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## The Tailoring of Statutory Bubble Zones: Balancing Free Speech and Patient's Rights

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## THE TAILORING OF STATUTORY BUBBLE ZONES: BALANCING FREE SPEECH AND PATIENTS' RIGHTS

Hill v. Colorado, 120 S. Ct. 2480 (2000)

### I. INTRODUCTION

In *Hill v. Colorado*,<sup>1</sup> the Supreme Court ruled on the constitutionality of a provision of a 1993 Colorado statute<sup>2</sup> restricting speech activity outside health care facilities. The statute's provision makes it unlawful to "knowingly approach" within eight feet of another individual to pass a pamphlet, show a sign, or engage in "oral protest, education, or counseling" without consent if the individual is within one hundred feet of a health care facility's entrance.<sup>3</sup> The Court upheld the statute and found that it was a content-neutral, narrowly tailored, valid time, place, and manner restriction that served significant governmental interests.<sup>4</sup>

This case resolved the outstanding issue of whether a floating buffer zone implemented by statute, as opposed to by injunction, was constitutional. Prior Supreme Court cases had determined that injunctions specifying fixed buffer zones around a medical facility were constitutional,<sup>5</sup> but that a fifteen-foot floating zone around an individual required by a court-imposed injunction was not constitutional.<sup>6</sup>

This Note argues that the Court's holding was correct under First Amendment precedent. Free speech is not an absolute right, and protected speech is subject to limitations.<sup>7</sup> The Su-

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<sup>1</sup> 120 S. Ct. 2480 (2000).

<sup>2</sup> COLO. REV. STAT. § 18-9-122 (1999).

<sup>3</sup> COLO. REV. STAT. § 18-9-122(3) (1999).

<sup>4</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2482-83 (2000).

<sup>5</sup> See *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 757 (1994).

<sup>6</sup> See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 361 (1997).

<sup>7</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

preme Court has previously found that expressive activity, even in public forums, is also "subject to reasonable time, place, or manner restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."<sup>8</sup> The *Hill* Court deemed the provision a restriction on place, and evaluating the provision using this standard, it appropriately found the restriction to be content-neutral because it did not restrict specific subject matters or viewpoints and served a legitimate purpose independent of the content.<sup>9</sup>

In the case at hand, the restricted activity intrudes on the individual rights of others, including the safeguarding of citizens' health and safety, unobstructed access to health care facilities, and privacy interests. This Note contends that the Court should have explicitly extended the captive audience doctrine to patients attempting to access health care facilities and relied on the unwilling captive audience's interest, rather than focusing on unobstructed access and patient welfare.<sup>10</sup>

Lastly, this Note argues that the Court correctly found that the statute is narrowly tailored, leaving available alternative means of communication,<sup>11</sup> and examines the potential impact of the decision on the drafting and enforceability of future buffer zone legislation.<sup>12</sup>

## II. BACKGROUND

### A. THE SHIFT IN ABORTION DISCOURSE AND JUDICIAL/LEGISLATIVE RESPONSES

Few topics elicit greater controversy in the United States than abortion. While the Colorado statute does not specifically

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<sup>8</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Note that content-based speech regulations are subject to strict scrutiny, while content-neutral regulations face intermediate scrutiny by the Court. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

<sup>9</sup> See *infra* Part V.A.

<sup>10</sup> See *infra* Part V.C.

<sup>11</sup> See *infra* Part V.D.

<sup>12</sup> See *infra* Part V.E.

address abortion, abortion protestors, as likely targets for prosecution, challenged the statute.<sup>13</sup> Since 1992, the abortion controversy has shifted focus from the actual procedure itself to demonstrators' free speech.<sup>14</sup> Some argue that stifling discourse about legal restrictions on abortion has led to greater violence and that any further limitations will heighten the violence.<sup>15</sup> Others believe that clearly defined boundaries on demonstrations are necessary barriers to violence<sup>16</sup> and contend that "[p]rotecting the safety of patients at reproductive health care facilities is crucial because without access, the constitutional right to abortion will become a nullity."<sup>17</sup> Diana DeGette, a proponent of the Colorado statute, described the activity around abortion clinics as "in-your-face screaming, spitting on people, thrusting ghastly pictures right into their faces."<sup>18</sup>

Courts have responded to violent and obstructive protest around abortion clinics by awarding injunctions.<sup>19</sup> These injunctions have included various combinations of fixed buffer zones, whereby demonstrators may not come within a specified radius of a clinic, and bubble zones, whereby demonstrators

<sup>13</sup> Petitioners' Brief at \*2-4, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856) (describing petitioners as "sidewalk counselors" opposed to legalized abortion who changed their activities around clinics out of their fear of prosecution).

<sup>14</sup> Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don't*, 79 B.U. L. REV. 959, 984 n.108 (1999).

<sup>15</sup> Note, *Safety Valve Closed: The Removal of Nonviolent Outlets for Dissent and the Onset of Anti-Abortion Violence*, 113 HARV. L. REV. 1210, 1211 (March 2000).

<sup>16</sup> Brief of Amici Curiae the State of New York et al., in Support of Respondents at 14-15, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856):

The decisions of this Court that have upheld statutes that have established buffer zones between demonstrators and the objects of their demonstrations are consistent with actual police experiences, which show that having clear, predictable guidelines understood in advance by all parties (including the police officers themselves) reduces violent confrontations at health care facilities while preserving the First Amendment rights of protestors.

*Id.*

<sup>17</sup> Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in Schenck v. Pro-Choice Network*, 62 BROOK. L. REV. 547, 547-48 (1996).

<sup>18</sup> David Olinger, *State High Court Affirms Abortion 'Buffer Zone'*, DENVER POST, Feb. 17, 1999, at B1.

<sup>19</sup> See, e.g., *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 376 (1997) (where District Court for the Western District of New York issued a preliminary injunction); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 758 (1994) (where Florida Circuit Court expanded an injunction). See also Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in Madsen v. Women's Health Center, Inc.*, 68 S. CAL. L. REV. 427, 431-32 (1995).

must remain a certain distance from individuals entering the clinic.<sup>20</sup> State legislatures and city councils have also responded, enacting numerous statutes and ordinances addressing the issue of abortion protests outside medical facilities in the past decade.<sup>21</sup> Additionally, in May 1994, Congress enacted the Freedom of Access to Clinic Entrances Act ["FACE"],<sup>22</sup> which focused on physical blockades and threats around abortion clinics. A 1999 clinic safety study reports that 32 percent of the 360 clinics surveyed were protected by some sort of buffer zone.<sup>23</sup> Furthermore, 39 percent of these clinics describe the enforcement of their buffer zones and injunctions as "strong."<sup>24</sup> This was nearly three times the number reported in 1998 (14 percent).<sup>25</sup>

#### B. THE VALIDITY OF PRIOR BUFFER ZONES AND BUBBLE ZONES

The Supreme Court previously has addressed the constitutionality of various buffer zones around health care facilities. In the 1994 case *Madsen v. Women's Health Care Center, Inc.*,<sup>26</sup> the Court examined a court-imposed injunction that included a smaller zone prohibiting picketing within thirty-six feet of the facility and a larger zone of three hundred feet in which only invited protestors were allowed.<sup>27</sup> The Supreme Court, however, upheld only part of the thirty-six-foot buffer zone.<sup>28</sup>

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<sup>20</sup> See *Schenck*, 519 U.S. 357 (where District Court for the Western District of New York issued a preliminary injunction); *Madsen*, 512 U.S. 753 (where Florida Circuit Court expanded an injunction). See also Kelly, *supra* note 19.

<sup>21</sup> See, e.g., CAL. PENAL CODE § 602.11(a) (West 1999) (prohibiting intentional blocking of access to health care facility); D.C. CODE ANN. § 22-1114.2(a) (1996) (prohibiting interference with access to health care facility in addition to unreasonable noise); MD. CODE ANN., Crimes and Punishment, Art. 27, § 577B (1999) (prohibiting intentionally stopping another from accessing a medical facility). See also PHOENIX, ARIZ., CODE § 23-10.1 (1993); SANTA BARBARA, CAL., CODE § 9.99 (1993); PENSACOLA, FLA., CODE § 8-1-18 (1995).

<sup>22</sup> 18 U.S.C. § 248 (1998).

<sup>23</sup> 1999 National Clinic Violence Survey Report, Feminist Majority Foundation. (January 19, 2000), available at <<http://www.feminist.org/research/cvsurveys/1999/1999ClinicSurvey.htm>>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 512 U.S. 753 (1994).

<sup>27</sup> *Id.* at 759-60.

<sup>28</sup> *Id.* at 776.

Chief Justice Rehnquist, writing for the majority, examined the government's purpose in creating the restrictions, determined that they were not directed at the contents of the speech, and thus ruled the restrictions were content-neutral.<sup>29</sup> The Court noted that if the restriction had been statutory, the *Ward v. Rock Against Racism* standard<sup>30</sup> would apply.<sup>31</sup> However, examining the differences between injunctions and statutes, the Court concluded that the differences mandate a "more stringent application of general First Amendment principles in [the injunction] context."<sup>32</sup> Not only do ordinances represent the legislature's policy choices, but injunctions impose a greater risk of biased and discriminatory application compared with ordinances.<sup>33</sup> Rejecting the *Ward* test as too lenient for injunctions, the Court stated that "[w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."<sup>34</sup>

The Court thus upheld the thirty-six foot-buffer zone<sup>35</sup> surrounding the entrance and driveway because that restriction burdened only enough speech to serve the significant government interest of ensuring entry to the clinic as well as preventing blocked traffic on the road.<sup>36</sup> The state court had found that petitioners consistently impeded access to the clinic in the past, that a less restrictive initial injunction had failed to prevent this, that petitioners would not be forced to be further than ten to

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<sup>29</sup> *Id.* at 762-64.

<sup>30</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989), proscribed that a time, place, and manner regulation of speech is constitutional as long as it is content-neutral, serves a significant government interest, is narrowly tailored to serve that interest, and allows ample alternate channels for communication.

<sup>31</sup> *Madsen*, 512 U.S. at 765.

<sup>32</sup> *Id.* Justice Stevens, in his separate opinion, disagreed with the majority's comparison of injunctions and statutes and contended that a more lenient standard was appropriate for injunctions because the subjects of the injunction had engaged in wrongdoing. *Id.* at 778 (Stevens, J., concurring in part, dissenting in part). Justice Stevens then concluded that the "physically approaching" prohibition in the three-hundred-foot zone was constitutional. *Id.* at 782.

<sup>33</sup> *Id.* at 764.

<sup>34</sup> *Id.*

<sup>35</sup> "The state court prohibited petitioners from 'congregating, picketing, patrolling, demonstrating, or entering' any portion of the public right-of-way or private property within 36 feet of the property line of the clinic . . ." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994).

