Saint Louis University Law Journal

Volume 45 | Number 4 Article 11

9-10-2001

Hill v. Colorado and the Evolving Rights of the Unwilling Listener

James J. Zych

HILL v. COLORADO AND THE EVOLVING RIGHTS OF THE UNWILLING LISTENER

I. INTRODUCTION

The right to free speech may be "[r]epeated so often in our jurisprudence that we know it by rote,"[1] but even so, there are many occasions for imprecise application of the rights of speakers. One particular occasion for conflict is when this fundamental right conflicts with some other right, such as the "right to be left alone" that has been recognized in American jurisprudence.[2] This right to be left alone, also characterized as a right or interest of unwilling listeners to be free from speech, has been the subject of many Supreme Court cases in the past century. There have been many attempts to reconcile these cases, either by the nature of the speech, the geographical location of the speaker or other methods, but no method is adequate to synthesize all of the opinions on the topic.

The Supreme Court addressed the issue when it decided *Hill v. Colorado*,[3] and in doing so validated a Colorado state statute that created a protective bubble around health care facilities, within which persons were prohibited from approaching closer than eight feet to engage in certain speech without consent of the listener.[4] The Court analyzed the statute under the principles of *Ward v. Rock Against Racism*[5] and found the restriction content neutral. It was merely a permissible restriction upon the manner of certain speech narrowly tailored to serve the important state interest in protecting persons from unwanted speech and assuring their access to health care facilities.

This Casenote will examine *Hill* within the context of the Court's First Amendment jurisprudence, with a particular focus on those cases involving the right of listeners to be free from unwanted speech. The scope of the "right" or

1. Hill v. Thomas, 973 P.2d 1246, 1251 (Colo. 1999).

2. *See* Hill v. Colorado, 120 S. Ct. 2480, 2489 (2000) (reasoning that "[t]he unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'") (citations omitted).

3. 120 S. Ct. 2480 (2000).

4. *Id.* at 2499.

5. 491 U.S. 781 (1989).

"interest" to be left alone will be examined, and a critical analysis of both the *Hill* opinion and the "right to be left alone" will be offered.

II. HILL V. COLORADO

In 1993, concerned with protecting access to health care facilities in the state, the Colorado Legislature enacted § 18-8-122 of the Colorado Revised Statutes, which provides:

> (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 prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.
>
> (2) 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.
>
> (3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.
>
> (4) For the purposes of this section, "health care facility" means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.
>
> (5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.
>
> (6) In addition to, and not in lieu of, the penalties set forth in this section, a person who violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S.[6]

After passage of the Act, several abortion protesters filed suit seeking a declaratory judgment that the statute was facially invalid because it violated

6. COLO. REV. STAT., § 18-9-122 (1994 Cum. Supp.).

the First Amendment.[7] Plaintiffs alleged that the statute was a content-based restriction on their freedom of speech, and that the statute was impermissibly overbroad because it infringed on more speech than necessary in order to accomplish its stated goal.[8] The trial court granted summary judgment to the state.[9] The Colorado Court of Appeals affirmed[10] and the Colorado Supreme Court denied review, whereby plaintiffs filed a writ of certiorari with the United States Supreme Court.[11] While the writ was pending, the Court decided *Schenck v. Pro-Choice Network of Western N.Y.*,[12] which involved a similar factual matter as the Colorado statute.[13] Accordingly, the Court vacated the decision of the Court of Appeals and remanded for consideration in light of *Schenk*. On remand, the Court of Appeals again affirmed. The Colorado Supreme Court then granted certiorari and upheld the statute.[14]

The Colorado Supreme Court viewed the case as involving two conflicting rights: the First Amendment rights of the plaintiffs and "an individual's right to privacy, here represented by access to medical counseling and treatment."[15] The Court reasoned that the right of privacy, first recognized by Justice Brandeis in 1890, was a "fundamental right," such that "the First Amendment can accommodate reasonable government action intended to effectuate the free exercise" of the right.[16] Although the case had been remanded for determination in light of *Schenk*, the Court determined that *Schenk* did not apply, and instead applied the test developed in *Ward v. Rock Against Racism*,[17] reasoning that § 18-9-122(3) was "a reasonable time, place, and manner restriction and hence, does not violate the proscriptions of the First Amendment."[18]

1. Majority Opinion

The Supreme Court granted certiorari and, in an opinion dated June 28, 2000, affirmed by a 6-3 majority.[19] Justice Stevens delivered the opinion, and was joined by Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsberg, and Breyer. Justice Scalia wrote a dissenting opinion that was

7. Hill v. Lakewood, 911 P.2d 670, 672 (Colo. App. 1995).
8. *Id.* at 673.
9. Hill v. Colorado, 120 S. Ct. 2480, 2486 (2000).
10. *Lakewood*, 911 P.2d at 670.
11. Hill v. Colorado, 120 S. Ct. at 2487.
12. 519 U.S. 357 (1997).
13. *Id.*
14. Hill v. Thomas, 973 P.2d 1246, 1246 (Colo. 1999).
15. *Id.* at 1253.
16. *Id.*
17. 491 U.S. 781 (1989).
18. *Thomas*, 973 P.2d at 1253-54.
19. Hill v. Colorado, 120 S. Ct. 2480, 2499 (2000).

joined by Justice Thomas. Justice Kennedy wrote a separate dissenting opinion.

The majority framed the question similarly to the Supreme Court of Colorado: "whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener."[20] The Court determined that the First Amendment rights of the petitioners were not violated because under the principles developed in *Ward*, the restriction was a content-neutral regulation of the time, place, or manner of speech.[21]

Before turning to the merits of the statute, the majority closely examined the two competing interests at stake: on the one hand, the interest the state sought to serve in protecting the rights of unwilling listeners, and on the other hand, the constitutionally protected rights of law abiding speakers.[22]

Justice Stevens noted four basic principles underlying the case of the challengers of the statute. First, the statute was alleged to be overbroad, because it applied to all public rights of way within 100 feet of the entrance to a health care facility, even though the legislative history clearly indicated a motivation to chiefly protect access to abortion clinics.[23] Second, the speech and speech-related conduct of the petitioners was protected by the First Amendment, even if offensive to some listeners.[24] Third, the public sidewalks involved were "quintessential public forums."[25] Finally, while it was arguable to what extent, it was agreed that the statute would serve to lessen the communicative impact of petitioners' activities.[26]

Balanced against these First Amendment rights and principles, the Court examined the state interests intended to be served by the statute.[27] The main interest cited was the police power to protect the health and safety of its citizens, including the unimpeded access to health care facilities.[28] In addition, the Court noted that the interest analysis must take into account the fact that the Colorado statute only dealt with speech directed at an unwilling audience.[29] The Court noted that restrictions on First Amendment rights could be appropriate where the speech was so intrusive as to be unavoidable (the captive audience problem), or where there was a deliberate verbal or visual assault (the

20. *Id*. at 2485. The Court also subsequently framed the question as "whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners . . . ." *Id.* at 2488.

