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CHARLES LUGOSI*

I. INTRODUCTION

Judge Frank Easterbrook reminded the legal community that focusing on a single strand of law was "doomed to be shallow" and would "miss [the] unifying principles" that bring integrity and consistency to legal doctrine.[1] His metaphor was the "Law of the Horse," and his concern was about the development of a law unique to cyberspace.[2] In this essay, I have identified a different kind of animal that has escaped its enclosure and has run amok in the field of constitutional law, depositing its manure all over First Amendment jurisprudence, leaving it a mess. What I am referring to is the "sacred cow" of abortion.[3]

Roe v. Wade[4] and its progeny[5] has had in the field of constitutional law the same kind of effect as yeast working its way through a batch of dough. Ordinarily that might be of no concern, unless we are talking about unleavened bread fit for Passover. Intellectual integrity has been sacrificed to defend the "sacred cow" of abortion by claiming the First Amendment as its latest victim,[6] subordinating the constitutional right of

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1. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996).

2. *Id.* at 207-8.

3. This descriptive term is in no way intended to offend any Hindus or to bear any resemblance to any established religion that in fact worships cows. In this essay, "sacred cow" means the veneration of the right to an abortion and the elevated status of *Roe v. Wade*, 410 U.S. 113 (1973), in the hierarchy of values defended emotionally and passionately by members of the Supreme Court.

4. 410 U.S. 113 (1973).

5. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reprod. Health Serv., 492 U.S. 490 (1989); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Maher v. Roe, 432 U.S. 464 (1977); Doe v. Bolton, 410 U.S. 179 (1973).

6. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994) (Scalia, J., dissenting).

free speech to the lesser interest or right to be let alone.[7] This essay asserts that the right to be let alone is not constitutionally equal to the preferred position of free speech[8] and must give way in the contest between these two values in order to preserve democracy.[9] The purity of constitutional law has been contaminated by grafting into the tree of life and liberty the right to be let alone, which does not fit within a democratic society treasuring the free exchange of ideas based upon the constitutional right that "Congress shall make no law . . . abridging the freedom of speech . . . ."[10] It is my contention that the engrafted branch of law supporting the right to be let alone from other people in the public forum is unnatural and incompatible with its host, and will one day be rejected, die, whither and drop off the constitutional tree.

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7. Judge Thomas Cooley, in his treatise on the law of torts, used the phrase, "[t]he right . . . to be let alone" in the context of an individual's right to be free from physical trespass. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888). Louis Brandeis and Samuel Warren have generally been credited with popularizing the phrase, "the right to be let alone," in their article, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), which dealt with the tort liability and intrusiveness of yellow journalists, who behaved like the modern day paparazzi who chased Princess Diana to her death. After his appointment to the Supreme Court, Justice Brandeis, in *Olmstead v. United States*, elevated the right to be let alone to constitutional status. *See* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) Justice Brandeis was deeply troubled by the use of wiretaps by police to gather evidence against individuals who sought to profit during Prohibition by importing liquor from British Columbia, Canada. *See id.* He believed citizens had a constitutional right to privacy from the prying surveillance techniques of the government, declaring:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They 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, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Id. (emphasis added).

8. *See* Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting). Specifically, Justice Douglas wrote:

> The First Amendment is couched in absolute terms -- freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment."

Id.

9. In this essay, democracy is not defined as simple majority rule, but includes a society where collective decisions are made by political institutions whose structure, composition and practices treat all members of the community as individuals, with equal concern and respect. Essential to this concept of democracy is "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . ." Stromberg v. California, 283 U.S. 359, 369 (1931).

10. U.S. CONST. amend. I.

Invoking the right to be let alone has choked the right of the citizen from engaging in the core value of debating on a personal and intimate level the moral choice of women whether or not to kill their own unborn sons and daughters. However, since 1973, the Supreme Court has repeatedly resorted to a "whatever-it-takes"[11] approach to stifle the flow of information to a pregnant woman, whether as part of a legislative scheme to ensure informed consent,[12] or from private citizens, compelled by their conscience and moral convictions to save the lives of unborn children.[13] No legal rule or doctrine has been safe from "ad hoc nullification"[14] in defense of the "sacred cow" of abortion. The most recent example of this has been the case of *Hill v. Colorado*.[15]

A new form of Iron Curtain called a "bubble zone,"[16] has invaded the traditional public forum of city sidewalks, insulating any unwilling listener from any speaker who might prick another's conscience by saying in ordinary civil conversation that abortion is a moral evil and the unjust killing of innocent human life. According to Justice Scalia, "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents."[17] The suppression of one-to-one conversations on the topic of persuading women contemplating abortion that killing unborn babies is wrong is the core speech made illegal by a Supreme Court bent on preserving the "sacred cow" of abortion, even if the Court's reasoning flies in the face of traditional First Amendment principles and values.

The right to be let alone is meaningless unless put into context. There are different species of the right to be let alone.[18] In this essay,

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11. Hill v. Colorado, 530 U.S. 703, 762 (2000) (Scalia, J., dissenting).

12. *See* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 760 (1986). "[T]he State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444 (1983), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

13. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 380 (1997) (upholding the provisions of the district court's injunction imposing 15-foot "fixed buffer zones around the doorways, driveways, and driveway entrances" of abortion facilities); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994) (holding "that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment").

14. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) ("Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion."); *see also Madsen*, 512 U.S. at 785 (Scalia, J., dissenting) (citing *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting)).

15. 530 U.S. 703 (2000).

16. Also known as buffer zones. *See Schenck*, 519 U.S. at 361.

17. *Hill*, 530 U.S. at 753 (Scalia, J., dissenting).

18. *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1434 (1992). Gormley summarized the types of privacy as follows:

> Species #1: The right to be let alone, with respect to the acquisition and dissemination of information concerning the person, particularly through unauthorized publication, photography or other media. (Warren & Brandeis's original privacy tort).

freedom from speech is assumed to be the value cherished by the unwilling listener. Silence is golden. What the unwilling listener wants to be free from is hearing moral messages when walking on a public sidewalk on the way into a place where abortions take place.

Since there is a legal right to an abortion, I assume a woman who plans to exercise this option may feel entitled to a portable zone of personal autonomy and a sealed conscience that may not be disturbed. Such an island of tranquility is vital to any woman who is unwilling to venture into the hurricane of controversy swirling about her decision to abort. Being in the eye of the hurricane brings only temporary respite, as the societal issue of abortion is bigger than any one individual, and eventually engulfs any woman who is contemplating or has undergone an abortion.

Another underlying premise in the right to be let alone is the "me" generation's freedom to choose to "tune in" or to "tune out."[19] The desire to control one's environment from incoming communications requires the suppression of unwelcome communications that make one feel uncomfortable or annoyed. The solution is an invisible portable cone of silence, similar in theory to the silly visible one Secret Agent Maxwell Smart put over his head to isolate himself in conversations with "Chief."[20]

Another benefit from the right to be let alone is freedom from inconvenient interruptions of planned activities.[21] People are in a hurry, and taking the time to talk is an old fashioned practice from an earlier time known to the generation of old timers who used to watch on black and

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Species #2: The right to be let alone, with respect to governmental searches and seizures which invade a sphere of individual solitude deemed reasonable by society. (Fourth Amendment privacy).

Species #3: The right to be let alone, when one individual's freedom of speech threatens to disrupt another citizen's liberty of thought and repose. (First Amendment privacy).

Species #4: The right to be let alone, with respect to fundamental (often unanticipated) decisions concerning the individual's own person, which are explicitly or implicitly reserved to the citizen (rather than ceded to the government) by the terms of the social contract. (Fourteenth Amendment privacy).

Species #5: The right to be let alone, with respect to a variety of private and governmental intrusions generally overlapping with species number one through number four above, yet often extending greater protections to the citizen by virtue of independent state constitutional provisions. (State constitutional privacy).

Id.

19. "Tune in, tune out," were typical attitudes adopted by the Hippies of the 1960's, who advocated casual promiscuous sex outside of marriage.

20. The name of this comedy TV series was *Get Smart* (NBC 1965-69, CBS 1969-70).

21. I have "miles to go before I sleep," writes poet Robert Frost. ROBERT FROST, *Stopping by Woods on a Snowy Evening*, *in* SELECTED POEMS OF ROBERT FROST 140, 140 (1963). The last thing some people want is to be interrupted with a message they do not want to receive.

white televisions, Andy, Opie, Aunt Bee and Barney - those lovable characters who inhabited the make-believe Southern town of Mayberry.[22]

I further assume that freedom from ideas that deeply offend fixed positions on moral and spiritual issues influencing personal choice is yet another reason why the content of a message disapproving of abortion is so vigorously resisted.

Fear and insecurity is at the heart of the unwilling listener, whose hardened resolve to go through with an abortion may melt in response to a message of love, support and concern from a stranger who has nothing to gain. The easiest way to overcome vulnerability is to hear only messages that say what you want to hear, and to block those messages that you fear will change your mind. When a prominent leader of the abortion cause like Dr. Bernard Nathanson,[23] and a poster-child, like Norma McCorvey,[24] the Jane Roe of *Roe v. Wade* fame, repent of their pro-choice actions and beliefs, and become ardent pro-lifers, there is good reason to fear the "sacred cow" of abortion will soon be slaughtered.

This essay will examine the tension between the law of privacy and First Amendment jurisprudence. The public forum will be defined. What *Hill* decided will be discussed. The question of freedom from speech and the legal limits to free speech will be examined. I will then discuss the principles and values at the core of the First Amendment and the essential role it serves to make democracy function. Next, the impact of *Hill* on the First Amendment will be discussed. I will then review the rise of the right to be let alone in First Amendment jurisprudence. The law establishing that there is no right to be let alone in the public forum will be reviewed. The question of protected and unprotected speech, and the content of those messages, will be discussed. I will then evaluate whether there is a constitutional right to be let alone. The First Amendment abortion line of cases[25] will then be evaluated to see if there is indeed a "distortion" in the constitutional jurisprudence that requires fixing, and what damage, if any, was done to the First Amendment by those cases. The

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22. *The Andy Griffith Show* (CBS 1960-68), is known for the moral values it imparted to viewers.

23. Co-founder in 1969 of the organization that became known as the National Abortion and Reproductive Rights Action League (NARRAL), and a physician who personally presided over 60,000 abortions, Dr. Nathanson converted from Judaism to Roman Catholicism. BERNARD NATHANSON, M.D., THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND (1996) (describing his journey from abortion provider to pro-life advocate).

24. McCorvey, who had been a hard-core supporter of abortion rights, worked at a Dallas abortion clinic and engaged in personal conversations with Rev. Phillip Benson, leader of the Operation Rescue office next door to the clinic. Eventually she accepted an invitation to attend church and was later baptized by Benson. She is now a pro-life activist and has started her own ministry called "Roe No More." She now prays for pro-choice leaders to repent. Her story is *available at* http://www.cnn.com/SPECIALS/1998/roe.wade/stories/roe.profile.

25. *See* cases cited *supra* notes 4-5.

issue of supremacy between privacy and free speech will be then assessed in my conclusion.

