



Case Western Reserve Law Review

Volume 38 | Issue 4

1988

Bering v. SHARE: Accommodating Abortion and the First Amendment

Bonny E. Sweeney

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Bonny E. Sweeney, *Bering v. SHARE: Accommodating Abortion and the First Amendment*, 38 Case W. Res. L. Rev. 698 (1988)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol38/iss4/22>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Note

BERING V. SHARE: ACCOMMODATING ABORTION AND THE FIRST AMENDMENT

I. INTRODUCTION

IN 1973 THE United States Supreme Court held that Texas statutes criminalizing abortion violated the constitutional right of privacy¹ and were therefore void. The controversial *Roe v. Wade*² decision, which permitted elective abortions during the first trimester of pregnancy, sparked a major anti-abortion movement in the United States.³ Before *Roe*, abortion was not uncommon; most states permitted abortion if the woman's life was in danger, and several states permitted "non-therapeutic" (that is, elective) abortions.⁴

1. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court found this right of privacy in the penumbras of the Bill of Rights, and held that a state law forbidding the use of contraceptives was unconstitutional. *Id.* at 483, 485.

2. 410 U.S. 113 (1973). The Court recognized separate and distinct state interests in protecting the life and health of the pregnant woman and in protecting the potentiality of human life. *Id.* at 162. Accordingly, the Court established guidelines for regulation of the abortion procedure which allow very little regulation of abortion in the first trimester of pregnancy, but permit greater state regulation and even proscription of abortion in the third trimester of pregnancy. During the first trimester the abortion decision is left to the medical judgment of the pregnant woman's physician; during the second trimester the state may regulate the abortion procedure in ways "reasonably related to maternal health"; in the third trimester the interest of the state in protecting potential life becomes compelling, and the state may regulate and even proscribe abortion unless necessary for the preservation of the pregnant woman's life or health. *Id.* at 163-64.

3. In a study of the anti-abortion movement in California, sociologist Kristin Luker argues that, although the anti-abortion movement had experienced "slow but steady" growth between 1967 (the year California reformed its abortion law) and 1973, the *Roe v. Wade* decision was the major catalyst for most anti-abortion activists. She reports that, of those interviewed, more joined the anti-abortion movement in 1973 than in any year before or since. K. LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 137 (1984). Luker further discusses in detail the mobilization of anti-abortion forces and the response to *Roe v. Wade*. *Id.* at 133-46. See also P. CONOVER & V. GRAY, *FEMINISM & THE NEW RIGHT: CONFLICT OVER THE AMERICAN FAMILY* 6 (1983) (*Roe* spurred organization of anti-abortion groups and programs).

4. In 1972, twenty-five states permitted abortion when necessary to save the woman's life; in addition, five states permitted abortion when necessary to save the life of the mother or child (apparently construing any induced birth as abortion). Alabama and the District of Columbia permitted abortion when necessary to preserve the life or health of the mother. Eleven states had adopted some version of the Model Penal Code abortion statute, which made abortion illegal except when the physician believed it was necessary to preserve the physical or mental health of the mother, the child would have grave mental or physical de-

Nevertheless, the *Roe* decision shocked many Americans who had been unaware of both the increasing public acceptance of abortion and of the very large number of abortions, both legal and illegal, which occurred annually.⁵

Following the *Roe* decision, abortion opponents formed hundreds of anti-abortion organizations, both formal and informal. Through these groups abortion opponents have tried to circumvent and reverse the *Roe v. Wade* decision. Anti-abortion activists have proposed both legislation⁶ and constitutional amendments⁷ which would prohibit abortion and have supported Supreme Court nominees who have expressed opposition to *Roe v. Wade*. They have also attempted to stop abortion through "direct action" strategies such as picketing, harassment, and violence.⁸

This Note will discuss the success of the "direct action" strategies of anti-abortion activists and the constitutional issues which these strategies raise. Lawful protest activities of anti-abortion groups are seemingly protected by the first amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech."⁹ Despite this protection, some conduct and speech of the anti-abortion protestors may, need to be restricted in order to enable women to exercise their constitutionally protected right to decide whether to terminate a pregnancy. Although *Roe* and subsequent abortion opinions by the Supreme Court only insulate the

facts, or the pregnancy resulted from rape, incest, or other felonious intercourse. Four states had very liberalized abortion laws and allowed abortion with very few restrictions besides residency and timing (e.g., non-viability). Four states prohibited all abortions, but courts in two of those states had interpreted the statutes to permit abortion when necessary to save the mother's life. One state had no abortion law at all, and one state allowed abortion when necessary to save the woman's life or the pregnancy resulted from rape. Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, 1972 U. ILL. L.F. 177, 179-80, nn.25-30. See also K. LUKER, *supra* note 3, at 272, n.3 (by 1973 nearly one-third of the states had liberalized their abortion laws).

5. K. LUKER, *supra* note 3, at 137-41. Luker argues that the Supreme Court Justices who decided *Roe* believed, and were justified in believing, that the abortion reform movement was a national one which "commanded widespread public support." *Id.* at 142. At that time, in contrast, the anti-abortion movement appeared to be a "small, isolated group, ideologically suspect because of the predominantly religious nature of its beliefs." *Id.*

6. See *infra* text accompanying notes 14-15.

7. See *infra* text accompanying note 13.

8. See *infra* text accompanying notes 17-32.

9. U.S. CONST. amend. I. The prohibition has been interpreted to apply to state governments through the 14th amendment as well. See *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (the due process clause of the 14th amendment of the federal constitution safeguards the freedoms of speech and press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech and of press are personal rights and liberties protected by the 14th amendment from impairment by the states).

abortion decision from undue *governmental* interference,¹⁰ women may have a constitutionally protected interest in making this decision free from private interference as well.

The Washington Supreme Court recently addressed this apparent conflict between the free speech rights of anti-abortion protesters and the interest of a woman in making the abortion decision free from harassment in *Bering v. SHARE*.¹¹ *Bering* restricted the location of anti-abortion protestors picketing a medical facility where abortions are performed and prohibited their use of particular words while at the picket site.¹²

II. THE ANTI-ABORTION MOVEMENT

A. *Strategies of Anti-Abortion Protestors*

Until recently, anti-abortion organizations concentrated most of their efforts on the political system. These groups have proposed constitutional amendments which would give Congress and the states the power to prohibit abortion,¹³ and have proposed legislation which would withdraw abortion-related cases from the jurisdiction of federal courts.¹⁴ They have also proposed legislation which would declare that human life exists from conception and would extend fourteenth amendment protections to fetuses.¹⁵ None of these proposals has succeeded. The anti-abortion movement has, however, been more successful in passing legislation restricting public funding for abortion and imposing various regulations on the performance of abortions.¹⁶

10. See *infra* note 45 and accompanying text.

11. 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987).

12. *Id.*

13. See, e.g., The Proposed Human Life Federalism Amendment, S.J. Res. 110, 97th Cong., 2d Sess. (1982), which would amend the Constitution as follows: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion: *Provided*, That a provision of a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern."

14. See, e.g., The Proposed Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981). These jurisdictional proposals, are, however, subject to constitutional attack. See generally *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution*, 97th Cong., 1st Sess. (1981) (hearing included "Report on the constitutionality of H.R. 4273" to withdraw abortion-related cases from federal courts' jurisdiction).

15. See The Proposed Human Life Bill, S. 158, 97th Cong., 1st Sess. (1981); H.R. 900, 97th Cong., 1st Sess. (1981). This proposed statute would also establish state court jurisdiction over abortion-related cases.

16. A federal statute known as the Hyde Amendment prohibits the use of federal funds for abortion except when the mother's life is endangered or the pregnancy resulted from rape, but allows the use of such funds for childbirth. Pub. L. No. 86-123, § 109, 93 Stat. 926

In the last several years, the focus of the abortion debate has shifted from the legislature to the community at large as the anti-abortion movement has increasingly directed its message toward abortion clinics, doctors, individual women, landowners, and insurers.¹⁷ Pickets, sit-ins, and sidewalk "counseling" at abortion clinics are increasingly common tactics.¹⁸ As the number and frequency of abortion clinic protests has increased,¹⁹ the character of the protests has changed. Abortion clinic administrators report that, in contrast to the protests of the 1970s, when anti-abortion activists marched silently, carrying signs and roses, protests of the 1980s are extremely vocal and increasingly confrontational.²⁰ Protestors shout at patients, urging them not to "murder" their "babies."²¹ They bang on, peer through, and shout through clinic windows.²² Clinic

(1980). See *Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (upholding the 1980 version of the Hyde Amendment).

States have also limited the use of federal funds for abortion. In *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court upheld a state regulation granting Medicaid benefits for childbirth but denying them for nontherapeutic abortions. *Id.* at 474.

