could occur. 144 However, the Court's argument regarding the place regulation overlooks one important facet of the petitioners' case. The area immediately outside an abortion clinic is, practically speaking, the only location where antiabortion protest can effectively occur. 145 The issue of abortion has largely been decided from a political standpoint for more than twenty years. The people the petitioners wish to reach the most, women seeking abortions, are gathered in no other readily identifiable and available location to be exposed to the sidewalk counselors' protests. 146 In short, if antiabortion protestors cannot expound their message outside an abortion clinic, their message may be, for lack of effectiveness, lost. 147

In addition, the Supreme Court found Colo. Rev. Stat. § 18-9-122 content-neutral due to the fact that this legislation was not enacted because of disagreement with the content of the protestors' message, or at least the purpose of the statute was not related to a particular mes-

141. Id.
142. Id.
143. Id.
144. Id. at 2491.
145. Id. at 2514-15.
146. Id.
147. Id.
sage. By answering the petitioners' claim in this manner, the Court overlooked the language of the statute itself, which identifies its purpose in balancing "the exercise of a person's right to protest or counsel against certain medical procedures . . .," as opposed to the right to obtain medical services. If a statute is designed to reach only those people who are seeking to protest a medical procedure, then obviously the statute does not apply to any positive or pro-medical procedure viewpoints. The statute itself is only addressing, and therefore, restricting those speakers who espouse a negative viewpoint against some form of medical services. When applied in the context of the location restriction, as well as the history of the legislation, one can only come to the logical conclusion that Colo. Rev. Stat. § 18-9-122, for all practical purposes, will only serve to restrict antiabortion protestors.

The statute also fails to prohibit approach for reasons other than protest, education, or counseling. If the true purpose of § 18-9-122 was to ensure access to clinics or promote public safety, why is the restriction on approach limited to people wishing to communicate in these manners? A person approaching an abortion clinic client wishing to chat about the latest Colorado Rockies game, the weather, or the Monica Lewinsky scandal would be allowed to enter the eight-foot floating buffer zone, with no applicable penalty according to the statute. Yet, this hypothetical person could prevent access to a clinic entrance just as easily as someone counseling or protesting could prevent access to a clinic entrance. However, only persons protesting or attempting to educate or counsel these potential abortion clinic clients can be prosecuted under the current statute. When the statute is analyzed in this fashion, the Supreme Court's finding of content-neutrality becomes even more questionable. As Justice Scalia stated in his dissent from the majority opinion, "This Colorado law is no more targeted at used car salesmen, animal rights activists, fund raisers, environmentalists and missionaries than French vagrancy law was targeted at the rich." The statute is based on suppression of antiabortion speech, and as a content-based restriction, should be struck down as a violation of the First Amendment's freedom of speech.

148. Id.
B. Overbreadth

The Supreme Court dismissed the petitioners’ overbreadth argument with little analysis, stating simply that it was a statute of general applicability. However, in order to determine whether a statute is overbroad, the Court has traditionally examined whether the restriction on speech matches the precise concern for which the statute was enacted.\textsuperscript{151} Here, the State claimed that the regulation of speech was necessary to protect a “person’s right to obtain medical counseling and treatment in an unobstructed manner.”\textsuperscript{152} This language signifies a concern with access to medical clinics, or perhaps with public safety or crowd control. However, the statute restricts speech based on lack of consent,\textsuperscript{153} which has no connection with access or safety. Therefore, the evil intended to be regulated against does not match the effect of Colo. Rev. Stat. § 18-9-122.\textsuperscript{154} This result creates a presumption of overbreadth in most cases in which First Amendment rights are involved, primarily due to the government’s tendency to restrict free speech while paying lip service to other public policy goals. In \textit{NAACP v. Button}, the Court stated: “Broad prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”\textsuperscript{155} Although the restriction embedded in Colo. Rev. Stat. § 18-9-122 may further the goal of ensured access to medical facilities, or increase the assurance of public safety, there remains an “insufficient nexus”\textsuperscript{156} between the regulation of the speech involved and the identified government interest. This dissonance between purpose and effect leads to the conclusion that more speech will be regulated than is necessary to achieve the government’s goal. As such, the petitioners’ requested injunction against the enforcement of Colo. Rev. Stat. § 18-9-122 should have been granted because the statute is unconstitutionally overbroad.