I conclude that more free speech is the answer, not less, on the issue of abortion. I agree with Justices Scalia and Thomas that there is no constitutional principle shielding an unwilling listener from moral or other messages in the public forum.[26] I further agree with Professor Haiman that the law should not protect the unwilling listener from the initial impact of any kind of communication in the public forum.[27] I also conclude that *Roe v. Wade*[28] is bad constitutional law, and must be overruled to prevent further injury to First Amendment jurisprudence.[29] If the Court remains faithful to current abortion law precedents, the ripple effect from cases like *Hill* will turn into a tidal wave, destroying the free speech rights of unionists, environmentalists, political activists, conscientious objectors and evangelists.

The solution is to place the burden of tolerating free speech in the public forum upon the listener as a reasonable price to pay to live in a free and democratic society. There are enough civil and criminal sanctions already in the law to deal with zealots who refuse to cease and desist. Creating the law of the "sacred cow" was unnecessary and a huge mistake. A legal system that worked was already in place. Perpetuating the law of the "sacred cow" will aggravate the errors of *Roe* and make a bad case like *Lochner v. New York*[30] look good to future law students.

II. THE PUBLIC FORUM

The focus of this discussion is the collision between the constitutional right to freedom of speech and the desire to be left alone in the

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26. *See* Hill v. Colorado, 530 U.S. 703, 752 (2000).

27. *See* Franklyn Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?* 67 NW. U. L. REV. 153, 193 (1972) (theorizing that "the law should not attempt to insulate any persons in our society, no matter how willing or unwilling an audience they may be, from the initial impact of any kind of communication, but that the law should protect their right to escape from a continued bombardment by that communication if they wish to be free from it."); *but see* Alan Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 U.C. DAVIS L. REV. 1163, 1172-73 (1996) (arguing that speech targeted at the unwilling listener is blatant harassment).

28. 410 U.S. 113 (1973).

29. *See* Thornburgh v. Am. College of Obstetricians and Gynecologists, 476 U.S. 747, 793-94 (1986) (White, J., and Rehnquist, J., dissenting) (arguing that "the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences."); *see also Hill*, 530 U.S. at 787-89 (Kennedy, J., dissenting) (linking the destruction of free speech to the Court's self-serving defense of illegitimate abortion rights: "Laws punishing speech which protests the lawfulness or the morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against . . . Absent the ability to ask the government to intervene, citizens who oppose abortion must seek to convince their fellow citizens of the moral imperative of their cause . . . What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse.").

30. 198 U.S. 45 (1905).

traditional public forum.[31] The specific public forums discussed in this essay are public streets and sidewalks. "Streets" were referred to by Justice Roberts in *Hague v. Committee for Industrial Organization*:[32]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[33]

In *Amalgamated Food Employees Union v. Logan Valley Plaza*,[34] Justice Marshall included "sidewalks" when he referred to *Hague* and other cases in support of the general proposition that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[35] It is beyond dispute that a public sidewalk, even in front of the Supreme Court building itself, is a public forum where any person has a general First Amendment right to speak.[36]

III. WHAT *HILL* DECIDED

Abortion is unquestionably a public issue debated with vigor and passion between individuals who hold differing views. It is the classic exercise of freedom of speech. Communicating thoughts by opening conversations with strangers on the public sidewalks heading toward entrances to abortion clinics has now been outlawed by *Hill* unless the intended recipient is willing to listen.[37] Without deciding that there exists a constitutional right to be free from unpopular speech in a public forum, Justice Stevens balanced the interests of unwilling listeners against the constitutional right of free speech, and upheld the legality of an eight-

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31. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45-46 (1983) (identifying three types of public forum: the traditional public forum; the public forum created by public designation; and the non-public forum).

32. 307 U.S. 496 (1939).

33. *Hague*, 307 U.S. at 515-16 (emphasis added).

34. 391 U.S. 308 (1968).

35. *Amalgamated Food* 391 U.S. at 315.

36. *See* United States v. Grace, 461 U.S. 171, 179-80 (1983).

37. *See* Hill v. Colorado, 530 U.S. 703, 728 (2000).

foot bubble zone.[38] In so doing, he severed personal speech from detached speech.[39]

As a result, some types of personal conduct, such as the arm's length handing out of pamphlets, were eliminated. Equally devastating was the end of personal speech and the loss of meaningful opportunities for quiet interpersonal conversations that once facilitated the creation of rapport between the sidewalk counselor (the initiator of the conversation), and the pregnant mother, the recipient.

What Justice Stevens left intact was detached speech, conducted outside the bubble zone, in the form of picket signs and bullhorns. Detached speech functions well as a demonstration of belief, but it is an ineffective and counterproductive means of persuading individuals that abortion is a moral evil for which viable alternatives exist. Shouts of "baby killer" from outside a bubble zone will only relieve the frustration of insensitive fanatics, who might otherwise use a gun or bomb against abortionists. Unfortunately, these remarks only increase the desire of pregnant women to be left alone from such idiotic (and counterproductive) behavior.

Predictably, the next legal weapon against anti-abortion demonstrators will be a law against excessive noise originating outside the perimeter of a bubble zone. Patients at medical facilities are entitled to peace and quiet, to alleviate health risks and promote psychological health.[40] However, a prior restraint on First Amendment rights, which attempts to lessen the psychological harm that might be inflicted on an intended class of persons, may be unlawful, especially where a means of escaping the anticipated harm is available by notice and location.[41]

IV. REASONABLE LIMITS TO FREE SPEECH IN THE PUBLIC FORUM

The Supreme Court has been willing to sanction state and municipal laws creating reasonable time, place and manner regulations that limit free speech irrespective of content.[42] The Court has prohibited blaring

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38. *See Hill* 530 U.S. at 729-30.

39. *See* Darrin Alan Hostetler, *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) (defining personal and detached speech).

40. *See* Beth Israel Hosp. v. Nat'l Labor Relations Bd., 437 U.S. 483, 509 (Blackmun, J., concurring)

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are 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 -- irrespective of whether that patient and that family are labor or management oriented -- need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed.

41. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

42. *See* Erznosnik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

sound from loudspeakers mounted on trucks roaming city streets at night,[43] upheld an anti-noise ordinance silencing civil rights demonstrations on a public sidewalk outside a senior high school,[44] and affirmed the right of the City of New York to control the amplified volume of raucous rock concerts in Central Park.[45] When the Court in *Public Utilities Commission v. Pollak*[46] permitted a street railroad company to broadcast music and commercials from radio programs, which enhanced the public transit experience for a majority of its riders,[47] Justice Black drew the line at the broadcasting of news, public speeches, views, or propaganda of any kind.[48] Justice Douglas delivered a powerful dissent, basing his opinion on the right to be let alone. He stated:

> The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. *The right to be let alone is indeed the beginning of all freedom.* Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. *A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy.* He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. *The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.* If we remembered this lesson taught by the First Amendment, I do not believe we would construe "liberty" within the meaning of the Fifth Amendment as narrowly as the Court does. *The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on streetcars traveling to and from home. In one sense it can be said that those who ride the streetcars do so voluntarily. Yet in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command.* The streetcar audience is a captive audience. It is there as a matter of necessity, not

43. *See* Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949).
44. *See* Grayned v. City of Rockford, 408 U.S. 104, 121 (1972).
45. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).
46. 343 U.S. 451 (1952).
47. *See Pub. Util. Comm'n,* 343 U.S. at 465-66.
48. *See id.* at 469 (Black, J., dissenting).

> of choice. One who is in a public vehicle may not of course complain of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel. One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen. *When we force people to listen to another's ideas, we give the propagandist a powerful weapon.* Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. Today the purpose is benign; there is no invidious cast to the programs. But the vice is inherent in the system. Once privacy is invaded, privacy is gone. Once a man is forced to submit to one type of radio program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program. If liberty is to flourish, government should never be allowed to force people to listen to any radio program. *The right of privacy should include the right to pick and choose* from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. *The right of privacy, today violated, is a powerful deterrent to anyone who would control men's minds.*[49]

Justice Douglas' ideas of captivity and the right to be let alone have taken root, and on the surface, lend themselves well to the bubble zone issue, as pregnant women seeking an abortion may have to travel on a public sidewalk to enter a clinic and inevitably face the prospect of confrontation with shouting pro-lifers exercising their lungs and their constitutional free speech rights. During the height of the Operation Rescue movement in the early 1990's,[50] getting into an abortion clinic was the

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49. *Id.* at 467-69 (emphasis added).

50. *See* http://www.altculture.com/.index/aentries/o/operationx.html.
(describing the rise and fall of Operation Rescue):
Antiabortion group that radicalized the pro-life movement of the late '80s and early '90s through mammoth clinic blockades and rhetoric equating abortion with murder and the Holocaust. Randall Terry (b. 1959), who founded OR [Operation Rescue] in 1987 while working as a used-car salesman in upstate New York, is credited with originating anti-abortion civil disobedience and militancy. The group's protests first came to the country's attention at the 1988 Democratic National Convention in Atlanta and peaked with the 46-day shutdown of Wichita, Kansas, in 1991. Three years later, OR was in splinters. In a single month (May 1994), RU-486 was licensed for U.S. production, the Freedom of Access to Clinic Entrances Act was signed into law, and a Houston jury ordered OR members to pay $1 million in punitive damages for a 1992 blockade of a local Planned Parenthood clinic. The Catholic Church also began to grow wary of the sidewalk counseling, surveillance, blockade, and harassment tactics taught at the group's Melbourne, Florida, training center. After

modern day equivalent of running the gauntlet in medieval times. However, those days are long over, and the faithful few who continue to maintain lonely vigils outside abortion clinics typically have different credentials. Leila Hill, the petitioner in *Hill*, is one of these faithful few. Ms. Hill, a paralegal and former obstetrics nurse, joined with others to form a group which provided education about the risks of abortion to pregnant women.[51] They called themselves "Sidewalk Counselors For Life."[52] Their behavior was impeccable, leading Justice Stevens to conclude that the sidewalk counseling conducted by Leila Hill and her fellow petitioners was neither abusive nor confrontational.[53]

It may be helpful to put Justice Douglas' dissent in *Pollak* into perspective.[54] Justice Douglas wrote this dissent during the Cold War when the threat of communism spawned McCarthyism. Americans were wary of mind control, and movies such as The Manchurian Candidate[55] exemplified the paranoia of the day. Radio broadcasts from Moscow and from the Voice of American fought ideological warfare on the short-wave band. To import Justice Douglas' reasoning now into the abortion debate takes it out of the context for which it was authored.

Minneapolis was selected by OR in 1993 as one of seven 'cities of refuge,' the archbishop there explicitly asked OR to stay away. The March 1993 murder of Florida doctor David Gunn led to a split between those condoning and condemning the violence--Terry left OR for the militia-affiliated United States Taxpayers Party, while some of the group's most strident leaders formed the American Coalition of Life Activists, a group that in 1995 published a 'Deadly Dozen' list targeting 12 American abortion doctors for harassment. By the mid-'90s, the internally divided OR had lost considerable visibility.

51. *See* Brian W. Oberst, *Buffering Free Speech: An Examination of the Impact of Colorado's Buffer Zone Law on Protected Speech after Hill v. Colorado*, 24 HAMLINE L. REV. 89, 90 (2000) (discussing Leila Hill and her "Sidewalk Counselors For Life" group).