As of 1985, 30 states limited abortion funding by allowing public funds to support abortion only where the woman's life was in danger; 14 states as well as the District of Columbia paid for all abortions (of these, five states paid for abortion only because of a state court order); six states paid for abortion only in cases of rape, incest, endangerment of the mother's life, and in some cases, where there was a fetal abnormality. Sollomon & Donovan, *State Laws and the Provision of Family Planning and Abortion Services in 1985*, 17 *FAM. PLAN. PERSP.* 262, 263 (1985).

The Supreme Court has limited the kinds of regulations which may be imposed on the performance of abortion. See, e.g., *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987) (per curiam) (affirming decision invalidating a statute requiring unemancipated pregnant minors to wait 24 hours after notifying both parents of decision to obtain an abortion); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (invalidating statute requiring informed consent similar to that in *Akron*, detailed record keeping, use of the abortion technique most protective of the fetus in post-viability abortions unless medical risks to mother were significantly higher, and second physician for post-viability abortions); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (invalidating requirement that all second trimester abortions be performed in a hospital, an informed consent requirement overstating possible physical and psychological consequences of abortion, a requirement that only a doctor could inform the woman of the risks of abortion, and a required 24-hour waiting period).

17. *America's Abortion Dilemma*, *NEWSWEEK*, Jan. 14, 1985, at 20, 23-24.

18. See Donovan, *The Holy War*, 17 *FAM. PLAN. PERSP.* 5, 6 (1985); Monaghan, *Sidewalk Counseling: A First Amendment Right*, 31 *CATH. LAW.* 50, 50 (1987).

19. Between 1977 and 1981, only 24 abortion clinics reported to the National Abortion Federation (NAF) that they had been the object of protests. In 1986, in contrast, 141 clinics reported protests to NAF. These are conservative numbers since most protests are not reported to the NAF. National Abortion Federation, *Incidents of Reported Violence Toward Abortion Providers* (1986) [hereinafter NAF, stats. I].

20. *America's Abortion Dilemma*, *supra* note 17, at 23.

21. *Id.*

22. See Donovan, *supra* note 18, at 6; *America's Abortion Dilemma*, *supra* note 17, at 23. One famous anti-abortion movement leader, Joseph Scheidler, was cited for contempt in the

patients, staff, and doctors not only are harassed at clinics, but also, in some cases, are subjected to picketing and harassing phone calls at their homes.²³ Some doctors who perform abortions report that anti-abortion activists have threatened members of their families.²⁴ Activists have urged hospitals not to employ doctors who perform abortions, and have urged landlords not to renew abortion clinic leases.²⁵ Anti-abortion activists have increasingly trespassed against and invaded clinics, blocked clinic entrances and exits, and physically obstructed clinic patients and staff.²⁶ Even more alarming is the fact that abortion clinics have been the targets of arson and bombings.²⁷ In the period from January 1982 to December 1986, the Bureau of Alcohol, Tobacco, and Firearms investigated thirty incidents of arson and nineteen incidents of bombings at abortion clinics, which had caused damage in excess of five million dollars.²⁸

Anti-abortion activists have also sponsored the recent proliferation of pregnancy counseling clinics, whose sole object is to persuade women to continue unwanted pregnancies. These clinics, which offer free pregnancy tests, advertise in phone books and newspapers in a manner calculated to attract women with unwanted pregnancies. Called "Problem Pregnancy" or "Pregnancy Distress," many of these clinics not only use logos similar or nearly identical to those of nearby abortion clinics, but also place themselves very near abortion clinics, preferably in the same building. Women who enter these clinics are subjected to very strong anti-abortion rhetoric, usually in the form of a graphic film and personal persuasion. Critics of these clinics, which are estimated to number

Bering case. Brief of Amici Curiae, National Lawyer's Guild, at 6, *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986). Scheidler is founder and director of the Pro-Life Action League, and has authored a book called *CLOSED: 99 WAYS TO STOP ABORTION*, in which he instructs anti-abortion activists in various tactics designed to disrupt clinics. He is well-known for his use of the bullhorn at clinics, through which he exhorts women not to "kill their babies." *America's Abortion Dilemma*, *supra* note 17, at 25.

23. Donovan, *supra* note 18, at 5-6; *America's Abortion Dilemma*, *supra* note 17, at 23.

24. Donovan, *supra* note 18, at 6.

25. See *Bering v. SHARE*, 106 Wash. 2d 212, 229, 721 P.2d 918, 929 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987); *America's Abortion Dilemma*, *supra* note 17, at 23-24.

26. Donovan, *supra* note 18, at 6.

27. National Abortion Federation, Reported Incidents of Arson and Bombing, 1986 (1986) [hereinafter NAF, stats.II].

28. Bureau of Alcohol, Tobacco and Firearms, Abortion Related Incidents Investigated (Dec. 5, 1986) (available at Office of Public Affairs). The National Abortion Federation has reported additional violent incidents not investigated by the BATF. NAF, stats.II, *supra* note 27; NAF, stats.I, *supra* note 19; National Abortion Federation, *Antiabortion Violence: Incidents of Arsons, Bombings, and Attempts, 1977-86* (Jan. 1987).

2,900, say that they provide "medical misinformation, brutally graphic films, exaggerated statistics, and high-pressure anti-abortion rhetoric."²⁹ Individual women and some pro-choice organizations have sued the groups sponsoring these clinics for deceptive advertising.³⁰

Anti-abortion and pro-choice activists agree that failures in the political arena have led to increased use of "direct action" protest tactics by anti-abortion activists.³¹ Some suggest that the large influx of fundamentalist Christians into the anti-abortion movement

29. *Pro-life 'Clinic' Tactics Criticized*, AM. MED. NEWS, Feb. 14, 1986, at 3. Many of the clinics are modeled on a manual published by Robert J. Pearson, founder of the Pearson Foundation, called HOW TO START AND OPERATE YOUR OWN PRO-LIFE OUTREACH CRISIS PREGNANCY CENTER. *Id.* For a description of this book see *Manual Outlines Methods on How to Deter Abortion*, AM. MED. NEWS, Feb. 14, 1985, at 65.

Some critics argue that the pregnancy counseling clinics might endanger the health of pregnant women who need medical treatment because they do not have medically trained staff who can recognize medical complications. See *Pro-Life 'Clinic' Tactics Criticized*, *supra* note 29, at 67.

30. Private individuals and state governments have sued clinics in Fort Worth, Texas and in California for deceptive advertising (California has laboratory licensure laws requiring that certain criteria be met in order to qualify as a "clinic"), but the Federal Trade Commission (FTC) is apparently unwilling to take action against the clinics. *Pro-life 'Clinic' Tactics Criticized*, *supra* note 29, at 66-67.

31. Donovan, *supra* note 18, at 8. For discussion of failed proposals at the national level, see *supra* notes 13-15 and accompanying text.

At the state level, anti-abortion legislation has not fared well in very recent years. In 1986, voters defeated anti-abortion efforts in four states and three towns. In Massachusetts, an amendment which would prohibit the use of state funds for abortion and which would permit the legislature to ban abortion failed 58% to 42%. A Rhode Island proposal which would have prohibited the use of state funds for abortion and which declared that life begins at fertilization failed 65% to 35%. In Arkansas an amendment to the state constitution which would prohibit the use of state funds for abortion, and which declared a policy of protecting life from conception, was defeated by a narrow margin. An Oregon amendment prohibiting the use of state funds was defeated 54% to 46%. In three New England towns, nonbinding referenda which asked whether *Roe v. Wade* should be overturned were also defeated. National Abortion Federation, *Public Support for Abortion*, FACT SHEET (Dec. 1986) [hereinafter NAF, FACT SHEET]; Donovan, *Letting the People Decide: How the Anti-abortion Referenda Fared*, 18 FAM. PLAN. PERSP. 127 (1986).

In 1985, 65 laws relating to fertility were passed in 49 states, but none of them imposed restrictions on abortion of the type struck down by the Court in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Several states enacted laws imposing severe penalties for illegal acts against abortion clinics, and several states passed nonbinding resolutions condemning violence and harassment directed against abortion providers. See, e.g., Washington state's Anti-Harassment Act of 1985, Washington Senate Bill 3012, May 13, 1985; Massachusetts statute increasing maximum sentence for illegal use of bombs; Wisconsin criminalization of trespassing on abortion facility; Connecticut, Virginia, and Washington resolutions condemning violence against abortion facilities and urging law enforcement officers to prosecute perpetrators of violence. Sollomon & Donovan, *supra* note 16, at 262.

in recent years has also helped change its character.³² Whatever the explanation for the change in tactics, there is no question that in recent years the number of anti-abortion protests has increased dramatically, and that those protests have become increasingly aggressive and frequently violent.