In addition to the lack of connection between stated purpose and effect, it must be considered that under the terms of Colo. Rev. Stat. § 18-9-122, the eight-foot “consent” buffer zone attaches to every person within one hundred feet of every medical clinic throughout the State of Colorado.\textsuperscript{157} This zone appears regardless of the person’s

\textsuperscript{154.} \textit{Hill v. Colorado}, 120 S. Ct. at 2512 (Scalia, J., dissenting).
\textsuperscript{155.} \textit{Id.} at 2513. (Scalia, J., dissenting).
\textsuperscript{156.} \textit{Id.} at 2513-14.
\textsuperscript{157.} \textit{Id.} at 2510.
intent to enter or not to enter a medical clinic. If an individual is walking along the sidewalk in front of a doctor’s office, with no intention of stepping inside, why should First Amendment freedoms be violated to protect his safety? Under the Court’s ruling in this case, no one can counsel this hypothetical pedestrian on the appropriate type of shoes to wear while running a marathon, educate him about the local evening news broadcast, or protest the availability of nuclear missiles in the former Soviet Union within eight feet of the pedestrian without his consent. A broad restriction on speech, brought to bear according to the statute to such a large pool of individuals and situations, becomes almost ridiculous in its breadth of application. A statute with effects that reach so far beyond its intended result cannot stand as constitutional.

C. Not Reasonable Time, Place or Manner Restriction

Even if one accepts the Supreme Court’s finding of content-neutrality, and agrees with the application of the Ward test to determine the statute’s constitutionality as a time, place, and manner restriction, Colo. Rev. Stat. § 18-9-122 must still be held unconstitutional. The first requirement of the Ward test states that a regulation upon speech cannot “burden substantially more speech than necessary to further the government’s legitimate interests” or must be “narrowly tailored”. By including every medical facility in the State of Colorado, Colo. Rev. Stat. § 18-9-122 creates an area of protection against speech far larger than is necessary to protect and ensure access to medical facilities. Not every medical facility hosts a gaggle of protestors outside its doors. Not every person within one hundred feet of a medical clinic is afraid that the approach of a stranger may interfere with his ability to enter the clinic. While the Supreme Court praises the depth and breadth of the statute as proof it is not content-based, the Court overlooks the extent of forbidden speech in situations totally foreign to the purpose for which the statute was enacted. If the statute is designed “to protect distraught women who are embarrassed, vexed, or harassed as they attempt to enter abortion clinics . . . [these acts] should be prohibited in those terms.” Given that the statute regulates far more speech than necessary to protect any of the State of Colorado’s asserted interests, it is not narrowly tailored, and therefore fails the Ward test for constitutionality.

160. Id. at 2522.
In addition, the Ward test requires that a content-neutral regulation leave open "ample alternative channels" for speech. In Frisby v. Schultz, the Supreme Court declared that the injunction at issue in that controversy allowed for ample alternative channels of communication because it "permit[ted] the more general dissemination of a message to the targeted audience." However, as the Hill petitioners claimed here, the targeted audience they wished to reach is unavailable except in the very location the sidewalk counselors are restrained from using for protest. Justice Kennedy stated in his dissent that "[d]oor-to-door distributions or mass mailing or telephone campaigns are not effective alternative avenues of communication for petitioners . . . . [T]he statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression." Colo. Rev. Stat. § 18-9-122 fails to leave open ample effective alternative channels for antiabortion speech, and therefore does not meet the Ward test for constitutionality of a time, place, and manner restriction.

D. Vagueness

In addition to the aforementioned problems with Colo. Rev. Stat. § 18-9-122, the statute leads to many difficulties because it is vague. One of the most difficult questions regarding Colo. Rev. Stat. § 18-9-122 is how to effectively and fairly enforce the consent requirement embedded within it. According to the statute, the consent of an individual is required in order to avoid criminal prosecution for an approach within eight feet of a person who has entered the 100-foot buffer zone around a medical clinic. This raises concerns about common human interaction. How will a protestor be able to determine whether consent has been given? How will a client approaching a medical facility know that an individual (such as a sidewalk counselor) requires the client's consent before the client may be approached? There are no answers to these practical enforcement difficulties contained within the Supreme Court's opinion or lower court opinions. However, because criminal prosecution under the statute depends on a lack of consent, the issue is of the most vital importance.

In addition to the consent difficulty, the question of compliance with the floating buffer zone remains unanswered. The Supreme Court contended that the scienter requirement ("knowingly") would protect an individual from an unintended violation of the statute.