52. *Id.*

53. *See* Hill v. Colorado, 530 U.S. 703, 752 (2000).

54. *See* Pub. Util. Comm'n v. Pollack, 343 U.S. 451, 467-69 (1952).

55. Roger Ebert wrote a glowing review of the movie, giving it the maximum rating of four stars. Here is part of the review:

> Here is a movie that was made in 1962, and it feels as if it were made yesterday. Not a moment of THE MANCHURIAN CANDIDATE lacks edge and tension and a cynical spin-and what's even more surprising is how the film now plays as a political comedy, as well as a thriller. After being suppressed for a quarter of a century, after becoming an unseen legend that never turned up on TV or on home video, John Frankenheimer's 1962 masterpiece now re-emerges as one of the best and brightest of modern American films. The story is a matter of many levels, some of them frightening, some pointed with satirical barbs. In a riveting opening sequence, a group of American combat infantrymen are shown being brainwashed by a confident Chinese communist hypnotist, who has them so surely under his control that one man is ordered to strangle one of his buddies and shoot another in the head, and cheerfully complies. Two members of the group get our special attention: the characters played by Frank Sinatra and Laurence Harvey. Harvey seems to be the main target of the Chinese scheme, which is to return him to American society as a war hero, and then allow him to lead a normal life until he is triggered by a buried hypnotic suggestion, and turned into an assassin completely brainwashed to take orders from his enemy controller.

See http://www.sharf.com/jennie/lansbury/manchur/ebert.html.

Justice Black observed the need for limits to free speech to combat noisy demonstrations in his opinion in *Gregory v. Chicago*:[56]

> No mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of *boisterous* and threatening conduct that *disturbs the tranquility* of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other *buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.*[57]

The alternative to control, feared Justice Black, was to sow the seeds of anarchy:

> Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out, and become no more than relics of a gone but not forgotten past. Churches would be compelled to welcome into their buildings invaders who came but to *scoff and jeer*; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes. And perhaps worse than all other changes, homes, the sacred retreat to which families repair for their privacy and their daily way of living, would have to have their doors thrown open to all who desired to convert the occupants to new views, new morals, and a new way of life. Men and women who hold public office would be compelled, simply because they did hold public office, to lose the comforts and privacy of an unpicketed home. I believe that our Constitution, written for the ages, to endure except as changed in the manner it provides, did not create a government with such monumental weaknesses. Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government *from noisy, marching, tramping, threatening picketers and demonstrators* bent on filling the minds of men, women, and children with fears of the unknown.[58]

It is a small incremental step to arrest anti-abortionists clamoring too loudly outside of a bubble zone. For example, in the first six months after its enactment, Baptist evangelists in Beaufort, South Carolina, were the only persons prosecuted for violating a local anti-noise ordinance for

56. 394 U.S. 111 (1969).
57. *Gregory*, 394 U.S. at 118 (emphasis added).
58. *Id.* at 125 (emphasis added).

raising their voices above the ordinary din of road and sidewalk traffic.[59] Dozens of seminary students have been arrested for the crime of preaching the gospel too loudly with their unaided voices outside the businesses of local merchants.[60] The content of the offending speech expressed moral views against abortion, immorality, homosexuality, and alcohol abuse.[61] Such restrictions on sidewalk and street corner preaching are not isolated events.[62]

The right to be let alone from detached speech will thus be easily accomplished by the application of existing jurisprudence.

All of this may be a pyrrhic victory, now that the availability of the abortion pill RU-486[63] has potentially changed the location of most abortions from the clinic to the privacy of the home.

The price for all this is has been the evisceration of the First Amendment. It is worth re-visiting the basic values and principles of First Amendment jurisprudence just to see how high that price has been.

V. THE VALUES AND PRINCIPLES AT THE CORE OF THE FIRST AMENDMENT

Debate on public issues as a matter of general principle should be "uninhibited, robust and wide-open."[64] In public debate, people "must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment."[65] The idea is that the "the best test of truth is the power of the

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59. *See* Patrick J. Flynn, *Street Preachers Versus Merchants: Will the First Amendment be Held Captive in the Balance?*, 14 ST. LOUIS U. PUB. L. REV. 613, 649 (1995).

60. *See id.* at 613.

61. *See id.* at 642.

62. *See e.g.*, Eanes v. State, 569 A.2d 604 (Md. 1992); Marks v. Florida, No. 91-1989 (Fla. Dist. Ct. App. 1992); City of Beaufort v. Baker, 432 S.E.2d 470 (S.C. 1993).

63. The following summary explaining RU-486 was taken from a Canadian web site:

> The medication "mifepristone" was invented in France by Dr. Etienne-Emile Baulieu in 1980. It is widely know as "RU-486" throughout North America. The letters are taken from the initials of the pharmaceutical company Roussel-Uclaf. The "486" is an arbitrary lab serial number. It was first introduced in France, where it is called Mifegyne. It has been used, in combination with prostaglandin medication, to induce abortions in about 500,000 women over almost 2 decades.
>
> Danco Laboratories, the U.S., distributor expected to be selling the pill in the U.S. by the end of 1999. That did not happen. The FDA finally approved the pill for U.S. distribution on September 28, 2000. It will be distributed under the name "Early Option Pill." In the U.S. RU-486 is to be taken within 49 days after the start of the last menstrual period. It is an antiprogestin. It binds itself to progesterone receptors on the wall of the uterus thus blocking the effect of the woman's natural progesterone. This triggers the shedding of the uterine wall, much like a normal period. RU-486 also opens the cervix, and causes mild contractions which help expel the embryo. The initial dose often causes some nausea, headache, weakness, diarrhea and/or fatigue. It may be taken at home up to the end of the first seven weeks of pregnancy.

http://www.religioustolerance.org/aboru486.htm.

64. N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

65. Boos v. Barry, 485 U.S. 312, 322 (1988) (citing Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

thought to get itself accepted in the competition of the market. . ."[66] Further, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."[67] The Supreme Court has stated, "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[68] The Court has also added, "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[69] Unpopular views peacefully communicated in a public forum may not be criminalized.[70] Provided the means of communication are peaceful, the message itself need not meet standards of public acceptability.[71] Democracy requires the personal communication of diverse ideas without fear of repression and criminal sanctions:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[72]

A total ban on conversational speech on a public sidewalk within a bubble zone on the perimeter of an abortion clinic is outright unconstitutional censorship discriminating against opponents of abortion.[73] This kind of suppression is not just a facial violation of the First Amendment; it cuts out the core of what it means to be an American. Justices Brandeis and Holmes, concurring in *Whitney v. California*,[74] believed that free speech was the foundation of liberty:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its

66. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).
67. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).
68. Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940).
69. NAACP v. Clairborne Hardware, 458 U.S. 886, 910 (1982).
70. *See* Edwards v. South Carolina, 372 U.S. 229, 237 (1963).
71. *See* Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
72. Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).
73. *See* Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J. concurring) (stating that picking and choosing which views may be discussed in a public forum is "censorship of the most odious form.").
74. 274 U.S. 357 (1927).

> government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that *freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth*; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that *public discussion is a political duty;* and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form.* Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. [75]

Suppression of freedom of speech inevitably sets off a chain reaction of events that culminates in growing social unrest until violence erupts. Sidewalk counselors view their moral imperative as a mission to expose the fallacies and falsehoods of abortion and to overcome its evil by education and compassion through intimate personal conversation. More speech is the answer, not enforced silence. Laws that silence the voices of quiet conversationalists is evidence of the cowardice of those who fear judicial reversal of *Roe* and the influence of the sidewalk counselors. Repression of sidewalk counselors can never be justified in a truly democratic society:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.* Only an emergency can justify repression. Such must be the rule if authority is to

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75. *Whitney*, 274 U.S. at 375-76 (emphasis added).

> be reconciled with freedom. Such, in my opinion, is the command of the Constitution.[76]

Whether or not bubble zone laws purport to be neutral, in reality these laws impact only pro-life advocates. The net result is that judges and governments control what ideas can be publicly debated, where, when, how, and by what means. This practice offends not only the First Amendment, but the Fourteenth as well:

> ...under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[77]

Bubble zone laws, created by judicial injunction or by legislative ordinance are the latest tools to take away the constitutional right of a person to approach another in the public forum and offer an idea that may or may not be welcomed. This is an attack on democracy itself:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.[78]

VI. IMPACT OF *HILL* ON ESTABLISHED FIRST AMENDMENT VALUES AND FREEDOMS

If *Hill* was correctly decided, then *Martin v. Struthers*[79] is in grave jeopardy. In *Martin*, the Supreme Court weighed the competing interests between members of the Jehovah Witnesses' faith who exercised their faith by residential door-to-door canvassing, and the privacy rights of the occupants of residential dwellings to be left alone from the nuisance of the moral message.

The relevance of *Martin* is immediately apparent. It is trite to say that until the door was opened to the visitor, it was generally impossible to know in advance whether the offer to engage in conversation about

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76. *Id.* at 377 (emphasis added).
77. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (emphasis added).
78. Stromberg v. California, 283 U.S. 359, 369 (1931).
79. 319 U.S. 141 (1943).

religion would result in a willing listener, who might accept a leaflet or an invitation to attend church. This situation is no different in principle from the dilemma faced by the sidewalk counselor, who has no idea how to identify a willing listener, without first risking a violation of a bubble zone law which prohibits the approach of an offer to talk to an unwilling listener.

In *Martin,* a divided Court struck down the municipal ordinance that protected residents from religious proselytizing. Justice Frankfurter dissented, recognizing that homes are sanctuaries from intrusions upon privacy and a place of rest from the stress of modern urban life.[80] Justices Roberts and Jackson joined Justice Reed in his dissent. He stated:

> No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment.[81]

This argument is hauntingly familiar to that of the majority in *Hill.*

Justice Reed further suggested that the mere passage of time can result in the loss of a constitutional freedom that has fallen into disuse:

> The antiquity and prevalence of colportage are relied on to support the Court's decision. But the practice has persisted because the householder was acquiescent. *It can hardly be thought, however, that long indulgence of a practice which many or all citizens have welcomed or tolerated creates a constitutional right to its continuance.* Changing conditions have begotten modification by law of many practices once deemed a part of the individual's liberty.[82]

Assuming that the householder no longer was acquiescent to colportage, Justice Reed thought it was appropriate for the municipality to regulate its practice.

Of significance is a line in the dissent that refutes any attempt by Justice Stevens in *Hill* to characterize the unwilling recipient of communication as a "captive audience." Justice Reed wrote, "[t]he First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics."[83] In other words, the pregnant woman who is unwilling to listen can simply walk away. It's as simple as that. The burden is light on the unwilling listener, who in *Martin,* had only to shut the door or refuse to open it, and the pedestrian in *Hill,* who could just keep on walking without a response and be in the clinic in a matter of seconds.

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80. *See Martin,* 319 U.S. at 152-53.
81. *Id.* at 154-55.
82. *Id.* (emphasis added).
83. *Id.* at 157.