B. *Impact of Anti-Abortion Protests*

It is far from clear that anti-abortion activists have been more successful in blocking abortion through protest than through political pressure. Anti-abortion activists do not seem to have had a very large impact on public opinion. While opinion poll results vary greatly with the exact wording of the abortion question, recent polls agree that a majority of Americans continue to favor legalized abortion.³³ Moreover, several polls suggest that support for legalized abortion has actually increased slightly in recent years.³⁴

The protestors themselves maintain that they have been very successful in closing down abortion clinics.³⁵ Abortion clinic directors disagree. While there have been reports that abortion clinics have been unable to get insurance and leases renewed as the result of anti-abortion activity,³⁶ these difficulties seem to stem more from violent attacks on abortion clinics than from peaceful picketing. There is no question that the aggressive nature of protests has been very expensive for abortion clinics, both in terms of repairing damage and in protecting against damage,³⁷ but it does not appear that

32. Donovan, *supra* note 18, at 8.

33. NAF, FACT SHEET, *supra* note 31. One study found that question wording could affect results as much as 10 to 15%. Jackson & Vinovskis, *Public Opinion, Elections, and the "Single-Issue" Issue*, in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 64 (G. Steiner ed. 1983).

34. See, e.g., NAF, FACT SHEET, *supra* note 31; K. LUKER, *supra* note 3, at 216-17; P. CONNOVER & V. GRAY, *supra* note 3, at 134; Jackson & Vinovskis, *supra* note 33, at 64-70. Polls agree that most Americans support a middle ground on abortion. That is, few Americans support legal abortion in all circumstances (22%, according to a 1985 Gallup poll), and few Americans favor making abortion illegal in all circumstances (22%, according to the same Gallup poll). According to 1985 polls conducted by ABC and the National Opinion Research Center, support for legalized abortion is greatest (more than 80%) when the life or health of the mother is threatened or when the pregnancy results from rape or incest. NAF, FACT SHEET, *supra* note 31.

35. Scheidler, founder and director of the Pro-Life Action League, claims to have closed 18 abortion clinics. *America's Abortion Dilemma*, *supra* note 17, at 25.

36. See Donovan, *supra* note 18, at 5.

37. Many clinics have hired guards, installed expensive security systems, and have trained staff in anti-terrorism techniques. *The Abortion-Clinic Bombings*, *NEWSWEEK*, Dec. 3, 1984, at 31; Donovan, *supra* note 18, at 5. The American Civil Liberties Union (ACLU) has published a pamphlet instructing clinics how to deal with anti-abortion protests, both violent and non-violent. ACLU REPRODUCTIVE FREEDOM PROJECT, PRESERVING THE

anti-abortion activists have succeeded in significantly reducing the number of abortion clinics.

Anti-abortion activists may be more successful, however, in convincing individual women to continue their pregnancies. The presence of anti-abortion protestors at abortion clinics undoubtedly makes abortion more distressing. Given the emotionally-charged nature of the decision to have an abortion and the difficulty in reaching a decision even under favorable conditions, the aggressive and confrontational nature of these direct action tactics may discourage some women, who otherwise would have elected an abortion, from choosing one.³⁸ The extent to which these anti-abortion tactics have had this consequence, however, is not easily documented.

In cases involving anti-abortion counseling clinics, legal remedies for deceptive advertising are available in some states.³⁹ Where the protestors' behavior is violent or aggressive, or where protestors trespass on the abortion clinic's property, the clinic clearly has legal remedies. In at least thirteen states abortion clinics have obtained injunctions against protestors who have blocked clinic entrances and parking lots; threatened, harassed, intimidated, insulted, or shoved patients and staff; trespassed against or invaded clinics; peered into or shouted through clinic windows; shouted obscenities; photographed patients; harassed patients and staff at home; used voice amplification; and made disruptive phone calls or false appointments.⁴⁰ Courts have also limited the number of protestors who may picket clinics at any one time, restricted the areas in which protestors may picket, and barred protestors from carrying signs such as "baby-killer."⁴¹ This latter restriction has been held to infringe unconstitutionally upon the free speech rights of protestors.⁴²

Most of the prohibited conduct for which legal remedies are available, such as arson, bombings, trespass and assault, does not

RIGHT TO CHOOSE: HOW TO COPE WITH VIOLENCE AND DISRUPTION AT ABORTION CLINICS (1986).

38. The presence of noisy protestors outside abortion clinics may also result in a higher rate of medical complications. See Dr. P. Stubblefield, Statement Before the House Judiciary Comm., Subcomm. on Civil and Constitutional Rights (submitted Dec. 17, 1986). J. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION 74-76 (1985) advocates increasing the abortion complication rate through disruptive protests as an effective way of stopping abortion.

39. See *supra* note 30.

40. Donovan, *supra* note 18, at 7.

41. *Id.*

42. OBGYN Ass'n. v. Birthright of Brooklyn, 64 A.D. 2d 894, 896, 407 N.Y.S. 2d 903, 906 (1978).

constitute *protected* speech. The remainder of this Note will discuss restrictions on anti-abortion speech which directly raise first amendment concerns. Specifically, this Note will address the question of whether, within the confines of the first amendment, some speech may be restricted in order to enable women to exercise freely their constitutionally protected right to decide to terminate a pregnancy, and to protect their interest in obtaining abortion free from harassment.

III. ABORTION AND THE FIRST AMENDMENT

A. Introduction

Anti-abortion protestors who engage in peaceful picketing at abortion clinics seem clearly to be exercising constitutionally protected rights of freedom of speech. If, however, the anti-abortion protestors' conduct and speech infringes upon the ability of women to exercise their privacy-based right to decide to terminate a pregnancy, perhaps, as at least one court has held,⁴³ the first amendment does not preclude restrictions on such speech.

The Supreme Court has held that the right of privacy includes the right to decide whether or not to continue a pregnancy, free from governmental interference.⁴⁴ This right does not preclude all *private* interference; the abortion funding cases clearly state that private interference with the abortion decision is not a constitutional violation requiring governmental correction.⁴⁵

43. *Bering v. SHARE*, 106 Wash. 2d 212, 226, 721 P.2d 918, 927 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987).

44. See *supra* text accompanying notes 1-2.

45. See also *Maher v. Roe*, 432 U.S. 464 (1977). The Court upheld, 6-3, a state regulation which grants Medicaid benefits for live births but denies them for non-therapeutic abortions. The Court rejected the claim that the policy preference for live births over abortion violated the equal protection clause by rejecting the argument that a governmental classification which burdens indigent women is a suspect classification. *Id.* at 470-71. In response to the claim that the regulation unconstitutionally infringed upon a fundamental right of privacy, the Court said that the lower court misconceived "the nature and scope of the fundamental right recognized in *Roe*" when it concluded that nothing less than a compelling state interest would justify the disparate treatment. *Id.* at 471-72. *Roe*, said the Court, only "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy [and does not limit] the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative." *Id.* at 473-74, 475.

In *Harris v. McRae*, 448 U.S. 297 (1980) the Court upheld, 5-4, the Hyde Amendment, a federal statute which prohibits states from using Medicaid funds for abortion unless the life of the mother is endangered or it is a medically necessary procedure following rape or incest. This statute differs from the one at issue in *Maher* in that "therapeutic" abortions, allowed by

As long as the anti-abortion protestors are not creations of the state or clothed with state action, the right of privacy does not *compel* government to prevent them from interfering with a woman's right to choose to terminate a pregnancy.⁴⁶ Even if private interference does not rise to the level of a constitutional violation, however, there may still be a significant governmental interest in protecting the right to decide to terminate a pregnancy free from harassment. Moreover, the case for government intervention will be made stronger insofar as it regulates, but does not deny, the protestors' speech. Whether this governmental interest is sufficiently important to justify restrictions on the speech of anti-abortion protestors is the question addressed by the Washington Supreme Court in *Bering v. SHARE*.⁴⁷

B. *Bering v. SHARE*

In *Bering v. SHARE*, Chief Justice Pearson, writing for the majority, modified but upheld the permanent injunctions issued by the Spokane Superior Court against SHARE anti-abortion picketers.⁴⁸ SHARE members⁴⁹ had been picketing a Spokane medical building housing more than two dozen medical offices, only some of which performed non-therapeutic abortions. Physicians in the building, concerned about the impact of SHARE's sidewalk "counseling" and picketing on the welfare of their patients, sought an injunction to restrain SHARE members' picketing. The lower court, after issuing a temporary restraining order, issued a permanent injunction following a full day show-cause hearing.⁵⁰ The injunction prohib-

the *Maher* statute, require only a medical determination that the mother's health, as opposed to life, require the abortion. In *Harris* the Court stated that, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.* at 316. The current U.S. Department of Justice believes that the protest activities of anti-abortion activities do not require investigation by the federal government. In response to letters from pro-choice organizations and clinics calling for an investigation by the Civil Rights Division into harassment of abortion providers and abortion seekers, the Assistant Attorney General of the Criminal Division wrote:

Despite a widespread belief to the contrary, in virtually no case have the civil rights statutes been violated by anti-abortion clinic activities. The Supreme Court has held that the right to abortion is derived from the Fourteenth Amendment. As such it is protected against interference by the state or its officials. It is not a right protected against private interference.