21. *Id*. at 2491.

22. *Id*. at 2488.

23. *Id*.

24. Hill v. Colorado, 120 S. Ct. at 2488-89.

25. *Id*. at 2489.

26. *Id*.

27. *Id.*

28. *Id.*

29. Hill v. Colorado, 120 S. Ct. at 2489.

nuisance problem). The Court recognized that the privacy interest varied widely with the context and factual setting of the dispute, and examined several of the cases mentioned previously here, ultimately citing *Rowan* for the proposition that "no one has a right to press even 'good' ideas on an unwilling recipient."[30]

In response to criticism from the dissent that the Court was creating a right to avoid unpopular speech in a public forum, Justice Stevens argued that "[w]e, of course, are not addressing whether there is such a 'right.' Rather, we are merely noting that our cases have repeatedly 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."[31]

2. The Dissenting Opinion

There were two dissenting opinions in *Hill*, with Justice Scalia writing an opinion joined by Justice Thomas, and Justice Kennedy writing separately, "to reinforce Justice Scalia's correct First Amendment conclusions and to set forth my own views."[32] Both dissenting opinions agreed on several issues: that the Colorado statute was content based, that the statute was overbroad and that there was no constitutionally cognizable interest in protecting citizens from unwelcome speech.

(a) Just What *Is* the State Interest?

Justice Scalia's most compelling argument was that the majority dropped the ball regarding the necessary state interest.[33] First, the Court analyzed the statute with the state's interest being the protection of "its citizens' rights to be let alone from unwanted speech."[34] However, the text of the Colorado statute identified the State's interest as ensuring that "the State's citizens may 'obtain medical counseling and treatment in an unobstructed manner' by 'preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility.'"[35] Justice Scalia saw the disconnect between the asserted interest and the interest used by the Court as a purposeful "distortion of our First Amendment law" designed to "sustain this restriction upon the free speech of abortion opponents."[36]

Further, Justice Scalia reasoned that the statute fails under either proffered interest. Justice Scalia's argument ran thus: if the state interest involved was

30. *Id.* at 2490 (citing Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)).
31. *Id*. at 2490.
32. *Id*. at 2516.
33. *Id.* at 2490.
34. Hill v. Colorado, 120 S. Ct. at 2507.
35. *Id.* (quoting COLO.REV.STAT. § 18-9-122(1) (1999)).
36. *Id.* at 2509.

"the right to be left alone," then the statute failed because this interest is not sufficiently valid to sustain a restriction on speech.[37] On the other hand, if the state interest was in preserving the "unimpeded access to health care facilities," then the statute was overbroad, since section (2) of the statute prohibited any conduct that would result in impeding access to health clinics.[38] There was no reason, in Justice Scalia's eyes, that *any* speech need be burdened if the interest involved is unimpeded access.[39]

(b) Versace, or Omar the Tentmaker?

Justice Kennedy's dissent added to the vagueness and overbreadth arguments Justice Scalia raised.[40] Like Justice Scalia, Justice Kennedy started from the perspective that the statute was constitutionally infirm because it attempted to limit speech that protested abortion.[41] Beyond that threshold matter, the Justices' main point of contention with the majority diverged somewhat. Rather than viewing the majority opinion as "caught on the 'compelling state interest' fence," as Justice Scalia did, Justice Kennedy saw the problem as being rooted in the overbreadth and vagueness area. The statute would obviously be content-based if it were directed only at speech that protested abortion. The attempt to save the statute by applying it to all speech made it broader than necessary to advance the state interest.[42] In addition, Justice Kennedy argued that the specific conduct prohibited under the statute was too vague to be enforceable (because, presumably, a statute that was more precise would be an unenforceable prior restraint).[43]

This is not to say that Justice Scalia did not protest the lack of narrow tailoring. He in fact agreed with Justice Kennedy on this point, arguing colorfully 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 . . . narrow tailoring must refer not to the standards of Versace, but to those of Omar the

37. *Id.* at 2508.

38. *Id.*at 2510.

39. Hill v. Colorado, 120 S. Ct. at 2510.

40. *Id.* at 2517.

41. *Id.*

42. *See id.* at 2522 (reasoning that

> [o]ur precedents do not permit content censoring to be cured by taking even more protected speech within a statute's reach. The statute before us, as construed by the majority, would do just that. If it indeed proscribes 'oral protest, education, or counseling' on all subjects across the board, it by definition becomes 'substantially broader than necessary to achieve the government's interest.').

43. *Id.* at 2520 ("In the context of a law imposing criminal penalties for pure speech, 'protest' is an imprecise word; 'counseling' is an imprecise word; 'education' is an imprecise word. No custom, tradition, or legal authority gives these terms the specificity required to sustain a criminal prohibition on speech.").

tentmaker."[44] The fundamental difference between the two is that while Justice Scalia saw the problem as a statute where the state interest was either non-existent or able to be accomplished by less restrictive means, Justice Kennedy saw a statute that covered either too little or too much.

(c) Fundamental Fairness

Finally, the basic fairness of the statute concerned both dissenters. Justice Kennedy summed up his misgivings when he stated, "[t]o say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment."[45] Justice Scalia similarly argued that under the Court's decision, "'[u]ninhibited, robust, and wide open debate' is replaced by the power of the state to protect an unheard-of 'right to be let alone' on the public streets."[46]

III. HISTORICAL BACKGROUND

When determining the scope of the so-called "right to be left alone," the Court has typically framed the case as a clash between "the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors . . . ."[47] Since the conflict may involve all types of communication and content, categorizing the body of law for analytic purposes is difficult. Therefore, this Casenote considers the cases chronologically to the extent possible. This chronological framework is subdivided by topical analysis where there are several cases surrounding one topic of debate.[48]

A. Early Cases: Sound Amplification

In an early examination of the conflict between free speech and the right to avoid it, the Court ruled that a city could permissibly regulate the use of sound amplification trucks.[49] *Kovacs v. Cooper* involved an appeal from an

44. Hill v. Colorado, 120 S. Ct. at 2507.

45. *Id.* at 2517.

46. *Id.* at 2515.

47. Erzoznik v. Jacksonville, 422 U.S. 205, 208 (1975).

48. For instance, cases involving "captive audiences" and the U.S. mail defy strict chronological categorization and are therefore treated together. For a more thoroughly topical approach to the problem, see Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 NW. U. L. REV. 153 (1972). Haiman divides unwanted communication into the areas of Door-to-Door Solicitation, Residential Picketing, Unwanted Telephone Calls and Mail, Public Address Systems and Sound Trucks, and Billboards and Other Public Thrusting. *Id.* at 158-74.