What *Martin* represents is that freedom and democracy demands nothing less than the right to exercise freedom of speech and the free exercise of religion. In a collision between the notion that a man's home is his castle, and religious freedom, there must be an accommodation of both privacy and freedom of speech.[84] A blanket law forbidding all attempts to initiate a conversation will affect both the willing and the unwilling listener. It is not for the Court or for the legislature or city hall to decide this issue on a uniform basis. It is the province of the person who receives the invitation to converse to decide for himself or herself whether or not to be a willing listener. In *Martin*, Justice Black framed the issue in the same manner:

> We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.[85]

The First Amendment is rooted in the dissemination of ideas. Taking away the choice of the potential listener by silencing the potential speaker is the aborting of free speech. A free society cannot tolerate a bubble zone muzzling conversations, just as it would not take away the right of homeowners in *Martin* of their responsibility to think for themselves and to make their own decision to communicate with the visitor at their door.[86] The *Martin* Court stated:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.[87]

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84. *See id.* at 150.
85. *See id.* at 143-44 (emphasis added).
86. *See id.* at 146-47.
87. *Id.*

In the aftermath of *Hill*, an inevitable challenge will be mounted at some point to reverse *Martin*. When that happens, there will be a great outcry from angry civil libertarians who will regret the judgment in *Hill*.

The future validity of *Marsh v. Alabama*[88] is also in doubt. In *Hill*, the Court used property law zoning as a model to create a bubble zone in a public forum, in essence forbidding trespassing into a zoned territory to offer a moral message. A property rights approach[89] not only elevates an abortion clinic, a commercial business, to the status of a private residence, it intrudes into the public forum. An apt comparison is the company town that was the subject of First Amendment litigation in *Marsh* by a member of the Jehovah Witnesses, who was convicted of distributing religious literature without company permission on the public sidewalk near the post office.[90] When a legal permit to distribute religious literature had been sought earlier, the company rejected the request.[91]

Justice Black's view of freedom prevailed, reversing the conviction. The right to freedom of religion outweighed the property rights at issue.[92] To be good citizens, people needed to be informed. To be properly informed, the information must be uncensored.[93]

The analogy to sidewalk counseling is obvious. The choice to abort requires full and informed consent. Censorship of views against abortion eliminate the possibility of making a fully informed decision. Abortion clinic owners are hostile to the message of pro-life supporters, and it would be bad for business to allow clients of a clinic to receive this message prior to an abortion. The absence of pro-life counselors invited inside abortion clinics for the purpose of dissuading pregnant mothers from having an abortion makes the point.

In his dissent in *Marsh*, Justice Reed suggested the proper course was to remove the speaker off the sidewalk freely used by the public, which was on company "property" and onto the public highway,[94] which was 30 feet away[95] from the contested location. The effect of this form of a "bubble zone" is to prohibit a close encounter with anyone entering or exiting the post office. The parallel with Justice Souter's reasoning in *Hill* is remarkable.[96]

The Court's historical defense of the communication of moral messages on public sidewalks was a result of the First Amendment being

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88. 326 U.S. 501 (1946).

89. *See* Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1 (1997); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

90. *See Marsh*, 326 U.S. at 503.

91. *See id.* at 503.

92. *See id.* at 509.

93. *See id.* at 508.

94. *Id.* at 517.

95. *Id.* at 514.

96. *See* Hill v. Colorado, 530 U.S. 703, 738-40 (2000).

regarded as a preferred constitutional right. Religious freedom and free speech were presumed to have a superior position over privacy, which at that time was not granted the present constitutional status it now enjoys.

VII. THE RISE OF THE RIGHT TO BE LET ALONE

Things began to change in a series of First Amendment cases in which the Court ruled against door-to-door magazine salesmen,[97] the advertisement of tobacco products,[98] the advertisement of election campaign propaganda on a public transit system,[99] the broadcasting of a vulgar social satire on commercial radio,[100] the delivery to private homes of junk mail tending to corrupt public morals,[101] the curtailment of the actions of members of a religious cult which aggressively solicited money and converts at limited public forums,[102] and a state fair.[103] This line of cases is distinguishable from *Martin* and *Marsh*, insofar as these other cases did not involve the communication of a moral message in a traditional public forum.

In *Rowan v. United States Post Office*,[104] the right of every person to be let alone from unwanted mail was placed on the scales with the right of others to communicate.[105] Every advertiser had the opportunity to communicate once with a homeowner, but thereafter the recipient could ask the Post Office to block further unwanted communications.[106] The Court upheld this freedom to be let alone, holding that "no one has a right to press even 'good' ideas on an unwilling recipient."[107] A person was permitted to erect a wall on the outer boundary of his residential domain so that no repeat advertiser might further penetrate without the prior consent of the intended recipient.[108]

In *Frisby v. Schultz*,[109] the home of an abortion provider was given protection from anti-abortion demonstrators.[110] To Justice O'Connor, the

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97. *See* Breard v. Alexandria, 341 U.S. 622 (1951).

98. *See* Packer Corp. v. Utah, 285 U.S. 105 (1932). Justice Brandeis did his best to use his position on the Supreme Court to push his concept of the right to be let alone. In 1932, a Utah statute banning tobacco ads from billboards throughout the state was upheld as a legitimate limitation on commercial free speech. The unwilling observer, claimed Brandeis, was unable to avert his eyes from unwelcome ads on public signs, which, unlike a radio, could not be turned off. *See id.*

99. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

100. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

101. *See* Rowan v. United States Post Office, 397 U.S. 728 (1970).

102. *See* Int'l Soc'y of Krishna Consciousness v. Lee, 505 U.S. 672 (1992); Board of Airport Comm'rs. v. Jews for Jesus, 482 U.S. 569 (1987).

103. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

104. 397 U.S. 728 (1970).

105. *See Rowan,* 397 U.S. at 736.

106. *See id.* at 729.

107. *Id.* at 738.

108. *See id.*

109. 487 U.S. 474 (1988).

110. *See Frisby,* 487 U.S. 474.

home was a refuge from intrusive offensive speech.[111] The privacy of the unwilling residential listener who was trapped or was hiding in his or her home prevailed over the constitutional free speech rights of demonstrators on the public sidewalks and streets in front of private residences.[112] Justice Brennan dissented in *Frisby*, noting that as long as the speech remained outside the home and did not unduly coerce the occupant, the government's interest in protecting residential privacy was not implicated.[113]

VIII. NO RIGHT TO BE LET ALONE IN THE PUBLIC FORUM

Going outside the home was another matter, for then the individual was subject to whatever assaulted his or her senses. "[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound . . . ."[114] In a free society, "one man's vulgarity is another's lyric."[115] Where a political message is communicated, even its vulgar character is to be tolerated as the price for living in a free society.[116] Justice Harlan held:

> While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. *Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.* In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. *Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.*[117]

Anticipating criticism of his opinion, Justice Harlan added:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open de-

111. *See id.* at 484-85.

112. *See* Carey v. Brown, 447 U.S. 455, 470-71 (1980).

113. *See Frisby*, 487 U.S. at 492-93 (Brennan, J. dissenting).

114. Rowan v. U.S. Post Office, 397 U.S. 728, 738 (1970).

115. Cohen v. California, 403 U.S. 15, 25 (1971).

116. *See Cohen*, 403 U.S. at 25 (discussing that Paul Cohen's jacket displayed the words, "Fuck the Draft," to express his feelings about conscription and the Vietnam War. While he wore the garment in the presence of the public in the corridor outside a courtroom, he respectfully removed it during the time he sat in the courtroom).

117. *Id.* at 21 (emphasis added).

> bate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense *not a sign of weakness but of strength.* We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.[118]

The constitutional principle at the root of not just Paul Cohen's freedom of speech, but of our freedom of speech, was the right to be let alone from government control so that democracy could function as it was intended. There was no alternative if we hoped to live in a free society:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[119]

The right to be let alone, assuming it exists, is from the reach of government, not the reach of our fellow citizens who desire to impart an idea for us to consider and debate. We are not to fear new ideas that may actually benefit us, but fear the evil of government censorship that suppresses independent thought in favor of conformity to the party line.

In venturing outside the home onto a city sidewalk, the burden is on the unwilling viewer to avert his or her eyes, to say "no" and refuse the offering of unwanted handbills and leaflets, or to physically remove himself or herself from the earshot of unwelcome verbal messages.[120]

Until *Hill v. Colorado*,[121] the leading case on the tension between the First Amendment rights of speakers against the privacy rights of the unwilling recipient who wished to be let alone, was generally thought to be *Erznoznik v. Jacksonville*.[122] An "R" rated movie, the "Class of '74," was shown at a drive-in theater, where scenes of female nudity were exposed to any member of the public who might chance or desire to catch a scene of the movie from adjacent property which included two public streets and a church parking lot.[123] This resulted in a prosecution under a municipal ordinance prohibiting a drive-in theater from showing a movie

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118. *Id.* at 24-25 (emphasis added).

119. *Id.* at 24 (emphasis added).

120. *See* LAURENCE H. TRIBE, RALPH S. TYLER, JR., AMERICAN CONSTITUTIONAL LAW 948 (2d ed. 1988).

121. 530 U.S. 703 (2000).

122. 422 U.S. 205 (1975).

123. *See Erznoznik*, 422 U.S. at 207.

with scenes of nudity that was visible from a public place or street.[124] The underlying assumption behind the ordinance was the right of people to be let alone in the public forum.[125] Churchgoers might be offended by becoming unwilling viewers of an "R" rated movie. It was solely the content of the movie's message that triggered prosecution under the law.[126] In striking down the ordinance, the Supreme Court concluded "the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content."[127] The burden was on the unwilling viewer to avert his or her eyes.[128] It was still open to a municipality to enact reasonable time, place and manner regulations applicable to all speech regardless of content.[129] In a pluralistic society, outside of the home, people will encounter politically and morally offensive forms of free speech.[130] This results in inescapable captivity in many circumstances.[131] It is the First Amendment that gives priority to the speaker, leaving the recipient of the communication with the choice to respond. "The Constitution does not permit [the] government to decide which types of otherwise protected speech is sufficiently offensive to require protection for the unwilling listener or viewer."[132] The Court was careful to note there was no issue about the privacy of persons in their homes who needed protection from visual or audible intrusions from movies shown at drive-in theaters.[133]

IX. CONTENT OF THE MESSAGE: PROTECTED OR UNPROTECTED?

The distinction between protected and unprotected speech is important to understand. Those who support the *Hill* decision of silencing sidewalk counselors applaud the banning of what they consider unprotected speech. Their argument is that sidewalk counselors fall outside of First Amendment protection because they utter "fighting words,"[134] provoke violence[135] or make defamatory statements,[136] such as labeling those who are a party to abortions as "murderers," resulting in psychological

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124. *See id.* at 206.
125. *See id.*
126. *See id.* at 212.
127. *Id.*
128. *See id.* at 210-11.
129. *See id.* at 209.
130. *See id.* at 210.
131. *See id.*
132. *Id.*
133. *See id.* at 212.
134. Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942). *See* Laurence J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 233 (1993); Amber M. Pang, *Speech, Conduct, and Regulation of Abortion Protest by Court Injunction: From Madsen v. Women's Health Center to Schenck v. Pro-Choice Network*, 34 GONZ. L. REV. 201, 226 (1998). The first article was a product of the co-authors' work representing various organizations and abortion clinics in lawsuits against Operation Rescue.
135. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
136. *See* Beauharnais v. Illinois, 343 U.S. 250, 254-57 (1952).