Letter from Stephen S. Trott to Lyn C. Gill, Cleveland Planned Parenthood (Aug. 28, 1985).

46. *Id.*

47. 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987).

48. *Id.*

49. SHARE is an informal, anti-abortion organization. *Id.* at 216, 721 P.2d at 918.

50. *Id.* at 216, 721 P.2d at 922-23.

ited SHARE picketers from:

- (1) picketing, demonstrating, or "counseling" at the Medical Building, except along the public sidewalk north of the bus stop on Stevens Avenue [this restriction effectively prevents picketers from demonstrating on the sidewalk fronting the major entrance];⁵¹
- (2) threatening, assaulting, intimidating or coercing anyone entering or leaving the Medical Building;
- (3) interfering with ingress or egress at the building or parking lots to the south or southeast on the premises;
- (4) trespassing on the premises;
- (5) engaging in any unlawful activity directed at respondent physicians or their patients;
- (6) referring, in oral statements while at the picket site, to physicians or patients, staff, or clients as "murdering" or "murderers", "killing" or "killers"; or to children or babies as being "killed" or "murdered" by anyone in the Medical Building.⁵²

SHARE demonstrators appealed the trial court's first time, place, and manner restriction, which prohibits picketers from demonstrating on the sidewalk fronting the medical facility's public entrance.⁵³ SHARE also appealed that part of the injunction, analyzed by the Washington Supreme Court as a content-based restriction, which prohibits protestors from using the words "kill" or "murder" and their derivatives at the medical facility.⁵⁴

The Washington Supreme Court upheld the place restriction, but found the content-based restriction to be drawn more broadly than was constitutionally permissible.⁵⁵ The court agreed that there was a compelling governmental interest in preventing children from being subjected to the psychological trauma of hearing the words "kill" and "murder" used in connection with their doctors just prior to a medical visit.⁵⁶ The court decided, however, that the governmental interest was compelling only when children were actually present at the picket site and held that the words "kill," "murder," and their derivatives could be prohibited only when children of an age likely to be adversely affected were present.⁵⁷ The court then remanded the case to the lower court to determine "the appropriate age limit," noting respondent-physicians' suggestion that the restricted words would have the most severe impact on children

51. *Id.* at 217, 721 P.2d at 922.

52. *Id.* at 219, 721 P.2d at 923-24.

53. *Id.* at 221, 721 P.2d at 924.

54. *Id.* at 234, 721 P.2d at 932.

55. *Id.* at 234, 721 P.2d at 931, 935.

56. *Id.* at 245, 721 P.2d at 937.

57. *Id.* at 242, 245-46, 721 P.2d at 936-37.

under the age of twelve.⁵⁸

1. *The Content-Neutral/Content-Based Distinction in First Amendment Analysis*

The constitutional guarantee of free speech has never been interpreted to be absolute.⁵⁹ The Supreme Court has stated that “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired”⁶⁰ and has separated restrictions on speech into two categories: content-neutral and content-based restrictions.⁶¹ This distinction is central to most first amendment analysis because content-neutral restrictions on speech are subjected to a lower standard of review than are content-based restrictions.⁶²

Content-based speech restrictions are considered more offensive to the values underlying the first amendment than are content-neutral time, place, and manner restrictions because they may represent government’s attempt to limit the expression of a particular viewpoint. Even “modest” content-based restrictions are, according to some commentators, difficult to justify because of the distorting influence they can have on public debate.⁶³

Content-neutral restrictions regulate speech with respect to the appropriate time, place, or manner of expression, and are justifiable without reference to the content of the message being expressed. In order to determine content-neutrality, courts must ask whether the restriction applies “evenhandedly” and impartially to all viewpoints.⁶⁴

Time, place, and manner restrictions will be upheld if (a) they are content-neutral, (b) they are narrowly tailored to serve a significant governmental interest, and (c) ample alternative means of com-

58. *Id.* at 242, 721 P.2d at 936.

59. At least not by a majority of the Court. *But see* Justice Black’s dissenting opinion in *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting) (arguing that constitutional guarantee of free speech is absolute).

60. *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

61. For a description and criticism of the content distinction in first amendment analysis, see M. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 87-126 (1984). *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-2, 12-3, at 789-804 (2d ed. 1988) (noting two categories of governmental restrictions on speech).

62. L. TRIBE, *supra* note 61.

63. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV., 189, 223 (1983) (noting that even modest content-based restrictions skew public debate).

64. *Heffron*, 452 U.S. at 649.

munication are available.⁶⁵ Injunctions (2) through (5) clearly meet all of these tests. They are content-neutral, reasonable methods of serving the significant governmental interests in protecting physicians, patients, and staff from unlawful harassment, preventing unlawful trespass, and facilitating ingress into and egress from the building. Since these restrictions do not prohibit SHARE protestors from picketing at the medical facility or anywhere else, the protestors retain ample opportunities to communicate their anti-abortion message. Thus, injunctions (2) through (5) do not impose unconstitutional restrictions on the speech of the anti-abortion protestors.⁶⁶

2. *Constitutional Validity of the Place Restriction*

The *Bering* court also found restriction (1), which enjoined picketers from protesting on the sidewalk fronting the public entrance to the medical facility, to be a constitutionally valid, content-neutral place restriction.⁶⁷ The court held that the place restriction was (a) content-neutral, (b) narrowly drawn to serve a significant state interest, and (c) left the SHARE protestors ample alternative means of expressing their views.⁶⁸

According to the majority, there are two principal justifications for the contested place restriction. They are: (a) to permit ingress and egress to and from the medical facility, and (b) to protect patients, staff, and visitors from the "heightened coercive impact" caused by the protestors' close proximity to the main entrance.⁶⁹

65. *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court recently reiterated this standard in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1986).

66. Examples of content-neutral time, place, and manner restrictions which have been upheld by the Court include the following: a rule allowing solicitors at a state fair to sell or distribute merchandise only from a duly-licensed location, *Heffron v. International Soc'y. for Krishna Consciousness*, 452 U.S. 640 (1983); a local ordinance forbidding street parades without a license, *Cox v. New Hampshire*, 312 U.S. 569 (1941); a local ordinance forbidding disturbing noises near a school in session, *Grayned v. City of Rockford*, 408 U.S. 104 (1972); and a National Park Service regulation prohibiting protestors from sleeping in the park, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). All of these regulations seek to restrict the time, place, or manner of speech, but do not single out a particular message for regulation.

67. 106 Wash. 2d 212, 222-32, 721 P.2d 918, 925-31 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987).

68. *Id.*

69. *Id.* at 223, 721 P.2d at 926. The court cited several Supreme Court cases upholding speech restrictions designed to facilitate ingress into and egress out of buildings, and to permit traffic to move on sidewalks, including the following: *Cameron v. Johnson*, 390 U.S. 611 (1968); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296

However, as the majority concedes, restrictions (2) through (5) adequately serve the first governmental interest in facilitating ingress and egress.⁷⁰ If no other governmental interest justifies the place restriction, the "narrowly tailored"⁷¹ part of the test for validity of content-neutral time, place, and manner restrictions requires that restriction (1) be invalidated, since the other restrictions serve the governmental interests in traffic flow. Thus, if the injunction is sufficiently narrow to meet constitutional requirements, it must be because it serves the second governmental interest advanced by the court.

The court based the governmental interest in protecting patients, staff and visitors from "heightened coercive impact" on the constitutional right of privacy, which protects a woman's right to decide whether to terminate a pregnancy.⁷² According to the *Bering* court, the privacy right encompasses not only the freedom to make the decision to terminate a pregnancy, but also the right to be able to *effectuate* that decision free from undue harassment.⁷³ The court stated that the proximity of the picketers to the medical facility's only public entrance infringed upon the privacy right by threatening the ability of a woman to effectuate her right to choose:

First, the very presence of anti-abortion picketers directly in front of the clinic could have such a coercive impact upon a woman that she foregoes the exercise of that right Second, continued harassment of physicians as they enter their lawful place of business may cause them to refuse to perform legal abortions for women.⁷⁴

The court supported its position by noting that similar harassment has allegedly persuaded physicians in twenty-one Washington counties to stop performing abortions.⁷⁵ The court reasoned that not only might physicians decide to discontinue performing abortions, but building owners might also be unwilling to lease space to doctors who perform abortions.⁷⁶ If either of these events occurred, "the coercive presence of the picketers directly in front of the Medical Building would severely compromise the ability of a woman to

(1940); *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

70. 106 Wash. 2d at 225, 721 P.2d at 930.