49. Kovacs v. Cooper, 336 U.S. 77 (1949).

individual who broadcast music and his voice over a loudspeaker in violation of a Trenton, New Jersey ordinance.[50] The court noted, "[t]he unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality."[51]

In a similar case involving sound amplification trucks just one year earlier, the opposite outcome was obtained. In *Saia v. New York*,[52] the challenged statute forbid the operation of amplification devices without a permit granted at the discretion of the Chief of Police.[53] Recognizing that "[a]nnoyance at ideas can be cloaked in annoyance at sound," the Court struck down the statute.[54] Since the grounds for striking down the statute involved the discretionary nature of the permit procedure and the consequential potential for abuse, *Saia* is factually different from *Hill*.[55] *Saia*, however, does discuss one of the fundamental conflicts at issue in *Hill*—the need to balance community interests (peace and quiet in *Saia*; the interests of unwilling listeners in *Hill*) with First Amendment rights. *Saia* established that when striking such a balance, courts "should be mindful to keep the freedoms of the First Amendment in a preferred position."[56]

The principles developed in these two early cases established the ground rules which were used in many of the later cases involving unwilling listeners. First, in a commonly repeated refrain, the Court in *Kovacs* treated the captive audience as *sui generis*, to which a greater level of protection (in the form of regulation restricting speech) is available.[57] In addition, the Court recognized that where First Amendment rights come into conflict with some other right of the community, some sort of balance must be struck, with the First Amendment in the preferred position.[58]

50. *Id*. at 78.

51. *Id.* at 86-87.

52. 334 U.S. 558 (1948).

53. *Id.*

54. *Id*. at 562.

55. The Court reasoned that "[w]hen a city allows an official to ban [loudspeakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas" and that any abuses loudspeakers may create could be addressed by narrowly tailored statutes. *Id*.

56. *Id.* at 562.

57. *Kovacs*, 336 U.S. at 86-87.

58. The Court in *Hill v. Colorado* reasoned that the relevant question was "whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners." 120 S. Ct. at 2488.

B. Captive Audiences: Lehman *and* Pollack

Two subsequent cases further developed the "captive audience" concept exemplified in *Kovacs*. In *Lehman v. Shaker Heights*[59] the Court confronted the issue of whether a city, through a management agreement with its public transportation contractor, could prohibit political advertising on public buses.[60] *Lehman* also reiterates the balancing principle found in *Saia*, reasoning that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question."[61] The conflicting interests in *Lehman* dictated that the regulation was valid, mainly based upon the city's role as a commercial actor. As the Court noted, the decision to refuse political ads for placement on city buses in *Lehman* "is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops."[62] Even though this was the chief rationale for the Court's ruling, the Court noted that the public forum analysis was not appropriate because "'[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.'"[63]

Public Utilities Comm. of D.C. v. Pollack[64] concerned the constitutionality of broadcasting radio programs on the buses of a public utility transit company.[65] Petitioners alleged that the broadcasting violated their right to privacy. In holding that the broadcast music did not violate the Constitution, the Court reasoned that "[h]owever complete [the] right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare . . . ."[66]

The *Pollack* Court recognized that the *Kovacs* opinion did, in fact, protect the interest of unwilling listeners as against amplified speech in public places.[67] The Court distinguished *Kovacs*, first by characterizing the holding as concerning "amplified *raucous* sounds"[68] and then by reasoning that *Kovacs* "did not indicate that it would violate constitutional rights of privacy or due process for the city to authorize some use of sound trucks and amplifiers in public places."[69]

59. 418 U.S. 298 (1974).

60. *Id*.

61. *Id.* at 302-03 (plurality opinion of Blackmun).

62. *Id.* at 304 (quoting Public Utils. Comm'n v. Pollak, 343 U.S. 451, 465 (1952) (Douglas, J., dissenting)).

63. *Id.* at 302.

64. 343 U.S. 451 (1952).

65. *Id*.

66. *Id.* at 464.

67. *Id.* at 464 n.10.

68. *Id.* at 464 (emphasis added).

69. *Pollack*, 343 U.S. at 464 n.10.

The Court's rationale in *Pollack*, however, is more concerned with questions of balance than with the captive audience problem. The large majority of listeners riding the Capital Transit buses in Washington D.C. wanted to hear music or at least did not object to hearing the music.[70] The Court was simply unwilling to allow a small minority of users to affect the listening preferences of the majority of the public.[71]

Both *Lehman* and *Pollack*, therefore, advanced the principles brought about in the earlier cases. The major advance in the area of the "captive listener" problem is that persons can be "captive" even when in public.[72] This is important because the Court could just as easily have said that inherent in the choice to use public transportation is an acceptance of listening to any speech offered in the public forum. The fact that an individual could be captive even in public is a concept that underlies the majority opinion in *Hill* and is even explicitly recognized when the Court quotes the captive audience language from *Lehman*.[73]

C. "Vulgar" Messages

Cohen v. California[74] involved an individual who wore a jacket on which he had written a profane anti-draft message into a courthouse.[75] Upon conviction for breach of the peace, the individual appealed. The Court reversed, and in the course of rejecting an unwilling listener argument, reasoned that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[76] The Court contrasted the situation in *Cohen*, where an unwilling auditor might merely avert their gaze, with the situation where

70. Two studies conducted by the Public Utility Commission found that

> 93.4 per cent were not opposed; that is, 76.3 were in favor, 13.9 said they didn't care, and 3.2 said they didn't know; 6.6 per cent were not in favor, but when asked the question "Well, even though you don't care for such programs personally, would you object if the majority of passengers wanted busses and streetcars equipped with radio receivers," 3.6 said they would not object or oppose the majority will. Thus, a balance of 3 per cent of those interviewed were firmly opposed to the use of radios in transit vehicles.

Id. at 459-60.

71. *Id*. at 465.

72. This principle was raised in the dissent in *Pollack* and was adopted in the majority opinion in *Lehman*. *See Lehman*, 418 U.S. 298, 302 (1974) ("'The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.'") (quoting *Pollack*, 343 U.S. at 465 (1952) (Douglas, J., dissenting)).

73. Hill v. Colorado, 120 S. Ct. at 2490.

74. 403 U.S. 15 (1971).

75. *Id*.