trauma to pregnant mothers who are about to fatally harm their fetuses.[137] Pamphlets containing photos of dismembered fetuses and/or normal fetuses handed out to pregnant mothers are no doubt considered obscene[138] and emotionally upsetting by some recipients. The Constitution permits restrictions on the content of speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[139] There is, as a result, a class of speech that can be regulated because of its "*constitutionally proscribable content.*"[140] Yet, even vulgar words may be protected speech when the words have mixed characteristics, for example, where the form of the message is offensive but the content has social value, however slight.[141]

"The First Amendment imposes . . . a 'content discrimination' limitation upon [the government's] prohibition of proscribable speech."[142] "The government may not regulate [free speech] based on hostility--or favoritism--toward the underlying message expressed."[143] Content-based restrictions presumptively violate the First Amendment and courts will not find them constitutionally valid unless the restrictions meet the strict scrutiny test.[144] This means that in a public forum, any restrictions on free speech must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[145] Otherwise, the government may "effectively drive certain ideas or viewpoints from the marketplace."[146]

Let us assume that outside the home, an individual might encounter on the public sidewalk another person who may approach and hand out religious or anti-abortion literature. If done within a bubble zone without prior consent, this would be a crime. This is the effect of *Hill.*[147] Yet in *Lovell v. City of Griffin,*[148] the Supreme Court invalidated a municipal ordinance requiring prior permission to hand out literature.[149] The Court declared street literature in the form of pamphlets and leaflets handed out

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137. *See* Hill v. Colorado, 530 U.S. 703, 710 nn.7 & 8 (2000).

138. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not within the area of constitutionally protected speech). Unlike obscenity, indecency merits First Amendment protection. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000).

139. *Chaplinsky,* 315 U.S. at 572.

140. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (alteration in original).

141. *See* Cohen v. California, 403 U.S. 15, 24-25 (1971).

142. *R.A.V.,* 505 U.S. at 387.

143. *Id.* at 386.

144. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

145. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citation omitted).

146. *R.A.V.,* 505 U.S. at 387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

147. *See* Hill v. Colorado, 530 U.S. 703, 734 (2000).

148. 303 U.S. 444 (1938).

149. *See Lovell,* 303 U.S. at 449.

by activists constituted "historic weapons in the defense of liberty."[150] In *Schneider v. New Jersey*,[151] the Court affirmed that while the intended recipient had a right to refuse the offered literature, the person offering the literature had a constitutional right to tender it.[152] The Court rejected the argument people had a right to be let alone on a public street based on the rationale that the person seeking to communicate an idea could just go elsewhere.[153]

In the abortion context, the last clear chance to persuade a pregnant mother not to have a planned abortion is on the sidewalk leading to the doors of the abortion clinic. So why did the Court in *Hill* go against its own First Amendment values and principles, and ban an entire category of free speech, namely the peaceful and respectful handing out of literature and conversational speech within eight feet of another person on a public sidewalk without the prior consent of the intended recipient? Is it a question of the content of the message? Has the Court created an exception to the communication of a moral message about a moral choice?

X. A CONSTITUTIONAL RIGHT TO BE LET ALONE?

To understand the answers to these questions, it is necessary to appreciate the judicial reasoning that led to the elevation of privacy to constitutional status in *Griswold v. Connecticut*.[154] In the private sanctity of the bedroom, people found it repulsive that the government could police the use of the birth control pill.[155] It was the decade of the 1960s—the height of the sexual revolution—when, unlike any prior time in American history, the birth control pill invited sexual promiscuity without the responsibility of parenthood.

Justice Douglas, writing for the majority in *Griswold*, elevated sexual privacy between married heterosexual couples to constitutional status, without anchoring privacy to any one particular enumerated constitutional right.[156] He cited academic literature[157] and case law[158] to sup-

150. *Id.* at 452.

151. 308 U.S. 147 (1939).

152. *See Schneider*, 308 U.S. at 162.

153. *See id.* at 163.

154. 381 U.S. 479 (1965).

155. It is now known that the birth control pill causes chemically induced abortions. *See* RANDY ALCORN, DOES THE BIRTH CONTROL PILL CAUSE ABORTIONS? 13 (5th ed. 2000), *at* http://www.epm.org/bcp.html.

156. *See Griswold*, 381 U.S. at 485-86.

157. *E.g.*, William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212 (1963) (discussing the meaning and scope of the right to privacy); Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960) (arguing that the "right to be let alone," while not explicitly stated in the Constitution, is the underlying theme of the Bill of Rights).

158. *E.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) (the Constitution applies to invasions of the "sanctity of a man's home and the privacies of life"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (the Fourth Amendment creates a right to privacy that is of equal importance as compared with all other basic rights in a free society).

port his theory that privacy was a constitutional right.[159] To get around the lack of specific text to anchor the constitutional right of privacy, he used the word picture of a "penumbra"[160] to stretch the scope of the Constitution to include on its fringe the right to privacy: "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[161]

In developing his position, Justice Douglas referred to *NAACP v. Alabama*[162] as authority for the idea that freedom of association was a constitutional right contained within the First Amendment, even if the text did not make this right apparent.[163] He stated, "the First Amendment has a penumbra where privacy is protected from *governmental intrusion.*"[164] It is worth noting that Justice Douglas limited the right to privacy under the First Amendment to protection from the government and not from the private individual.[165] Justice Douglas made this perfectly clear in his dissent in *Poe v. Ullman,*[166] by explaining that his dissent in *Pollak v. Public Utilities Commission of District of Columbia*[167] arose out of his opposition to government-sponsored radio programs.[168] The significance of this was not lost on Justice Scalia in his *Hill* dissent when he emphasized that the "right to be let alone," assuming it existed, was

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159. *See Griswold*, 381 U.S. at 484-85.

160. The definition of "penumbra" includes: "a shadow cast (as in an eclipse) where the light is partially but not wholly cut off by the intervening body" and "a surrounding or adjoining region in which something exists in a lesser degree." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1673 (1986). Critics of this new constitutional right of privacy, upon which was founded the constitutional right to an abortion, claimed it was created "out of nothing." Justices White and Rehnquist, dissenting in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 785 (1986), *overruled by* Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992), might well have viewed the Justice Douglas' "Penumbra" as the "Twilight Zone:"

> There is a fifth dimension beyond that which is known to man. It is a dimension as vast as space and as timeless as infinity. It is the middle ground between light and shadow, between science and superstition, and it lies between the pit of man's fears, and the summit of his knowledge. This is the dimension of imagination. It is an area which we call . . . THE TWILIGHT ZONE.

Rod Serling, http://www.scifi.com/twizone/twilite2.html (last visited Sept. 23, 2001).

161. *Griswold*, 381 U.S. at 484.

162. 357 U.S. 449 (1964).

163. *See NAACP*, 357 U.S. at 462; *Griswold*, 381 U.S. at 483.

164. *Griswold*, 381 U.S. at 483 (emphasis added).

165. *See id.* at 485.

166. 367 U.S. 497 (1961).

167. 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting).

168. *See Poe*, 367 U.S. at 517. Justice Douglas, dissenting in *Pollak*, defined "liberty," within the purview of the Fifth Amendment, to include the right of "privacy," a right he thought was infringed because a member of a "captive audience" was forced to listen to a government-sponsored radio program. *See Pollak*, 343 U.S. at 467-69 (Douglas, J., dissenting).

"conferred, *as against the government*":[169] "it is the right of the *speaker* in the public forum to be free from government interference."[170]

Justice Douglas concluded that penumbras surrounding the First, Third, Fourth, Fifth, and Ninth Amendments impliedly created constitutionally guaranteed zones of privacy as against the government.[171] In his earlier dissent in *Poe v. Ullman*, Justice Douglas sought to graft the right to privacy onto the branch of liberty in the Fourteenth Amendment,[172] but did not pursue that idea in *Griswold*.[173]

Earlier cases involving "privacy and repose" lent legitimacy to the recognition of a constitutional right to privacy.[174] However, the cases cited by Justice Douglas all dealt with protecting the individual's right to be let alone from the government, the solitary exception being *Breard v. City of Alexandria*.[175] In *Breard*, the Court approved the municipal government's regulation of commercial speech at private residences.[176] Not one of the cases cited by Justice Douglas in *Griswold* stood for the proposition that, as between citizens in the public forum, there existed a right to be let alone. The constitutional elevation of the right to be let alone must, therefore, be restricted solely to freedom from government and arguably also to freedom from commercial peddlers calling at one's private residence.

The concurring opinion of Justice Goldberg agreed that marital privacy concerning the use of contraceptives was beyond the reach of government.[177] He rested his argument primarily upon the Ninth Amendment: "In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth [a]nd Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments."[178] Again, the right to be let alone applied against the government. Concluding "the right of privacy is a fundamental personal right,"[179] Justice

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169. Hill v. Colorado, 530 U.S. 703, 751 (2000) (Scalia, J., dissenting) (alteration in original) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

170. *Hill*, 530 U.S. at 751 (Scalia, J., dissenting) (alteration in original).

171. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

172. *See Poe*, 367 U.S. at 515-17 (Douglas, J., dissenting).

173. Justice Harlan's concurrence set forth the view that Connecticut's law violated the "ordered liberty" guaranteed in the Fourteenth Amendment. *See Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Justice White also would have relied on the Fourteenth Amendment. *See Griswold*, 381 U.S. at 502 (White, J., concurring).

174. *See Griswold*, 381 U.S. at 485.

175. 341 U.S. 622 (1951).

176. *See Breard*, 341 U.S. at 644-45.

177. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

178. *Id.* at 493.

179. *Id.* at 494.

Goldberg cited with approval this passage from Justice Brandeis' dissent in *Olmstead v. United States*[180]:

> The protection guaranteed by the [Fourth and Fifth A]mendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, *as against the government, the right to be let alone*-the most comprehensive of rights and the right most valued by civilized men.[181]

None of the Justices in the *Griswold* majority appeared to contemplate a constitutional right to be let alone from fellow citizens in the public forum. Justice Black, joined by Justice Stewart, dissented in *Griswold*.[182] They argued that no constitutional right to privacy existed and that the use of the word "privacy" had the potential to both expand and dilute constitutional freedoms:

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. *But there is not.* There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of *diluting or expanding* a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and sei-

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180. 277 U.S. 438 (1928) (Brandeis, J., dissenting), *overruled in part by* Berger v. New York, 388 U.S. 41 (1967) *and* Katz v. United States, 389 U.S. 347 (1967).

181. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (emphasis added).