71. *Id.* at 222, 721 P.2d at 930.

72. *Id.* at 222, 721 P.2d at 928.

73. 106 Wash. 2d at 227, 721 P.2d at 928 (citing, e.g., *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

74. 106 Wash. 2d at 228, 721 P.2d at 928.

75. *Id.* at 229, 721 P.2d at 929.

76. *Id.*

effectuate the abortion decision, in turn violating the woman's constitutional right of privacy under *Roe v. Wade*.”⁷⁷

The Supreme Court has held, however, that “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”⁷⁸ In *Organization for a Better Austin v. Keefe*⁷⁹ the Court invalidated an injunction prohibiting the Organization for a Better Austin (OBA) from distributing leaflets critical of Keefe's real estate practice. OBA, an organization whose purpose was to stabilize the racial mix of Austin, Illinois, objected to Keefe's “blockbusting” tactics; Keefe allegedly exploited white homeowners' fears that blacks were moving into the neighborhood in order to induce them to sell their homes and thereby obtain additional real estate listings for himself. When Keefe refused to sign an agreement not to solicit home sales in Austin, OBA began to distribute leaflets critical of Keefe's tactics. The appellate court enjoined OBA from distributing the leaflets, apparently viewing the campaign as “coercive and intimidating, rather than informative.”⁸⁰ The Supreme Court invalidated the injunction and held that speech which is intended to influence the conduct of others is constitutionally protected:

The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities . . . [OBA's leafletting tactics] are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.⁸¹

In other cases, however, the Court has upheld restrictions on speech intended to influence the conduct of others. In *Cox v. Louisiana*,⁸² the Court upheld a Louisiana statute prohibiting picketing near a courthouse with the intent to obstruct justice. The Court held that, because the statute was narrowly drawn, because non-speech conduct (picketing and patrolling) may be regulated or pro-

77. *Id.* at 229, 721 P.2d at 929. See *Roe v. Wade*, 410 U.S. 113 (1973).

78. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982).

79. 402 U.S. 415 (1971).

80. *Id.* at 418.

81. *Id.* at 419. See also *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), in which the Court reversed a Mississippi decision holding defendants liable for economic damages caused by a boycott of white businesses launched to protest racial inequalities. The boycott was supported by speeches, picketing, and by the exertion of social pressure on those who violated the boycott. The Court held that, despite its intended coercive impact, the nonviolent speech in support of the boycott was protected by the first amendment.

82. 379 U.S. 559 (1965).

hibited more easily than "pure" speech, and because of the importance of the governmental interest in protecting the judicial system from the pressures of protestors, the statute was not unconstitutional.⁸³ The Court characterized the interest in fair administration of justice as essential to a constitutional democracy, and noted the constitutional safeguards requiring fairness in the criminal process, including the right to a fair trial: "The constitutional safeguards relating to the integrity of the criminal process . . . embrace the fundamental conception of a fair trial, and . . . exclude influence or domination by either a hostile or a friendly mob."⁸⁴

Similarly, the *Bering* court justified the place restriction as necessary to protect the exercise of the constitutionally protected right to decide to terminate a pregnancy. Contrary to the implication of the *Bering* dissent,⁸⁵ the fact that private individuals, rather than the state,⁸⁶ infringed upon the women's privacy right need not diminish the state interest in protecting the exercise of that right. While the constitution does not require states to protect individuals from interference by others with their constitutional rights, it does not prohibit them from doing so. State legislatures, and perhaps state courts, are free to make the policy judgment that a woman's right to abortion is one deserving of protection from interference by private individuals.⁸⁷

Cox shows that in some circumstances the state interest in protecting a constitutional right from private interference may be sufficient to justify a content-neutral place restriction on speech. The

83. *Id.* at 562.

84. *Cox* at 562.

85. *Id.* at 252, 721 P.2d 941 (Dolliver, C.J., dissenting).

86. The Supreme Court cases cited by the majority in support of the significant state interest in protecting the exercise of a woman's right of privacy, *Whalen v. Roe* and *Roe v. Wade*, involved state interference with the privacy right. In *Roe v. Wade*, 410 U.S. 113 (1973), state statutes made abortion a crime unless necessary to save the life of the pregnant woman. In *Whalen v. Roe*, 429 U.S. 589 (1977), a state statute required disclosure by doctors of prescriptions of certain drugs which had a high potential for abuse.

87. In *United States v. Guest*, 383 U.S. 745 (1966), a majority of the Court (which did not include the author of the Court's Opinion) implied that section five of the 14th amendment empowered Congress to enact laws punishing persons who interfered with the exercise by others of 14th amendment rights, whether or not they were acting under color of state law. See Justice Brennan's opinion, *id.* at 781-82. States, endowed with similar power, have enacted legislation prohibiting private individuals from interfering with the rights of others. See, e.g., the Massachusetts Civil Rights Act, Mass. Gen. L. Ch. 12, §§ 11H, 11I ("Whenever any person or persons, whether or not acting under color of law, interfere . . . with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action . . ." *Id.* at 11H).

Bering court made the policy judgment that a woman's right to abortion, which is protected by the Constitution, is sufficiently important to justify place restrictions on the speech of persons attempting to interfere with the exercise of that right. Underlying the court's judgment was the belief that the abortion right is one peculiarly susceptible to the coercion of others, because of the nature of the abortion decision.

The essentially private and personal nature—noted in several Supreme Court opinions—of the decision to obtain an abortion strengthens the governmental interest in ensuring that a woman can obtain an abortion free from harassment. In *Roe v. Wade*, the Court emphasized the “very personal nature” of the abortion decision when it held that abortion is protected by the right of privacy.⁸⁸ In *Belotti v. Baird*, Justice Stevens in his concurring opinion wrote: “It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”⁸⁹ Moreover, the Court's invalidation of statutes imposing consent requirements on abortion also underscores the personal nature of the decision: the abortion decision is a personal one which should be made by the woman, and no other party should have veto power over that decision.⁹⁰

A woman who has decided to have an abortion rightly expects that the privacy and confidentiality of that decision will be respected, and should not have to exercise that decision in a public setting which requires her to force her way through shouting protestors. If protection of free speech requires the state to allow anti-abortion protestors to stand in close proximity to the only public entrance to a medical facility, a woman must be forced not only to hear the protestors' views on the morality of abortion—which surely constitute protected speech—but must also be subject to the personal harassment of being called a murderer and baby killer.

Several Supreme Court decisions have recognized an interest akin to the interest in being free from harassment, and have used that interest to justify restrictions on speech. In *Kovacs v. Cooper*,⁹¹

88. 410 U.S. 113, 152-53.

89. 443 U.S. 622, 655 (1979).

90. See, e.g., *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416; *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747; *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Zbaraz v. Hartigan*, 763 F.2d 1532, *aff'd*, 108 S. Ct. 479 (1987).

91. 336 U.S. 77 (1949).

the Court upheld an ordinance prohibiting the use on public streets of sound trucks or of any instrument attached to a vehicle, emitting "loud and raucous" noises.⁹² This speech restriction was justified by the "duty [of the state] within constitutional limitations, to protect the well-being and *tranquility* of a community."⁹³

The Court has also recognized that the special characteristics of a place may justify additional restrictions on speech. In cases involving labor disputes at hospitals, the Court has upheld restrictions on organizational speech because of the special nature of hospitals and the interests of patients.⁹⁴

The Court has also found that schools possess special characteristics which may justify additional restrictions on speech. In *Grayned v. City of Rockford*⁹⁵ the Court upheld the conviction, under an anti-noise ordinance, of a protestor who picketed near a school while the school was in session. The Court noted that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable.'"⁹⁶ The Court also stated that "expressive activity may be restricted, but only if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'"⁹⁷ According to the reasoning of the above cases, a medical facility like the one in *Bering* ought to be able to maintain a certain degree of quiet and tranquility and should not be forced to permit shouting protestors to picket in close proximity to the only public entrance. These cases also suggest that governmental restrictions on the place and manner of speech aimed at reaching this goal are permissible.

The interest in freedom from harassment reflects the Court's special solicitude for peace and tranquility in the home. In *Breard v. Alexandria*,⁹⁸ the Court upheld a "Green River ordinance," which, as applied, prohibited door-to-door solicitation of magazine subscriptions. The Court held that door-to-door solicitors could not use the first amendment's protection to override a homeowner's

92. *Id.*

93. *Id.* at 83 (emphasis supplied).

94. *See* NLRB v. Baptist Hospital, 442 U.S. 773 (1981).

95. 408 U.S. 104 (1972).

96. *Id.* at 116 (quoting Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)).

97. *Id.* at 118 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969)).