<sup>36</sup> *Id.* at 768, 770.

twelve feet from approaching cars, and that protestors forced to stand on the other side of the street could still be seen and heard from the parking lot of the clinic.<sup>37</sup>

In contrast, the Court rejected the thirty-six-foot buffer zone on the back and side of the facility because it found that this part of the injunction did not address the relevant government interest of preserving access to the clinic: the protestors had not blocked that area and individuals did not need to cross that area to gain access to the clinic.<sup>38</sup> The Court also struck down an "images observable" provision because the ease with which a patient could avoid the message by simply averting her eyes made that restriction overly burdensome in its attempt to limit threats to patients.<sup>39</sup> In addition, the Court rejected the three-hundred-foot consent zone around the facilities because it burdened "more speech than necessary to prevent intimidation and to ensure access to the clinic."<sup>40</sup> Lastly, the Court struck down a three-hundred-foot zone around residences because this restriction was simply too large and would result in a general ban on marching through the neighborhood.<sup>41</sup>

A few years later, in 1997, the Court again considered the constitutionality of buffer zones around medical clinics. In *Schenck v. Pro-Choice Network of Western New York*,<sup>42</sup> Chief Justice Rehnquist again wrote for the majority and recognized the significant governmental interests at issue, including: "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."<sup>43</sup> The Court upheld a prohibition on "demonstrating" in a fifteen-foot fixed buffer zone around clinic entrances and driveways established through an injunction, finding it necessary to ensure access to the clinic.<sup>44</sup>

The Court, however, struck down a provision creating a fifteen-foot floating bubble zone against demonstrations around

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<sup>37</sup> *Id.* at 770-71.

<sup>38</sup> *Id.* at 771.

<sup>39</sup> *Id.* at 773.

<sup>40</sup> *Id.* at 774.

<sup>41</sup> *Id.* at 775-76.

<sup>42</sup> 519 U.S. 357 (1997).

<sup>43</sup> *Id.* at 376.

<sup>44</sup> *Id.* at 380.

persons and vehicles accessing the clinic because that provision burdened more speech than necessary to protect the governmental interests.<sup>45</sup> Chief Justice Rehnquist declared that the floating zones were "a broad prohibition," preventing the counselors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks."<sup>46</sup> The restriction required that a demonstrator maintain at all times a fifteen foot distance of separation from the individual, thus requiring the demonstrator to move as the individual moved.<sup>47</sup> In moving with one person, the demonstrator must remain cognizant of the locations of other individuals so as not to invade their fifteen-foot bubble.<sup>48</sup> The Court found that uncertainty would result, leading to an overburdening of speech.<sup>49</sup>

Subsequent to these two Supreme Court cases, the Second Circuit upheld a floating bubble zone of five feet created by an injunction stemming from a FACE violation.<sup>50</sup> On the other hand, the Ninth Circuit struck down a Phoenix ordinance that established eight-foot floating buffer zones around health-care facilities whereby a demonstrator was required to actively withdraw if requested.<sup>51</sup> While the Ninth Circuit found that the ordinance served the government interests of protecting access to the facilities, preventing harassment and intimidation, and safeguarding medical privacy,<sup>52</sup> it found that the ordinance, although content-neutral, was not narrowly tailored because, similar to *Schenck*, the protestor would experience uncertainty concerning compliance.<sup>53</sup> Later, the Ninth Circuit upheld a California ordinance prohibiting protestors from a fixed eight-foot buffer zone around both health care facilities and places of worship, but, following *Sabelko*, rejected a floating buffer zone within one hundred feet of the same facilities.<sup>54</sup> Further, while federal circuit courts have maintained that FACE is constitu-

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<sup>45</sup> *Id.* at 377.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 378.

<sup>48</sup> *Schenk v. Pro-Choice Network of Western New York*, 519 U.S. 357, 378 (1997).

<sup>49</sup> *Id.*

<sup>50</sup> *See United States v. Scott*, 187 F.3d 282, 289 (2d Cir. 1999).

<sup>51</sup> *See Sabelko v. City of Phoenix*, 120 F.3d 161, 165, (9th Cir. 1997).

<sup>52</sup> *Id.* at 164.

<sup>53</sup> *Id.* at 164-65.

<sup>54</sup> *See Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998).



tional,<sup>55</sup> the United States Supreme Court has not reviewed these federal circuit rulings.

### C. THE COLORADO STATUTE AT ISSUE

The Colorado General Assembly enacted Colo. Rev. Stat. § 18-9-122 in 1993 in response to a practice of verbal abuse and physical assaults outside health care facilities.<sup>56</sup> The statute addresses the problems of harassment and violence outside of such facilities, including abortion clinics.<sup>57</sup> Prior to enactment, the House and Senate Judiciary Committees of the Colorado General Assembly held hearings where testimony addressed the conduct of protestors, including intimidation, and impeding access to clinics.<sup>58</sup> While only seven percent of 60,000 clinic patients were there to contemplate an abortion, all patients were subject to the admonitions of protestors.<sup>59</sup> The testimony also included reports of protests by groups such as animal rights activists outside of health care facilities.<sup>60</sup> Furthermore, a witness declared that "protesters create a particularly difficult situation for persons with physical disabilities who lack the physical capability to move through crowds."<sup>61</sup>

The legislature detailed the public health considerations in subsection 18-9-122(1):

The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that

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<sup>55</sup> See, e.g., *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998); *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998) (per curiam); *Terry v. Reno*, 101 F.3d 1412 (D.C. Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996).

<sup>56</sup> See *Hill v. Thomas*, 973 P.2d 1246, 1249 (Colo. 1999).

<sup>57</sup> COLO. REV. STAT. § 18-9-122 (1999).

<sup>58</sup> *Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. Ct. App. 1995).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

prohibits a person from knowingly<sup>62</sup> obstructing another person's entry to or exit from a health care facility.

The statute then details two separate subsections restricting activity around health care facilities, which it defines as "any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state."<sup>63</sup> Subsection 2, which was unchallenged in this case, states that "[a] person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility."<sup>64</sup> The petitioners chose to focus their complaint solely on subsection 3, which dictates that:

No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk areas within a radius of one hundred feet from any entrance door to a health care facility.<sup>65</sup>

The statute makes violation a class 3 misdemeanor punishable by a \$750 fine and up to six months in prison.<sup>66</sup>

Legislators decided on the distance of eight feet by first moving around a room until they found a separation that provided comfort but allowed conversation at a normal tone of voice and then measuring their separation with a tape measure.<sup>67</sup> Former Colorado Rep. Diane DeGette stated: "It's about two arms' lengths away. If a protester holds up a leaflet, I can lift my hand and take the leaflet."<sup>68</sup> Thus, Ms. DeGette considered both pamphleteering and conversation for the size of the bubble zone.<sup>69</sup> The Colorado State Legislature enacted CSA sec-

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<sup>62</sup> COLO. REV. STAT. § 18-9-122(1) (1999).

<sup>63</sup> COLO. REV. STAT. § 18-9-122(4) (1999).

<sup>64</sup> COLO. REV. STAT. § 18-9-122(2) (1999).

<sup>65</sup> COLO. REV. STAT. § 18-9-122(3) (1999).

<sup>66</sup> Michael Romano, 'Bubble Law' Remains Intact, ROCKY MOUNTAIN NEWS, June 29, 2000, at 4A.

<sup>67</sup> Mike Soraghan, *DeGette Celebrates Decision. Ruling Upholds Law She Drafted*, DENVER POST, June 29, 2000, at A9. (The two state legislators were Sen. Mike Feeley and Rep. Diana DeGette. DeGette stated, "A lot of thought went into it [the distance]. We were trying to hammer out what was constitutional." DeGette is now a member of Congress.)

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

tion 18-9-122, and it became effective April 19, 1993. The statute experienced widespread support, with eighty-five of the one hundred legislators approving the measure.<sup>70</sup> As of June 2000, Ms. DeGette claimed that no one had been arrested for violating the statute and the temperament of protests had calmed.<sup>71</sup>

### III. FACTS AND PROCEDURAL HISTORY

Petitioners included Leila Jeanne Hill, Audrey Himmelmann, and Everitt W. Simpson, Jr., all abortion opponents acting as "sidewalk counselors" to women seeking abortions.<sup>72</sup> Believing that women terminate pregnancies in part because they lack information about abortion alternatives,<sup>73</sup> petitioners attempted to "educate, counsel, persuade, or inform pedestrians and occupants of motor vehicles in areas adjacent to medical clinics about abortion and abortion alternatives."<sup>74</sup> Petitioners incorporated written cards, leaflets, pamphlets, and a fetal model in their counseling.<sup>75</sup> Posters included photographs from abortions and text such as "Abortion Kills Children," and Mr. Simpson wore a sandwich board with both textual and visual messages.<sup>76</sup> After Colo. Rev. Stat. section 18-9-122(3) became effective, petitioners modified their counseling methods out of fear of prosecution, but believed that these "changes have made their expressive activities more difficult and less effective."<sup>77</sup>

Five months after Colorado adopted the statute, the plaintiffs filed a complaint in the District Court for Jefferson County, Colorado, seeking a declaratory judgment that section 18-9-122(3) facially violated the First Amendment, as well as a permanent injunction against its enforcement.<sup>78</sup> Plaintiffs alleged that their fear of prosecution under section 18-9-122 caused

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<sup>70</sup> Romano, *supra* note 66.

<sup>71</sup> Soraghan, *supra* note 67.

<sup>72</sup> Hill v. City of Lakewood, 911 P.2d 670, 673 (Colo Ct. App. 1995).

<sup>73</sup> Petitioners' Brief at \*2, Hill v. Colorado, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>74</sup> Hill, 911 P.2d at 673.

<sup>75</sup> *Id.*

<sup>76</sup> Petitioners' Brief at \*3, Hill v. Colorado, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>77</sup> *Id.* at \*4.

<sup>78</sup> Hill, 911 P.2d at 672. See also Hill v. Colorado, 120 S. Ct. 2480, 2485 (2000). "Petitioners' complaint alleged the statute was unconstitutional under both a facial and an as-applied challenge. However, as the statute had not yet been enforced, the trial court correctly ruled that the challenge was facial only." Hill v. Thomas, 973 P.2d 1246, 1248 n.2 (Colo. 1999).

them “to be chilled in the exercise of fundamental constitutional rights,”<sup>79</sup> and named District Attorney David J. Thomas, the City of Lakewood, Attorney General Gale A. Norton, and the State of Colorado as defendants (referred to hereinafter as “the State”).<sup>80</sup> In their complaint, plaintiffs alleged that the statute violated the right to free speech found in the First Amendment to the U.S. Constitution.<sup>81</sup> The complaint contended that it was not possible to remain on the sidewalk as well as remain at a distance of eight feet from others while performing their counseling.<sup>82</sup> The plaintiffs’ complaint alleged that the statute was an unconstitutional content-based restriction lacking a compelling government interest, and furthermore, that the statute was vague, overbroad, and an invalid prior restraint.<sup>83</sup>

The State later filed a motion for summary judgment, alleging the statute was constitutional.<sup>84</sup> The State appended to the motion the legislative hearing transcripts, which included testimony about the use of escorts outside of clinics to assist with clinic access and protect patients from aggressive counselors as well as against the risk that these heated interactions would negatively impact patients’ medical care.<sup>85</sup> While evidence was submitted about confrontational demonstrations blocking access to the clinics, there was no evidence that the defendants engaged in such hostile behavior.<sup>86</sup> In turn, the protestors filed a cross-motion for summary judgment alleging the statute was facially unconstitutional.<sup>87</sup>

#### A. COLORADO TRIAL COURT UPHELD THE COLORADO STATUTE

In an unpublished opinion, Judge Gaspar F. Perricone entered summary judgment for the State, declaring the statute a constitutional restriction that did not violate the First Amendment.<sup>88</sup> While Judge Perricone agreed with petitioners that the

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<sup>79</sup> *Hill*, 120 S. Ct. at 2485 (citing Petitioners’ Brief, at \*18-19, *Hill* (No. 98-1856)).

<sup>80</sup> *Hill*, 911 P.2d at 672-73.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 672.