76. *Id.* at 21.

listeners are subject to the "raucous emissions of sound trucks blaring outside their residences."[77]

Two interesting points may be made about *Cohen*. First, there is an implicit rejection of the concept that vulgar speech can inherently constitute a breach of the peace. While the Court might have taken the stance that the words on the jacket constituted a per se breach of the peace criminally (or a common law nuisance civilly), the Court instead focused on the empirical effects of the speech itself.[78] Rather than allowing the state to assert that some persons *might* have been unwilling, the Court instead reasoned that "a more particularized and compelling reason" must be given in order to restrict speech.[79]

Second, the Court seems to endorse a theory of a continuum of privacy interests in public spaces. The Court noted that "while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home."[80]

Several years after *Cohen*, the Court found another occasion to evaluate the conflict between vulgar speech and unwilling listeners. In this instance, the opinion in *Pollack* notwithstanding, the Court determined that one unwilling listener could affect a restriction on speech. In *FCC v. Pacifica Found.*,[81] a New York radio station was reprimanded for broadcasting comedian George Carlin's "Seven Dirty Words" monologue.[82] Several weeks after the broadcast, the FCC received what was apparently the sole complaint regarding the broadcast.[83] The radio station appealed both the FCC's determination that the material was indecent, and challenged the FCC's ability to restrict its speech. The Supreme Court was unsympathetic, holding both that the material was indecent and the FCC could constitutionally regulate this speech.

Notably in *Pacifica*, the FCC specifically proposed that a nuisance-type analysis be used.[84] The Court accepted this view, but never analyzed whether,

77. *Id.*

78. *Id.* at 23 ("We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.").

79. *Cohen*, 403 U.S. at 26.

80. *Id.* at 21-22.

81. 438 U.S. 726 (1978).

82. *Id.* Rather than imposing formal sanctions, the FCC issued a memorandum opinion stating that the finding that the Carlin monologue was indecent would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.* at 730. The radio station appealed from this order. *Id.* at 733.

83. *Id.* at 730.

84. *Id.* at 731.

or to what extent, the notion of public nuisance applied to restrictions on speech where there were unwilling listeners. The only guidance the Court offered was a short paragraph explaining the "pig in the parlor" concept of nuisance and reasoning that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[85]

The outcome obtained in *Pacifica* differs from that obtained in both *Cohen* and *Pollack*—two prior cases that bear factual similarities. Like *Cohen*, the speech involved in *Pacifica* was vulgar. In *Cohen*, however, the fit between the regulation challenged (breach of the peace) and the alleged offense (wearing a vulgar jacket) was poor. The Court was simply unwilling to find that a profane expression written on a jacket could constitute a breach of the peace.[86] In contrast, the Court determined that the vulgar monologue in *Pacifica* fell squarely within the regulatory power of the FCC, and that the exercise of the regulation was within acceptable bounds.[87]

In contrast, it is factual differences, rather than legal ones, that explain the different outcomes in *Pacifica* and *Pollack*. Like *Pollack*, *Pacifica* involved radio broadcasts with a small number of unwilling listeners. However, unlike *Pollack*, the speech at issue in *Pacifica* was vulgar. Therefore, *Pollack* may be characterized as determining whether *any* speech may be permitted in the applicable public forum (public buses), whereas *Pacifica* hinged more specifically upon whether "indecent" or "vulgar" speech may be publicly broadcast with immunity from regulation.

While it is an important case, *Erzoznik v. Jacksonville*[88] is difficult to reconcile with the other opinions. In *Erzoznik*, a drive-in theater owner was convicted for violating a Jacksonville ordinance that prohibited the showing of nudity at drive-in theaters.[89] The ordinance was struck down by the Court upon a challenge of facial validity by the theater owner.[90] In holding that the statute impermissibly infringed upon the owner's First Amendment rights, the Court reasoned that, similar to *Cohen*, persons who did not wish to see the

85. *Id.* at 750-51.

86. *See Cohen*, 403 U.S. at 26 ("It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

87. *See Pacifica*, 438 U.S. at 748 (reasoning that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity'") (citations omitted).

88. 422 U.S. 205 (1975).

89. *Id.*

90. *Id.* at 217-18.

movie could merely avert their eyes. The Court seemed to take the *Cohen* decision one step further, however, reasoning that even where the captive audience problem is present, First Amendment rights should trump the interests of unwilling listeners:

> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.[91]

In a strong dissent, Chief Justice Burger, joined by Justice Rehnquist, took issue with the fact that this "speech" could be avoided merely by not looking. The unique character of the drive-in theater, including the fact that it dominated the skyline and presented color and animation against a dark background made the persons around the theater unable to avoid the speech.[92]

If it is true that where there is a captive audience, the Court has seen fit to limit speech rights, the converse is also accurate: where there is no captive audience problem, the Court is much less likely to let stand a restriction on speech, even where speech is vulgar. Such was the case in *Sable Communications of Cal., Inc. v. FCC*,[93] where a "dial-a-porn" company facially challenged amendments to the Communications Act that prohibited indecent and obscene interstate commercial telephone messages. The federal attorneys relied on *Pacifica* for the proposition that indecent material may be federally regulated.[94] The Court disagreed, distinguishing *Pacifica* because it did not involve a blanket prohibition on all indecent speech, as did the regulation in *Sable*.[95] In addition, the Court noted that there was no captive audience problem because the phone services offered by *Sable* required the affirmative act of dialing the number.[96]

The *Sable* decision is consistent with a nuisance analogy, in that it leaves open the possibility that certain speech may be "channeled" via regulation to appropriate times or places. To the extent that the statute at issue involved not a channeling, but an outright ban, it was constitutionally infirm.

91. *Id.* at 210-11 (citations and footnote omitted).
92. *Id.* at 220.
93. 492 U.S. 115 (1989).
94. *Id.* at 127.
95. *Id.* at 127.
96. *Id.* at 128.

D. Mail Cases

Rowan v. United States Post Office Dept.[97] is an example of a case that squarely dealt with the balance between free speech and privacy. In *Rowan*, several mailing companies challenged a federal statute that gave individuals the right to require the removal of their names from junk mailing lists that mailed sexually explicit material to the home.[98] The Court reasoned that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"[99] and concluded that in this case, the statute was permissible. The two related issues that swayed the Court in *Rowan* were the "captive audience problem" and the unique nature of the home. In fact, the Court addressed both issues when it stated that "[i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."[100]

The prevention of unwanted mailings or advertisements arose again in several subsequent cases. In *Carey v. Population Services International*,[101] the Court concluded that a ban on advertisements of prophylactics was unconstitutional.[102] In attempting to sustain its statute, the State of New York argued that the ads were potentially "offensive and embarrassing to those exposed to them" without offering any specific evidence of persons who were offended, embarrassed, or otherwise were unwilling viewers.[103] The Court noted that the mere possibility of offense was insufficient to justify suppression of speech.[104] Further, the Court reasoned that "much advertising is 'tasteless and excessive,' and no doubt offends many."[105]

Similarly, in *Bolger v. Youngs Drugs Product Corp.*,[106] the Court struck down a statute that prohibited the mailing of unsolicited advertisements for prophylactics. [107] While *Rowan* involved the granting of power to an

97. 397 U.S. 728 (1970).