98. 341 U.S. 622 (1951).

interest in privacy and repose.⁹⁹ Although the Court has invalidated other ordinances restricting door-to-door soliciting,¹⁰⁰ the Court has on several occasions stressed that an individual's interest in being left alone is greatest in the home, "the last citadel of the tired, the weary, and the sick."¹⁰¹

Another type of speech which might be subject to special restrictions in order to protect the interest in freedom from harassment is residential picketing. Although in *Carey v. Brown*¹⁰² the Court invalidated, on equal protection grounds, an ordinance which generally prohibited residential picketing, but discriminated in favor of a particular kind of speech (labor speech), the Court left open the question whether a ban on residential picketing which did not discriminate on the basis of subject matter would violate the first amendment. In *Carey* the Court emphasized that its opinion should not "be understood to imply . . . that residential picketing is beyond the reach of uniform and nondiscriminatory regulation."¹⁰³ In *Garcia v. Gray*¹⁰⁴ the Tenth Circuit upheld, as applied, an ordinance prohibiting residential picketing. Testimony in that case indicated that the picketing, by city employees at the home of the mayor and other city officials, "created disturbance, noise and an aura of har-

99. *Id.* at 645. The *Breard* court emphasized that its decision was protecting homeowners from annoyance by opportunists for private gain.

100. See *City of Watseka v. Illinois Public Action Council*, 107 S. Ct. 919 (1987), *aff'g mem.*, 796 F.2d 1547 (7th Cir. 1986) (invalidating ordinance prohibiting door-to-door soliciting prior to 9 a.m. and after 5 p.m. Monday through Saturday); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (invalidating ordinance, under which a Jehovah's Witness was convicted, which prohibited any person from ringing doorbells for the purpose of distributing handbills).

101. *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). See *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (broadcast media has more limited first amendment protection than other media, in part because it may intrude into the "privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (upholding statute allowing addressees to remove their names from mailing lists for erotic materials).

102. 447 U.S. 455 (1980) (invalidating under the equal protection clause of the 14th amendment a statute prohibiting picketing of residences or dwellings except where a dwelling is a place of employment involved in a labor dispute). See also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating city ordinance which prohibited picketing within 150 feet of school as violative of 14th amendment equal protection clause because an impermissible distinction between labor and other speech was made by ordinance). Lower court decisions have sometimes upheld, sometimes invalidated, bans on residential picketing. In the labor context, courts have been more willing than in other areas to uphold residential bans. See *Arnolds & Seng, Picketing and Privacy: Can I Patrol on the Street Where You Live?*, 1982 ILL. L. REV. 463, 465 (1982); *Kamin, Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1967).

103. 447 U.S. at 470-71.

104. 507 F.2d 539 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

assessment and fear.”¹⁰⁵ *Garcia* is at odds with other Circuit Court decisions invalidating ordinances prohibiting residential picketing.¹⁰⁶ The Supreme Court will hear one of these conflicting cases—*Frisby v. Schulz*¹⁰⁷—this term. The Court’s decision in that case should shed some light on the degree of protection accorded to the general interest in freedom from harassment, and also on the particular interest in freedom from harassment in the privacy of one’s home.

Of course, the anti-abortion protestors at issue in *Bering* were picketing on a public sidewalk, not in front of women’s homes. However, it is the *privacy* of the home and the interest in tranquility which is emphasized in cases such as *Breard* and *Garcia*. The nature of the abortion decision and the psychological state of a woman about to have an abortion suggest that the state may legitimately decide that a woman about to enter an abortion clinic is entitled to a greater degree of privacy and tranquility than is usually accorded in public places.¹⁰⁸

As the above cases illustrate, the Supreme Court has been willing to uphold content-neutral, narrowly tailored time, place and manner restrictions in order to protect the interest in being free from excessive noise, and to protect the interests in maintaining some degree of quiet and tranquility in hospitals, schools, and in one’s home. If this interest in freedom from harassment is one which justifies time, place, and manner restrictions on speech, the *Bering* place restriction is not unconstitutional. The essentially personal and private nature of the abortion decision justifies a place restriction which, by restricting the proximity of protestors to the only public entrance to the medical building, seeks to limit the extent to which anti-abortion protestors are able to harass women who have chosen to obtain an abortion.

105. *Id.* at 542.

106. See *Pursley v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987), in which the court invalidated as unconstitutionally overbroad an ordinance which proscribed picketing of a residential or dwelling place. The court recognized the significant governmental interest in peace and privacy of the home, but found the ordinance insufficiently narrowly tailored because, for example, it prohibited picketing in partially commercial areas as well as in purely residential areas.

107. *Schulz v. Frisby*, 807 F.2d 1339 (7th Cir. 1986) (invalidating ordinance prohibiting residential picketing and upholding lower court’s injunction against enforcement), *aff’d*, 822 F.2d 642 (1987), *prob. juris. noted*, 108 S. Ct. 692 (1988).

108. See *supra* text accompanying notes 2, 98 & 104.

3. *Constitutionality of Restriction on the Use of the Words "Kill," "Murder," and Derivatives*

The *Bering* court analyzed part (6) of the injunction, which prohibits protestors from using the words "kill" or "murder" or their derivatives in the presence of children, as a content-based speech restriction.¹⁰⁹ The words "kill" and "murder," used in reference to doctors at the medical building, express SHARE's view that abortion is morally wrong and that human life should be protected at conception. By prohibiting these words, the injunction arguably singles out a particular message for regulation.

(a) *The High Value/Low Value Speech Distinction in First Amendment Analysis.*

Some content-based speech restrictions will be permitted with a showing of less than a compelling governmental interest. Since *Chaplinsky v. New Hampshire*,¹¹⁰ the Court has used a two-tiered approach to content-based speech restrictions. Dictum in that case outlined two separate classes of speech. The first class, "low value" speech, is not entitled to first amendment protection.¹¹¹ Low value speech is not protected because "such utterances are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth."¹¹² Speech in this class has traditionally included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."¹¹³ According to the *Chaplinsky* Court, criminal punishment for low value speech "would raise no question under [the Constitution]."¹¹⁴ All speech which is not "low value" is protected by the first amendment; any content-based restrictions on "high value" speech must meet the highest standard of review.¹¹⁵

109. See *supra* text accompanying note 52.

110. 315 U.S. 568 (1942).

111. *Id.* at 571-72.

112. *Id.*

113. *Id.* at 572. Some commentators argue that this two-tiered approach to speech has declined in the Court in recent years, and that the only remaining category of speech which is wholly unprotected is obscene speech. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

114. 315 U.S. at 572.

115. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (content-based speech restrictions "will be upheld only if narrowly drawn to accomplish a compelling governmental interest"); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) ("A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views."); *Police Dep't v. Mosley*, 408 U.S.

This "two-level" approach to first amendment analysis has been extensively analyzed and criticized by legal scholars and Supreme Court Justices alike.¹¹⁶ In recent years some members of the Court have moved from the two-tiered *Chaplinsky* system to one which provides some, but less than complete, first amendment protection to several intermediate categories of speech.¹¹⁷ These categories include, among others, sexual speech which is not obscene,¹¹⁸ and offensive speech which is not obscene.¹¹⁹

(b) "Kill" and "Murder": Low Value Speech?

The *Bering* court relied on two Supreme Court decisions addressing the constitutionality of restrictions on unprotected and "low value" speech, *Ginsberg v. New York*¹²⁰ and *FCC v. Pacifica Foundation*,¹²¹ to hold that the content-based speech restriction prohibiting protestors from using the words "kill," "murder," or their derivatives in the presence of children did not violate the first amendment.¹²²

The court held that there was a compelling governmental interest in preventing children from hearing the words "kill" and "murder" used in connection with their doctors. The court also adopted the trial court's finding that the prohibited words had "inflicted trauma upon the children overhearing such references and . . . by their very utterance . . . harmed the doctor-patient relationship essential to the effective delivery of health care."¹²³ The *Bering* court held that this compelling governmental interest was sufficient to proscribe, consistent with the first amendment, the words "kill" and "murder."¹²⁴

92, 95 (1972) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

116. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 761 (1978) (Powell, J., concurring); Kalven, *The Metaphysics of the Law of Obscenity*, *supra* note 113.

117. See L. TRIBE, *supra* note 61, ¶ 12-18, at 930.

118. *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986) (upholding zoning regulation of adult theatres; films not held obscene); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding zoning regulation of adult theatres); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding ordinance prohibiting sale of sexually oriented materials to children under age 16).

119. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC sanction of offensive speech).

120. 390 U.S. 629 (1968).

121. 438 U.S. 726 (1978).

122. 106 Wash. 2d 212, 237-41, 721 P.2d 918, 933-35 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987).

123. *Id.* at 237, 721 P.2d at 933 (quoting from the trial court opinion).