<sup>83</sup> *See Hill*, 120 S. Ct. at 2485.

<sup>84</sup> *See id.* at 2486.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Hill v. Thomas*, 973 P.2d 1246, 1248 (Colo. 1999).

<sup>88</sup> *See Hill*, 120 S. Ct. at 2486; Petitioners’ Brief at \*1, \*5, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

statute addressed a 'quintessential' public forum,<sup>89</sup> he relied on *Ward* to hold that the statute permissibly imposed a valid content-neutral time, place, and manner restriction.<sup>90</sup> He found that the extension of the statute beyond protest to education and counseling contributed to the application of the statute to all viewpoints.<sup>91</sup> He further noted that the legislative history confirmed that the State did not favor some viewpoints over others and concluded that the statute left available ample alternative means of communication.<sup>92</sup> Finally, he determined that the statute was not overbroad, vague, nor a prior restraint.<sup>93</sup>

#### B. COLORADO COURT OF APPEALS AFFIRMED

Petitioners appealed the summary judgment ruling, but the Colorado Court of Appeals affirmed.<sup>94</sup> Judge Ruland found that the Colorado statute, like the injunction in *Madsen v. Women's Health Center, Inc.*,<sup>95</sup> did not apply only to anti-abortion speech, but rather equally limited speech supporting abortion or addressing organ transplants.<sup>96</sup> Concluding that the statute did not discriminate based on viewpoint, the court applied the content-neutral criteria set forth in *Ward*.<sup>97</sup> Significant government interests were at issue including safe and unimpeded access for patients and staff to medical facilities.<sup>98</sup> In addition, reasonable alternatives for communication were available, and the statute did not burden speech more than what was reasonably necessary.<sup>99</sup> Therefore, the Colorado restrictions were deemed permissible.<sup>100</sup>

Defining "knowingly" based on the criminal code and "protest," "consent," and "counseling and education" using Web-

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<sup>89</sup> Traditionally, public streets and sidewalks are considered public forums typically held open for public communication in the form of assembly and debate. See *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

<sup>90</sup> *Hill*, 120 S. Ct. at 2486.

<sup>91</sup> *Id.*; Petitioners' Brief at \*5, *Hill* (No. 98-1856).

<sup>92</sup> *Hill*, 120 S. Ct. at 2486.

<sup>93</sup> *Id.* at 2486-87.

<sup>94</sup> *Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. Ct. App. 1995).

<sup>95</sup> 512 U.S. 753 (1994).

<sup>96</sup> *Hill*, 911 P.2d at 673.

<sup>97</sup> *Id.* at 673-74.

<sup>98</sup> *Id.* at 674.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

ster's Dictionary, the court rejected the contention that the statute was vague for failing explicitly to define certain terms within the statute itself.<sup>101</sup> The Court of Appeals further declared that there was no authority for extending the prior restraint doctrine beyond the typical situation—where a government entity has the discretion to allow or not allow certain activity—to a situation where private citizens may decide whether others may confront them.<sup>102</sup>

#### C. UNITED STATES SUPREME COURT VACATED AND REMANDED

After the Colorado Supreme Court denied certiorari, the United States Supreme Court in 1997 vacated the judgment of the Court of Appeals of Colorado.<sup>103</sup> The Court remanded the case to the Court of Appeals for its reconsideration based on *Schenck v. Pro-Choice Network of Western New York*.<sup>104</sup> In response to the Colorado Court of Appeals' request for supplemental briefs,<sup>105</sup> the petitioners contended that because *Schenck* struck down a floating zone of fifteen feet, the Colorado floating bubble of eight feet also should be rejected.<sup>106</sup> Petitioners further relied on *Schenck* for the proposition that there is no right to be let alone on a public sidewalk, that fifteen feet is too distant for normal conversation, and that "it is difficult to determine when one is less than a specified distance from a patient or staff member, thus making compliance with the statute difficult."<sup>107</sup>

#### D. COLORADO COURT OF APPEALS AGAIN AFFIRMED

Upon remand, the Court of Appeals rejected these arguments and again upheld the statute.<sup>108</sup> Judge Ruland began by noting that the *Schenck* court "expressly declined to hold that a valid governmental interest in ensuring ingress and egress to a medical clinic may never be sufficient to justify a zone of separation between individuals entering and leaving the premises and

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<sup>101</sup> Hill v. City of Lakewood, 911 P.2d 670, 674 (Colo. Ct. App. 1995).

<sup>102</sup> Id. at 675.

<sup>103</sup> Hill v. Colorado, 519 U.S. 1145 (1997).

<sup>104</sup> Id.

<sup>105</sup> Hill v. City of Lakewood, 949 P.2d 108 (Colo. Ct. App. 1997).

<sup>106</sup> Id. at 109.

<sup>107</sup> Id.

<sup>108</sup> Id.

protestors.”<sup>109</sup> The Colorado Court of Appeals again relied on *Madsen* to determine that the *Ward* standard applied, given that the *Madsen* court had noted that the appropriateness of the *Ward* standard had the restriction been a general statute.<sup>110</sup> Under this criterion, the court upheld the Colorado statute because it was a narrowly tailored restriction that provided ample alternative means of communication.<sup>111</sup>

The case at hand is distinguishable from *Schenck* because eight feet, unlike fifteen feet, allows sufficient protection of speech, and a protestor could approach once they obtained the consent of the individual.<sup>112</sup> The court focused on the government interests at issue (especially consideration for the disabled), ruling them sufficient to justify the restrictions.<sup>113</sup> In response to the argument that it would be difficult to assess an approach of eight feet, the court noted that the level of *mens rea* the statute required is “knowingly,” so inadvertent violation is not prosecutable.<sup>114</sup>

#### E. COLORADO SUPREME COURT AFFIRMED *EN BANC*

The plaintiffs again appealed, and the Colorado Supreme Court granted certiorari and affirmed the lower courts *en banc*.<sup>115</sup> Justice Scott wrote that the statute was a reasonable time, place, and manner restriction on speech under the *Ward* standard.<sup>116</sup> The court further noted that even the petitioners no longer disputed that the statute was content-neutral.<sup>117</sup> Significantly, the Colorado General Assembly “was concerned with the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures.”<sup>118</sup> The court recounted the development of cases supporting the right to privacy and concluded that the statute is a reasonable action to facilitate this fundamental right.<sup>119</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Hill v. City of Lakewood*, 949 P.2d 107, 109 (Colo. Ct. App. 1997).

<sup>112</sup> *Id.* at 110.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999) (*en banc*).

<sup>116</sup> *Id.* at 1253-54.

<sup>117</sup> *Id.* at 1251.

<sup>118</sup> *Id.* at 1258.

<sup>119</sup> *Id.* at 1253.

Noting the Supreme Court directive to consider *Schenck*, the court determined that *Schenck* is appropriate only to judicially created injunctions, not to statutes.<sup>120</sup> As explained in *Madsen*, "injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances," and thus, the court gives greater latitude to statutes.<sup>121</sup> Additionally, the Colorado statute is less restrictive than the *Schenck* injunction because the statute does not prohibit a person from standing still and communicating his message.<sup>122</sup>

The court declined to rely on the Ninth Circuit's reasoning in *Sabelko v. City of Phoenix*,<sup>123</sup> which used the *Ward* test to rule that an ordinance creating an eight-foot floating buffer zone was not narrowly tailored and thus unconstitutional.<sup>124</sup> The Colorado Supreme Court ruled that *Sabelko* was not binding authority and was factually distinguishable.<sup>125</sup> In *Sabelko*, the protestors were required to withdraw from another person upon request even if the protestor did not move.<sup>126</sup> "In other words, under the *Sabelko* ordinance, if a protestor stood still and an individual came within eight feet, the protestor would have violated the ordinance."<sup>127</sup> In contrast, the Colorado statute does not impose this duty to retreat: if the protestor stood still then it would not be a violation because of the inclusion of the word "approaching" in the statute.<sup>128</sup> If the protestor does not actively approach the patient, then the protestor may not be prosecuted.<sup>129</sup>

The Colorado Supreme Court further found that section 18-9-122(3) is narrowly tailored.<sup>130</sup> The court noted that, under

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<sup>120</sup> *Id.* at 1255.

<sup>121</sup> *Hill v. Thomas*, 973 P.2d 1246, 1255 (Colo. 1999) (*en banc*) (citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994)).

<sup>122</sup> *Hill*, 973 P.2d at 1257-58 ("What renders this statute less restrictive than . . . the injunction in *Schenck* . . . is that under section 18-9-122(3), there is no duty to withdraw placed upon petitioners, even within the eight-foot limited floating buffer zone.")

<sup>123</sup> 120 F.3d 161 (9th Cir. 1997).

<sup>124</sup> *Hill*, 973 P.2d at 1255.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Hill v. Thomas*, 973 P.2d 1246, 1255 (Colo. 1999) (*en banc*).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1257.



*Ward*, narrowly tailored does not mean "the least restrictive or least intrusive means of doing so."<sup>131</sup> The court focused on the combination of the *mens rea* "knowingly" and the *actus reus* "approaching."<sup>132</sup> If either of these is missing, the protestor is not subject to prosecution. This sufficiently tailors the statute: a protestor need not worry about unintentional actions or speaking while standing still.<sup>133</sup> Finally, the court determined that ample alternative communication channels existed: All people "are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion."<sup>134</sup> One can still communicate in normal conversation, display signs, and approach up to eight feet of another person.<sup>135</sup> Unsatisfied with the Colorado Supreme Court's ruling, petitioners again appealed.

#### F. UNITED STATES SUPREME COURT GRANTED CERTIORARI

After this long path through the lower courts, the case finally found resolution in the United States Supreme Court, which granted certiorari in 1999.<sup>136</sup> Groups submitting *amicus* briefs supporting petitioners were the Life Legal Defense Foundation,<sup>137</sup> People for the Ethical Treatment of Animals ("PETA"),<sup>138</sup> the American Civil Liberties Union ("ACLU"),<sup>139</sup> and the American Federation of Labor and Congress of Industrial Organization ("AFL-CIO").<sup>140</sup> In contrast, *amicus* briefs sup-

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<sup>131</sup> *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 1257-58.

<sup>134</sup> *Hill v. Thomas*, 973 P.2d 1246, 1255, 1258 (Colo. 1999).

<sup>135</sup> *Id.* at 1258-59.

<sup>136</sup> *Hill v. Colorado*, 527 U.S. 1068 (1999).

<sup>137</sup> Amicus Brief of Life Legal Defense Foundation, 1999 WL 1045139, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>138</sup> Brief Amicus Curiae of People for the Ethical Treatment of Animals in Support of Petitioners, 1999 WL 1032802, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>139</sup> Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners, 1999 WL 1045141, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856). (While the ACLU typically supports the reproductive rights of women, its concern for First Amendment protections led it to argue for the rejection of the Colorado statute.)