161. See Ward, 491 U.S. 791.
164. Id. at 2498.
However, the Court fails to respond to the basic concern expressed by the petitioners. In a highly emotional and often crowded situation, it will be difficult for any person, even those with the best intentions of complying with the regulation, to accurately estimate and maintain an eight-foot distance while continuing their speech. Are these individuals to be prosecuted if their estimation is off by one foot? This uncertainty about the common application of the most basic facet of the legislation could restrict speech in an even broader manner. Out of fear of prosecution, antiabortion protestors will maintain 10-foot, 15-foot, or even 20-foot distances from those entering medical clinics. In its application, therefore, the statute will have a chilling effect upon speech that the statute it was not intended to reach. The Supreme Court, in the majority opinion, did not adequately deal with this problem.

E. Public Policy

An additional public policy issue concerns the need for a statute such as Colo. Rev. Stat. § 18-9-122 to ensure access to medical clinics. Why is it necessary to create a statute that restricts First Amendment freedoms when other means exist of accomplishing the State of Colorado's goal? The Federal Access to Clinic Entrances Act comes to mind. The precedent of this federal legislation established a model for states that wished to provide further protection for their citizens' access to medical services. Yet, the FACE Act, while providing the protection sought by the Colorado General Assembly, did not restrict speech in any manner. In addition to the FACE Act, there are several common law tort or criminal causes of action to protect those entering medical clinics, including the law of trespass, intentional infliction of emotional distress, assault, battery, and false imprisonment.¹⁶⁵ None of these actions restrict speech, yet could be applied to discourage interference with access to medical facilities. The fact that the Colorado General Assembly saw the need to bypass these traditional and readily enforceable remedies to remove the petitioners' ability to exercise their free speech rights speaks volumes about the true purpose of this statute. As far as Colo. Rev. Stat. § 18-9-122 creates restrictions upon speech when current law could be applied to resolve the State's concerns, it represents bad public policy as a duplicative and overly restrictive regulation.

¹⁶⁵. Id. at 2522.
F. Implications

The Supreme Court's majority opinion in Hill v. Colorado constitutes a major change in the history of First Amendment jurisprudence. For the first time, the Supreme Court has recognized a citizen's ability to silence speech on the basis of his disagreement with its content in a traditional public forum. The Court refers to this ability as the "right to be let alone". This reduced protection of free speech contravenes Supreme Court precedent in many First Amendment cases. For example, in Cohen v. California, the Court stated that if offensive speech occurred in a public forum, the burden was on the members of the audience to avert their eyes or otherwise ignore the offensiveness of the speech. The only location in which the Court has previously recognized this so-called "right to be let alone" is in the privacy of one's own home. Thus, the Supreme Court extended the right to be let alone in one's home to an unwilling listener in a traditional public forum.

The implications of this new "right" boggle the mind. Perhaps, if stretched to its maximum application, the ability of a citizen to avoid unpopular speech in a traditional public forum could signal the death of First Amendment freedoms, although it is unlikely that such a flagrant disregard for First Amendment protections will be propounded by the Supreme Court. In the area of protest speech, however, there may be significant changes in the ability of speakers to "force" their ideas upon unwilling listeners. The most obvious application of this new right is within the subject matter of the Hill controversy. Antiabortion protestors across the nation may find protesting in traditional methods to be criminalized if unwanted (which is usually the case). This restriction, based on the right to be let alone, may sound the death knell for antiabortion speech as we know it.

It is possible that the new "right to be let alone" could be used to solve some of the stickiest constitutional conundrums we face as Americans. For example, the right to be let alone, if expanded and duly recognized, could be used to curtail hate speech. Certainly the town of Skokie, Illinois would find this result agreeable! Indeed, if a person disagreed with the message delivered as hate speech (which by its literal definition is probable), that person, under a statute that recog-

166. Id. at 2489.
nized the right to be let alone in a public forum, might prosecute a Ku Klux Klan member for addressing him in an unwanted fashion on a public street.

V. CONCLUSION

The United States Supreme Court, in its disposition of Hill v. Colorado, ignored several major flaws in Colo. Rev. Stat. § 18-9-122. Indeed, the statute could have been declared unconstitutional on its face for several reasons: its overbreadth, its basis on content, and its invalidity as a time, place, and manner restriction. Nevertheless, the statute stands as a defensive coup for abortion patients and supporters in Colorado. The effects of the Hill case reach far beyond one state, however, due to the Court’s introduction of a new right. The “right to be let alone”, whether one disagrees with its invention or not, will have drastic consequences on the future of protest speech, particularly in the antiabortion protest area. Whether the “right to be let alone” will be utilized in other questionable areas of constitutional doctrine remains to be seen, but one can only hope the creation of this new “right” does not symbolize the end of a traditional freedom.

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