124. *Id.* at 241, 721 P.2d at 935.

The *Bering* court relies too heavily, however, upon *Ginsberg* and *Pacifica*. Those cases did not allow the speech restrictions to stand because there was a sufficiently compelling governmental interest to overcome the strong presumption of unconstitutionality of content-based restrictions on "high value" speech. Rather, *Ginsberg* involved low-value speech which was obscene only as to minors;¹²⁵ *Pacifica* involved "offensive" speech, which, according to some members of the Court, also deserves less than full first amendment protection.¹²⁶

(c) *Ginsberg v. New York*.

In *Ginsberg*, the Court upheld appellant's conviction under a New York law prohibiting the sale of magazines containing nude pictures to children under seventeen years old.¹²⁷ The Court explicitly stated that the magazines would not be obscene for adults, but rejected a claim that the New York legislature's variable definition of obscenity, which imposed a different standard for minors, violated minors' constitutional rights.¹²⁸ The *Ginsberg* majority opinion held that it was rational for the New York legislature to decide that the speech at issue in that case was, with respect to minors, obscene, and so unprotected: "obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech."¹²⁹

The Court reasoned that legislators have the power to adopt a different standard of obscenity for minors because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."¹³⁰ The Court pointed to the primary role of parents in rearing children and concluded that the legislature could properly leave to parents the decision whether or not their children ought to view nude photographs.¹³¹

States, as well as parents, have legitimate, independent interests in " 'protect[ing] the welfare of children,' " according to the Court, "and [in ensuring] that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-devel-

125. 390 U.S. 629, 629.

126. 438 U.S. 726, 729-31.

127. 390 U.S. at 636-37.

128. *Id.* at 634, 638.

129. *Id.* at 641-42.

130. *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

131. *Id.* at 639.

oped men and citizens.’”¹³² The Court found that the sale of the magazine to the youth constituted such an abuse, and upheld Ginsberg’s conviction.¹³³

The *Bering* court quoted much of the *Ginsberg* opinion to support its view that protecting children from hearing the words “kill” and “murder” used in reference to their doctors is a compelling governmental interest. The court argued that parents should be able to decide whether and when to explain abortion to their children, and analogized the harm resulting from hearing the proscribed words in this case to the harm of viewing the nude pictures in *Ginsberg*.¹³⁴ The *Bering* court thought the content-based restriction justified by the state’s “interest in preventing the ‘abuse’ suffered by young children hearing the proscribed words just before they visit their doctors.”¹³⁵

Ginsberg does reaffirm the principles that the state’s power to control the conduct of children is greater than its authority over adults, and that the state has legitimate and independent interests in protecting the welfare of children. The reasoning of the *Ginsberg* Court, with its emphasis on protecting minors from abuse, readily applies to the *Bering* fact pattern, where the court had legitimate worries about the detrimental impact the proscribed words would have on young children. However, the *Bering* court’s reliance on a decision sanctioning the restriction of *obscene* speech in justifying restrictions on the use of the words “kill” and “murder” in the context of abortion reflects a balance in which the first amendment interests are given too little weight.¹³⁶

The *Ginsberg* Court explicitly sanctioned New York’s adjustment of the obscenity standard as applied to minors and accepted the state’s judgment that the magazines were obscene with respect

132. *Id.* at 640-41 (quoting *Prince*, 321 U.S. at 165).

133. *Id.* at 641.

134. 106 Wash. 2d at 239, 721 P.2d at 934.

135. *Id.*

136. In *Roth v. United States*, 354 U.S. 476 (1957), the Court formulated the following definition of obscenity: “Obscene material is material which deals with sex in a manner appealing to [the] prurient interest . . . [of] the average person, applying contemporary community standards” *Id.* at 487, 489. The Court modified this definition in *Miller v. California*, 413 U.S. 15 (1973). In determining whether material is obscene, the trier of fact must ask:

- (a) whether the “average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest,
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. The words “kill” and “murder” clearly do not fit this definition of obscenity.

to children.¹³⁷ Since obscenity is unprotected speech, the Court's decision that the magazines were obscene as to children in the context of that case disposed of the first amendment problem. The *Ginsberg* Court did not depart from the principle that regulation of speech which does not fall within one of the unprotected categories must meet a very stringent standard of review. The Court implicitly balanced the potential harm to the children who saw the magazines against the harm to the first amendment interests, and found that the first amendment interests were outweighed. In a case such as *Bering* the potential harm to children of hearing the proscribed words may be equally great, but the SHARE protestors' *political* message should not be subject to the kind of balancing process applied to the contextually *obscene* speech in *Ginsberg*. While the *Bering* court properly considered the reasoning in *Ginsberg* applicable to the facts of *Bering*, extension of the holding to that decision would more seriously endanger first amendment interests.

(d) FCC v. Pacifica Foundation.

Pacifica involved "offensive" speech. In *Pacifica* the Supreme Court reviewed an order issued by the Federal Communications Commission (FCC) to a radio station owned by Pacifica Foundation.¹³⁸ The radio station had broadcast comedian George Carlin's monologue "Filthy Words," a recording of a live performance in which Carlin repeated a number of profane words which he contended could not be said on the public airwaves. "Filthy Words" was broadcast in the early afternoon.¹³⁹ A father, who heard the recording while driving in the car with his young son, wrote a letter to the FCC complaining about the broadcast.¹⁴⁰ The FCC granted the complaint and held that the "language as broadcast was indecent and prohibited by 18 U.S.C. § 1464."¹⁴¹ The FCC did not impose formal sanctions on Pacifica Foundation, but instead put a note in the radio station's file and indicated that in the future it might sanction radio stations that broadcast similar programs in the afternoon when it was likely that children would be listening. The order was challenged on first amendment and statutory grounds.¹⁴²

137. 390 U.S. at 640-41.

138. 438 U.S. 726, 731.

139. *Id.* at 729-30.

140. *Id.*

141. *Id.* at 725.

142. *Id.* at 727, 729-31. The statutory issues were (1) whether the FCC's action was "censorship" prohibited by 47 U.S.C. § 326, and (2) whether non-obscene indecent speech could be restricted under 18 U.S.C. § 1464 (1976 ed.), which forbids radio broadcasts of "any

The Supreme Court upheld the FCC order.¹⁴³ The Court held that the FCC has constitutional and statutory power to regulate speech which is not obscene. In that part of the opinion in which five Justices joined,¹⁴⁴ the Court emphasized the narrowness of the holding and its dependence upon the particular context of the afternoon radio broadcast.¹⁴⁵ Because the *Pacifica* decision sanctions restrictions on non-obscene speech, it appears to afford better support for the *Bering* injunction than *Ginsberg*.

The *Bering* court in particular relied on Justice Powell's concurring opinion, in which Justice Powell stressed the "shock" value of continually repeating the profane words, and the consequent harmful impact on children.¹⁴⁶ The *Bering* court similarly thought that children would suffer from the "shock" of hearing their doctors called "killers" and "murderers" just before a medical visit.¹⁴⁷

Justice Powell's opinion does not, however, provide adequate support for the *Bering* speech restriction. Justice Powell, who disagreed with Justice Stevens' high-value/low-value approach to first amendment analysis in *Pacifica*,¹⁴⁸ suggested that Carlin's recording could be restricted in this very limited context (that is, when children were likely to be listening) because of the manner (he called it "verbal shock") of expression.¹⁴⁹ He agreed with the FCC view that most listeners would find Carlin's monologue "vulgar and offensive" or "'patently offensive.'"¹⁵⁰

Justice Powell also emphasized the intrusive quality of a radio broadcast, arguing that the home is one place where people usually may be free from unwanted communication.¹⁵¹ Justice Powell, who stated in *Pacifica* that "the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech

obscene, indecent, or profane language." *Id.* at 731, 735. The Court concluded that § 326 did not proscribe the FCC's action, and that non-obscene, indecent speech could be restricted under 18 U.S.C. § 1464. *Id.* at 738.

143. *Id.* at 750-51.

144. Justices Burger and Rehnquist joined in all parts of Stevens' opinion. Justices Blackmun and Powell joined in all parts except IV-A and IV-B (in which Justice Stevens placed Carlin's speech into the "low-value" category), and Justice Powell filed a concurring opinion joined by Justice Blackmun. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice Stewart filed a dissenting opinion in which Justices Brennan, White, and Marshall joined. *Id.* at 728.

145. *Id.* at 750-51.

146. *Id.* at 757-58 (Powell, J., concurring).

147. 106 Wash. 2d at 240-41, 721 P.2d at 934-35.

148. 438 U.S. at 761 (Powell, J., concurring).

149. *Id.*

150. *Id.* at 757 (Powell, J., concurring).