<sup>140</sup> Brief for the American Federation of Labor and Congress of Industrial Organization as Amicus Curiae in Support of Petitioners, 1999 WL 1034471, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

porting the respondents included submissions by the United States;<sup>141</sup> the National Abortion and Reproductive Rights Action League, National Abortion Federation, NOW Legal Defense and Education Fund;<sup>142</sup> the American College of Obstetricians and Gynecologists and the American Medical Association;<sup>143</sup> the City of Boulder and the City and County of Denver;<sup>144</sup> and a brief in which the attorneys general for eighteen states joined.<sup>145</sup>

#### IV. SUPREME COURT DECISION

##### A. THE MAJORITY OPINION

Justice Stevens wrote the opinion of the Court, in which Chief Justice Rehnquist and Justices Breyer, Ginsburg, O'Connor, and Souter joined, whereby the Court affirmed the judgment of the Colorado Supreme Court and upheld the constitutionality of Colo. Rev. Stat. section 18-9-122(3).<sup>146</sup> In his analysis, Justice Stevens first considered the legitimate interests at issue<sup>147</sup> and then evaluated whether the time, manner, place restriction on speech activity was: content-neutral;<sup>148</sup> narrowly tailored to serve the legitimate interests, allowing ample alternate means of communicating;<sup>149</sup> not overbroad;<sup>150</sup> not impermissibly vague;<sup>151</sup> and not acting as a prior restraint on speech.<sup>152</sup>

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<sup>141</sup> Brief for the United States as Amicus Curiae Supporting Respondents, 1999 WL 1211725, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>142</sup> Brief Amici Curiae of National Abortion and Reproductive Rights Action League, National Abortion Federation, NOW Legal Defense and Education Fund in Support of Respondents, 1999 WL 1186249, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>143</sup> Brief of the American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae in Support of Respondents, 1999 WL 1186250, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>144</sup> Amici Brief of the City of Boulder and the City and County of Denver in Support of Respondents, 1999 WL 1186251, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>145</sup> Brief Amici Curiae the State of New York, et al., in Support of Respondents, 1999 WL 1186258, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856). (states included Arizona, California, Connecticut, Hawaii, Kansas, Maine, Massachusetts, Maryland, Missouri, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Vermont and Washington).

<sup>146</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2484 (2000).

<sup>147</sup> See *infra* Part IV.A.1.

<sup>148</sup> See *infra* Part IV.A.2.

<sup>149</sup> See *infra* Part IV.A.3.

### 1. *The Opposing Interests*

In analyzing the question of “whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener,”<sup>153</sup> Justice Stevens first examined the concerns and constitutionally protected rights of those on both sides of the debate that required balancing.<sup>154</sup> The Court recognized that “[t]he First Amendment interests of petitioners are clear and undisputed:” the speech is conducted on the “quintessential” public forum of public sidewalks and streets, therefore, normally protected.<sup>155</sup> On the other hand, the State can exercise its traditional police powers to safeguard its citizens’ health, safety, and welfare, which “may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests.”<sup>156</sup> The State also has an interest in the facilitation of unbiased and objective application of the law through specific rules.<sup>157</sup>

Justice Stevens then addressed the consideration of the interests of unwilling listeners. The Colorado statute only implicates communications to unwilling audiences, and while the right to free speech includes the right to try to sway others to one’s viewpoint, “it does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.”<sup>158</sup> The audience’s ability to escape the communication is significant as “[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.”<sup>159</sup> The privacy interests of unwilling listeners varies with the location of the communica-

<sup>150</sup> See *infra* Part IV.A.4.

<sup>151</sup> See *infra* Part IV.A.5.

<sup>152</sup> See *infra* Part IV.A.6.

<sup>153</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2485 (2000).

<sup>154</sup> *Id.* at 2488.

<sup>155</sup> *Id.* at 2488-89.

<sup>156</sup> *Id.* at 2489.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding a municipal ordinance restricting picketing activities in residential areas)).

<sup>159</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2489 (2000) (citing *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 772-73 (1994)).

tion, rising in importance near one's home and in situations where one cannot avoid the message.<sup>160</sup>

Similar to the Colorado Supreme Court in its opinion, Justice Stevens included the "interest in avoiding unwanted communication" within the "right to be let alone" discussed by Justice Brandeis in his *Olmstead v. United States*<sup>161</sup> dissent.<sup>162</sup> The Court supported the balancing of the audience's right to be let alone along with unimpeded passage against the protestor's right to free speech because the statute applied only to communications to unwilling listeners.<sup>163</sup> Denying the dissenters' contention that it has created a "right to avoid popular speech in a public forum," the Court instead stated that it was noting only that precedent had "recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'"<sup>164</sup> Justice Stevens argued that past cases do not support the dissenters' contention that consideration of such interests in the balancing was unconstitutional. He then re-identified the protection of patients' physical and emotional health along with unfettered access to the medical facilities as the purposes for the Colorado statute.<sup>165</sup>

## 2. Content-Neutral Time, Place, and Manner Restriction

Next, the Court agreed with the four state court opinions and ruled the statute a content-neutral time, place, and manner regulation based on the standard from *Ward v. Rock Against Racism*.<sup>166</sup> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, and manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."<sup>167</sup> The Colorado statute passes *Ward's* test because: (1) it regulates the places for speech and not the speech itself;

<sup>160</sup> *Id.* Justice Stevens related the ability to access medical facilities to the ability to go to and from work that is identified in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921).

<sup>161</sup> 277 U.S. 438, 478 (1928).

<sup>162</sup> *Hill*, 120 S.Ct. at 2489-90.

<sup>163</sup> *Id.* at 2490.

<sup>164</sup> *Id.* (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 208 (1975)).

<sup>165</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2491 n.25 (2000).

<sup>166</sup> *Id.* at 2491 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

<sup>167</sup> *Id.* (citing *Ward*, 491 U.S. at 791).

(2) the Colorado legislature did not adopt it as a result of disagreeing with a particular message, and the statute applies equally to all viewpoints and does not reference a specific subject matter; and (3) Colorado's interests in privacy, unimpeded access, and even-handed enforcement were not correlated to the speech's content.<sup>168</sup>

While the petitioners claimed the restriction is content-based because one needs to examine the message to determine if it constitutes "protest, education, or counseling," the Court rejected this argument, noting that mere examination of the communication's content does not automatically make it content-based.<sup>169</sup> Many statutes require the evaluation of speech content in order, for example, to determine if it is a threat, agreement, or offer.<sup>170</sup> Justice Stevens declared that "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."<sup>171</sup> Citing previous cases upholding restrictions on picketing and demonstrating including *Schenck* and *Madsen*, the Court concluded that the examination of whether an individual is demonstrating is no less extensive than that necessary to determine if an individual is counseling.<sup>172</sup> The Court distinguished *Carey v. Brown*,<sup>173</sup> relied on by the petitioners, because the statute rejected in *Carey* restricted the particular subject matter of labor disputes whereas Colorado's statute is not limited to a particular subject matter.<sup>174</sup> Because the Court concluded that the Colorado statute does not restrict based on viewpoint or subject matter, the Court agreed with the lower courts that the statute is content-neutral.<sup>175</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 2491-92. The Court addressed this argument, but noted that it was likely waived by petitioners as it was not addressed in any of the four state court opinions. 120 S. Ct. at 2492. The Colorado Supreme Court's opinion stated that petitioners no longer argued that the statute was content-based, conceding that a time, place, and manner regulation's standard was appropriate. 120 S. Ct. at 2487, note 19 (citing *Hill v. Thomas*, 973 P.2d 1246, 1251 (1999)).

<sup>170</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2492 (2000).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 447 U.S. 455 (1980).

<sup>174</sup> *Hill*, 120 S.Ct. at 2493. (Noting that anyone, including used car salesmen and animal rights activists, who attempt to educate or counsel on any subject matter could fall within the statute's restrictions.

<sup>175</sup> *Id.* at 2492-94.

### 3. *Narrowly Tailored Regulation Allowing Other Communication Channels*

Having concluded the statute is content-neutral and serves legitimate government interests, Justice Stevens then declared that the statute is narrowly tailored and provides sufficient alternative channels for communication and is thus a “valid time, place, and manner regulation.”<sup>176</sup> “As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”<sup>177</sup> This statute, Justice Stevens wrote, does not entirely exclude all means of communication—protestors still may display signs, speak at a conversational volume, and pass out leaflets as long as they stand still.<sup>178</sup> The Court distinguished *Schenck* because eight feet, unlike *Schenck*’s fifteen feet, is a “normal conversational distance.”<sup>179</sup> Significantly, a Colorado speaker does not violate the statute if she stands in place, and including the “knowing” requirement prevents inadvertent violations.<sup>180</sup>

Focusing on the place where the regulations apply, the Court highlighted Colorado’s legitimate concerns specific to healthcare facilities.<sup>181</sup> The Court found that such facilities—like the schools, courthouses, and homes where previous decisions had recognized government interests in protecting such places—also implicate special concerns and government interests.<sup>182</sup> The Court noted that “[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions.”<sup>183</sup> The Court then recognized that in protecting those persons the statute also could limit harmless approaches, but declared that “[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding

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<sup>176</sup> *Id.* at 2494.

<sup>177</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2494 (2000).

<sup>178</sup> *Id.* at 2495 (The Court even argued that the eight-foot separation would make it easier for the audience to see the signs and could encourage loud and aggressive protestors to temper their conduct such that the peaceful petitioners could be heard).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2496.

<sup>182</sup> *Id.*

<sup>183</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2496 (2000).

subjectivity, to protect speech itself.”<sup>184</sup> The Court further noted that this restriction is limited to one hundred feet from the entrance and is thus less restrictive than the ban on picketing outside of residences upheld in *Frisby v. Schultz*,<sup>185</sup> the restriction of leafleting at a fairground in *Heffron v. International Society for Krishna Consciousness, Inc.*,<sup>186</sup> or the frequently required silence in areas outside of hospitals.<sup>187</sup> “Signs, pictures, and voice itself can cross an 8-foot gap with ease,”<sup>188</sup> and therefore, the Court concluded, Colo. Rev. Stat. section 18-9-122(3) is “reasonable and narrowly tailored.”<sup>189</sup>

#### 4. Not Overbroad

The Court rejected the petitioner’s characterization of the statute as “overbroad” because it impacts and protects too many people and does not focus on facilities where disruptions had occurred, stating that statutes which reach further than their intended purposes are not thereby unconstitutional.<sup>190</sup> The Court found that the same government interests are implicated for all persons accessing a medical facility.<sup>191</sup> The statute’s generality renders it content-neutral’ thus *Ward* is the appropriate standard. The Court called the “comprehensiveness” of the statute a “virtue,” “because it is evidence against there being a discriminatory governmental motive.”<sup>192</sup> The Court distinguished the cases cited by the petitioners where the breadth of the statute resulted in which a statute’s breadth resulted in its extension to protected activity.<sup>193</sup> In this case, the Court noted that the statute will indeed impact protected speech activity, and the breadth alone does not cause the restriction on protected speech.<sup>194</sup>

In response to the petitioners’ additional argument that the statute is overbroad because it “bans virtually the universe of

<sup>184</sup> *Id.*

<sup>185</sup> 487 U.S. 474 (1988).

<sup>186</sup> 452 U.S. 640, 647 (1981).

<sup>187</sup> *Hill*, 120 S. Ct. at 2496-97.

<sup>188</sup> *Id.* at 2496.

<sup>189</sup> *Id.* at 2497.

<sup>190</sup> *Id.*

<sup>191</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2498 (2000).

<sup>192</sup> *Id.* at 2497.

<sup>193</sup> *Id.* at 2498.