182. *See Griswold*, 381 U.S. at 507 (Black, J., dissenting).

zures." *"Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures.* I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.[183]

In a footnote, Justice Black observed the Court had no jurisdiction to elevate the right of privacy to constitutional status:

> Observing that "the right of privacy . . . presses for recognition here," today this Court, *which I did not understand to have power to sit as a court of common law*, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."[184]

Justice Black warned of the potential adverse consequences of shifting power to the judiciary implicit in the elevation of the right to be let alone to constitutional status:

> I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, *will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country.* Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, *jeopardize the separation of governmental powers* that the Framers set up and at the same time *threaten to take away much of the power of States to govern themselves* which the Constitution plainly intended them to have.[185]

Substantive due process loomed once again on the horizon, and Justice Black pleaded in vain with his colleagues on the Court to let the

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183. *Id.* at 508-09 (Black, J., dissenting) (emphases added).

184. *Id.* at 510 n.1 (alteration in original) (emphasis added) (quoting majority opinion, *id.* at 485). *See generally* David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991) (discussing the origin and evolution of the right to privacy).

185. *Griswold*, 381 U.S. at 520-21 (Black, J., dissenting) (emphases added) (footnote omitted).

Lochner doctrine[186] sleep forever in peace.[187] The Court's own subjective viewpoint and personal predilections concerning personal rights affecting privacy were "no less dangerous" than earlier reasoning by the *Lochner* Court about economic theories.[188]

Eisenstadt v. Baird[189] represented a turning point in the evolution of the constitutional right to personal privacy. Justice Brennan constitutionalized individual autonomy pertaining to reproductive freedom when he extended the constitutional elevation of marital privacy in *Griswold* to the distribution of contraceptives to unmarried sexual partners in *Eisenstadt*.[190] He wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[191] The significance of this passage is that it extended privacy from its confines of the marital bedroom to fundamental, decisional, personal reproductive autonomy outside the vows of marriage and the privacy of one's own home.[192]

Justice Brennan rested his opinion on previous opinions of the Court establishing the fundamental principle that the government may not intrude into an individual's privacy except in very limited circumstances.[193]

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186. *See* Lochner v. New York, 198 U.S. 45 (1905).

187. *See Griswold*, 381 U.S. at 522-23 (Black, J., dissenting).

188. *Id.* at 522 (Black, J., dissenting).

189. 405 U.S. 438 (1972).

190. *See Eisenstadt*, 405 U.S. at 453-54.

191. *Id.* at 453.

192. *See* Nan Hunter et al., *Contemporary Challenges to Privacy Rights*, 43 N.Y.L. SCH. L. REV. 195, 212 (1999).

193. *See Eisenstadt*, 405 U.S. at 453-54. Brennan likely found the following excerpts from the referenced previous opinions to be the most helpful:

> It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society. . . . [I]n the privacy of a person's own home--that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . .
>
> . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
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> Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) (Marshall, J.) (citations omitted).
>
> "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority define as crimes."
>
> Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 546 (1942) (Jackson, J., concurring).
>
> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching [sic] and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom

As in *Griswold*, the majority did not attempt to establish a right to be let alone from fellow citizens in the public forum.

Griswold inevitably linked the constitutional right to bear or beget children to the constitutional decision of whether or not to terminate the life of one's own unborn child through abortion.[194] This set the stage for *Roe v. Wade*,[195] which followed a year later.

Writing for the majority in *Roe*, Justice Blackmun concluded, "the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation."[196] The Court candidly acknowledged, "[t]he Constitution does not explicitly mention any right of privacy."[197] Citing a line of authority to justify creating a constitutional right of privacy from the government,[198] the *Roe* Court included *Katz v. United States*,[199] which explicitly rejected a general constitutional right to be let alone from other people:

> The petitioner had phrased those questions as follows:
>
> Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.
>
> We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily

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the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Skinner, 316 U.S. at 541 (Douglas, J.).

> There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.

Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) (Harlan, J.).

194. *See* Hunter, *supra* note 192 at 212-14.

195. 410 U.S. 113 (1973).

196. *Roe*, 410 U.S. at 154.

197. *Id.* at 152.

198. *Id.*

199. 389 U.S. 347 (1967).

> promoted by incantation of the phrase "constitutionally protected area." Secondly, *the Fourth Amendment cannot be translated into a general constitutional "right to privacy."* That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But *the protection of a person's general right to privacy--his right to be let alone by other people--is*, like the protection of his property and of his very life, *left largely to the law of the individual States.*[200]

Similarly, the First Amendment cannot be translated into a general constitutional right to be let alone from the free speech of other people. Constitutionally protected areas, like bubble zones, have no place in protecting individual privacy from governmental intrusions, as their function has nothing to do with preventing the intrusion of the government but with silencing the free speech rights of other people. Just as "the Fourth Amendment protects people, not places,"[201] so must the First Amendment protect people who exercise freedom of speech, and not the place (whether bubble zone or not) where that speech is tendered.

Justice Blackmun felt that the "concept of personal liberty and restrictions upon state action" in the Fourteenth Amendment served as the constitutional home of a pregnant mother's right to decide "whether or not to terminate her pregnancy."[202] The right to be let alone from government had now been reconstituted as a "new form of privacy" termed "liberty of choice."[203]

In dissent, Justice Rehnquist concluded there existed a limited right of privacy to be free from government intrusion, that *Roe* marked a return to substantive due process and a revival of *Lochner*, and that no constitutional right to personal privacy existed in the Fourteenth Amendment:

> If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. . . .

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compel-

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200. *Katz*, 389 U.S. at 349-51 (emphases added) (footnotes omitted).
201. *Id.* at 351.
202. *Roe*, 410 U.S. at 153.
203. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1395-96.

ling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment. To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.[204]

In *Doe v. Bolton,*[205] the companion case to *Roe,* Justice White also strongly opposed the newly minted constitutional right to an abortion, finding "nothing in the language or history of the Constitution to support the Court's judgment."[206] Prominent scholars, including John Hart Ely, soon chastised the Court for its decision in *Roe.*[207]

Freedom of choice to terminate a pregnancy soon became entrenched in American feminist culture as intrinsic to a woman's individual dignity and personal autonomy.[208] The Supreme Court struck down various legislative attempts by different states to confine, restrict, or create an informed choice.[209] The law endowed a woman with the choice of abortion on demand, and the government had no power to influence that choice by raising "moral and spiritual questions."[210]

Chief Justice Burger, who had earlier concurred in *Roe* and *Doe,* expressed in *Thornburgh* his sense of betrayal and astonishment in ad-

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204. *Roe,* 410 U.S. at 172-74 (Rehnquist, J., dissenting) (citation omitted).

205. 410 U.S. 179 (1973).

206. *Doe,* 410 U.S. at 221 (White, J., dissenting).

207. *See, e.g.,* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 27-28 (Yale University Press, Ltd. 1975) (questioning the *Roe* Court's justification for imposing its own model statute regulating abortion); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920, 947-49 (1973) (concluding *Roe* is "bad constitutional law" because it is not connected to "any value the Constitution marks as special"); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221, 311 (1973) (concluding the *Roe* Court exceeded its legitimate authority by going beyond the bounds of "conventional morality").

208. *See, e.g.,* the web site for the National Abortion and Reproductive Rights Action League *at* http://www.naral.org/about/index.html (last visited Sept. 21, 2001) ("a right to privacy includes having access to safe and legal abortion, effective contraceptive options, and quality reproductive health care").

209. "The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986), *overruled by* Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992); *see also* City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 443-44 (1983) (arguing that State statutes cannot go beyond permissible limits to ensure informed consent because the information works not to inform the patient but to persuade her to forego the procedure).

210. *Thornburgh,* 476 U.S. at 771-72.

mitting the concerns predicted by the dissenters in *Roe* and *Doe* had been right all along:

> Yet today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo and the availability of state-funded alternatives if she elects not to run those risks. Can anyone doubt that the State could impose a similar requirement with respect to other medical procedures? Can anyone doubt that doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health, both physical and emotional than an abortion, and risk a malpractice lawsuit if they fail to do so?
>
> Yet the Court concludes that *the State cannot impose this simple information-dispensing requirement in the abortion context* where the decision is fraught with serious physical, psychological, and moral concerns of the highest order. *Can it possibly be that the Court is saying that the Constitution forbids the communication of such critical information to a woman?* We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the "demand" will not even have to be the result of an informed choice.[211]

Into this legislative void identified by Chief Justice Burger stepped Christian activists who assumed the role of sidewalk counselors,[212] free of any tie to government authority. "The constitutional right to an abortion" was, after all, "a right against the state, not private individuals."[213] Many people had assumed that private influence to provide educational informational and alternative choices to abortion that might dissuade a woman from choosing an abortion would not violate any constitutional right to an abortion.[214] Activists did not confine this activism to sidewalk counseling, but often accompanied it with blockades of clinic entrances and large-scale demonstrations.[215] Courts issued injunctions to quell the anti-abortion protests,[216] and state ordinances followed.[217] The creation of bub-

211. *Id.* at 783-84 (Burger, C.J., dissenting) (emphases added) (footnote omitted).

212. *See generally* J.C. Wilkie, *A Protective Ring or Violence?* at http://www.priestsforlife.org/articles/protectivering.html (last visited Sept. 13, 2001) (explaining the role of sidewalk counselors who provide a "protective ring" outside abortion clinics to prevent violence and to witness to women before and after the abortion).

213. *See* James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 502 (1996).

214. "'Sidewalk counseling' consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature.'" Hill v. Colorado, 530 U.S. 703, 708 (2000) (quoting petitioner's appeal brief).

215. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 758-59 (1994); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 362-63 (1997).

216. *See Madsen*, 512 U.S. at 757; *Schenck*, 519 U.S. at 366.

ble zones provided a zone of privacy for those unwilling to hear the anti-abortion message.[218] Violent acts ensued.[219]

Does the government have the legal right to prevent private individuals, like sidewalk counselors, from talking women out of exercising their constitutional right to an abortion, by exercising their constitutional right to free speech? In the court battles that resulted, judges had the opportunity to insert their viewpoints into the abortion controversy.[220]

XI. ASSESSING THE DAMAGE TO THE FIRST AMENDMENT

Now that *Hill* has settled the lawfulness of the bubble zone, the sidewalk counselor has the burden to identify and retreat from the unwilling listener. Practically, this task is impossible and puts an end not only to a class of free speech, sidewalk counseling, but also to the substance of that speech. Of greater significance has been the damage done to the First Amendment. The casualty list begins with *Madsen*, continues with *Schenck*, and concludes for now with *Hill*.

In *Madsen*, the Supreme Court upheld the constitutional validity of an injunction and its establishment of a thirty-six-foot bubble zone on a public street outside of an abortion clinic in Melbourne, Florida.[221] In doing so, the Court prohibited numerous individuals, united by their opposition to abortion, and who had broken no law, from exercising their constitutional rights of assembly, free speech, and association within the judicially created bubble zone.[222] The evidence did not include a hint of violence, and visitors freely entered and exited the abortion clinic.[223] The Court relaxed the strict scrutiny standard established by precedent, which courts had to apply whenever they imposed a content-based or viewpoint-based limitation on First Amendment rights in a public forum.[224] Instead, the Court created for the law of the sacred cow, the new right of abortion, a lesser standard, which falls between strict scrutiny and intermediate scrutiny.[225] This new "intermediate-intermediate" scrutiny test is as follows: "Whereas intermediate scrutiny requires that the restriction be 'narrowly tailored to serve a significant government interest,' the new standard requires that the restriction 'burden no more speech than necessary to serve a significant government interest.'"[226]

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217. *See, e.g., Hill*, 530 U.S. at 707 (upholding a Colorado statute banning sidewalk counseling within an eight-foot bubble zone with respect to an unwilling listener).