151. *Id.* at 759-60 (Powell, J., concurring).

when they are in public,"¹⁵² would accord more protection to speech in a public forum like a street or sidewalk¹⁵³ than to speech in the home. As the *Bering* court noted, children visiting the medical building cannot avoid the impact of the protestors simply by averting their eyes or closing their ears; the protestors' words will reach the children when they walk through the picket line in order to reach their doctor. However, unlike the case of the woman seeking to implement her decision to have an abortion whose privacy interests do not weaken between her home and the medical facility,¹⁵⁴ the privacy interests of the children in being free from unwanted and offensive communication may be weaker on a public sidewalk than in their own homes. If so, SHARE's speech should be granted more protection than the *Pacifica* radio broadcast, which could have intruded into the home. Moreover, the other injunctions imposed on the anti-abortion protestors, including the contested place restriction, minimize the effect that the hearing of those words can have on children.¹⁵⁵ Because of the special discomfort associated with face-to-face confrontations and the fear engendered by close proximity to angry, vocal, protestors, children are much less likely to be traumatized by hearing protestors shout "killer" and "murderer" on the next street than they would be by protestors shouting those words in their ears just before they enter the medical building.

The *Bering* court also disregarded Justice Stevens' opinion in *Pacifica*. Justice Stevens quite clearly based his opinion, in which Justice Rehnquist and Chief Justice Burger joined, on the "low value" of Carlin's speech.¹⁵⁶ Stevens was not concerned by the possibility that the FCC's order might lead to self-censorship on the part of some broadcasters. He thought the order's definition of indecency would "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."¹⁵⁷ This

152. *Id.* at 759 (Powell, J., concurring).

153. *Id.* Speech in public forums, especially streets and parks, has traditionally been accorded more first amendment protection than speech in non-public forums. See *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 517-18 (1939) (Roberts, J., concurring) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). See also Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 236-45 (discussing development of the public forum theory).

154. See *supra* section III.B.2.

155. See *supra* text accompanying notes 51, 52.

156. 438 U.S. at 746.

157. *Id.* at 743.

kind of speech, according to Stevens, "surely [lies] at the periphery of First Amendment concern."¹⁵⁸

In contrast, the words "kill" and "murder," especially in the context of the abortion debate, cannot be considered "low value." They are neither obscene nor offensive in the constitutional sense, though their expression may certainly offend some hearers. For SHARE picketers, the words are very clearly an "essential part of [the] exposition of ideas."¹⁵⁹ As such, they qualify for the strict protection accorded to "high value" speech.

(e) "*High Value*" of the Words "Kill" and "Murder."

The words used by the SHARE picketers and prohibited by restriction (6) are a central part of the debate on the abortion issue. The anti-abortion activists and their supporters believe that the embryo is a person, and that abortion is murder; this belief is the moral foundation of the anti-abortion position. The Supreme Court has stated that "[p]ublic-issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' has always rested on the highest rung of the hierarchy of First Amendment values."¹⁶⁰ The words "kill" and "murder," when used by anti-abortion protestors, seem to rest squarely on the highest rung of first amendment values.

One can argue that the words "kill" and "murder" are simply particular vehicles used to express the protestors' belief that abortion is morally wrong, and that proscription of the use of those words is not a *content-based* restriction at all, but is simply a restriction on the *manner* of speech. The *Bering* injunction does not prevent the protestors from expressing their views through other words, for example, "Abortion results in the death of a human being." If the injunction restricts only the *manner*, and not the *content* of the protestors' speech, it should be subject to a lower standard of review. In this case, however, the words are chosen for their emotive impact; other words probably could not adequately convey the depth of the beliefs of the anti-abortion protestors. Choosing words for their impact is protected by the first amendment.

In *Cohen v. California*¹⁶¹ the Supreme Court reversed Paul Cohen's conviction under a disturbing-the-peace statute. Cohen had

158. *Id.*

159. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

160. *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (footnotes omitted).

161. 403 U.S. 15 (1971).

worn a jacket with the words "Fuck the Draft" inscribed on the back into a Los Angeles courtroom. Justice Harlan, writing for the majority, recognized that "words are often chosen as much for their emotive as their cognitive force," and argued that the emotive force may often be the "more important element of the overall message sought to be communicated."¹⁶² Although Cohen could have expressed his view by inscribing the following message on his jacket: "The draft is wrong, and Americans have a moral right to disregard it," this would not have communicated his political views as forcefully. Similarly, referring to doctors who perform abortions as "killers" and "murderers" forcefully communicates SHARE's belief that abortion is morally wrong. It is difficult to imagine words which could effectively replace "kill" and "murder" in expressing the anti-abortion movement's highly emotional message.

(f) *Words Which by Their Very Utterance Inflict Injury.*

In *Chaplinsky v. New Hampshire* the Court stated that there are some classes of speech, including "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," which do not deserve any first amendment protection.¹⁶³ The Supreme Court cases which have analyzed first amendment questions under this part of the *Chaplinsky* doctrine have focused on "fighting words" which tend to incite an immediate breach of the peace. It can be argued that "kill" and "murder" are "fighting words" when they are used to describe persons entering and leaving a medical center where abortions are performed; they are, arguably, insulting epithets addressed to specific persons likely to be provoked to immediate violence.¹⁶⁴ However, the Court has construed the "fighting words" exception to protected speech very narrowly, and has not upheld a conviction for uttering "fighting words" since *Chaplinsky*.¹⁶⁵

The Court has not foreclosed the possibility of restricting speech which by its very utterance inflicts injury. "Kill" and "murder,"

162. *Id.* at 26.

163. 315 U.S. 568, 572 (1942).

164. *See* *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 107 S. Ct. 940 (1987). *See* *Gooding v. Wilson*, 405 U.S. at 518, 523 (1972); *Cohen v. California*, 403 U.S. at 20.

165. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972) (statute making speech which tends to cause a breach of peace a misdemeanor held unconstitutionally vague under first and 14th amendments); *Street v. New York*, 394 U.S. 576 (1969) (conviction of "casting contempt" on American flag through speech overturned as violative of freedom of expression); L. TRIBE, *supra* note 61, § 12-10, at 850-56.

when used in reference to doctors and women at abortion clinics, may well be words which cause injury simply by virtue of their being uttered and heard.¹⁶⁶ A woman about to have an abortion is quite likely to be distressed by being called a "murderess"; indeed, some claim that complication rates for the abortion procedure increase when picketers are protesting outside the clinic.¹⁶⁷ The *Bering* court found that these words caused injury to children about to visit their doctors. Moreover, the words "kill" and "murder," in these circumstances arguably do not serve the values underlying the first amendment; they are not likely to invite more speech, and probably will not be countered by more speech. If the Constitution allows restrictions on injurious words, perhaps the words at issue in *Bering* should be restricted.

However, while there may be a compelling governmental interest in minimizing the harm caused by the words "kill" and "murder," there are less restrictive means to further this interest. The place restriction and other injunctions in *Bering* limit the proximity of the protestors to the public entrance and the persons most likely to be injured by the words,¹⁶⁸ and also impose restrictions on the manner of protest. These measures will minimize the harm caused by the words "kill" and "murder." The protestors' free speech rights should not be infringed by proscribing the use of these words at the picket site when young children are present.

IV. CONCLUSION

This Note has argued that the content-based restriction in *Bering* unconstitutionally restricts the free speech rights of SHARE protestors. This conclusion, if correct, may be troubling because it limits the means by which women can be protected from intimidation by anti-abortion protestors. While anti-abortion activists clearly have the right to attempt to persuade women that abortion is wrong, the presence of shouting anti-abortion picketers at an abortion clinic has a much more coercive impact on women seeking abortion than other forms of persuasion. But a court should not adopt content-based restrictions in order to protect a woman's interest in deciding to terminate a pregnancy free from harassment;

166. L. TRIBE, *supra* note 61, § 12-10, at 856: "The Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard The first amendment need not sanctify the deliberate infliction of pain simply because the vehicle used is verbal or symbolic rather than physical."

167. *See supra* note 38.

168. *See supra* text accompanying note 52.

imposition of the content-neutral time, place, and manner restrictions embodied in restrictions (1) through (5) of the *Bering* injunction, if effectively enforced,¹⁶⁹ probably would have substantially reduced the coercive impact of the anti-abortion picketers.

Moreover, vigorous prosecution of trespassers, vandals, and violent protestors would help ensure the availability of abortion facilities. Some states have recently passed laws imposing stricter punishments on anti-abortion protestors who vandalize, burn, or bomb abortion facilities, and others have passed "Anti-Harassment" acts,¹⁷⁰ declaring the state's intention to punish those who unlawfully interfere with a woman's right to choose. These kinds of measures are preferable to those which, by limiting the terms of the abortion debate or singling out a particular viewpoint for regulation, restrict the freedom of expression.

BONNY E. SWEENEY

169. *Id.*

170. *See supra* note 31.