98. The statute in *Rowan* specifically provided a procedure for removal from mailing lists where the material being sent was a "'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." *Id.* at 730 (quoting 39 U.S.C. § 4009(a) (1964 ed., Supp. IV)).

99. *Id.* at 735.

100. *Id.* at 736.

101. 431 U.S. 678 (1977).

102. *Id*.

103. *Id.* at 701.

104. *Id*.

105. *Id.* at 701 n.27 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976)).

106. 463 U.S. 60 (1983).

107. *Id*. For a good discussion of the various interests involved in the unwilling listener area, see the concurring opinion of Chief Justice Rehnquist, joined by Justice O'Connor, in *Bolger*, 463 U.S. at 77-78.

individual to prevent unwanted mail, the Court subsequently declined to allow the government itself to decide what unsolicited material may be sent to the home. The Court recognized that under *Rowan* an individual had the power to prevent mailings that the individual considered offensive, but that the statute acted as an *ex ante* determination that all prophylactic advertisements were objectionable enough to prevent their entry into the home was unwarranted and unsustainable.[108]

Finally, in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*,[109] the Court struck down a regulation that prohibited the inclusion of partisan advertising in Consolidated Edison electric bills. Notably, the Court reasoned that the recipients of the bills were *not* a captive audience, despite the language to the contrary in *Rowan*.[110] The *Consolidated Edison* opinion also interestingly offered the following uncited rule of law, which is not seen in any prior or subsequent case: "[w]here a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectional speech."[111]

E. Acts on Public Property

United States v. Kokinda[112] involved the ability of the Postal Service to limit speech on its property.[113] While *Kokinda* hinged on the question of whether the Postal Service sidewalk was a "public area," the case is relevant since it upheld a restriction on peaceful speech in a public area that was not a "public forum."[114] The respondents in *Kokinda* were convicted of violating a federal regulation against soliciting alms and contributions on Post Office property. In determining whether the regulation was permissible under a reasonable test, the Court took into account the interests of unwilling listeners, reasoning that "[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out

108. The Court noted that "we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72.

109. 447 U.S. 530.

110. *Compare Consol. Edison*, 447 U.S. at 539 n.7 ("[t]he Consolidated Edison customers who receive bill inserts are not a captive audience"), *with Rowan*, 397 U.S. at 736 ("[i]n today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail"). While the bills themselves in *Consol. Edison* were not "unwanted," the bill inserts arguably may have been.

111. *Consol. Edison*, 447 U.S. at 541-42.

112. 497 U.S. 720 (1990).

113. *Id.*

114. *Id.* at 737.

information."[115] This intrusion helped to justify the ban, even though as in *Hill*, there was no evidence that the specific persons challenging the Act had "harassed, threatened, or physically detained unwilling listeners."[116] At least tangentially, *Kokinda* engaged in a nuisance analysis whereby the improper behavior of certain speakers was imputed to all members of the speaking class.

In addition to nuisance considerations, the ease of regulation appeared to play a part in *Kokinda*. The Court noted that "postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals."[117] Rather than being strictly about free speech on public property, *Kokinda* is best read as upholding the ability of the United States, as land owner and business operator, to efficiently manage its operations.

In one of the most significant recent First Amendment cases, the Court dealt with the unwilling listener problem tangentially. In *Ward v. Rock Against Racism*,[118] a New York city regulation required users of a public bandshell in Central Park to utilize sound-amplification equipment and a sound technician provided by the city.[119] One of the justifications offered by the city was that the serene character of the adjacent "Sheep Meadow" section of the park needed to be protected.[120]

The unwilling listeners in *Ward* were represented by park users and residents of areas adjacent to the park, who over a period of years complained about the concerts performed at the bandshell by the Rock Against Racism organization.[121] In an attempt to reconcile the unwilling listeners and the Rock Against Racism organization, the city instituted a bandshell user guideline that required use of city equipment and the city technician.[122] The Court ruled that these regulations were proper time, place, or manner regulations that the city could enact to further its goal of maintaining the serenity of Sheep Meadow as well as the surrounding neighborhoods.[123]

The most important aspect of *Ward* is that it gives the Court a framework to judge future cases. Indeed, *Hill* was decided under the principles of *Ward*, and the Court ultimately concluded that the manner of speech was being regulated, rather than the content of the speech itself.[124] Therefore, in both

115. *Id.* at 734.
116. *Id.* at 753.
117. *Kokinda*, 497 U.S. at 735.
118. 491 U.S. 781 (1989).
119. *Id.* at 784.
120. *Id.* at 788 n.2.
121. *Id.* at 785.
122. *Id.* at 788 n.2.
123. *Ward*, 491 U.S. at 792.
124. Hill v. Colorado, 120 U.S. 2480, 2494 (2000).

instances, the regulations were permissible, because in both cases the regulations also furthered a state interest (in *Ward*, maintaining serenity in the surrounding areas, and in *Hill* ensuring access to health facilities).

F. Picketing Cases

The exemption of certain forms of communication from regulations restricting speech can also make the regulation unconstitutional. In *Carey v. Brown*,[125] for example, the Court struck down a statute that prohibited residential picketing, but exempted labor picketing.[126] Since labor picketing thwarted the State's interest in the same manner as any other type of picketing, exempting only labor picketing meant that the statute was not content-neutral. Likewise, in *Police Department of Chicago v. Mosley*,[127] the Court struck down a similar ordinance that was aimed at preventing picketing at schools, but exempted labor picketing.

Frisby v. Schultz[128] also involved the permissible scope of limitations on residential picketing. However, the Town Board in Brookfield, Wisconsin, relying on the Court's teaching in both *Carey* and *Mosley*, wrote its ordinance so that it banned all such acts only in residential areas.[129] While rejecting the contention that streets in primarily residential areas should not be considered public fora, the Court nevertheless upheld the statute because it was content-neutral, narrowly tailored to serve a significant government interest and left open ample alternative channels of communication. The government interest involved was the protection of residential privacy. The Court noted that although individuals most often avoid speech they do not wish to hear, "the home is different."[130] The Court noted that there was no problem, from a First Amendment perspective, with regulating speech that was offensive to a captive audience.[131]

While *Carey* and *Mosley* are important cases in the evolution of this area of law, the *Frisby* decision is perhaps the most relevant to the *Hill* decision. The majority opinion in *Hill* cites *Frisby* for support of much of the legal principles involved in the case. For example, *Frisby* provided support for the notion that regulation of offensive speech may be permissible where the

125. 447 U.S. 455 (1980).

126. *Id.* at 462. The Court ruled that "under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home."

127. 408 U.S. 92 (1972).

128. 487 U.S. 474 (1988).

129. The ordinance read: "'It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.'" *Id.* at 477.

130. *Id.* at 484.

131. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* at 487.

audience cannot avoid it. Also, the majority relied on *Frisby* for the proposition that a statute does not become viewpoint based merely because its enactment was "motivated by the conduct of the partisans on one side of a debate."[132] Finally, the Court noted that the fact that much more speech was burdened by the *Frisby* ordinance illustrates that the Colorado statute is reasonable.[133]

G. Abortion Cases

Madsen v. Women's Health Center, Inc.[134] involved the challenge of an injunction issued by a Florida state court prohibiting abortion protesters from engaging in a number of different activities around a particular abortion clinic. Finding that a previous, less restrictive injunction had been ignored, and therefore was insufficient to protect the State's interest,[135] the Florida district court entered the new, more restrictive injunction at issue. The Court upheld the portion of the injunction establishing a thirty-six foot speech-free zone around the entrance of the clinic[136] and upheld a limited noise provision,[137] but struck the other portions of the injunction.[138]

Madsen is important for several reasons. First, as in many of the previous cases, the Court discussed the captive audience problem. It reasoned that, as in *Frisby*, the audience of the communication was captive for all intents and purposes, and that the state had a legitimate interest in protecting the psychological and physical well-being of the patients at the clinic.[139] The interest in protecting residential privacy, therefore, is extended by analogy to medical privacy after *Madsen*.[140]

132. Hill v. Colorado, 120 S. Ct. 2480, 2494 (2000).

> The antipicketing ordinance upheld in Frisby v. Schultz . . . a decision in which both of today's dissenters joined, was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral.

Id. (citation omitted).

133. "The restriction interferes far less with a speaker's ability to communicate than did the total ban on picketing on the sidewalk outside a residence . . . ." *Id.* at 2497.

134. 512 U.S. 753 (1994).

135. The asserted interest was "to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to [medical and counseling] services." *Id.* at 753 (citation omitted).

136. *Id.* at 770.

137. *Id.* at 772.

138. *Id*. at 776.

139. *See Madsen*, 512 U.S. at 768 (paraphrasing the Florida Supreme Court) ("[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, 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.") (citations omitted).

140. *Id.*

In addition, the *Madsen* injunction contained a 300 foot "no-approach" provision that attempted to prevent unconsented approach for speech purposes.[141] The court struck down the provision, reasoning that "it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary . . . ."[142] The Court noted that while certain speech may be independently proscribable, there was no showing that such speech was present.[143] Finally, the Court noted that the consent requirement, in and of itself, was a sufficient basis to strike the injunction, because it burdened more speech than necessary.[144]

Schenck vs. Pro-Choice Network of Western N.Y.[145] also touched upon many of the same issues later argued in *Hill*.[146] *Schenck* involved a fixed buffer zone that was designed, similarly to *Madsen*, to protect patients' access to clinics. The injunction at issue in *Schenck*, however, went one step further by enacting a fifteen-foot "floating" buffer that followed each of the clinic patients as they entered or exited the clinic.[147] Quoting extensively from *Madsen*, the Court struck down the floating buffer zone as overbroad.[148] Since the asserted state interest was in protecting access to clinics, a buffer zone that prevented approaching clinic patrons was broader than necessary. This was particularly true because of the type of speech that could be affected (leafleting) and the forum that was involved (public sidewalks, which the Court called a "prototypical public forum").[149]

After *Madsen* and *Schenck*, the Court apparently saw no problem with fixed speech-free zones to remedy past abuses, but did not favor the operation of floating buffer zones. In addition, both *Madsen* and *Schenck* recognize that while First Amendment interests are paramount, specific allegations of past

141. The no-approach provision (section (5) of the injunction), prohibited the protestors "[a]t all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners] . . . ." *Id.* at 760.

142. *Id.* at 774.

143. *Id*.

144. "The 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Hill*, 120 S. Ct. at 774.

145. 519 U.S. 357 (1997).

146. *Id*.

147. The temporary restraining order prohibited protesters from "physically blockading the clinics, physically abusing or tortiously harassing anyone entering or leaving the clinics, and 'demonstrating within 15 feet of any person' entering or leaving the clinics." *Id*. at 364.

148. *See id*. at 372-73.

149. The Court stated that "[l]eafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum." *Id*. at 377.

illegal activities or disruptive behavior may justify some restrictions upon speech.[150] Further, the Court, at least in *Madsen*, recognized that the captive nature of the audience may also justify regulation.[151]

III. ANALYSIS

A. Why Hill *is a "Hard Case"*

The cynical (and simplistic) view of *Hill* is that it was simply another case implicating abortion rights, and that the Court, in an outcome-determinative manner, merely formed lines along either pole of the political spectrum and fought over the middle, deciding votes. However, the presence of Chief Justice Rehnquist in the majority complicates this analysis. Whatever may be said regarding the Chief Justice's political bent, it can surely be stated that he is not a member 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 abortion, as phrased by Justice Scalia.[152]

There are two main complicating factors in this case. First, the Colorado statute, at its most restrictive, merely prevents a speaker from approaching within eight feet without permission. Accordingly, the burden on speech is de minimus. Second, while there is no doubt that First Amendment rights have always been paramount, particularly in the public domain, they have never been absolute; where speech (or speech conduct) represents "fighting words" or obscenity or nuisance, speech can and has been constitutionally proscribed.

1. How Much Speech is Burdened in *Hill*?

The oral arguments in *Hill* shed some light upon how the Court, and in particular, Chief Justice Rehnquist, viewed the case. In the context of a discussion of the differences between *Hill* and *Schenk*, the arguments turned toward the issue of the distance of the "bubble" involved in the statute. Chief Justice Rehnquist offered:

> But the—but the distance must make some difference, Mr. Sekulow. Perhaps the difference between 8 feet and 15 doesn't, but if you got down to 3 feet, for example, it doesn't seem to me there's any message you can't communicate at a distance of 3 feet. The—the distance requirement would impede you.[153]

150. See the discussion *supra* regarding *Hill v. Colorado's* treatment of this issue.

151. One difference between *Schenck* and *Madsen* was that the Court did not find a captive audience problem for the patients in the clinic involved in *Schenck*. *See Schenck*, 519 U.S. at 376 n.8.

152. Hill v. Colorado, 120 S. Ct. 2480, 2503 (2000) (Scalia, J., dissenting) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 785 (1994)).

153. Oral Arguments, Hill v. Colorado, 2000 U.S. Trans LEXIS 14, 7.

Later, when the attorney for the petitioners argued that what was involved was speech in a public forum, Chief Justice Rehnquist replied:

> But speech on a public forum, the traditional concept is, you know, there's somebody on a soapbox and a bunch of people gathered around them, not that you're one on one with someone an eighth of an inch away.[154]

Both of these short excerpts support the position that ultimately found its way into the majority opinion authored by Justice Stevens—that the statute burdened little speech because no speech was affected as long as it was made beyond the distance of eight feet.[155] Justice Stevens, and the five other justices who joined the majority, simply did not see any burden in fact where the regulation created an eight foot bubble and allowed all speech outside that bubble.