218. *See* Weinstein, *supra* note 213, at 472.

219. *See, e.g., A Brief History of Anti-Abortion Violence Patterns*, at http://www.feministcampus.org/sam3_historysub.asp (last visited Sept. 13, 2001).

220. *See* Weinstein, *supra* note 213, at 506.

221. *See Madsen*, 512 U.S. at 757-58.

222. *See id.* at 785 (Stevens, J., dissenting).

223. *See id.* at 790 (Scalia, J., dissenting).

224. *See id.* at 790-91 (Scalia, J., dissenting).

225. *See id.* at 791 (Scalia, J., dissenting).

226. *Id.* (Scalia, J., dissenting) (quoting majority opinion, *id.* at 765).

The second attack on the First Amendment was the nature of the injunction itself. By definition, the injunction constituted a prior restraint of free speech, and as such, presented the "greatest threat"[227] to First Amendment values. To allow the injunction to continue directly conflicted with a long history of striking down speech-restricting injunctions[228] that had, by their nature, a heavy presumption against constitutional validity.[229] The majority's reliance on *NAACP v. Claiborne Hardware Co.*[230] and *Carroll v. President & Commissioners of Princess Anne*,[231] was misplaced and contradictory.[232] The court did not achieve pin-pointed, narrowly couched tailoring to meet government interests.[233] The bubble zone constituted a blanket ban on an entire species of free speech – the normal conversation.

By giving its imprimatur to the bubble zone, the Supreme Court legitimized viewpoint discrimination against anti-abortionists exercising their free speech rights, signaling its implied approval of future laws to silence pro-life speech. This discrimination served another purpose, as it also defended the Court's illegitimate creation of a constitutional right to an abortion by silencing its critics. Like a loaded gun,[234] the injunction became an available weapon to be used as a prior restraint against pro-life speech before an activist ever uttered a word.

In *Schenck*, the Supreme Court upheld as constitutionally valid a fixed, fifteen-foot bubble zone, established by judicial injunction, against anti-abortion demonstrators in Rochester and Buffalo, New York.[235] The injunction's original terms permitted the presence of two sidewalk counselors inside the zone, provided their conduct conformed to the terms of a cease and desist order.[236]

The cease and desist provision forced sidewalk counselors located inside the buffer zones to retreat fifteen feet from the person being counseled once the person indicated a desire not to be counseled.[237] This

227. *Id.* at 797 (Scalia, J., dissenting).

228. *See* Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-40 (1957); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43, 44 (1977); Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980); CBS Inc. v. Davis, 510 U.S. 1315, 1318 (1994).

229. *See Keefe*, 402 U.S. at 419.

230. 458 U.S. 886 (1982).

231. 393 U.S. 175 (1968).

232. *See Madsen*, 512 U.S. at 798 (Scalia, J., dissenting).

233. *See, e.g., Carroll*, 393 U.S. at 183-84 ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the order.")

234. *See Madsen*, 512 U.S. at 815 (Scalia, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

235. *See* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 361, 364, 380 (1997).

236. *See Schenck*, 519 U.S. at 381 n.11.

237. *See id.* at 369-70.

clause facilitated a recipient's escape from hearing any moral message.[238] It was triggered just by saying "no" to the communication offered by the counselor, or "don't talk to me," before the counselor initiated any conversation.[239] The constitutionality of the cease and desist clause was appealed and held by the Court to be a proper restriction of the appellant's First Amendment rights.[240]

Unlike the facts in *Madsen*, which emphasized the need of abortion clinic patients for peace and quiet conducive to rest and repose,[241] the facts in *Schenck* did not turn on noise but on a history of "peaceful conversations . . . devolv[ing] into aggressive and sometimes violent conduct."[242] In these circumstances, the Court decided, "a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible."[243]

Chief Justice Rehnquist considered and rejected a "right" to be let alone in the public forum:

> Petitioners also contend that the "cease and desist" provision which limits the exception for sidewalk counselors in connection with the fixed buffer zone is contrary to the First Amendment. We doubt that the District Court's reason for including that provision--"*to protect the right of the people approaching and entering the facilities to be left alone*"--*accurately reflects our First Amendment jurisprudence* in this area. *Madsen* sustained an injunction designed to secure physical access to the clinic, *but not on the basis of any generalized right "to be left alone" on a public street or sidewalk.*[244]

In dissent, Justice Scalia deplored the Court's unwillingness to strike down the fixed bubble zone since the court created the zone based on the invalid theory of a "right to be let alone" in the public forum and not on the right of unobstructed access to the abortion clinic.[245]

Justice Scalia was appalled at the gratuitous language chosen by the majority to accommodate free speech rights, when the Court could have adopted a more assertive protective stance to enhance free speech rights.[246] He was further alarmed by the Court's unprecedented expansion of jurisdiction and power on its own motion to protect the public interest.[247] This move, feared Justice Scalia, intruded the function of the

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238. *See id.*
239. *See id.* at 369.
240. *See id.* at 384-85.
241. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772 (1994).
242. *Schenck*, 519 U.S. at 377.
243. *Id.*
244. *Id.* at 383 (emphases added).
245. *Id.* at 387-88 (Scalia, J., concurring in part and dissenting in part).
246. *See id.* at 390-91 (Scalia, J., concurring in part and dissenting in part).
247. Specifically, Scalia stated:

executive branch of government, thereby upsetting the constitutional balance of powers.[248]

Also disturbing was the Court's departure from settled practice in the way in which the Court approached its review of lower court injunctions. Instead of validating the *Schenck* injunction on the basis of the facts actually found by the District Court, the Supreme Court reviewed the injunction based on of what the court below "might have" found.[249]

These aberrations from established general legal doctrines amounted to more evidence that the law of the sacred cow was making a "destructive inroad upon First Amendment law."[250]

Left undecided in *Schenck* was "whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two."[251] The affirmative answer to this question came in *Hill*.[252]

In 1993, the Colorado state legislature enacted a law making it illegal to "'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling

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> The Court proceeds from there to make a much more significant point: An injunction on speech may be upheld even if not justified on the basis of the interests asserted by the plaintiff, as long as it serves "public safety." "[I]n assessing a First Amendment challenge, a court . . . inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order. . . . Here, the District Court cited public safety as one of the interests justifying the injunction. . . . [T]he fact that 'threat to public safety' is not listed anywhere in respondents' complaint as a claim does not preclude a court from relying on the significant governmental interest in public safety in assessing petitioners' First Amendment argument."
>
> . . . .
>
> This is a wonderful expansion of judicial power. Rather than courts' being limited to according relief justified by the complaints brought before them, the Court today announces that a complaint gives them, in addition, ancillary power to decree what may be necessary to protect--not the plaintiff, but *the public interest*! Every private suit makes the district judge a sort of one-man Committee of Public Safety. There is no precedent for this novel and dangerous proposition.

Id. at 392-93 (Scalia, J., concurring in part and dissenting in part) (alterations in original) (citation omitted).

248. *See id.* at 393-94 (Scalia, J., concurring in part and dissenting in part).

249. Scalia expressed disagreement with the majority's departure from established practice:

> We are not in the business (or never used to be) of making up conclusions that the trial court *could permissibly* have reached on questions involving assessments of fact, credibility, and future conduct--and then affirming on the basis of those posited conclusions, whether the trial court *in fact* arrived at them or not. That is so even in ordinary cases, but it is doubly true when we review a trial court's order imposing a prior restraint upon speech.

Id. at 389 (Scalia, J., concurring in part and dissenting in part) (alterations in original) (footnote omitted).

250. *Id.* at 394 (Scalia, J., concurring in part and dissenting in part).

251. *Id.* at 377.

252. Hill v. Colorado, 530 U.S. 703 (2000).

with such other person.'"[253] This law had the effect of banning sidewalk counseling on public sidewalks within 100 feet of abortion clinic entrances.[254] The state's declared purpose in creating this law was to enable women to have unimpeded access to abortion clinics.[255] In *Hill*, opponents unsuccessfully challenged the constitutionality of this eight-foot bubble zone.[256]

Justice Stevens, writing for the majority, held that the First Amendment rights of the speaker were subordinate to the privacy rights of the unwilling listener.[257] This was so even though, unlike in *Schenck*, the sidewalk counselors acted politely and respectfully.[258] It made no difference that speech occurred in a public forum.[259] This result was unprecedented and contrary to the Court's First Amendment teachings.[260] Despite all this, the Court's decision was predictable due to the necessity to distort the law to shield the law of the sacred cow – abortion. The decision constituted a simian response of: "[h]ear no evil, see no evil, speak no evil."[261]

To save the Colorado law, the Court elevated a common law right of privacy to a constitutional "interest" that outweighed, on the scales of justice, the preferred constitutional right of free speech.[262] The Court ruled in a bold and unabashed manner that revived old case law suppressing the free speech rights of trade unionists.[263] In championing the

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253. *Hill*, 530 U.S. at 707 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

254. *See id.* at 708-09.

255. *See id* at 708 n.1 (quoting COLO. REV. STAT. § 18-9-122(1) (1999)).

256. *See id.* at 707, 712, 735.

257. *See id.* at 718 (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970)).

258. *See Hill*, 530 U.S. at 710.

259. *See id.* at 718.

260. *See id.* at 741-42 (Scalia, J., dissenting).

261. You can order your own monkey trio in the now famous poses *at* http://www.mentomerc.com/mentomerc/hear.html (last visited Sept. 8, 2001) *or* http://www.amerasiaimports.com/26k-29k/29586_30130.html (last visited Sept. 8, 2001).

262. *See Hill*, 530 U.S. at 718.

263. *See id.* at 717 (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)). Not referred to in *Hill* was another passage from *American Steel Foundries* that the court could have used to justify its categorization of sidewalk counselors located inside the bubble zone as "missionaries":

> Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition 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 importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It

right of the unwilling recipient to be let alone, the Court offered no guidance on how a sidewalk counselor, intending to exercise his or her free speech rights, could possibly know in advance of tendering a communication, whether the intended recipient was willing or unwilling to hear a moral message about abortion. A wrong guess would result in a violation of the criminal law.[264]

Justice Scalia did not disappoint in delivering a scathing analysis of the damage caused by *Hill* to the First Amendment.[265] If the subject matter were not abortion, Justice Scalia predicted the Court would have instantly found Colorado's law to be content-based[266] and viewpoint discriminatory.[267] Justice Scalia viewed the abandonment of the strict scrutiny standard as a contrived fabrication intended to permit the survival of the bubble zone under the less onerous standard for content-neutral speech regulations.[268]

The Court's characterization of the law as one that regulated places, not speech,[269] was just as convincing to Justice Scalia, as the Emperor was to the child who could not be fooled in Hans Christian Andersen's children's fable, *The Emperor's New Clothes*.[270] To Justice Scalia, the

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becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. *The purpose should be to prevent the inevitable intimidation* of the presence of groups of pickets, *but to allow missionaries.*

Am. Steel Foundries, 257 U.S. at 206-07 (emphases added).