<sup>194</sup> *Id.*

protected expression, including the displays of signs, distribution of literature, and mere verbal statements,"<sup>195</sup> the Court declared that the statute does not actually "ban" any statements.<sup>196</sup> Instead "[i]t merely regulates the places where communications may occur."<sup>197</sup> Moreover, the Court found that the impact on other protestors whose conduct is implicated by the statute will not differ from the impact on the petitioners; all are treated similarly, legitimately falling within the sweep of the statute.<sup>198</sup>

### 5. *Not Vague*

Furthermore, Justice Stevens rejected the argument that the Colorado statute is unconstitutionally vague.<sup>199</sup> He explained that a statute might be vague either by failing to explain adequately to people what is prohibited or by allowing or encouraging inconsistent enforcement.<sup>200</sup> This statute does not fall into either category because it contains a scienter requirement (the law must be broken "knowingly") and people understand what the words "approaching," "consent," "protest, education, or counseling" mean.<sup>201</sup> The Court similarly rejected vagueness arguments from *Schenck*<sup>202</sup> and *Madsen*.<sup>203</sup> The Court determined that what is important is the application of the statute not to a far-fetched hypothetical, but to the typically encountered situation.<sup>204</sup> Concluding that "it is clear what the ordinance as a whole prohibits,"<sup>205</sup> the Court noted that "because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'"<sup>206</sup> Furthermore, Justice Stevens found that the police are sufficiently guided by the statute, including the specific distances of the zones at issue,

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<sup>195</sup> *Id.* at 2497.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2498 (2000).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> 519 U.S. 357, 383 (1997).

<sup>203</sup> 512 U.S. 753, 775-776 (1994).

<sup>204</sup> *Hill*, 120 S. Ct. at 2498.

<sup>205</sup> *Id.* at 2498 (citation omitted).

<sup>206</sup> *Id.* (citation omitted).



and thus, the amount of police judgment involved for enforcement is not problematic.<sup>207</sup>

#### 6. *Not a Prior Restraint*

Lastly, the Court discarded the argument that the consent provision of the statute introduces an unconstitutional prior restraint on speech.<sup>208</sup> Noting that the Court rejected this argument in both *Madsen* and *Schenck*, Justice Stevens further argued that "the restrictions in this case raise an even lesser prior restraint concern than those at issue in *Schenck* and *Madsen*, where particular speakers were at times completely banned within certain zones. Under this statute, absolutely no channel of communication is foreclosed."<sup>209</sup> Furthermore, the Court contended that prior restraints apply only to official censorship and, thus, requiring an individual's consent to approach is not a prior restraint.<sup>210</sup> Thus, the Court affirmed the Colorado Supreme Court's judgment.<sup>211</sup>

#### B. CONCURRENCE BY JUSTICE SOUTER IN WHICH JUSTICES O'CONNOR, GINSBURG, AND BREYER JOINED

Justice Souter joined the opinion of the Court, adding further discourse on the analysis of whether a regulation of speech is content-based.<sup>212</sup> He explained that content-based regulations, which include restrictions on both particular subjects and viewpoints within a subject, face "strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others."<sup>213</sup> Justice Souter distinguished regulations of the circumstances of speech delivery from regulations of the content of speech and noted that just because one is engaged in speech does not immunize him from regulation of his behavior while speaking.<sup>214</sup> To be content-based, the restriction must be imposed because of the actual message within the

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<sup>207</sup> *Id.* at 2499.

<sup>208</sup> *Id.* (Neither dissent addressed this issue).

<sup>209</sup> *Id.*

<sup>210</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2499 (2000).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 2499 (Souter, J., concurring).

<sup>213</sup> *Id.* at 2499-2500 (Souter, J., concurring).

<sup>214</sup> *Id.* at 2500 (Souter, J., concurring).

communication and “not because of offensive behavior identified with its delivery.”<sup>215</sup> Justice Souter concluded that Colorado regulations were introduced because of objectionable conduct and were not designed to silence one side of the controversy.<sup>216</sup> The statute does not address a specific opinion since the individual may stand in place and communicate any message that the individual wishes, clearly showing that “the reason for [the statute’s] restriction on approaches goes only to the act of approaching, not to the content of the speech of those approaching.”<sup>217</sup>

Justice Souter next addressed the breadth and clarity of the statute.<sup>218</sup> He dismissed the concern that subsection (3) may apply to unintentional speakers by noting the requirement that the speaker act “knowingly.”<sup>219</sup> Justice Souter “fail[s] to see danger of the substantial overbreadth required to be shown before a statute is struck down out of concern for the speech rights of those not before the Court.”<sup>220</sup> This is because he believes most people near the entrances to the facilities will be using those facilities, and instances when the statute will unnecessarily reach passersby will be rare. Justice Souter also found that the statute is not impermissibly vague. Focusing on the word “education,” he noted that it does not provide a significant limitation beyond immunizing greetings or inquiries for assistance: “[w]hat is significant is not that the word fails to limit clearly, but that it pretty clearly fails to limit very much at all.”<sup>221</sup> People subject to the statute are likely to understand the word and will thus have fair warning. Furthermore, the police discretion for enforcement is not greater than when applying other general criminal statutes.<sup>222</sup>

### C. JUSTICE SCALIA’S DISSENT IN WHICH JUSTICE THOMAS JOINED

Not surprisingly, Justice Scalia provided an impassioned dissent, attacking the majority for applying a different jurispru-

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<sup>215</sup> *Id.* at 2500-2501 (Souter, J., concurring).

<sup>216</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2501 (2000) (Souter, J., concurring).

<sup>217</sup> *Id.* (Souter, J., concurring).

<sup>218</sup> *Id.* at 2501-2 (Souter, J., concurring).

<sup>219</sup> *Id.* (Souter, J., concurring).

<sup>220</sup> *Id.* at 2502 (Souter, J., concurring).

<sup>221</sup> *Id.* (Souter, J., concurring).

<sup>222</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2502 (2000) (Souter, J., concurring).

dence to abortion cases than that applied to all other types of cases.<sup>223</sup> Castigating the Court for its ruling, Justice Scalia stated that because the regulated speech is that of abortion opponents, the regulation “enjoys the benefit of the ‘ad hoc nullification machine’ that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.”<sup>224</sup>

Justice Scalia first argued that the restriction on oral communications is in fact content-based, because an approach for any message other than one of protest, education, or counseling would be permissible.<sup>225</sup> “Whether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on what he intends to say when he gets there.”<sup>226</sup> Justice Scalia contended the regulation would be deemed content-based if the petitioners were antiwar protestors or union members, rather than opponents of abortion.<sup>227</sup>

Similarly to his dissents in both *Madsen* and *Schenck*, Justice Scalia argued that a restriction is content-based not only if it is always used for “invidious, thought-control purposes,” but also if it creates a risk of such use.<sup>228</sup> This restriction does just that.<sup>229</sup> Utilizing a disparate impact argument, Justice Scalia declared that:

[t]he Court’s confident assurance that the statute poses no special threat to First Amendment freedoms because it applies alike to ‘used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries,’ . . . is a wonderful replication (except for its lack of sarcasm) of Anatole France’s observation that ‘[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges. . .’<sup>230</sup>

Justice Scalia, convinced that the legislators were specifically “taking aim at” abortion opponents, found that at some point regulation of conduct is so connected with speech that it be-

<sup>223</sup> *Id.* at 2503 (Scalia, J., dissenting).

<sup>224</sup> *Id.* (Scalia, J., dissenting).

<sup>225</sup> *Id.* (Scalia, J., dissenting).

<sup>226</sup> *Id.* (Scalia, J., dissenting).

<sup>227</sup> *Id.* (Scalia, J., dissenting).

<sup>228</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2504 (2000) (Scalia, J., dissenting) (quoting *Madsen v. Women’s Health Care Center, Inc.*, 512 U.S. 753 (1994)).

<sup>229</sup> *Id.* (Scalia, J., dissenting).

<sup>230</sup> *Id.* (Scalia, J., dissenting).

comes speech itself.<sup>231</sup> "The strictures of the First Amendment cannot be avoided by regulating the act of moving one's lips; and they cannot be avoided by regulating the act of extending one's arm to deliver a handbill, or peacefully approaching in order to speak."<sup>232</sup> In essence, restricting the place of speech is the same as restricting speech and still must survive strict scrutiny.<sup>233</sup>

Under the strict scrutiny standard, Justice Scalia found the statute unconstitutional, providing little explanation for his conclusion.<sup>234</sup> "Suffice it to say that if protecting people from unwelcome communications (one of the governmental interests the Court posits) is a compelling state interest, the First Amendment is a dead letter."<sup>235</sup> Next, Justice Scalia stated that

if . . . forbidding peaceful, nonthreatening, but uninvited speech from a distance closer than eight feet is a 'narrowly tailored' means of preventing the obstruction of entrance to medical facilities (another of the government interests the State asserts) narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker.<sup>236</sup>

Thus, Justice Scalia rejected one purported interest and found the statute was not narrowly tailored to address the other interest.

Even assuming, *arguendo*, that the Colorado statute is a content-neutral, time, place, and manner restriction, Justice Scalia maintained that it still failed under the corresponding standard.<sup>237</sup> Examining the government interests in greater detail, Justice Scalia first chastised the Court for relying primarily on an interest that he claimed Colorado not only failed to assert, but also repudiated—the right to be let alone.<sup>238</sup> Not only does Jus-

<sup>231</sup> *Id.* at 2505 (Scalia, J., dissenting).

<sup>232</sup> *Id.* (Scalia, J., dissenting).

<sup>233</sup> *Id.* at 2504 (Scalia, J., dissenting).

<sup>234</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2507 (2000) (Scalia, J., dissenting). Justice Scalia defined the strict scrutiny test as requiring "the restriction be narrowly tailored to serve a compelling state interest." *Id.*

<sup>235</sup> *Id.* (Scalia, J., dissenting).

<sup>236</sup> *Id.* (Scalia, J., dissenting).

<sup>237</sup> *Id.* (Scalia, J., dissenting).

<sup>238</sup> *Id.* at 2507-8 (Scalia, J., dissenting). "The interest that the Court makes the linchpin of its analysis was not only unasserted by the State; it is not only completely different from the interest that the statute specifically sets forth; it was explicitly disclaimed by the State in its brief before this Court, and characterized as a 'straw inter-

tice Scalia believe the Court's denotation of the right as an "interest" inappropriate, but he also thinks that the majority misinterprets the "interest" and that it actually supports his rejection of the regulation.<sup>239</sup> If there is in fact such a right, it was traditionally a right imposed against the government and not against fellow citizens.<sup>240</sup> Thus, Justice Scalia found that such a right would actually support "the right of the speaker in the public forum to be free from government interference of the sort Colorado has imposed here,"<sup>241</sup> rather than the right of an individual to be let alone from the speech of his fellow citizen. Dismissing the idea of a captive audience on public sidewalks, Justice Scalia found that outside the home, citizens have the burden either to look away or to get away from any unwelcome communication.<sup>242</sup>

Addressing what he considered the "real" state interest, "the preservation of unimpeded access to health care facilities," Justice Scalia determined that subsection (2) adequately addresses that interest while still being narrowly tailored.<sup>243</sup> Even though he recognized that it was possible that subsection (2) would not restrict some expressions that could impede access, he rejected subsection (3) because he found it prohibits a "vast" amount of harmless speech.<sup>244</sup> Justice Scalia declared, "[t]he sweep of this prohibition is breathtaking."<sup>245</sup> Justice Scalia not only criticized the majority's standard for tailoring, but he also chided the majority for its naive belief that people converse at a distance of eight feet apart on public sidewalks, as opposed to "in the quiet of my chambers."<sup>246</sup> He found the statute lacks a sufficient connection between its goal of unimpeded access and the restrictive provision, and rejected the "prophylactic approach" of the stat-

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est' petitioners served up in the hope of discrediting the State's case." *Id.* at 2507-8 (citing Respondent's Brief, 1999 WL 1146869 at \*25 n.19, *Hill* (No. 98-1856)).