In so reasoning, the Court placed too much emphasis on the cognitive component of speech, while ignoring the emotive aspect. While speaking at a distance of eight feet may well be sufficient to convey the cognitive conduct of the desired message, it may be insufficient to communicate the emotive function, which has been termed as "practically speaking . . . the more important element of the overall message sought to be communicated."[156] Indeed, under the Court's rationale, Congress could conceivably forbid the Court from hearing oral arguments altogether, since such a restriction on the Court would "not have any adverse impact on the readers' ability to read" the parties' briefs.[157] Of course, *Hill* involved an eight foot limit rather than a total ban, but the crux of the matter is that there *is* a difference between the written and spoken word, and there *is* a difference, however small, between a word spoken at eight feet and a word spoken at closer proximity.

2. Is This Genre of Speech Able to be Proscribed?

Viewed from the perspective of the Colorado legislature that enacted the law, the protesters around the entrances to the medical facilities had appropriated more than their fair share of the public right of way, however that term may be loosely used. In deference to fundamental notions of fairness (not to mention the real-world praxis involved in comparing First Amendment rights vis-à-vis the rights of citizens to peacefully go about their business and "enjoy" the public land), Colorado should be able to enact and enforce laws designed to prevent a group from dominating the public discourse to such an

154. *Id.* at 10.

155. *See* Hill v. Colorado, 120 S. Ct. at 2483 ("The 8-foot zone should not have any adverse impact on the readers' ability to read demonstrators' signs. That distance can make it more difficult for a speaker to be heard, but there is no limit on the number of speakers or the noise level.").

156. Cohen v. California, 403 U.S. 15, 26 (1971).

157. Hill v. Colorado, 120 S. Ct. at 2483.

extent. Divorced of their speech component, the actions that led the Colorado legislature to enact the law involved the same types of actions that would normally be considered a nuisance.

The Restatement, Second, of Torts defines a public nuisance as "unreasonable interference with a right common to the general public."[158] The Restatement comments that public nuisance includes "interference with . . . the public peace, as by loud and disturbing noises . . . ."[159] The twist in *Hill* and similar cases is that the loud and disturbing noises are generated in a speech or speech related conduct. Therein lies the difficulty for the courts. In many of the cases, where a public nuisance was present (when viewed without regard to any possible free speech implications), the Court has upheld a regulation against such acts.

For example, in *Ward*, a regulation against loud music was upheld. Similarly, regulation of amplified sound trucks was permitted in *Kovacs*. While *Pacifica* did not represent the classic example of "loud noise," the courts that dealt with it nevertheless viewed it with an eye towards a nuisance analogy (reasoning that the same recording might be appropriate for airing on the public airwaves in another context; for instance, at a later time when no children would be listening).

A. Cantwell

The implicit nuisance analogy can be found in *Cantwell v. Connecticut*.[160] Jesse Cantwell was a Jehovah's Witness who went door to door soliciting contributions and handing out information regarding his religion. Upon meeting two men on the street, he stopped them and asked if he could play them a record on the portable phonograph he was carrying. Upon receiving their permission, he proceeded to play the record "Enemies," which generally attacked "all organized religious systems as instruments of Satan and injurious to man; it then single[d] out the Roman Catholic Church for strictures couched in terms which naturally would offend not only a person of that persuasion, but all others who respect the honestly held religious faith of their fellows."[161] The two men, both Catholics, were highly offended.

The Court set aside the conviction, chiefly on grounds of the overbreadth nature of the breach of the peace statute.[162] The rationale offered by the Court,

158. RESTATEMENT (SECOND) OF TORTS, § 821B (1977).

159. *Id*., § 821B, cmt. b.

160. 310 U.S. 296 (1940).

161. *Id.* at 309.

162. *Id.* at 311.

> Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioners'

however, implicated the mutuality of the speech, as well as the lack of any sort of nuisance conduct on the part of Cantwell. The Court found Cantwell to be engaged "only in an effort to persuade a willing listener to buy a book or contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."[163] In addition, the Court noted that "[t]here is no showing that [Cantwell's] deportment was noisy, truculent, overbearing, or offensive" and that "the sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic."[164]

Cantwell, like *Cohen* and *Erzoznick*, may merely show that a general breach of the peace statute is simply insufficient to constitutionally restrict any speech. In each of the three cases, the government responded to the "there oughtta be a law" outcry from affronted citizens with an ex post attempt to shoehorn the conduct into a general statute already on the books. As such, the response of the state of Colorado was markedly different—its legislature passed a law. In so doing, it did its best to carefully tailor the law to the perceived problem.

B. The "Bad Apple" Problem

In addition to the problem of definition, the cases reveal serious fairness concerns. In several at least, the conduct of several bad actors comprising a small subset of a larger class is used to justify restrictions on the speech of the entire class. In *Hill*, for instance, there was no finding that the respondents had harassed. Likewise in *Kokinda*, there was no evidence that the particular solicitors there had bothered anyone. The Court in both cases, however, imputed the problematic speech of other similarly situated speakers upon the entire class of speakers.

To a certain extent, this will always be the case when a state uses its police power to address a perceived problem; for instance, a state may regulate nude dancing establishments, thereby impinging the speech-related conduct of the dancers, because of the perceived harmful "secondary effects" of such establishments, such as crime, prostitution, et cetera.[165] Such a regulation affects both the bad actors and the innocent persons the same.

> communication . . . raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Id. at 311. Of course, rather than a general breach of the peace statute, the Court in *Hill* was confronted with a statute that was carefully drafted to avoid the infirmities found here.

163. *Id.* at 310. The Court did not address the thornier question of whether the men, when consenting to be played a record on a public street, became "willing listeners" to any communication a victrola might produce (such as the anti-Catholic material here).

164. *Id.* at 309.

165. *See* Erie v. Pap's A.M., 529 U.S. 277 (2000).

However, there seems to be an inherent potential for misuse of this concept, particularly since many important topics also tend to be the most controversial, thereby creating the greatest potential for conflict. For instance, suppose the city of Seattle decided to restrict the free speech rights of protesters at the next World Trade Organization Conference. Under the rationale in *Hill*, so long as the legislature found a need to protect its citizens' health and safety, the city could enact restrictions on speech such as those found in the Colorado statute to protect persons who do not wish to hear the speech of the protestors. This would result in a small band of bad actors shutting down the speech of a much larger group of protesters who stayed within the law.