264. *See* COLO. REV. STAT. § 18-9-122(3).

265. *See Hill*, 530 U.S. at 741-65 (Scalia, J., dissenting). Scholarly articles published in response to *Hill* have also been critical of its damage to the First Amendment. *See, e.g.*, Martin H. Belsky, *Privacy: The Rehnquist Court's Unmentionable "Right,"* 36 TULSA L.J. 43, 47-48 (2000) ("privacy is not a fundamental right, and therefore there is no special need to protect access as part of the right"); Brian W. Oberst, Casenote, *Buffering Free Speech: An Examination of the Impact of Colorado's Buffer Zone Law on Protected Speech After* Hill v. Colorado, *120 S.Ct. 2480 (2000)*, 24 HAMLINE L. REV. 89, 92 (2000) ("the Hill [sic] Court erroneously concluded that Subsection (3) was a constitutional time, place, and manner restriction on protection [sic] speech"); Christy E. Wilhelm, Notes, *If You Can't Say Something Nice, Don't Say Anything at All:* Hill v. Colorado *and the Antiabortion Protest Controversy*, 23 CAMPBELL L. REV. 117, 141 (2000) ("one can only hope the creation of this new 'right' [to be let alone] does not symbolize the end of a traditional freedom").

266. *See Hill*, 530 U.S. at 742 (Scalia, J., dissenting).

267. *See id.* (Scalia, J., dissenting).

268. *See id.* at 748-49 (Scalia, J., dissenting).

269. *See id.* at 741 (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 719).

270. The fable reads, in part:

Everyone said, loud enough for the others to hear: "Look at the Emperor's new clothes. They're beautiful!"

"What a marvelous train!"

"And the colors! The colors of that beautiful fabric! I have never seen anything like it in my life." They all tried to conceal their disappointment at not being able to see the clothes, and since nobody was willing to admit his own stupidity and incompetence, they all behaved as the two scoundrels had predicted.

A child, however, who had no important job and could only see things as his eyes showed them to him, went up to the carriage.

"The Emperor is naked," he said. "Fool!" his father reprimanded, running after him. "Don't talk nonsense!" He grabbed his child and took him away. But the boy's remark,

naked truth was that "if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter."[271]

The ultimate irony was that in *Hill*, the State repudiated any interest in protecting its citizens' rights to be let alone from unwanted speech, and yet the Court fictitiously attributed this purpose to the impugned legislation.[272] The Court flip-flopped from its holding in *Schenck*, where it had disavowed the right to be let alone.[273] Instead, in *Hill*, the Court "repackage[d] . . . the 'right'[to be let alone] as an 'interest'" deserving of protection,[274] and created a new right to be let alone, not from the government, where such a principle existed,[275] but from a private individual in the public forum, where no such principle existed.[276]

The opinion elevated the abortion clinic, a commercial business, to the constitutional status of a private residence.[277] No longer did the recipient of an unwanted message have the burden to avert one's eyes or tolerate unwelcome speech.[278] The burden had shifted to the speaker.[279]

In upholding Colorado's bubble zone, the Court approved the approach of prophylaxis, "the antithesis of narrow tailoring."[280] Speech opposing abortion was unwelcome. The list of wounds to the First Amendment grew: "So one can add to the casualties of our whatever-it-takes pro-abortion jurisprudence the First Amendment doctrine of narrow tailoring and over-breadth. R.I.P."[281]

XII. CONCLUSION

A new era has begun. A corresponding right to be free from speech now matches speech rights. Every individual, in the public forum, now

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> which had been heard by the bystanders, was repeated over and over again until everyone cried:
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> "The boy is right! The Emperor is naked! It's true!" The Emperor realized that the people were right but could not admit to that. He thought it better to continue the procession under the illusion that anyone who couldn't see his clothes was either stupid or incompetent.

The entire fable may be read *at* http://www.geocities.com/Athens/2424/clothes.html (last visited Sept. 8, 2001).

271. *Hill*, 530 U.S. at 748-49 (Scalia, J., dissenting).

272. *See id.* at 750 (Scalia, J., dissenting).

273. *See id.* at 750-51 (Scalia, J., dissenting) (quoting Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 383 (1997).

274. *Id.* at 751 (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 717 n.24).

275. *See id.* at 751 (Scalia, J., dissenting) (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 210 (1975).

276. *See id.* at 752 (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 716).

277. *See id.* at 753 (Scalia, J., dissenting).

278. *See id.* at 752-53 (Scalia, J., dissenting) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 948 (2d ed. 1988).

279. *See id.* at 752 (Scalia, J., dissenting).

280. *Id.* at 762 (Scalia, J., dissenting).

281. *Id.* (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 729).

has a right to veto another individual's First Amendment rights.[282] The inevitable result, silence, will replace the cacophony of a free society engaged in robust debate. The government is our "Father Knows Best,"[283] deciding not just what can be said, but where, when, and in what manner. The Commonwealth of Massachusetts has enacted legislation imitating Colorado's buffer zone law and has relied on *Hill* to justify its restrictions against free speech.[284] Once upon a time, Justice Stevens wrote, "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[285]

Speech opposing abortion has lost its First Amendment status.[286] Only time will reveal whether the damage caused by the Court to its First Amendment jurisprudence will remain confined to the abortion context or spread like an out-of-control virus throughout the entire body of First Amendment law. The implications for environmentalists, trade unionists, evangelists, politicians, and others are enormous and serious. The Court has opened a Pandora's box[287] that it can only close by killing the sacred cow of abortion.

The root cause of the distortion to First Amendment jurisprudence is the line of reasoning that began in *Griswold* and flowered in *Roe*. The true nature of the beast was revealed in *Thornburgh* and manifested in *Stenberg*. At a minimum, the Court must reverse *Roe* to stem the bleeding of the First Amendment before it becomes fatal. How the Court will eventually handle the free speech issues in the *Nuremberg Files* case[288] will serve as a predictor of the future of the First Amendment.

As long as the law of the sacred cow of abortion exists, courts will suspend general First Amendment principles and values when it comes to the First Amendment rights of those who oppose abortion and wish to persuade others that a moral choice deserves consideration. The right or interest to be let alone in the public forum from moral or other messages is an invention created specifically for the law of the sacred cow. It has no basis in history or precedent, and is an embarrassment to the intellect of those who sit on the Supreme Court. The Court's "imposition of its

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282. *See* Flynn, *supra* note 59, at 648.

283. *See* Tim's TV Showcase, *Father Knows Best*, *at* http://www.timvp.com/father.html (last modified June 2001) (explaining that *Father Knows Best* was a situation comedy aired on television from 1954 to 1962, where the father of the household dealt with the routine problems of his family).

284. *See* McGuire v. Reilly, 122 F. Supp. 2d 97, 100 (D. Mass. 2000), *rev'd*, 260 F.3d 36 (1st Cir. 2001); Op. of the Justices to the Senate, 430 Mass. 1205, 1211 (Sup. Ct. 2000).

285. Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 790-791 (1988).

286. *See Hill*, 530 U.S. at 760.

287. *See* Olympus Productions,*The Enduring Appeal of Myths*, *at* http://www.dcs.ed.ac.uk/home/me/pandora.html (last visited Sept. 13, 2001) (explaining the origin of this myth).

288. Planned Parenthood of Columbia/Williamette Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1012 (9th Cir. 2001).

own, extraconstitutional value preferences"[289] is obvious, and more than that, is a classic illustration of prescribing what shall be orthodox in matters of opinion.[290] In defending the dubious right to an abortion, the Court has perpetuated the law of the sacred cow.

The right to an abortion has become a cultural and religious symbol to feminists and secular humanists who have figuratively wrapped around this icon of personal autonomy the American flag. Those who would have the temerity to attack this sacred right to an abortion by persuading others there is another choice have been vilified as traitors.

Consider the scorn heaped upon Gregory Lee Johnson, who was convicted of desecrating an American flag in Dallas, Texas.[291] The Supreme Court freed Johnson, holding, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[292] Writing for the majority, Justice Brennan explicitly refused to create "the law of the American flag":

> *There is, moreover, no indication*--either in the text of the Constitution or in our cases interpreting it--*that a separate juridical category exists for the American flag alone.* Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. *The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole*--such as the principle that discrimination on the basis of race is odious and destructive--*will go unquestioned in the market-place of ideas.* See Brandenburg v. Ohio. . . . *We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.*[293]

Just as the Court would have been gravely mistaken to create the "law of the Stars and Stripes," it caused a serious and damaging error by creating a separate juridical category for abortion, the law of the sacred cow.

Opponents of abortion do not present a "clear and present danger"[294] to American society. Law must not be used as a means to criminalize the conduct of sidewalk counselors who act on their moral imperative to

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289. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794 (1986) (White, J., dissenting), *overruled by* Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992).

290. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion).

291. *See* Texas v. Johnson, 491 U.S. 397, 399 (1989).

292. *Johnson*, 491 U.S. at 414.

293. *Id.* at 417-18 (emphases added) (citation omitted).

294. Schenck v. United States, 249 U.S. 47, 52 (1919).

persuade others abortion is wrong. The better approach is to facilitate opportunities for free and fearless reasoning in full discussions.[295]

"[F]ree speech is the rule, not the exception."[296] It is unconstitutional to suppress speech just because of "fear, ... passionate opposition against the speech, ... [or] a revolted dislike for its contents."[297] Would immediate injury to society occur if speech by sidewalk counselors were allowed within a bubble zone? The answer is an emphatic "no." Arguably, society would benefit from less abortions, as the state has an interest in the birth of new and potentially useful citizens.[298] If so, the remedy is "more speech, not enforced silence."[299]

Justice Jackson's words in *Barnette* ring true today, just as strongly as when he penned these words for the ages:

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. ...
>
> ... [T]he First Amendment ... was designed to avoid these ends by avoiding these beginnings. ... Authority here is to be controlled by public opinion, not public opinion by authority. ...
>
> ... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act there faith therein.[300]

Not since the issue of slavery tore apart this nation has an issue been more divisive than abortion. Differing on the moral question of abortion touches the heart of the nation. Close-mindedness, bubble zones, and coerced silence in the public forum have no place in a democratic society. "Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved."[301] No debate can ever be won "by shutting one's ears or ... silencing

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295. *See* Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).

296. *Dennis*, 341 U.S. at 585.

297. *Id.*

298. *See* Roe v. Wade, 410 U.S. 113, 163 (1973).

299. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

300. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (emphasis added).

301. *Dennis*, 341 U.S. at 556 (Frankfurter, J., concurring).

opponents."[302] As long as there is personal freedom and the courage to speak out, one thing is known for certain: the truth will go marching on.[303]

302. *Dennis*, 341 U.S. at 553 (Frankfurter, J., concurring) (citing Sir William Haley, *What Standards for Broadcasting?*, MEASURE, Summer 1950, at 211-12).

303 *See* Julia Ward Howe, *Battle Hymn of the Republic*, *at* www.ukans.edu/carrie/docs/texts/battle/htm (last visited December 3, 2001).