<sup>239</sup> *Id.* (Scalia, J., dissenting).

<sup>240</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2508 (2000) (Scalia, J., dissenting).

<sup>241</sup> *Id.* (Scalia, J., dissenting).

<sup>242</sup> *Id.* at 2509 (Scalia, J., dissenting).

<sup>243</sup> *Id.* at 2510 (Scalia, J., dissenting). Subsection (2) states that a person is guilty of a crime who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility." COLO. REV. STAT. § 18-9-122(2) (1999).

<sup>244</sup> *Id.* at 2510 (Scalia, J., dissenting).

<sup>245</sup> *Id.* (Scalia, J., dissenting).

<sup>246</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2511 (2000) (Scalia, J., dissenting).

ute, declaring “[p]rophylaxis is the antithesis of narrow tailoring.”<sup>247</sup>

#### D. JUSTICE KENNEDY’S DISSENT

Justice Kennedy began his dissent with the contention that “[f]or the first time, the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.”<sup>248</sup> Supporting Justice Scalia’s analysis of the First Amendment violation, Justice Kennedy characterized the majority’s analysis as a risk to the tradition of open communication in public forums.<sup>249</sup>

Justice Kennedy, the author of the majority opinion upholding a noise-level restriction in *Ward*, found the *Ward* framework inappropriate to the Colorado statute because he deemed it a content-based restriction of speech.<sup>250</sup> He distinguished cases utilized by the majority by declaring that an officer need not examine the speech to determine if one is picketing or leafleting, but would need to do so to evaluate if one is protesting, educating, or counseling.<sup>251</sup> Justice Kennedy then concluded that to be content-neutral, the statute would have to apply to every building, and not just every health-care facility, in the state of Colorado, and thus the statute was realistically a topic-based restriction.<sup>252</sup> “By confining the law’s application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination.”<sup>253</sup> Ignoring the special government considerations related to medical care and patient safety, he analogized this restriction to a hypothetical restriction that regulated “oral protest, education, or counseling” within one hundred feet of a lunch counter, which he contended would have been rejected as content-based by previous courts.<sup>254</sup> “It should be a profound disappointment to defenders of the

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<sup>247</sup> *Id.* at 2512, 2514 (Scalia, J., dissenting).

<sup>248</sup> *Id.* at 2516 (Kennedy, J., dissenting).

<sup>249</sup> *Id.* (Kennedy, J., dissenting).

<sup>250</sup> *Id.* (Kennedy, J., dissenting).

<sup>251</sup> *Id.* (Kennedy, J., dissenting).

<sup>252</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2517 (2000) (Kennedy, J., dissenting). (On the other hand, Justice Kennedy argued that the Colorado statute was overbroad).

<sup>253</sup> *Id.* (Kennedy, J., dissenting).

<sup>254</sup> *Id.* (Kennedy, J., dissenting).

First Amendment that the Court today refuses to apply the same structural analysis when the speech involved is less palatable to it.”<sup>255</sup>

Justice Kennedy also characterized the statute as a viewpoint-based restriction because of the inclusion of the word “against” in the first subsection of the statute.<sup>256</sup> He argued that speech supporting abortion rights would not be a violation of the statute, as statements like “We are for abortion rights” would not be “oral protest, education, or counseling.”<sup>257</sup> Based on the belief that the statute is a subject-matter and viewpoint-based regulation, Justice Kennedy deemed it invalid.<sup>258</sup>

Additionally, Justice Kennedy stated that the statute was unconstitutional because it is vague and overly broad.<sup>259</sup> Justice Kennedy claimed, “the Colorado courts did not give the statute a sufficient narrowing construction,” and agreed that “protest” “counseling,” and “education” are not precise words, thus likely chilling speech and enhancing the potential for biased enforcement and prosecution.<sup>260</sup> He found ambiguity in the execution of the statute: the possibility of a protestor moving closer to another patient while trying to maintain an eight-foot distance from a first patient, the possibility of unclear signals for consent, and the inability to always know if a building contains some sort of health facility.<sup>261</sup> Justice Kennedy, therefore, rejected the criminal statute because of its lack of specificity.<sup>262</sup>

Like Justice Scalia, Justice Kennedy also found that even if the statute were content-neutral, it would not be a valid time, manner, and place restriction because it burdens more speech than necessary to achieve the government’s interests.<sup>263</sup> “Our precedents do not permit content censoring to be cured by taking even more protected speech within a statute’s reach.”<sup>264</sup> Rather than restrict approaches to patients, Justice Kennedy

<sup>255</sup> *Id.* (Kennedy, J., dissenting).

<sup>256</sup> *Id.* (Kennedy, J., dissenting).

<sup>257</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2517 (2000) (Kennedy, J., dissenting).

<sup>258</sup> *Id.* (Kennedy, J., dissenting).

<sup>259</sup> *Id.* at 2519 (Kennedy, J., dissenting).

<sup>260</sup> *Id.* at 2520 (Kennedy, J., dissenting).

<sup>261</sup> *Id.* (Kennedy, J., dissenting).

<sup>262</sup> *Id.* at 2521 (Kennedy, J., dissenting).

<sup>263</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2521 (2000) (Kennedy, J., dissenting).

<sup>264</sup> *Id.* at 2522 (Kennedy, J., dissenting).

would rely on criminal statutes proscribing battery and argued that subsection (2) adequately addresses the issue of access to facilities.<sup>265</sup> He further stated that subsection (3) does not provide "ample alternative channels for communication of the information" because the speaker should be able to select the appropriate means and forum for delivery of the message.<sup>266</sup> Contending that "law forecloses peaceful leafleting," Justice Kennedy then examined the history of leafleting and cited cases holding that one has a right to tender, but not force another to accept, a leaflet.<sup>267</sup>

Lastly, Justice Kennedy examined how the majority's ruling conflicts with the balanced approach of *Planned Parenthood of SE Pennsylvania v. Casey*,<sup>268</sup> whereby the Court curtailed legal protest to eliminate abortions and left available the opportunity for moral debate.<sup>269</sup> Now, Justice Kennedy argued, the Court has incorrectly abridged the moral discourse.<sup>270</sup>

#### V. ANALYSIS

The Court's holding that Colo. Rev. Stat. section 18-9-122(3) is constitutional certainly was not predictable in light of the Court's strong words against bubble zones in *Schenck*.<sup>271</sup> While the Court in *Madsen* had ruled that statutes should be judged more leniently than injunctions,<sup>272</sup> the *Hill* Court, unlike the Colorado Supreme Court, did not rely on this distinction in its majority opinion.<sup>273</sup> Interestingly, the author of the majority opinion, Justice Stevens, actually argued in his separate opinion in *Madsen* that statutes should be held to a more exacting scrutiny.<sup>274</sup> The Court, instead, chose to distinguish *Schenck* based on the Colorado statute's smaller distance allowing normal conversational volumes, as well as on the fact that a speaker need not

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<sup>265</sup> *Id.* (Kennedy, J., dissenting).

<sup>266</sup> *Id.* at 2524 (Kennedy, J., dissenting).

<sup>267</sup> *Id.* at 2524-25 (Kennedy, J., dissenting).

<sup>268</sup> 505 U.S. 833 (1992).

<sup>269</sup> *Hill*, 120 S. Ct. at 2529 (Kennedy, J., dissenting).

<sup>270</sup> *Id.* at 2529-30 (Kennedy, J., dissenting).

<sup>271</sup> In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 378-79 (1997), Chief Justice Rehnquist called the injunction's floating zone a "broad prohibition" that burdened more speech than necessary.

<sup>272</sup> *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-765 (1994).

<sup>273</sup> *Hill*, 120 S. Ct. at 2480.

<sup>274</sup> *Madsen*, 512 U.S. at 778 (Stevens, J., concurring in part, dissenting in part).



retreat and can stand in place without risk of criminal prosecution.<sup>275</sup> The Court appropriately identified a principled means of distinguishing *Schenck* and *Madsen* from *Hill*, and in so doing, correctly found that the Colorado statute is a content-neutral restriction that is adequately tailored to meet the relevant government interests.

A. WHICH STANDARD TO APPLY: CONTENT-NEUTRAL INTERMEDIATE SCRUTINY OR CONTENT-BASED STRICT SCRUTINY

The majority correctly found that the Colorado statute imposes a content-neutral restriction on speech activity because it targeted neither a specific subject matter, since it was not limited to the subject of abortion, nor a particular viewpoint, since it was not limited to speech opposing abortion.<sup>276</sup> While Justice Scalia provided an interesting disparate impact-type argument to support the characterization of the statute as content-based,<sup>277</sup> the Court appropriately recognized that it is the government's purpose, and not the result, that is significant.<sup>278</sup> Realistically, most statutes will have an impact on only certain groups. While arguing that FACE does not violate the First Amendment, Professor Laurence Tribe stated: "It is crucial to recognize that nothing in the First Amendment remotely shields objectively defined, nonspeech conduct from regulation simply because many or even most of those who engage in that conduct are likely to share a certain philosophy or viewpoint."<sup>279</sup> The majority aptly noted that a statute prohibiting solicitation at airports was upheld even though it was more likely to impact Hari-Krishnas.<sup>280</sup> *Ward* clarifies that, instead, the statute is content-neutral if it is "justified without reference to the content of the regulated speech."<sup>281</sup> Here,

[t]he legislator who proposed what became subsection (3) expressly referred to that testimony [about intimidating and obstructive conduct by anti-Medicaid and animal rights activists around medical facilities] in de-

<sup>275</sup> *Hill*, 120 S. Ct. at 2495.

<sup>276</sup> *Id.* at 2491-94.

<sup>277</sup> *Id.* at 2504 (Scalia, J., dissenting).

<sup>278</sup> *Id.* at 2491.

<sup>279</sup> Laurence H. Tribe, *The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993*, 1 VA. J. SOC. POL'Y & L. 291, 301 (1994).

<sup>280</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2493-94 (2000).

<sup>281</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

scribing the 'overall purpose of this Bill, which is not directed solely toward [any] type . . . of clinic . . . , but, rather, towards the right of any patient to seek the medical treatment they need.'<sup>282</sup>

The majority, though, failed to address fully Justice Kennedy's analogy to the restriction of speech outside a lunch counter, which he contended would have been struck down as content-based.<sup>283</sup> Justice Stevens, rewriting the hypothetical as prohibiting anyone from sitting at a lunch counter for more than an hour without making a purchase, declared that such a statute also would not be content-based "(even if it were enacted by a racist legislature that hated civil rights protestors (although it might raise separate questions about the State's legitimate interest at issue))."<sup>284</sup> However, the existence of legitimate interests seems inextricably intertwined with the analysis of whether a restriction is content-based. The lack of a rational and justifiable government interest in the hypothetical statute betrays any contention that the purpose is anything but racist and targeted at those opposing segregation and thus shows that the purpose of the restriction was to silence a message. A statute cannot be "justified without reference to the content of the regulated speech"<sup>285</sup> if it is not justified at all. In contrast, the government has legitimate interests related to medical facilities that apply regardless of the speaker's message.<sup>286</sup> Thus, Justice Kennedy's lunch counter example likely would be content-based while the Colorado statute remains content-neutral.