An appropriate next question would be "so what?" What harm is there in regulating the manner by which certain speech may be directed at unwilling listeners? The answer is twofold. First, since there is no specific requirement regarding an appropriate level of evidentiary findings that would support restrictions, there is potential for a state to push the outer limits of restrictions by merely asserting that a problem exists.[166] Such a finding without factual basis could result in adversely impacting the very free speech rights that the First Amendment purports to guarantee—those of minority or unpopular speakers.

The second problem, related to the first, is that the lack of an adequate rule of law to be prospectively applied invites abuse. With no clear or even cohesive theory to follow, the First Amendment ceases to guarantee anything greater than the proposition that speech within the current judicial vogue is protected speech. This is undoubtedly not the arrangement intended by the text or the spirit of the First Amendment.[167]

C. What is the Scope of the "Right" or "Interest"?

Much of the confusion in the cases can be traced directly to the fact that no case—*Hill* included—ever fully defined the scope of the "right" or "interest" that is claimed to exist on behalf of the unwilling listener. In many instances, the Court merely mentioned the existence of an "interest" and moved on. However, the Court would do well to clarify the scope of the interest in order to guide future conduct.

166. *See* Alan J. Howard, *When Can the Moral Majority Rule?: The Real Dilemma at the Core of the Nude Dancing Cases*, 44 ST. LOUIS U. L.J. 897-907 (2000).

167. Justice Scalia had the same concerns in mind when he argued:

> I have no doubt that this regulation would be deemed content-based in an instant if the case before us involved antiwar protesters, or union members seeking to "educate" the public about the reasons for their strike. "[I]t is," we would say, "the content of the speech that determines whether it is within or without the statute's blunt prohibition . . . . But the jurisprudence of this Court has a way of changing when abortion is involved."

Hill v. Colorado, 120 S. Ct. 2480, 2483 (2000) (citations omitted).

It is clear that there is no absolute right to be free from unwanted communication, at least not applied to all speech in all locations, at all times. This is obvious by the fact that there is no corresponding legal duty to obtain consent from every potential listener. However, courts have at various times treated the interest of listeners as privileges, which operate to negate the right of persons to engage in free speech, or powers, which grant the auditor the ability to change a legal relation.[168]

1. Privileges and "No-Rights"

The relation between a speaker and a listener may be characterized as a privilege interacting with a "no-right." From the speaker's perspective, there is a privilege to speak in a public place. This privilege includes the ability to protest, educate, or counsel. The corresponding entitlement on the part of the public (or more particularly, that portion of the public within earshot or eyesight of the protest, education, or counseling) is a "no-right." This "no-right" means that any listener or view of the message has no right to stop the speaker from speaking.

Alternately, the legal relations may be framed from the point of view of the unwilling listener. From the listener's perspective, there is a privilege to be free from certain types of speech in certain types of situations. This privilege is particularly strong where the listener is "captive" and cannot escape the speech. In such a situation, the Court effectively recognizes a privilege on the part of the listener to be free from speech, which is balanced by a "no-right" on the part of those desiring to speak.

The wiggle room analytically is the definition of "captive audience." Users of public transportation buses are considered a captive audience.[169] Visitors to the Los Angeles County courthouse, however, are not.[170] Persons whose homes are subject to picketing which is targeted at the occupant of the house are captive;[171] persons whose homes happen to overlook a drive-in movie theater playing movies containing nudity are not.[172] While the definition defines the outcome, unfortunately the definition defies easy synthesis, and so the legal relations are not clearly resolved.

168. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 50-51 (1923).

169. See, e.g., the discussion of *Pollack* and *Lehman supra* note 68.

170. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (reasoning that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

171. See Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different.") (citations omitted).

172. *See* Erzoznick v. Jacksonville, 422 U.S. 205, 212 (1975) ("In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.") (citations omitted).

In addition to those circumstances where there is no "captive audience problem," a listener may also have a privilege as against a speaker in certain situations where the listener is not a captive. The two situations where such privilege issues typically arise involve circumstances where the content of the message being spoken involves some sort of vulgar or sexual theme,[173] or where the conduct of the speech itself constitutes a nuisance.[174]

The cases involving nuisance have all involved unwelcome noise. The Court has determined that individuals are privileged against unwelcome noise. This is true even where the listeners are not a "captive audience" to the noise. As Justice Kennedy wrote in *Ward*:

> [I]t can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquility, and privacy of the home" . . . but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise.[175]

2. Right-Duty-Power

Rather than a case of conflicting privileges, the speaker/unwilling listener situation could also be analyzed in terms of rights, duties, and powers. A person protesting on a public sidewalk in front of an abortion clinic normally has a First Amendment right to engage in protest speech. The corresponding duty on the part of the general public would be not to prevent the exercise of this right. By requiring the consent of the unwilling listener as a prerequisite to speaking, the *Hill* statute effectively granted a person entering into the clinic a power: they could consent to the speech, thereby leaving the speaker's right to speak in place, or they could refuse to consent, thereby destroying the speaker's right.

This change in the legal relation between the anti-abortion protester and the public land is what marks the interest conveyed to the clinic patron as a power, and not a privilege. The existence of a privilege would merely operate to deprive the speakers right to speak, without changing the legal relation between the speaker and the public land. The patron merely says to the speaker: "you are free to speak, but not to me" as opposed to saying "you are no longer free to speak on this particular piece of property."

173. *See, e.g.*, discussion of *Pacifica supra*.

174. *See* discussion of *Kovacs* and *Ward supra.* For a discussion of other circumstances where courts have protected unwilling listeners from "nonspeech harms," see Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REF. 489, 507-12 (1999).

175. Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989).

Prior to *Hill*, the Court had only created such a right-duty-power regime in situations involving speech directed at the home. For example, in *Rowan*, the Court reasoned that:

> In effect, Congress has erected a wall—*or more accurately permits a citizen to erect a wall*—that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable. Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.[176]

By permitting a person to erect a wall through which no speech may enter, the Court upheld a statute that granted the citizen a right in the home to be free from certain types of speech. The corresponding duty on the part of the privilege operates to negate the right of the mailing company to engage in free speech by sending mail to the home.

IV. CONCLUSION

When speech is being forced upon a "captive" audience or when the speech is so intrusive as to constitute a nuisance, the law will operate to protect the "unwilling listener." However, like any abridgment of speech, this protective power should be used as sparingly as possible. *Hill* may be seen as an invitation by some legislatures to begin a process of creative drafting in order to limit many types of disfavored speech merely by characterizing the limit as protecting unwilling listeners. Since most protest speech falls upon the ears of persons who are "unwilling listeners" to some extent or another, there is a danger of abuse in the precedent set by *Hill*.

JAMES J. ZYCH*

176. Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970) (emphasis added).

* J.D. Candidate, Saint Louis University School of Law. I would like to thank my family, and in particular, my wife and my father, for helpful comments on early drafts of this Note.