There is no evidence that supports the contention that the Colorado legislature was specifically targeting the anti-abortion viewpoint, which would make it content-based. Justice Kennedy's reliance on the word "against" from Colo. Rev. Stat. section 18-9-122(1) to find that the Colorado legislator's purpose was to target a viewpoint and make an abortion supporter immune from prosecution is inappropriate.<sup>287</sup> The inclusion of this word merely hints at the fact that much of the evidence of behavior the legislators were concerned with related to conduct

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<sup>282</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>283</sup> *Hill*, 120 S. Ct. at 2517 (Kennedy, J., dissenting).

<sup>284</sup> *Id.* at 2494.

<sup>285</sup> *Ward*, 491 U.S. at 791.

<sup>286</sup> *Hill*, 120 S. Ct. at 2491.

<sup>287</sup> *Id.* at 2517 (Kennedy, J., dissenting).

of animal-rights activists and abortion protestors questioning medical procedures. However, the actual provision at issue, Colo. Rev. Stat. § 18-9-122(3) does not include the word “against.” The majority correctly asserted that an abortion advocate approaching a patient within eight feet to educate about benefits of abortion also would violate this provision and be subject to criminal punishment.<sup>288</sup> In all, the Court accurately found the statute to be content-neutral: the restriction had neither a content-based purpose nor discriminated on its face between subjects or viewpoints.

#### B. THE RELEVANT GOVERNMENT INTERESTS

For a time, place, or manner limitation on speech to be valid, it must serve significant and legitimate government interests.<sup>289</sup> The majority identified several such interests for the Colorado statute: protection of citizens’ health and safety; unimpeded access to health care facilities; prevention of patient trauma from harassment or confrontation; and a “privacy interest in avoiding unwanted communication” as a part of the right to be let alone.<sup>290</sup> Certainly it is within the police powers of the state to safeguard the public peace and prevent violence against persons.<sup>291</sup> By preventing in-your-face interactions and communications, the State is effectively preventing not only violence against the patients but also retaliatory violence by distressed patients.

Justice Scalia argued that the right to be let alone only applies to the private citizen’s right to escape interference by the government, and not by an individual.<sup>292</sup> This contradicts Supreme Court precedent in *Frisby*, whereby the interest in protecting an unwilling listener in his home—residential privacy—justified an ordinance limiting picketing in residential areas.<sup>293</sup> The Court invoked a privacy right against interference by an individual against another individual.<sup>294</sup> Similarly, the right to be

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<sup>288</sup> *Id.* at 2494.

<sup>289</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>290</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2489 (2000).

<sup>291</sup> Brief Amici Curiae the State of New York, et al., in Support of Respondents, 1999 WL 1186258, *Hill v. Colorado*, 120 S. Ct. 2480 (No. 98-1856).

<sup>292</sup> *Hill*, 120 S. Ct. at 2508 (Scalia, J., dissenting).

<sup>293</sup> *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

<sup>294</sup> *Id.*

let alone may be invoked to protect patients from demonstrators at healthcare facilities. In *Bering v. SHARE*, the Washington Supreme Court similarly noted that protection of personal privacy "even from private invasion, constitutes a compelling State interest justifying a reasonable place restriction on picketing."<sup>295</sup>

Turning to the undisputed government interest of unimpeded access to the health care facilities, Justice Kennedy incorrectly found that the law of battery or torts sufficiently addresses this concern.<sup>296</sup> The records of violence that led the Supreme Court to uphold the injunctions in *Schenck* or *Madsen* betray the effectiveness of such laws. Furthermore, Justice Scalia was incorrect when he failed to find a sufficient connection between the goal of unimpeded access and subsection (3).<sup>297</sup> It is clear that people will be better able to safely enter a facility if no one can approach within eight feet to block them. The Court needed to find only one compelling government interest; here, there were multiple legitimate interests at stake.

### C. THE CAPTIVE AUDIENCE DOCTRINE

While there is consensus that the statute is focused on a public forum, the majority also hints that the recipients of the speech at issue are unique based on their inability to avoid the speech.<sup>298</sup> Some argue that because the patients cannot reasonably avoid the speech, they are captive audiences—similar to an individual in his home.<sup>299</sup> The Supreme Court has upheld restrictions on picketing and protests in residential areas, describing the target of such speech as "figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding unwanted speech."<sup>300</sup> The Supreme Court extended the captive audience doctrine outside of the home in other cases such as *Erznoznik v. City of Jacksonville*, where the Court applied the doctrine to passengers on public buses.<sup>301</sup> In *Lehman v.*

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<sup>295</sup> *Bering v. SHARE*, 721 P.2d 918 (Wash. 1986) (en banc).

<sup>296</sup> *Hill*, 120 S. Ct. at 2522 (Kennedy, J., dissenting). Justice Scalia instead determined that subsection (2) of the statute adequately addressed this government interest. *Id.* at 2510.

<sup>297</sup> *Id.* at 2510 (Scalia, J., dissenting).

<sup>298</sup> *Id.* at 2489-90.

<sup>299</sup> Ellis & Wu, *supra* note 17, at 578.

<sup>300</sup> *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

<sup>301</sup> 422 U.S. 205 (1975).

*City of Shaker Heights*, the Court limited political advertising on buses because it considered the passengers captive.<sup>302</sup> "In balancing these competing rights, the Court's prior cases reveal that it applies the captive audience doctrine when: (1) a strong privacy interest is implicated; (2) the target cannot practically avoid unwanted communication; and (3) the restriction on speech is minimal."<sup>303</sup>

*Madsen* hinted that the doctrine could apply to medical patients when citing the lower court's contention that "targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical well-being of the patient held 'captive' by medical circumstance."<sup>304</sup> In *Hill*, the American College of Obstetricians and Gynecologists and the American Medical Association argued that the medical patient is a "classic captive audience, with greater interests than bus passengers."<sup>305</sup> It is more arguable that a bus passenger could walk or take other means of transportation, but a medical patient has fewer options to avoid the unwanted communication. "[U]nlike the captive audience on the streetcar, an individual seeking medical care, particularly medical care relating to reproductive matters, has important interests in privacy and anonymity, and is 'practically helpless to escape th[e] interference with his [or her] privacy.'"<sup>306</sup> Moreover, the government has an interest in ensuring that patients get the medical care they need. We should want women to get prenatal care, and both men and women to get treatment as early as possible for ailments. "Ultimately, the legislature acted to preserve the right of all Coloradoans to choose 'health services which could save their lives, such as cancer screening and treatment, routine medical examinations and pap smears.'"<sup>307</sup> Therefore, "[t]he state's interest is particularly compelling here . . . because it seeks to protect individual interests in privacy and anonymity, as well as health and safety, in a context in which individuals, absent state intervention, are un-

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<sup>302</sup> 418 U.S. 298 (1974).

<sup>303</sup> *Ellis & Wu*, *supra* note 17, at 578.

<sup>304</sup> *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 768 (1994). See *Ellis & Wu*, *supra* note 17, at 580.

<sup>305</sup> Brief of the American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae in Support of Respondents at 20, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>306</sup> *Id.* at 21-22.

<sup>307</sup> Respondents' Brief at 10, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

able acting alone to protect those interests."<sup>303</sup> As some have argued, the captive audience doctrine should provide protection to "people in coercive situations, not places."<sup>309</sup>

The captive audience doctrine test is met since the patients' privacy interests are at issue, there is minimal restriction of expression, and the patient cannot practically avoid the communications. This doctrine, thus, supports the constitutionality of the Colorado statute. In calling the suggestion that an individual could be captive on a public sidewalk "absurd,"<sup>310</sup> Justice Scalia completely ignored the fact that the relevant public ways are specifically outside of medical facilities and that it is not so simple to walk away when one may require access to obtain needed medical attention. The *Hill* opinion itself notes only that prior cases have recognized the interests of captive, unwilling listeners and fails to explicitly address whether the doctrine applies to the circumstances.<sup>311</sup> The Court, hesitant to extend the doctrine, retreats to the government's interests in ensuring clinic access and safeguarding patients' emotional and physical health to justify the statute's restriction.<sup>312</sup>

#### D. CATCH-22s: NARROWLY TAILORED/OVERBROAD V. CONTENT-BASED AND THE EXISTENCE OF PRINCIPLED ANALYSIS<sup>313</sup>

In *Hill*, the majority and the dissenters disputed the means of analyzing whether a content-neutral restriction is narrowly tailored. Collapsing the analysis of narrow tailoring and alternative means of communicating, Justice Stevens focused on the determination that the statute did not foreclose any means of communication and that, under *Ward*, the statute need not be the least restrictive means of addressing the interests on which

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<sup>303</sup> Brief of the American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae in Support of Respondents at 22, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

<sup>309</sup> J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312 (1999) (arguing that the captive audience doctrine is better suited to workplace speech than speech in the home).

<sup>310</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2509 n.3 (2000) (Scalia, J., dissenting).

<sup>311</sup> *Id.* at 2490.

<sup>312</sup> *Id.* at 2490 n.25.

<sup>313</sup> Respondents refer to Petitioners' arguments against the statute as overbroad and/or content-based as a constitutional Catch-22. Respondents' Brief at 18 n.17, *Hill v. Colorado*, 120 S. Ct. 2480 (2000) (No. 98-1856).

the statute was grounded.<sup>314</sup> *Ward* declared that the existence of less restrictive means does not make a restriction invalid as long as “the means chosen are not substantially broader than necessary to achieve the government’s interest.”<sup>315</sup> This indicates what a statute cannot be, but does not clarify what a content-neutral statute must be. Justice Scalia criticized the majority for implying that “narrow tailoring can be relaxed when there are other speech alternatives”, but he then failed to explain what narrow tailoring itself is and how to separate its analysis from consideration of alternatives.<sup>316</sup> After *Hill*, while it remains evident that the standard is less restrictive than the “least restrictive means” applied to content-based restrictions, it is unclear what the true test of narrowly tailored is for content-neutral restrictions.

In drafting this statute, the Colorado legislature encountered a significant challenge in how to make the statute narrowly tailored without making it content-based, while still addressing the relevant interests. While the majority believes the legislature succeeded in this regard, it is clear that the Colorado legislature could not have rewritten this statutory provision such that the dissenters would uphold it. If the legislature made it narrower, then the dissenters would have had even stronger arguments for a content-based analysis. On the other hand, the dissents attacked the statute for not being narrowly tailored.<sup>317</sup> In oral argument, a Justice noted that the petitioners “argue, on one hand the statute is too broad and, on the other hand, it’s too narrow.”<sup>318</sup>

Admittedly, the statute does apply to the entrance of every healthcare facility in the state of Colorado.<sup>319</sup> The subject of much discussion during oral argument, the Justices and attorneys determined that the statute would apply to a one hundred foot radius from the front door of any building with a doctor’s office, even if the office was on the eighteenth floor and surrounded by non-medical offices, as long as it coincided with a

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<sup>314</sup> *Hill*, 120 S. Ct. at 2494. In contrast, *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000), explains that content-based restrictions face the strictest scrutiny and must be the least restrictive means available.

<sup>315</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

<sup>316</sup> *Hill*, 120 S. Ct. at 2511 (Scalia, J., dissenting).

<sup>317</sup> *Id.* at 2514 (Scalia, J., dissenting); *Id.* at 2522-23 (Kennedy, J., dissenting).

<sup>318</sup> Transcript of Oral Argument, 2000 WL 72054 at \*26 (Jan. 19, 2000).

<sup>319</sup> COLO. REV. STAT. § 18-9-122(4) (1999).

public way.<sup>320</sup> Even though Justices reacted negatively to this reach, they did not suggest a preferable approach. While alternatives might limit the application to only free-standing clinics or medical facilities that constitute some percent of a building, the same government interests apply regardless of the set-up of the facility, and any other approach appears to be an arbitrary line-drawing. The government interests of protecting patients from stressful harassment and providing clear access to the facilities remain.<sup>321</sup>

While at first glance it may appear that there is no principled approach for analyzing these zones, this is incorrect. The decision to uphold an eight-foot bubble zone in *Hill* and reject a fifteen-foot bubble in *Schenck* may seem like arbitrary line drawing. However, the distance is significant to assess whether the regulations allow sufficient alternative means of communication and to determine whether any means of speech are actually foreclosed.<sup>322</sup> The Court's rationale that an eight-foot distance allows normal conversational volumes, while a fifteen-foot distance does not, is not a hollow means of distinguishing *Schenck*. Instead, the difference in distance ensures that no method of communication (normal conversational volumes, sign display, and leafleting) is eliminated.<sup>323</sup>

The Colorado legislators focused on this requirement when deciding on the eight-foot distance: it was not a result of a random selection of a number, but rather a measurement of a distance where they felt people still could communicate but harassment would be prevented.<sup>324</sup> To prove that point, the Chairwoman of Colorado's Senate Judiciary Committee set up the witness table at a distance of eight feet from her seat and then told any witnesses that contended that eight feet was too great a distance for communicating a message that she was able to hear them without problem.<sup>325</sup> In oral argument the Justices discussed distances in relation to the corresponding potential for intimidation.<sup>326</sup> When petitioners were unwilling to accept a

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<sup>320</sup> Transcript of Oral Argument, 2000 WL 72054 at \*32-43 (Jan. 19, 2000).

<sup>321</sup> *Hill*, 120 S. Ct. at 2497-98.

<sup>322</sup> *Id.* at 2495, 2499.

<sup>323</sup> *Id.* at 2495.

<sup>324</sup> Soraghan, *supra* note 67.

<sup>325</sup> *Id.*

<sup>326</sup> Transcript of Oral Argument, 2000 WL 72054 at \*9-12 (Jan. 19, 2000).



hypothetical bubble reduced to six inches or even an eighth of an inch, Chief Justice Rehnquist noted that the traditional concept of public forum speech was an individual speaking from atop a soap box.<sup>327</sup> The combination of the ability to remain standing in place with the normal conversational distance led to the conclusion that no means of communication are truly foreclosed.<sup>328</sup> This statute is less restrictive than many upheld previously by the Court, while protecting the significant interest of access to medical care.<sup>329</sup>

#### E. IMPACT OF THE SUPREME COURT RULING

This Supreme Court decision likely will have a significant impact on the number of states choosing to enact similar legislation and the manner in which these states tailor the language of their statutes. The president for the New York NOW Legal Defense and Education Fund stated, "This creates a road map for legislators across the country to exercise their responsibility to ensure that women have safe, unimpeded access to reproductive health care."<sup>330</sup> The fact that eighteen states joined in an *amicus* brief supporting the constitutionality of the Colorado statute may indicate that more states support and will enact such statutes.<sup>331</sup>

In the wake of the Supreme Court's decision, Massachusetts lawmakers retooled a pending bill to make it similar to the Colorado statute.<sup>332</sup> The original bill, which already had passed in the Senate,<sup>333</sup> barred protestors from entering a twenty-five foot buffer zone surrounding a clinic and was abandoned by the

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<sup>327</sup> *Id.* at \*11-12.

<sup>328</sup> *Hill*, 120 S. Ct. at 2495.

<sup>329</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988) (upholding a statute prohibiting restrictions on gathering near an embassy); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ordinance that prohibited demonstrations outside of schools during school-hours); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding statute prohibiting picketing outside courthouses when picketing attempted to influence the proceedings).

<sup>330</sup> Romano, *supra* note 66.

<sup>331</sup> *Id.*

<sup>332</sup> Daniel Barbarisi, *Lesser-Known Bills Finally Get Attention*, BOSTON GLOBE, July 30, 2000, at A19. The Massachusetts House passed the bill on July 28, 2000, by a vote of 107-48 and the Senate approved the bill on July 29, 2000. *Id.*

<sup>333</sup> Michael Rezendes, *Abortion Clinic Buffer Zone Ok'd. Lawmakers Reach a Compromise on Controversial Plan*, BOSTON GLOBE, July 27, 2000, at B7.

legislators just a few days prior to the amended bill's passage.<sup>334</sup> The modified bill institutes an eighteen-foot zone around clinic entrances as well as a six-foot "corridor" between the entrances and the sidewalk. The measure also creates a six-foot bubble zone around people accessing the clinic and incorporates the Colorado statute's provision of prohibiting knowingly approaching another "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling" within that zone.<sup>335</sup> Thus, while similar in wording to the Colorado statute, it covers a smaller area: the buffer zone is eighteen feet, as opposed to Colorado's one hundred feet, and the bubble zone is six feet, as opposed to Colorado's eight feet.

Members of the pro-life community supported the modification to the bill because they believed it allowed greater interaction with patients.<sup>336</sup> Members of the pro-choice community supported passage as well, since they believe it provided at least some protection to the targets of the protests, noting that Colorado clinics have communicated to them a decline in tension and harassment since the Colorado law went into effect.<sup>337</sup> Significantly, the Massachusetts Supreme Judicial Court had issued an advisory opinion earlier in the year that the original buffer zone would be constitutional.<sup>338</sup> Thus, even with this decision and successful passage in the Senate, some legislators were arguably able to use the Colorado ruling to gain a compromise and pass a less stringent bill.<sup>339</sup>

Surprisingly, just ten days after the law went into effect, United States District Court Judge Edward F. Harrington issued a preliminary injunction on November 20, 2000, barring the

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<sup>334</sup> Karen E. Crummy, *House Oks Weakened Bill on Clinic Protests*, BOSTON HERALD, July 29, 2000, at 5.

<sup>335</sup> MASS. GEN. LAWS. ch. 266, § 120E½(b) (2000). See also Crummy, *supra* note 334.

<sup>336</sup> Crummy, *supra* note 334:

"We think it's favorable to use since the new (bill) allows more contact and interaction with those entering the clinic than the old bill," said Ray Neary, president of the Massachusetts Committee for Life, who pointed out that his organization is still opposed to the measure in its entirety on free speech grounds, "We are very happy that pro-life legislators included (those provisions) in it."

<sup>337</sup> *Id.*

<sup>338</sup> Rezendes, *supra* note 333.

<sup>339</sup> *Id.*

state from enforcing the law.<sup>340</sup> Judge Harrington distinguished the Massachusetts statute from its Colorado counterpart on two fronts: (1) the Massachusetts statute exempts clinic employees and volunteers acting within the scope of their employment and (2) the Massachusetts statute applies only to abortion clinics, rather than all health care facilities.<sup>341</sup> Judge Harrington argued that these characteristics made the statute uniquely directed toward abortion speech, creating an unequal opportunity for pro-life advocates to communicate their message, and he concluded it was unconstitutional.<sup>342</sup> However, the U.S. Court of Appeals for the First Circuit issued an order staying the preliminary injunction on December 20, declaring that the harm to public safety outweighed the potential effect on speech.<sup>343</sup> Massachusetts may enforce the law until the Attorney General's appeal is heard.<sup>344</sup> It will be interesting to see the First Circuit's consideration of the focus of the statute on abortion clinics alone since the prophylactic approach of the Colorado's statute to all medical facilities and its general application was a cornerstone of Stevens' opinion.<sup>345</sup>

Even so, the three provisions of the Colorado statute that likely will have progeny include: (1) the use of the word "approaching" to indicate that a protestor may remain in place, (2) the absence of a requirement to withdraw from a target, and (3) the use of bubble zones rather than entire buffer zones, setting the bubble size at a distance of eight feet or less—a conversa-

<sup>340</sup> See *McGuire v. Reilly*, 122 F. Supp. 2d 97 (D. Mass. 2000). See also Shelley Murphy, *US Judge Rejects Abortion Clinic Law*, BOSTON GLOBE, Nov. 21, 2000, at A1.

<sup>341</sup> *McGuire*, 122 F. Supp. 2d at 102-103.

<sup>342</sup> *Id.* While Judge Harrington contends that the "government must never take sides in the battle of ideas and ideals in the traditional public forum", his opinion itself has been criticized for bias. Planned Parenthood of Massachusetts President Diane Luby believes that "[t]he tone in certain places exhibits a personal opinion versus a judicial opinion. It read as a person inserting their own opinion about choice into a legal opinion." J.M. Lawrence, *Fed Judge KOs Abortion-Clinic Buffer Zone*, BOSTON HERALD, Nov. 21, 2000, at A1. Judge Harrington included dialog that related a pro-choice advocate's consideration of an unborn fetus to the "non-person status" assigned to slaves in the South and Jews in Germany during the Holocaust. *McGuire*, 122 F. Supp. 2d at 104 n.10.

<sup>343</sup> Doug Hanchett, *Fed Court Restores Clinic Buffer Zone*, BOSTON HERALD, Dec. 23, 2000, at A5; Shelley Murphy, *Court Gives Go-Ahead on Buffer Zones. State to Enforce Its New Law for Abortion Clinics*, THE BOSTON GLOBE, December 23, 2000, at A1.

<sup>344</sup> Hanchett, *supra* note 343; Murphy, *supra* note 340.

<sup>345</sup> *Hill v. Colorado*, 120 S. Ct. 2480, 2491, 2493, 2496, 2497 (2000).

tional distance. Such bubble zones are less restrictive on speech since individuals may remain at any distance from the clinic as long as they do not take certain actions.<sup>346</sup> For example, Denver city officials soon will consider revising a 1990 city ordinance that mirrors the Colorado statute, except that the ordinance requires a protestor to withdraw if a target requests.<sup>347</sup> A woman who had been charged with violating the statute (the charges were later dropped) filed a federal lawsuit challenging the ordinance as an impermissible restriction on her freedom of speech.<sup>348</sup> Thus, it is clear that one focus of statutory challenges will be the existence of omission culpability for failing to withdraw from a patient.

## VI. CONCLUSION

In the muddled world of First Amendment jurisprudence, *Hill* provides some guidance to states in drafting constitutional buffer zone legislation. In future cases, courts should apply the analysis in *Hill* to uphold such legislation as long as the distance does not eliminate normal conversation, a violation does not result from standing in place, and the general statute is not adopted to silence the content of the speaker's message, applicable to the proscribed speech activity regardless of the subject matter or viewpoint. The Court's analysis of the Colorado statute as a content-neutral time, place, and manner restriction that provides sufficient means of communicating messages was appropriate.

With the addition of *Hill v. Colorado* to the Supreme Court's abortion protest jurisprudence, one may consider the following restrictions constitutional: injunctions creating fixed buffer zones and, now, statutes establishing bubble zones (where one could speak to another at a conversational level) within a fixed buffer zone. It is worth noting that the United States Supreme Court has not ruled on a case involving a statutory fixed buffer zone, less any bubble zone, which prohibits any entry within the fixed radius.

Kristen G. Cowan

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<sup>346</sup> *Hill v. Thomas*, 973 P.2d 1246, 1257-58 (Colo. 1999).

<sup>347</sup> Arthur Kane, *Suit Would Ease City Bubble Law. Denver Law Stricter Than State's*, DENVER POST, Sept. 30, 2000, at B2.

<sup>348</sup> *Id.*

